

10/29/75

Memorandum 75-84

Subject: Eminent Domain Publication

The staff is pleased to report that the Continuing Education of the Bar (CEB) is going to pay the cost of publishing The Eminent Domain Law and the conforming changes in codified sections, together with the official comments. We have agreed on a firm price with CEB--\$7,000 for 2,000 copies to CEB--that should cover the entire cost of the publication. This price includes about \$1,500 to cover overruns on estimated costs so it is unlikely that the Commission will need to use any of its own funds to pay the cost of this publication. The estimates cover 500 additional copies to include in our bound volume and also 500 additional copies for our own use.

We think that the Commission's Recommendation (revised to reflect changes made before the proposed legislation was enacted) is valuable material that should be included in the publication. However, the cost of making substantial revisions in the Recommendation would run up the cost to the point where it would be impossible to include this material in our proposed publication. Accordingly, the staff has revised the Recommendation to make only those changes we felt were required. With this in mind, please mark your suggested editorial revisions on one of the two attached copies and return it to the staff at the November meeting.

We plan to organize the publication generally as follows:

- (1) Title page.
- (2) Contents (This will be only a general listing of contents.)
- (3) Preface (draft attached to this Memorandum)
- (4) Recommendation (as revised--draft attached to this Memorandum)

- (5) Outline of Eminent Domain Law (listing of each section with section titles)
- (6) Text of Eminent Domain Law with Official Comments
- (7) Outline of Conforming Revisions (listing of each section under appropriate headings)
- (8) Text of Conforming Revisions with Official Comments. (We plan to arrange all conforming revisions in section order by codes, taking the conforming revisions from five bills containing codified sections and consolidating them. We do not plan to reprint the text of repealed sections, but we do plan to print the official Comments to repealed sections. We will have to set out amended sections as amended, without showing the nature of the amendment, since the publication will be a paste up job from the enrolled bills which do not show these changes. We may decide to omit some purely technical conforming revisions.)
- (9) Appendix I. Disposition of Existing General Condemnation Statute (we plan to print the text of the repealed sections so the text will be available for convenient comparison with the new Statute, together with the official Comments.)
- (10) Appendix II and III. We plan to reprint our recommendations to the 1976 Legislature on condemnation for byroads and utility easements and relocation assistance by private condemners because we believe these will be of interest to persons who will use the proposed publication. We will also print these recommendations in our Annual Report so they will be available generally without the need to tear up copies of the proposed publication to obtain copies.)
- (11) Table showing Session Law Chapter Source for Conforming Revisions (This is needed because the Conforming Revisions come from five different session law chapters. It would be too expensive to indicate the source of the section under each section.)

We have not promised CEB that we will provide an index for the publication. Since the publication will be included in our bound volume, we will have to index it at some time, either now or when the bound volume is prepared. If we put an index in the proposed publication, we would include a cross-reference to the separate index in the bound volume index and not reindex it. There would be no additional staff work to prepare the index now or when the volume is prepared for printing. The only problem is that the staff has a great deal of work right now in preparing a substantial volume of material for the printer

for the 1976 session. We will prepare an index for the proposed publication if at all possible. The cost of printing the index was not included in the estimates, but there probably is enough money included in the \$7,000 CEB has agreed to pay to cover the cost.

We also plan to charge the cost of composition of the two eminent domain recommendations to the 1976 session to the \$7,000 provided by CEB. Should the costs exceed \$7,000, we will have to pay the excess so this is not unfair to CEB since the recommendations will be useful in the CEB program.

Do the staff plans meet with Commission approval? Does the Commission have any suggestions concerning the publication?

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

## PREFACE

This pamphlet contains the Eminent Domain Law and related revisions of codified sections. The official Law Revision Commission or Legislative Committee Comment is set out following each statute section. The Eminent Domain Law was enacted by Chapter 1275 of the Statutes of 1975. The amendments, repeals, and additions of codified statutes were made by a series of bills. The source of the session law chapter that amended, repealed, or added a particular codified section is indicated in the Table which begins on page \_\_\_\_.

The 1975 eminent domain legislation was the result of recommendations of the California Law Revision Commission. Recommendation Proposing the Eminent Domain Law, 12 Cal. L. Revision Comm'n Reports 1601 (1974); Tentative Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Special District Statutes, 12 Cal. L. Revision Comm'n Reports 1101 (1974). For earlier tentative recommendations, see Tentative Recommendation Relating to Condemnation Law and Procedure: The Eminent Domain Law, 12 Cal. L. Revision Comm'n Reports 1 (1974), Condemnation Authority of State Agencies, 12 Cal. L. Revision Comm'n Reports 1051 (1974).

Eleven bills were introduced at the 1975 Regular Session to effectuate the Commission's eminent domain recommendations. All were enacted. Cal. Stats. 1975, Chs. 1275 (The Eminent Domain Law), 1239 (conforming changes--state agency condemnation), 1240 (conforming changes--codified sections), and 581, 582, 584, 585, 586, 587, 1176, and 1276 (conforming changes--special district statutes). See also Cal. Stats. 1976, Ch. \_\_\_\_ (operative date--urgency measure).

The official Comment that follows each section is taken from the pertinent Law Revision Commission Recommendation unless a new or revised Comment for the particular section is found in the special reports adopted by the Assembly

Committee on Judiciary or the Senate Committee on Judiciary. See Report of Assembly Committee on Judiciary, Assembly J. 5183-5212 (May 19, 1975); Report of Senate Committee on Judiciary, Senate J. 6537-6563 (Aug. 14, 1975).

The California Continuing Education of the Bar (CEB) paid the cost of publishing this Commission pamphlet. The Commission is pleased to assist CEB in its effort to inform lawyers, appraisers, judges, and others concerning the new eminent domain law. The pamphlet also will aid the Commission in its continuing study of eminent domain law.

Any defect in the legislation contained in this pamphlet should be brought to the attention of the Law Revision Commission so that the Commission can study the matter and present any necessary corrections for legislative consideration. The Commission also solicits suggestions for revision of other statutes relating to eminent domain, such as the Evidence Code provisions relating to evidence in eminent domain and inverse condemnation actions. The address is: California Law Revision Commission, Stanford Law School, Stanford, California, 94305.

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

proposing

THE EMINENT DOMAIN LAW

(REVISED TO REFLECT CHANGES MADE BY LEGISLATURE)

Editorial Note. The material that follows is taken from the Law Revision Commission's Recommendation Proposing the Eminent Domain Law, 12 Cal. L. Revision Comm'n Reports 1625-1671 (1974). The material has been revised to reflect the changes made by the Legislature after the Commission recommended legislation was introduced. Although these revisions were made by the Commission's legal staff, the revised material does not necessarily represent the views of the Commission. For authoritative sources of legislative intent, see the discussion in the Preface to the pamphlet.

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## INTRODUCTION

Pursuant to a 1965 legislative directive,<sup>1</sup> the California Law Revision Commission presents in this report its recommendation for a comprehensive Eminent Domain Law,<sup>2</sup> along with necessary conforming changes.<sup>3</sup> The proposed comprehensive statute is the culmination of the Commission's exhaustive study of condemnation law and procedure that has previously resulted

<sup>1</sup> The Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study condemnation law and procedure with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings. This was an expansion of an earlier direction to make such a study with a view to recommending revisions "to safeguard the property rights of private citizens." See Cal. Stats. 1956, Res. Ch. 42, at 263.

<sup>2</sup> The Eminent Domain Law is intended to supply rules for eminent domain proceedings. The law of inverse condemnation is left for determination by judicial development. Although the Commission has been authorized to study the subject of inverse condemnation, it has not yet completed its study, nor has it formulated recommendations with respect to the subject. For a progress report, see the Commission's Annual Report (December 1974), 12 CAL. L. REVISION COMM'N REPORTS 501 (1974).

<sup>3</sup> This report proposes conforming changes in general statutes relating to eminent domain and in the statutes relating to condemnation for state purposes. For conforming changes in statutes relating to exercise of eminent domain by special districts, see *Tentative Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Special District Statutes*, 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974). ~~Changes recommended by the Commission in this tentative recommendation are noted in this report.~~

See also 12 Cal. L. Revision Comm'n

Reports at 2004-2008 (1974).



in the enactment of legislation on several major aspects of eminent domain law.<sup>4</sup>

Although Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure purports to be a comprehensive and systematic statement of the law of eminent domain, in fact it falls far short of that. Enacted over 100 years ago, its draftsmanship does not meet the standards of modern California statutes. There are duplicating and inconsistent provisions. There are long and complex sentences that are difficult to read and more difficult to understand. There are sections that are obsolete and inoperative. There is a total lack of statutory guidance in certain critically important areas of the law, and there are other areas that are treated in the most cursory fashion. Nor is Title 7 the exclusive statutory source of eminent domain law. There are hundreds of provisions in other statutes, both codified and uncodified, that duplicate provisions of the general eminent domain statute or that are unnecessarily or undesirably inconsistent with it.

These deficiencies call for a thorough revision and recodification of the California law of eminent domain. In formulating the comprehensive Eminent Domain Law, the Commission has looked to reform efforts in a number of other jurisdictions<sup>5</sup> and has reviewed the eminent domain law of every jurisdiction in the United States.<sup>6</sup> The Commission has examined the draft of the Model Eminent Domain Code<sup>7</sup> and the Uniform Eminent Domain Code.<sup>8</sup> The Commission has drawn upon all these sources in producing a modern Eminent Domain Law

<sup>4</sup> See CONDEMNATION PRACTICE IN CALIFORNIA xii (Cal. Cont. Ed. Bar 1973):

In dealing with trends and developments in eminent domain law, the major role played by the California Law Revision Commission for more than a decade should be considered. Commission studies and recommendations have led to many statutory changes, e.g., exchange of valuation data, evidence in condemnation cases, immediate possession, possession pending appeal, abandonment, voluntary arbitration, and governmental liability.

For a complete listing of Commission recommendations in this field and the legislative action on the recommendations, see the letter of transmittal accompanying this report.

12 Cal. L. Revision Comm'n Reports at 517 n.3 (1974).

<sup>5</sup> Recent reports received by the Commission include NEW YORK STATE COMMISSION ON EMINENT DOMAIN, REPORT (1971, 1972); VIRGINIA ADVISORY LEGISLATIVE COUNCIL, LAWS RELATING TO EMINENT DOMAIN (1972); IOWA EMINENT DOMAIN STUDY COMMITTEE, FINAL REPORT (1971); LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON EXPROPRIATION (1971).

<sup>6</sup> Among the many contemporary revisions of the law of eminent domain, the 1964 Pennsylvania Eminent Domain Code is particularly noteworthy. See PENNSYLVANIA JOINT STATE GOVERNMENT COMMISSION, EMINENT DOMAIN CODE, AS AMENDED WITH COMMENTS AND NOTES (1972).

<sup>7</sup> See *Draft of Model Eminent Domain Code*, 2 REAL PROPERTY, PROBATE & TRUST J. 365 (1967).

<sup>8</sup> The Reporter-Draftsman for the Uniform Eminent Domain Code is Professor Arvo Van Alstyne, University of Utah College of Law. The Commission has provided Professor Van Alstyne with preliminary drafts of this recommendation and has reviewed the Uniform Eminent Domain Code with the assistance of Professor Van Alstyne as a consultant.

within the existing California statutory framework.

The comprehensive Eminent Domain Law proposed in this report will replace the existing general eminent domain title of the Code of Civil Procedure.<sup>9</sup> Its major purpose is to cover, in a comprehensive manner, all aspects of condemnation law and procedure.<sup>10</sup> It will constitute a complete and well organized compilation of the law and will provide one uniform statute applicable to all condemnors and all condemnation proceedings.<sup>11</sup> Its enactment will permit the repeal of approximately 125 sections and the amendment of approximately 150 sections to delete more than 28,000 words of unnecessary language.<sup>12</sup>

While the Eminent Domain Law requires that all condemnors follow its provisions, it imposes no new mandatory costs on local public agencies. A public agency is not required to exercise the power of eminent domain in pursuance of its property acquisition program; the statute provides that any agency authorized to exercise the power of eminent domain to acquire property for a particular purpose may also acquire the property by grant, purchase, lease, gift, devise, contract, or other means. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is left to the discretion of the agency authorized to acquire the property.

While the Eminent Domain Law will make a number of important changes in existing law, to a large extent it restates that law, corrects technical defects, eliminates obsolete and inconsistent provisions, and fills gaps in the law. The more important changes made by the Eminent Domain Law are

<sup>9</sup> The Commission considered various locations for the Eminent Domain Law, including enactment of a separate code. However, due to the relatively narrow scope of the subject when considered with reference to the California codes and to the adoption of the general principle that eminent domain proceedings should be governed by the same rules as civil actions generally (see discussion under "Condemnation Procedure" *infra*), the Commission recommends that the Eminent Domain Law should simply be substituted for the present Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure.

<sup>10</sup> There are some areas of the law purposely left to judicial development. Moreover, the Eminent Domain Law cannot limit any provisions of the California or United States Constitutions.

It should also be noted that there are some statutes applicable to property acquisition generally and not limited to eminent domain proceedings. See, e.g., GOVT. CODE §§ 7260-7274 (relocation assistance and fair acquisition policies). Such statutes are not affected by the Eminent Domain Law and continue to remain applicable when property is acquired by eminent domain. See further discussion under "Relocation Assistance," *infra*.

<sup>11</sup> The special provisions relating to valuation of public utility property by the Public Utilities Commission pursuant to California Constitution, Article XII, Section 23a and Public Utilities Code Sections 1401-1421 will not be affected.

<sup>12</sup> See "Table of Sections Affected," *infra*.

Affected," 12 Cal. L. Revision Comm'n Reports at 2113 (1974).

discussed below. Other changes of less importance are noted in the Comments that follow the text of the proposed legislation.

6/ The operative date of the Eminent Domain Law is deferred until July 1, 1977, to allow interested persons sufficient time to become familiar with its contents. On the operative date,

~~however, the law is made applicable to pending proceedings to~~

however, the law is made applicable to any pending proceeding that was commenced on or after January 1, 1976, to

the fullest extent practicable so that the transition will be swift and the benefits of the law will be immediately available to all persons.

## THE RIGHT TO TAKE

### Delegation of Eminent Domain Power

#### Basic Statutory Scheme

The power of eminent domain may only be exercised in aid of a recognized public use by a person authorized by statute to exercise such power.<sup>13</sup> In California, the statutory delegation of the power of eminent domain appears to be exceedingly broad. Section 1001 of the Civil Code states in part: "Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure" by exercise of the power of eminent domain.

When enacted in 1872, Code of Civil Procedure Section 1238 listed a great number of uses as "public uses," and it has been amended many times since then to list additional uses. Despite the amendments, many recognized public uses are not listed in the section, and the inclusion of a use in the listing is no guarantee that the use is in fact a public use.<sup>14</sup> Moreover, Civil Code Section 1001, although unchanged since its enactment in 1872 and purporting to authorize the exercise of eminent domain power by "any person," has been narrowly construed by the courts when a person other than a public entity or privately owned public utility has sought to condemn property.<sup>15</sup>

To a considerable extent, the listing of uses in Code of Civil Procedure Section 1238 is surplusage since the Legislature has generally ignored the statutory scheme established by Civil Code Section 1001 and Code of Civil Procedure Section 1238 in delegating the power of eminent domain. The Legislature has instead enacted numerous other codified and uncodified sections that authorize condemnation for particular public uses. In fact, there are hundreds of statutes that grant the power of eminent

<sup>13</sup> *People v. Superior Court*, 10 Cal.2d 288, 295-296, 73 P.2d 1221, 1225 (1937).

<sup>14</sup> The question whether a particular use is a public use is always subject to judicial review. See discussion *infra* under "Public Use."

<sup>15</sup> See discussion *infra* under "Quasi-public entities and private persons."

domain to particular persons for particular purposes.

The Commission recommends that clear statements of the extent of eminent domain authority of public entities, public utilities, and others be substituted for the statutory scheme established by Civil Code Section 1001 and Code of Civil Procedure Section 1238. In addition, where a statute grants the power of eminent domain to a particular entity for a particular use, this grant should be treated as a legislative declaration that a taking by that entity for that use is a taking for a public use; it should not be necessary to add to the statute the superfluous statement that the taking is for a public use.

The adoption of this approach will eliminate the need for a separate listing of public uses in the general eminent domain law. It will eliminate the need for frequent amendments to list public uses that merely duplicate grants of eminent domain authority made by other statutes. It will eliminate the existing uncertainty concerning the extent to which private persons may exercise the power of eminent domain and will insure that the power of eminent domain will be construed to extend only to those private persons intended to have such power.

The effect of this approach is to recognize the long-standing legislative practice of delegating the power of eminent domain by specific statute despite the listing of public uses in Section 1238. Nonetheless, to assure that no public entity will be deprived of any right it now has to exercise the power of eminent domain, clear statements of condemnation authority should be enacted to cover those few cases where such authority is now based on Sections 1001 and 1238 and is not otherwise specifically provided. Likewise, clear statements of the condemnation authority of privately owned public utilities should be added to the Public Utilities Code. The extent to which other private individuals and corporations should be authorized to exercise the right of eminent domain is discussed later in this recommendation.<sup>16</sup>

#### Persons Authorized to Exercise Power

**State agencies.** Eleven state agencies are authorized by statute to exercise the power of eminent domain.<sup>17</sup> Nevertheless,

<sup>16</sup> *Id.*

<sup>17</sup> The agencies authorized to condemn are the Adjutant General (MIL. & VET. CODE § 437), Trustees of the California State University and Colleges (EDUC. CODE § 24503), Department of Fish and Game (FISH & GAME CODE §§ 1348-1349), Department of General Services (GOVT. CODE §§ 14661-14662), State Lands Commission (PUB. RES. CODE § 6508), Department of Parks and Recreation (GOVT. CODE § 54093; PUB. RES. CODE §§ 5006, 5006.2; STS. & HWYS. CODE § 887.2), Department of Transportation (PUB. UTIL. CODE §§ 21633-21635; STS. & HWYS. CODE §§ 102, 103.5, 104-104.4, 104.6, 30400-30413; WATER CODE § 8304), Public Works Board (GOVT. CODE § 15854), Reclamation Board (WATER CODE §§ 8590, 8593-8595), Regents of the University of California (EDUC. CODE § 23151), and Department of Water Resources (WATER CODE §§ 250-256, 258-259, 345-346, 11575-11592).

the acquisition of necessary property for many of these agencies is in fact accomplished by the Public Works Board through the Property Acquisition Law.<sup>18</sup>

During recent years, there has been extensive study of the state property acquisition program and, specifically, of the extent to which property acquisition should be accomplished exclusively through the Property Acquisition Law rather than by individual state agencies.<sup>19</sup> The question whether an individual state agency should itself acquire the property it needs for its activities or should acquire such property only through the Property Acquisition Law is one that the Commission has not undertaken to resolve. The Commission has, however, in the course of its study of eminent domain law reviewed all the statutes relating to condemnation of property for state purposes.

The Commission has determined that the statutes granting condemnation authority to state agencies should be revised to eliminate the grants of condemnation authority to state agencies that do not now exercise such authority. This will restrict such grants to those agencies now actually engaged in the property acquisition function and will leave the policy decision as to which agencies should continue to engage in this function for later legislative decision. Specifically, the Commission makes the following recommendations:

(1) The Department of Transportation, Department of Water Resources, Regents of the University of California, and Reclamation Board (on behalf of the Sacramento and San Joaquin Drainage District) should continue to be authorized by statute to condemn for their purposes. The Department of Fish and Game should continue to be authorized to condemn for the ~~Wildlife Conservation Board in those situations in which~~ condemnation is presently authorized.

~~Wildlife Conservation Board,~~ and the State Lands Commission should continue to be authorized to condemn in those situations in which condemnation is presently authorized. The Legislature added Hastings College of the Law as an agency authorized to condemn for its own purposes.

(2) Condemnation of property for all other state purposes should be a responsibility of the Public Works Board under the Property Acquisition Law. This recommendation will eliminate the delegation of eminent domain authority to those agencies that do not now exercise such authority: the Adjutant General, Trustees of the California State University and Colleges, Department of General Services, ~~State Lands Commission~~ and Department of Parks and Recreation.

(3) The statutes relating to the exercise of the power of eminent domain by state agencies should be revised to conform to the proposed general legislation relating to eminent domain.

<sup>18</sup> GOVT. CODE §§ 15850-15866.

<sup>19</sup> E.g., CALIFORNIA LEGISLATIVE ANALYST, A SURVEY OF LAND ACQUISITION AND DISPOSAL BY STATE AGENCIES (1969)

The general eminent domain provisions have been carefully drafted to cover in a comprehensive manner all aspects of condemnation law and procedure. The object of providing one comprehensive eminent domain law will be defeated, however, unless inconsistent and duplicating provisions are deleted from the statutes governing condemnation of property for state purposes.<sup>20</sup> If these conforming revisions are not made, there will be continuing confusion over the extent to which the inconsistent provisions remain in effect or are impliedly repealed.

**Special districts.** The great majority of special districts have, by virtue of their enabling statutes, general authority to condemn any property necessary to carry out any of their objects or purposes. Thus, approximately 160 different types of special districts, totaling more than 2,000 individual districts, have general condemnation authority.<sup>21</sup> With respect to these districts, there is no need to rely on Section 1001 of the Civil Code and Section 1238 of the Code of Civil Procedure as the source of condemnation authority, and the repeal of those sections will have no effect on the condemnation authority of these districts.

Approximately 30 different types of districts either are not authorized by their enabling statutes to exercise the power of eminent domain, or the grant of eminent domain power in their enabling statutes is not sufficiently broad to permit condemnation of property for some of the district's authorized functions. The Commission has reviewed these enabling statutes and has concluded, with two exceptions noted below, that no revision of these statutes is needed. Some of these districts have no power to acquire or hold property. Others have no corporate power. In some cases, the acquisition of necessary property for the district by eminent domain is accomplished by the county or a city. The omission of a grant in other statutes appears to be a conscious legislative decision. Accordingly, absent any experience that demonstrates a need to grant the power of eminent domain to any of these special districts, the Commission proposes no change in their enabling statutes.

Public cemetery districts and resort improvement districts<sup>22</sup> derive their power of eminent domain from Civil Code Section 1001 and Code of Civil Procedure Section 1238. In order that the

<sup>20</sup> The provisions of the general legislation that supersede repealed sections or deleted portions of sections are indicated in the Comments that follow the sections of the ~~proposed legislation included in this report~~ legislation as enacted.

<sup>21</sup> For a listing, see CONDEMNATION PRACTICE IN CALIFORNIA, Appendix A: Tables ID and IE (Cal. Cont. Ed. Bar 1973).

<sup>22</sup> Although no new resort improvement districts can be formed after May 19, 1965 (see PUB. RES. CODE § 13003), the authority of existing districts should be preserved.

repeal of these sections will not adversely affect these types of districts, the statutes governing these districts should be revised to preserve their condemnation authority.

There are a large number of codified and uncodified statutes relating to special districts that contain provisions that are inconsistent with or duplicate the general provisions of the Eminent Domain Law. The general eminent domain provisions have been carefully drafted to cover in a comprehensive manner all aspects of condemnation law and procedure. The objective of providing one comprehensive eminent domain law will be defeated, however, unless inconsistent and duplicating provisions are deleted from the statutes governing special districts.<sup>23</sup> If these conforming adjustments are not made, there will be continuing confusion over the extent to which the inconsistent provisions remain in effect or are impliedly repealed. Therefore, the Commission recommends that the special district statutes be adjusted to conform to the proposed general legislation relating to eminent domain.<sup>24</sup>

<sup>23</sup> Examples of the types of conforming revisions recommended include the following:

(1) Language that the right of eminent domain is to be exercised by the district in the manner provided by law for the condemnation of private property for public use, with the same rights, powers, and privileges as a city, county, or municipal corporation, may be deleted with the enactment of the comprehensive eminent domain legislation providing generally that the power of eminent domain may be exercised only in accordance with its provisions.

(2) Statements that a particular use by a district is a public use may be repealed with the enactment of the comprehensive eminent domain legislation providing that statutory authorization to condemn for a particular purpose constitutes a legislative declaration that that purpose is a public use.

(3) Detailed listings of particular types of property that may be acquired by a district for public use may be eliminated with the enactment of the comprehensive eminent domain legislation providing that a person authorized to condemn for a particular use may exercise the power of eminent domain to condemn property of any character necessary for that use.

(4) The requirement that the district proceed in the name of the district may be repealed with the enactment of the comprehensive eminent domain legislation providing for prosecution of the proceeding by the person seeking to acquire the property.

(5) The comprehensive eminent domain legislation provides for all of the following matters, thereby enabling repeal of provisions covering the same matters for each district:

(a) Requirement of adoption of a resolution of necessity and specification of the effect to be given the resolution.

(b) Acquisition of property for the purposes of remnant elimination (excess condemnation).

(c) Acquisition of property already devoted to public use for more necessary and compatible public uses.

(d) Acquisition of property for exchange purposes.

(e) Entry upon property to locate public improvements.

<sup>24</sup> For the amendments, additions, and repeals needed to conform the special district statutes to the Eminent Domain Law, see *Tentative Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Special District Statutes* (January 1974), to be reprinted in 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974). For changes from the tentative recommendation in the Commission's final recommendation with respect to the special district statutes, see ~~the report~~.

12 Cal. L. Revision Comm'n Reports at 2004 (1974).

**Cities and counties.** A great number of statutes authorize cities and counties to condemn property for essentially all of their activities.<sup>25</sup> This broad condemnation authority is justified. Accordingly, for purposes of clarification, cities and counties should be specifically authorized to condemn property to carry out any of their powers or functions just as special districts are now authorized to condemn for all their functions. Specific restrictions on the power of cities and counties to condemn property for particular purposes<sup>26</sup> would not be affected by such authorization.

**School districts.** Section 1001 of the Civil Code and Section 1238 of the Code of Civil Procedure are the primary bases for the condemnation authority of school districts. Since these sections will not be continued, a provision should be added to the Education Code to preserve the authority of school districts to exercise the power of eminent domain to acquire property necessary for school purposes.

**Public utilities.** Section 1001 of the Civil Code and various subdivisions of Section 1238 of the Code of Civil Procedure are also the primary source of the condemnation authority of privately owned public utilities. In order that the repeal of these sections will not adversely affect the condemnation authority of public utilities, provisions should be added to the Public Utilities Code to preserve and clarify the authority of public utilities to exercise the power of eminent domain to acquire property necessary to carry out their regulated activities.

**Quasi-public entities and private persons.** The right to exercise the power of eminent domain in California is not limited to governmental entities and public utilities. Section 1001 of the Civil Code literally authorizes a private person to condemn property for any of the uses listed in Section 1238 of the Code of Civil Procedure. Other statutes have expressly granted the power of eminent domain to certain private entities which are

<sup>25</sup> For a listing, see CONDEMNATION PRACTICE IN CALIFORNIA, Appendix A: Table IC (Cal. Cont. Ed. Bar 1973). The one possible exception to this generalization is acquisition of property for open space purposes. See GOVT. CODE §§ 6950-6954. Compare Note, *Property Taxation of Agricultural and Open Space Land*, 8 HARV. J. LEGIS. 158 & n.1 (1970) (implying condemnation authorized) with California Legislative Counsel, Opinion No. 17885 (Eminent Domain) (Oct. 24, 1969) (concluding condemnation not authorized). The Commission recommends that the authority of cities and counties to condemn property for open space purposes be made clear with appropriate limitations to prevent any abuse of the power.

The legislation as enacted does not contain the Commission recommended provisions relating to condemnation for open space purposes.

<sup>26</sup> E.g., GOVT. CODE §§ 37353(c) (existing golf course may not be condemned by city for golf course purposes), 50701 (local agency may not condemn for golf course, marina, or small craft harbor under revenue bond act), 54341 (local agency may not condemn publicly owned property under Revenue Bond Law of 1941 without consent of owner).



engaged in quasi-public activities.

In *Linggi v. Garovotti*,<sup>27</sup> the California Supreme Court held that the owner of an apartment building could condemn a necessary easement for a sewer across his neighbor's property to connect the apartment building to the mains of an established sewer system. The extent to which private persons can condemn for other uses listed in Section 1238 is unclear. The *Linggi* case is an exceptional one; the courts generally have not permitted a private person to condemn property unless he is engaged in a quasi-public activity.<sup>28</sup>

Having considered the various uses listed in Section 1238 and the judicial decisions involving attempts by private persons to exercise the power of eminent domain, the Commission recommends that condemnation by private persons be abolished<sup>29</sup> except in the following cases:

(1) The condemnation authority of nonprofit educational institutions of collegiate grade should be continued without change.<sup>30</sup>

(2) The existing condemnation authority of nonprofit hospitals<sup>31</sup> should be liberalized to permit condemnation not only to expand existing hospitals but also to establish a newly organized and licensed hospital and to permit the acquisition of property whether or not "immediately adjacent" to existing holdings. As enacted, the legislation requires that the property to be

acquired be "adjacent" to other property used or to be used for hospital purposes.

(3) The condemnation authority of certain nonprofit housing corporations which provide housing for low income families should be continued and clarified.<sup>32</sup>

<sup>27</sup> 45 Cal.2d 20, 286 P.2d 15 (1955).

<sup>28</sup> *Lorenz v. Jacob*, 63 Cal. 73 (1893) (supplying mines with water); *Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 676, 32 P. 802 (1893) (supplying farming neighborhoods with water); *People v. Elk River Mill & Lumber Co.*, 107 Cal. 221, 40 P. 531 (1895) (floating logs on nonnavigable streams); *General Petroleum Corp. v. Hobson*, 23 F.2d 349 (S.D. Cal. 1927) (byroad to prospect for oil).

<sup>29</sup> In addition to the repeal of Section 1001 of the Civil Code and Section 1238 of the Code of Civil Procedure, the Commission recommends the repeal of Streets and Highways Code Sections 1050-1054 (special private byroad statute) and Water Code Sections 7020-7026 (private ways for canals) and the amendment of Harbors and Navigation Code Section 4009 (private wharves, chutes, and piers). The Commission recommends no change in Health and Safety Code Section 8715 (alteration, vacation, or replatting of public and private cemetery drives and parks an exercise of eminent domain).

<sup>30</sup> The condemnation authority of these institutions, now found in subdivision 2 of Section 1238 of the Code of Civil Procedure, should be continued by a provision added to the Education Code.

<sup>31</sup> CODE CIV. PROC. § 1238.3. Section 1238.3 should be repealed and provision made for condemnation by nonprofit hospitals in the Health and Safety Code.

<sup>32</sup> See HEALTH & SAF. CODE §§ 34874-34879 (limited dividend housing corporations). Provisions comparable to the sections relating to the exercise of condemnation authority by limited dividend housing corporations should be added to the statute relating to land chest corporations in the Health and Safety Code. Land chest corporations, if they now have condemnation authority, must base such authority on Section 1001 of the Civil Code and subdivision 21 of Section 1238 of the Code of Civil Procedure.

(4) The condemnation authority of mutual water companies should be continued without change.<sup>33</sup>

(5) The Legislature added provisions to the recommended legislation to make clear that any cemetery authority which is described in Section 23701c of the Revenue and Taxation Code or is a corporation sole may condemn property necessary to enlarge its existing cemetery.

Resolution consenting to eminent domain proceeding by quasi-public entity. The Legislature added a new requirement that must be satisfied before an eminent domain proceeding may be commenced by a quasi-public entity (a nonprofit educational institution of collegiate grade, nonprofit hospital, cemetery authority, nonprofit housing corporation, or mutual water company). Such a quasi-public entity may not commence an eminent domain proceeding until a resolution consenting to the acquisition has been adopted by the legislative body of (1) each city within which any of the property to be taken is located and (2) the county if any of the property is not located within city boundaries. The city or county may refuse to consent to the acquisition with or without a hearing, but it may adopt the resolution only after a hearing at which persons whose property is to be acquired by eminent domain have had a reasonable opportunity to appear and be heard. Notice of the hearing is given by first-class mail to each person whose property is to be taken and whose name and address appear on the last equalized county assessment roll. The resolution must be adopted by a vote of two-thirds of all the members of the legislative body. The city or county may require the person seeking the resolution to pay in advance all costs in connection with the proceedings to obtain the resolution. The resolution requirement is in addition to any other requirements imposed by law and does not relieve the quasi-public condemnor

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from the requirement that public necessity for the taking be established in the eminent domain proceeding itself.

### Joint Exercise of Power

Two or more public entities should be authorized to enter into an agreement under the Joint Powers Agreement Act<sup>34</sup> for the joint exercise of their respective powers of eminent domain, whether or not possessed in common, for the acquisition of property as a single parcel. This authority already exists where a school district is a party to the joint powers agreement<sup>35</sup> and should be extended to permit exercise of such authority by public entities whether or not a school district is a party to the joint powers agreement.

### Property Subject to Condemnation

#### Property Interest That May Be Acquired

The grants of condemnation authority to various public entities differ widely in their description of the types of property and rights or interests therein that may be acquired by eminent domain. Some grants are restricted to "real property";<sup>36</sup> some grants broadly allow condemnation of "real or personal property"<sup>37</sup> or permit condemnation of "property" without limitation;<sup>38</sup> other grants contain an extensive listing of the various types of property and rights and interests in property that may be taken.<sup>39</sup>

A general provision should be enacted that, except to the extent otherwise limited by statute,<sup>40</sup> will permit the

<sup>34</sup> The substance of subdivision 4 of Section 1238 of the Code of Civil Procedure should be continued by a provision added to the Public Utilities Code.

<sup>35</sup> GOVT. CODE §§ 6500-6583.

<sup>36</sup> FINCC. CODE § 15007.5.

<sup>37</sup> State condemnation authority under the Property Acquisition Law is limited, for example, to any interest in real property. See GOVT. CODE § 15853. The Commission does not recommend that the Property Acquisition Law be broadened to cover acquisition of "personal property" since other statutes provide for state acquisition of personal property. See also, *e.g.*, HEALTH & SAF. CODE § 34525 (housing authority).

<sup>38</sup> *E.g.*, PUB. RES. CODE § 5006 (Department of Parks and Recreation), PUB. UTIL. CODE § 30503 (Southern California Rapid Transit District).

<sup>39</sup> *E.g.*, HARB. & NAV. CODE §§ 5900.4 (harbor improvement districts), 6076 (harbor districts), 6296 (port districts); PUB. UTIL. CODE §§ 12703 (municipal utility districts), 16404 (public utility districts), 28953 (San Francisco Bay Area Rapid Transit District). The vast majority of condemnation grants authorize the taking of any necessary "property."

<sup>40</sup> *E.g.*, Alameda County Flood Control and Water Conservation District Act § 5 ("real and personal property of every kind, including lands, structures, buildings, rights-of-way, easements, and privileges" and "all lands and water and water rights and other property necessary or convenient for [district purposes]").

<sup>41</sup> The Commission recommends no change in the statutory provisions which exempt certain types of property from condemnation. See, *e.g.*, FISH & GAME CODE § 1349 (farm lands exempt except by specific authorization of Legislature); HEALTH & SAF.

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condemnation of any type of property and any right, title, or interest therein necessary for the public use for which it is acquired. Further, the existing judicially developed rule that a grant of condemnation authority includes the authority to acquire any property necessary to carry out and make effective the principal purpose involved should be codified,<sup>41</sup> and duplicating and inconsistent provisions should be repealed.<sup>42</sup> The resolution of necessity should, as it generally is now, be conclusive on the issue of the necessity for acquiring any right or interest in property to be devoted to public use.<sup>43</sup>

#### Property Already Appropriated to Public Use

Existing law permits to a limited extent the acquisition by eminent domain of property already appropriated to public use.<sup>44</sup> The Commission believes, however, that joint use of property appropriated to public use should be encouraged in the interest of the fullest utilization of public land and the least imposition on private ownership. To this end, it recommends that any authorized condemnor be permitted to acquire, for use in common, property already devoted to public use if the joint uses are compatible or can be made compatible without substantial alteration of the preexisting public use.

Only where the two uses are not compatible and cannot be made compatible should a condemnor be permitted to take for its exclusive use property already appropriated to public use. In such a case, taking of the property should be permitted only for a more necessary public use than the use to which the property

CODE §§ 8134, 8550, 8550.5 (cemetery land not subject to condemnation for rights of way); PUB. RES. CODE § 5006.2 (property within Aptos Forest not subject to eminent domain except by permission of Legislature); PUB. UTIL. CODE § 21632 (Department of Transportation cannot take existing airport owned by local public entity without consent of entity). See also *Emery v. San Francisco Gas Co.*, 28 Cal. 347 (1855) (money not subject to eminent domain). The substance of Code of Civil Procedure Section 1240(2) (15th and 36th sections of certain public domain land not subject to condemnation) should be continued.

<sup>41</sup> Inherent in the power to condemn property for a particular purpose is the power to condemn additional property to effectuate that purpose. See, e.g., *City of Santa Barbara v. Cloer*, 216 Cal. App.2d 127, 30 Cal. Rptr. 743 (1963), and *Monterey Flood Control & Water Conservation Dist. v. Hughes*, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962).

<sup>42</sup> Numerous statutes provide a variety of tests to determine to what extent additional property may be acquired. See, e.g., CODE CIV. PROC. § 1238(15) (trees along highways to 300 feet); STS. & HWYS. CODE § 104.3 (protect and preserve highways to 150 feet); WATER CODE § 256 (protect and preserve dams and water facilities to 500 feet). The Commission recommends that, in place of this multiplicity, there be substituted a uniform and comprehensive authorization to acquire all property necessary to carry out and make effective the principal purpose involved.

<sup>43</sup> See Taylor, *The Right to Take—The Right to Take a Fee or Any Lesser Interest*, 1 PAC. L.J. 555 (1970).

Under some circumstances, the resolution of necessity is not conclusive. See discussion infra under "Resolution of Necessity."

<sup>44</sup> See CODE CIV. PROC. §§ 1240(3), (4), (6), 1241(3) (acquisition of property devoted to public use for "consistent" and more necessary public uses).

is already appropriated.<sup>45</sup>

The resolution of necessity of a public entity should not be conclusive on the question whether a use is compatible with or more necessary than another public use.<sup>46</sup> It should be noted, however, that there is a statutory hierarchy of more necessary users—state,<sup>47</sup> local public entities,<sup>48</sup> private persons—as well as specific statutory more necessary use presumptions such as those afforded certain park property and property kept in its natural condition.<sup>49</sup> ~~No change in this scheme is recommended. The Commission does, however, recommend that the substance of~~

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condition. No change in this scheme was recommended by the Commission.

The Commission did, however, recommend that the substance of

Sections 1240(3) and 1241(3) of the Code of Civil Procedure (property appropriated to public use by certain local public entities may not be taken by another such entity) be repealed and all public entities be subject to the compatible and more necessary use scheme described above.

As enacted by the Legislature, the legislation provides that a use by a public entity is a more necessary use than any use by a person other than a public entity, use by the state is presumed to be more necessary than use by a local public entity, and an existing use by a local public entity is presumed to be more necessary than use by another local public entity.

#### Extraterritorial Condemnation

Case law establishes that a local public entity—such as a city, county, or special district—may condemn only property within its territorial limits except where the power to condemn property outside its limits is expressly granted by statute or is necessarily implied as an incident to one of its other statutory powers.<sup>50</sup> This rule should be codified. Unaffected by this codification would be statutes that expressly authorize extraterritorial condemnation<sup>51</sup> and statutes—such as those authorizing the furnishing of sewage facilities or the supplying of water—under which the power of extraterritorial condemnation may be implied.<sup>52</sup>

As enacted, the legislation includes an express grant to local public entities of extraterritorial condemnation authority for water, gas, or electric supply purposes or for airports, drainage, or sewer purposes.

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- <sup>45</sup> This scheme should also apply where two or more persons seek to condemn the same property and the proceedings have been consolidated. In this case, condemnation should be allowed for joint use among the condemners. Where the various uses are not compatible, condemnation should be allowed for the more necessary public use and the proceeding dismissed as to the others.
- <sup>46</sup> See discussion *infra* under "Public Necessity."
- <sup>47</sup> GOVT. CODE § 15855.
- <sup>48</sup> CODE CIV. PROC. §§ 1240(3) and 1241(3).
- <sup>49</sup> CODE CIV. PROC. §§ 1241.7 and 1241.9.
- <sup>50</sup> See *City of No. Sacramento v. Citizens Util. Co.*, 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961) (implied authority); *City of Hawthorne v. Peebles*, 165 Cal. App.2d 758, 333 P.2d 442 (1959) (statutory authority); *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, 72 Cal. App.2d 638, 165 P.2d 741 (1946) (statutory authority).
- <sup>51</sup> *E.g.*, GOVT. CODE § 61610; HARB. & NAV. CODE § 7147; HEALTH & SAF. CODE §§ 6514, 15852(c); PUB. RES. CODE § 5540. Such statutes are constitutional. *City of Hawthorne v. Peebles*, 165 Cal. App.2d 758, 333 P.2d 442 (1959); *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, 72 Cal. App.2d 638, 165 P.2d 741 (1946).
- <sup>52</sup> *City of Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604 (1891) (sewage) (dictum); *City of No. Sacramento v. Citizens Util. Co.*, 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961) (water). *Cf. Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 718, 329 P.2d 289, 291 (1958). Compare *City of Carlsbad v. Wight*, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963).

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## Public Use and Necessity

### Constitutional Requirement of Public Use

Article I, Section 19, of the California Constitution prohibits the exercise of eminent domain except for a "public use."<sup>53</sup> Whether a particular purpose is a public use is an issue that is always justiciable in an eminent domain proceeding.<sup>54</sup> Ordinarily, however, a taking by a public entity or public utility does not present a public use issue. The property sought to be taken will be devoted to a purpose that is declared to be a public use by statute, and history indicates that there is little likelihood that the court will declare the use not to be a public use. There are, however, some situations that may present a significant public use issue. These situations are discussed below.

### Acquisition for Future Use

It is well established that statutory grants of general condemnation power carry with them the right to condemn property in anticipation of the condemnor's future needs, provided there is a reasonable probability of use of the property within a reasonable period of time.<sup>55</sup> This standard should be codified. The question whether there is such a probability should always be justiciable; however, any use of property within seven years after the commencement of an eminent domain proceeding should be deemed "reasonable."

As enacted, the legislation provides that use within 10 years after commencement of the proceeding is deemed "reasonable" where the property is taken pursuant to the Federal Aid Highway Act of 1973.

### Acquisition of Physical and Financial Remnants

The acquisition of part of a larger parcel of property for public use will on occasion leave the remainder in such size, shape, or condition as to be of little market value. The elimination of such remnants may be of substantial benefit to the community at large as well as to the owners of such property. Generally speaking, California's condemnors with any substantial need therefor have been granted specific statutory authority to condemn the excess for the purpose of remnant elimination.<sup>56</sup> Some of these statutes are so broadly drawn that they literally authorize exercise of the power of eminent domain to acquire remnants in circumstances not constitutionally permitted.<sup>57</sup>

<sup>53</sup> *City & County of San Francisco v. Ross*, 44 Cal.2d 52, 279 P. 529 (1955).

<sup>54</sup> *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959).

<sup>55</sup> See, e.g., *Central Pac. Ry. v. Feldman*, 152 Cal. 303, 92 P. 849 (1907); *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 P. 585 (1899); *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961).

<sup>56</sup> E.g., CODE CIV. PROC. § 1266 (city and county highway authorities); STS. & HWYS. CODE § 104.1 (Department of Transportation); WATER CODE §§ 254 (Department of Water Resources), 43533 (water districts). These statutes, however, vary from agency to agency, often with little or no apparent reason for the difference.

<sup>57</sup> See *People v. Superior Court*, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1958).

The Commission has concluded that all public entities should be granted the authority to condemn excess property for the purpose of remnant elimination,<sup>58</sup> whether the remnant be physical or financial. Under existing law, a public entity may acquire a remainder if the acquisition would be justified to avoid "excessive" severance or consequential damages to the remainder.<sup>59</sup> The Commission recommends that a more meaningful test be used to determine whether the remainder may be taken—that it be left in such size, shape, or condition as to be of little market value. Under this test, for example, if the taking of part of a larger parcel of property would leave a remainder, regardless of size, in such a condition that it is landlocked and no physical solution will be practical, the taking of the remainder would be authorized.<sup>60</sup>

Remainders that are of little market value should be subject to acquisition by both voluntary means and by condemnation but, to safeguard against the abuse of such authority, the property owner should always be able to contest whether the remainder will be "of little market value." The property owner should also be permitted to show that the condemnor has available a reasonable and economically feasible means to avoid leaving a remnant of little market value; if he is successful in demonstrating such a "physical solution," condemnation of the excess should not be allowed.

#### Acquisition for Exchange Purposes

A number of California condemnors are authorized to acquire property of a third party for the purpose of exchange with the owner of property that is needed for public use.<sup>61</sup> This authority

<sup>58</sup> Nongovernmental condemnors have no statutory authority to acquire excess property. No change in this regard is recommended.

<sup>59</sup> *People v. Superior Court*, 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

<sup>60</sup> This was the situation in *People v. Superior Court*, *supra*. Other situations where the taking of the remainder would be permitted include cases where the remainder (1) will be reduced below the minimum zoning limits for building purposes and it is not reasonably probable that there will be a zoning change, (2) will be of significant value to only one or few persons (such as adjoining landowners), or (3) will be landlocked and have primarily a speculative value dependent upon access being provided when adjacent land is developed and the time when the adjacent land will be developed is a matter of speculation.

On the other hand, a usable and generally salable remainder could not be taken even though its highest and best use has been downgraded by its severance or a serious controversy exists as to its best use and value after severance. Likewise, the remainder could not be taken (1) to avoid the cost and inconvenience of litigating the issue of damages, (2) to preclude the payment of damages, including damages substantial in amount in appropriate cases, (3) to coerce the condemnee to accept whatever price the condemnor offers for the property actually needed for the public project, or (4) to afford the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public project.

<sup>61</sup> See, e.g., GOVT. CODE § 15858 (state); STS. & HWYS. CODE §§ 104(b), 104.2 (Department of Transportation); WATER CODE § 253(b) (Department of Water Resources).



to acquire "substitute property" to be exchanged for the "necessary property" should be extended to all public entities; but, in order to safeguard the rights of the third party, the authority should be restricted to the following situations.

Where the necessary property is devoted by its owner to a public use and he could exercise the power of eminent domain to acquire substitute property for the same public use from a third party, the public entity should be permitted to acquire substitute property by eminent domain for the owner of the necessary property. This authority will avoid the need for two condemnation proceedings. To protect against possible abuses, a substitute taking on these grounds should be allowed only where the owner of the necessary property has agreed to the exchange and it is clear that the substitute property will be devoted to the same public use as the necessary property.

In exceedingly rare cases, justice may require that the detriment to the owner of the necessary property be avoided in whole or in part by providing substitute facilities on land of a third party. The most frequently encountered situation of this sort is where the acquisition of the necessary property would leave other property in such condition as to be deprived of utility service or access to a public road. In such a case, substitute condemnation could provide a quite simple physical solution to what otherwise would be a case of severely damaged property. Accordingly, a public entity should be authorized to condemn such property as appears reasonably necessary and appropriate to supply utility service or access after taking into account any hardship to the owner of the substitute property. In cases other than utility or access cases, the public entity should be authorized

than utility or access cases, the Commission recommended that the public entity should be authorized

to acquire substitute property for exchange purposes only if (a) the owner of the necessary property has agreed to the exchange, (b) the substitute property is in the same general vicinity as the necessary property, and (c) taking into account the relative hardship to both owners, the exchange would not be unjust to the owner of the substitute property.

owner of the substitute property; but the Legislature deleted the provision designed to effectuate this recommendation before the legislation was enacted.

The propriety of a taking for the purpose of exchange should always be subject to challenge, and the public entity should have the burden of proof that its taking of substitute property will satisfy these criteria.

#### Statutory Requirement of Public Necessity

The necessity for a taking must be established before property may be acquired by eminent domain.<sup>62</sup> The Commission believes

<sup>62</sup> See, e.g., CODE CIV. PROC. §§ 1240(6), 1241(2), and 1242.

that this statutory requirement is a sound one and recommends that no person be permitted to exercise the power of eminent domain unless:

(a) The public interest and necessity require the proposed project;

(b) 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; and

(c) The property and interest therein sought to be acquired are necessary for the proposed project.

#### Resolution of Necessity

Some, but not all, public entities must adopt a resolution of necessity to acquire property by eminent domain before such a proceeding may be commenced.<sup>63</sup> Among those public entities required to adopt a resolution of necessity, the vote requirement for most is a simple majority.<sup>64</sup> The Commission believes that the requirement of the adoption of the resolution of necessity is a salutary one: In addition to informing the property owner of the authority for the proposed acquisition, it helps to insure that the public entity makes a considered decision of both the need for the property as well as for the proposed project itself. Accordingly, the Commission recommends that all public entities be required to adopt a resolution of necessity for the

~~acquisition of any property by eminent domain. The acquisition~~  
acquisition of any property by eminent domain.

The Legislature added a requirement that a resolution of necessity may be adopted only after the governing body has given each property owner whose property is to be acquired by eminent domain notice and a reasonable opportunity to appear and be heard on the issue of necessity. The notice is given by first-class mail to those property owners whose names and addresses appear on the last equalized county assessment roll. Failure to file a written request to appear and be heard within 15 days after the notice is mailed results in a waiver of the right to appear and be heard. Public agencies are authorized to satisfy the hearing requirement through any other procedure that provides the property owner with equivalent protection.

The Commission recommended that adoption of the resolution of necessity

should be by a majority vote of all the members of the governing body of the public entity<sup>65</sup> since a majority vote is normally required for the decision to undertake the proposed project itself. ~~The resolution should describe the public use and refer~~

itself. As enacted, the legislation requires that the resolution be adopted by a vote of two-thirds of all the members of the governing body.

The resolution should describe the public use and refer

to the statutory authority for the taking; it should describe the property needed for the project; it should declare that the public entity has found and determined that the public interest and necessity require the proposed project, that the proposed project is planned or located in the manner that will be most compatible with the greatest public good and least private injury, and that the property sought to be taken is necessary for the proposed

<sup>63</sup> Compare, e.g., CODE CIV. PROC. § 1241(2) (resolution may be adopted) with WATER CODE § 8594 and GOVT. CODE § 15853 (resolution required).

<sup>64</sup> See, e.g., GOVT. CODE § 15855 and STS. & HWYS. CODE § 102.

<sup>65</sup> This rule should not apply to the Regents of the University of California. See EDUC. CODE § 23151 (two-thirds vote required for taking by Regents of the University of California). Nor would it apply to the San Francisco Bay Area Transportation Terminal Authority. See GOVT. CODE § 67542 (unanimous vote of board required).

<sup>66</sup> Thus, the majority requirement should not apply to acquisition of property by a county for state highway purposes since the decision to undertake such a project requires a greater than majority vote. See STS. & HWYS. CODE § 760 (four-fifths vote of supervisors required for project as well as for condemnation).

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project.

In the great majority of cases, the resolution of necessity of a public entity establishes a conclusive presumption of public necessity.<sup>67</sup> The Commission has weighed the need for court review of necessity questions against the economic and procedural burdens such review would entail and against the policy that entrusts to the legislative branch of government basic political and planning decisions concerning the need for and design and location of public projects. The Commission has concluded that the policy to provide conclusive effect to the resolution of necessity of a public entity is a sound one and should be continued. Where the condemnor is a public utility or other private entity, however, the issue of public necessity should always be subject to court determination.<sup>68</sup>

There are certain situations where the necessity of the taking by a public entity should be subject to court review. The resolution of necessity should not have a conclusive effect for acquisitions outside the territorial limits of the public entity.<sup>69</sup> In addition, it should be made clear that the resolution of necessity has no effect on the justiciability of such "public use" issues as takings for exchange purposes, taking of remnants, and takings for future use.<sup>70</sup>

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taking of remnants and some takings for future use.

The Legislature made two important changes in the legislation before it was enacted. Provisions were added to make the resolution of necessity not conclusive to the extent that its adoption or contents were influenced or affected by a gross abuse of discretion by the governing body. In addition, a provision was added making the resolution of necessity ineffective to authorize the condemnation proceeding where, but for bribery of a member of the governing body, the resolution would not otherwise have been adopted.

## COMPENSATION

### Basic Compensation Scheme

Existing law provides that compensation shall be paid for property taken by eminent domain and, if the property is part of a larger parcel, for damage to the remainder caused by its

<sup>67</sup> See, e.g., GOVT. CODE § 15855 (Public Works Board); STS. & HWYS. CODE § 103 (Department of Transportation); WATER CODE § 251 (Department of Water Resources); CODE CIV. PROC. § 1241(2) (city, county, school district). The resolution is given conclusive effect even if its passage is obtained through fraud, bad faith, corruption, or gross abuse of discretion. *People v. Chevalier*, 52 Cal.2d 289, 340 P.2d 598 (1959).

<sup>69</sup> For an exception to this rule, see PUB. RES. CODE § 25528 (finding of necessity by State Energy Resources Conservation and Development Commission conclusive on public necessity of condemnation by utility). This exception should be continued, and a similar exception should be made for nonprofit hospitals on certification of necessity by the Director of Health. **The legislation as enacted makes no such exception for nonprofit hospitals.**

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<sup>68</sup> Judicial review of necessity in extraterritorial condemnation cases is desirable since the political process may operate to deny extraterritorial property owners an effective voice in the affairs and decision-making of the local public entity. *Cf. Scott v. City of Indian Wells*, 6 Cal.3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972). For this reason, when extraterritorial condemnation is undertaken, a local public entity is denied a conclusive presumption as to the public necessity of its acquisition. See, e.g., *Code Civ. Proc.* § 1241(2); *City of Los Angeles v. Keck*, 14 Cal. App.3d 520, 52 Cal. Rptr. 599 (1971).

<sup>70</sup> These public use issues have previously been discussed. See discussion *supra* under "Public Use and Necessity."

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severance from the part taken and by construction and use of the project for which it is taken. If benefits are conferred by the project, the benefits may be offset against compensation for damage to the remainder but not against compensation for the part taken.<sup>71</sup>

Most states use the same general compensation scheme as California.<sup>72</sup> Nevertheless, the Commission has considered the compensation approaches adopted in the remaining states. The most popular alternative is the "before and after" rule under which the value of the property before the taking and the value of the remainder after the taking are determined and the difference, if any, is awarded to the property owner. Despite the apparent fairness and simplicity of operation of the before and after rule, the Commission has determined not to recommend any change in the general California compensation scheme because there appears to be no general consensus in California that adoption of a different scheme would be desirable.<sup>73</sup>

Although the Commission has concluded that the basic method of measuring compensation in California should be retained, there are a number of defects or deficiencies that need correction, and there are some losses suffered by property owners that are not now compensated but should be. The revisions of existing law recommended by the Commission are outlined below.

### Accrual of Right to Compensation

Code of Civil Procedure Section 1249 provides that, for the

<sup>71</sup> The basic compensation scheme appears in Code of Civil Procedure Section 1249(1)-(3).

<sup>72</sup> See, e.g., 4A P. NICHOLS, EMINENT DOMAIN § 14.23 *et seq.* (rev. 3d ed. 1971) (including a discussion of the numerous variations).

<sup>73</sup> The Commission notes that the California scheme of valuing the part taken, computing damages to the remainder, and offsetting benefits against the damages to the remainder has undergone a continuing process of judicial development. Court decisions have limited compensable items of damage, for example, to those that amount to more than "mere inconvenience" and that are peculiar to the particular property. See, e.g., *Eachus v. Los Angeles Consol. Elec. Ry.*, 103 Cal. 614, 57 P. 750 (1894), and *City of Berkeley v. Von Adelung*, 214 Cal. App.2d 791, 29 Cal. Rptr. 802 (1963). Recent cases, however, indicate that particular items of damage may be compensable in any case where the property owner is required to bear more than his "fair share" of the burden of the public improvement. See, e.g., *People v. Volunteers of America*, 21 Cal. App.3d 111, 98 Cal. Rptr. 423 (1971). A similar development has taken place in the determination of what items of benefit may be offset against damages; traditionally only "special" benefits might be offset, but recent cases have found special benefits in areas not previously included. Compare *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1053 (1902), with *People v. Giumarra Farms, Inc.*, 22 Cal. App.3d 98, 99 Cal. Rptr. 272 (1971).

In light of this continuing judicial development and improvement under the California scheme, the Commission recommends no codification of particular elements of damage and benefits.

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purpose of assessing compensation and damages, the right thereto accrues as of the date of issuance of summons. This date is an arbitrary one since summons may not be issued at the time the complaint is filed and, even if issued, may not be served immediately. The filing of the complaint commences the eminent domain proceeding and serves to vest the court with jurisdiction;<sup>74</sup> hence, the date the complaint is filed is a more appropriate date for accrual of the right to compensation.

### Date of Valuation

Since 1872, Code of Civil Procedure Section 1249 has required that the property taken be valued as of the date the summons is issued. In an attempt to improve the position of the property owner and to compel the condemnor to expedite the proceeding, a provision was added in 1911 specifying that, if a case is not brought to trial within one year and the delay is not caused by the defendant, the date of valuation is the date of trial. Neither the taking of possession nor the depositing of probable compensation has any bearing in determining the date of valuation. In cases in which the issue of compensation is once tried and a new trial is necessary, the Supreme Court of California has held that the date of valuation remains the same date used for that purpose in the original trial.<sup>75</sup>

The Commission has considered the oft-made proposal that the date of valuation be, in all cases, the date of trial. Much can be said in favor of that change. Unless the condemnor deposits probable compensation and takes possession of the property at that time, the date the proceedings are begun is not an entirely logical date of valuation. It would seem more appropriate to ascertain the level of the general market and the value of the particular property in that market at the time the exchange of the property for "just compensation" actually takes place. Also, in a rapidly rising market, property values may have increased so much that the property owner cannot purchase equivalent property when he eventually receives the award. In other states in which the power of eminent domain is exercised through judicial proceedings, the majority rule is to fix the date of trial as the date of valuation.<sup>76</sup> Nonetheless, the existing California rules appear to have worked equitably in most cases. The alternative rule might provide an undesirable incentive to condemnees to delay the proceedings to obtain the latest possible date of

<sup>74</sup> See CODE CIV. PROC. §§ 411.10 and 1243; *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15 (1924).

<sup>75</sup> See *People v. Murata*, 55 Cal.2d 1, 357 P.2d 833, 9 Cal. Rptr. 601 (1960).

<sup>76</sup> See 3 P. NICHOLS, *EMINENT DOMAIN* § 8.5(2) at 38-39 (rev. 3d ed. 1965).

valuation. And, as a matter of convenience, there is merit in fixing the date of valuation as of a date certain, rather than by reference to the uncertain date that the trial may begin. The Commission therefore recommends retention of the existing rules with the modifications described below.

#### **Deposit to Establish Date**

The condemnor should be permitted to establish an early date of valuation by depositing the probable amount of compensation for withdrawal by the property owner. In addition to providing a needed incentive to condemnors to deposit approximate compensation, the rule would accord with the view that the property should be valued as of the time payment is made. For convenience, the date of valuation should be the date the deposit is made unless an earlier date is made applicable by the existing rules. A date of valuation thus established should not be subject to change by any subsequent development in the proceeding.

#### **Date in Case of New Trial**

In case of a new trial, the date of the new trial, rather than the date used in the original trial, should be the date of valuation since the date used in the original trial is of no practical or economic significance. The court should have discretion, however, to specify another date where to do so would be appropriate, e.g., where a new trial was necessitated by misconduct of a party. To clarify existing law, a similar rule should be provided for a "retrial" following a mistrial.

#### **Date Based on Commencement of Proceeding**

As a technical matter, provisions respecting the date of valuation should be changed to compute that date from the commencement of the proceeding (filing of the complaint) rather than from the issuance of summons since the date of commencement of the proceeding marks the inception of the court's jurisdiction over the property.

#### **Enhancement and Blight**

It is generally recognized that announcement of a public improvement may cause property values to fluctuate before eminent domain proceedings are begun. Existing California statutes do not deal with this problem.<sup>77</sup> Case law establishes,

<sup>77</sup> Recently enacted Government Code Section 7267.2 requires condemnors to make an offer to acquire property in the amount of their determination of probable compensation. The section also provides that, for the purpose of this offer:

Any decrease or increase in the fair market value of real property to be acquired prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner or occupant, will be disregarded in determining the compensation for the property.



however, that any increase in the value of the property before the time it becomes reasonably certain that the property will be taken for the project is to be included in arriving at the compensation to be made for the property; any increases thereafter attributable to the project itself are excluded.<sup>75</sup>

The law as to the treatment of any decrease in value is uncertain; demands by property owners that alleged decreases in value be excluded have frequently been denied. The reason commonly given is that any attempt to determine the existence or amount of such a decrease would be to engage in speculation. As recognized by recent cases, however, the injustice to the property owner is clear if general knowledge of the proposed improvement has actually depreciated the market value of the property prior to the date of valuation.<sup>79</sup> Such influence can be shown by expert testimony and by direct evidence as to the general condition of the property and its surroundings as well where the value is depressed as where the value is enhanced.

Equitably, the amount awarded to the owner should be equivalent to what the market value of the property would have been on the date of valuation but for the proposed improvement's influence on the market. Accordingly, a uniform rule should be established by statute to provide that the value of the property taken on the date of valuation may not include any increase or decrease in such value resulting from (1) the project for which the property is taken, (2) the eminent domain proceeding itself, or (3) any preliminary actions on the part of the condemnor related to the taking or damaging of the property.<sup>80</sup> In the case of a partial taking, this rule should also apply in valuing the remainder in the "before" condition.

### Divided Interests

At the time property acquired by eminent domain is taken, it is not always held by a single owner in fee simple; frequently, there are coowners, liens and encumbrances, deed restrictions, leases, and the like. The Commission has reviewed the statutory and case law relating to compensating and apportioning the award among divided interests and recommends the following changes in existing law.

#### Leaseholds

Under existing law, where property subject to a lease is

<sup>75</sup> See *Merced Irr. Dist. v. Woolstenhulme*, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 633 (1971).

<sup>79</sup> Cf. *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

<sup>80</sup> The recommended rule is consistent with Government Code Section 7267.2.

partially taken, the lessee's obligation to pay rent under the terms of the lease for the property taken continues unabated, and the lessor's compensation for the property is given in part to the lessee to be paid back to the lessor as a part of the rental installments.<sup>61</sup> This rule, which in effect makes the lessee a trustee for the lessor's compensation, has been widely criticized.<sup>62</sup> The lessor should be compensated immediately for the property taken, and the lessee should not be required to make payments on property no longer subject to the lease. Unless the lease otherwise provides, a partial taking of property subject to a leasehold should work a pro rata reduction of the rental obligation; and, if the taking is so great that it operates as a frustration of the whole lease, the court should, on motion of any party, terminate the lease.

#### Liens

Case law provides that, where there is a lien on property taken by eminent domain, in the case of a partial taking, the lienholder is entitled to share in the award only to the extent of the impairment of his security.<sup>63</sup> This rule should be codified, with permission for the parties to make a subsequent agreement allowing the lienholder a greater share of the compensation.

#### Options

Existing law denies compensation to the holder of an unexercised option to acquire property.<sup>64</sup> An option may be a valuable interest for which substantial consideration was given. An option holder should receive compensation for the fair market value of the option.<sup>65</sup>

The provision recommended by the Commission was deleted from the legisla-  
 tion as unnecessary in view of a subsequently decided California Supreme  
 Court case holding an unexercised option to be a compensable interest. 85a

#### Future Interests

When property subject to a life tenancy is taken by eminent domain, the life tenant's portion of the award may be inadequate for investment to provide the life tenant with the same income or comparable living conditions as the original life tenancy. In this situation, the court should have authority to defer distribution of the eminent domain award pending termination of the life tenancy and meanwhile to permit investment of the

<sup>61</sup> *City of Pasadena v. Porter*, 201 Cal. 381, 257 P. 526 (1927).

<sup>62</sup> See, e.g., Horgan & Edgar, *Leasehold Valuation Problem in Eminent Domain*, 4 U.S.F. L. REV. 1 (1969).

<sup>63</sup> See, e.g., *Milstein v. Security Pac. Nat'l Bank*, 27 Cal. App. 3d 482, 103 Cal. Rptr. 16 (1972).

<sup>64</sup> See, e.g., *People v. Ocean Shore R.R.*, 90 Cal. App.2d 464, 203 P.2d 579 (1949).

<sup>65</sup> This is consistent with the general rule that unexercised options to purchase or lease property are considered in determining the value of a lease. See, e.g., *People v. Gianni*, 29 Cal. App.3d 151, 105 Cal. Rptr. 248 (1972).

85a. See *County of San Diego v. Miller*, 13 Cal.3d 684, 532 P.2d 139, 199 Cal. Rptr. 491 (1975).

funds or their devotion to such purposes as would be equitable under the circumstances. The grant of such authority would codify existing case law.<sup>86</sup>

Contingent future interests in property such as rights of reentry and possibilities of reverter are denied compensation under existing law.<sup>87</sup> Such future interests may have substantial market value, particularly where the reentry or reverter is imminent at the time of the taking. If the transformation of the future interest to a present interest was reasonably imminent at the time the eminent domain proceeding was commenced, the future interest should be compensated at its fair market value. Additionally, where the occurrence was not reasonably imminent but the future interest was appurtenant to some property that is damaged by the acquisition, the owner should be compensated for that damage.<sup>88</sup> And, where the occurrence was not reasonably imminent but the future interest restricted the use of the property to charitable or public purposes, the award should be devoted to the same purposes subject to the continued future interest.

### Improvements

A condemnor must take and pay for all improvements pertaining to the realty that it acquires by eminent domain.<sup>89</sup> Discussed below are several problem areas in the application of this rule.

#### Classification of Improvements

Whether certain types of business equipment are improvements pertaining to the realty has been a continuing source of litigation.<sup>90</sup> In 1957, Code of Civil Procedure Section 1248b was enacted to provide that equipment designed for manufacturing or industrial purposes and installed for use in a fixed location is deemed a part of the realty regardless of the manner of installation. Nevertheless, this did not completely resolve the issue. It is sometimes difficult to determine whether particular equipment falls within the language of Section 1248b. Moreover, some types of business equipment—particularly equipment used in a commercial enterprise—are clearly *not* covered by the section. The Commission recommends that

<sup>86</sup> Estate of Giacomelos, 192 Cal. App.2d 244, 13 Cal. Rptr. 245 (1961).

<sup>87</sup> See, e.g., *Romero v. Dep't of Public Works*, 17 Cal.2d 189, 109 P.2d 662 (1941).

<sup>88</sup> See, e.g., *City of Santa Monica v. Jones*, 104 Cal. App.2d 463, 232 P.2d 55 (1951), for a situation in which the use restriction served to benefit appurtenant property.

<sup>89</sup> See, e.g., CODE CIV. PROC. §§ 1248 and 1249.1.

<sup>90</sup> See, e.g., *People v. Texaco, Inc.*, 25 Cal. App.3d 514, 101 Cal. Rptr. 923 (1972); *City of Los Angeles v. Klinker*, 219 Cal. 198, 25 P.2d 826 (1933).

improvements pertaining to the realty include any facility, machinery, or equipment installed on the property to be taken or on the remainder, regardless of the method of installation, that cannot be removed without a substantial loss in value or without substantial damage to the property on which it is installed. This will assure that such property having special in-place value will be taken and compensated as part of the realty.

As enacted, the legislation covers only "machinery or equipment" and does not include "any facility" as recommended by the Commission.

In case of a dispute over whether property is an improvement pertaining to the realty, the parties should be able to obtain an early determination prior to transfer of possession of the property.

#### Removal of Improvements

While improvements pertaining to the realty must be taken and paid for by the condemnor, there may be situations where the condemnor does not require improvements that the owner desires to keep. In such situations, the owner should be expressly authorized to remove the improvements and to receive compensation for their removal and relocation cost, provided that such cost does not exceed the value of the improvements. Where the removal of the improvements will damage property to which they are attached, the owner should not be charged with the damage. The condemnor should always have the right to oppose removal and pay the value of the property as improved.

On occasion, a taking of property will require the taking of only part of an improvement. In such a situation, the improvement may be substantially destroyed or require a disproportionate expense for storing and the like. Where justice so requires, either plaintiff or defendant should be allowed to require a taking of and payment for the whole improvement even though it is not required for public use and is located only partially on property taken.

#### Subsequent Improvements

As a general rule, improvements placed on the property after service of summons are not included in the determination of compensation.<sup>91</sup> Where the improvement is in the process of construction at the time of service of summons, this rule can cause the owner serious difficulties. For example, the partially completed improvement may present the risk of injury to the public or may be exposed to destruction by vandalism or by the

<sup>91</sup> CODE CIV. PROC. § 1249. This rule is subject to the judicially recognized exception that improvements required to be made by a public utility to its utility system following service of summons are compensable. *Citizens Util. Co. v. Superior Court*, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963).

elements. In such a situation, if the property owner continues with additional construction after service of summons with the written consent of the condemnor, compensation should be determined on the basis of the improvement with the additional construction. Such consent may well be forthcoming if the condemnor anticipates a lengthy delay in the time of acquisition and wishes to avoid payment of damages for such delay.<sup>92</sup>

Absent the condemnor's written consent, the property owner in the process of construction should, at least, be authorized to recover the cost of making additional improvements designed to protect the public from the risk of injury from the partially completed improvement or to protect partially installed machinery or equipment from damage, deterioration, or vandalism, whether or not the additional work adds to the value of the improvement, provided notice is given to the plaintiff and the additional work is reasonable. In addition, such an owner should be authorized to obtain a court order allowing compensation for the property to include the value added by subsequent improvements upon a showing that the hardship to the condemnor of permitting the subsequent improvements is outweighed by the hardship to the property owner of leaving the construction incomplete. No such order should be permitted after the condemnor has deposited the probable compensation with the court.

construction incomplete. The legislation as enacted permits the court to make an order limiting the extent to which an improvement made under the hardship exception shall be taken into account in determining compensation.

#### Harvesting and Marketing of Crops

Where a condemnor takes possession of property at a time that prevents the owner from harvesting and marketing crops growing on the property, the value of the crops is included in the compensation.<sup>93</sup> Where the condemnor plans to take possession at a time that will preclude harvest of a crop not planted at the time of service of summons, it should be authorized to obtain a court order preventing the planting. In such a case, the property owner should recover for the loss of use of his property.

#### Compensation for Injury to Remainder

The Commission recommends no change in the basic rules relating to compensation for injury to the remainder in the case of a partial taking. However, features of these basic rules that require improvement include (1) the rule of *People v. Symons*<sup>94</sup> and (2) the computation of damages and benefits that will accrue in the future.

<sup>92</sup> See, e.g., *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 31 Cal. Rptr. 316 (1972) (inverse condemnation).

<sup>93</sup> CODE CIV. PROC. § 1249.2.

<sup>94</sup> 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960).

### Rule of *People v. Symons*

The *Symons* case held that a property owner may not recover severance damages in eminent domain unless the portion of the project that causes the damage is located on property taken from the owner. Subsequent cases cast doubt on the continued vitality of the *Symons* rule,<sup>95</sup> and the present state of the law is not clear.

A property owner whose remaining property is injured by the project for which a portion of his property was taken may suffer substantial losses whether the damage-causing portion of the project is located on or off the property taken. Accordingly, the rule of *Symons* should be abrogated by statute and should be replaced by the general rule that severance damages are awarded whether or not the damage is caused by a portion of the project located on the part taken.

By parity of reasoning, it should be made clear that benefits created by the project should be offset against severance damages whether or not the benefits are caused by a portion of the project located on the part taken. This would continue existing law.<sup>96</sup>

### Computation of Future Damages and Benefits

Existing law requires compensation for severance damage to be computed on the assumption that the project is completed as of the date compensation is assessed.<sup>97</sup> This requirement may work a hardship on the property owner where present damages are offset against benefits to be conferred by the project at some time in the future, thereby postponing compensation for the damage. To alleviate this problem, both damages and benefits should be assessed on the basis of the proposed schedule for completion of the improvement rather than on the assumption that the improvement is completed and in operation. Should the project not be completed as anticipated, damages would be recoverable by the property owner as at present.<sup>98</sup>

### Compensation for Loss of Goodwill

Eminent domain frequently works a severe hardship on owners of businesses affected by public projects. As a rule, business losses have not been compensated.<sup>99</sup> This rule of

<sup>95</sup> See, e.g., *People v. Ramos*, 1 Cal.3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969).

<sup>96</sup> See *People v. Hurd*, 205 Cal. App.2d 16, 23 Cal. Rptr. 67 (1962).

<sup>97</sup> See, e.g., *People v. Schultz Co.*, 123 Cal. App.2d 925, 268 P.2d 117 (1954).

<sup>98</sup> *Id.*

<sup>99</sup> See, e.g., *City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 P. 705 (1915). Government Code Section 7262, enacted Cal. Stats. 1971, Ch. 1574, provides for limited business losses in the form of relocation or in-lieu payments not to exceed \$10,000 where relocation is not possible without a substantial loss of patronage. *City of Community Redevelopment Agency v. Abrams* (hearing granted by Supreme Court 1974) (compensation for goodwill constitutionally required).

noncompensability has been widely criticized,<sup>100</sup> and the Commission believes that some step should be taken to compensate the owner of a business taken or damaged in an eminent domain proceeding for losses he suffers. But, in order to assure that the losses are certain and measurable for the purposes of compensation, recovery should be allowed only for the loss of goodwill proved by the property owner and only to the extent that such loss is caused by the acquisition of the property or the injury to the remainder and cannot reasonably be prevented by a relocation of the business and by taking those steps and adopting those procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

The Legislature added a requirement that a business seeking compensation for loss of goodwill provide the court with the state tax returns of the business and that such returns be made available to the condemnor upon such terms and conditions as will preserve their confidentiality.

### Work to Reduce Compensation

There may be several practical ways by which the condemnor can reduce the damages to the property owner. For instance, if there are structures on the property that the owner desires to keep, it may be relatively inexpensive for the condemnor to relocate the structures for the owner while the project equipment is on the site. Likewise, the condemnor may be able to reduce severance damages substantially by constructing fences, sidewalks, driveways, retaining walls, drainage works, and the like on the owner's remaining property at the time work on the project is in progress. Public entities should be authorized to enter into agreements with the property owner to perform such work when it will result in an overall savings.<sup>101</sup>

### Relocation Assistance

The relocation assistance provisions of Government Code Section 7260 *et seq.* should not be made a part of the eminent domain statute. The relocation assistance provisions are applicable to acquisitions of property by public entities by any means, including eminent domain. They provide compensation for losses of a different character than those covered by the eminent domain statute. The Eminent Domain Law is so drafted

<sup>100</sup> See, e.g., Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. WEST. L. REV. 57 (1969); Note, *The Unsoundness of California's Noncompensability Rule as Applied to Business Losses in Condemnation Cases*, 20 HASTINGS L.J. 675 (1969); see also Aloi & Goldberg, *A Reexamination of Value, Good Will and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604 (1968); Note, *"Just Compensation" for the Small Businessman*, 2 COLUM. J.L. & SOC. PROB. 144 (1966); Comment, *An Act to Provide Compensation for Loss of Goodwill Resulting From Eminent Domain Proceedings*, 3 HARV. J. LEGIS. 445 (1966).

<sup>101</sup> This concept is an expansion of existing authority in Streets and Highways Code Section 970 (certain types of work in connection with an acquisition for opening or widening a county road).

that it does not duplicate any item of compensation provided by the relocation assistance provisions. Rather, it covers areas not covered by the relocation assistance provisions; in cases of possible overlap, compensation is paid only once.<sup>102</sup>

### Prohibition Against Double Recovery

There are situations where there may be an overlap of two statutes granting compensation for the same loss in an eminent domain proceeding. For example, the provisions recommended by the Commission for compensation for loss of goodwill of a business might in some situations duplicate to a limited extent the payment under Government Code Section 7262(d) to the business in lieu of a relocation allowance. To avoid the possibility of double recovery in this and other situations, the law should clearly state that a person may recover only once for the same loss.

## CONDEMNATION PROCEDURE

It has long been the California rule that eminent domain proceedings are governed by the same procedures as civil actions generally.<sup>103</sup> These procedures are supplemented where appropriate by provisions specially applicable to eminent domain proceedings, but such provisions are relatively few in number. Generally speaking, there has been little criticism of this procedural scheme, and the Commission recommends few major changes in it. However, the provisions relating to possession and deposits prior to judgment have been under continuing Commission study for a number of years, and major changes in these provisions are recommended.

### Pleadings

The special nature of an eminent domain proceeding has required special rules relating to pleadings; the Commission believes that such special treatment is necessary.

#### Contents of Pleadings

The complaint should include an adequate description of the property sought to be taken, as under existing law,<sup>104</sup> and should include a map indicating generally the property described in the complaint and its relation to the project for which it is being taken. Presently, a map is required only where a right of way is sought.<sup>105</sup>

<sup>102</sup> See discussion under "Prohibition Against Double Recovery" *infra*.

<sup>103</sup> See, e.g., CODE CIV. PROC. §§ 1256, 1257, 1262.

<sup>104</sup> CODE CIV. PROC. § 1244(5).

<sup>105</sup> CODE CIV. PROC. § 1244(4).



The existing requirements that the complaint indicate (1) the nature and extent of the interests of the defendants in the property and (2) whether the property sought to be taken is part of a "larger parcel" should be eliminated. The first issue is one that should be pleaded by the defendants; the second is one more appropriately raised and resolved at a later point in the proceedings.

Existing law also requires that the complaint contain "a statement of the right of the plaintiff" to take the property.<sup>106</sup> To enable the defendant to have a better understanding of the ground for the proceeding and to prepare more adequately for his response, the statement of the plaintiff's right should be more detailed. The complaint should include a description of the public use for which the property is sought to be taken, an allegation of "public necessity" for the taking (including references where appropriate to the resolution of necessity), and a reference to the statute authorizing the plaintiff to acquire the property by eminent domain. Failure to comply with these requirements should subject the complaint to attack by way of demurrer. The Legislature added a requirement that, in the case of a quasi-public condemnor, the complaint include a reference to the resolution of the local public entity consenting to the acquisition and that reference be made to certain other approvals or requirements of public officers or public bodies.

Existing law requires that the defendant set forth in his answer both a statement of his right, title, or interest in the property taken and the amount of compensation he claims for the taking.<sup>107</sup> The second requirement should be eliminated; it serves little purpose at the initial stage of the proceeding and generally represents at best an ill-informed guess of what will be the compensation for the taking. A special pleading for disclaimer of any interest by a defendant should be provided for by statute. The Legislature added a requirement that the answer state that the defendant claims compensation for loss of goodwill where he seeks compensation for such loss. The amount of such compensation need not be specified.

The existing requirement that a defendant file a claim with a public entity as a condition to bringing a cross-complaint in an eminent domain proceeding<sup>108</sup> should not be continued. The cause of action is necessarily related to the pending eminent domain proceeding;<sup>109</sup> hence, no useful purpose is served by presentation of the claim to the public entity prior to filing the cross-complaint.

#### Verification

A public entity need not verify its pleadings but, where a public entity is the plaintiff, the defendant must verify his answer.<sup>110</sup> The Commission recommends a new scheme for

<sup>106</sup> CODE CIV. PROC. § 1244(3).

<sup>107</sup> CODE CIV. PROC. § 1246.

<sup>108</sup> *County of San Luis Obispo v. Ranchita Cattle Co.*, 16 Cal. App.3d 383, 94 Cal. Rptr. 73 (1971); see GOVT. CODE §§ 905 and 905.2.

<sup>109</sup> See CODE CIV. PROC. § 428.10 and Comment thereto.

<sup>110</sup> CODE CIV. PROC. § 446. If the defendant is also a public entity, it need not verify its answer.

eminent domain pleadings. In place of verification, the pleading of a party (including a public entity) who is represented by an attorney should be signed by his attorney. The signature of the attorney should constitute a certification that he has read the pleading, that to the best of his knowledge, information, and belief there is ground to support its contents. If the pleading is not signed or is signed with intent to defeat the purposes of the signature requirement, it should be subject to being stricken. These provisions would be substantively the same as those of the Federal Rules of Civil Procedure.<sup>111</sup> Under this scheme, verification will not be required where an attorney represents a party, but the requirement of signature and the sanctions for noncompliance will apply to both plaintiff and defendant.

#### Amendment

The liberal rules generally applicable to the amendment of pleadings<sup>112</sup> are also desirable in an eminent domain proceeding. It should be made clear, however, that a court may, where justice so requires, impose such terms and conditions to an amendment as a change in the date of valuation or awarding costs and fees. Where an amendment would add property to that covered by the complaint of a public entity, adoption of a resolution of necessity for the additional property should be a prerequisite. And, where an amendment would delete property from the complaint, the plaintiff should follow the procedures and pay the price for a partial abandonment.<sup>113</sup>

#### Summons

Existing law requires that the summons duplicate such items contained in the complaint as the description of the property and the statement of the plaintiff's right to condemn.<sup>114</sup> This duplication should not be required in the ordinary case since the defendant may refer to the complaint for this information. However, where service of summons is by publication, the summons should describe the property to be taken in a manner reasonably calculated to give a person with an interest in the property notice of the proceeding.

Existing law requires that the summons be served in the same manner as in civil actions generally.<sup>115</sup> This requirement should be continued except that, where service is by publication, the

<sup>111</sup> See FED. R. CIV. PROC. 11.

<sup>112</sup> CODE CIV. PROC. § 473.

<sup>113</sup> See discussion *infra* under "Abandonment and Dismissal."

<sup>114</sup> CODE CIV. PROC. § 1245.

<sup>115</sup> *Id.*

plaintiff should also post copies of the summons on the property ~~taken and record a notice of the pendency of the proceeding in~~ taken. A notice of the pendency of the proceeding should be recorded in the office of the county recorder of the county where the property is located.<sup>116</sup> These additional requirements will not be burdensome and will increase the likelihood that interested persons receive actual notice of the proceeding.

Where the state is a defendant, existing law requires service of summons on the Governor, Attorney General, Director of General Services, and State Lands Commission.<sup>117</sup> The Commission recommends that *only* the Attorney General be served; he can notify the proper state agency of the proceeding. The Commission is advised that this would work no substantial change in present practice.

### Possession Prior to Judgment

#### Extension of Right to Obtain Early Possession

Section 14 of Article I of the California Constitution, which authorized the state and local public entities<sup>118</sup> to take possession of the property to be condemned immediately upon commencement of an eminent domain proceeding, or at any time thereafter, if the condemnation is for any "right of way" or "lands to be used for reservoir purposes," has been replaced by Section 19 of Article I which was approved by the voters at the 1974 General Election. Section 19 provides in part: "The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation." Section 19 is consistent with prior recommendations by the Law Revision Commission that the California Constitution be amended to permit the Legislature to broaden the provisions authorizing early possession.<sup>119</sup>

The narrow limits of the authorization for early possession<sup>120</sup>

<sup>116</sup> It should be noted that filing of a lis pendens at the commencement of a proceeding is required by Code of Civil Procedure Section 1243, but the plaintiff's failure to do so is not a jurisdictional defect. This requirement should be revised to make clear that the plaintiff should immediately deposit in the court the sum recommended by the Commission.

<sup>117</sup> Code Civ. Proc. §§ 1240(8) and 1245.4.

<sup>118</sup> The authorization extended to "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." See also CODE CIV. PROC. § 1243.4.

<sup>119</sup> See *Tentative Recommendation and a Study Relating to Condemnation Law and Procedure: Number I— Possession Prior to Final Judgment and Related Problems*, 8 CAL. L. REVISION COMM'N REPORTS 1101, 1107-1110, 1167-1170 (1957); *Tentative Recommendation Relating to Condemnation Law and Procedure: The Eminent Domain Law*, 12 CAL. L. REVISION COMM'N REPORTS 1, 364-369 (1974).

<sup>120</sup> Code of Civil Procedure Section 1254 provides a procedure whereby any condemnor may obtain possession "at any time after trial and judgment entered or pending an appeal from the judgment."

in Section 14 reflected a fairly general impression that the best interests of the property owner always lie in postponing the inevitable relinquishment of possession as long as possible. There is some justification for this impression because the California Constitution and statutes for many years failed to provide adequate procedural safeguards for the property owner.<sup>121</sup> Improvements were made in 1957 and, in 1961, the Legislature enacted legislation recommended by the Commission that partially systematized the law on this subject.<sup>122</sup> Nevertheless, careful analysis reveals that broader provisions for early possession, with appropriate safeguards for both parties, would benefit both condemnors and property owners.

To the condemnor, an assurance of timely possession facilitates an orderly program of property acquisition. In acquiring property for public use, it is frequently essential that there be a definite future date as of which all property needed for the public improvement will be available. An undue delay in acquiring even one essential parcel can prevent construction of a vitally needed public improvement and can complicate financial and contractual arrangements for the entire project. To avoid such a delay, the condemnor may be forced to pay the owner of that parcel more than its fair value and more than the owners of similar property received. In general, the need of the condemnor is not for haste but for certainty in the date of acquisition. The variable conditions of court calendars and the unpredictable period required for the trial of the issue of compensation preclude any certainty in the date of acquisition if that date is determined solely by entry of judgment in the proceeding. Lack of the right to obtain possession prior to entry of judgment thus may lead to precipitate filing of proceedings and premature acquisition of property.

From the property owner's point of view, if reasonable notice is given before dispossession and if prompt receipt of the probable compensation for the property is assured, possession prior to judgment frequently will be advantageous. Upon the commencement of the eminent domain proceeding, the

<sup>121</sup> Before 1957, there were no provisions for withdrawal of the required deposit. Further, no period of notice to the property owner was specified, and the order for possession could be made effective when granted. These pre-1957 rules afforded at least the possibility of serious inconvenience to the property owner.

<sup>122</sup> See *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings*, 3 CAL. L. REVISION COMM'N REPORTS at B-1 (1961). See also Cal. Stats. 1961, Ch. 1613, amending or adding CODE CIV. PROC. §§ 1243.4, 1243.5, 1243.6, 1243.7, 1249, 1249.1, 1253, 1254, 1255a, and 1255b.

landowner loses many of the valuable incidents of ownership. He is practically precluded from selling or financing the property and is legally deprived of any further increase in the value of the property. He is denied compensation for improvements made after service of the summons in the proceeding. As a practical matter, he usually must find and purchase other property prior to termination of the litigation. He must also defray the expenses of the litigation. It is possible that these difficulties will force him to settle for an amount less than he would eventually have received in the eminent domain proceeding. In contrast, the taking of possession and payment of approximate compensation prior to judgment permit the landowner to meet these problems and expenses while proceeding with the trial on the issue of compensation. Even if he has no urgent need for prompt payment, he may invest in other property the amount he receives as approximate compensation or he may leave it on deposit and receive interest at the legal rate of seven percent.

The desirability of determining the condemnor's right to take the property before transfer of possession does not preclude broadened provisions for exchanging probable compensation for possession prior to judgment. While the limiting doctrines of "public use" and "public necessity" once played important roles in condemnation cases, now the only substantial question to be determined in nearly all condemnation proceedings is the amount of compensation. And, because the question of the condemnor's right to take the property is decided by the court—rather than by the jury—that question can be expeditiously determined in the cases in which it arises.

The existing statutory authorization for possession prior to judgment is stated in Section 1243.4 of the Code of Civil Procedure, which provides:

1243.4. 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 plaintiff 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, in the manner and subject to the conditions prescribed by law.

The authorization for possession prior to judgment in takings for rights of way applies to most acquisitions for highway, freeway, and street purposes. As expansively interpreted, the authorization for such possession in takings of lands for reservoir

purposes applies to most acquisitions of property needed to develop and conserve water resources. It has become apparent, however, that these two classes are neither entirely logical nor sufficiently inclusive. For example, a local government—but not a public utility serving the same needs—may obtain possession of the rights of way for an electric system; and neither may obtain possession of the site for the power plant.

The development of highways, and especially freeways, sometimes necessitates the taking of property outside the right of way. Even though the acquisition is by the state, no authorization exists for early possession of property outside the boundaries of the right of way. Similarly, many acquisitions in which possession prior to judgment would be appropriate are excluded both by the limitation as to entities and by the limitation as to the public purpose for which the property is being acquired. As an example, an assured date of possession is not available for the acquisition of a school site; however great the need and whatever the size or responsibility of the school district.

The Commission accordingly recommends that any person authorized to acquire property by eminent domain should also be authorized to obtain possession of that property prior to judgment. This recommendation would extend the right of prejudgment possession to public utilities which, at present, do not have the right.<sup>123</sup>

#### Improvement of Prejudgment Possession Procedure

In order to protect the rights of owners and occupants of property of which possession prior to judgment is taken, the Commission recommends that the substance of the existing procedure for making and withdrawing deposits and for taking possession prior to judgment be modified in several important ways.

**Amount of deposit.** Under existing law, the court fixes the amount of the deposit on ex parte application of the condemnor.<sup>124</sup> The amount fixed is almost always the amount suggested by the condemnor. Although existing law gives the property owner the right to have the court redetermine the amount of the deposit,<sup>125</sup> experience has demonstrated that the court, having once made an order fixing the amount of the

<sup>123</sup> A few quasi-public entities also would be authorized to take possession prior to judgment. See discussion *supra* under "Quasi-public entities and private persons." Under the Commission's recommendation, private persons would not have the right of prejudgment possession because they would no longer exercise the power of eminent domain.

<sup>124</sup> CODE CIV. PROC. § 1243.5(a).

<sup>125</sup> CODE CIV. PROC. § 1243.5(d).

deposit, is reluctant to reconsider that decision even though the initial order was made on ex parte application.

Before making a deposit, the condemnor should be required to have an appraisal made by an expert appraiser. The amount deposited should be the amount determined by the appraiser to be the probable amount of compensation that will be awarded in the proceeding. The condemnor should be required to notify interested parties of the making of the deposit and to supply a statement or summary of the appraisal ~~on which~~ <sup>2</sup> which the amount of the deposit is based. The amount deposited should be subject to review and change by the court on motion of any interested party.

The recommended procedure would simplify existing practice by eliminating the need for an ex parte application to the court in every case. It would, however, provide the interested parties with information as to the ~~amount of the deposit~~ <sup>appraisal</sup> on which the amount of the deposit is based and, if any party is dissatisfied with the amount of the deposit, he will have a factual basis for applying to the court for an increase in the deposit.

**Procedure for making deposits.** Existing law provides for the deposit of approximate compensation only in connection with an order for possession.<sup>126</sup> However, any condemnor, whether or not it seeks possession prior to judgment, should be authorized to make a deposit of the probable amount of compensation that will be awarded in the proceeding. After a deposit is made, the condemnor should be entitled to an order for possession, effective 30 days after the making of the order, if the property owner either (a) expresses in writing his willingness to surrender possession of the property on or after a stated date or (b) withdraws the deposit.

The recommended procedure would provide a method by which the parties could effect a transfer of the right to possession in exchange for substantial compensation without prejudice to their rights to litigate the issue of compensation. It would benefit both parties to the proceeding. The deposit would assure the condemnor an early date of valuation. The property owner could withdraw the deposit and thus finance the acquisition of other property and defray other expenses incident to the taking. If there are several parties unable to agree on the withdrawal, a party would be able, in an appropriate case, to obtain a court order requiring investment of the deposit for the benefit of the defendants. The withdrawal would benefit the condemnor; the property owner would, as under existing law, thereby waive all

<sup>126</sup> CODE CIV. PROC. § 1243.5(a).

defenses to the proceeding except the claim to greater compensation, and withdrawal would also permit the condemnor to obtain possession without regard to the uncertain date that the trial and possible appeals may be concluded.

**Withdrawal of deposit.** The existing system for withdrawing the deposit should be streamlined to eliminate obstacles and delays. Under existing practice, where a party makes application to withdraw a deposit and the plaintiff objects to the withdrawal, such withdrawal is not permitted unless the plaintiff is able to make personal service of notice of the application upon all parties.<sup>127</sup> Two changes in the withdrawal procedure are recommended:

(1) The existing absolute prohibition of withdrawal absent personal service on all parties should be eliminated.<sup>128</sup> Quite often, "defendants" in eminent domain proceedings can easily be shown to have no compensable interest in the property. The courts can protect the rights of persons upon whom it is not possible to make service by requiring a bond or limiting the amount withdrawn in any case where it appears that the party not served actually has a compensable interest in the property.<sup>129</sup>

(2) The plaintiff should be permitted to serve the notice of the application by mail on the other parties and their attorneys, if any, in all cases in which the other party has appeared or been served with the complaint and summons.

**Use of evidence of deposit or withdrawal in valuation trial.** Existing law precludes use of the amount of the deposit or the amount withdrawn and supporting data in the trial on the issue of compensation.<sup>130</sup> This is a salutary rule because it encourages the plaintiff to make adequate deposits. Case law enables defendants to defeat the spirit of the rule by calling the plaintiff's appraiser as their own witness.<sup>131</sup> This loophole should be closed by statute.

**Cost of withdrawal bonds.** Existing law requires the condemnor to reimburse the cost of bond premiums where the need for the bond arises from the defendant's efforts to withdraw an amount greater than that originally deposited.<sup>132</sup> Reimbursement is not required under existing law if the bond is required because of conflicting claims among defendants.<sup>133</sup>

<sup>127</sup> CODE CIV. PROC. § 1243.7(e).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* CODE CIV. PROC. § 1243.7(f).

<sup>130</sup> CODE CIV. PROC. § 1243.5(e).

<sup>131</sup> *People v. Cowan*, 1 Cal. App.3d 1001, 81 Cal. Rptr. 713 (1969); *People v. Douglas*, 15 Cal. App.3d 814, 96 Cal. Rptr. 644 (1971).

<sup>132</sup> CODE CIV. PROC. § 1243.7(b).

<sup>133</sup> CODE CIV. PROC. § 1243.7(f).



However, conflicting claims to a deposit usually result from the need to allocate the award among owners of separate interests in the property. In such a case, the need for the allocation—as well as for the bond—arises from the eminent domain proceeding rather than from any act or omission of the defendants. Accordingly, the condemnor should be required to reimburse the cost of the bond in all cases except where the need for the bond arises primarily due to an issue as to title between the claimants.<sup>134</sup>

**Possession.** The present requirement of 20 days' notice to the owners and occupants of property before the condemnor takes possession<sup>135</sup> should be extended to 90 days in the case of property occupied by a dwelling, business, or farm and to 30 days in all other cases. The present 20 days' notice can result in serious hardship and inconvenience. The longer notice requirements will not only serve to reduce the possibility of hardship and inconvenience but will also make possible the actual disbursement to the property owner of the required deposit before he is obligated to relinquish possession.<sup>136</sup> However, where the plaintiff can show its urgent need for possession of unoccupied property, the court should be authorized to allow the plaintiff to take possession on such notice as the court deems proper under the circumstances of the case.

As enacted, this provision is not limited to unoccupied property; it applies to any property the taking of possession of which will not displace or unreasonably affect any person in actual and lawful possession.

In addition to a lengthened notice period, the owner or occupant of property should be able to obtain relief from the order for possession prior to judgment if the hardship to him will be substantial and the condemnor does not need possession or will suffer insignificant hardship by having possession delayed. So long as an order for possession is in effect, however, the condemnor should be entitled to enforcement of the order as a matter of right.

#### **Prejudgment Deposit on Demand of Property Owner**

The Commission has considered statutes of other states that permit the property owner, in all cases, to demand deposit of approximate compensation at the beginning of the proceedings.<sup>137</sup> Under these statutes, the condemnor usually is given the right to possession upon complying with the demand of the condemnee. Although these statutes have merit, integration of such a requirement into California condemnation

<sup>134</sup> Cf. CODE CIV. PROC. § 1246.1 (costs of determining issue as to title among defendants are borne by defendants).

<sup>135</sup> CODE CIV. PROC. § 1243.5(e).

<sup>136</sup> The lengthened time periods are also in accord with Government Code Section 7267.3, requiring 90 days' written notice before possession of occupied property.

<sup>137</sup> See, e.g., PA. STAT. ANN., Tit. 26, § 1-407 (Supp. 1965).

procedure does not appear feasible at this time. Nonetheless, a greater incentive should be provided to the condemnor to deposit approximate compensation in certain classes of hardship cases.

One such class of cases is where a residence is being taken. The common need to purchase another home before receipt of the final award places a particularly onerous burden upon the property owner. The property owner should have a right to demand that a deposit be made if the property being taken is residential property having not more than two dwelling units and he resides thereon. If the deposit is not made, interest at the legal rate of seven percent should be allowed on the amount of the eventual award from the date that the deposit should have been made.

Another class of "hardship case" is where rental property becomes subject to a high vacancy rate due to the condemnation proceeding. The owner of this type of property should be permitted to demand a prejudgment deposit and, absent compliance with the demand, likewise be entitled to recover interest, less his net rental profits.<sup>135</sup>

#### Procedures for Determining Right to Take

Where objections to the right to take are raised, the practice has been to hear and determine such objections prior to the trial of compensation issues. This priority should be continued and reflected in statutory form.

Where the court determines that the plaintiff does not have the right to acquire by eminent domain any property described in the complaint, it should be authorized to order, in lieu of immediate dismissal, conditional dismissal as to that property unless such corrective action as the court may direct has been taken within the time directed. The court should impose such limitations and conditions as are just under the circumstances of the particular case including the requirement that the plaintiff pay to the defendant all or a 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.

#### Procedures for Determining Compensation

##### Pretrial Exchange of Valuation Data

The existing California scheme for pretrial exchange of

<sup>135</sup> This recommendation would supplement the recovery for lost rents occasioned by precondemnation publicity as provided in *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

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valuation data among the parties to an eminent domain proceeding calls for a demand by a party no later than 50 days prior to trial and the opportunity to make a cross-demand no later than 40 days prior to trial, with the actual exchange of data occurring 20 days prior to trial.<sup>139</sup> While this scheme permits the exchange of basic valuation data, it does not permit sufficient time for follow-up discovery<sup>140</sup> and therefore is not as effective as it ought to be. To remedy this defect, the Commission recommends that the demand and exchange occur earlier in the proceeding<sup>141</sup> with an opportunity for the parties thereafter to undertake subsequent discovery to within 20 days before trial. This recommendation would preserve the mutuality of the exchange scheme without imposing additional burdens on the parties.

#### Burden of Proof of Compensation

Existing law places the burden of proof on the issue of compensation on the defendant.<sup>142</sup> This burden is inappropriate in an eminent domain proceeding since the task of the trier of fact is to sift through the conflicting opinions of value and supporting data and fix a value based on the weight it gives to them. Neither party should be made to bear a greater burden of persuasion than the other.

#### Valuation Evidence

Evidence of the value of property in an eminent domain proceeding must relate to the fair market value of the property.<sup>143</sup> Although fair market value is normally determined by reference to "open market" transactions,<sup>144</sup> there may be certain types of property for which there is no open market.<sup>145</sup> To assure that the basic evidentiary standard of fair market value is applicable to such special purpose properties, the phrase "in the

<sup>139</sup> *Open Civ. Proc.* § 1372.01.

<sup>140</sup> *See Cal. R. Cr. 232* (limiting discovery undertaken within 30 days of trial).

<sup>141</sup> The demand should occur no later than 10 days following the date on which a trial date is selected. This will enable an earlier cutoff of demands while preserving adequate notice to the parties when the cutoff will occur. In this connection, the provision for a cross-demand should be eliminated. If, of marginal utility, the parties having ample opportunity to submit any necessary demands prior to the cutoff date. Elimination of the cross-demand will also serve to allay the misimpression that has arisen in some cases that a party who serves a demand need not exchange his own data unless a cross-demand has been served on him. The exchange of data should occur 40 days prior to trial unless the parties agree to another date.

<sup>142</sup> *See, e.g., City & County of San Francisco v. Tillman Estate Co.*, 205 Cal. 651, 272 P. 555 (1928).

<sup>143</sup> *See EVID. CODE* § 814.

<sup>144</sup> *Id.*; *see also Sacramento S.R.R. v. Heilbron*, 156 Cal. 408, 409, 104 P. 979, 980 (1909).

<sup>145</sup> Examples of such special purpose properties are schools, churches, cemeteries, parks, and utilities.

open market" should be deleted from the definition of fair market value.<sup>146</sup> This change will have no effect on the valuation of other properties for which there is an open market.

The legislation as enacted includes a provision that the fair market value of property for which there is no relevant market is its value as determined by any method of valuation that is just and equitable.

The Commission plans to review at a future time the provisions of the Evidence Code—Sections 810-822—relating to evidence in eminent domain and inverse condemnation proceedings.

#### Limitation on Valuation Experts

The number of valuation experts who may testify for a party in an eminent domain proceeding is presently limited to two, subject to a showing of good cause for additional witnesses.<sup>147</sup> This special provision is unnecessary and should be repealed. Its repeal would not affect the general authority of the court to control the number of expert witnesses.<sup>148</sup>

#### Compensation of Court-Appointed Appraisers

The court may appoint appraisers, referees, commissioners, or other such persons to fix the value of property taken.<sup>149</sup> The fees fixed by the court for such persons may not exceed "similar fees for similar services in the community where such services are rendered."<sup>150</sup> This restriction on the amount of compensation is unwarranted and may preclude effective use of court-appointed appraisers and the like in communities with comparatively low fee scales. The general rules governing compensation of court-appointed third parties are sufficient.

#### Possession After Judgment

The provisions for deposit, withdrawal, and possession of property following judgment but prior to the time the judgment becomes final are unnecessarily restrictive. Specific changes to improve the procedures are recommended below.

#### Deposit of Award

Under existing law, the defendant receives notice that a deposit has been made on the award only when he is served with an order for possession.<sup>151</sup> Since interest ceases to accrue when such a deposit is made<sup>152</sup> and since the defendant may need the

<sup>146</sup> Application of the fair market value standard to special purpose properties is consistent with other provisions dealing expressly with valuation of particular properties. See, e.g., GOVT. CODE § 51295 (valuation of property under contract under California Land Conservation Act of 1965) and PUB. RES. CODE § 5407.2 (valuation of park land).

<sup>147</sup> CODE CIV. PROC. § 1267.

<sup>148</sup> CODE CIV. PROC. § 723.

<sup>149</sup> CODE CIV. PROC. § 1266.2.

<sup>150</sup> *Id.*

<sup>151</sup> CODE CIV. PROC. § 1254.

<sup>152</sup> CODE CIV. PROC. § 1255b(c).

money for a short-notice move, he should receive notice of the deposit in all situations. Accordingly, the plaintiff at the time of making a postjudgment deposit should be required to serve a notice that the deposit has been made on all the parties who have appeared in the proceeding and who claim an interest in the property taken. This will parallel the prejudgment deposit requirement.

In case the judgment is reversed, vacated, or set aside, it should be made clear that there is no judgment for deposit and withdrawal purposes or for obtaining possession after judgment. Prejudgment procedures should be used, and any amounts deposited should be deemed prejudgment deposits for the purposes of these procedures.

#### Withdrawal of Award

Existing law provides the opportunity for one of several defendants to withdraw a deposit after entry of judgment without notice to the other defendants.<sup>153</sup> This provision creates a race to withdraw among parties laying claim to the award that could result in prejudice to parties who have had no opportunity to protect their interests. In order to protect all parties, a defendant seeking to withdraw any part of the award following judgment but prior to the time the award has been apportioned should serve a notice of application for withdrawal on all other parties who have appeared and are interested in the award. After the award has been apportioned, an applicant for withdrawal should be required to give notice only as the court may require.

The court should be authorized to require, in its discretion, that the defendant provide an undertaking to secure repayment of any excessive withdrawal made after entry of judgment. This will permit the court to protect the condemnor in cases where it appears that the final judgment may be less than the amount withdrawn. For example, the court might require an undertaking in a case where the condemnor has made a motion for a new trial or has appealed from the judgment and the court believes that there is a substantial possibility that the judgment will be vacated, reversed, or set aside and a new trial granted.

Where there is a delay between entry of judgment and the time of apportionment of the award and the defendants are unable to agree to the withdrawal of an amount deposited for them, such amount should be deposited in an interest-bearing account for their benefit upon motion of any defendant having an interest in the award. This will assure that the defendants will not lose interest earned on the deposit pending resolution of

<sup>153</sup> CODE CIV. PROC. § 1254(f).

their dispute.

### Possession After Judgment

The 10-day notice period before which possession may be taken by the condemnor pursuant to an order for possession obtained after entry of judgment<sup>154</sup> is unduly short in the case of occupied property. This period should be extended to 30 days in cases where the property is occupied by a dwelling, business, or farm.

### Satisfaction of Judgment

Under existing law, unnecessary confusion has arisen from the purely theoretical distinction between a payment into court to satisfy the judgment<sup>155</sup> and a deposit made pending appeal or motion for new trial.<sup>156</sup> One uniform procedure should be provided for paying the amount of the award into court after entry of judgment, and for withdrawing the amount so paid, whether or not either party plans to appeal or move for a new trial.

Existing law requires that the condemnor satisfy the judgment no later than 30 days after it becomes final except that, where the condemnor is the state or a public corporation, it may delay payment up to a year in order to market bonds to enable it to pay the judgment.<sup>157</sup> This delay provision should be eliminated; a property owner suffers many hardships in the course of the planning and execution of a public project without the added hardship of a year's delay before he receives payment for his property.

In the event that the 30-day period elapses without satisfaction of the judgment, existing law requires the property owner to seek execution before he is entitled to have the proceeding dismissed.<sup>158</sup> The property owner should be permitted to seek dismissal of the eminent domain proceeding upon nonpayment without having to make an expensive, time-consuming, and futile attempt to execute. To protect the condemnor in such a case from dismissal for an inadvertent failure to pay, the property owner should give notice of intent to seek dismissal and should have a right to obtain the dismissal if the condemnor fails to pay within 20 days thereafter.

At present, it is not clear whether the final order of condemnation may be obtained after satisfaction of judgment

<sup>154</sup> See CODE CIV. PROC. § 1254(c).

<sup>155</sup> CODE CIV. PROC. § 1252.

<sup>156</sup> CODE CIV. PROC. § 1254.

<sup>157</sup> CODE CIV. PROC. § 1251.

<sup>158</sup> CODE CIV. PROC. § 1252.

alone or whether the judgment must first become final,<sup>159</sup> for the protection of all parties concerned, the law should be made clear that a final order of condemnation may be issued only after final judgment.

### Costs

Code of Civil Procedure Section 1255 states that, in eminent domain proceedings "costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." However, very early the California Supreme Court held that Section 1255 "must be limited by section 14 [now Section 19] of article I of the constitution. . . . To require the defendants in [an eminent domain] case to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the plaintiff, would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs."<sup>160</sup> Thus, despite the language of Section 1255, the cases have generally allowed the defendant in an eminent domain proceeding his ordinary court costs<sup>161</sup> except that the costs of determining title as between two or more defendants is borne by the defendants.<sup>162</sup> The statutes should be revised to conform with existing law on costs.

In case of an appeal by the plaintiff, the defendant has normally been allowed his costs on appeal whether or not he is the prevailing party.<sup>163</sup> Where the defendant appeals and prevails, he is always allowed his costs.<sup>164</sup> However, the law is not clear whether the defendant who takes an appeal but does not prevail is entitled to costs.<sup>165</sup> A general rule should be provided that the defendant is entitled to his costs on appeal in all eminent domain cases except where the court rules otherwise.

If the defendant obtains a new trial and subsequently fails to obtain an increased award, the cost of the new trial is taxed against him.<sup>166</sup> This rule is unduly harsh and should be

~~Code Civ. Proc. § 1255 of *Arcelega v. Housing Authority*, 115 Cal. App.2d 279, 283 (1964).~~ [footnote deleted]

<sup>159</sup> *City & County of San Francisco v. Collins*, 98 Cal. 259, 262, 33 P. 56, 57 (1893).

<sup>160</sup> See, e.g., *Decoto School Dist. v. M. & S. Tile Co.*, 225 Cal. App.2d 310, 315, 37 Cal. Rptr. 225, 229 (1964).

<sup>161</sup> CODE CIV. PROC. § 1246.1.

<sup>162</sup> See, e.g., *Sacramento & San Joaquin Drainage Dist. v. Reed*, 217 Cal. App.2d 611, 31 Cal. Rptr. 754 (1963).

<sup>163</sup> See, e.g., *Regents of Univ. of Cal. v. Morris*, 12 Cal. App.3d 679, 90 Cal. Rptr. 816 (1970).

<sup>164</sup> Compare, e.g., *City of Baldwin Park v. Stoskus*, 8 Cal.3d 563, 571, 503 P.2d 1333, 1338, 105 Cal. Rptr. 325, 330 (1972), with *City of Oakland v. Pacific Coast Lumber & Mill Co.*, 172 Cal. 332, 156 P. 468 (1916).

<sup>166</sup> CODE CIV. PROC. § 1254(k). See, e.g., *Los Angeles, P. & G. Ry. v. Rumpp*, 104 Cal. 20, 37 P. 859 (1894).

eliminated; a defendant should not be required to pay the cost of obtaining a proper and error-free trial.

### Litigation Expenses

#### Entry for Examination

Where a condemnor enters upon property to determine the suitability of the property for public use, it must compensate the owner for any damages caused by the entry and by any tests made and must pay the owner for his court costs and reasonable attorney's fees expended in obtaining such compensation.<sup>167</sup> The provision for award of attorney's fees should be extended to include all litigation expenses, but such litigation expenses should be recoverable only where the condemnor acts unlawfully or abusively.

#### Pretrial Settlement Offers

The substance of the newly enacted statute<sup>168</sup> requiring the parties to make final settlement offers prior to trial and awarding the defendant his litigation expenses where his offer was reasonable and the plaintiff's offer was unreasonable should be retained. The legislation as enacted permits the court to consider the evidence admitted as well as the compensation awarded in determining the reasonableness of the final settlement offers.

#### Abandonment and Dismissal

Litigation expenses, including reasonable attorney's fees, appraisal fees, and fees for the services of other experts, are awarded to the defendant where the plaintiff abandons the proceeding<sup>169</sup> or the defendant defeats a public entity plaintiff's right to take the property by eminent domain.<sup>170</sup> This rule should be expanded to allow litigation expenses against all plaintiffs in any case where the eminent domain proceeding is dismissed, including dismissal for failure to prosecute (a situation where litigation expenses are denied by the existing law).<sup>171</sup> In addition, where the plaintiff abandons the property after having taken possession, it should pay all damages proximately caused by the proceeding; this would permit compensation for loss of goodwill, temporary interference with business, and the like, which might not otherwise be compensable under existing law.<sup>172</sup>

### Rights of Former Owner in Property Taken

<sup>167</sup> CODE CIV. PROC. § 1242.5(e).

<sup>168</sup> CODE CIV. PROC. § 1249.3.

<sup>169</sup> CODE CIV. PROC. § 1255a.

<sup>170</sup> CODE CIV. PROC. § 1246.4.

<sup>171</sup> See, e.g., *City of Industry v. Gordon*, 29 Cal. App.3d 90, 105 Cal. Rptr. 206 (1972).

<sup>172</sup> Code of Civil Procedure Section 1255a(d) provides only for damages arising out of the "taking and use" of the property and any "loss or impairment of value" suffered by the land and improvements.



The Law Revision Commission considered in depth the possibility of permitting the former owner of property taken by eminent domain to repurchase that property should it become surplus to the needs of the condemnor.<sup>173</sup> The Commission has concluded, however, that a general repurchase right would create practical problems of administration that far outweigh its potential social benefits and accordingly recommends against adoption of the repurchase right as a statutory requirement.<sup>174</sup>

<sup>173</sup> For a background study prepared for the Commission on this subject, see Sterling, *Former Owner's Right to Repurchase Land Taken for Public Use*, 4 PAC. L.J. 65 (1973).

<sup>174</sup> For a similar conclusion, see LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON EXPROPRIATION 118-121 (1971).