

11/15/78

## Memorandum 78-71

Subject: Study E-200 - Special Assessment Liens in Eminent Domain Proceedings

At the time the Commission prepared its recommendation relating to ad valorem property taxes on property taken by eminent domain, the Commission's attention was called to comparable problems in the area of payment and apportionment of special assessment liens. The Commission determined to deal with these problems on a nonpriority basis.

The staff initially prepared an analysis of the special assessment problems and a proposal for curing the problems, which we sent to a few experts for review and comment. Taking the suggestions of the experts into account, we have now prepared the attached draft of a tentative recommendation on special assessment liens for the Commission's review.

The proposal is largely a clarification and codification of existing law. It requires joinder of assessment lienholders in the eminent domain proceeding. It requires fixed lien special assessments to be either paid off or assumed by the condemnor; in case of a partial taking the assessments are paid off only to the extent necessary to prevent an impairment of security, and the lien continues on the remainder. In the case of special ad valorem assessments, the obligation of the assessment is apportioned between condemnor and property owner in the same manner taxes are apportioned, based on the time of acquisition of the property; in a partial taking, the obligation of the assessment is allocated between the part taken and the remainder in the same manner the original assessment was imposed.

The staff requests Commission approval of the staff draft to distribute as a tentative recommendation to interested persons. These persons would include assessment and bond attorneys, cities and improvement districts, and the eminent domain bar. When comments are received, we will review the particular aspects of the tentative recommendation that present problems in order to prepare legislation for the 1980 legislative session.

Respectfully submitted,

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STAFF DRAFT  
TENTATIVE RECOMMENDATION

relating to

SPECIAL ASSESSMENT LIENS IN EMINENT DOMAIN PROCEEDINGS

Introduction

While property acquired by eminent domain is normally encumbered by a lien for taxes, the property may also be encumbered by special assessment liens. The Eminent Domain Law gives thorough treatment to the problems of payment and apportionment of taxes on the property,<sup>1</sup> but does not treat assessment liens specifically.<sup>2</sup>

Assessment liens are sufficiently different in character from tax liens to require different treatment.<sup>3</sup> Uncertainties concerning payment and apportionment of assessment liens on property acquired by eminent domain have presented continuing problems to practitioners and the courts, and should be resolved by statute.<sup>4</sup>

Nature of Special Assessment Liens<sup>5</sup>

Whereas property taxes are levied for support of general governmental functions, special assessments are levied for the cost of specific local improvements such as streets, sewers, irrigation, drainage,

1. Code Civ. Proc. §§ 1268.410-1268.430; see Ad Valorem Property Taxes in Eminent Domain Proceedings, 14 Cal. L. Revision Comm'n Reports \_\_\_\_ (1978).
2. General treatment of liens is prescribed in Code of Civil Procedure Sections 1265.210-1265.240.
3. See, e.g., *Redevelopment Agency v. Penzner*, 8 Cal. App.3d 417, 423-24, 87 Cal. Rptr. 183, \_\_\_\_-\_\_\_\_ (1970).
4. See, e.g., Note, Eminent Domain: Liability for Assessments Accruing During Proceedings, 8 Hastings L.J. 327 (1957); Letters to California Law Revision Commission from Charles L. Hemmings (March 30, 1977) and Peggy L. McElligott (February 16, 1978) on file in the Commission's office.
5. This discussion is drawn from 2 Bowman, *Ogden's Revised California Real Property Law* §§ 22.1-22.2 (1975) and 2 Miller & Starr, *Current Law of California Real Estate* § 11:141 (rev. 1977). For a description of the California special assessment procedures under the

and off-street parking. Special assessments are premised upon a special benefit received by the property assessed.

Since 1885, the California legislature has enacted numerous statutes relating to special taxes and assessments and to formation of assessment districts. Special assessment acts are found in the Streets and Highways, Water, and Health and Safety codes, implemented by Revenue and Taxation Code and Government Code provisions.<sup>6</sup>

Special assessments are of two general types. Fixed lien special assessments are nonrecurring and in predetermined amounts, levied at the beginning of a project; they are designed to cover the cost of acquisition and installation of a particular local improvement. Special ad valorem assessments are recurring and indeterminate, levied annually for maintenance of projects and other purposes of an improvement district.

Special assessments may be collected in a variety of ways, depending upon the type of assessment and the statute under which it is levied. A fixed lien special assessment may be collected in a lump sum, may be collected in installments, or bonds may be issued to represent unpaid amounts. A fixed lien special assessment or a special ad valorem assessment may be collected and enforced by the county tax collector at the same time as and as a part of annual local taxes, or may be collected separately in the manner specified in the law governing the improvement district.

The special assessment and any bonds issued to represent the assessment are usually secured by a lien upon the real property assessed. The procedure for imposing the lien is detailed in applicable statutes or in improvement procedure codes adopted pursuant to city charters. The lien of a fixed lien special assessment is generally imposed upon each parcel of property assessed and all persons are deemed to have constructive notice of the lien. In the special ad valorem assessment situation, a lien is generally imposed upon property in the same manner as a tax lien without specific notice being filed in the office of the county recorder. In most cases, however, the assessment must be filed

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improvement acts commonly used, see Gaines, The Right of Non-Property Owners to Participate in a Special Assessment Majority Protest, 20 U.C.L.A. L. Rev. 201, 204-12 (1972).

6. See, e.g., Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts, 12 Cal. L. Revision Comm'n Reports 1001 (1974).

with the county recorder before the lien is created, although the assessment itself may have been validly levied and is immune from attack. Special assessment liens have statutory priority.<sup>7</sup>

Liability of Property Acquired by Eminent Domain for Special Assessments

The major problems that have arisen concerning assessment liens on property acquired by eminent domain are: (1) allocation of liability for and payment of existing liens as between condemnor and property owner; and (2) imposition of liens in the future on the property acquired by eminent domain.

Existing liens. Existing assessment liens on property acquired by eminent domain, like tax liens, are not subject to cancellation upon acquisition of the property.<sup>8</sup> If an existing assessment lienholder is not made a party to the eminent domain proceeding, and if the lien is not discharged by payment from the award, the existing assessment lien continues unimpaired.<sup>9</sup>

As a part of the judgment in an eminent domain proceeding, an existing assessment lien on the property may be either paid from the award<sup>10</sup> or withheld from the award and later paid by the condemnor.<sup>11</sup> If such provision is not made and the lien is neither paid from the award nor withheld from the award for later payment by the condemnor, the condemnor and not the former property owner is liable for the assessment.<sup>12</sup>

7. See Gov't Code §§ 53930-53937.
8. Redevelopment Agency v. Penzner, 8 Cal. App.3d 417, 87 Cal. Rptr. 183 (1970).
9. Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789 (1957).
10. Code Civ. Proc. § 1260.220; Redevelopment Agency v. Penzner, 8 Cal. App.3d 417, 87 Cal. Rptr. 183 (1970).
11. Code Civ. Proc. § 1265.220; City of Los Angeles v. Superior Court, 2 Cal.2d 138, 39 P.2d 401 (1934); People v. Cheda, 154 Cal. App.2d 531, 317 P.2d 145 (1957).
12. Marin Municipal Water Dist. v. North Coast Water Co., 40 Cal. App. 260, 180 P. 620 (1919).

Whether an assessment lien imposed during pendency of eminent domain proceedings is treated as an existing lien chargeable to the property owner or a future lien on the property acquired by the condemnor, depends upon the status of the proceeding at the time the lien is imposed. Generally, a lien imposed prior to entry of judgment is an existing lien against the property owner.<sup>13</sup> A lien recorded after the condemnor has taken possession of the property, even though prior to judgment, is a future lien on the property acquired by the condemnor.<sup>14</sup>

Future assessments. Whether property acquired by eminent domain remains subject to special assessments imposed after acquisition depends upon the character of the condemnor and the statute under which the assessments are imposed. Property acquired by a private condemnor<sup>15</sup> remains liable for special assessments since there is neither a constitutional nor a statutory exemption for such property.<sup>16</sup> Property held by a public entity other than for public use also remains subject to special assessments.<sup>17</sup> Property held by a public entity for public use, however, is not liable for special assessments unless the statutes under which the assessments are levied expressly provide therefor.<sup>18</sup>

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13. *City of Los Angeles v. Superior Court*, 2 Cal.2d 138, 39 P.2d 401 (1934).
  14. *People v. Peninsula Title Guar. Co.*, 47 Cal.2d 29, 301 P.2d 1 (1956).
  15. Private condemnors include such entities as nonprofit colleges (Educ. Code § 94500), nonprofit hospitals (Health & Saf. Code § 1260), and public utilities (Pub. Util. Code §§ 610-624).
  16. Cf. Cal. Const. art. XIII § 3 (exempt properties).
  17. See, e.g., *Conley v. Hawley*, 2 Cal.2d 23, 38 P.2d 408 (1934) ("Property acquired by the state through delinquent tax sales is held by the state in its proprietary capacity and not for governmental purposes. Lands so held are subject to general assessments and other burdens not imposed on property impressed with a public purpose."); *La Mesa etc. Irr. Dist. v. Hornbeck*, 216 Cal. 730, \_\_\_ P.2d \_\_\_ (1933).
  18. *City of Inglewood v. County of Los Angeles*, 207 Cal. 697, 280 P. 360 (1929) ("Public property of a municipality, that is, property owned by such municipality and by it devoted to public use, is liable for special assessments for public improvements only in case there is a positive legislative authority therefor."); *County of Santa Barbara v. City of Santa Barbara*, 59 Cal. App.3d 364, 130 Cal. Rptr. 615 (1976); *City of Pasadena v. Chamberlain*, 1 Cal.

### Statutory Treatment of Special Assessment Liens

The rules discussed above that govern the liability of property acquired by eminent domain for special assessments are found primarily in the case law. Although these rules are generally satisfactory, they should be codified so that the Eminent Domain Law contains a clear statement of the law. Important aspects of codification are:

(1) Joinder of lienholders. The holder of a lien on property must be joined as a party to the proceeding, or the lien is left unimpaired.<sup>19</sup> In contrast, a county or other taxing agency having a lien only for ad valorem property taxes need not be made a party.<sup>20</sup> Although some special assessment liens are collected by the county tax collector with ad valorem property taxes, special assessment liens are treated as general liens for purposes of joinder and payment in the eminent domain proceeding.<sup>21</sup> The statute should make this rule clear.

(2) Payment of fixed lien special assessments. General liens on property acquired by eminent domain may be either paid from the award to the lienholder<sup>22</sup> or withheld from the award by the condemnor and held for payment to the lienholder when due.<sup>23</sup> Case law has applied the same rules to special assessment liens. This treatment is appropriate for fixed lien special assessments, which are imposed for a particular capital improvement and thus are in the nature of a general lien on the

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App.2d 125, \_\_\_ P.2d \_\_\_ (1934) ("The true and fundamental reason why the property remains subject to the assessments levied against it until paid, even though the city enters and devotes the land to public use, lies in the fact that the improvement acts cited expressly subject the land within the district to the assessments levied to pay instalments due on improvement bonds.").

19. See Code Civ. Proc. § 1250.220 and Comment thereto.

20. Rev. & Tax. Code § 4986.9.

21. See, e.g., *Wilson v. Beville*, 47 Cal.2d 852, 306 P.2d 789 (1957).

22. Code Civ. Proc. § 1260.220.

23. Code Civ. Proc. § 1265.220.

property. The Eminent Domain Law should make clear that the same rules govern fixed lien special assessments as govern general liens.<sup>24</sup>

(3) Payment of special ad valorem assessments. Special ad valorem assessments are levied on an annual basis for maintenance and other purposes of the assessing entity, and thus are more in the nature of tax liens than general liens. It is appropriate that special ad valorem assessments be treated in the same manner as tax liens, and their obligation apportioned between property owner and condemnor on the basis of the time of acquisition of the property. The amount apportioned to the property owner should be paid from the award. The amount apportioned to the condemnor should be the responsibility of the condemnor, for which the property remains as security. Whether the amount apportioned to the condemnor is subject to cancellation will depend on the particular condemnor and the particular statute under which the assessment is levied. This recommendation does not address the general problem of public property being removed from the assessment rolls of a special district.

(4) Allocation of award to lienholder in partial taking. Where there is a partial taking of property subject to an assessment lien, the question arises whether the lien should be paid off in whole, transferred to the remainder in whole, or allocated in some manner between the part taken and the remainder. Since the lien of a fixed lien special assessment will usually secure bonds, it is essential that any allocation not impair the security of the portion of the lien not paid off. The rule for general liens on property in a partial taking is that the lienholder may share in the award to the extent determined by the court to be necessary to prevent an impairment of the security, and the lien continues on the remainder as security for the unpaid portion of

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24. It may be advantageous to the condemnor to permit the lien to remain on the property and withhold an amount from the award sufficient to pay off the obligation of the lien as it comes due. This option is available to the condemnor in the case of a general lien, and should be available in the case of a fixed lien special assessment as well.

the indebtedness.<sup>25</sup> This provision is appropriate for fixed lien special assessments as well, and should be made expressly applicable to them. The lien of a special ad valorem assessment, on the other hand, being in the nature of a tax lien, should be apportioned between the part taken and the remainder on the same basis on which the original assessment was made. This will preserve the lien without impairing the security.

#### Proposed Legislation

The Law Revision Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 1260.250 of, and to add Section 1260.260 to, the Code of Civil Procedure, relating the special assessment liens and bonds in eminent domain proceedings.

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

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25. Code Civ. Proc. § 1265.225.

Code of Civil Procedure § 1250.250 (amended)

SECTION 1. Section 1250.250 of the Code of Civil Procedure is amended to read:

1250.250. (a) If the only interest of the county or other taxing agency in the property described in the complaint is a lien for ad valorem taxes, the county or other agency need not be named as a defendant.

(b) The holder of a lien securing a special assessment or a bond representing a special assessment shall be named as a defendant even though the lien may secure a special ad valorem assessment and may be collectible with ad valorem taxes by the county tax collector.

Comment. Subdivision (b) is added to Section 1250.250 to assure that special assessment and bond lienholders are included in the eminent domain proceeding, just as general lienholders are. Failure to join a lienholder leaves the lien unimpaired. This codifies existing law. See Section 1250.220 and Comment thereto. For payment of special assessment liens, see Section 1260.260.

Note. Section 1250.250 is a provision proposed to be added to the Eminent Domain Law. See Cal. L. Revision Comm'n Reports, Recommendation Relating to Ad Valorem Property Taxes in Eminent Domain Proceedings (1978).

Code of Civil Procedure § 1260.260 (added)

SEC. 2. Section 1260.260 is added to the Code of Civil Procedure to read:

1260.260. (a) As used in this section:

(1) "Fixed lien special assessment" means a nonrecurring assessment in a fixed amount levied by a local public entity for the capital expenditure for a specific improvement, whether collectible in a lump sum or installments.

(2) "Special ad valorem assessment" means a recurring assessment in an indeterminate amount levied annually by a local public entity other than for the capital expenditure for a specific improvement, whether fixed on the basis of the value of the property assessed or some other basis.

(b) If property acquired by eminent domain is encumbered by the lien of a fixed lien special assessment or a bond representing a fixed lien special assessment:

(1) The amount of the lien shall be paid to the lienholder from the award or withheld from the award for payment pursuant to Section 1265.220.

(2) Where there is a partial taking of the property, the amount of the lien prescribed in Section 1265.225 shall be paid to the lienholder from the award.

(c) If property acquired by eminent domain is encumbered by the lien of a special ad valorem assessment:

(1) The amount of the lien prorated to, but not including, the date of apportionment determined pursuant to Section 5082 of the Revenue and Taxation Code, shall be paid to the lienholder from the award. As between the plaintiff and defendant, the plaintiff is liable for the amount of the lien prorated from and including the date of apportionment determined pursuant to Section 5082 of the Revenue and Taxation Code.

(2) Where there is a partial taking of the property, the amount of the lien, reduced by the amount for which the plaintiff is liable pursuant to this paragraph, shall be paid to the lienholder from the award. As between the plaintiff and defendant, the plaintiff is liable for the amount of the lien allocable to the part taken for the current assessment year, determined to the extent practicable in the same manner and by the same method the amount of the assessment on the property for the current assessment year was determined, and prorated from and including the date of apportionment determined pursuant to Section 5082 of the Revenue and Taxation Code.

Comment. Section 1260.260 clarifies the rules for payment of special assessment liens on property, regardless whether the assessments or bonds secured by the liens are collected by the county tax collector along with ad valorem taxes or in some other manner. Cf. Section 1260.250 (determination and payment of property taxes). The lienholder must be made a party to the proceeding. See Section 1250.250. Priority of special assessment liens is governed by Sections 53930-53937 of the Government Code.

Subdivision (b) governs fixed lien special assessments, which are levied for the cost of acquisition and installation of a particular local improvement, and are the responsibility of the property owner. Under subdivision (b)(1) the lien must be either paid wholly from the award or at the plaintiff's option deducted from the award and paid by the plaintiff as the obligation comes due. This codifies existing law. See Sections 1260.220 and 1265.220; Redevelopment Agency v. Penzner, 8 Cal. App.3d 417, 87 Cal. Rptr. 183 (1970); City of Los Angeles v. Superior Court, 2 Cal.2d 138, 39 P.2d 401 (1934); People v. Cheda, 154 Cal. App.2d 531, 317 P.2d 145 (1957). In case of a partial taking, the lien is paid from the award only to the extent necessary to prevent an

impairment of the security, and the obligation of the lien remains on the property owner. This also codifies existing law. See Section 1265.225.

Subdivision (c) governs special ad valorem assessments, which are levied for maintenance of improvements and other general purposes of the assessing entity. These assessments are in the nature of taxes, and their obligation is apportioned between property owner and condemnor in the same manner as taxes. Cf. Sections 1260.250 (determination and payment of taxes) and 1268.410 (liability for taxes). The amount apportioned to the condemnor under subdivision (c) may or may not be subject to cancellation, just as property taxes may or may not be subject to cancellation, depending upon the particular condemnor and the statute governing imposition of the assessment. See Cal. L. Revision Comm'n Reports, Tentative Recommendation Relating to Special Assessment Liens in Eminent Domain Proceedings (1978).

Note. Section 1260.250, referred to in the Comment, is a provision proposed to be added to the Eminent Domain Law. See Cal. L. Revision Comm'n Reports, Recommendation Relating to Ad Valorem Property Taxes in Eminent Domain Proceedings (1978).

Revenue and Taxation Code Section 5082, referred to in the text of the statute, is a provision proposed to be added by Cal. L. Revision Comm'n Reports, Recommendation Relating to Ad Valorem Property Taxes in Eminent Domain Proceedings (1978). The date of apportionment determined pursuant to Section 5082 is comparable to the date of acquisition determined pursuant to Section 4986(b).