

(36)

9/12/60

Supplement to Memorandum No. 74(1960)

Subject: Additional letters re Commission's Recommendations

Attached are some additional letters that have been received relating to the Commission's eminent domain proposals. As these letters are from persons who have previously written to us, they will be cited as follows: P. W. Supp. (6), (7), (12) etc.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

OFFICE OF THE COUNTY COUNSEL

SUITE 1100 HALL OF RECORDS
LOS ANGELES 12, CALIFORNIA

August 23, 1960

California Law Revision Commission
School of Law
Stanford, California

Attention: Mr. John H. DeMouilly

Subject: Recommendations relating to the rules
of evidence in eminent domain proceedings

Gentlemen:

Referring to our letter of July 22, 1960 addressed to the California Law Revision Commission, commencing at page 6 we discussed the superiority of comparable sales to the income and reproduction cost approach to value. Since then we have examined the "Staff and Consultants Reports to the Committee" dated February, 1959, published by the Joint Interim Committee on Assessment Practices of the California Legislature. That report deals primarily with the valuation of utility properties. However, it repeatedly and forcefully states in layman's language the conclusion heretofore reached by many others that "actual market prices are the best evidences of value" (at page 79).

At page 58 the report states that

"This Report has discussed in some detail the several direct evidences of value available to the assessor as a substitute for the best evidences, i. e., recent sales prices for the property being appraised or for comparable properties."

At page 76 the report states that

"As previously stated, value is a price at which a product will be exchanged in a competitive market. It follows that actual market prices are the best evidences of value. When sales of a given class of property are numerous enough to indicate a consensus, and properties are sufficiently similar to permit ready comparison of one with another, the appraiser can readily use this criterion and need hardly concern himself with any other."

In discussing the capitalization approach to value, at page 84 the report concludes that

"The basic rate of capitalization to be employed in capitalizing either a perpetual stream of income or a terminating stream, is one of the most difficult things to determine."

Likewise, in discussing the reproduction cost approach to value, which it concludes "should play a very minor role" (page 98) in the appraisal of utility properties, at page 57 the report states that in determining the land value in the reproduction cost study, "Recent sales of comparable properties are taken into consideration where possible."

It appears that the consultant to the Law Revision Commission, who is an attorney, not an appraiser, has arrived at conclusions contrary to the law as expressed by the courts and also contrary to the conclusions of the consultants to the Joint Interim Committee on assessment prices, who are appraisers and economists rather than being lawyers.

Very truly yours,

HAROLD W. KENNEDY
County Counsel

By 
A. R. Early
Deputy County Counsel

ARE: IMH

STATE OF CALIFORNIA
Department of Public Works

DIVISION OF CONTRACTS AND RIGHTS OF WAY
(LEGAL)

PUBLIC WORKS BUILDING
1120 N STREET
(P. O. BOX 1469)
SACRAMENTO 7, CALIFORNIA

PLEASE REFER TO
FILE NO.

September 1, 1960

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear Mr. DeMouilly:

Re: Comments on Tentative Recommendations and
Proposed Legislation Relating to Taking
Possession and Passage of Title in Eminent
Domain Proceedings.

Reference is made to your letter of June 27, 1960, requesting our comments and suggestions on the tentative recommendations and proposed legislation of the California Law Revision Commission relating to taking possession and passage of title in eminent domain proceedings.

As we have pointed out to you in previous letters, the Department of Public Works of the State of California is directly interested in and vitally concerned with the field of condemnation law. This is particularly true in regard to taking of possession, as this Department is involved in the majority of all immediate possession acquisitions under Article I, Section 14, of the California Constitution. As hereinafter indicated, we are in agreement with part of the recommendations of the Commission in this portion of its eminent domain study, except for some objections in principle and a few technical changes.

In our study of the Consultant's report and the Commission's tentative recommendations, we were concerned by the lack of factual data and reasons to support several of the conclusions contained therein. It appears to us that substantive changes are recommended without a full and complete investigation of necessity therefor, and without a full study of the effect of such changes upon the acquisition of right of way and land for public improvement projects.

An understanding of acquisition procedure and the administration of an effective right of way program involving the condemnation of property for public use is important in any consideration of legislation affecting the right of immediate possession and passage of title.

There are several harmful effects in statutes which can delay a condemnor's entry into possession. If the condemnor must await possession pending a motion to stay the order or to vacate the order, or during appeal of the order before entering into possession, the consequences may be detrimental to all interested parties; the landowner, the condemnor and the public. Any delay in entering the condemned land is a serious problem. From the standpoint of the condemnor and the public, construction of urgently needed facilities should not be delayed. In addition to prolonging the time which the public must wait for a new or improved highway, delay in possession has financial consequences. The cost of the new facility may become exorbitant or prohibitive due to rising building and labor costs. Any hindrance to the closing of the gap between highway modernization and traffic requirements is simply compounding an existing problem. As hereinafter pointed out, one of the major consequences of a delay provision in an immediate possession statute would be the inability of the State of California to certify the right of way, for purposes of starting bidding procedures, letting contracts and obtaining Federal participation.

The effect of some of the Commission's recommendations upon the State Department of Public Works can be more clearly understood when it is realized that during the 1958-1959 fiscal year bids were opened on 649 projects with a construction value of \$264,388,400.00, which figure does not include the cost of right of way. The cost of right of way acquisition and utility relocation, exclusive of land clearance, amounted to \$126,648,702.00 for the fiscal year. The State highway system construction contracts referred to above entailed the improvement of 1,879 miles of highways and construction of 367 bridges and separation structures. This involved the acquisition of 8,556 parcels of land by negotiation and condemnation.

For convenience, our comments and suggestions will be first directed to the conclusions contained in the tentative recommendations of the California Law Revision Commission, and then to the specific sections and amendments to the statutes relating to passage of title and possession.

COMMENTS ON COMMISSION'S RECOMMENDATIONS

Immediate Possession1. Order of Immediate Possession.

We agree with the Commission that immediate possession is one of the most important questions in the area of eminent domain law. Generally, we have found little practical difficulty in our present practice of processing orders of possession. It should be noted that this Department administers the vast majority of such cases under California law. Although there are now no statutes specifying the exact procedure to be followed in obtaining an order of immediate possession, we have no objection to the Commission's codifying the present practice and procedure. This would include the enactment of a statute providing that the condemnor, after issuance of summons, may apply to the court ex parte for an order authorizing immediate possession. We are not in accord with the Commission's recommendation that the order is not to be "routinely granted". Besides being indefinite, these words could mean different things to different superior courts, and do not add anything to what we now consider the present meaning of an ex parte proceeding. The court should have the duty to issue the order where it determines that the plaintiff is entitled to obtain immediate possession of the property pursuant to Article I, Section 14, of the California Constitution. Again, this is the present procedure and practice in obtaining an order of immediate possession.

2. Notice of Order to Owners and Occupants.

Although neither the Consultant to the Commission, nor the Commission, has indicated any basis or reason for extending the present notice provisions in Section 1243.5 from three days to twenty days, we have no objections to such change, providing that the court, upon application of the condemnor, may shorten the time within which the notice must be given to a period not exceeding three days. It has been the practice of this Department, even before the enactment of Code of Civil Procedure Section 1243.5, to give to owners and occupants reasonable notice of the State's intention to take possession of their property. The Right of Way Manual of the California Division of Highways (Section 5.491) provides that "It is the policy of the Division of Highways to give adequate notice to the property owners and parties in possession before taking possession of property." It also provides that "A true copy of the Notice of Intention To Take Possession shall be served ... at least 10 days before possession is to be taken." In operating under this statute, we have found no hardship situations to exist and none has been brought to our attention.

An order for possession is not self-executing and before a person can be dispossessed, under such an order, the condemnor must obtain a writ of assistance, which results in a further delay in the actual taking of possession.

We disagree with the recommendation of the Commission that the notice of intention to take possession must be given by personal service or, if personal service cannot be made, by mailing. Particularly with the expansion of the notice to twenty days, there is little danger that the mailing will not be adequate. This would also save the expense to the condemning agency of forcing it to make personal service in all cases. In this regard it should be noted that in all cases, negotiations have been carried on over a reasonable period of time, and the owners and occupants are well aware that their property is needed. We have found no situation where the service of the notice by mail has proved to be inadequate.

We disagree with the recommendation of the Commission that the service of the order for possession must be made on all persons revealed by the records to have an interest in the property whether or not their names appear on the "latest secured assessment roll". The primary person who needs notification of the intention to take possession is the occupant of the property in order to give him a sufficient and reasonable time within which to make his plans to move. Other parties, such as trust deed holders and owners of easements, have no particular interest as to the exact date when the condemnor needs possession. To personally serve, or serve by mail, all parties and persons who have minor interests in the property would place an undue burden on the condemnor without any particular benefit to them. In fact, it would duplicate the notice that is given by the service of summons and complaint upon these parties. The net effect of such provision would be to impair and encumber the right of the condemnor to obtain immediate possession. We believe the "latest secured assessment roll" should be used to determine the address of the owners of the property. The addresses of record owners are not readily apparent from the records on file in the recorder's office nor from the title company's maps and records. The county tax collector and assessor have such information readily available. Since the addresses there are sufficient in mailing tax notices, they should be sufficient for the purpose of giving notice of intention to take possession.

3. Delay in Effective Date of Order.

The Commission recommends that within the 20-day period after notice is given, the owner or occupant of the property should be able to apply to the court for an order delaying the effective date of immediate possession in order

to prevent "unnecessary hardship". The Commission's recommendation is without support, either in fact or reason. This Department cannot emphasize too strongly its considered position against a provision in our law which would give one property owner the power to delay a vast public project such as the interstate highway system to the detriment of the public and the users of the highway.

In practical effect, this proposal would wipe out entirely the right of immediate possession. The owner of a single small parcel of property could hold up a huge project for long periods of time, and there would be no way of recovering from him any damage done to the public interest if it were shown that his attempts to delay were not well founded or even were motivated by unfair intentions.

As we have heretofore indicated, ^{XXV} every effort is made by this department to offer ample opportunity for the turning over of possession and we believe that, generally speaking, such is the policy of all condemning agencies. As a practical matter, it has to be because the only procedure available to the condemnor in the event the owner does not give up possession is to obtain a writ of assistance from the superior court directing the sheriff to obtain and turn over the possession to the condemning agency. Courts do not issue these writs except upon a showing of necessity and with the imposition of reasonable conditions.]

^{XXV} The writer sees practically all complaints that are written in to either the Governor's office or to this Department concerning the acquisition of rights of way, the dealings of the Department's representatives with the public, and the conduct of its litigation, whether written directly by the Department affected or transmitted by some member of the Legislature to whom the complaint has been made. The writer can recall over the years no instances of complaints about the exercise of the power to obtain immediate possession. We believe that a weakening of the power to obtain immediate possession would seriously hamper, if not in some cases make it impossible for governmental agencies to carry out projects which the expanding population has to have.

The committee on Right of Way of the American Association of State Highway Officials, in its syllabus on immediate possession of highway right of way, had this to say about a statute which provides for a date on which possession may be taken:

"It neutralizes the dilatory tactics of some condemnees who hope to obtain financial rewards as a result of their manipulations and harassments or to thwart a project by prolonging litigation

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beyond the time when funds are available for the purpose."

The Bureau of Public Roads has provided in General Administrative Memorandum No. 68 that it will not approve federal projects such as the interstate highway system for advertising for bids until the Division of Highways has certified that either (1) the right of way has been acquired; or (2) that while the right of way has not been fully acquired that the right to occupy and use the right of way has been acquired; or (3) that while negotiations for right of way are in progress "those parcels which have not been acquired will be made fully available for occupancy and use within days." The Division of Highways, for non-federal participating projects, has adopted the same policy as that required by the Bureau of Public Roads. (California Right of Way Manual Section 10.10.)

No project can be approved for advertising unless a definite date is known upon which the State can rely that it will have the right to the occupancy and use of the property. The provisions of the State Contract Act (Government Code Sections 14250, et seq.) require a definite advertising period. The Standard Specifications of the Division of Highways provide that the contractor will have full use and occupancy of the right of way for construction purposes. If a delay provision is incorporated into the immediate possession procedure, it will bring about many serious complications in the budgeting, acquisition of right of way, advertising and construction of major highway projects involving millions of tax dollars. In addition, the State Division of Highways will not have the benefit of definite dates for the utility relocations incident to the construction of the highway, definite dates for the removal of obstructions in the proposed right of way, definite dates to begin advertising for construction projects, and definite dates for the contractor to have possession and occupancy of the right of way. Last and most important, a delay provision will subject the State to possible suits for breach of contract when it cannot deliver the right of way to the contractor as specified. The only practical solution to this problem, if such legislation was adopted, would be not to advertise until after physical possession has been obtained of all property within a given project area. This would mean that the property would have to be acquired weeks, months, or even years before it is actually needed, thus depriving the property owner of the use of the property for that period of time to the ultimate disadvantage of both the condemnor and condemnee. The hardship, if any (although we know of none to exist), is sufficiently alleviated by the recommendation of the Commission to give twenty days' notice prior to taking possession.

4. The Withdrawal of Deposit.

The Commission recommends that the condemnees be authorized to withdraw the entire deposit that has been made by the condemnor. The experience of this Department under Code of Civil Procedure Section 1254.7, has not indicated any necessity for increasing the amount to be withdrawn from 75% to 100%. Studies of the withdrawals made under this section in our Sacramento, Los Angeles and San Francisco offices indicate that withdrawals are applied for in less than 5% of the total number of parcels for which deposits have been made. This Department has no objection to allowing withdrawal of the entire amount of the deposit, providing that no more than the original deposit made by the condemnor may be withdrawn. The explanation for this suggestion is contained in our comments on Code of Civil Procedure Section 1254.7.

5. Vacating the Order of Immediate Possession.

The Commission has recommended that the owner or the occupant of the property has the right to (1) contest the condemnor's right to take the property by eminent domain; and (2) the condemnor's right to obtain immediate possession of the property by a motion to vacate the order of possession. First of all, the trial court can vacate any order for immediate possession where it is shown that the condemnor does not have the right to take the property or that the condemnor does not have the right to immediate possession (See Darbee v. Superior Court, 138 Cal. App. 710). Secondly, should the trial court not vacate its order, there is a common law remedy for a writ of prohibition to the appellate courts (See Central Contra Costa etc. Dist. v. Superior Court, 34 Cal. 2d 845). This right is more effective than an appeal because the matter can be heard and determined within a relatively short time without having the record prepared and transmitted to the appellate court. For that reason we recommend that no change in the remedy be made.

Possession Pending Appeal

We agree with the recommendation of the Commission that legislation should be enacted to permit the condemnor to take possession pending appeal and by doing so not waive its right of appeal. We do feel that Code of Civil Procedure Section 1254 should be rewritten in order to break the section up into its various component parts and to conform to Section 1243.5 as nearly as possible. These suggestions concerning the amendment of Code of Civil Procedure Section 1254 will be discussed later.

Passage of Title

In reviewing the Consultant's study and the recommendation of the Commission, we could find no advantage to the condemnor or to the property owner by accelerating the time at which title passes in condemnation proceedings. This Department opposes this recommendation in principle in that there are no reasons for such a change. As hereinafter pointed out, we feel that Code of Civil Procedure Section 1254.7, pertaining to withdrawal of deposits, should be amended to delete the reference to passage of title. This would eliminate the only criticism that the Consultant had concerning lack of uniformity.

The present law on passage of title on the recording of the final order in condemnation and the exception in tax lien cases is settled law and is working out satisfactorily. A change in the time of passage of title would create several problems and, as far as we can see, would solve none. For example, should there be an amendment to the pleadings providing for a larger or a smaller taking of the property, the problem is created that there are several different times when different titles to the same property pass. The title can bounce back and forth between the condemnor and the condemnee. Where title passes at the culmination of the litigation, there is no question as to when and what property is transferred to the condemnor.

There are several reasons which support the proposition that passage of title at the recordation of the final order of condemnation is more desirable. First, past experience has shown that the recordation date of the Final Order is a date which is easily and positively established. Second, we have no experience to support the proposition that the date when the condemnor takes possession can be as easily and positively established. Third, the date of possession can be a shifting one, depending upon the disposition by the trial and appellate courts of the various motions to stay and vacate the order of possession and appeals therefrom. Lastly, the recordation of the Final Order serves both as a focal point of title change and notice through the recording laws to the rest of the world of the title change.

There is also a certain logical appeal to the present rule that the property owner does not lose title until just compensation is finally determined and paid into court for his benefit. It is only at the time of the trial that the property owner and the condemnor can present full evidence on the issues of public use and value. Until these matters have been thus finally resolved by the trier of fact

and just compensation arising therefrom paid into court for the benefit of the property owner, it can be argued that the property owner should retain title to the property. If at the trial the issue of public use was determined adversely to the condemnor, but possession already authorized, then under the new provisions, title having already passed to the condemnor, it would have to be returned to the owner.

Compensation for Improvements

The recommendation of the Commission that legislation be enacted providing compensation to the condemnee for the improvements on the property on the date of service of summons unless they are removed or destroyed prior to the date on which the condemnor takes title to or possession of the property, is acceptable to the Department of Public Works. This "recodifies" the present law concerning valuation of improvements and it also clarifies the condemnation law regarding improvements that are removed or destroyed prior to the date on which the condemnor takes title to or possession of the property.

Taxes and Special Assessments

We are not in accord with the recommendation of the Commission that the condemnor be required to reimburse the condemnee for the pro rata share of taxes that have been paid by the property owners and are attributable to that portion of the tax year following the date on which the condemnor acquires the title to or the possession of the property. We feel that such legislation would be unconstitutional as being a gift of public moneys (Art. IV, Secs. 22, 31), and diversion of highway funds (Art. XXVI). The net result is a windfall to the tax collecting agencies. To require the condemnor to reimburse the property owner for such prepaid taxes would be tantamount to taxing the condemnor for its possession of, or title to, the condemned property. This is plainly contrary to the law (Art. XIII, Sec. 1).

We recommend and suggest that legislation be adopted providing for a refund of those taxes that are canceled by the court where they are paid by the property owner prior to the time that title was transferred to or possession taken by the public agency. This legislation would enable the property owner to recover those taxes to which he is rightfully entitled and would allow the tax collecting agency to make such a refund.

Abandonment by the Condemnor

The Department of Public Works is basically opposed to the recommendation of the Commission that a condemnor who has taken possession of the property prior to the final order of condemnation should not have the right to abandon the condemnation action unless the condemnee stipulates to the abandonment. One of the principal reasons for this position is that most "abandonments" are not total abandonments but are slight changes in right of way alignments such as where by mistake the taking line has gone through a small portion of an existing building where the alignment can be drawn back to protect the improvements and minimize damages. In this situation a statute such as the one proposed would permit the condemnee to force the State into compensating him to obtain his consent to an abandonment. Another example of the same type of situation is an amendment to take a lesser interest, such as a reservation of mineral and oil interests to the property owner.] These examples could be multiplied indefinitely. xxy

We feel that the property owner is adequately protected under existing case law by the doctrine of estoppel. This protection is afforded to the property owner (whether or not the condemnor takes possession) where the condemnor has led a property owner to believe that his property will be taken for a public use and in reliance thereon the property owner has acquired other property (Times-Mirror v. Superior Court, 3 Cal. 2d 309; McGee v. Los Angeles, 6 Cal. 2d 390). In the Consultant's study (page 56), the statement is made that the Times-Mirror case, supra, "has been limited by a subsequent case" (Gibson Properties v. Oakland, 12 Cal. 2d 291). The Gibson case reaffirms the general rule contained in the Times-Mirror and McGee cases and merely indicates that the facts in the Gibson case were insufficient to be a basis for recovery of damages. The Gibson case did not involve a claim of estoppel.

We might add that very few total abandonments are made by the State Department of Public Works. This is because alignments for highway right of way are usually definite and certain, except for slight changes in alignment. However, this fact should not preclude the right of the State to abandon where it is required in the public interest.

There are not many examples of total abandonments after entry into possession by any of the condemnors who presently have the right to immediate possession, due to the fact that such possession is taken for the purpose of immediate construction of expensive public improvements, which projects would be highly uneconomical to abandon.] To our knowledge the actual number of cases of abandonment after

possession are very few and, therefore, the problem the Commission seeks to solve is more theoretical than actual.

Interest

The recommendation of the Commission providing that interest cease to accrue on the amount deposited to secure an order of immediate possession as of the date the amount may be withdrawn benefits the condemnor. This Department feels, however, that the property owner should not be forced to either withdraw the deposit or lose both the possession of the property and interest on the award. The possibility of objections being made to the withdrawal and the possibility that, due to title uncertainties or other reasons, the withdrawal of the full sum may not be possible, should not work against the property owner and deprive him of interest on the award. In addition, there is the possibility that a portion of the withdrawal will have to be repaid. Our recommendation that title pass only on the recording of the final order of condemnation dictates the conclusion that interest should not cease until the ultimate award. It should also be noted that the State does earn some interest on the money deposited with the State Treasurer in the Condemnation Deposit Fund.

A provision providing that interest cease upon the deposit of the security would result in applications to withdraw in almost all cases. It would place the court in the position of determining in almost every parcel what amount should be withdrawn, thus requiring a preliminary valuation figure, which would amount to a full trial, at increased expense and costs to the property owner and the condemnor.

A constitutional problem may be present in any legislation requiring the property owner to withdraw any deposit and reinvest it in order to obtain just compensation (interest) on this amount to cover loss of use of his property taken under an order of immediate possession. A provision providing that interest cease to accrue on the deposit of security could very well be held to be an unconstitutional condition restricting the property owner's right to compensation for the loss of use of his property.

The second portion of the recommendation provides that interest cease as to funds deposited in court from the date the deposit is available for payment. We have no objection to this portion of the recommendation providing that it applies only to funds deposited pursuant to a judgment in condemnation and does not apply to security deposits.

Constitution Revision

The first part of the recommendation of the Commission, attempting to assure the property owner of compensation at the time possession of his property is taken, is inherently impossible. The only way such assurance may be given is to require a full hearing before a jury and an appeal. This is not possible until the conclusion of the litigation. Consequently, we feel that the basic protection given by the Constitution is proper--security for the payment of just compensation rather than prompt payment.

We agree with the Commission that if the right to take immediate possession of property is to be expanded, it should be done by the Legislature rather than requiring a constitutional amendment for each and every additional agency or public use. However, we do not see the need to remove from the Constitution the present two uses which are specified therein--right of way and reservoir purposes. We feel that there is a definite distinction between those public purposes which for many years have had constitutional authorization for immediate possession and those additional public uses which may be permitted to take immediate possession by a delegation of power in the Constitution to the Legislature. Several factors bring about this distinction between public uses, such as the nature of the public use, and whether or not the resolution of necessity is conclusive or rebuttable. In effect, the public purposes of rights of way and reservoirs should not be voted out of the Constitution in order to give the right of immediate possession to other public agencies or for other public purposes.

There is an additional problem in connection with eliminating from the Constitution the existing purposes for which immediate possession can be obtained. The present proposal of the Commission provides that the supplementary legislation take effect after the approval of the constitutional amendment by the people. There will be a hiatus created between the effective date of the new constitutional amendment and the time that the new supplementary legislation takes effect (if at all). In the interim there will be no right to immediate possession for any public use, including right of way and reservoir purposes. This, of course, would create havoc in our current freeway construction plans and the Water Bond Act of 1958. This problem reinforces our recommendation to keep right of way and reservoir purposes in the Constitution and give the Legislature the power to determine to which additional public uses immediate possession should be extended.

The elimination of reservoir purposes from the Constitution and delegating to the Legislature whether or not there should be immediate possession for reservoir purposes may cast doubt on the validity of the Water Bond Act of 1958 and lead to a reopening of the controversial water issue before the Legislature.

We see no objection to the recommendation of the Commission that the phrase "irrespective of any benefits from any improvements proposed by such corporation" be stricken from the Constitution, since it does not affect the Department of Public Works and applies only to private corporations.

Since 1933, numerous attempts have been made to amend Article I, Section 14, of the California Constitution to add other public uses which would be entitled to immediate possession. Only two constitutional amendments were submitted to the people. Both were defeated. A list of the constitutional amendments introduced since 1933 to broaden the immediate possession portion of Article I, Section 14, is attached to this letter.

Supplementary Legislation

We express no opinion concerning the Commission's recommendation that legislation be enacted extending the right of immediate possession to all condemnors. However, the Commission should consider in such a recommendation the differences in the various types of public uses and the conclusive or rebuttable effect of each agency's resolution of necessity. These factors should be given consideration in determining whether or not immediate possession should be extended to all condemnors. One effect of the recommendation would be to permit public agencies to take over immediately private utilities serving the public and might possibly lead to granting immediate possession to private individuals. (See Linggi v. Garovotti, 45 Cal. 2d 20) Some of the problems which can be raised if a blanket right of immediate possession is given by the Legislature are (1) the question of public use; and (2) the question of necessity; and (3) the question of more necessary public use.

The question of public use has been raised in several recent cases. While in many areas specific uses have been long upheld as proper public uses, such as highways, the concept of public use is constantly undergoing change, resulting in new determinations by the appellate courts as to whether specific uses are or are not public uses. For example, there have been recent cases considering the acquisition of property by redevelopment agencies (Redevelopment Agency v. Modell, 177 A.C.A. 345); parking agencies (S. F. v. Ross,

44 Cal. 2d 52); private individuals for sewer lines (Linggi v. Garovotti, supra); and the condemnation of property by public agencies outside their territorial limits.

At the present time, there are only certain agencies which have been granted a conclusive presumption as to the necessity for acquiring particular property. All other agencies must prove that the property is necessary for the public use and that it will serve the greatest public good with the least private injury. In the situation where these issues must be proven, the problems mount as to whether the agency will eventually be upheld in its right to take the property. Consequently, there is more chance that the court will hold that the property cannot be taken.

Where property is already devoted to a public use by either a public or a private agency, and it is sought to be taken for a more necessary public use, the acquiring agency must prove that its public use is more necessary than the one to which the property is currently devoted. To permit immediate possession in this type of case might well mean that by successive orders for immediate possession, the possession property could bounce back and forth between the various agencies until it is finally determined which public use is more necessary.

[The second portion of the Commission's recommendations on supplementary legislation concerns the power of the court to determine whether there is any necessity for the condemnor to obtain possession prior to judgment and giving the condemnee the right to raise this question and obtain a determination of the court. This recommendation of the Commission gives the court the power to invade the administrative determination of the executive branch of the government. The necessity for immediate possession is but an incident of the necessity for the taking of the parcel.^{xyv} ~~The necessity in the case of highways is conclusive (Streets and Highways Code Section 103) and has been held in the recent Supreme Court case of People v. Chevalier, 52 Cal. 2d 299, to be not subject to judicial review.^{xyvi} Stated simply, the court should not have the right to make the administrative determination of the time at which possession is necessary, as this is but a part of the over-all administrative determination concerning the necessity for taking the property for highway purposes.] In effect, the recommendation of the Commission would make an exception to the present conclusive presumption provided in Streets and Highways Code Section 103 in that it would give the court the power to determine when the property could~~

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Mr. John H. DeMouilly

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be taken. The court would be substituting its discretion for that of the Highway Commission and the Division of Highways, which agencies are the ones vested with the duty to supervise the over-all project and the budgeting of funds.

The practical effect of requiring a court determination, and, as indicated in the proposed statute, a stay when an appeal is taken, would destroy the right which has just been granted. The only value of the right of immediate possession is if the agency is assured that it can take possession and thereby plan with reliance in order to consider the greatest public benefit and the least private injury.

COMMENTS ON COMMISSION'S STATUTORY
AND CONSTITUTIONAL AMENDMENTS

In order to aid the Commission in its consideration of our suggestions and comments on the proposed legislation we have attached a revised draft of the statutes affected and a revised draft of the constitutional amendment which incorporate our thoughts on this matter.

C.C.P. Sec. 1243.4 (1). This subsection attempts to restate the present case law concerning the right of certain condemnors to take immediate possession pursuant to Article I, Section 14 of the California Constitution by an ex parte order. The deletion of the reference to the various public agencies in the code section and the reference to the particular plaintiff entitled to take possession meets with our approval inasmuch as we do not know to which agencies the legislature may grant, if any, the right of immediate possession.

The authorization in this section allows the plaintiff to take immediate possession at any time "after the issuance of summons and prior to the entry of judgment." We feel the words "and prior to the entry of judgment" should be deleted in order to permit the agencies entitled to take immediate possession to do so pursuant to the Constitution without obtaining an additional order of possession under C.C.P. 1254, inasmuch as the authority contained in Article I, Section 14 continues throughout the proceedings and is not limited to the period before entry of judgment.

It is also desirable to make a distinction between the right to take immediate possession under the Constitution where there is a need for the property immediately and the situation under C.C.P. Section 1254 where there may or may not be particular plans for the use of the property and there is no absolute right to the taking of possession. A fuller discussion of this problem of taking possession is contained in our comments and suggestions concerning C.C.P. Section 1254 (infra).

In order to clarify the codification of the present practice and procedure in obtaining immediate possession pursuant to Article I, Section 14, it is necessary that there be a reference in this code section to a court order fixing the security which must be deposited in order to obtain the order of immediate possession. The proposed code section apparently contemplates the deposit of security after the order of immediate possession is obtained, thus making it an order subject to a condition subsequent. If the deposit is made in the State Treasury there is no showing in the court record that the condition subsequent has been complied with.

Therefore, we recommend that the current procedure be incorporated in the statute. This procedure contemplates that the court, upon application of condemnor, will fix the amount of the security for each parcel, and that after deposit of such security, the court, upon ex parte application, will authorize the plaintiff to take immediate possession. In this way the order of possession is not subject to a condition subsequent, and is definite and certain and the case file will show that the deposit has been made.

C.C.P. Sec. 1243.5 (2). This section is phrased in the terms of a condition. We feel the phraseology of this section should be stated positively. Therefore, we have used the introductory words "Upon a showing by the plaintiff" instead of the words "If the court determines." Again reference is made to the two types of orders which are in current use, the order fixing security and the order of possession. It should be noted at this time that the present case law holds that no order of possession is necessary when the court has fixed security and the security has been deposited. We feel the words "probable just compensation" should be eliminated from the proposed amendment to this section and the words of the Constitution be incorporated therein. The term "probable just compensation" contemplates a hearing and determination of market value contrary to the long established theory of a security deposit as a basis for immediate possession. We feel that the term "probable just compensation" is misleading or may be misleading in that until there is an actual determination it is only a guess as to what the ultimate outcome of the case will be. Unless there are to be two or more trials as to what is just compensation the actual realities of the situation are that before the plaintiff can take immediate possession the property owner can only be assured of security for the final payment. We have, therefore, incorporated the present wording of the Constitution concerning reasonably adequate security to provide for just compensation and any damage incident thereto.

Subsection (a) concerning a description of the property which must be included in the order authorizing immediate possession should be expressed so as not to require a complete repetition of the description when the description may be had by reference to the complaint. A metes and bounds description is usually long and meaningless to the average property owner, and the copying of the description in the complaint may possibly lead to errors and mistakes.

Subsections (b) and (d) meet with our approval.

Subsection (c) should be shortened to avoid the repetitious reference to the order and also to accord with the

hereinbefore mentioned practice of having two orders, one fixing security and one authorizing immediate possession.

C.C.P. Sec. 1243.5 (3). The deletion of reference to the public agencies meets with our approval and as hereinabove indicated the extension of the time from three to twenty days is not objectionable, providing the plaintiff may for good cause shorten the period to not less than three days. It is our recommendation that the time period within which notice has to be given be changed to its former meaning of twenty days prior to the time possession is taken in order to meet with the situation where a date has been specified but service cannot be made. Under the proposed legislation it could be argued that a complete new order would have to be obtained. The purpose and intent of the statute can be served by merely stating that twenty days' notice must be given prior to the time possession is taken.

We feel that the retention of the right to either make personal service or mailing to the owners is necessary to avoid the problem and needless expense of making personal service in all cases. There is adequate protection under the 20-day period as well as the fact that because of prior negotiations the defendants are aware that they will be required to give up possession of their property. It should also be noted that a requirement of personal service, unless a court order is obtained, can create a needless delay while searching for a defendant who is avoiding service. We have also retained the present provision of a single service or mailing to those at the same address. There seems to be no reason to delete this time and money saving provision. We have also retained the use of the latest secured assessment roll because, as noted above, such is one of the few sources where addresses of the owners of the property can be readily ascertained. In addition, it should be noted that the one who is most seriously inconvenienced by immediate possession is the occupant of the property, and his address is obviously known.

C.C.P. Sec. 1243.5 (4). We see no reason for the codification of this provision since it is presently contained in the Constitution. The only change which we have made in statute is to change the phrase from "probable just compensation" to refer to Article I, Section 14 of the Constitution providing for "adequate security."

C.C.P. Sec. 1243.5 (5). We have eliminated this subdivision because it states negatively what has been positively stated in the preceding subsections.

C.C.P. Sec. 1243.5 (6). We have eliminated subdivision

(6) of this section for the reasons stated in our comments on the Commission's recommendations concerning delay in the effective date of the order and of vacating the order for immediate possession. We particularly object to the provision permitting the court to stay the order without notice to the condemnor. This provision would impair the timetable of the particular agency respecting the use and occupancy of the right of way, and if it did not have notice of the stay of the order the condemnor would not be heard. The hardship on the condemnor and loss of benefit to the public could not be made known to the court. This subsection does not provide for any showing of "unnecessary hardship" in accordance with the Commission's recommendation, nor is there any time limit set for the maximum permissible delays of possession that could be granted. .

C.C.P. Sec. 1243.5 (7) and (8). We have eliminated both of these sections because we feel that not only is appeal not the appropriate remedy but also a stay of the order of immediate possession would effectively destroy the right to immediate possession. As mentioned previously, an appeal is a time-consuming method and there is already an effective and expeditious remedy by way of a writ of prohibition to test the propriety of the court's order. If a stay is granted, or even if a stay may be granted, a condemning agency cannot make plans until it actually has possession and the time to appeal from the order has run. If it should make any plans and enter into contracts before this time it is jeopardizing its contracts and may be subject to damages for breach because it cannot deliver the use and occupation of the right of way.

We have added subsection (6) to the Code of Civil Procedure Section 1243.5 concerning inadmissibility of the amount of the money deposited or withdrawn or the evidence introduced relative to those proceedings. The Highway Research Board in Special Report 33 indicated that in eight states statutes specifically provide that the amount of money deposited or withdrawn or the evidence introduced relative to those proceedings have no bearing upon and are inadmissible in the main condemnation proceeding.*

We have also added subdivision (7) to Section 1243.5 clarifying the fact that if the plaintiff should take possession under the Constitution it should not be held to have waived the right to appeal any more than it does under the Commission's draft in Section 1254.

*Arizona, Florida, Illinois, Minnesota, Nevada, New Mexico, Oregon, Tennessee, Utah

C.C.P. Sec. 1248. We have eliminated Code of Civil Procedure Section 1248 from the draft of the proposed amendments and have substituted an addition to Revenue and Taxation Code Section 4986.1. Our reasons for the substitution of this code section and comments on the amendment to Section 1248 will be contained in our comments on Section 1252.1. For convenience we have retained the same section numbers of the act.

C.C.P. Sec. 1249. We have changed this section to clarify the date of valuation and to bring it in line with the code sections involving other procedural matters. The first change made is to change the term "not tried within one year" to "not brought to trial within one year." The phrase "tried" is not used in this sense in any other code section, whereas the phrase "brought to trial" has been adjudicated and means the commencement of the trial. This is in accordance with the current practice.

We have also added a paragraph providing for a definite date of valuation in the event of a new trial. We feel that after a mistrial, new trial or an appeal that the date of valuation should remain the same as that used in the first trial provided the case is brought to trial within a reasonable time after the new trial is ordered. We believe that with the crowded condition of the trial calendars of the courts that a period of eight months is a reasonable time. In this regard it should be noted that there is a case currently pending in the California Supreme Court which will decide some of these issues (Peo. v. Murata, LA 25903). This case is to be heard by the Supreme Court on the 21st of September, 1960. Regardless of the outcome of the case, we feel that these matters should be clarified in the statute. The Supreme Court, of course, cannot legislate on this matter and, at most, could only refer to a reasonable time. Therefore, this is a necessary and proper area for action by the Law Revision Commission.

C.C.P. Sec. 1249.1. We have made two changes in the draft. The first is to refer to "special benefits", since improvements on the property can be specially benefited as well as damaged. The second change was to eliminate the words "or before the trial," in order not to penalize the condemnor for improvements that are removed by the property owner or destroyed during trial and before the recording of the final order.

C.C.P. Sec. 1252.1. We have eliminated Section 1252.1 as well as the amendment to Section 1248 and have substituted in lieu thereof the Revenue and Taxation Code Section 4986.1. The reasons for this addition to the Revenue and Taxation Code and the elimination of Section

1252.1 from the Code of Civil Procedure are contained above in our comments and suggestions on the Commission's recommendation concerning the payment by the condemnor of prepaid taxes. We feel the provision we have drafted is equitable to all three parties involved--the property owner, the condemnor, and the tax collecting agency.

C.C.P. Sec. 1253 (1) and (2). We agree with the Commission's recommendations in regard to these two subdivisions and have made no changes other than deleting the references in subdivision (2) which refers to subdivision (3).

C.C.P. Sec. 1253 (3). We have eliminated this subdivision because as stated before in reference to passage of title, we feel that the title should not pass on taking possession and that only one title should pass at the final conclusion of the litigation. As discussed previously, the early passage of title does not benefit either the condemnor or the condemnee.

C.C.P. Sec. 1254. We have redrafted this section for two basic reasons. In the first place, we feel that the procedure should, as nearly as possible, conform to the procedure under Section 1243.5. If this is followed it will assist both condemnor and condemnee in understanding the procedure. Secondly, we feel that the section should be broken down into its component parts to also assist in the understanding of the section.

We have eliminated the requirement in the Commission's draft that the order shall describe the property, the estate or interest acquired therein, and the purposes of the condemnation. We feel that as this order is only entered after judgment there is no necessity for these additional items as the judgment has already fully described these matters.

The first change which we have made is to clarify the section by making it clear that it applies only in a case where the plaintiff is not already in possession of the property. If the plaintiff has taken possession pursuant to Article I, Sec. 14, of the Constitution there are adequate safeguard provisions under Section 1243.5 where the court is permitted to alter the amount deposited and can and will increase the amount to the amount of the judgment. By having a complete procedure under Section 1243.5, we do not feel that Section 1254 will have to provide for such cases requiring additional proceedings.

We wonder why the Commission has retained the provision that an order authorizing possession by a school district is not appealable? This is not consistent with the recommendation of the Commission and does not treat all condemnors alike.

The next change which has been made is to provide that the plaintiff first must deposit the amount of the judgment in court for the defendant and then, as in the case of Section 1243.5, may apply ex parte to the Superior Court for an order for possession. In most cases the payment of the full judgment into court is sufficient to protect the defendant. If the defendant should feel that additional sums are necessary, we have provided a procedure similar to that contained in Section 1243.5 for him to move for an order altering the amount of the deposit. The ex parte order will therefore eliminate the necessity of an appearance by the defendant and the plaintiff in the usual case where the full amount of the judgment is adequate.

We have added a provision for a notice prior to the time that the plaintiff may take possession. This notice is to be given to the defendants or to their attorneys. We believe that as the judgment has already been entered, a ten-day notice is sufficient to protect the defendants. This conforms to C.C.P. Section 1243.5.

C.C.P. Sec. 1254 (3). This section provides for the altering of the deposit in court and incorporates the provision for the additional deposit presently contained in Section 1254.

C.C.P. Sec. 1254 (4), (5) and (7). These sections are identical to the ones previously contained in Section 1254 and are merely a breakdown of the section. There has been one deletion from the third paragraph of Section 1254 which provides that in ascertaining the amount to be paid into court, the court shall take care that the same be sufficient and adequate. This sentence serves no useful purpose and consequently we have deleted it.

C.C.P. Sec. 1254 (8). This is the provision which the Law Revision Commission has added providing that the plaintiff may take an appeal even though it has deposited and taken possession of the property.

C.C.P. Sec. 1254 (9). We have added this section to provide that the condemnor may recover any excess withdrawn by a defendant. Nine jurisdictions include within their "immediate possession" statutes a provision which requires the land owner to repay to the condemnor the difference in the amount withdrawn and the final award in the event the award is less than the sum deposited and paid over to the property owner.** This additional provision for re-

** Arkansas, Delaware, Illinois, Louisiana, Minnesota, New Jersey, Tennessee, District of Columbia and Alaska (Highway Research Board Special Report 33).

payment of any overage would parallel the provision contained in Code of Civil Procedure Section 1254.7.

C.C.P. Sec. 1254.5. The only change which we have in this section is to refer back to Section 14 of Article I of the Constitution instead of Section 1243.5, because we do not know what the amendment to the Constitution or Section 1243.5 will be. We would also suggest that this section be renumbered to Section 1243.6 to keep the sections dealing with immediate possession together.

C.C.P. Sec. 1254.7. We have made several changes in wording in this section. The first change from the Commission's draft is to retain the reference to the deposit as being security since this is the present wording of the Constitution and is the theory and basis for immediate possession prior to judgment.

The next change was made in reference to the amount which a party may withdraw. We used the terms that were originally in the statute and merely deleted the 75% figure thus increasing it to 100%. As there cannot be a full hearing at this stage of the proceeding, we deleted the reference to the court making a finding in regard thereto. We also feel that since the basic theory of the deposit is security only, the amount to be withdrawn should be limited to the amount originally deposited because this is really an offer of the condemnor to purchase the property at that amount. If the defendant could increase the deposit (perhaps many times the amount offered by the condemnor, and many times the amount finally determined to be just compensation and withdraw the full amount it would change the whole theory of an offer. The property owner may well have difficulty in repaying this excess amount deposited. Also the property owner would have had the use of money for a period of time when he was not entitled thereto and thus denying the public of the use of such funds for that period.

A new thought should be incorporated into the statute, in regard to the withdrawal, that while the maximum sum which may be withdrawn cannot exceed the amount originally deposited, the court in determining the amounts to be withdrawn shall consider ~~the protection~~ given plaintiff in assuring the return of any moneys paid out in the event that the amount withdrawn exceed ~~the~~ amount to which the defendant is entitled as finally determined in the condemnation proceeding. We have also provided that after a judgment has been entered an additional sum may be withdrawn up to a total sum not exceeding the amount of the judgment. Again in determining how much should be withdrawn, the court should also consider the protection to the plaintiff in assuring the return of excess withdrawals. We did not feel that it was necessary to

add a provision for an increase in the deposit to the amount of the judgment. This is taken care of by the provision that the court, on motion, may at any time alter the amount of the deposit.

We suggest that the last sentence of Section 1254.7 be made a separate paragraph as the subject matter is not directly related to the other parts of this section and in order to draw it to the attention of defendants when they wish to withdraw under this section.

Although we have not done so in our draft, we suggest that this section be renumbered Section 1243.7 for the same reasons mentioned in connection with Section 1254.5. Both of these sections deal with the immediate possession statute.

C.C.P. Sec. 1255a (1). We have deleted the first phrase relating to the time that title has vested in the plaintiff because, as discussed previously, we do not feel that title should pass until the recording of the final order. We have also added after the terms "final judgment" the phrase "as defined in Section 1265.7", since the term "final judgment" has various meanings in different factual situations.

C.C.P. Sec. 1255a (2). We have deleted this subsection from our draft of the statute since it unduly restricts the right of abandonment. Our reasons for this conclusion are contained above in our comments on the Commission's recommendation.

C.C.P. Sec. 1255a (3). We are in general agreement with this provision. We have renumbered the section as 1255a (2) and have added to the section a provision codifying the present law in regard to the allowable costs on an abandonment. These costs are only those additional costs which "result from the abandonment". We agree with the provision limiting the time to 40 days prior to pretrial, rather than trial.

C.C.P. Sec. 1255a (4). We have eliminated this section since if Section 1255a (2) is eliminated and the title does not pass until the filing of the final order, there is no need for this section. The need for repassage of title under this section is another reason why title should not pass until the final order of condemnation is recorded.

C.C.P. Sec. 1255b (1). Our draft of this subsection eliminates subsection (b) with reference to the award

drawing interest from the date that title to the property sought to be condemned vests in the plaintiff. This deletion is in accordance with our previous suggestions and amendments concerning vesting of title. Under our suggestion title would not vest in the condemnor until the final order is recorded, which is after the date of the entry of judgment in condemnation. We agree with the change in reference from "lawful" to "legal" interest rates.

Subsection (c) has been relettered as subsection (b) and clarified to refer to the date that the plaintiff is authorized to take possession of the property. We have eliminated the reference to any damage resulting from the taking since that must necessarily occur after the taking of possession and is therefore surplusage. This also clarifies our position under Section 1243.5 that while the date authorizing possession should be specified in the order for immediate possession, this date should not be made jurisdictional in regard to the notice. Our recommendation clarifies the position that where notice is served within 20 days of the date specified in the order, the possession is merely postponed. Nevertheless, the date specified in the order is a date certain for computation of interest and will cause no controversy, whereas an uncertain date, such as the date that possession is taken, can lead to uncertainties.

C.C.P. Sec. 1255b (2). The only change we have made in this subsection is in part (b) in adding the words "or paid into court pursuant to the judgment" in order to incorporate into this section our present practice and procedure.

Section 12. The reference to Section 2 of the act to amend the sections of the Code of Civil Procedure relating to eminent domain should be deleted if the Commission adopts our recommendation that Section 1248 of the Code of Civil Procedure should not be amended and that in lieu thereof Section 4986.1 be added to the Revenue and Taxation Code.

Article I, Section 14. The proposed constitutional amendment of the Law Revision Commission has been revised to retain the present authorization for immediate possession for right of way and reservoir purposes and to authorize the Legislature to expand to other uses and agencies the right of immediate possession.

The only other basic change which we have made is to retain the original wording of the Constitution that the deposits under an order for immediate possession are "security for the payment of just compensation" rather than "the probable just compensation". As indicated above, unless there

is a complete hearing, there cannot be a determination of just compensation. Consequently, security is more nearly descriptive of what actually takes place.

We have deleted the reference to prompt payment of the deposit because, as indicated in our discussion in regard to Section 1254.7, the entire amount of money on deposit cannot always be paid without working undue hardships on the condemnee if he is forced to return it. Additionally, it should be noted that it cannot be ascertained who is entitled to the money and how much he is entitled to until the final determination of the litigation.

We have also deleted the reference to the Legislature's power to prescribe the procedure, the purposes and the agencies by which immediate possession of property may be taken. This is already authorized under our proposed revision and the case law of the State.

We dislike the incorporation into the constitutional amendment the reference to the prompt payment of just compensation since such amendment implies to the voters of the State of California that just compensation is not now being promptly paid. Just compensation must be promptly paid "within 30 days after final judgment" pursuant to Code of Civil Procedure Section 1251. Also this amendment solves no practical problems presently existing and may lead to legal developments unfair to the condemnor.

The problems concerning the amendments of "prompt payment" and "probable just compensation" are very similar to that revolving around the Commission's proposed change in the date of transfer of title to the condemnor from the date of the recordation of the final order to the date of the authorization for taking possession. Such a proposed constitutional policy would apparently recognize the property owner's right to immediate payment at the time the property is taken from his possession so that the owner might meet the expenses of locating and purchasing property to replace that taken and of moving to the new location. Any adoption of this policy, however, could not change the fact that it is impossible to have just compensation determined by the courts until well after the authority to possess the property is given to the condemnor. The court's decision as to what amount constitutes just compensation will almost always differ from a previous estimate made by anyone aside from the ultimate trier of fact. Therefore, an almost impossible burden is placed on the condemnor and on the trial court to accurately estimate probable just compensation at the time authorization to possess the property is issued. It would appear that the total effect of this new constitutional

policy, plus providing that 100% of the security deposit can be withdrawn and providing title change at the time possession is authorized and providing that the property owner must withdraw the deposit or lose the interest thereon or the use thereof, would be to change the nature of the deposit from one of security to one of an anomolous nature, requiring a determination of just compensation be made before trial, by persons having no power to ultimately make such a determination and subject to change at any time before the trial, or finally at the trial.

We feel that this is unrealistic and places an undesirable burden on the condemnor and on the courts, which may give rise to further abnormalities in the law. Further, this policy, together with the supplementary changes proposed to be made within C.C.P. Sec. 1243.5, invites a continued series of contests as to probable just compensation from the day the condemnor applies for an order of possession until the time of the final disposition of that issue at the trial. We believe that one trial on the issue of just compensation is adequate and that this procedure can be retained if the deposit were kept as a security deposit subject to withdrawal, rather than an attempted estimate of what the ultimate trier of fact will finally determine is just compensation for the taking of the property.

SUPPLEMENTARY LEGISLATION

We have made no revision of Section 1243.5 as we feel that the first revision contained herein of Section 1243.5 is sufficient at the present time. As noted in our comments under the previous heading SUPPLEMENTARY LEGISLATION, we feel that the specific agencies and the specific public purposes should be specified by the legislature rather than giving a blanket power of immediate possession to all agencies.

We also feel that subsection (6) (b) should not give the court the power to determine the necessity for the taking of possession or in the alternative the section could be limited to those agencies which do not have a conclusive presumption as to necessity.

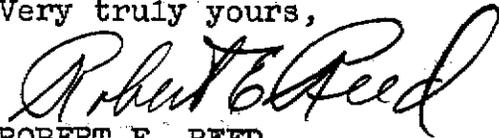
We feel that our revision of Section 1243.5 would be sufficient should the constitutional amendment be passed by merely specifying the particular agencies and public uses for which immediate possession may be taken.

We again wish to state our appreciation for being

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kept advised of the Commission's work in the field of eminent domain. We hope that our suggestions and comments on the eminent domain law concerning passage of title and immediate possession are helpful to the Commission. If you or the Commission desires further comments or suggestions, please do not hesitate to call upon us. If extra copies of reports to the Commission of other public agencies or private individuals are available, we would appreciate your mailing a set to us. If you desire, a representative of this office can be present at the Commission meeting which considers these suggestions and comments. We are enclosing sufficient copies of this letter in order that you may distribute one to each member of the Commission so that they may be advised of our thoughts on this subject.

Very truly yours,

ROBERT E. REED
Chief Counsel

An act to add Section 1249.1 to, to amend Sections 1243.5, 1249, 1253, 1254, 1254.5, 1254.7, 1255a and 1255b of, the Code of Civil Procedure, and to add Section 4986.1 to the Revenue and Taxation Code, relating to eminent domain.

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

Section 1. Section 1243.5 of the Code of Civil Procedure is amended to read:

1243.5. (a) (1) In any case in which the State, a county, a municipal corporation, a public corporation, or a district takes immediate possession of lands to be used for reservoir purposes, or a right of way, plaintiff is entitled pursuant to Section 14 of Article I of the Constitution of this State; to take immediate possession of the property sought to be condemned, the plaintiff may, at any time after the issuance of summons apply ex parte to the court for an order fixing security in such amount as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto and after deposit of such security may apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property sought to be condemned.

(2) Upon a showing by the plaintiff that it is entitled to acquire the property by eminent domain and that the plaintiff is entitled pursuant to Section 14 of Article I of the Constitution to take immediate possession thereof,

the court shall issue such orders. The order authorizing immediate possession shall:

(a) Describe the property and the estate or interest therein sought to be acquired, by reference to the complaint.

(b) State the purposes of the condemnation.

(c) State the amount of the deposit.

(d) State the date upon which the plaintiff is authorized by the order to take possession of the property.

(3) the State; or such county; municipal corporation; public corporation; or district; as the case may be; shall; At least three 20 days prior to the time possession is taken, the plaintiff shall personally serve make personal service on or mail to the record owner or owners of the property; if known; and on the person or persons; if any; in possession of the property; if any; either a copy of the order of the court authorizing such possession or a notice thereof. If the order or notice is mailed it shall be sent by registered or certified mail and; if sent to the owners; it shall be addressed to them such person at their his last known address. A single service upon or mailing to those at the same address shall be sufficient. The latest secured assessment roll in the county where the property is located may be used to ascertain the names and addresses of the owners of the property. The time herein specified may, for good cause shown by affidavit of the plaintiff, be

shortened for a period not less than three days.

(4) At any time after the court has made an order authorizing immediate possession, the court may, upon motion of any party to the eminent domain proceedings, alter the amount that the plaintiff is required to deposit in accordance with Article I, Section 14, of the California Constitution.

(5) At any time after the court has made an order authorizing immediate possession and before the plaintiff has taken possession pursuant to such order, the court, upon motion of the owner of the property or an interest therein or of an occupant of the property, may vacate the order if the court determines that the taking is not for the purposes or uses specified in Article I, Section 14, of the California Constitution.

(6) No reference shall be made to the amount deposited or withdrawn or evidence introduced in fixing such deposit or withdrawal in the trial of the issue of compensation.

(7) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by making a deposit and taking possession pursuant to this section.

Sec. 3. Section 1249 of said code is amended to read:

1249. Subject to Section 1249.1, for the purpose of assessing compensation and damages the right thereof thereto shall be deemed to have accrued at the date of the

issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in Section 1248; provided, that in any case in which the issue is not tried brought to trial within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the commencement of the trial. Nothing in this section contained shall be construed or held to affect pending-litigation. If an order be made letting the plaintiff into possession, as provided in section one thousand two hundred fifty-four, the compensation and damages awarded shall draw lawful interest from the date of such order. No-improvements-put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

Upon a new trial after the granting of a motion for a mistrial, or after the granting of a motion for new trial or after an appeal, the compensation and damages shall be deemed to have accrued at the date used in the original trial; provided that in any case in which the new trial is not brought to trial within eight months after the date of the order granting the mistrial or new trial or the date of filing of the remittitur, whichever date

is later, unless the delay is caused by the defendants, the compensation and damages shall be deemed to have accrued at the date of the commencement of new trial.

Sec. 4. Section 1249.1 is added to said code, to read:

1249.1. All improvements pertaining to the realty that are on the property on the date of the service of summons and which enhance its value for its highest and best use shall be considered in the assessment of compensation, damages and special benefits unless they are removed or destroyed either before title to the property or possession of the property is taken by the plaintiff, whichever is earlier. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

Sec. 5. Section 4986.1 is added to the Revenue and Taxation Code, to read:

4986.1. If the amount of the current tax is paid by the property owner prior to the time title was transferred to, or possession taken by the public agency, that pro rata share of the current taxes canceled by order of the court shall be refunded to the property owner by the tax collecting agency upon application of the property owner.

Sec. 6. Section 1253 of the Code of Civil Procedure is amended to read:

1253. (1) When payments have been made and the bond given, if the plaintiff elects to give one, as required by the last two Sections 1251 and 1252, the court must shall make a final order of condemnation, which must shall describe the property condemned, the estate or interest acquired therein and the purposes of such condemnation. A certified copy of the order must shall thereupon be filed in the office of the recorder of the county in which the property is located. ; and thereupon

(2) The title to the property described therein in the final order of condemnation shall vests in the plaintiff for the purposes described therein specified upon the date that a certified copy of the final order of condemnation is filed in the office of the recorder of the county.

Sec. 7. Section 1254 of said code is amended to read:

1254. (1) In any case in which the plaintiff is not in possession of the property sought to be condemned, the plaintiff may, at any time after trial and judgment entered or pending an appeal from the judgment to the Supreme Court, whenever the plaintiff shall have paid after payment into court, for the defendant, the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs

that may be recovered in said proceeding; as well as all damages that may be sustained by the defendant; if, for any cause; the property shall not be finally taken for public use; apply ex parte to the superior court in which the proceeding was tried for an order authorizing may; upon notice of not less than 10 days; authorize the plaintiff; if already in possession; to continue therein; and if not; then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. In an action for condemnation of property for the use of a school district; an order so authorizing possession or continuation of possession by such school district is not appealable.

(2) At least 10 days prior to the time possession is taken the plaintiff shall mail to the defendants or to their attorneys, either a copy of the order of the court authorizing such possession or a notice thereof. Such mailing shall be sent by either registered or certified mail. A single service upon or mailing to those at the same address shall be sufficient.

(3) At any time after the court has made an order authorizing immediate possession, the court may, upon motion of any party to the eminent domain proceedings, alter the amount that the plaintiff is required to deposit

and may require the plaintiff to deposit an additional sum to provide a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use.

(4) The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same full amount of the judgment at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court, or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation. In ascertaining the amount to be paid into court, the court shall take care that the same be sufficient and adequate.

(5) The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff

from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceedings), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided.

(6) 1. The court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If the court orders deposit in the State Treasury, it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and to safely keep the same in the Condemnation Deposits Fund, which fund is hereby created in the State Treasury and for such duty he shall be liable to the plaintiff upon his official

bond. Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Sections 16430, 16431 and 16432, Government Code, or deposited in banks as provided in Chapter 4 of Part 2 of Division 4 of Title 2, Government Code. The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the Treasurer shall invest or make deposits in bank accounts in accordance with the designations.

2. For the purposes of this section, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

3. Interest earned and other increment derived from investments or deposits made pursuant to this section, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the Treasurer in taking and making delivery of bonds or other securities under this section, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and

deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

(7) In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

(8) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by depositing the amount of the judgment and such further sum as may be required by the court and taking possession of the property pursuant to this section.

(9) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the condemnation proceeding shall be returned to the party who deposited it, and the superior court in which the condemnation proceeding is pending shall enter judgment therefor against the defendant.

Sec. 8. Section 1254.5 of said code is amended

to read:

1254.5. When money is paid into court required to be deposited as provided by Section 14 of Article I of the Constitution, the court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section it shall be held, invested, deposited, and disbursed in the manner specified in Section 1254, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that action.

Sec. 9. Section 1254.7 of said code is amended to read:

1254.7. At any time after money has been deposited as security as provided in Section 14 of Article I of the Constitution for the condemnation of any property or interest in property for state highway purposes, upon application, in the manner hereinafter provided, of the party whose property or interest in property is being taken, the court may order from the money deposited in connection with such property or interest an amount a sum not exceeding 75 percent of the amount originally deposited for the respective property or interest to be paid to such party. Such application shall be made by affidavit wherein the applicant shall set forth his interest in the property

and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff and no withdrawal shall be made until at least ~~twenty~~(20) days after such service of the application, or until the time for all objections has expired, whichever is later. Within ~~said twenty~~ (20) days the 20-day period, the plaintiff may object to such withdrawal by filing an objection ~~thereof~~ thereto in court on the grounds that other persons are known or believed to have interests in the property. In this event the plaintiff shall attempt to personally serve on such other persons a notice to such persons that they may appear within ~~ten~~ (10) days after such service and object to such withdrawal, and that failure to appear will result in the waiver of any right to such amount withdrawn or further rights against the plaintiff to the extent of the sum withdrawn. The plaintiff shall state in its objection the names and last known addresses of other persons known or believed to have an interest in the property, whether or not it has been able to serve them with such notice and the date of such service. If the plaintiff in its objection reports to the court that it is unable to personally serve persons known or believed to have interests in the property within ~~said twenty~~ the (20) day period, said money shall not be withdrawn until the applicant causes such personal service to be made. If such persons so served appear and object to the withdrawal, or if the plaintiff so requests, the court shall thereupon

hold a hearing after notice thereof to all parties and shall determine the amounts to be withdrawn, if any, and by whom, to a total amount sum not exceeding 75 percent of the amount originally deposited. After a judgment has been entered and upon proper application pursuant to this section, the court may determine that an additional sum may be withdrawn to a total sum not exceeding the amount of the judgment. In determining the amount to be withdrawn at any time, the court shall consider the protection given plaintiff in assuring the return of any moneys paid out in the event that the amount withdrawn exceeds the amount to which the defendant is entitled as finally determined in the condemnation proceeding. No persons so served shall have any claim against the plaintiff for compensation for the value of the property taken or severance damages thereto, or otherwise, to the extent of the amount withdrawn by all parties; provided, the plaintiff shall remain liable for said compensation to persons having an interest of record who are not so served. If withdrawn, the receipt of any such money shall constitute a waiver by operation of law to of all defenses in favor of the person receiving such payment except with respect to the ascertainment of the value of the property or interest in the manner provided by law; and title to the property or interest as to which money is received pursuant to this section shall vest in the State as of the time of such payment. Any amount so paid to any party shall be credited upon any judgment

providing for payment and shall be considered payment upon the judgment as of the date the withdrawal is made so that no interest shall be payable upon the amount so withdrawn after the date of its withdrawal.

Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the condemnation proceeding shall be returned to the party who deposited it, and the court in which the condemnation proceeding is pending shall enter judgment therefor against the defendant.

Sec. 10. Section 1255a of said code is amended to read:

1255a. (1) The plaintiff may abandon the proceedings at any time after the filing of the complaint and before the expiration of thirty days after the final judgment as defined in Section 1264.7, by serving on defendants and filing in court a written notice of such abandonment; and failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceedings.

(2) Upon such abandonment, express or implied, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their additional costs and disbursements resulting from the abandonment, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney

fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided, however, that upon judgment of dismissal on motion of plaintiff, defendants, and each of them, may file a cost bill within thirty (30) days after notice of entry of ^{such} judgment; that said costs and disbursements shall not include expenses incurred in preparing for trial where the said action is dismissed forty days or more prior to the time set for the trial of pre-trial conference in the said action or if no pre-trial conference is set, the time set for the trial of the action.

Sec. 11. Section 1255b of the Code of Civil Procedure is amended to read:

1255b. If the plaintiff in a condemnation proceeding obtains an order from the court for possession of the property sought to be condemned prior to the trial of the action; then (1) The compensation and damages awarded in a condemnation proceeding shall draw lawful legal interest from the effective date of said order, earliest of the following dates:

(a) The date of the entry of judgment.

(b) The date that the plaintiff is authorized to take possession of the property sought to be condemned.

(2) The compensation and damages awarded in a condemnation proceeding shall cease to draw interest on the earliest of the following dates:

(a) As to any amount withdrawn pursuant to Section

1243.5 or Section 1254, the date that such amount was with-
drawn by the person entitled thereto.

(b) As to any amount paid to the person entitled
thereto or paid into court pursuant to the judgment, the
date of such payment.

Sec. 12. This act applies to all actions or proceedings in eminent domain pending in the courts at the time this act takes effect in which no order authorizing the plaintiff to take possession of the property sought to be condemned prior to the final order of condemnation has been made prior to the effective date of this act.

Section 3 of this act does not apply to any action or proceeding pending in the courts at the time this act takes effect.

A resolution to propose to the people of the State of California an amendment to the Constitution of the State, by amending Section 14 of Article I thereof, relating to eminent domain.

Resolved by the Senate, the Assembly concurring,
That the Legislature of the State of California at its 1961 Regular Session commencing on the 2nd day of January, 1961, two-thirds of the members elected to each of the two houses of the Legislature voting therefor, hereby proposes to the people of the State of California that the Constitution of the State be amended by amending Section 14 of Article I thereof, to read:

Sec. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner; and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation; which Except as provided in Section 23a of Article XII of this Constitution, such just compensation shall be ascertained by a jury, unless a jury be waived,

as in other civil cases in a court of record, as shall be prescribed by law; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, or other agency authorized by statute the aforesaid State or municipality or county or public corporation or district or agency aforesaid may take immediate possession and use of any right of way, or lands to be used for reservoir purposes or other public use authorized by statute, required for a public use whether the fee thereof or an a lesser estate, interest or easement therefor be sought, upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such the taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said the eminent domain proceedings, after such notice to the other parties as the court may be prescribed by law,

alter the amount of such security so required in such proceedings. The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier.

Offices of
The County Counsel
of Los Angeles County
Suite 1100 Hall of Records
Los Angeles 12, California

September 2, 1960

California Law Revision Commission
School of Law
Stanford, California

Attention: Mr. John H. DeMouilly

Re: Recommendations relating to proposals of
the Law Revision Commission

Gentlemen:

This office has been furnished a copy of "A STUDY RELATING TO TAKING POSSESSION AND PASSAGE OF TITLE" prepared by the private consultant to the Law Revision Commission and a copy of the "TENTATIVE RECOMMENDATION AND PROPOSED LEGISLATION" of the California Law Revision Commission Relating to "TAKING POSSESSION AND PASSAGE OF TITLE IN EMINENT DOMAIN PROCEEDINGS".

Our comments have been requested on the above study and proposals and we have set forth specific responses to the proposed legislation and the study upon which the proposals are based.

Preliminarily, we wish to advise you that this office acts as attorney for numerous agencies having the power of eminent domain. Some of these agencies, such as the County of Los Angeles and the Los Angeles County Flood Control District, have and constantly exercise the right of immediate possession in their acquisitions for road, flood control channels, debris basins and the like. By reason of this background, we have considerable experience in dealing with the legal basis for those proceedings and in the practical effect on the condemnor and condemnee resulting from their exercise.

We do not agree with the conclusions of the consultant that the subject is replete with vexing questions and numerous unsettled problems. We are not aware of any questions arising concerning whether title should be transferred on some date other than the recordation of the final order in condemnation.

Questions of tax liability and interest payments we believe

have been settled:

See Revenue and Taxation Code, Sec. 4986, re proration of taxes;
People v Peninsula Title Guaranty Co., 47 C2 29, re assessments;
Bellflower School District v Skaggs, C2, re interest on the award;
CCP 1255b re interest on judgment where immediate possession.

Turning to the specific proposals we have the following comments:

1. Order of Immediate Possession: We can see no useful purpose being accomplished in the enactment into a statute of procedures presently used in obtaining an ex parte order of possession. Those safeguards sought by such a statute are identical with those daily afforded under present procedures.

2. Notice of order to owners and occupants: In 1957 the legislature added CCP 1243.5 to require 3 days notice before possession is taken. At this time the legislature heard arguments in favor of a greater period of time and those pointing to the necessity for retaining the immediacy of such a right.

The reference to the latest secured assessment roll as the source of owners of property is not a novel concept in these proceedings. It is used in numerous county and municipal improvement act proceedings to give owners notice of hearings, etc. and through experience has been demonstrated as the source most likely to give current reliable information as to ownership. We do not know what other "records" would furnish a better reference.

3. Delay in effective date of order: We have examined the Federal procedure in this matter of delay in securing possession and have conferred with attorneys familiar with the actual exercise of the power and their experience has shown that such a delay is not warranted. It would seem to us that if hardship cases had developed through the present exercise of this power (and we are not aware of any) then there might be good reason for consideration, a delaying procedure. It is important to consider that the type of improvement being constructed in these cases is usually a freeway, road or flood control channel which has an effect on and involves much more

than just each parcel taken. We have in the past, with considerable success, relied upon the public officials charged with the responsibility for constructing these works to see that owners are given sufficient time to properly move. Absent abuses of this discretion, we do not agree that a statute should be enacted which provides for this unnecessary extension.

4. Withdrawal of deposit: We agree that the owner entitled to the award should be entitled to 100% of the deposit. We also believe the provisions of CCP 1254.7 should be extended to all cases where immediate possession is taken..

5. Vacating the order of immediate possession: This proposal seems to spring from a concern that the legislative bodies of the various public agencies might designate certain private property as necessary for a public improvement when such might not be the case. It should first be pointed out that the vast majority of those "takings" by immediate possession emanate from public bodies where the legislative determination of "necessity" is conclusive upon proper adoption of the resolution. See also People v Chevalier, 52 C2 299. In the Chevalier case, the court recognized the undesirable consequences that could flow from contents regarding necessity where the one parcel is but a part of a substantial project in stating "*** would open the door to endless litigation, and perhaps conflicting determinations on the question of 'necessity' in separate condemnation actions brought to obtain the parcel sought to carry out a single public improvement." We have examined the California cases and are aware of no case where "necessity" has ever been successfully raised.

We suggest also that it is certainly within the power of the court to vacate a previously made order prior to possession. If such a procedure be adopted, we would also think that an appropriate writ proceeding would be far speedier than an appeal in resolving the question.

Possession Pending Appeal: We are in wholehearted agreement with this proposal.

Passage of Title: We have no objection to these proposals.

Compensation for Improvements: We do not believe that there should be any question but what the condemnee is entitled to the value of his improvements to the extent that they contri-

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bute to the value of the real property. We believe the law is abundantly clear on this point. If a statute is proposed which attempts to spell these things out, it should also consider the experiences of certain Eastern states where move-on houses were placed in the path of proposed freeways for the purpose of enhancing damages. This should not be allowed.

Taxes and Special Assessments: Our only question on this proposal is whether the refund should come from the condemning agency or the tax collecting agency.

Abandonment by the Condemnor: We again are not aware of any hardship cases as could exist. We do not believe that unfounded concern for such cases should be the basis for statutory exactments [sic] particularly where many years of experience and many years of going through such procedures have failed to create such a case. A possible answer to the concern expressed is to provide that where possession is taken, money on deposit withdrawn, and title passes, then the public agency cannot abandon.

Interest: We agree with the proposals regarding interest.

Constitutional Revision and Supplementary Legislation: We are in agreement with the proposed constitutional revisions. We cannot agree on a piece-meal determination as to the propriety of taking possession for the same reasons set for regarding contests of "necessity". It would indeed be unfortunate for a portion of a particular improvement to be delayed because of an adverse ruling on possession when all other parcels were approved.

We appreciate the opportunity to comment on the proposed legislation. We hope our comments and recommendations serve to acquaint you with the benefit of our experience in this field.

Yours very truly,

HAROLD W. KENNEDY, County Counsel

/s/ Richard A. Del Guercio

By Richard A. Del Guercio
Deputy County Counsel

RDG/Jcu

(36)

DION R. HOLM

City Attorney

San Francisco 2, California

August 31, 1960

John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Re: TENTATIVE RECOMMENDATIONS OF THE CALIFORNIA LAW REVISION
COMMISSION RESPECTING TAKING POSSESSION AND PASSAGE OF
TITLE IN EMINENT DOMAIN PROCEEDINGS.

Dear Mr. DeMouilly:

Your letter dated June 27 enclosing study and tentative recommendations respecting the above entitled matter have been received.

The study and recommendations have been reviewed and I am pleased to submit my comments:

I.

Constitutional Amendment With Implementing Legislation.

The California Law Revision Commission has concluded that the provisions of Section 14, Article I, of the State Constitution which grant the right of immediate possession are too narrow in scope and defective. These provisions grant the right of immediate possession only to specified public agencies in right of way and reservoir cases. Moreover, they do not assure the property owner that he will actually receive compensation at the time his property is taken.

It is tentatively recommended that the present provisions of the Constitution respecting such right to immediate possession should be repealed and the Constitution amended to grant the legislature power to determine which agencies should have the right to take immediate possession and the procedure to be followed subject to the constitutional right of the owner to be promptly compensated.

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It is proposed by the Commission that in the event such constitutional amendment is adopted legislation should be enacted extending the right of immediate possession to all condemners.

It is also recommended that any such implementing statute should permit the condemnee promptly to raise the question of whether there is necessity for the condemnor to obtain possession prior to judgment.

Since possession cannot be obtained other than for right of way or reservoir purposes until judgment, many needed public improvements are unduly delayed even though there is no real issue respecting the right of the public to take the property. Moreover, delay in the acquisition of property frequently results in increasing costs to such an extent that the improvements cannot be constructed with the funds available or must be drastically curtailed in scope.

Certainly the right of immediate possession should prove beneficial to municipalities and other public agencies. While amending the Constitution with the enactment of the proposed implementing legislation may prove difficult to accomplish, the changes should be urged.

II.

The following legislation is also tentatively recommended by the California Law Revision Commission.

1. Order of immediate possession.

While there are no statutes respecting procedure to be followed in obtaining an order of immediate possession in practice the order of possession is issued on an exparte application. The Commission believes that the present procedure need not be changed but should be codified and that the order should not be issued unless the court determines that the condemnor is entitled to take the property and obtain immediate possession.

Codification of existing procedure should not be objectionable.

2. Notice of order to owners and occupants.

Presently only three days notice to owners and occupants is required before possession is actually taken. Moreover, the condemnor is permitted to determine the names and addresses of the owners of the property from the latest assessment roll.

The Commission recommends that at least 20-days notice should be required and that service should be made on all persons revealed by the records to have an interest in the property. Since all persons having an interest in the property should be given adequate notice there should be no objection to this proposal.

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3. Delay in effective date of order.

Within the 20-day period after notice is given the owner or occupant of the property should be permitted to apply to the court for an order delaying the effective date of immediate possession in order to prevent unnecessary hardship. There is no such provision in the existing law. This proposal may on occasion prove beneficial to municipalities when other condemnors seek to acquire their property. It should not prove objectionable.

4. Withdrawal of deposit.

While the Constitution presently requires the condemnor in cases of immediate possession to make a deposit and gives the condemnee the right to challenge the amount deposited there is no right to withdraw any of the deposit unless the property is taken for highway purposes in which event the condemnee may withdraw only 75%.

Thus the condemnee must vacate the property and move to a new location when there may be no money available from the condemnation.

The Commission recommends that persons having an interest in the property be authorized to withdraw the entire deposit. This appears to be fair and should not be objectionable.

5. Vacating the order of immediate possession.

The Commission recommends that the owner or occupant of the property should have the right to contest the condemnor's right to take the property by eminent domain or his right to obtain immediate possession of the property, or both, by motion to vacate the order for immediate possession prior to the time possession is taken.

It is further recommended that such an order should be appealable, but that while the appeal should not automatically stay proceedings under the order of immediate possession both the trial and appellate courts should have the right to stay proceedings until the appeal is decided.

Presently there is no provision in the existing law that permits the condemnee to contest the right of the condemnor to take property prior to the time possession is taken.

The issue of public use which may be used as a defense in every condemnation proceeding and the question of necessity which may be raised under certain limited circumstances are of very little aid to the condemnee if the condemnor has already demolished all improvements on the property, denuded the site of vegetation and inundated the property with water. This appears to be a fair proposal and should not be objectionable.

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6. Possession pending appeal.

The Commission recommends that the statutes permitting the condemnor to take possession pending appeal should be revised to provide that taking possession shall not constitute a waiver of the right of appeal.

The existing rule holding that a condemnor waives the right to appeal on taking possession is unfair to the condemnor and should be changed by appropriate legislation.

7. Passage of title.

The Commission recommends that if possession is taken prior to the final order of condemnation title should pass when the condemnor is authorized by the order of possession to take the property. The condemnee at that time loses substantially all vestiges of title and there should be no objection to this proposal.

8. Compensation for improvements.

The Commission recommends that legislation should be enacted providing that the condemnee is entitled to compensation for the improvements on the property on the date of the service of the summons unless they are removed or destroyed prior to the date the condemnor takes title to or possession of the property. This proposal should prove to be very helpful since it would clarify existing law. Its adoption should be urged.

9. Taxes and special assessments.

The Commission recommends that the condemnor should be required to reimburse the condemnee for the prorata share of the taxes that have been paid and are attributable to the portion of the tax year following the date that the condemnor acquires title to or possession of the property.

While property taxes and special assessments are prorated from the date the condemnor either takes title to or possession of the property where the condemnor is a public agency the condemnee presently loses the benefit of the proration if he has already paid such taxes or assessments since there is no provision for refund by the taxing authority or reimbursement by the condemnor. The condemnee should not lose the benefit of proration where he has already paid taxes or assessments and there should be no objection to this amendment.

10. Abandonment by the condemnor.

The Commission recommends that if the condemnor takes possession of the property prior to final order of condemnation, it should not have the right to abandon the proceedings unless the condemnee consents to the abandonment.

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C.C.P. Section 1255 (a) presently permits the condemnor to abandon the taking at any time after the commencement of the action and until 30 days after final judgment unless the condemnee can establish an estoppel such as was done in Times-Mirror vs. Superior Court (1935) 3 Cal. 2d 309. The proposed amendment would not appear to be objectionable.

11. Interest.

The Commission recommends the enactment of legislation providing that interest ceases to accrue upon payment of the award or if funds are deposited in court upon the date the deposit is available for payment to the person entitled to it.

Presently interest runs from the date of entry of judgment unless possession is taken prior to entry of judgment in which case interest is computed from the effective date of the order for possession.

While the condemnee presently has the right to withdraw up to 75% of a deposit made by the condemnor in highway acquisition cases he may refuse to withdraw the deposit and force the condemnor to pay interest on the full amount of the judgment from the date of taking possession.

Certainly the condemnor should not be required to pay interest on money deposited simply because the condemnee neglects or refuses to withdraw it. The adoption of the proposed amendment should be urged.

Sincerely yours,

S/ DION R. HOLM
DION R. HOLM
City Attorney