

#36.20(1)

7/16/71

Memorandum 71-53

Subject: Study 36.20(1) - Condemnation Law and Procedure--The Right to Take
(Legislatively Declared "Public Uses"--Code of
Civil Procedure Sections 1264.1-1264.9)

SUMMARY

This memorandum presents for repeal Code of Civil Procedure Sections 1264.1-1264.6 and 1264.8-1264.9, relating to condemnation of toll road and toll bridge franchises. Section 1264.7 has broader procedural implications and will be considered separately at a later time.

BACKGROUND

Code of Civil Procedure Sections 1264.1-1264.9, dealing with condemnation of toll road and toll bridge franchises, were added to the code in 1937. It has been speculated that toll bridges and roads were becoming so prevalent that a special scheme dealing with their acquisition was necessary. See Work of 1937 California Legislature, 11 So. Cal. L. Rev. 1, 33-39 (1937) (attached as Exhibit I).

This speculation does not conform to present reality. Although up to the first decades of this century, local public entities were empowered to and did grant franchises to private parties to construct and operate toll roads and bridges, the 1929 Legislature vested exclusive authority in the Department of Public Works to issue these franchises while removing county authority to issue or renew them. See Sts. & Hwys. Code §§ 30800, 30810. Toll roads and bridges existing in August 1929 were permitted to remain in existence (Section 30811(a)), but the removal of county authority combined with a provision that a toll road automatically becomes a county highway upon the expiration of a franchise (Section 902) insured that, with the passage of time, county franchises for toll bridges and toll roads would gradually disappear.

Unless the Department of Public Works has granted franchises for toll roads and toll bridges (and every indication is that it has not--see Exhibit II), there appears to be no present application of the Code of Civil Procedure Sections 1264.1-1264.9. Over forty years have passed since the removal of county authority to grant these franchises, and it is highly likely that all franchises so granted will have expired.

In addition, the coverage of these code sections is so limited as to be of no practical consequence. And, in any event, the bulk of the provisions simply restate the general rules of eminent domain that would apply absent the provisions. See analysis, below.

ANALYSIS

The coverage of Sections 1264.1-1264.9 is quite restricted. Section 1264.1 provides the basic scope:

1264.1. Where the property sought to be condemned is a franchise of limited duration to collect tolls on any bridge or highway, the plaintiff may condemn the right to take such franchise as of a future date, which date shall be specified in the complaint and in the judgment of condemnation.

It should thus be noted that the section applies only to bridge and highway toll franchises of limited duration, which as pointed out above, will all have expired by now. Further, the section applies only to franchises of that type which are sought to be condemned as of a future date.

The repeal of these sections will thus affect little, if anything. It should be noted that Section 1264.1 does not in itself authorize condemnation of toll road franchises. Such authorization must be found in other sections. Under the Commission's proposed comprehensive statute, any person authorized to condemn for roads and bridges will be able to condemn toll franchises for

those purposes. See Eminent Domain Code § 101 ("property" defined). See also Cal. Const. Art. XII, § 8 (power of Legislature to take franchise); Pub. Util. Code § 1403 (local entities petition to Public Utilities Commission to condemn property and rights of utility); Code Civ. Proc. § 1240(5) (property that may be taken includes franchises).

Following Section 1264.1, which provides the basic scope of the franchise provisions, Sections 1264.2-1264.6 deal with various procedural and substantive problems involved in determining the damages or amount of compensation in cases coming under Section 1264.1. These provisions, to a large extent, duplicate the rules normally applicable in valuation proceedings. For a detailed discussion, refer to Exhibit I.

Section 1264.7 defines the terms "judgment" and "final judgment." These definitions are applicable to all eminent domain proceedings and will be considered in detail in the context of eminent domain procedure at a later time.

Section 1264.8 alters the normal rule prescribing when a judgment in an eminent domain action must be paid. This alteration is necessary if the scheme allowing condemnation as of a future date is to operate effectively. With the repeal of that scheme, Section 1264.8 will be of no further value and may be repealed.

Section 1264.9 is distinct from the other toll franchise sections that precede it and was enacted as a self-contained unit. See discussion in Exhibit I. It is of broader application than the other sections, relating to condemnation of toll roads and bridges (some of which do exist--see Exhibit II), as well as to condemnation of toll franchises.

The section declares that the court has jurisdiction to make the following determinations with regard to the liability of the condemnor to any city, county, "or other public mandatory":

- (1) Liability for taxes.
- (2) Liability for license fees.
- (3) Liability for franchise payments.
- (4) Liability for reversionary rights.

This statement of jurisdiction is unnecessary and may be repealed.

(1) Determination of liability for taxes generally is vested in the court, and substantive rules are provided in other sections. See Rev. & Tax. Code § 4986 and Code Civ. Proc. §§ 1252.1 and 1252.2.

(2), (3) Determination of liability for license fees and franchise payments to the city, county, "or other public mandatory," is obsolete since cities and counties may no longer issue toll franchises. The State Highway Fund is the depository for money received from such franchises, should they exist. Sts. & Hwys. Code § 30308.

In any case, the general jurisdictional statute to be incorporated in the Eminent Domain Code will provide the court adequate authority to determine whether the condemnor is liable for fees. Moreover, the Commission has previously determined that substantive rules governing important problems should be spelled out rather than a bare statement that the court has jurisdiction to decide the issue. As indicated above, the staff does not believe that the problem of obligations for toll franchise fees is significant enough to warrant a special set of rules.

(4) Determination of liability for reversionary rights in an entity generally is vested in the court by another section. See Code Civ. Proc. § 1247(2)(court may hear and determine all conflicting claims to the property).

CONCLUSION

Sections 1264.1-1264.6 and 1264.8-1264.9 of the Code of Civil Procedure have little or no present application and, in any case, they largely duplicate existing law. They should be repealed. Repealed sections with Comments are set out in Exhibit III.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

DEPARTMENT OF PUBLIC WORKS

1120 N STREET
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June 28, 1971

Mr. Nathaniel Sterling
Legal Counsel
California Law Revision Commission
School of Law--Stanford University
Stanford, California 94305

Dear Mr. Sterling:

In your letter of June 18, 1971, to the California Toll Bridge Authority, you called the Authority's attention to the current study of the California law of eminent domain. In that letter you pointed out that the Commission will consider, as part of its study, the disposition of Sections 1264.1 to 1264.9 of the Code of Civil Procedure which relate to the acquisition of private toll bridge and toll road franchises.

You have asked if there are any presently operating toll bridge franchises and whether it is the policy of the Department of Public Works to authorize new franchises pursuant to Streets and Highways Code Section 30800. As to any operating toll bridge franchises, to our knowledge there are none. There is, however, one privately owned interstate toll bridge known as the Cibola Bridge which spans the Colorado River near Blythe, California. Permission for the construction of this bridge was granted some years back by the U. S. Army Engineers after approval of the plans by the Highway Department of Arizona and the California Department of Public Works. This approval was given as required by the provisions of Federal law, specifically the General Bridge Act of 1946. It is possible that at some time public acquisition of this bridge may occur.

Insofar as the policy of the Department of Public Works to authorize the issuance of new franchises for toll bridge construction is concerned, all that can be said is that no applications have been filed for many years past. The Department has no established policy but would consider any application on its individual merits.

Sincerely

A handwritten signature in cursive script that reads "Richard C. East".

RICHARD C. EAST
Assistant Secretary
California Toll Bridge Authority

EXHIBIT III

CODE OF CIVIL PROCEDURE § 1264.1

Staff recommendation September 1971

Code of Civil Procedure § 1264.1 (repealed)

Sec. . Section 1264.1 of the Code of Civil Procedure is repealed.

~~1264.1.--Where the property sought to be condemned is a franchise of limited duration to collect tolls on any bridge or highway, the plaintiff may condemn the right to take such franchise as of a future date, which date shall be specified in the complaint and in the judgment of condemnation.~~

Comment. Section 1264.1 and its implementing Sections 1264.2-1264.6 and 1264.8, relating to condemnation of toll franchises of limited duration as of a future date, are not continued. These sections were of extremely limited application and are presently of little or not significance, for there appear to be no existing toll bridge or toll road franchises. In addition, these sections largely restated the rules of eminent domain that would be applicable in their absence. See Work of the 1937 California Legislature, 11 So. Cal. L. Rev. 1, 33-39 (1937).

For related provisions, see Eminent Domain Code Section 101 ("property" defined); Streets and Highways Code Sections 30800 and 20810 (granting franchises); Public Utilities Code Section 1403 (condemnation of utilities); Cal. Const., Art XII, § 8 (right of Legislature). See also former Code of Civil Procedure Sections 1238(4) and 1240(5) and Comments thereto (condemnation of toll bridges and roads, and of franchises).

Code of Civil Procedure § 1264.2 (repealed)

Sec. . Section 1264.2 of the Code of Civil Procedure is repealed.

~~1264.2,--The measure of damages in the case of a proceeding coming under section 1264.1 shall, except as provided in section 1264.3, be the value of the rights granted under said franchise for the period between said date and the expiration of said franchise, due consideration being had to the burdens as well as the benefits conferred by such franchise.~~

Comment. See Comment to former Section 1264.1.

CODE OF CIVIL PROCEDURE § 1264.3

Staff recommendation September 1971

Code of Civil Procedure § 1264.3 (repealed)

Sec. . Section 1264.3 of the Code of Civil Procedure is repealed.

~~1264.3.--If-provision-was-made-in-the-franchise-sought-to-be-con-
demned-or-in-the-applicable-statutes-under-which-the-franchise-was
granted-for-the-aquisition-of-said-toll-bridge-or-toll-road-or-said
franchise-by-the-county-granting-the-franchise-or-by-the-counties,
jointly-acting,-in-which-the-toll-bridge-or-toll-road-is-situate,-on
the-payment-of-the-fair-cash-value-of-said-toll-bridge-or-toll-road,
without-consideration-of-the-value-of-the-franchise,-then-and-in-that
event,-in-any-proceeding-brought-for-the-taking-of-such-franchise,-the
compensation-awarded-shall-not-exceed-the-fair-cash-value-of-such-toll
bridge-or-toll-road,-exclusive-of-the-value-of-the-franchise.~~

Comment. See Comment to former Section 1264.1.

CODE OF CIVIL PROCEDURE § 1264.4

Staff recommendation September 1971

Code of Civil Procedure § 1264.4 (repealed)

Sec. . Section 1264.4 of the Code of Civil Procedure is repealed.

~~1264.4.--If-a-new-trial-is-granted-or-the-judgment-is-reversed and-remanded-for-a-new-trial,-the-plaintiff-shall-have-the-right-as a-matter-of-course,-in-cases-coming-under-section-1264.1-to-amend the-complaint-to-specify-a-different-date-as- of-which-said-franchise shall-be-taken.~~

Comment. See Comment to former Section 1264.1.

Code of Civil Procedure § 1264.5 (repealed)

Sec. . Section 1264.5 of the Code of Civil Procedure is repealed.

~~1264.5. --If the defendant appeals from the judgment and the judgment is affirmed in a case coming under Section 1264.1, the plaintiff shall be entitled to have deducted from the principal of the judgment to be paid the net receipts of tolls collected or collectible from the date for the taking as specified in the judgment to the date on which the judgment of the reviewing court becomes final, on showing that prior to the date specified for said taking the plaintiff was able to pay the said judgment and offered to pay the same to the defendant, or into court for his benefit, in return for a waiver of the appeal. --The term "net receipts" means the sum obtained by subtracting from the total amount of tolls collected or collectible the amounts actually and necessarily expended or incurred for the operation and maintenance of said toll road or toll bridge during said period.~~

~~This section does not apply in those cases in which the plaintiff takes possession pending appeal pursuant to the provisions of Section 1254 or takes possession under the provisions of Section 14 of Article I of the Constitution.~~

Comment. See Comment to former Section 1264.1.

Code of Civil Procedure § 1264.6 (repealed)

Sec. . Section 1264.6 of the Code of Civil Procedure is repealed.

~~1264.6.--To secure the deduction specified in Section 1264.5 the plaintiff must within 10 days after the remittitur is received from the reviewing court serve on the defendant and file in the superior court his motion to set for hearing the question of the deduction to be made.--If, on the hearing of said motion, proof is made to the satisfaction of the court of plaintiff's ability to pay, and offer to pay, the judgment, as specified in Section 1264.5, the court shall grant the motion and shall fix a time for the determination of the amount to be deducted, which amount shall be determined by the court sitting without a jury unless plaintiff or defendant on or before the date of the hearing of said motion to set files with the court a demand in writing for a jury, in which case the said amount shall be determined by a jury.~~

Comment. See Comment to former Section 1264.1.

Code of Civil Procedure § 1264.8 (repealed)

Sec. . Section 1264.8 of the Code of Civil Procedure is repealed.

~~1264.8.---In-any-case-brought-under-section-1264.1,-the-plaintiff shall-have-the-full-period-specified-in-section-1251-in-which-to-pay the-judgment,-but-in-case-the-period-specified-in-that-section-expires prior-to-the-date-specified-in-the-judgment-for-the-taking-of-said franchise,-the-period-shall-be-extended-to-and-including-the-day-pre-ceeding-said-specified-date.~~

~~No-abandonment-shall-be-implied-under-section-1255a-unless-the judgment-is-not-paid-within-the-time-herein-specified.~~

Comment. See Comment to former Section 1264.1.

Code of Civil Procedure § 1264.9 (repealed)

Sec. . Section 1264.9 of the Code of Civil Procedure is repealed.

~~1264.9.---In-any-action-for-the-aquisition-hereunder-of-a-toll-road or-toll-bridge-or-the-franchise-for-the-collection-of-tolls-thereon,-the court-in-which-such-action-is-pending-shall-have-jurisdiction-to-determine-the-liability-of-the-condemning-party-to-any-county,-city-or-other public-mandatory-for-taxes,-license-fees-or-franchise-payments-and-to determine-the-reversionary-rights-of-any-such-county,-city-or-other public-mandatory-in-or-to-the-franchise-or-property-so-sought-to-be acquired,-and-if,-and-in-the-event,-any-such-liability-be-so-determined against-said-condemning-party,-then-and-in-that-event-an-award-shall-be made-to-such-county,-city-or-other-public-mandatory,-pursuant-to-the provisions-of-the-law.~~

Comment. Section 1264.9, relating the the jurisdiction of the court to determine the liability of a condemnor for taxes, license fees, and franchise payments on, as well as, reversionary interests of a city, county, or other public mandatory in, a toll bridge or toll road, or franchise thereon, is not continued. The section was of little or no current significance, for there appear to be few existing private toll roads or bridges and no existing franchises for their operation. Moreover, the court has general jurisdiction to determine matters incident to the condemnation of property (see Eminent Domain Code Section ____; see also former Code of Civil Procedure Section

CODE OF CIVIL PROCEDURE § 1264.9

Staff recommendation September 1971

1247(2) and Comment thereto), as well as specific jurisdiction to determine liability for taxes (see Revenue and Taxation Code Section 4986; see also former Code of Civil Procedure Sections 1252.1 and 1252.2 and Comments thereto).