

#36.80

9/28/71

Memorandum 71-68

Subject: Study 36.80 - Condemnation (Procedural Aspects)

SUMMARY

This memorandum presents for Commission consideration the portion of the attached draft of the eminent domain procedural provisions relating to contesting the right to take. Although the staff is presently drafting other procedural provisions (see tentative outline, attached), contesting the right to take is a discrete subject that requires expeditious approval in order for the Commission to publish an independent recommendation on the right to take in eminent domain. Cross-references contained in many of the provisions relating to contesting the right to take are frequently allusions to other procedural provisions the Commission has yet to review but which may be seen in the outline.

In addition to the provisions for contesting the right to take, this memorandum also presents some general procedural provisions that must be read in conjunction with the contesting scheme.

ANALYSIS

The basic scheme the Commission has previously approved for contesting the right to take is one in which objections are raised at one time and resolved prior to the valuation portion of the proceeding. The attached draft of this procedural scheme is described below.

The attached draft also incorporates several significant changes from existing law intended to make it easier for a defendant to prove his objection to the right to take. These changes are predicated on the observation that

present law makes it nearly impossible to prove lack of public use. The specific changes discussed below are (1) the test for lack of public use is changed from intent to reasonable probability; (2) the burden of proof is placed uniformly on the plaintiff and changed from preponderance to clear and convincing; and (3) the defendant is provided a means to vacate the judgment or claim damages upon subsequent discovery that the plaintiff should not have been allowed to take the property.

Contesting the Right to Take

The attached draft permits any person who has answered to raise objections. An answer to the complaint amounts to a general appearance in which the defendant asserts his interest in the property sought to be taken.

Objections must be raised within a relatively brief time, if at all. If not raised, they are deemed waived forever unless the defendant is later able to attack the final judgment on the basis of newly discovered evidence. See below. The time to object is basically within 30 days after service of the complaint or at the time of filing the answer if such occurs more than 30 days later. This time may be extended by stipulation of the parties or, if they are unable to agree, by order of the court upon good cause.

The "objection" is visualized as a pleading much like the answer in civil actions, raising special defenses of lack of right to take. As such, the defenses must be specifically alleged and supporting facts stated. If this is not done, or if it is done in an unclear manner, the plaintiff may demur to the objections. The defendant has the opportunity to amend his objections so that they are not demurrable or to make other changes, just as answers in civil actions generally may be amended.

Either party may set the objections for hearing, but the proceeding may not move forward to valuation problems until the objections are disposed of. At hearing, the burden of proof is on the plaintiff (see below). All the normal rules of civil procedure relating to the gathering and production of evidence are applicable in such a hearing.

The court then determines whether there is a right to take the property. If it finds a right to take all the property, it so orders, and the proceeding continues. The issue is appealable later or instantly by writ. If it finds a right to take only some of the property, it so orders and dismisses the proceeding as to the rest. Recoverable costs and disbursements are available to the defendant upon dismissal for lack of right to take. The order of dismissal may be appealed while the proceeding as to the rest continues. And, if the court finds no right to take any of the property, it dismisses the proceeding entirely. The order of dismissal is a final judgment and is appealable.

A final judgment may be subsequently attacked under the attached draft if new evidence comes to light. See discussion below.

Grounds for Contesting

The attached draft contains a listing of all possible grounds for objecting to the right to take. Objections to the complaint on its face, e.g., that it is unclear or that it does not contain all required information, are to be made by demurrer to the complaint.

The grounds for objection listed are all those that may be raised under the Commission's right to take proposal. The only major change from present law is that, at present, the only way a defendant may assert lack of public use is by alleging fraud or abuse of discretion in the sense that the plaintiff

does not intend to use the property as it declares. The attached draft, recognizing that it is nearly impossible to demonstrate subjective intent, proposes as an alternate ground that there is no reasonable probability that the property will be devoted to the use declared.

Burdens and Presumptions

The law governing which parties must plead and prove different facts, and the applicable presumptions governing the proof, is sufficiently confused to warrant statutory clarification in the comprehensive statute.

As nearly as we have been able to discern, the following represents present law governing right to take issues:

(1) The plaintiff in all cases has the burden of pleading public use and necessity.

(2) The defendant may contest the public use of the property--whether or not the plaintiff has the benefit of a conclusive resolution on the issue of necessity--by pleading specific facts indicating fraud or abuse of discretion in that the plaintiff does not intend to put the property to a public use. The burden of proof is upon the defendant on this issue. The plaintiff is aided by a presumption of regularity of official action if the plaintiff is a public entity.

(3) The defendant may contest the public necessity of the project by a specific denial in his answer if the resolution of the condemnor is not conclusive on the issue of necessity. Where the issue of necessity is for judicial determination, the three aspects of necessity are treated disparately:

(a) Whether the proposed improvement is necessary is not subject to judicial review.

(b) Whether the property is necessary for the project, the burden of proof is on the plaintiff. Where the plaintiff is a public entity, the resolution of necessity (in cases where it is not conclusive) appears to create a presumption that shifts to the defendant the burden of going forward with the evidence. Where the plaintiff is a private person, it must prove the aspect of necessity by a preponderance of the evidence.

(c) Whether the project is located in a manner most compatible with greatest public good and least private injury, the burden of proof is on the defendant. The burden on the defendant is a difficult one since he must establish another location that is clearly better than that selected by the plaintiff.

The reasons for these varying burdens and presumptions are not clear. They appear from the few cases to have developed in a haphazard manner on an ad hoc basis. The staff proposes the following uniform set of burdens and presumptions:

(1) The defendant has the burden to raise any objections to the right to take, or else they are waived.

(2) The plaintiff has the burden of proof on all objections to the right to take. The burden should be one of "clear and convincing proof."

(3) If the plaintiff is a public entity, it will be aided by presumptions. In certain cases, the resolution of necessity will be given conclusive effect; in others, merely rebuttable effect.

The justification for such a system is that a person ought not to have his property taken unless the taker can clearly and convincingly demonstrate to a court that it has the right to do so. As a practical matter, this amounts to a restriction on private condemnors only who are not aided by any presumption.

In addition, there will be provisions designed for special cases, e.g., future use, excess, more necessary, compatible. These provisions will specify their own burdens and presumptions. The staff has yet to review them for integration with the provisions relating to contesting the right to take.

Vacating Judgment or Damages

The attached draft includes provisions designed to deal with fraudulent acquisitions. In the attached draft, the defendant is aided by shifting the burden of proof to the plaintiff and by making a more liberal test for lack of public use. A third provision of the attached draft is based on the assumption that these liberalizations are not really adequate to overcome the defendant's handicap, particularly if the plaintiff is a public entity aided by a presumption of regularity. All the evidence is in the hands of the plaintiff and will often be inaccessible.

One possible way to limit fraud is to give the former owner a repurchase right at original acquisition cost. The Commission rejected this approach as unwieldy and suggested we might do more directly what a repurchase right would have accomplished indirectly.

The attached proposal is to allow direct attack on the judgment where evidence comes to light sometime later, as will happen on occasion, that reveals the plaintiff had no right to take, perhaps because it did not intend to devote the property to the use alleged.

Section 2250 is a draft of a provision permitting attack on the judgment on the ground of newly discovered evidence. The right to attack the judgment has been limited to the period of seven years after the judgment became final.

The judgment may be successfully attacked only if evidence is brought to light that was previously not discoverable with reasonable diligence. And the new evidence must be such as to have caused a denial of plaintiff's right to take if produced at the original trial.

Where the court finds for the condemnee on the basis of the subsequent evidence, it may dismiss the original proceeding and order the property reverted to the condemnee. If, however, the property has changed hands or is presently in public use, the subsequent holders and present users are protected: The condemnee is awarded damages in the amount of the increase in value of the property.

RELATED PROVISIONS

Accompanying the provisions on contesting the right to take are attached related general provisions that should appear at the beginning of the Eminent Domain Code. They are of broad procedural significance.

Eminent Domain Code exclusive procedure. Section 200 indicates that the Eminent Domain Code provides the only means by which the power of eminent domain may be exercised. There may be exceptions to this general rule that the Commission has yet to consider, e.g., procedures before the Public Utilities Commission.

Rules of practice. Section 201 is the recodification of the general principle that the rules of practice for civil actions generally govern eminent domain proceedings unless there is a specific eminent domain provision covering the point. Section 201 is more broadly phrased than former Code of Civil Procedure Section 1256 in that it applies to all codified and uncodified rules governing civil actions. This was the result also in court decisions under Section 1256. See Comment to Section 201.

Saving provision. In accordance with the Commission's instruction at the September 1971 meeting, the staff has included a draft of a provision that preserves judgments rendered under prior law and procedure. This provision also specifies that proceedings commenced under prior law are to be finished under prior law while proceedings commenced after the effective date of the Eminent Domain Code are governed by provisions of the code.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

C O M P R E H E N S I V E S T A T U T E

	<u>Page</u>
DIVISION 3. GENERAL PROVISIONS	
§ 200. Exercise of eminent domain _ _ _ _ _	1
§ 201. Rules of practice _ _ _ _ _	2
§ 203. Effect of enactment of code _ _ _ _ _	9

COMPREHENSIVE STATUTE § 200

Staff recommendation

§ 200. Exercise of eminent domain

200. The power of eminent domain may be exercised only as provided in this code unless otherwise specifically provided by statute.

Comment. Section 200 is the same in substance as the second sentence of former Code of Civil Procedure Section 1237. The Eminent Domain Code provides a uniform procedure for the exercise of the power of eminent domain, applicable to all acquisitions by condemnation except in certain instances. The exceptions are:

§ 201. Rules of practice

201. Except as otherwise provided in this code, the rules of practice that govern civil actions generally are the rules of practice for proceedings under this code.

Comment. Section 201 provides the general rule that eminent domain proceedings are to be governed by the same general principles as other civil actions. See Felton Water Co. v. Superior Court, 82 Cal. App. 382, 256 P. 255 (1927). It supersedes the more restrictively worded provision of former Code of Civil Procedure Section 1256. The general object of Section 201 is to give a trial by jury in every case, if demanded, and, when not demanded, a trial by the court; and to conform the practice in these proceedings as nearly as practicable to that in civil actions. Cf. People v. Clausen, 248 Cal. App.2d 770, 57 Cal. Rptr. 227 (1967); People v. Buellton Dev. Co., 58 Cal. App.2d 178, 136 P.2d 793 (1943); Holman v. Toten, 54 Cal. App.2d 309, 128 P.2d 808 (1942). The advantage to having the practice in different proceedings in the courts as nearly uniform as possible is manifest. See Code Commissioners' Note to former Code of Civil Procedure Section 1256.

Generally speaking, the rules of practice that govern civil actions may be found in Part 2 of the Code of Civil Procedure (Sections 307-1062a). In addition, provisions in other portions of the Code of Civil Procedure and many nonstatutory rules of procedure may be applicable to eminent domain proceedings if they are applicable to civil actions generally. The test of

COMPREHENSIVE STATUTE § 201

Staff recommendation

whether such general rules of practice are incorporated by Section 201 is whether the Eminent Domain Code provides a different rule. Express rules specifically applicable to eminent domain proceedings may be found in Division 8 of the Eminent Domain Code. Some of these rules may be inconsistent with general rules of practice, and some may be consistent. As to rules not expressly covered in Division 8 of the Eminent Domain Code, the test whether a general rule of practice applies is whether it would be consistent with the other provisions of this code. Cf. Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924); Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 P. 1123 (1903)(dissenting opinion). As a rule, the mere fact that a provision of the Code of Civil Procedure utilizes the term "action" rather than "proceeding," and the fact that a provision has not been applied to other special proceedings, does not preclude its applicability in eminent domain proceedings. The intent of Section 201 is to include as many rules of practice as would be consistent with the provisions of this code.

There follows below an indication of some of the major rules of civil practice that are incorporated in the Eminent Domain Code by Section 201.

Commencement of the proceeding. An eminent domain proceeding is commenced by the filing of a complaint. See Code Civ. Proc. § 411.10. This provision supersedes a portion of former Code of Civil Procedure Section 1243, which provided that eminent domain proceedings were commenced by filing a complaint and issuing summons. Section 1243 is repealed. Section 411.10

makes clear that the filing of a complaint alone is sufficient to commence an eminent domain proceeding with its attendant consequences.

The filing of a complaint in the proper court confers subject matter jurisdiction on the court. See Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924); Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941). See also Section 2200 (effect of judgment in eminent domain).

Service of process. The Code of Civil Procedure provisions relating to the form of summons and manner of service apply to eminent domain proceedings. See Code Civ. Proc. §§ 412.10 and 412.20. See also Section 2032(a). Failure of a party to respond to summons may result in a default judgment against him. See Code Civ. Proc. §§ 585 and 586.

Lis pendens. The plaintiff in an eminent domain proceeding should file a lis pendens after the proceeding is commenced in order to assure that it acquires full title to the property that it seeks. See Code Civ. Proc. § 409. This provision supersedes a portion of former Code of Civil Procedure Section 1243 requiring the plaintiff to file a lis pendens after service of summons. Section 1243 is repealed. Section 409 makes clear the obligation to file a lis pendens and the consequences of failure to do so.

Failure of the plaintiff to record a notice of the pendency of the proceeding pursuant to the provisions of Section 409 of the Code of Civil

Procedure does not deprive the court of subject matter jurisdiction, but relieves innocent third parties from the operation of a judgment affecting the property in dispute. See Bensley v. Mountain Lake Water Co., 13 Cal. 306 (1859); Housing Authority v. Forbes, 51 Cal. App.2d 1, 124 P.2d 194 (1942). See also former Code Civ. Proc. § 1243 (duplicating the requirements of Section 409) and Roach v. Riverside Water Co., 74 Cal. 263, 15 P. 776 (1887)(Section 409 applicable to condemnation proceedings).

Change of venue. The change of venue provisions of the Code of Civil Procedure are generally applicable to eminent domain proceedings. See § 2012 and Yolo Water & Power Co. v. Superior Court, 28 Cal. App. 589, 153 P. 394 (1915). But see Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 P. 1123, 1136 (1903).

Pleadings, amendments, time extensions. The rules governing pleadings and motions generally are applicable to eminent domain proceedings, subject to several major exceptions. The contents of the complaint, demurrer, answer, and cross-complaint are specified in Division 8. See §§ 2040, 2050, 2060, and 2070. However, the rules governing pleadings and motions generally are applicable. Thus, the provisions of Code of Civil Procedure Section 1010 et seq., relating to notices and filing and service of papers, are fully applicable.

Code of Civil Procedure Section 1054, relating to time extensions for filing pleadings, is applicable to pleadings in eminent domain. See Bottoms v. Superior Court, 82 Cal. App. 764, 256 P. 422 (1927). Likewise, Code of

Civil Procedure Sections 432, 472, and 473, governing pleading amendments, are applicable. See Kern County Union High School v. McDonald, 180 Cal. 7, 179 P. 180 (1919).

Pretrial activities. Between the time of pleading and trial, there may be many activities specified in and controlled by the Code of Civil Procedure. The parties may proceed with depositions and other discovery techniques. Code Civ. Proc. § 1985 et seq. The judge may be subject to disqualification due to financial interest or prejudice. Code Civ. Proc. §§ 170 and 170.6. See John Heinlen Co. v. Superior Court, 17 Cal. App. 660, 121 P. 293 (1911); Kohn v. Superior Court, 239 Cal. App.2d 428, 48 Cal. Rptr. 785 (1966). Code of Civil Procedure Section 594, regarding setting the action for trial, applies in eminent domain as does Section 1048, severance and consolidation of causes and issues for trial. See Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933); City of Oakland v. Darbee, 102 Cal. App.2d 493, 227 P.2d 909 (1951). And, of course, the court has the power to grant a continuance where necessary. See, e.g., Code Civ. Proc. § 594a.

Jury or court trial. The provisions of the Code of Civil Procedure that specify a court determination of questions of law and jury determination of questions of fact, unless waived, are incorporated in the Eminent Domain Code. See Code Civ. Proc. §§ 309 and 592. See also California S.R.R. v. Southern Pac. R.R., 67 Cal. 59, 7 P. 123 (1885); Wilmington Canal & Reservoir Co. v. Dominguez, 50 Cal. 505 (1875); Vallejo & N.R.R. v. Reed

Orchard Co., 169 Cal. 545, 147 P. 238 (1915). It should be noted, however, that the court in an eminent domain proceeding may try preliminary issues related to the right to take and foundational matters related to compensation as well as other incidental issues. §§ 2100 and 2150. Trial of just compensation is left to the jury. See § ; Cal. Const., Art. I, § 14; People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

During the trial, the court has all its normal and usual powers, including the authority to control the number of expert witnesses and to appoint its own expert. See Evidence Code §§ 352 and 730.

Upon trial of the eminent domain proceeding, judgment must be rendered and entered as in other civil actions. See, e.g., Code Civ. Proc. §§ 632 and 668. Fountain Water Co. v. Dougherty, 134 Cal. 376, 66 P. 316 (1901).

Attacking judgments. A judgment in an eminent domain proceeding may be attacked in the same manner as judgments in civil actions generally. Relief from default may be obtained. Code Civ. Proc. § 473. Also, equitable relief from judgment on the basis of fraud may be available. See generally 5 B. Witkin, California Procedure 2d Attack on Judgment in Trial Court §§ (2d ed. 1970). The applicable statute of limitations in such a case is prescribed in Code of Civil Procedure Section 338(4).

Civil writs may be available to attack interlocutory orders and judgments of the court. See, e.g., Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950); Weiler v. Superior Court, 188 Cal. 729, 207 P. 247 (1922); People v. Rodoni, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966).

Staff recommendation

The provisions regulating appeals in civil actions apply to eminent domain proceedings. See Code Civ. Proc. §§ 901- ; San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App.2d 668, 267 P.2d 349 (1954).

Dismissal. Although some specific grounds for dismissal are listed in Chapter 12 of Division 8 of the Eminent Domain Code, these grounds should not be construed to be the exclusive grounds. Thus, for example, dismissal may occur where there is a finding of no right to take pursuant to Section 1269.01 or 2110. Certain provisions of the Code of Civil Procedure relating to dismissal are also applicable in eminent domain proceedings. E.g., Section 581a (failure to timely prosecute); Section 583 (failure to timely bring to trial). See Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 468 (1941); City of San Jose v. Wilcox, 62 Cal. App.2d 224, 144 P.2d 636 (1944); Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964); Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924).

§ 203. Effect of enactment of code

203. No proceeding to enforce the right of eminent domain, or judgment rendered pursuant thereto, commenced prior to the enactment of this code and the repeal of Title 7 of Part 3 of the Code of Civil Procedure, is affected by such enactment and repeal.

Comment. Section 203 has a dual effect. It makes clear that the repeal of the eminent domain provisions of the Code of Civil Procedure and the enactment of new provisions in the Eminent Domain Code in no way affect the validity of proceedings and judgments rendered prior thereto. In addition, it makes clear that pending proceedings are to be completed under old law and are not affected by enactment of the Eminent Domain Code. For a comparable provision, see former Code of Civil Procedure Section 1261.

C O M P R E H E N S I V E S T A T U T E

DIVISION 8. PROCEDURE

CHAPTER 1. JURISDICTION

- § 2000. Jurisdiction of court
- § 2001. Competence of court
- § 2002. Orders and judgments; enforcement

CHAPTER 2. VENUE

- § 2010. Place of commencement
- § 2011. Place of trial
- § 2012. Change of place of trial

CHAPTER 3. PARTIES

- § 2020. Names of parties
- § 2021. Named plaintiffs
- § 2022. Named defendants
- § 2023. Intervenors

CHAPTER 4. SUMMONS

- § 2030. Contents of summons
- § 2031. Persons served
- § 2032. Manner of service

CHAPTER 5. PLEADINGS

Article 1. Complaint

- § 2040. Contents of complaint
- § 2041. Joinder of property
- § 2042. Time to respond

Article 2. Demurrer

§ 2050. Contents of demurrer

§ 2051. Grounds for demurrer

Article 3. Answer

§ 2060. Contents of answer

Article 4. Cross-Complaint

§ 2070. Cross-complaints

CHAPTER 6. CONTESTING RIGHT TO TAKE

Article 1. Objections to Right to Take

§ 2080. Contents of objection

§ 2081. Grounds for objection

§ 2082. Persons entitled to object

§ 2083. Manner of objection

§ 2084. Time for objection

Article 2. Response to Objections

§ 2090. Response to objections

Article 3. Hearing of Objections

§ 2100. Hearing

§ 2101. Evidentiary burdens

Article 4. Court Orders

§ 2110. Court orders

§ 2111. Failure to object is waiver

CHAPTER 7. PRETRIAL PRACTICE

CHAPTER 8. TRIAL PRACTICE

Article 1. Preliminary Issues

§ 2150. Bifurcation of preliminary issues

§ 2151. Resolution of issues

CHAPTER 9. JUDGMENT

§ 2200. Effect of judgment

CHAPTER 10. PAYMENT OF JUDGMENT

CHAPTER 11. NEW TRIALS AND APPEALS

Article 3. Attack of Judgment in Trial Court

§ 2250. Vacating judgment on basis of new evidence

CHAPTER 12. DISMISSAL

Article 1. Grounds for Dismissal

§ 2300. Abandonment

§ 2301. Amended complaint

§ 2302. Failure to pay or deposit award

Article 2. Costs and Damages

§ 2310. Recoverable costs and disbursements

§ 2311. Damages caused by possession

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 8. PROCEDURE

Comment. This division contains rules of practice expressly applicable to eminent domain proceedings. The omission of a particular aspect of procedure from this division does not indicate that such aspect is inapplicable to eminent domain proceedings, but only that the general rules of civil practice apply where consistent with this code. See Section 201 and Comment thereto. Likewise, a treatment herein of some particular aspect of procedure, such as the listing of pleadings in Chapter 5 or the catalog of grounds for dismissal in Chapter 12, is not intended to be exhaustive or to preclude other applicable rules of civil practice.

Procedure

DIVISION 8. PROCEDURE

Chapter 6. Contesting Right to Take

Article 1. Objections to Right to Take

§ 2080. Content of objection

2080. An objection to the right to take shall:

(a) State the grounds for each objection to the right to take.

Such grounds may be inconsistent.

(b) State specifically the facts upon which each ground for objection is based.

Comment. Section 2080 prescribes the content of an objection to the right to take. The objection to the right to take is a pleading new to California eminent domain law. It is the mechanism whereby the defendant raises defenses he may have to the complaint, other than defects on the face of the complaint which are raised by demurrer. The objections must be filed and served on the plaintiff in the same manner as are other pleadings. See Section 201.

The objection to the right to take supplants the demurrer and the answer as the means to challenge the taking of property. See People v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968)(answer); People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959)(answer); Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955)(demurrer). Under the Eminent Domain Code, the answer is a formal appearance in which the defendant asserts his

interest in the property; the demurrer is used to attack defects on the face of the complaint. See Sections 2050 and 2060. Both the answer and demurrer are pleadings responsive to the complaint. The objection to the right to take is not a responsive pleading and may be filed only after the answer, not in lieu of the answer. See Section 2082. Questions as to just compensation for the taking are raised at a later stage in the proceeding. See Section .

What is an objection to the right to take? An objection to the right to take is a separate document. It is the pleading by which any defenses to the right to take are raised. Section 2080.

Who may raise objections? Only proper parties to the proceeding may contest the right to take. These are persons who have filed an answer in the proceeding alleging their interest in the property. See Section 2082.

What objections can be raised? The possible grounds for objection to the right to take are set out in Section 2081. They may be inconsistent, but the facts supporting each objection must be specifically stated. Section 2080(b).

The requirement in subdivision (a) that the grounds for objection be expressly stated is generally consistent with former decisional law that, for example, required the defendant to affirmatively allege how, or in what manner, a proposed use would not be public. Likewise, the requirement in subdivision (b) that specific facts be stated is consistent with former law that, for example, called for specific facts indicating an abuse of discretion such as an intention not to use the property as resolved. See People v. Chevalier, supra.

When must objections be raised? Objections must be raised early in the proceeding with the object of early disposition. See Section 2084 and Comment thereto.

What is consequence of failure to object? Failure to object generally waives the objection. See Section 2111.

Depositions, discovery, and evidence. The means of gathering and producing evidence and their admissibility in court are the same as in civil actions generally. Section 201.

When are objections adjudicated? Objections must be disposed of before trial of the proceeding may commence. See Section 2100(b).

When is decision reviewable? An order dismissing the proceeding is a final judgment and is immediately reviewable on appeal. An order confirming the right to take is an interlocutory judgment and may not be appealed until there is a final order of condemnation. Review by writ of an interlocutory judgment may be available in an appropriate situation. See Section 2110 and Comment thereto.

§ 2081. Grounds for objection

2081. The grounds for objection to the right to take are:

(a) The plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint.

(b) The purpose stated is not a public use.

(c) The plaintiff does not intend to use the property described in the complaint for the purpose stated, or there is no reasonable probability that the plaintiff will use the property for the purpose stated.

(d) The property described in the complaint is not subject to acquisition by the power of eminent domain for the stated purpose.

(e) The plaintiff is a public entity and has not properly adopted a resolution of necessity.

(f) The public interest and necessity do not require the proposed project.

• (g) The proposed project is not planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(h) The property is not necessary for the proposed project.

(i) The right or interest sought to be acquired is not necessary for the proposed project.

(j) Acquisition of the property is sought pursuant to Section 401, and its acquisition is not authorized by that section.

(k) Acquisition of the property is sought pursuant to Section 412, and its acquisition is not authorized by that section.

(l) Acquisition of the property is sought pursuant to Section 421, and its acquisition is not authorized by that section.

(m) Acquisition of the property is sought pursuant to Chapter 8 (commencing with Section 450) of Division 4, and its acquisition is not authorized by that chapter.

(n) Acquisition of the property is sought pursuant to Section 470, and its acquisition is not authorized by that section.

Comment. Section 2081 prescribes the sole grounds for objection to the right to take. The defendant may raise any or all of these objections even though they may be inconsistent.

Subdivision (a). The power of eminent domain may be exercised to acquire property for a public use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use. Section 301.

Subdivision (b). The power of eminent domain may be exercised only to acquire property for a public use. Section 300. Cal. Const., Art. I, § 14. U.S. Const., Amend. XIV.

Subdivision (c). Not only is the plaintiff obligated to allege a public use (subdivision (b) supra), but it is also constitutionally obligated to in fact devote the property to the use alleged. The test in the past has been whether the plaintiff intends to apply the property to the proposed public use. See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959). Section 2081 adds the more liberal test whether there is a reasonable probability of such devotion. If, at the time of acquisition, the plaintiff intends to devote

the property to the use alleged or there is a reasonable likelihood of such devotion, the acquisition is proper; and the plaintiff may thereafter devote the property to any other use, public or private. See Arechiga v. Housing Authority, 159 Cal. App.2d 657, 324 P.2d 973 (1958). It should be noted, however, that, where the condemnation judgment is procured by fraud, the judgment may be subject to attack in a separate proceeding. See Section 201; Capron v. State, 247 Cal. App.2d 212, 55 Cal. Rptr. 330 (1966). The statute of limitations for collateral attack on the basis of fraud in acquisition is three years from discovery of the fraud. See Code Civ. Proc. § 338(4). In addition, the judgment may be subject to attack on the basis of newly discovered evidence. See Section 2250.

Subdivision (d). Certain property may not be subject to condemnation for specified purposes. For example, a city may not acquire by eminent domain an existing golf course for golf course purposes. Govt. Code § 37353(c). Property appropriated to a public use may not be taken except for more necessary or compatible uses. Sections 450 and 470. Cemetery land may not be taken for rights of way. Health & Saf. Code §§ 8134, 8560, 8560.5. Certain land in the public domain may not be taken at all. Pub. Res. Code § 7994. An industrial farm may not be established by a county on land outside the county. Penal Code § 4106. The Department of Commerce may not condemn for World Trade Centers. Govt. Code § 8324. The Department of Aeronautics may not take existing airport owned by local entity. Pub. Util. Code § 21632. See also Section 301 and Comment thereto (eminent domain only for purposes authorized by statute); cf. subdivision (m) infra (more necessary public use).

Subdivision (e). A public entity may not commence an eminent domain proceeding until after it has passed a resolution of necessity that meets the requirements of Chapter 2 of Article 4. Section 310. A properly adopted resolution must be preceded by a public hearing. Section . It must contain all the information required in Section 311 and must be adopted by a vote of a majority of all the members of the governing body of the local public entity. Section 312. A resolution adopted as a result of bribery or by other illegal means has not been properly adopted and consequently is subject to challenge on the grounds specified in this subdivision.

It should be noted that this subdivision applies only to public entities. Other condemnors are not obligated to adopt a resolution of necessity; but, once adopted, the resolution gives public entities the benefit of a conclusive presumption on certain issues. See Section 313. Other condemnors do not have the benefit of this presumption, but must prove the issues in court if challenged. See Sections 2101 and 2111.

Subdivision (f). The power of eminent domain may be exercised to acquire property for a proposed project only if the public interest and necessity require the proposed project. Section 302(a).

Subdivision (g). The power of eminent domain may be exercised to acquire property for a proposed project only if the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. Section 302(b).

Subdivision (h). The power of eminent domain may be exercised to acquire property for a proposed project only if the property sought to be acquired is necessary for the proposed project. Section 302(c).

Subdivision (i). Any person authorized to acquire property for a particular use by eminent domain may exercise the power to acquire any right or interest in property necessary for that use except as limited by statute. Section 303.

Subdivision (j). Property may be taken for future use only if there is a reasonable probability that its date of use will be within seven years from the date the complaint is filed or within such longer period as is reasonable. Section 401(b).

Subdivision (k). Property may be taken for substitute purposes only if: (1) the owner of the property needed for the public use has agreed in writing to the exchange and, under the circumstances of the particular case, justice requires that he be compensated in whole or in part by substitute property rather than by money; (2) the property to be exchanged is in the vicinity of the public improvement for which the property needed is taken; and (3) taking into account the relative hardship to the owners, it is not unjust to the owner of the property to be exchanged that his property be taken so that the owner of the needed property may be compensated by such property rather than by money. Section 412(a).

Subdivision (l). Property excess to the needs of the proposed project may be taken if it would be left as a remainder in such size, shape, or condition as to be of little market value or to give rise to a substantial risk that the entity will be required to pay in compensation an amount substantially equivalent to the amount that would be required to be paid for the whole parcel. Section 421(a).

Subdivision (m). Property appropriated to public use may be taken by eminent domain for another public use only if the other use is a more necessary public use or is compatible. Section 450. Uses more necessary than others are specified in Chapter 8 (commencing with Section 451) of Division 4 and elsewhere.

Subdivision (n). Property appropriated to public use may be taken by eminent domain if the proposed use is compatible with the existing use to which the property is appropriated or such future use as may be reasonably anticipated. Section 471(a).

§ 2082. Persons entitled to object

2082. Only a person who has answered the complaint may object to the right to take.

Comment. Section 2082 makes clear that only proper parties to the proceeding may contest the right to take. A proper party is one who claims an interest in the property sought to be acquired. Such a person may either be named in the complaint or may intervene, but in either case is identified by the fact of answering the complaint which constitutes a formal appearance in the proceeding. See Section 2060.

A defendant may file his objections concurrently with his answer although they must be contained in a separate document.

§ 2083. Manner of objection

2083. An objection to the right to take shall be filed with the court and served on the plaintiff in the same manner as pleadings in civil actions generally.

Comment. An objection to the right to take must be filed and served within the time limits specified in Section 2084. The manner of service is provided in Section 465 and Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of the Code of Civil Procedure.

§ 2084. Time for objection

2084. (a) Except as provided in subdivision (b), a defendant may not file an objection to the right to take after the last of the following events:

(1) Expiration of the period within which he is permitted to file any responsive pleading.

(2) Expiration of the period allowed by stipulation of the parties for the filing of objections.

(b) Where application is made prior to the expiration of the last event specified in subdivision (a), the court, upon a showing of good cause, may order additional time for the defendant to prepare objections to the right to take.

Comment. Section 2084, in conjunction with Section 2082 (who may object), provides the basic time limits within which objections to the right to take must be raised. Failure to raise the objections within the time provided waives them. Section 2111.

Subdivision (a). Objections to the right to take may not be filed until the defendant has answered the complaint. If the defendant answers within the 30-day period prescribed for responsive pleadings by Section 2042, he has from the time of answer until the end of the period to object. He may file the objection concurrently with the answer, but it must be in a separate document. If the defendant files a responsive pleading other than an answer

within the 30-day period and then is permitted to answer at some time beyond that period, the defendant may file his objections with the answer. Paragraph (1).

If the parties have stipulated some longer time period than those described above, the defendant has until the end of that period to object. Paragraph (2). He may only do so, of course, after he has filed his answer. See Section 2082.

Subdivision (b). Upon application of the defendant before the expiration of his time to object, the court may order an extension. Subdivision (b). Good cause that would permit a time extension might include the need for discovery or the acquisition of preliminary appraisal reports where this information would be vital to an informed decision. See Section 2081 and Comment thereto.

Article 2. Response to Objections

§ 2090. Response to objections

2090. (a) The plaintiff may respond to an objection to the right to take upon either or both of the following grounds:

(1) The objection to the right to take does not state facts sufficient to constitute a ground for objection.

(2) The objection to the right to take is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

(b) Any objection to the right to take is deemed controverted by the plaintiff.

Comment. Like the answer, the objections to the right to take are deemed denied. See Code Civ. Proc. § 431.20(b). However, they may be demurred to by the plaintiff, either because they do not state a ground for objection or because their import is not sufficiently clear to enable the plaintiff to prepare its case. Compare Code Civ. Proc. § 430.20(a) and (b).

The procedures for hearing the demurrer to the objections are the same as those for a demurrer to an answer. The objections may be amended in the same manner as other pleadings. See Code Civ. Proc. §§ 472, 473.

Article 3. Hearing of Objections

§ 2100. Hearing

2100. (a) Objections to the right to take shall be heard on motion and notice by either party to the adverse party.

(b) Until all such objections are resolved, there shall be no further action in the proceeding with regard to the determination of just compensation.

Comment. Section 2100 makes provision for bringing to trial the objections, if any, that have been raised against the plaintiff's right to take the property it seeks. It should be noted that no time limits are specified in this section.

Subdivision (a). Either party may set the issues for hearing. Failure to bring them to trial within the time specified in Code of Civil Procedure Section 583 is ground for dismissal of the proceeding. See Section 201.

Subdivision (b). Disposition of the right to take is a prerequisite to further proceedings relating to just compensation. This does not preclude such activities as depositions and discovery related to the right to take.

§ 2101. Evidentiary burdens

2101. Except as otherwise provided by statute, the plaintiff has the burden of proof on all issues of fact raised by an objection to the right to take. This burden is one of clear and convincing proof.

Comment. Section 2101 specifies the allocation of the burden of proof in hearings on right to take issues. Generally, the burden to plead or raise such issues is on the defendant. Sections 2082 and 2111. The issues must be raised specifically and factual allegations stated. Section 2080. The issues thus raised are of two general types, legal and factual. Legal issues--such as whether the use alleged is a public use, whether the plaintiff is authorized by law to condemn the particular property for the particular purpose alleged, and what the requisite formalities are for proper adoption of the resolution of necessity--have no specific burdens assigned other than those that may be applicable in civil actions generally.

Factual questions--such as whether the plaintiff intends to use the property as alleged or whether the property is necessary for the proposed project--must be proved by the plaintiff by clear and convincing proof. Under prior law, the plaintiff bore the burden of demonstrating necessity issues generally by a "preponderance" of the evidence. See, e.g., Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955). But the issues whether the plaintiff intended to use the property for the purpose alleged and whether the project was located in a manner most compatible with the greatest public

good and least private injury were required to be proved by the defendant. People v. Lagiss, 160 Cal. App.2d 28, 324 P.2d 926 (1958); Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891). Section 2101 places a uniform burden of all factual right to take issues on the plaintiff and raises the evidentiary standard to one of "clear and convincing" proof.

The plaintiff may be aided in satisfying this burden by presumptions if the plaintiff is a public entity. A public entity must enact a resolution of necessity before it may condemn. Section 310. But once it has enacted such a resolution, the resolution may be conclusive on many of the issues of of necessity. Section 313. Of course, the resolution must have been properly adopted if it is to be given any effect at all. Section 2082(e). In addition, it is presumed that official duty has been regularly performed. Evidence Code § 664. Plaintiffs that are not public entities do not have the advantage of any such presumptions but must prove the right to take issues on the basis of the evidence they present.

The burden specified in Section 2101 is applicable generally to right to take issues, absent express statutory provisions indicating other burdens or other quanta of proof required. Other express statutory provisions include: Sections 401 (future use), 421 (remnants), 455 (more necessary public use), 471 (consistent public use).

[NB. The above provisions have yet to be reviewed and integrated in this scheme.]

Article 4. Court Orders

§ 2110. Court orders

2110. (a) The court shall hear and determine all objections to the right to take brought before it pursuant to Section 2100.

(b) If the court determines that the plaintiff does not have the right to acquire by eminent domain any property described in the complaint, it shall dismiss the proceeding as to that property. Such dismissal is a final judgment.

(c) If the court determines that the plaintiff does have the right to acquire by eminent domain the property described in the complaint, the court shall so order. Such order is an interlocutory judgment.

Comment. Section 2110 provides for a court determination of right to take issues.

Subdivision (a). Court determination of the right to take is consistent with the California Constitution and with prior law. Cal. Const., Art. I, § 14 (jury determination of compensation) and People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

The court has general authority to determine all issues and make all orders necessary and appropriate to its determinations. See also Section 2002 (general authority of court in aid of its jurisdiction).

COMPREHENSIVE STATUTE § 2110

Staff recommendation

Subdivision (b). A determination that the plaintiff has no right to condemn the defendant's property requires an order of dismissal. In case the complaint alleges alternative grounds for condemnation, a dismissal as to one ground does not preclude a finding of right to take on another ground. An order of dismissal is a final judgment as to the property affected and is appealable. See Code Civ. Proc. § 904.1. Contrast People v. Rodoni, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966). Such order also entitles the defendant to recoverable costs and fees. See Section 2310.

Subdivision (c). A determination that the plaintiff may condemn the defendant's property is not a final judgment. An appeal must await the conclusion of the litigation. See Code Civ. Proc. § 904.1. Review by writ may be available in an appropriate case. See, e.g., Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955).

COMPREHENSIVE STATUTE § 2111

Staff recommendation

§ 2111. Failure to object is waiver

2111. An objection to the right to take not raised within the time specified in Section 2084 is waived unless the court for good cause determines otherwise.

Comment. Failure to raise a defense by timely objection constitutes a waiver of that defense except where judicial relief is granted upon a showing of good cause. An example of such cause might be where the defendant has been misled by a plaintiff's failure to properly plead its statutory authority or other excusable neglect.

It should be noted that, even though a defendant may waive objections by failure to plead them, a court may nonetheless subsequently dismiss the proceeding if it finds in an immediate possession hearing that the plaintiff does not have the right to take the property by eminent domain on the face of its complaint.

In addition, a judgment may be vacated for lack of right to take pursuant to Section 2250.

Chapter 11. New Trials and Appeals

Article 3. Attack on Judgment in Separate Proceeding

§ 2250. Vacating judgment on basis of new evidence

2250. (a) A person from whom property was acquired under this code may, within seven years after the judgment of condemnation became final, upon notice to the person who acquired the property, move the court to vacate the judgment or to award damages as provided in this section.

(b) If, upon hearing the motion, the court determines that the condemnee has presented evidence that (i) was unknown and unavailable at the time the judgment became final and (ii) would have required dismissal of the proceeding on any of the grounds specified in Section 2081, the court shall:

(1) Vacate the judgment and dismiss the prior proceeding as to any of the property still owned by the condemnor and not devoted to public use.

(2) Award as damages to the condemnee the amount by which the market value of the property at the time the motion was filed exceeds the condemnation award as to any property not described in paragraph (1).

Comment. Section 2250 establishes a procedure new to California law, allowing for direct attack upon a final judgment of condemnation on the basis of newly discovered evidence. The motion to vacate or award damages is analogous to the equitable bill of review for a new trial. See San Joaquin etc. Irr. Co. v. Stevinson, 175 Cal. 607, 166 P. 338 (1917). Contrast Walls v. System Freight Service, 94 Cal. App.2d 702, 211 P.2d 306 (1949). The motion to vacate must be brought within seven years after the time the judgment became final, and the judgment will be vacated or damages awarded only if the newly discovered evidence is such that it would have required reversal on the right to take issues specified in Section 2081.

The procedure established by this section is in addition to and does not limit any other procedures to attack an eminent domain judgment, whether directly or collaterally, in the original or subsequent proceedings. Cf. 5 B. Witkin, California Procedure 2d Attack on Judgment in Trial Court (2d ed. 1971).

Subdivision (a). For "final judgment," see Section . The motion should be filed in the Superior Court that rendered judgment even though that court may have been a transfer court not located in the same county as the subject property. The motion should, of course, contain such essential information as identification of the judgment sought to be vacated, a description of the new evidence, and the reasons for its previous unavailability. The motion should be filed and served as are motions and papers in civil actions generally. Code Civ. Proc. § 1010 et seq. It is, of course, the obligation of the moving party to set the motion for hearing although either party may do so.

Subdivision (b). The new evidence alleged must have previously been unknown and unavailable. It must have been of the type that the moving party could not, with all proper diligence, have discovered. If the existence of the evidence was known but was not available, diligent pursuit would have required a request for an extension of time or for a continuance. Absent such a request, the new evidence could not be considered previously unknown and unavailable.

Paragraph (1). A court order of vacation and dismissal is equivalent to a dismissal of the original proceeding. If the moving party is the defendant in the prior proceeding, he is entitled to be restored to possession of the property, to reimbursement for any damages suffered, and to his recoverable costs and expenses. See Sections 2311 and 2310. He need not refund the award received.

Paragraph (2). If property is devoted to a public use or is no longer in the hands of the original condemnor, the condemnee may receive damages rather than return of his property. The measure of damages is the increased value of the property.

CODE OF CIVIL PROCEDURE § 1237

Staff recommendation

Code of Civil Procedure § 1237 (repealed)

Sec. . Section 1237 of the Code of Civil Procedure is repealed.

~~1237.--Eminent-domain-is-the-right-of-the-people-or-Government-to
take-private-property-for-public-use.--This-right-may-be-exercised-in
the-manner-provided-in-this-Title.~~

Comment. Code of Civil Procedure Section 1237 is superseded in whole by various provisions of the Eminent Domain Code.

The first sentence of former Section 1237 is not continued. It was misleading in that the right of eminent domain could be exercised by private persons as well as by the people or government. See former Civil Code § 1001. To the extent that the first sentence limited the right of eminent domain to property taken for public use, the limitation is continued in Section 14 of Article I of the Constitution and in Section 300 of the Eminent Domain Code.

The second sentence of former Section 1237 is superseded by Section 200 of the Eminent Domain Code.

CODE OF CIVIL PROCEDURE § 1256

Staff recommendation

Code of Civil Procedure § 1256 (repealed)

Sec. . Section 1256 of the Code of Civil Procedure is repealed.

~~1256.--Except-as-otherwise-provided-in-this-Title,-the-provisions
of-Part-2-of-this-Code-are-applicable-to-and-constitute-the-rules-of
practice-in-the-proceedings-mentioned-in-this-Title.~~

Comment. Section 1256 is superseded by Section 201 of the Eminent
Domain Code.

CODE OF CIVIL PROCEDURE § 1261

Staff recommendation

Code of Civil Procedure § 1261 (repealed)

Sec. . Section 1261 of the Code of Civil Procedure is repealed.

~~1261.--No-proceeding-to-enforce-the-right-of- eminent-domain-commenced
before-this-Title-takes-effect,-is-affected-by-the-provisions-of-this
Title.~~

Comment. With the repeal of Title 7 of Part 3 of the Code of Civil Procedure, Section 1261 is no longer necessary. For a comparable provision in the Eminent Domain Code, see Section 203.

CODE OF CIVIL PROCEDURE § 1262

Staff recommendation

Code of Civil Procedure § 1262 (repealed)

Sec. . Section 1262 of the Code of Civil Procedure is repealed.

~~1262.--Until the first day of January, one thousand eight hundred and seventy-three, at twelve o'clock noon, the provisions of Sections 1256 and 1257 of this Title are suspended, and until then, except as otherwise provided in this Title, the rules of pleading and practice in civil actions now in force in this State are applicable to the proceedings mentioned in this Title, and constitute the rules of pleading and practice therein.~~

Comment. Cf. Sections 201 and 203 of the Eminent Domain Code.