

Memorandum 79-28

Subject: Study E-200 - Special Assessment Liens on Property Acquired
for Public Use (Comments on Tentative Recommendation)

Attached to this memorandum is a copy of the Commission's tentative recommendation relating to special assessment liens on property acquired for public use. The tentative recommendation basically clarifies and codifies existing law concerning how the obligation of the lien is apportioned and paid between the acquiring entity and the property owner.

This tentative recommendation was distributed for comment during the past Spring, and the comments received are attached as Exhibits 1-5. The general reaction to the tentative recommendation was favorable. See Exhibits 1-3.

The Southern California Edison Company (Exhibit 4--gold) notes a problem they encountered in making a negotiated purchase of a portion of property encumbered by bonds representing assessment liens. There was no applicable statutory procedure for segregation and apportionment of the obligation, and the bondholder was able to make an excessive demand for segregation. This problem could be cured by addition of a provision along the following lines:

Government Code § 53939 (added)

53939. (a) As used in this section, "transaction" means negotiated purchase and sale, gift, or devise.

(b) If property acquired in a transaction is encumbered by a lien securing a special assessment or a bond representing a special assessment and there is no applicable statutory procedure for apportionment of the lien, any party to the transaction may, within one year after completion of the transaction, apply to the Superior Court of the county in which the property or a portion thereof is located to, and the court may, apportion the lien between the parties to the transaction.

Comment. Section 53939 provides authority for court segregation and apportionment of assessment liens in the absence of an applicable statutory procedure. It applies regardless whether the person acquiring the property is a public entity or other person.

The staff recommends inclusion of this provision in the Commission's recommendation.

Professor Sato (Exhibit 5--blue) raises the question whether fixed lien special assessments and special ad valorem assessments should be treated differently from each other. The tentative recommendation treats fixed lien special assessments as general liens and makes the property owner responsible for their payment; special ad valorem assessments are treated as taxes and their obligation is apportioned between condemnor and property owner. Professor Sato argues that both types of liens represent improvements that have benefitted the property for which the property owner receives compensation, therefor the property owner should be responsible for payment of both types. The staff disagrees. The definitions make clear that a fixed lien special assessment is levied for the capital expenditure for a project and a special ad valorem assessment is levied for purposes other than capital expenditure for a project. Thus, it is the fixed lien assessment that represents the benefit to the property and it is appropriate that such an assessment be the responsibility of the property owner. The special ad valorem assessment is applied to general district purposes such as maintenance and should be apportioned between the parties on the basis of the value they receive from it.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1
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STURGIS, NESS & BRUNSELL
A PROFESSIONAL CORPORATION

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March 2, 1979

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, Ca. 94305

Dear Mr. Sterling:

We have reviewed the tentative recommendation relating to special assessment liens on property acquired for public use dated February 9, 1979.

We think that the tentative recommendation adequately treats the concerns expressed to you in our letter of October 2, 1978. We have no further comment on the recommendation except to say that we think it is a good workmanlike job.

Yours very truly,

STURGIS, NESS & BRUNSELL
a professional corporation


Robert Brunsell

RB:mc

EXHIBIT 2



The Metropolitan Water District of Southern California

Office of General Counsel

March 9, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Gentlemen:

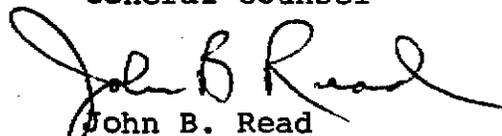
Tentative Recommendation Relating to
Special Assessment Liens on Property
Acquired for Public Use

We have reviewed the tentative recommendation and approve it.

We find the references to Code of Civil Procedure Section 1250.250 on page 8 as an existing section to be somewhat confusing. In view of AB 135 which would add the section to the code, it will probably be one before your recommendation reaches Bill form, but a footnote on page 8, similar to footnote 20 on page 5, would have been helpful.

Very truly yours,

Robert P. Will
General Counsel


John B. Read
Deputy General Counsel

JBR:abm

EXHIBIT 3

ROBERT J. SCOLNIK
ATTORNEY AT LAW
100 BUSH STREET
SUITE 2000
SAN FRANCISCO, CALIFORNIA 94104
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May 7, 1979

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Gentlemen:

I have reviewed your tentative recommendation relating to Special Assessment Liens on Property Acquired for Public Use.

While I am not an expert in this field, your analysis, proposals and draft of legislation makes sense to me, and I have nothing to suggest in the form of addition, deletion or modification, and I can think of no objections.

Very truly yours,


Robert J. Scolnik

RJS/nj

EXHIBIT 4

Southern California Edison Company

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ROSEMEAD, CALIFORNIA 91770

MARVIN D. HOMER
ASSISTANT COUNSEL

LAW DEPARTMENT

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March 22, 1979

State of California
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Tentative Recommendation relating to
Special Assessment Liens on Property
Acquired for Public Use.

Dear Sirs:

I have read with interest your tentative recommendation, but have noticed that you have failed to deal with a problem that was recently confronted by the Southern California Edison Company. Our recent problem related to a negotiated purchase and not to property acquired by eminent domain. Your commission does not deal with this problem. Section (5) on page 7 specifically disclaims any intention of dealing with this problem:

"The statute should not attempt to regulate the payment and apportionment of special assessment liens in acquisitions other than by eminent domain, but should leave it to the parties to see that the liens are paid or apportioned pursuant to any applicable statutory procedures. The statute should make clear that, to the extent this is not done, the property acquired by the public entity remains encumbered by the liens and the liens remain fully enforceable against the acquiring entity."

In our negotiated purchase, Edison had no difficulty with the seller of the property who remained cooperative. Our difficulty was with the bondholder who demanded an additional fee to segregate the land as to the portion of property we purchased and the portion of land retained by the seller. While the original demand could be considered nominal, I have been informed that the bondholder recently increased his demand. While this instance in itself may not be of overwhelming importance, its significance lies in the fact that in the future, properties of greater value and size and bonds of greater value could be involved, with consequent increased demands for additional fees by bondholders for segregation.

March 22, 1979

Page 11 of your report contains the proposed language of new Government Code §53938(a). I would propose the following language be added at the end of proposed §53938(a):

"provided however, that if only a part of the property is acquired, the public entity within a period of one year after the purchase and sale, gift or devise, may apply to the Superior Court of the County within which the property, or a portion thereof, is located for a segregation and apportionment of the lien as to the part of the property so acquired and the part of the property not acquired."

That language would have provided a prompt solution to our problem and will prevent the problem from arising in the future.

Your Commission is to be commended in its efforts, but I feel it has omitted to deal with one aspect which is of concern to our Company.

Sincerely,

Marvin D. Homer
Marvin D. Homer
Assistant Counsel

MDH/jj

cc: M. Handler
D. Sparks
D. Monge
B. Geil
F. Dienethal

P. S. I have been informed that due to the forceful arguments presented by the Edison employee processing the matter, the particular bondholder relented and will not insist on his increased demand for segregation. Edison will pay the original demand to accomplish the segregation.

UNIVERSITY OF CALIFORNIA, BERKELEY

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December 11, 1978

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Nathaniel,

I have looked over the draft on special assessment liens in eminent domain proceedings and have several comments.

On a purely technical level, you have provided a definition for special ad valorem assessment applicable to § 1260.260. The term, however, is also used in § 1250.250 and technically is not governed by the definition in § 1260.260.

A more basic problem is the distinction drawn between the fixed lien special assessment and the special ad valorem assessment. Let us assume that a lien to secure a fixed lien special assessment has been placed on the land in question and the assessment is to be paid in installments. The distinction between this and the special ad valorem assessment is that in the latter situation the amounts to be assessed in the future is not fixed, although one can probably determine the approximate assessment rate. The issue as to whether the burden of the assessment should fall on the condemnor or the condemnee for these assessments, whether fixed or special, ultimately depends upon the initial valuation of the property taken.

If the property is valued in the eminent domain proceedings as if there were no lien, then it is proper to make the property owner responsible for the payment of the lien. This would be very much like the situation of lessor and lessee having the award apportioned between them after the condemnor has paid the market value award. Theoretically, it would not matter whether the special assessment is fixed (with annual installments) or is not precisely fixed (with annual assessments). In either case, the improvement for which the assessment is being made has been completed and has added to the value of the property in question. In the private sector market, when such property is transferred, the price will reflect a discounted value of the future obligations deducted from the "market value without the encumbrance." The deduction can be accurately made in the case of fixed annual installments. In the case of special ad valorem assessments (to use your terminology), the buyer in the market will have to estimate that for

Mr. Nathaniel Sterling
December 11, 1978
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the future and make a deduction for such future obligation since the income of the property to be capitalized will be reduced by such obligation.

If you have followed me this far, then I suggest that the solution you have provided in the draft for fixed lien special assessment is correct if the valuation upon which the initial award is made does not take into account the future installments. In this case, the condemnee should rightly have the amount of future installments deducted from the award.

Your solution for special ad valorem assessment liens is wrong if the initial award is based on the market value of property as increased by the improvement for which the assessments are being made but without any deduction for future assessments to be made. If this should happen, the condemnee gets a windfall in that he will be compensated for benefits for which he has not yet paid.

Thus, insofar as the equity considerations between the condemnor and condemnee are concerned, the fixed lien special assessment and the special ad valorem assessment are the same. The initial award could be based on the market value as increased by the improvement for which the special assessments are yet to be paid and the responsibility be placed upon the condemnee to satisfy the future obligations. On the other hand, the condemnor can be made responsible for the future obligations, in which case a deduction should be made from an award which is based on increase in value due to the improvement for which special assessments will be made in the future.

The other consideration is fairness to the lienholder in terms of loss of security in whole or in part. The fairness may depend a great deal upon whether a private party has a direct lien arising from the assessment on the property. One of the Improvement Acts (1910, 1913 or 1915) provide for such direct private lien on the property.

I may be wrong but the present draft does not keep these issues separate and may lead to a situation where the condemnee may receive a windfall.

Sincerely,



Sho Sato

SS:es