

Memorandum 99-67**Withdrawal of Prejudgment Deposit in Eminent Domain
(Draft of Tentative Recommendation)**

Attached to this memorandum is a draft of a tentative recommendation to make a condemnor liable to a property owner if all of the following events occur:

- The condemnor gives a prejudgment deposit for possession of the property.
- There is an overwithdrawal of the deposit by one of the interested parties.
- The overwithdrawing party fails to reimburse other parties who are ultimately determined to be entitled to a greater share of the award.
- No security was required for the withdrawal that would cover the deficit.

The draft tentative recommendation implements the Commission's decision made at the August 1999 meeting.

The staff notes that this draft is somewhat nebulous about certain procedural details. For example, it is not clear what events trigger the condemnor's liability — how long does the overwithdrawing party have to pay? must the other parties first seek execution of judgment against the overwithdrawing party? etc.

The condemnor liability contemplated by this tentative recommendation will so rarely occur that the staff did not deem it worthwhile to construct a complete or elaborate enforcement process for the statute. We are not aware of the circumstances envisioned by the tentative recommendation ever having occurred, and if they ever do the court can devise an appropriate procedure.

The staff questions whether the Commission should proceed with this proposal. It addresses a technical (not a practical) problem. We can envision a long struggle over the proposed legislation with public entities concerned about potential liability in an unusual case. Do we really want to devote the staff resources necessary for this effort, and tax the Commission's goodwill in this area, just to try to establish a theoretical point of eminent domain law?

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

1 potential trap may be easily cured by revision of the statute to make clear what the
2 notice suggests — that a party waives rights if the party fails to appear and object.
3 The Law Revision Commission recommends this clarification of the law.

4 Ordinarily, an objecting party is able adequately to protect its rights in court.¹⁰
5 The court determines the proportionate amounts of the deposit to be withdrawn by
6 the parties. If it is ultimately determined that a party has overwithdrawn the
7 amount to which the party is entitled, the party is responsible for reimbursement to
8 others having interests in the property.¹¹

9 This scheme founders if a party who withdraws excessive compensation
10 meanwhile becomes judgment proof and cannot repay others who are entitled to a
11 share of the award. The eminent domain law anticipates this eventuality by
12 enabling the court to require the withdrawing party to give security to the other
13 parties at the time of the withdrawal.¹² This remedy is not completely adequate —
14 in some cases the court may fail to require security; in other cases the cost of
15 obtaining security may as a practical matter make it unavailable.¹³

16 If the overwithdrawing party is judgment proof, and if there is no security to
17 cover the shortfall, persons who have an interest in the property are in jeopardy of
18 being denied just compensation for their interests. In such a case, the Law
19 Revision Commission recommends that the law make clear that the condemnor is
20 responsible to ensure that the parties receive the just compensation to which they
21 are constitutionally entitled.

22 The policies that favor this allocation of the risk of loss include:

23 (1) Immediate possession is for the convenience of the condemnor in planning
24 and scheduling the project; the condemnor should pay for any costs associated
25 with that convenience.

26 (2) The condemnor may be the only party to the proceeding with the resources to
27 cover the risk of loss — a property owner may not have the resources, and in fact
28 the financial position of a property owner may be worsened by the proceeding.

29 (3) The condemnor is the only party in a position to spread the risk of loss — it
30 acts on behalf of the public, for the public benefit, and the public should
31 compensate affected property owners for the losses involved.

32 The combination of circumstances giving rise to liability of the condemnor for
33 an overwithdrawal will be unusual, and any resulting increase in the condemnor's
34 acquisition budget will be nominal. The Law Revision Commission believes that
35 this addition to the law will ensure just compensation to all parties whose property
36 is taken for public use, without imposing an undue burden on the public.

10. Code Civ. Proc. § 1255.230(d). (“If any party objects to the withdrawal, or if the plaintiff so requests, the court shall determine, upon hearing, the amounts to be withdrawn, if any, and by whom.”)

11. Code Civ. Proc. § 1255.280(a).

12. Code Civ. Proc. § 1255.240.

13. In this circumstance, a requirement of security may deny a party the constitutional right of compensation for the taking of the party's property. It should be noted that the cost of security is recoverable in the proceeding. Code Civ. Proc. §§ 1255.240(b), 1268.710.

PROPOSED LEGISLATION

1 **Code Civ. Proc. § 1255.230 (amended). Objections to withdrawal**

2 SECTION. 1. Section 1255.230 of the Code of Civil Procedure is amended to
3 read:

4 1255.230. (a) No withdrawal may be ordered until 20 days after service on the
5 plaintiff of a copy of the application or until the time for all objections has expired,
6 whichever is later.

7 (b) Within the 20-day period, the plaintiff may file objections to withdrawal on
8 any one or more of the following grounds:

9 (1) Other parties to the proceeding are known or believed to have interests in the
10 property.

11 (2) An undertaking should be filed by the applicant as provided in Section
12 1255.240 or 1255.250.

13 (3) The amount of an undertaking filed by the applicant under this chapter or the
14 sureties thereon are insufficient.

15 (c) If an objection is filed on the ground that other parties are known or believed
16 to have interests in the property, the plaintiff shall serve or attempt to serve on
17 ~~such~~ the other parties a notice that they may appear within 10 days after ~~such~~
18 service and object to the withdrawal. The notice shall advise ~~such~~ the parties that
19 their failure to object will result in waiver of any rights against the plaintiff to the
20 extent of the amount withdrawn. The notice shall be served in the manner provided
21 in Section 1255.450 for service of an order for possession. The plaintiff shall file,
22 and serve on the applicant, a report setting forth (1) the names of the parties upon
23 whom the notice was served and the dates of service and (2) the names and last
24 known addresses of the other parties who are known or believed to have interests
25 in the property but who were not so served. The applicant may serve parties whom
26 the plaintiff has been unable to serve. Parties served in the manner provided in
27 Section 1255.450 who fail to appear within 10 days after service and object to the
28 withdrawal shall have no claim against the plaintiff for compensation to the extent
29 of the amount withdrawn by all applicants. The plaintiff shall remain liable to
30 other parties having an interest of record ~~who are not so served~~ but, if ~~such~~ the
31 liability is enforced, the plaintiff shall be subrogated to the rights of ~~such~~ the
32 parties under Section 1255.280.

33 (d) If any party objects to the withdrawal, or if the plaintiff so requests, the court
34 shall determine, upon hearing, the amounts to be withdrawn, if any, and by whom.

35 **Comment.** The sixth and seventh sentences of Section 1255.230 are amended for consistency
36 with the first, second, and third sentences.

37 **Code Civ. Proc. § 1255.280 (unchanged). Repayment of amount of excess withdrawal**

38 1255.280. (a) Any amount withdrawn by a party pursuant to this article in excess
39 of the amount to which he is entitled as finally determined in the eminent domain

1 proceeding shall be paid to the parties entitled thereto. The court shall enter
2 judgment accordingly.

3 (b) The judgment so entered shall not include interest except in the following
4 cases:

5 (1) Any amount that is to be paid to a defendant shall include legal interest from
6 the date of its withdrawal by another defendant.

7 (2) If the amount originally deposited by a plaintiff was increased pursuant to
8 Section 1255.030 on motion of a party obligated to pay under this section, any
9 amount that is attributable to such increase and that is to be repaid to the plaintiff
10 shall include legal interest from the date of its withdrawal.

11 (c) If the judgment so entered is not paid within 30 days after its entry, the court
12 may, on motion, enter judgment against the sureties, if any, for the amount of such
13 judgment.

14 (d) The court may, in its discretion and with such security, if any, as it deems
15 appropriate, grant a party obligated to pay under this section a stay of execution
16 for any amount to be paid to a plaintiff. Such stay of execution shall not exceed
17 one year following entry of judgment under this section.

18 ☞ **Staff Note.** The text of Section 1255.280 is set out here for convenience of reference.