

Memorandum 66-25

Subject: Study 36(L) - Condemnation Law and Procedure (Possession Prior to Final Judgment)

Attached to this memorandum are two copies of the "recommended legislation" portion of the tentative recommendation on possession prior to final judgment. Please mark any changes on one copy and return it to the staff at the June meeting. We will send the preliminary part of the tentative recommendation to you as soon as it is prepared. The attached material reflects the prior decisions made by the Commission on this subject.

Also attached are a letter from BARTD (Exhibit I - pink) and from Roger M. Sullivan (Exhibit II - yellow).

Hopefully, the Commission will approve a tentative recommendation on this subject at its June meeting so that the same can be distributed for comment.

THE CONSTITUTIONAL AMENDMENT

The proposed Constitutional Amendment is in the form approved at the Los Angeles meeting, except that the proposed provisions have been rearranged and placed before the stricken material. The "Comment" added to the section proposing the amendment summarizes the changes made by the amendment. The purposes and effects of the amendment are also explained to some extent in the recommendation and are dealt with at length in the study prepared on this subject (Possession Prior to Final Judgment in California Condemnation Proceedings, 2/17/66).

The Proposed Legislation

In general. The draft legislation has been revised in keeping with the actions and recommendations of the Commission at the Los Angeles meeting. Numerous draftsman's changes have been made, however, in the interest of clarity and consistency. The Comments to the sections have also been rewritten. It is suggested that the Commissioners read the

entire draft with a view to gauging its overall clarity and consistency.

Section 1268.01

At its Los Angeles meeting, the Commission discussed the problem inherent in use throughout Title 7 of the term "the property." Under Code of Civil Procedure Section 1244, any number of "parcels" may be combined in the same proceeding. There is no special learning on the meaning of the terms "the property" or "the parcel" for the limited purpose of immediate possession. However, under Code of Civil Procedure Section 1248(1) the "parcel" to be separately valued is a term of some precision. Prior to the adoption in 1939 of Code of Civil Procedure Section 1246.1 (which entitles the condemnor to have "the property" valued as a whole notwithstanding separate interests therein), case law required the condemnor to make separate deposits for each "parcel" and for each separate interest in a given parcel. The latter requirement apparently no longer exists and has not been incorporated in these drafts. Accordingly, it would appear to be sufficient to provide in this section, as has been done, that the condemnor may (and impliedly must) make a deposit for each "parcel" involved in the proceeding.

Mr. Carlson and Mr. Walker mentioned oddities under existing law of part of a taking being subject to immediate possession, and another part not being so subject (because the other part is not being taken for a right-of-way or for reservoir purposes). The broad provision for immediate possession in Section 1269.02 would seem to obviate this awkwardness.

Section 1268.02

This section was changed to delete any reference to "amounts" to

remove any indication of a requirement that the condemnor make separate deposits for particular interests in one parcel of property.

Section 1268.03

This section was changed to assure that, in cases in which the proceeding involves various parcels of property, only those parties having an interest in the property for which the deposit was made are entitled to notice. The Comment was rewritten.

Section 1268.04

No change.

Section 1268.05

This section and the Comment have been rewritten in the interest of clarity and to effect the following changes:

(1) Subdivision (c) has been changed to modify the existing requirement that all parties be personally served and the absolute prohibition against withdrawal without such service. This draft requires personal service unless the adverse claimant has appeared in the proceeding or has been served with summons. In that event, the service is by mail upon both the party and his attorney. Subdivision (d) has been rewritten, however, to permit the court to deny withdrawal even though the portion sought to be withdrawn is not actively claimed by another person, and to permit the court to require security in such circumstances.

(2) Subdivision (c) has also been rewritten to assure that a party not objecting to a withdrawal waives only his rights against the plaintiff, and not against the party who might possibly make an excessive withdrawal.

(3) Subdivision (e) has been added to require the condemnor to

pay any bond premium incurred unless the need for the bond arises primarily from an issue as to title between defendants.

Section 1268.06

This section has been rewritten in the interest of clarity.

Section 1268.07

No changes.

Section 1268.08

Minor grammatical changes have been made in this section.

Section 1268.09

No changes.

Section 1268.10

No changes.

Section 1268.11

This section has been added. It is necessary to provide for a situation in which the defendant moves from the property after the deposit of probable just compensation has been made. As the condemnor may make the deposit without obtaining an order for possession, and as the defendant may or may not withdraw the amount deposited, such a provision is logically necessary to conform to the risk-of-loss and interest sections. See Sections 1249.1(d) and 1255b(b).

Section 1269.01

Subdivision (a) has been rewritten to conform to the proposed constitutional language, and the Comment has been rewritten.

Section 1269.02

Subsection (d) has been rewritten to require that any motion to modify or set aside the order for possession be made within 10 days after service of the order.

Provision for an appeal from the order for possession or the order modifying or vacating an order for possession has been eliminated.

The Comment to the section has been rewritten.

Section 1269.03

This section has been rewritten in the interest of clarity, to delete any specification of details for the motion, and to delete provision for appeal. The Comment has also been rewritten.

Section 1269.04

Subdivision (a) of this section has been rewritten, without substantive change, and the Comment has been rewritten.

Section 1269.05

The section that appeared in previous drafts as number 1269.05, and which would have required 90 days' notice to residents and occupants, has been deleted. Throughout, however, the existing 20-day delay in the effective date of an order for immediate possession has been extended to 30 days. In this connection, the letter attached as Exhibit I concludes the staff's correspondence with BARTD. That letter would seem to argue for fixing the period of notice at 30 days. However, the letter from Mr. Sullivan, attached as Exhibit II (yellow), points out an additional consideration in favor of a longer period of notice. That is, the property owner would have a more adequate opportunity to withdraw the funds before being required to move. The withdrawal procedures have been simplified somewhat, and the 30-day period of notice will permit property owners at least the formal opportunity to withdraw the funds prior to being required to move. If the property owner moves with optimum timing, he can obtain an order for withdrawal of the funds within the 30-day period. See Section 1268.05.

This section, permitting the defendant to obtain an order fixing probable just compensation, has been revised to limit application to owners who are also residents of a dwelling having four or less units. This application is adapted from the Rumford Act. As in earlier drafts, the only sanction for the condemnor's not making the deposit is the accrual of interest on the eventual award.

Section 1269.06

No changes.

Section 1270.01

This section has been rewritten to make clear that entry of judgment is the dividing line between Chapters 1 and 2, on the one hand, and Chapter 3 on the other.

The Comment to the section has also been rewritten.

Section 1270.02

No change.

Section 1270.03

This section has been rewritten to clarify the meaning of "one service at a single address."

Section 1270.04

This section has not been changed but an extensive Comment has been added.

Section 1270.05

This section and the comment have been extensively rewritten. First, a provision has been added permitting, but not requiring, the court to require a bond for withdrawal, even after judgment, if the condemnor or another defendant objects to withdrawal. Second, the section has been rewritten to clarify the right of the defendant to

withdraw, after entry of judgment, an amount deposited before judgment. As explained in the Comment, that result has already been reached in decisions. Further, unfettered withdrawal after entry of judgment is appropriate, since Code of Civil Procedure Section 1255b has been made to terminate interest, as of entry of judgment, on a deposit made before judgment.

Section 1270.06

No substantive change.

Section 1270.07

No change.

Section 1270.08

No change.

Section 1249 (amended)

This section has been changed from earlier drafts to remove the date of valuation provisions. These provisions have been placed in a new section (1249a), and Section 1249 has been reduced to (1) a statement of the "actual value" measure of compensation, (2) a provision permitting the taking into account of increases or decreases in market value caused by the proposal for the public improvement, and (3) the provision that improvements placed upon the property after service of summons are not to be the subject of compensation. An extensive Comment has been added explaining the second provision.

Section 1249a (added)

The rules for determining the date of valuation which the Commission has previously approved have been placed in this section. An extensive Comment has been added explaining the provisions.

Section 1249.1 (amended)

Subdivision (d), the only subdivision changed in this recommendation, has been rewritten. The subdivision now conforms to the provisions made for deposit without regard to the obtaining of an order for possession. See Section 1268.11.

No changes of substance have been made in the remainder of the material. Various formal changes have been made, however, and in certain instances the Comments have been expanded.

Respectfully submitted,

Clarence B. Taylor
Special Condemnation Counsel


BAY AREA RAPID TRANSIT DISTRICT

814 MISSION STREET, SAN FRANCISCO, CALIFORNIA 94103 YUKON 8-1818

May 18, 1966

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Room 30 - Crothers Hall
Stanford University
Stanford, California 94305

Subject: Your May 13, 1966 letter to Mr. John D. Rogers, Condemnation Counsel
Rogers, Vizzard & Tallett
369 Pine Street, San Francisco, California

Dear Mr. DeMouilly:

Please accept my apology for not writing earlier in response to a request from Mr. John D. Rogers on April 12 concerning inaccuracies contained in the March 11 issue of the San Francisco Chronicle. The article in question was written by Michael Grieg and was titled "Directors of BART Picketed".

As Mr. Rogers mentioned in his April 7, 1966 letter to you, the San Francisco Bay Area Rapid Transit District's policy is to provide as much advance notice of possession as possible and in almost every known instance, notice has been given 10 to 25 days earlier than that required by statute. Further, this District has liberally agreed to extensions beyond the court-concurred effective dates whenever possible.

The accusation contained in the Chronicle article that "tenants are getting 3-day eviction notices" is an erroneous inference from an eminent domain possession standpoint. The District has given 3-day notices to Pay Rent or Quit (see sample attached) on approximately 50 of the 2,000 parcels acquired but these notices were given for nonpayment of rent on District-owned properties. The average rental delinquency was in excess of three months and although actual figures are not available, approximately 40% of the tenants involved made arrangements to pay delinquent rent and remained in occupancy.

As to possession under eminent domain statutes, in no instance has this District independently, or through its condemnation counsel, petitioned the court for possession earlier than the 20-day provision set forth in Section 1243.5 (c), Code of Civil Procedure. In most cases, we strive to give 45 to 60 days actual notice, that is, service of the Order for Possession, prior to the effective date set forth in the order. Our standard policy is to provide a minimum of 30 days notice by actual service even in the most critical circumstances.

ADRIEN J. FALK
PRESIDENT
NEWELL S. CASE
VICE PRESIDENT

R. R. STOKES
GENERAL MANAGER

DIRECTORS

LANE COUNTY
ANDREW C. ANDERSON
FELIX K. CHIALVO
JEROME W. HALLMAN
WILFRED SWAN

CONTRA COSTA
COUNTY
NEWELL S. CASE
W. L. CUMMINGS
ARRY L. MORRISON, JR.

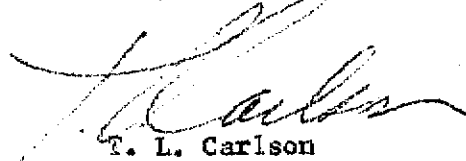
SAN FRANCISCO
COUNTY
ALLAN E. CHARLES
ADRIEN J. FALK
OSWALD LAPHAM, JR.
WILLIAM M. REEDY

May 18, 1966

Mr. John H. DeMouilly

Thank you very much for requesting our comments on this delicate subject and especially for following up with Mr. Rogers prior to distributing your tentative recommendations to those parties actively interested in your commission's activities.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'T. L. Carlson', with a large, sweeping flourish extending from the end of the name.

T. L. Carlson

Real Estate Manager

TLC/jke

cc: Rogers, Vizzard & Tallett

attch

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT
814 Mission Street, San Francisco, California 94103

NOTICE TO PAY RENT OR QUIT

To

You are hereby required to pay the rent of the premises hereinafter described and of which you now hold possession pursuant to _____, said unpaid rent amounting to the sum of _____, being the amount now due and owing by you to the San Francisco Bay Area Rapid Transit District, owner of said premises, for the period from _____ through _____, or deliver up possession of same to said District within three (3) days from receipt of this notice, as by statute in such cases made and provided, or the said District shall institute legal proceedings against you.

You are further notified that unless you pay said rent, as aforesaid, the said District does hereby elect to declare a forfeiture of said _____.

Said premises are situated in the City of _____, _____, and are described as follows:

Dated: _____

SAN FRANCISCO BAY AREA
RAPID TRANSIT DISTRICT,

REAL ESTATE MANAGER

By _____
Right of Way Agent

Memo 66-25

EXHIBIT II

LAW OFFICES

THORPE, SULLIVAN, CLINNIN & WORKMAN

JOHN G. THORPE
ROGER M. SULLIVAN
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700 ROWAN BUILDING
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LOS ANGELES, CALIFORNIA 90013
MADISON 5-7762

May 27, 1966

Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

RE: Condemnation Law and Procedure

Gentlemen:

In December of 1965 you sent a letter to the undersigned as well as others, who are interested in the field of condemnation law, asking for information as to specific instances where existing case or statutory law has led to unjust results.

I have just had some experience in connection with a series of condemnation actions affecting a small community in San Diego County where the State Highway Department is condemning its route for the new Freeway No. 80. The specific problem has come up in the case of People vs. Robinson, et al (Stanley Chambers, Parcel 9; George A. Fordney and Elizabeth C. Fordney, Parcel 10), San Diego Superior Court No. 293763, and in the case of People vs. Becker, et al (Fred D. Rushing and Evangeline A. Rushing, Parcels 4A, 4B, 5, 6), San Diego Superior Court No. 294195.

Under existing code sections 1243.5 and 1243.7 the State is Required to deposit the amount of its estimated just compensation in court at the time it applies for its order of immediate possession. The court may give possession on the basis of this ex parte application as soon as 20 days after the application for immediate possession is filed and a copy of the order served on the owner and/or occupants of the property. Thereafter, the property owners may apply for withdrawal of this deposit and a minimum 20-day period must elapse before the matter can be set down for hearing or a stipulation for withdrawal of the deposit negotiated with the State Highway Department. The 20-day period is required to permit notice of the application for withdrawal to be made to those who have an interest

May 27, 1966

of record in the property. As a matter of practice, the plaintiff almost always files an objection to withdrawal by reason of taxes due the County. This is caused by the delay in showing payment of taxes on the County records.

The specific hardship that results in these cases is that unless the property owners have ample funds to enable them to buy or arrange to build facilities for residential or commercial use, as the case may be, they are caught in the dilemma of being unable to obtain the funds from the State Treasurer until several weeks after the effective date of the order of immediate possession. For example, in the case involving the Fordneys the order of immediate possession was received on March 28, 1966, ordering that possession be given on May 6, 1966. Application for withdrawal was immediately filed on March 31. Objections to withdrawal were filed by the State on April 13, listing the claim of the County of San Diego for taxes and the Security Bank as beneficiary under a first trust deed. A stipulation was worked out providing for an order disbursing the deposit to the respective claimants. As of this date, the money has not yet been received and in all likelihood it will be several weeks before the certified copy of the order is processed by the State Highway Department through the State Treasurer and thereafter a check mailed to the property owner's attorney.

I would suggest that the condemnor be required to deposit the funds and notify the owner at least 90 days prior to the effective date of the order of immediate possession instead of the present 20-day period. In this fashion the owner could have an opportunity to process his application for withdrawal and obtain his funds at least 30 days before the effective date of possession and thereby be in a position to commence construction on other facilities or to buy other facilities in sufficient time to vacate the property desired by the condemnor. The condemnor is in a position to know his construction schedule far in advance and the 90-day period would not cause any difficulty I feel.

* * * * *

Yours very truly,



ROGER M. SULLIVAN

RMS:mp

cc: Herman F. Selvin