#36 10/11/66

Memorandum 66-62

Subject: Study 36(L) - Condemnation Law and Procedure (#5 - Possession Prior to Final Judgment and Related Problems

Attached are two copies of a revised tentative recommendation on this subject. The previous tentative recommendation has been revised so that the legislation and constitutional amendment are in the form of the preprinted bills prepared by the Legislative Counsel.

This tentative recommendation was circulated to all persons and organizations on our condemnation list. Its general content was presented to the Senate Fact Finding Committee on Judiciary at the State Bar Convention. The tentative recommendation was also published in the Weekly Law Digest for September 5, 1966.

The purpose of considering the recommendation at this meeting is to make such further changes as may be necessary so that the pamphlet can be approved for printing at the November meeting. The staff intends to shorten the preliminary portion of the recommendation considerably, as our experience has shown that the background material now included tends to raise problems and elicit views outside the scope of this particular recommendation.

Approximately 20 letters (attached as Exhibits I-XX) have been received since circulation of the tentative recommendation. As might be expected, the responses range from general disapprovals to general approvals. On the whole, the reaction would appear to be as favorable as could be expected in view of the nature of the subject.

General responses

The Southern Section of the State Bar Committee on Condemnation Law and Procedure disapproves the constitutional amendment and proposed legisla-

tion "in its present form" (Exhibit I). As the minutes of the section point out (page 5) "there was no discernable majority opinion with respect to any specific reason for its disapproval," except that the committee believes that the power to extend immediate possession should not be delegated to the Legislature (page 2), and the committee disfavors the extension or broadening of the power of immediate possession (page 5). The views of the members of the committee are summarized on pages 2 and 5 of the minutes.

Mr. Pegram of the Department of Public Works and a member of the Southern Section observes that "it is doubtful that such a recommendation will be approved by either the Legislature or the voters" and that "broadening of the power of immediate possession has not to my knowledge been requested by any agency nor has there been a demonstration of the need for such broadening" (see letter attached to Exhibit I).

The Department of Public Works, noting that it has made four separate oral presentations to the Commission on this subject, offers detailed objections to particular provisions but gives no general response to the recommendation (Exhibit II).

Southern California Edison Company comments that the revised procedure "appears to be very workable and certainly constitutes a marked improvement over existing practice" (Exhibit III).

The Department of Finance strongly objects to one section and opposes two other sections, but notes that "we do not intend to oppose these [other] sections as long as your proposed legislation remains in substantially its present form" (Exhibit V). It "neither favors nor opposes" the constitutional amendment and the extension of "immediate possession."

Homer B. Crotty comments that "the work suggests a considerable improvement of the existing statutory law" (Exhibit VIII).

Pacific Lighting Companies express their view that the "recommendation if enacted, would accomplish much in solving the possession problem in an equitable and fair manner to both the property owner and the condemnor" (Exhibit IX).

Robert J. Williams offers a single objection and notes that "in other respects, the proposed legislation deals adequately with the problem" (Exhibit XIII).

Robert V. Blade comments favorably upon several of the provisions but also expresses his belief that "some of the proposals should be seriously reconsidered" (Exhibit XV).

Harold W. Culver of the San Diego City Schools notes his "substantial agreement with the changes made" (Exhibit XVI).

The San Diego County Counsel opposes two particular sections but in other respects advises that "we are in substantial agreement with the tentative recommendation" (Exhibit XVII).

The City Attorney of San Jose also is "in general accord" with the recommendation and "particularly favors the constitutional amendment" (Exhibit XVIII).

Pacific Gas and Electric Company opposes a particular feature of the revised procedure but otherwise approves the recommendation (Exhibit XIX).

Gerald B. Hansen notes that the members of his firm "affirmatively recommend in favor of this form of tentative recommendation" (Exhibit XX).

The Constitutional Amendment

The State Bar Committee believes that "any amendment which would extend the scope of the present constitutional provision [for possession prior to

judgment] should clearly specify the public agencies and the purposes to which the power is extended" (Exhibit I). The Committee also believes "that the need for such an order and the amount of probable just compensation should not be the subject of ex parte proceedings" (Exhibit I).

Mr. Pegram notes that the recommendation "demonstrates that if the power of immediate possession is to be expanded, more restrictions will be placed upon the agencies who will use the new power" (see letter attached to Exhibit I).

On the other hand, Messrs. Attie, Netzer, and Barr recommend deletion of the existing constitutional authorization for immediate possession. They note that "whatever might have been the historical justification for setting right of way and reservoir purposes apart from all other acquisitions, we can see no purpose for it now" (Exhibit VII). Mr. Blade also observes that "there is clearly no reason to retain the present provisions concerning rights of way and lands for reservoir purposes, since the Legislature can do this by enactment" (Exhibit XV).

The non-governmental public utilities favor the amendment (Exhibits III, IX, and XIX) except that they see no need for immediate possession by ex parte application and would have all such possession obtained by noticed motion (Exhibit IX).

For reasons thoroughly considered and developed in previous meetings of the Commission, the staff recommends no change in the form of the constitutional amendment.

Messrs. Attie, Netzer, and Barr recommend that Section 14 of Article I be made to include provisions for "expert condemnation panels" (Exhibit VIII). Although that suggestion may have merit, constitutional language is

unnecessary unless determination of value by the expert panel is to be made mandatory rather than optional. The specific suggestion is that the litigant should "be given an opportunity to choose between a lay jury and an expert condemnation panel." As it is not necessary to change the form of the proposed constitutional amendment to permit legislation to accomplish this, the staff recommends that no change be made in the proposal.

The proposed legislation

For convenience the comments and suggestions are considered in the order of the sections as set forth in the revised tentative recommendation and in the preprinted bill.

Sections 1-4. The sections are repeals and were commented upon only by the State Bar Committee which observes that they "should not be so repealed unless other legislation is enacted to cover the same subject matter" (Exhibit I).

Section 5. This section is criticized by Mr. Pegram (see letter attached to Exhibit I), the Department of Public Works (Exhibit II), and The Bank of America (Exhibit IV). Mr. Pegram and the department fear that the proposed language would "give the courts some discretion in areas where . . . no discretion is intended." The bank erroneously assumes that the section would "prevent a lender from acquiring possession of the property in the event of default." The fears of the department may have some historical basis in that courts apparently have exercised a measure of discretion in granting writs of possession or of assistance to enforce orders for immediate possession. Although the proposed language seems clear enough, the objection might be overcome by changing the language to read as follows:

> (4) To determine the right to possession of the property, as between the plaintiff and the defendant, in accordance with Title 7.1 (commencing with Section 1268.01), to enforce its orders for possession [etc.].

The words "as between the plaintiff and the defendant" clearly seem to eliminate the fears expressed by the bank, but in an abundance of caution an explanatory sentence might be added to the comment to the section.

Section 6. The State Bar Committee suggests that this additional language concerning increases or decreases in value prior to the date of valuation "is ambiguous and does not clarify existing law" (Exhibit I). The committee favors "the view that the subject matter in question should be left to the discretion of the trial and appellate courts" (Exhibit I). Mr. Pegram considers the change a "good idea," but believes that a "careful study will be necessary to set forth the manner in which this issue is raised" (see letter attached to Exhibit I). The Department of Public Works states that the proposed language is "appropriate as an isolated statement of theoretical law," but suggests that "an approach on the evidentiary level would be more appropriate" (Exhibit II). The Bank of America comments that the reference to "general knowledge" could be "subject to many interpretations" (Exhibit IV).

Mr. Webber approves the proposal, but suggests "that there be some additional language added to the section so as to make clear that testimony is admissible which is intended to show either increase or decrease from the improvement" (Exhibit VI).

Pacific Lighting Companies express the view "that evidence concerning changes in market value caused supposedly by the pendency of a public improvement is most speculative and conjectural." They advise, however, that they have no objection to the proposal as it is "fair and equitable" (Exhibit IX). Mr. Blade believes the proposal is "highly commendable" (Exhibit XV). The members of Mr. Hansen's firm "particularly commend your

proposed form of Section 1249(b)," noting that "this has always been a bad area" (Exhibit XX).

It should be noted that the proposed language is substantially the same as the federal proposals and as that enacted in other states. It also should be noted that the principal purpose of the proposal is to eliminate a seeming disparity in existing California law between increases and decreases. Attached as Exhibit XXI is a form of brief frequently offered by public agencies in support of the view that decreases may never be taken into account.

Although it is clear enough in other jurisdictions, the statutory admonition to "disregard" increases or decreases may be deficient in California. One appellate decision has held that to "disregard" a decrease is to ignore the diminution in market value altogether.

The staff therefore suggests changing the language to read as follows:

> (b) If the market value of property taken or injuriously affected has increased or decreased prior to the date of valuation and such increase or decrease has been substantially due to the general knowledge that the public improvement or project was likely to be made or undertaken, the actual value of the property shall be determined as if the increase or decrease attributable to such knowledge had not occurred. The existence and amount of any increase or decrease attributable to such knowledge may be shown in the ways and subject to the limitations set forth in Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code.

The language should be read in connection with the phrase "actual value" in subdivision (a) of revised Section 1249. The comment to the section should probably also be changed to state explicitly that the expert may take into account such an increase or decrease in connection with transactions used as a basis for his opinion as to value. See Evidence Code Sections 815-818.

In connection with the date of valuation and "pre-condemnation," as he terms it, Mr. Crotty suggests that interest (with offset of rents or profits, if any) be allowed from the time "the project limits were finally determined" (Exhibit VIII). The proposal suggests the general problem of losses as distinguished from changes in market value, prior to the date of valuation. As a matter of convenience, the staff has relegated that problem to our study and recommendation on compensation. Similarly, the Bank of America (Exhibit IV) and Mr. Linneman (Exhibit X) raise the problem of losses largely attributable to the particular date that the condemnor chooses to serve the summons in the proceeding. Growing crops or buildings in the process of construction are familiar examples. Again, the only promising statutory amelioration of this problem appears to be changes in the rules respecting compensability and measures of compensation, rather than in revision of condemnation procedure.

Section 7. The State Bar Committee disapproves this section establishing the date of valuation (Exhibit I). The committee recommends no change "unless such would relate to the protection of the owner from the effect of the condemnor's delay in proceedings in a declining market, such as by giving the owner the option . . . to have the date of value fixed as being either the date of issuance of summons or the date of trial." Mr. Pegram believes that the changes would "complicate the law," "without any real substantial corresponding benefits to either the property owner or the condemnor" (see letter attached to Exhibit I). The Department of Public Works believes that "complications are introduced by this section which are probably more detrimental to the property owner and the condemnor than they are worth" (Exhibit II). The Department of Finance "has some reservations" respecting

the section but does not intend to oppose it (Exhibit V). Mr. Webber would prefer "a uniform rule as to date of trial or retention of the existing rule" (Exhibit VI). The Los Angeles County Flood Control District believes that the proposal would be "complex, unwieldy and probably unworkable" (Exhibit XII).

The San Diego City Schools and the County Counsel, San Diego, point out that the condemnor's privilege of fixing a date of valuation by depositing probable just compensation is possible only if funds for that purpose are available (Exhibits XVI and XVII). They also point out that funds must be available to the condemnor to preserve the original date of trial in cases of new trials. See subdivision (g). They explain in some detail the difficulties in obtaining the necessary funds where those funds derive, in part, from the state government.

The Commission will recall that this proposal on the date of valuation is an admitted compromise in recognition of the considerations generally urged, pro and con, in these letters. Although there is little support for the specific compromise adopted by the Commission, the staff recommends that no change be made in the tentative recommendation. The property owners urge that the date of trial be adopted as the date of valuation. You will recall the reasons why the Commission rejected this alternative. The staff would recommend that the six-month distinction that the Commission has adopted be eliminated except that if this distinction were eliminated there would be little incentive to the condemnor to make a deposit in a case where possession prior to trial is not needed.

Please note the suggested revision of subdivision (g) of Section 1249a contained in the revised tentative recommendation. This revision should be compared to the subdivision as contained in the preprinted bill. The

provision in the preprinted bill, which is the provision approved by the Commission, is defective in that it permits a deposit to be made under Chapter 1 at any time prior to the retrial (not just within 30 days after entry of judgment or, if a motion for new trial or to vacate or set aside the judgment has been made, within 10 days after disposition of such motion).

The Department of Public Works and other public agencies oppose fixing the date of valuation as of the date "the issue of compensation is brought to trial," rather than simply as of "the date of trial." They fear that the former language might discourage condemnors' requests for bifurcation of trials. As the actual difference in dates should not be substantial, and as it is trial of the issue of compensation that logically should fix the date of valuation, the staff recommends that no change be made in the tentative recommendation.

Messrs. Attie, Netzer, and Barr suggest that the formal change in the date of valuation from the issuance of summons to the filing of the complaint is not worth making in view of the fact that for several years cases would be governed by two different rules (Exhibit VII). They also suggest that the basic date of valuation should be 20 days after the service of notice of the making of a deposit, rather than the date of making the deposit. Such a change would further enable the defendant to actually receive probable compensation before the date of valuation. Although each of these suggested changes is essentially formal and could be incorporated in the recommendation, the staff recommends that no change be made in the tentative recommendation.

Sections 8-11. These sections make formal or conforming changes only. No comments were addressed to them, except that a number of practitioners

particularly favor the amendment to Code of Civil Procedure Section 1252, which provides, in effect, for a uniform post-judgment deposit procedure (e.g., Exhibit IX).

Section 12. The State Bar Committee approves the proposed changes in the consequences of abandonment (Exhibit I). Mr. Pegram and the Department of Public Works disfavor the changes and would disallow any appraiser's or attorney's fees incurred prior to the commencement of the proceeding (see letter attached to Exhibit I and Exhibit II). The Department of Finance has "reservations" concerning any requirement that the condemnor pay the condemnee's appraisal fees in the event of abandonment (Exhibit V). Mr. Webber "endorses" the proposed changes (Exhibit VI). Pacific Lighting Companies express the view that no change should be made in the existing statutory provision, and fear that the proposed changes "may encourage property owners to expend unnecessary money on appraisers" (Exhibit XIX).

The County Counsel, San Diego, believes that the condemnor should not be required to pay either appraisal or attorney's fees for services rendered prior to the commencement of the action (Exhibit XVII). That office suggests that the commencement of the action is a date certain and that until that time "no definitive action has been taken by the public."

It should be noted that under existing law reasonable attorney's fees are recoverable whenever the services are rendered, but that all other expenses, including appraisal fees, are subject to the 40-day limitation. For reasons previously considered by the Commission, the staff recommends retention of the existing proposal. Messrs. Attie, Netzer, and Barr suggest in substance the revision of subdivision (c) to read in part "reasonable attorney and appraisal fees actually and necessarily incurred." The staff concurs in this recommendation.

Section 13. This section, which makes various rather technical changes in the rules as to payment of interest, is not particularly supported or opposed by the comments received.

The public agencies oppose subdivision (a)(4) as that subdivision is related to proposed Section 1269.05, which is intended to require a deposit at the option of the condemnee in very limited circumstances. This matter should be deferred for discussion until Section 1269.05 is considered.

Mr. Crotty suggests the payment of interest, less rents or profits, from a date prior to the commencement of the proceeding (Exhibit VIII). His suggestion, however, is not so much one of the treatment of interest as it is a form of compensation for "pre-condemnation."

Mr. Blade opposes the rule that interest on a deposit made to obtain possession before judgment should cease upon entry of judgment (Exhibit XV). He cites the practical problem of actually withdrawing the funds. In mentioning the possibility of a continuing conflict between various interests in the property, however, he appears to be in error in that judgment should not be entered until that conflict has been resolved by the trial court. He also opposes subdivision (c), which permits the court, rather than the jury, to assess interest and any offset against interest. He believes that "determination of a proper interest rate in one county should be the same in every other county." However, the subdivision does not permit the application of varying rates of interest, but merely permits the court, rather than the jury, to assess interest at 7% and to determine the amount to be offset as rents or income.

Section 14. This section merely relocates an existing provision of Code of Civil Procedure Section 1254. Restatement of the existing provision

is strongly opposed by the State Bar Committee (Exhibit I). In the relocated language, that committee suggests that the word "shall" be changed to "may." As the committee observes, the effect of the change would be to leave costs (in the case of new trials) to the discretion of the trial court. We have a separate study on this matter, and we suggest that we defer consideration of whether any change should be made in the existing law.

Section 15 (Chapter 1). The State Bar Committee favors the depositing of probable just compensation, even though it opposes any extension of "immediate possession" (Exhibit I). Mr. Webber proposes that such deposit be made mandatory in all cases (Exhibit VI).

The Department of Public Works suggests two changes to proposed Section 1268.02. The first suggestion, in effect, would permit recoupment of an excessive withdrawal prior to final judgment. We do not believe this to be a desirable change. The second suggestion would permit the trial court to stay its redetermination of probable just compensation until after any motion for new trial has been determined. This appears to be a desirable change and the staff recommends inclusion of the language suggested by the department.

With respect to Section 1268.05(e), the department suggests that the bond be made mandatory if demanded by the condemnor. Counsel for property owners, however, observe that any provision for mandatory bonds in effect negates the privilege to withdraw (Exhibits VII and XV). The staff recommends that no change be made in the proposed subdivision.

The department and other public agencies suggest that Section 1268.09 be expanded to also provide that affidavits or other evidence offered to

obtain an order fixing probable compensation, or to increase or decrease the amount determined, may not be given in evidence or referred to on trial of the issue of compensation.

The department apparently fears that the appraiser who submitted the appraisal report that served as the basis for the order determining probable just compensation will be subject to impeachment at the trial of the case by showing his prior inconsistent statements in the appraisal report presented in the proceeding to determine probable just compensation. We suspect that a property owner might likewise be subject to impeachment if he made statements in an effort to obtain an increase in probable just compensation and then appeared at the trial. Consider also the problems of withdrawals by persons holding separate interests in the same parcel.

The staff believes that it is unlikely that the evidence used at the hearing to determine probable just compensation will be used to impeach at the trial. Apparently, however, the public agencies fear that such evidence may be used against them at the trial. As a practical matter, we suspect that public agencies will be more likely to make higher deposits if the evidence that supports them cannot be used against the agency at the trial. Hence, we believe that the suggestion of the department is a desirable revision.

We have considerable difficulty in framing the language to effectuate the suggestion. We suggest that Section 1268.09 be revised to read:

> 1268.09. Neither the amount deposited nor any amount withdrawn pursuant to this chapter shall be given in evidence or referred to in the trial of the issue of compensation. No reference shall be made in the trial of the issue of compensation to the fact that a party has or has not offered evidence or any particular evidence in connection with a deposit or withdrawal pursuant to this chapter.

The Bank of America complains that withdrawal procedure, and specifically Section 1268.04, requires service of the application for withdrawal only

upon the plaintiff (Exhibit IV). Since 1957, however, the plaintiff has been required, in effect, to serve all parties having an interest of record as it remains liable to defendants not so served. See subdivision (c). The views of the bank would not appear to necessitate change in existing procedure.

Messrs. Attie, Netzer, and Barr suggest that Section 1268.04 be changed to require mailing of a copy of the application for withdrawal "to the plaintiff as per its address on the complaint," rather than being served on the plaintiff. The staff would suggest, instead, that reference be made in the comment to the applicability of the general provision for service by mail upon a party who has appeared in the proceeding.

Mr. Linneman suggests that proposed Section 1268.07 be clarified to limit the waiver of defenses to the particular parcel for which the deposit was made. As the effect of this suggestion is the intention of the existing language, the staff suggests that the point be made in the comment to the section, rather than by change of the proposed statutory language.

The Attorney General of the State of Washington suggests that service of the application for withdrawal should be the function of the condemnee, rather than the condemnor (Exhibit XIV). Notwithstanding the abstract logic of the suggestion, the existing procedure appears to have worked satisfactorily and the staff suggests that no change be made in existing procedure. One advantage of the existing practice is that the condemnor knows with greater certainty that potential claimants have been served.

Chapter 2. With respect to this chapter, which provides for immediate possession in three distinct classes of cases, the comments generally divide as to whether the commentator is condemnor or condemnee.

The State Bar Committee particularly opposes ex parte procedure (Exhibit I).

Mr. Pegram believes that the provision for a 90-day extension in Section 1269.02 will substantially eliminate use of the section (see letter attached to Exhibit I). He also believes that the requirement of a noticed motion will eliminate the effectiveness of Section 1269.03. The views of the Department of Public Works are similar (Exhibit II). Mr. Webber suggests, in effect, a form of noticed motion procedure for all (including existing) immediate possession cases (Exhibit VI). Pacific Lighting Companies suggest, in effect, that noticed motion procedure, rather than ex parte applications, be provided in all immediate possession cases (Exhibit IX). Mr. Blade also would require noticed motion procedure in all cases (Exhibit XV).

Although these conflicting views and the reasons supporting them have been given meticulous attention by the Commission heretofore, the staff recommends the merging of Sections 1269.02 and 1269.03 into a single procedure involving notice to the property owner prior to the making of the order determining probable just compensation or the order for possession prior to judgment.

The public agencies (e.g., Department of Public Works; Exhibit II) suggest that the determination of the right to take in Section 1269.03 be made final and appealable. Although that suggestion has considerable merit, it would be necessary to specify whether an appeal would preclude an order for possession pending disposition of the appeal.

All of the non-governmental public utilities point out that subparagraph (4) of subdivision 1269.03(c) should be deleted, as it is utterly impracticable for the utilities to obtain a certificate of public convenience and necessity to support each particular property acquisition (Exhibits III, IX, XIX).

The staff therefore recommends deletion of the subparagraph. Pacific Lighting Companies also point out that paragraph (2) of subdivision (c) seemingly requires the plaintiff to show the lack of any hardship of possession being taken to the owner or occupant. Rather than changing the proposed language, the staff would recommend that the comment to the section indicate that proof by the plaintiff of the absence of hardship is not necessarily required.

With respect to Section 1269.04, extension of the period of notice to the property owner from 20 to 30 days appears to be opposed only by the Los Angeles County Flood Control District (Exhibit XII).

Section 1269.05 is roundly condemned by all public agencies. See Exhibits II, V, XVI, and XVII. The Department of Finance argues (without merit, we believe) that the requirement of payment of interest if the deposit is not made could be held to constitute an unconstitutional gift of public moneys (Exhibit V). The Department of Public Works notes that the section "presents a problem and could be easily amended to make it applicable to all types of property" (Exhibit II). On the other hand, counsel for property owners uniformly favor greater incentives for the depositing of probable compensation and some expressly approve provisions calculated to make the deposit mandatory. See Exhibits I, VI, XIV, and XV. The Commission will recall that this section, with its very limited application and sanction, results from many dilutions of a general proposal that condemnees be given at least a limited voice in the matter of depositing probable compensation prior to trial. The lack of force of the existing proposal is appropriately underscored by Mr. Crotty's suggestion that interest be paid in all cases from the earliest date of "pre-condemnation" (Exhibit VIII).

The creditable basis of opposition on the part of all public agencies appears to be that the section may serve as the germ of a much more general provision permitting property owners to demand approximate compensation. The one specific difficulty with the section mentioned by the public agencies is that the existing language "might be construed to cover large amounts of property whose highest and best use was not residential but happened to have one or two residential units thereon" (Exhibit II).

The staff recommends no change in the section, except for inclusion of a dollar limit, such as $50,000, in subdivision (a).

Chapter 3. This chapter, which deals with deposits and possession after judgment and supersedes Code of Civil Procedure Section 1254, was mentioned in only a few of the comments. A few attorneys observed that its provision of a single post-judgment deposit procedure is desirable (e.g., Exhibit XV).

The Department of Public Works particularly approves subdivision (b) of Section 1270.05 (Exhibit II). That department, however, would make the requirement of an undertaking mandatory upon the request of the condemnor. Under existing law, the condemnee is entitled to withdraw deposits made after judgment in all cases; no provision is made for undertakings. Further, interest ceases upon the judgment upon deposit of its amount. The staff therefore recommends that the requirement of an undertaking remain discretionary with the court. In the absence of a plausible motion for a new trial or other exceptional circumstance, the condemnee should be entitled to withdraw the deposit, after judgment, without security.

Section 16. This article of the Government Code dealing with the Condemnation Deposits Fund is a codification of provisions now found in the

Code of Civil Procedure. It was not commented upon except by the State Bar Committee which specifically approves its codification (Exhibit I).

Sections 17-20. These sections merely amend two improvement acts to make their provisions concerning the date of valuation and subsequent improvements conform to the general provisions on those subjects in the Code of Civil Procedure. They were not commented upon except by the State Bar Committee which specifically approves their amendment to establish conformity between the improvement acts and the Code of Civil Procedure. In other words, the sections should be made to conform to the final recommendation as to the content of Sections 1249, 1249a, and 1249.1 of the Code of Civil Procedure.

Respectfully submitted,

Clarence B. Taylor
Special Condemnation Counsel

Memo 66-62 EXHIBIT I

FRANCIS H. O'NEILL
AND
RICHARD L. HUXTABLE
ATTORNEYS AT LAW
458 SOUTH SPRING STREET · SUITE 535
LOS ANGELES 13, CALIFORNIA
MADISON 7-2131

FRANCIS H. O'NEILL
RICHARD L. HUXTABLE
WILLIAM G. COSKRAN

September 15, 1966

John H. DeMoully, Executive Sec'y
CALIFORNIA LAW REVISION COMMISSION
Room 30, Crothers Hall
Stanford University
Stanford, California, 94305

Re: Immediate Possession in Eminent Domain Proceedings

Dear Mr. DeMoully,

I enclose herewith a copy of the Minutes of the meeting of the State Bar Committee on Condemnation Law and Procedure, Southern Section, September 8, 1966, concerning the discussion by that section of the committee of the proposed legislation submitted. It is my understanding that the Northern Section of the Committee concurs in the view of the Southern Section with respect to the proposed Constitutional amendment but has not yet had an opportunity to discuss the proposed bill in detail.

These minutes are provided to you under authorization of the resolution of the Board of Governors of the State Bar that this committee is authorized to express to your Commission the views of the Committee on your tentative recommendations, however, you are advised that such views are those of the Committee only and not necessarily those of the Board of Governors.

Very truly yours,

RICHARD L. HUXTABLE

RLH:s

MINUTES OF MEETING
OF
STATE BAR COMMITTEE ON CONDEMNATION
LAW AND PROCEDURE -- SOUTHERN SECTION

DATE: September 8, 1966
PLACE: Suite 535, 458 South Spring Street, Los Angeles, California
PERSONS PRESENT: Richard L. Huxtable, Chairman, Richard del Guercio, Hodge L. Dolle, Sr., Homer L. McCormick, Jr., Justin M. McCarthy, and Roger M. Sullivan.
PERSONS ABSENT: George C. Hadley, John N. McLaurin, Paul E. Overton, Reginald B. Pegram, and Terry C. Smith.

The meeting was held pursuant to notice to consider a study of the Law Revision Commission of the State of California relating to possession prior to final judgment and related problems in California condemnation procedure, as said study was revised July 14, 1966, and more specifically to consider REPRINT SENATE CONSTITUTIONAL AMENDMENT No. 1, proposed by Senator Cobey, 1967, entitled A resolutionto propose to the People of the State of California an amendment to the Constitution of the State by amending Section 14 of Article I thereof, relating to eminent domain, and REPRINT SENATE BILL No. 2, proposed by Senator Cobey, 1967 entitled An act to amend Sections 1247, 1249, 1249.1, 1252, 1253, 1255a, 1255b,1257 of, to add Title 7.1(commencing with Section 1268.01) to Part 3 of, to add Section 1249a to, and to repeal Sections 1243.4, 1243.5, 1243.6, 1243.7 and 1254 of, the Code of Civil Procedure and to amend Sections 38090 and 38091 of and to add Article 9 (commencing with Section 16425) to Chapter 2 of Part 2 of Division 4 of Title 2 of, the Government Code and to amend Sections 4203 and 4204 of the Streets and Highways Code, relating to eminent domain.

Said matters were discussed in general and specific terms and each of the members attending was asked to express his own views respecting the same. Member R. B. Pegram, being unable to attend the meeting in person, had theretofore submitted his opinions in writing, by letter dated August 24, 1966, copies of which were distributed to the membership of the Southern Section and a copy of which is attached to the original copy of these Minutes.

The action of the persons in attendance at said meeting were as follows:

As to REPRINT SENATE CONSTITUTIONAL AMENDMENT No. 1, it was moved, seconded and carried that said proposed Constitutional Amendment be disapproved in its present form.

The members were unanimous in their opinion that the power to designate the public agencies or persons who may obtain an order of immediate possession or the power to designate the public purposes for which such an order may be obtained should not be delegated to the Legislature and , therefore, any amendment which would extend the scope of the present Constitutional provision should clearly specify the public agencies and the purposes to which the power is extended.

Three of the members present felt that there should be no extension or broadening of the power of immediate possession whatsoever. One member felt that any broadening of the power should be on a "very selective basis", and, as to any such extension of the power, it should be exercisable only after judicial determination in proceedings of which notice is given to the owners and occupants of the land. One other member was of the opinion that any extension of the power should relate only to those uses which require assemblage of substantial areas of land where the substantial part of the area has already been acquired and where a substantial hardship will be suffered if the condemnor is required to delay its project during the normal course of judicial proceedings in acquisition of the remaining parcels. Comment was made by others that in such circumstances there should be some showing that the condemnor has theretofore proceeded with diligence.The last member felt that the only extension of the power of immediate possession should be to School Districts for classroom purposes only and that such order would be obtainable only where there has been judicial determination in which proceedings of notice has been given to the owners and occupants of the land (1) that there is a need for such order in consideration of the comparative hardship of the parties, (2) The date upon which the order should become effective, which shall not be less than thirty days following the date of the order, and (3) the amount sufficient to guarantee the payment of probable just compensation to the owners and occupants.

A substantial majority of the Committee was of the opinion that in the event there should be an extension of the power to obtain an order of immediate possession, that the need for such an order and the amount of probable just compensation should not be the subject of ex parte proceedings.

As to REPRINT SENATE BILL No. 2, the action of the Committee in attendance was as follows:

Sections 1 through 4 and 11: It was moved, seconded and passed that the legislation proposed to be repealed by said Sections should not be so repealed unless other legislation is enacted to cover the same subject matter and that reference be made to later recommendations of the Committee respecting such proposed substitute legislation.

Section 5: It was moved, seconded and passed, that no action be taken with respect to Section 5 in that the amendment sought thereby is necessitated by the proposed enactment of Title 7.1 and that reference be made to the Committee's recommendations with respect to that proposed enactment.

Section 6: It was moved, seconded and carried, that no separate action be taken with respect to the proposed amendment of sub-section (a) except by reference to the recommendation of the Committee with respect to Section 7 of the Bill, and that proposed sub-section (b) be disapproved in that it is ambiguous and does not clarify existing law.

It was the feeling of the Committee present that a simple statement that "any increase or decrease in market value prior to the date of valuation that is substantially due to the general knowledge that the public improvement or project is likely to be made or undertaken shall be disregarded", is meaningless in that it fails to clearly state what the ultimate effect of the rule should be. The rule as stated may be applied to the end that if an individual sale has been decreased by knowledge of the impending construction of the public improvement, that decrease must be ignored and the sale must be accepted as a fair market transaction and a proper basis for expert opinion. The effect of the rule then would be to place a decreased value upon the property being taken. The same language may be urged to mean that a sale which has been so influenced is no longer relevant to the determination of the value which the subject property would have had were there no advance knowledge of the impending construction of the public improvement. In Atchison, Topeka & Santa Fe, R.R.Co. v. Southern Pac. Co., 13 C.A. 2d 505, 517, the rule was applied with the effect that decreased sales were accepted "as is" and the owner's compensation was thereby less than the value the property would have had were there no advance knowledge of the impending public improvement while in Buena Park School Dist. v. Metrim Corp., 176 C.A. 2d 255, 259, it was observed that the Court could have "advised the jury that they should treat the property as having the value it would have had, had no preliminary action been taken by the public agency. Irrespective of the precise wording favored by any particular member of the Committee, the Committee present unanimously favored the view that the subject matter in question should be left to the discretion of the trial and appellate Courts.

Section 7: It was moved, seconded and carried, that proposed Section 1249a be disapproved. The majority of the Committee was of the opinion that there should be no change with respect to the fixing of the date of valuation unless such

would relate to the protection of the owner from the effect of the condemnor's delay in proceedings in a declining market such as by giving the owner the option, upon notice sufficiently prior to the time of trial, to have the date of value fixed as being either the date of issuance of summons or the date of trial.

Section 8: It was moved, seconded and carried that the proposed amendment of Section 1249.1 to add subparagraph (b) be approved providing that the same language appearing as a portion of Code of Civil Procedure Section 1249 be deleted (said deletion is contemplated as a portion of the amendment of that Section in Section 6 of the Bill, however, other proposed amendments of Section 1249 proposed by Section 6 have heretofore been disapproved by the Committee).

Sections 9, through 11: Moved, seconded and carried that the amendments contemplated are necessitated by the proposed enactment of Titles 7.1 and reference is therefore made to the recommendation of the Committee in that respect.

Section 12: Moved, seconded and carried that the proposed amendment of Section 1255a be approved.

Section 13: It was moved, seconded and carried that no separate action be taken with respect to this section other than by reference to the Committee's action upon the proposed enactment of Title 7.1.

Section 14: It was moved, seconded and carried that the proposed amendment of Code of Civil Procedure Section 1257 restating the rule presently contained in C.C.P. §1254(k) be disapproved in its present form, but that the same be approved if the word "shall" appearing in line 20 page 13 of the proposed Bill be changed to the word "may".

The majority of the Committee was of the opinion that the assessment of costs against the property owner in new trial should be subject to the discretion of the trial Court. One member observed that if the new trial was obtained by the owner upon the grounds of insufficiency of the evidence to justify a verdict or newly discovered evidence, the assessment of the costs of the second trial against the property owner may be justified, however, if the new trial was granted because of error at law objected to by the owner at the time of the first trial, misconduct of the attorney for the condemnor, misconduct of the juror or other circumstance beyond the control of the property owner, costs of the second proceeding, which is the only proceeding in which the owner has had an opportunity for a fair determination of just compensation, should not be taxed against the owner. It is possible that the latter application would be held unconstitutional under the rule of Heimann vs.

City of L.A., 30 Cal.2d 746, 752-753.

Section 15: It was moved, seconded and carried that Section 15 be disapproved in its present form.

Although the Committee present was unanimous in its disapproval of Section 15, there was no discernible majority opinion with respect to any specific reason for its disapproval, other than (1) the Committee disfavors the extension or broadening of the power of immediate possession by delegation of the power to specify the agencies and purposes by whom and for which the power may be exercised to the Legislature, (2) a substantial number of the Committee disfavor any broadening of the power of immediate possession at all, (3) other members of the Committee feel that any broadening of the power should be constitutionally limited to specific public agencies for specific purposes, (4) some members feel that any broadening of the power should require judicial determination after notice of all elements affecting the order including the need for the order, the time which should elapse before the order becomes effective and the amount which should be deposited to secure payment of just compensation, (5) some members felt that provision should be made for recovery by the owner of additional damages, not otherwise recoverable, which are proximately suffered because of the granting of the order of immediate possession, such as losses due to interruption of business, which would not have been suffered in the ordinary course of proceedings, additional costs of moving inventory which might have been avoided in the ordinary course of proceedings, or the inclusion of inventory and other items of personal property as items taken and for which compensation must be paid, losses suffered because of hasty purchase of new property to replace that being taken, etc., and (6) most members felt that exparte proceedings should be avoided wherever possible.

It was further moved, seconded and carried that Chapter 1 of proposed Title 7.1 is approved in principle by the Committee.

All members of the Committee present felt that many hardships to the owner could be avoided by making available to him all or a substantial part of the just compensation to which he will become entitled as early in the proceeding as possible. Some members of the Committee felt that the only benefit which should result to the condemnor by the owner's withdrawal of funds would be an irrevocable waiver of any defenses relating to the public use and necessity while others felt that such withdrawal should entitle the condemning agency to an order of immediate possession, effective at a date sufficiently after the date of the withdrawal to afford the owner an adequate opportunity to consummate whatever

transactions are necessary and to move from the premises.

Section 16: It was moved, seconded and carried that the proposed additions to the Government Code, requiring that interest be paid to the depositors in the condemnation deposits fund in the State Treasury is approved without its reference to proposed Title 7.1 of the Code of Civil Procedure.

Section 17: It was moved, seconded and carried that the Committee disapprove the amendment of Government Code Section 38090 to provide that the date of value for parties waiving trial under the City Park & Playground Act of 1909 should be determined in accordance with Section 1249a of the Code of Civil Procedure as proposed by Section 7 of this Bill, be disapproved on the grounds that the adoption of said Section 7 has heretofore been disapproved.

It appears that the majority of the Committee is of the opinion that the same date of value should be applied to the owner who waives trial under the Park & Playground Act of 1909 as would be applied were he to demand a trial and, therefore, the intent of Section 17 to establish consistent dates of valuation is approved.

Section 18: It was moved, seconded and carried that amendment of the Government Code Section 38091 to state a rule with respect to the inclusion or exclusion of improvements placed on the property at or about the time of the bringing of the action which is consistent with the "service of summons rule in convential actions is approved.

Section 19: It was moved, seconded and carried that the proposed amendment of Section 4203 of the Streets and Highways Code to provide that the date of value shall be determined in accordance with the provisions of Code of Civil Procedure, Section 1249a as proposed by Section 7 of this Bill is disapproved, in that said Section 7 was previously disapproved by the Committee, but that the intent of Section 19 to establish a rule consistent with the rule respecting date of value established by the Code of Civil Procedure is approved.

Section 20: It was moved, seconded and carried that the proposed amendment of Section 4204 of the Streets and Highways Code to establish a rule respecting the treatment of improvements placed upon the property at or about the time of the bringing of the action and consistent with the "service of summons" rule of the Code of Civil Procedure is approved.

It was further moved, seconded and carried that Richard H. Huxtable, the Chairman of the Committee, or such other member

of the Committee as he should appoint for such purpose, shall be authorized to appear before the Senate Fact-Finding Committee on Judiciary of the California Legislature, Tuesday, September 20 and Wednesday, September 21, at the Disneyland Hotel, in the City of Anaheim, and to testify with respect to the views of the Committee hereinbefore stated, with the understanding that his testimony shall concern the views of the Committee and not the views of any specific individual.

Respectfully submitted,

RICHARD L. HUXTABLE, Chairman

STATE OF CALIFORNIA TRANSPORTATION AGENCY

EDMUND G. BROWN, Governor

DEPARTMENT OF PUBLIC WORKS
DIVISION OF CONTRACTS AND RIGHTS OF WAY (LEGAL)
3540 WILSHIRE BLVD., SUITE 1100, LOS ANGELES 90005
Telephone: 385-0431

August 24, 1966

Richard L. Huxtable, Chairman
Committee on Condemnation
Law and Procedure
458 So. Spring Street, Suite 535
Los Angeles 13, California

Dear Dick:

Re: Law Revision Commission's Tentative Recommendation Re Possession Prior To Final Judgment

Since I have for some time now scheduled an out-of-the-country trip for August 30, 1966, I am acting on your suggestion to submit my comments to you and the members of your committee in writing.

A major revision is proposed concerning Article I, Section 14 of the California Constitution. Basically the proposed amendment would permit any public agency authorized by the Legislature to take possession of property prior to entry of judgment. The authorization for such possession is contained in this same proposal of the Law Revision Commission and will be discussed later.

It is doubtful that such a recommendation will be approved by either the Legislature or the voters as both have recently turned down extension of the right to immediate possession.

The broadening of the power of immediate possession has to my knowledge not been requested by any agency nor has there been a demonstration of the need for such broadening.

The accompanying legislation proposed by the Law Revision Commission demonstrates that if the power of immediate possession is to be expanded, more restrictions will be placed upon the agencies who will use the new power. It is my belief that these added restrictions, particularly the authorization for the court to extend the time after which an agency may take possession, will discourage any use of this broadened power. It will be impossible for an agency to plan any construction until it is assured that it can get possession of the property. When a court can extend the time after which the agency may take possession, the agency would be under great risks to schedule any financing or construction prior to actual acquisition.

At the present time, immediate possession can only be taken for reservoir and right of way purposes. Where condemnation is involved for these purposes there are usually a large number of parcels which are affected. To delay the construction of these facilities until all properties have been acquired would take these properties off the tax

rolls long prior to actual need.

Privately owned public utilities would undoubtedly oppose such an amendment due to the fact that public utility districts could take immediate possession of the privately owned public utility facilities.

Turning now to the proposed statute which accompanies the proposed Constitutional amendment, there are several sections which should be commented upon.

Section 1268.02: In the last sentence of this section there is a provision which provides that the court may not redetermine just compensation to be less than the total amount which has been previously withdrawn. This provision should be modified to permit a court, after it has denied a motion for a new trial, to either redetermine the probable just compensation to be the amount of the verdict or to at least require a bond on the amount in excess of the verdict. This modification is reasonable in that before the probable just compensation would be redetermined, both a jury and the court would have passed on its propriety. It would also put the property owner on clear notice that the excess amount of the verdict is not clearly his. Also certain constitutional questions are here involved.

Section 1268.05 (e): This subsection gives the trial court discretion in requiring an undertaking where the trial court has authorized a withdrawal which is claimed by another party or to which another party may be entitled. Subdivision "c" of this same section provides that the condemnor is liable to all parties having an interest of record who are not served. I therefore believe that the undertaking should be mandatory because in many cases it is impossible to serve all parties, and under this subsection, withdrawals are permitted even though all parties of record are not served.

It should be noted in this connection that the condemnor must pay the premium for any undertaking (see subdivision "f").

Section 1268.09: This section is a restatement of the Code of Civil Procedure Section 1243.5 that: "The amount deposited on any amount withdrawn . . . shall (not) be given in evidence or referred to . . .". Under the proposed legislation, there would undoubtedly be more hearings on the subject of probable just compensation, therefore, both property owners and condemnors would rely upon evidence supporting their respective positions which would not necessarily be the same as would be given at the time of trial. Therefore, in order to more fully comply with the intent of the present law there should be a modification of this section which would clearly provide that the affidavits or other forms of evidence given in support of an order fixing security should be given the same protection as provided now to the amount of money withdrawn.

Section 1269.02(d)(1): This section provides that in a case where a condemnor has a conclusive presumption of necessity the court may conclusively stay an order for possession for a period of 90 days. Whenever such a provision for a stay is provided, a public agency in order to protect itself must take immediate possession sufficiently in advance so as to prevent any stay which might be granted from affecting its construction schedule. Where such a provision is provided, the net effect is to remove the whole purpose of the section and to make condemnors shy away from the use of the section. If condemnors do use the section it would be necessary to take possession far enough in advance to effectively prevent any stay from interfering with the plans and thus cause a removal of the property from the tax rolls long prior to its actual need.

1269.03: This section provides for all public agencies to take immediate possession of property; however, it also provides that before this can be done a noticed motion must be made and that the court may, in effect, determine the date on which the condemnor may take possession by weighing the hardship to the owner against the need of the condemnor. As stated previously, such a restriction severely limits the probable use of this section.

If this section is approved there should be a provision providing that at the noticed hearing the question of public use and necessity should be finally determined and an appealable order entered. Obviously this question of public use and necessity should be determined prior to any change of possession so as to work the least hardship on both the condemnor and the condemnee.

1269.05: This section generally provides that a home owner may require a deposit be made at his, the home owner's, option. No demand for this section has been shown nor does there appear to be any need for it. Until such time as the need for this type of legislation is fully studied, and until the effects of such a provision on both the condemnor and the condemnee can be undertaken, it is my recommendation that the section be deleted from the proposed legislation.

1247(4): This section should be clarified so as to specifically provide that there is no discretion in the trial court in regard to regulating the right to possession where it is provided in other sections that the court has no discretion.

1249(b): Generally this section, which provides that an increase or decrease in market value due to the general knowledge of the public improvement is not be be considered, is a good idea. However, it would seem that this section is not the proper place for such enactment. A careful study will be necessary to set forth the manner in which this issue is raised. For example, it will need to be determined whether

sales are comparable or not comparable because either the subject property or the sale is enhanced or blighted; or whether the sale should be allowed into evidence and then the appraiser allowed to "adjust" the price of the sale to take into account the effect of the enhancement or blight.

1249.a: This is a general change in the approach to date of value. Generally it provides that the date of value shall be the date that possession was taken or six months after the filing of the complaint (if trial is had within one year). The "six month" rule is generally of little benefit to the condemnee in a rising market or to the condemnor in a falling market. Sales after the date of value are generally allowed and even though the jury is instructed on the date of value we all know that they often take such later sales into account. Thus the so-called advantage of a six month's later date of value will be outweighed by the delay of hiring appraisers where a property owner desires an early appraisal of his property in order to more adequately negotiate with the condemning agency. It will also discourage settlements until after the six month period has passed in order to be assured of the latest valuation when there is a rising market.

There is also a change in the wording of the section. Under the proposed legislation the date of valuation is dependent on the date that the issue as to compensation is tried. With this provision in effect it will be more difficult to obtain a bifurcation of a trial in order to try special issues which may drastically affect any appraisal made of the property. Without such bifurcation witnesses may have to be prepared to testify on two or more legal theories. Such a change in the law should be resisted by both condemnors and condemnees, as well as the courts, because the bifurcation of issues tends to decrease the costs of appraisals and to decrease the number of trial days necessary to try a case. In short, Section 1249.a tends to complicate the law concerning the date of value without any real substantial corresponding benefits to either the property owner or the condemnor.

Section 1244.a(c): This section has been amended so as to provide that appraisal fees and attorney fees may be recovered on an abandonment even though they were incurred prior to the commencement of the proceedings. Any such expenses, had no suit been filed, would have been the responsibility solely of the property owner. It would seem that there is little justification in providing a windfall to a property owner merely because a suit was filed.

Section 1255.b: Section 1255.b(a)4 and the last sentence in 1255.b(b) should be deleted as they provide for interest accruing under Section 1269.05. As I have previously indicated I object to Section 1269.05 until a thorough study is made of this subject and therefore these sections should also be deleted.

Most cordially yours,

R. B. Pegram

RBP:ls

cc: Richard A. Del Guercio
Hodge L. Dolle, Sr.
George C. Hadley
Homer L. McCormick, Jr.
Justin M. McCarthy
John N. McLaurin
Paul E. Overton
Terry C. Smith
Roger M. Sullivan

Memo 66-62 Exhibit II

STATE OF CALIFORNIA—TRANSPORTATION AGENCY EDMUND G. BROWN, Governor

DEPARTMENT OF PUBLIC WORKS
DIVISION OF CONTRACTS AND RIGHTS OF WAY (LEGAL)
1120 N STREET, SACRAMENTO

September 14, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Re: Tentative Recommendation Relating to Condemnation Law and Procedure #5 - Possession Prior to Final Judgment and Associated Problems.

By letter dated August 3, 1966, you have requested the Department of Public Works to comment on the tentative recommendation of the Commission on possession as revised on July 30, 1966.

The Department of Public Works has made four separate oral presentations to the Law Revision Commission concerning its comments and suggestions with respect to the proposed constitutional amendment and statute. There are several additional comments and suggestions that we ask the Commission to consider.

Section 1247(4)

This section was added to incorporate the phrase found in C.C.P. §1254, providing that the court may "...stay all actions and proceedings against the plaintiff..." arising from possession of the property. In order to do this, the Commission has added provisions which gives the court the power to regulate the right to possession and to enforce its order. The danger of this section as presently drafted is that it appears to give the court some discretion in areas where under the specific provisions of the proposed statute no discretion is intended. If this section is clarified as specifically

stated above the section would be relatively innocuous. The comment indicates that this is merely a codification of the court decisions, but the section as drafted is broader.

Section 1249

On page 79, the comment states that the increase or decrease in market value due to the general knowledge of the public improvement is not to be considered in arriving at the amount of severance damages and special benefits in addition to the value of the property. While this concept is correct insofar as the value of the part taken and the value of the whole property in the before condition is concerned, the effect of the public improvement must be considered in regard to the questions of severance damages and special benefits. Section 1249(b) may be appropriate as an isolated statement of theoretical law. However, there are serious implications in its practical implementation. Certainly this section should not be used as a stepping stone to raise issues of "blight" without substantial proof thereof. The comment of the Commission following this section indicates that there is uncertainty in the law as to whether "blight" may or may not be considered. Actually the cases, when carefully analyzed, turn on the basis that there was no concrete evidence of such deleterious effect on the property taken aside from mere speculation by an expert witness testifying for the property owner. Such unfounded speculation has always been condemned by the cases (Sacramento and San Joaquin Drainage Dist. ex rel. State Reclamation Board vs. Reed, 215 C.A. 2d 60) and it is our fear that this section would open the door to the claim of "blight" in many cases where absolutely no proof of such effect could be factually established. That such an unfounded claim, however, can seriously prejudice a jury, is plainly evident. A careful analysis of the cases shows that the rule in regard to "enhancement" is much the same as the rule in regard to "blight". Thus, the case of San Diego L. & T. Co. v. Neale, 78 C. 63, 74-5, indicates that while provable increase in value caused by knowledge of the public improvement may not be considered as part of just compensation in valuing the part taken, mere speculative claims of increase in value, not capable of factual separation from the general market, may not be deducted from the market value of the part taken.

The comment purports to "change" the rule as to "blight" to correspond with the rule as to "enhancement". The danger

is that the court will interpret such a "change" to open the door to unlimited speculation on the "blight" issue. It is suggested that very careful consideration be given to the practical application of such a purported "change" or "clarification" in the law.

Perhaps an approach on the evidentiary level would be more appropriate. This could be accomplished either separately or in connection with a change as proposed in Section 1249. Thus, such questions as the effect of the general knowledge of the public improvement on comparable sales, whether favorable or unfavorable, should be spelled out. Whether such an affected sale should be considered noncomparable because it is affected by the general knowledge of the improvement or whether the appraiser should be permitted to make some adjustment in the price of the comparable sale to reflect the effect of such general knowledge should be thoroughly studied before any general "change" in existing law is made as proposed in Section 1249(b).

Section 1249(a)

The content of this section has been substantially changed by the Law Revision Commission. The essence of the change is to make the date of valuation six months after the filing of the complaint where the trial is had within one year unless the delay is caused by the defendant. The Department generally agreed with this approach to determine the date of valuation in the spirit of compromise because of the original proposal of the Law Revision Commission to make the date of value the date of possession or date of trial, whichever was earlier.

Complications are introduced by this section which are probably more detrimental to the property owner and the condemnor than they are worth. For example, it will be impossible for a property owner without extra expense to obtain an early appraisal of his property unless six months have passed after the filing of the complaint. No appraiser can make an early firm determination of value. Negotiations for settlement will thus be impaired by uncertainty. If a property owner or a condemnor does obtain such appraisal then it will have to be brought up to date. At the same time unless there is a very unusual market the actual increase of value in six months' period would normally not compensate for this additional expense. The failure to maintain the Murata rule

and also the statement in the comment that a mistrial eliminates the attempted trial for purposes of date of valuation, opens the door to invited misconduct. Such should not be encouraged by any statute.

An additional problem is presented because the date of valuation is fixed by the date that the "issue of compensation" is brought to trial, rather than the date of commencement of trial. Often there is a contest of an issue which could be more easily and economically settled by a bifurcated trial. After such early determination of legal issues, both sides are able to instruct their appraisers according to the law as determined by the trial judge on the first hearing. The present practice is to request a bifurcation of the trial to settle such an issue. Under the law as proposed, a condemnor would be encouraged to oppose any such bifurcation so as to prevent a delay in the trial of the issue of compensation. This would force both sides to have their appraisers prepare the case on two or more different legal theories and thus add to the expense and uncertainty. Since the trial of special issues in condemnation cases provides for a desirable and worthwhile procedure, its use should not be discouraged by a date of valuation statute which will bring about its disuse in order to preserve an earlier date of valuation. Such bifurcation of issues is usually beneficial in that it decreases the number of court days required to try a case and may bring about a settlement.

Section 1255a(c)

This section increases the costs that a condemnor must pay for the abandonment of an eminent domain proceeding by including appraisal fees as well as attorneys' fees whether or not the action was abandoned 40 days prior to trial. This section provides that in addition to appraisal fees and attorneys' fees incurred after the proceeding is commenced, appraisal fees and attorneys' fees incurred before the proceeding was commenced shall be recovered. It is our opinion that appraisal fees and attorneys' fees incurred by the property owner prior to the commencement of the proceeding should not be paid by the condemnor. Only those costs incurred as the result of the proceeding should be borne by the condemnor. Appraisal fees and attorneys' fees incurred by the property owner prior to the commencement of the pro-

ceeding could very well be for the purpose of dissuading the governmental agency from the acquisition of the property. These fees and expenses were not incurred for the purpose of defending the condemnation action, but were incurred for the purposes of preventing the condemnation action. The date of filing of the action would seem a more reasonable date for determining which fees and expenses are to be paid by the condemnor. The allowance of fees for services rendered before the proceeding was commenced could prove to be incapable of exact determination and subject to dispute and abuse.

Section 1255b

We object to 1255b(a)4 and the last sentence in 1255(b). These additions to this section provide for interest accruing under Section 1269.05. We have commented on our objection to Section 1269.05, and for the same reasons the provisions here should be deleted.

Section 1268.02

The last sentence of this section provides that the court may not determine probable just compensation to be less than the total amount previously withdrawn. We believe that this provision should be modified so that the court could redetermine probable just compensation to be the amount of the judgment even though a greater sum had been previously withdrawn. The early return to the public agencies of this excess amount is necessary so that property owners will not have time to encumber or invest the withdrawn amounts and to put the property owner on notice that the excess amount withdrawn over and above the judgment is due and owing the condemnor. We suggest the following language be added at the end of the section to read as follows: "...unless the amount withdrawn is greater than the amount of the judgment in which case the probable just compensation shall be the amount of the judgment."

After the second sentence the following should also be provided: "The court may stay its determination of the amount of probable just compensation until after a motion for new trial has been determined." The reason for this provision is to prevent the tying of the trial court's hands by forcing the court to redetermine the amount of

probable just compensation as the amount of the verdict where it is going to grant a new trial on the basis of either an excessively large verdict or an excessively small verdict. After it has granted the motion for new trial it may, but is not obliged to, redetermine the amount as that of the set aside verdict.

Section 1268.05(e)

This subsection provides that where the court determines that an applicant is entitled to withdraw a part of the deposit that another party claims or to which another person may be entitled, the court may require an undertaking. Since subdivision (c) provides that the condemnor remains liable to all parties having an interest of record who are not served, we believe that the bond should be mandatory if demanded by the condemnor. The condemnor may not be able to serve all parties and since the proposed statute allows withdrawal in such situations, a bond or undertaking is necessary to protect the taxpayers' funds. This should not prove too onerous a requirement since the condemnor is required to pay the premium for the undertaking pursuant to subdivision (f) of this same section.

Section 1268.09

This section restates in substance the requirements of existing law contained in C.C.P., §1243.5, that "The amount deposited ... and the amount ... withdrawn ... may not be given in evidence or referred to ...". Since the Commission is renumbering this section we believe that the concept should be fully stated so as to provide that the affidavits or other forms of evidence given in support of an order fixing security should also be given the same protection as the amount deposited or withdrawn and cannot be offered in evidence or be referred to in the trial. The reason for this suggested change is that either party might circumvent the intent of the present law by offering into evidence or referring to the affidavits or other evidence used by the other party to obtain an order fixing security or to obtain an order increasing or decreasing the amount of probable just compensation.

Section 1269.02(d)(1)

This subdivision authorizes the court to stay the effect of an order for immediate possession where it is obtained in those cases in which the condemnor has a conclusive presumption of necessity. We believe that the court should not be able to stay the order where the plaintiff is entitled to it, even for a period of 90 days. Since the resolution of necessity is conclusive and binding on the court the court should not be able to thwart the necessity or need for the property by delaying the possession of the property and the award of construction contracts.

This problem of stays focuses the attention on the whole problem of the extension of the right to immediate possession. The Commission is concerned with extending the right and at the same time providing the property owner with the right to at least limited "protection". The net result of this is that an agency which decides to exercise its new right of immediate possession must plan to take possession sufficiently in advance of its actual need so that no court, no matter how arbitrary, can extend the time. If the agency does not follow this procedure, it may be faced with the situation where it has committed itself to contracts which contemplate the actual possession of the property on the date it specified in the contract and not be able to meet its contractual obligations because of an alleged hardship to the property owner. This would result in contractors' claims for delay because of failure of the condemnor to provide the right of way as agreed upon in the contract. This power granted to the court by subsection (d) violates the basic premise contained in our constitution - that of the separation of powers. The court should not be able to substitute its discretion for that of the executive branch of government.

Section 1269.03

The effect of this proposed section has been generally commented on in the first part of this memorandum. Because this section provides for a noticed hearing, the question of public use and necessity should be finally determined at the hearing. It should be provided that if a defendant fails to object or to contest, he has waived his right at any future time to contest public use or necessity. Furthermore, it should be provided that the determination of these issues by the court constitutes an appealable order.

Section 1269.05

This section is the so-called compulsory deposit for immediate possession on motion by the property owner, and takes away from the condemnor the discretion as to whether immediate possession should be taken of the property. This section limits the condemnor to the extent that if the deposit is not made within 20 days after the order, the moving party is entitled to legal interest regardless of the fact that the condemnor does not take possession. In addition, the deposit of probable just compensation is determined in a noticed, contested hearing, whereas in all other cases the deposit in situations involving right of way or reservoir is accomplished in an ex parte proceeding.

Although subsection (a) limits the effect of this provision to dwellings containing two or less residential units, one of which is owner occupied, this section presents a problem and could be easily amended to make it applicable to all types of property. An additional problem is presented in that there is no provision for any bond on any amount which is more than the condemnor's estimate of probable just compensation. This could be particularly dangerous in the situation of the single family residence where the party making the request appears in propria persona. He may not be fully aware that the amount which the court determines to be probable just compensation and which amount he withdraws may have to be paid back to the condemnor. In addition to the penalty for the payment of interest the condemnor is further penalized if it does not deposit the probable just compensation since subsection (c) of this section does not provide any offset to such interest for rents or other income received by the owner or the value of the owners possession of the property after the deposit was required. This provision is not fair to the condemnor and provides a windfall to the owner where the condemnor is not in a financial position to comply with the order of the court.

Furthermore, Section (a) of this section, while purporting to be limited to residential units, is so ambiguous that it might be construed to cover large amounts of property whose highest and best use is not residential but happened to have one or two residential units thereon. The court could consider that this subsection would apply to such a situation

and require a deposit to be made on large ranch property or commercial property improved with one or two units, contrary to the intent of the drafters of the statute.

Section 1269.05 has most serious consequences in that it would require the unnecessary deposit of public funds where possession is not needed by the governmental agency concerned. This would prevent the use of such funds for actual construction or other purposes while the public funds are required to be on deposit. This one feature of the statute could delay the completion of public works projects where substantial amounts of money are tied up in court deposits. The Law Revision Commission has not indicated in its study and recommendation any demand or need for this particular provision and no demand or need has been evidenced with respect to home owners or persons living in dwelling units containing two or less units. No section should be enacted into law without a full study of the need for such a provision and the final consequences upon public agencies.

Section 1269.06

This section is good insofar as it gives the condemnor the right to take possession at a date earlier than it otherwise could where it has sought or intends to seek possession of the property and the defendants entitled to possession have either vacated the property or withdrawn the deposit. However, it emphasizes the inequities inherent in §1269.05 in that under §1269.05 a defendant may demand a deposit; the condemnor in order to protect itself may be forced to make a deposit, and the defendant may refuse then to withdraw any portion of the deposit. In such a situation the money is deposited and is of no benefit to either the condemnor or the condemnee. There should be a provision either here or in some other section which provides that after a defendant has demanded and received an order and the deposit is made by the condemnor that the condemnor may then obtain an order for possession.

Section 1270.05

This section should be made to conform to the suggestions which we have made above with regard to Sections 1268.05 and 1268.06. The last sentence of Section 1270.05 would accomplish this. Therefore, in any withdrawal after judgment over objection, an undertaking should be made mandatory upon the

request of the condemnor; the condemnor would pay the cost pursuant to the present provisions of §1268.05(f), the condemnor would recover the premium paid for said undertaking, and pursuant to the present provisions of §1268.05(c) the condemnor would have subrogation rights.

Additionally, as suggested in our comments to §1268.02, a provision should be added whereby the court could stay its redetermination of the amount of probable just compensation until after a motion for new trial has been determined.

We again wish to advise the Commission that the Department of Public Works is grateful for the opportunity to comment on the tentative recommendation relating to immediate possession. A representative of the Department will be available to answer questions when this matter is heard by the Commission.

Sincerely,

Robert F. Carlson

ROBERT F. CARLSON
Assistant Chief Counsel

Encls. 20 copies

cc's to: Willard A. Shank, A.G's. Office
Norman B. Peek " "
Robert L. Bergman " "
Thomas T. Jordan, Recl. Board
Thomas H. Clayton, Gen. Serv.
Norman Wolf
League of Cities
Russell B. Jarvis
San Diego County Counsel
Santa Clara County Counsel
Butte County Co. Counsel
K. Duane Lyders
Robert W. James, Dept. of Water Res.
John Smock, Judicial Counsel
Richard Allen, Dept. of Water Res.
Dept. of Public Wks. (S.F. Legal Office)-10)
" " " " (L.A. Legal Office)-10)
" " " " (S.D. Legal Office)- 5)
Los Angeles County Counsel

Memo 66-62 EXHIBIT III

Southern California Edison Company
P. O. BOX 351
LOS ANGELES, CALIFORNIA 90053

ROLLIN E. WOODBURY
GENERAL COUNSEL
HARRY W. STURGES, JR.
ROBERT J. CAHALL
ASSISTANT GENERAL COUNSEL

LAW DEPARTMENT
624-7111

DAVID N. BARRY, III
NORMAN E. CARROLL
JOHN R. BURY
H. CLINTON TINKER
KENNETH M. LEMON
WILLIAM E. MARX
H. ROBERT BARNES
TOM P. GILFOY
LOWELL T. ANDERSON
DAVID C. HENSLEY
ASSISTANT COUNSEL

September 16, 1966

John R. De Moully, Executive Secretary
State of California
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Tentative Recommendations of the California Law Revision Commission Relating to Condemnation Law and Procedure

Dear Mr. DeMoully:

Thank you for keeping me informed of the progress of the proposed new eminent domain sections.

In reviewing the material you sent I note an area of particular concern to investor-owned public utilities such as the one I represent. This is the area that would extend early possession to such utilities in the manner as set forth in proposed Section 1269.03. The procedure suggested in this section appears to be very workable and certainly constitutes a marked improvement over existing practice. There is however one requirement appearing in this Section that I'd like to call to your attention for further consideration.

Section 1269.03(c) sets forth the conditions which a court must find to exist before it makes an order that authorizes the plaintiff to take possession. One of these conditions is that utilities under the jurisdiction of the Public Utilities Commission must show that "the public necessity of the proposed improvement is evidenced or supported by a certificate of public convenience and necessity issued by the Public Utilities Commission under the provisions of the Public Utilities Code."

It was my thought that this certificate requirement may have been included due to a misunderstanding of just when public utilities under the jurisdiction of the Public Utilities Commission obtain certificates of public convenience and necessity. These certificates are only required when a utility is extending its facilities into territory not already served by the utility. With the possible exception of the construction of certain major generating facilities this is, in fact, the only time when certificates are obtained. The remarks of the court in San Diego Gas & Electric Company vs. Lux Land Company, 194 Cal. App.2d 472, at page 479, are called to your attention in this regard. During my experience of handling somewhere around one hundred separate condemnation actions over the past several years the need for the facility was evidenced by a certificate in only one or two cases. This I believe to be a more or less representative experience for the utility industry throughout California.

Accordingly, it may be seen that requiring a certificate of public convenience and necessity to obtain possession is to require a whole new, independent proceeding before the Public Utilities Commission that most probably would not otherwise occur. In addition to causing utilities a great deal of extra difficulty, time and expense, this could also have the effect of flooding the Public Utilities Commission with a vastly increased volume of work.

The inclusion of the certificate requirement also raises a certain inference that obtaining certificates is a necessary condition precedent to proving the issue of necessity, whether or not early possession is ever sought, which of course, as has heretofore been pointed out, is not the case.

The public interest would appear to be adequately protected from an arbitrary exercise of the early possession procedure by subparagraphs (1) and (2). As we interpret the requirement of subparagraph (1) which provides that the court must first find that the plaintiff is entitled to take the property before it orders the plaintiff into possession, such requirement necessarily includes a finding in favor of the plaintiff on the issues of necessity, public use and if raised,

compatibility of location. If this interpretation is in accordance with your intention a defendant would in effect be afforded all of the protection he is now, under existing law, afforded to keep a plaintiff out of possession; the only difference being that the issues relating to the right to condemn would be tried at the time early possession was sought rather than at the time of the trial of the valuation issues as is current practice. The "balancing" in which the court is instructed to engage under subparagraph (2) of course, provides even more protection to a defendant and seems to be a reasonable additional requirement.

For the foregoing reasons it is respectfully suggested that the Commission consider eliminating subparagraph (4) from Section 1269.03(c).

This letter has been discussed and worked on jointly with Mr. Charles Van Deusen of the Pacific Gas and Electric Company's Law Department and it is my understanding that he will be forwarding to you a substantially similar letter under his signature.

May I thank you again for providing me with the opportunity of making these comments.

Very truly yours,

Tom P. Gilfoy
Assistant Counsel

AIRMAIL
SPECIAL DELIVERY

TPG:gjl

cc: Charles T. Van Deusen, Esq.

Memo 66-62

Cable Address — BANKAMERICA

Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION

SAN FRANCISCO HEADQUARTERS

LEGAL DEPARTMENT

SAN FRANCISCO, CALIFORNIA 94120

September 13, 1966

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

Re: Tentative Recommendations Relating to Condemnation Law #5

Gentlemen:

We have received a copy of your Tentative Recommendations Relating to Condemnation Law #5 which are a product of much work and thought and which we have not had sufficient opportunity to thoroughly review. Therefore, the following is intended to generalize our reactions as a lender to some of the Commission's recommendations.

Section 1268.04 proposed to be added to the Code of Civil Procedure provides that any defendant having an interest in the property may withdraw all or any portion of the deposit. There is no provision requiring service upon anyone other than the plaintiff. Therefore any defendant could withdraw without notice to the remaining defendants. Section 1268.05 provides that no withdrawal may be ordered until twenty days after service of a copy of the application on the plaintiff or until the time for all objections has expired. The plaintiff may object upon the grounds stated in the section and, in the event it does so, on the grounds that other parties are known or believed to have an interest in the property the plaintiff is to serve them and they have ten days within which to object. The defendants, other than the one seeking withdrawal, have no protection unless the plaintiff elects to file an objection. In the event that other parties have an interest in the proceedings, plaintiff should be obligated to notify them of the application for withdrawal or, as an alternative, the applicant should be required to serve all of the defendants with a copy of his application and twenty days should be allowed them to file an objection. This appears to be more in keeping with (d) of your recommended amendment to Section 14 of Article I of the State Constitution.

The second section of 1269.01 (b) is somewhat confusing. It appears that the word "not" should be

inserted between the words "has" and "been reversed" in the second line or if it is intended only to refer to a judgment regarding the value, the language should be more specific. Similar language is contained in 1269.02 -.03.

Section 1247-4, which is new, provides the court with power to stay any other actions or proceedings arising from possession of property. This would prevent a lender from acquiring possession of the property in the event of default under the terms of a deed of trust or security agreement as the case may be. Such provision is not necessary in that the lender would also be a defendant and any action on its part to recover its debt would not be detrimental to the plaintiff.

Section 1249 (b) refers to "general knowledge" and this, of course, is subject to many interpretations, and could include rumors. The "general knowledge" could go on indefinitely, therefore, this should be more specific as to authenticity and the time of the proposed taking. In the event that this sub-section were to be modified as proposed by adding (b), an owner would be precluded from working the land or improving it and its value, salability and rentability could be greatly impaired thereby depriving the owner of revenue with which to service or pay off loans or even to procure new credit on the security of the land or leasehold interest and all because of "general knowledge". Subdivision (b) of Section 1249 (a) provides that the date of valuation is the date on which the plaintiff makes a deposit unless an earlier date is applicable. In many cases a complaint is filed, deposit is made and the defendants are not served for quite some time and they go about their business in total ignorance of the pending action. Therefore, I suggest that the date of valuation should be geared to service of the complaint and summons on all defendants, and this is in accordance with the proposed changes to the Government and Streets and Highways Codes.

Section 1249.1 (b) refers to improvements and if this is intended to include preparation of land for crops and the crops themselves, it should be clarified. In all events some allowance should be made for the work done in preparing the land for the sowing of crops or planting of trees and consideration should be given to the planting and caring for crops and trees which have not arrived at a producing stage. In many instances the farmer

or orchardist has obtained credit on the strength of the anticipated crops and unless he be allowed to complete and harvest the crops or be paid a sum based on the anticipated yield, he would be unfairly saddled with the debt, particularly if the proceedings were to be abandoned and he had stopped after the filing. If this section is intended to refer only to structures, it should be clarified and consideration should be given to such improvements which are approaching completion. A partially completed structure generally becomes a target for vandalism if work is stopped and again this would be most detrimental to the owner and lender in the event of abandonment. This also applies to Section 38091 of the Government Code and Section 4204 of the Streets and Highways Code and should be considered in the modification of Section 38090 of the Government Code.

I wish to compliment the Commission on its work and hope the foregoing observations will be considered and prove helpful.

Very truly yours,

Geo. A. Ghiselli
Counsel

GAG:gh

622-2847

STATE OF CALIFORNIA—REVENUE AND MANAGEMENT AGENCY EDMUND G. BROWN, Gov

DEPARTMENT OF FINANCE
SACRAMENTO

September 14, 1966

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

Gentlemen:

Subject: Your Report Titled "Possession Prior to Final Judgment and Related Problems"

The Department of Finance and the Department of General Services have reviewed the subject report on behalf of the Revenue and Management Agency. As a result of this review and in accordance with the request contained in your letter dated August 3, 1966 we wish to make several comments in regard to the report.

This agency neither favors nor opposes the proposed amendment to the California Constitution which would permit the legislature to extend the right to take possession prior to trial to all eminent domain actions. On a few occasions in the past the right to take possession would have been helpful to this agency and if the right is extended there may be a few occasions in the future when it will be helpful. However, if the right is extended we believe the benefit to this agency will be offset by problems which will arise from the demands that on various occasions and for various reasons will be made that this agency exercise its right to obtain immediate possession even though we deem it inappropriate to exercise the right as to the particular piece of property. (This agency believes that the right of possession, if available, should only be exercised where it is actually necessary to obtain possession of the property in order to meet a construction schedule.)

As to the proposed legislation to implement the constitutional amendment, we wish to make the following observations:

Where the property to be acquired contains not more than two residential units and one of the units is occupied as the residence of the condemnee, proposed Section 1269.05 permits the condemnee to require the condemnor to either deposit probable just compensation

with the court or have the compensation awarded draw legal interests from the 21st day after the date of the order determining probable just compensation, such interest to be paid even if the condemnor later abandons the proceedings. We believe that the condemnor should have the sole discretion as to whether or not it should take possession prior to judgment and the condemnor should not be required to bear the burden of short-term management of property for which it does not have an immediate need. The effect of Section 1269.05 is to penalize the condemnor for problems created by the long delay from the time of filing a complaint until the actual date of trial. Inasmuch as this delay is generally not the fault of the condemnor it appears unfair to so penalize the condemnor.

Since monies deposited by the condemnor under Section 1269.05 will not draw interest for the condemnee, it can be assumed that in most cases the condemnee will withdraw any such deposit. This could result in a substantial loss of revenue to the State since the money withdrawn would have been invested by the State and be accruing interest for the State at a rate of about 4% (Section 16480, et seq Government Code). In the cases where the State fails to deposit the money, while the State will generally have the money invested at about 4%, it will be required to pay 7% to the condemnee. This also could cost the State a substantial sum.

Article IV, Section 31, of the California Constitution provides in effect that the State Legislature cannot make or authorize the making of a gift of public monies. It may be argued that Subdivision (c) of Section 1269.05 is unconstitutional under said Article 4, Section 31, since where the proceeding is abandoned and the condemnee has been in continuous possession the payment of interest to the condemnee would be a pure windfall to the condemnee, especially since there would be no offset for the value of the condemnee's possession. (This is to be contrasted with the payment of attorneys' fees, appraisers' fees, and other costs which involve reimbursement of costs actually incurred by the condemnee.)

It should also be noted that the language of the proposed section is unclear as to the extent the section covers land adjoining or surrounding a residence occupied by a condemnee. For example, could a condemnee obtain a court order under the section for his entire holding where he resides in a dwelling on the premises and also owns and farms the surrounding 640 acres.

This agency also has some reservations regarding the following proposed sections:

1. Section 1249(a) changing the date of valuation from the date of issuance of summons to six months from the filing of the complaint and also providing that in the event of a retrial the date of valuation will be the date of the retrial rather than the date of the original trial unless the condemnor deposits into court the amount of the award in the original trial.

2. Section 1255(a) requiring the condemnor to pay the condemnee's appraisal fees in the event of an abandonment.

While Sections 1249(a) and 1255(a) do not meet with our approval, we do not intend to oppose these sections as long as your proposed legislation remains in substantially its present forms.

HALE CHAMPION, ADMINISTRATOR
Revenue and Management Agency

By _____
John P. Sheehan
Chief Deputy Director
Department of Finance

cc: Hale Champion
Frank Mesple

Memo 66-62

EXHIBIT VI

ROSS AND WEBBER

ATTORNEYS AT LAW

SAUL N. ROSS
ROBERT S. WEBBER
GORDON W. HACKETT

600 EL CAMINO REAL
P. O. BOX 237
SAN BRUNO, CALIFORNIA
415-588-0387

September 14, 1966

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

Gentlemen:

I am interested in offering some comments on the recommendations of the Law Revision Commission embodied in the material dated July 30, 1966.

Because my interest is more in the line of the substantive material rather than the procedural or technical framing of the statutes, I would like to relate my comments to the discussion offered in the beginning pages of the material rather than to the code sections as set out later in the material.

The Commission, on page 9, recommends that the period of notice prior to possession be extended to 30 days, and I would like to endorse that recommendation.

However, in my opinion, the problem on Orders for Immediate Possession is not so much the period of notice that is involved but the procedure and method of obtaining the Order — the Commission recommendations, with some modifications, essentially preserve the existing procedure and in this respect I believe some changes should be made.

The principal problem is the setting of the amount that is put on deposit as security against the possession. This is done on a purely ex parte basis, with some member of the condemning agency staff making a pro forma affidavit as to the amount. The chances of upsetting that affidavit, once the Order has been made and issued by the court are, in my experience, very slim. The court is inclined to let the matter rest until trial. Further, the affidavit made by the agency staff member is always most conservative and it is extremely rare to see an affidavit made for an amount that is in excess or even equal to the amount of fair market value subsequently testified to by the condemning agency. As a result, the provisions providing for withdrawal of the deposit are diluted considerably if the property owner is not able to withdraw a sufficient amount to replace the property he is losing or receive equal benefits from the loss of use of the property. And, of

course, if he is pinched for effective, useable funds for an interim period between the time of taking of possession and the time of trial (which can run for a year or more without being unusual), it obviously acts as a wedge toward coercing a settlement on his part.

I do not believe it is at all fair for the condemning agency to set the amount of deposit as an ex parte matter even though there is provision in the code for a challenge of that amount. As I have indicated before, the courts seem very loath to enter into an extensive hearing on the subject once the Order has been made.

Therefore, may I suggest the following for your consideration: That the condemnor be obliged to give Notice to the property owner that an Order for Possession is being made and that, accompanying the Notice, the condemnor inform the property owner as to the amount proposed to be deposited as security for possession. The property owner should then have thirty days in which to file objections to the proposed Order — giving him the right to file objections to both the taking itself and the amount of deposit. If he does file such objections, the condemnor should then have the obligation of coming forward in a hearing before the court to substantiate the amount of its proposed security. Inasmuch as the condemnor proposes a taking without the benefit of a determination as to just compensation, it seems equitable to me that the condemnor should have the obligation of coming forward with a sufficient prima facie showing that the amount sought to be deposited represents fair market value.

I would suggest this procedure for all Orders for Possession, particularly in light of the fact that the Commission recommendations now propose to extend the right to immediate possession to almost all cases. This extension can often work a severe hardship on the property owner because it means that by the time trial takes place the improvements on the property may very well have been demolished and the property owner has little to show to represent his contention of value other than some photographs which can rarely tell the whole story.

In my view, there is little reason for a broad extension of the right of possession. Most public projects are planned for a time long in advance of the actual need of acquisition of the property — generally, several years in advance of the need for acquisition. There is no reason why a proposed school, or power line, or public parking lot can't begin its acquisition program and the filing of suit sufficiently in advance to make its schedule. I think there is good basis for according the right to possession to a project as extensive as a highway project because of the

multitude of properties that can be involved in a lengthy highway program — obviously, one or two properties can stall sufficiently to hold up such a program. But the number of properties is reduced drastically in almost all other kinds of public projects and the same sort of necessity for possession should not arise unless there has been bad pre-planning by the public agency.

In any event, if it is felt that this right to possession should be extended as broadly as suggested, then it would seem to me it should be subject to review by the court prior to an ex parte Order being issued on the subject. My suggestion on this line, I believe, would put the court in the position of approaching the problem without some predetermination having been made by reason of the Order already of record.

On page 11 of the discussion, the Commission makes a recommendation which I think is very interesting and could correct many inequities that now exist. This is the discussion relating to the requirement that a deposit be made in all condemnation actions, whether an Order for Possession is contemplated or not. The suggestion in the discussion, as I understand it, is that this would be a requirement of the filing of a condemnation action. However, in the proposed Section 1268.01, the wording of the section sets it out as an elective procedure on the part of the plaintiff in indicating that the "plaintiff may" deposit the amount of probable just compensation. Also, from some of the later discussion, I assume that the Commission's intentions were to make this an elective procedure.

May I suggest that the Commission consider the possibility of making this a mandatory procedure. The problems that I am most concerned with have arisen in my practice several times and I have heard the same complaint from others in this respect: the condemnor files a condemnation action against a given piece of property. No Order for Possession is taken. The property owner is in the midst of improving his property — he may be halfway through a subdivision development or halfway through the construction of an apartment building. He is faced with the problem of having the valuation fixed as of a given date, consistent with the issuance of summons which, for all practical purposes, generally means the date of the filing of the Complaint. Any improvements he makes thereafter are at his own peril inasmuch as the law provides that he cannot be compensated for subsequent improvements. On the other hand, he is halfway through a project which, if it remains in that state, can be such a severe liability that it can be a financial disaster. He cannot complete

the project and hope to recoup his investment; he cannot derive any income from the property; he is in the position of paying financing charges on the money that he has borrowed to carry the project and his carrying charges, together with his own investment in the property which is returning nothing, can over a period of time ruin his economic position. The condemnor may very well take a year before he proceeds to bring the case into court. This may not at all be in the control of the property owner; the condemnor may choose (and I have had this experience) not to serve him in the action so that he is not in a position to bring the case to issue or not bring other interested and necessary parties into the action so that the matter can be at issue (such as lienholders or lessees or divided interests) and this, again, prevents the property owner from filing a Memorandum to Set to bring the case to court at an early date. Even in the circumstance when he is able to do so the court calendar may be such, even with priorities, that he cannot bring the case to trial for many months, every month of which is costing him a substantial amount of money and none of these expenses is recoverable in the action. If the suggestion of the Commission were to be instigated, a large part of the property owner's problem in this situation could be averted — particularly, if it is instigated together with some procedure along the line of the suggestion made earlier in this letter to insure that a sufficient amount of deposit be made. Under those circumstances, the property owner could make a withdrawal and either pay off his obligations or at least carry the financing costs in the interim period until the property is acquired.

As an alternative suggestion to requiring a deposit in every condemnation case, may I suggest a procedure whereby the property owner may, in every condemnation case regardless of whether or not possession is sought by the condemnor, apply to the court for a deposit to be made by the condemnor once the condemnation action has been filed. This might obviate the condemnor's objections to having great sums of money on deposit in all condemnation cases, many of which will settle eventually. But it would also serve the purpose of alleviating the great hardship that is sometimes inflicted on some property owners. At least, he would be in a position, once the action is filed, of making his position known to the court and getting some relief in those cases of hardship.

I would like to endorse the Commission recommendations relative to simplifying the procedure to withdraw by simply mailing the application to other parties and their attorneys. Also, it seems proper that the condemnor should be given the right to possession when the defendants have either vacated the property or withdrawn the deposit.

With respect to the proposals on date of valuation, I would like to offer a criticism of the suggestions made in the tentative recommendations of the Commission.

The first recommendation, that the condemnor should be permitted to establish the date by depositing probable just compensation seems to me to be a procedure that would work against itself. The problem with that concept is that once the deposit has been made, there is no pressure (to the extent that the date of valuation does have pressure and, in some cases, it can be quite important) to bring the trial to completion. Once that date has been established, the condemnor can sit back and presumably take an indefinite amount of time to take any further action in the case. The fact that the property owner may be entitled to withdraw the funds in the meantime does not necessarily cure the problem that he has if the trial takes several years to complete. After all, the property owner is not really in a position to make full utilization of the amount of deposit of just compensation because he may very well be faced with the possibility of having to return a portion of those funds if his award should be something less than the deposit. Without having the certainty and freedom of feeling that the money to be paid for the property is his to use in all respects, the property owner is not really in the position of having been compensated for his property and a valuation date that goes a year or two back can penalize him in the trial that results.

Similarly, the rule that a valuation date be set six months after the filing of the complaint would not necessarily establish a fair criteria although, in combination with the existing rule that if the matter is not brought to trial within one year the trial date acts as the valuation date, does serve to equalize that situation. The problem with that rule, in my mind, is that the market for the property and immediately surrounding the property may be considerably affected by the filing of the complaint. This could work both ways so that the property and its vicinity may suffer a blight because of the complaint or receive an enhancement because of the filing of the complaint. In either case, this is an element that is generally felt should not be considered in a trial and a valuation date six months after the filing might very well reflect one of those two situations. By the same token, so would a valuation date more than a year after the issuance of summons which winds up with a trial date valuation date.

I would like to suggest a re-examination of the proposal that has been made to the Commission before, one which the Commission

comments on as having rejected. On page 18 of the material discussing this point, the Commission indicates that the reason for rejecting the date of trial as the date of valuation is that it would provide an undesirable incentive to condemnees to delay the proceedings. (I might add that the very reverse of this would be true on the point discussed earlier — that is, when a deposit serves to establish the date of valuation, it would eliminate the incentive to hasten the proceedings on the part of the condemnor.) As a practical matter, there is very little that a defendant can do to delay proceedings. Once he has been served with the action, he cannot effectively stall for very long in getting his Answer on file without the consent of the condemnor and the condemnor has it within his control to bring the matter to issue. He also has it within his control to move to set the matter for trial and these cases, of course, have priority on the calendar. The condemnee is in very little control as to the course or progress of the proceedings. The only thing that occurs to me that he might delay on is his discovery procedures but this does not hinder the condemnor from filing his Memo to Set and having the matter calendared for Pre-trial Conference. At that time, as often happens, if the condemnee has not completed his discovery the pre-trial judge will order him to do so within a given number of days. I think the simplicity of the rule is appealing as well as the fact that, as a practical matter, this is the time that the property owner does in fact receive his compensation for effective purposes.

However, I do believe there is an objection to the date of valuation being the date of trial; the one earlier made that the market may very well have reflected blight or enhancement between the time the action was filed and the time it is brought to trial. Furthermore, there would have to be some accompanying legislation that would prevent the property owner from materially altering or improving his property in the interim period before trial so that his physical situation changes with respect to the date of valuation. If the former point does not concern the Commission unduly, then it seems to me that the latter point can be fixed by legislation.

In the long run, however, my own feeling is that the presently existing rule is a reasonably fair one. The date of issuance of Summons is generally the same as the filing of the Complaint and is a reasonable date on which to operate if the case is actually brought to trial within the year. This is largely within the control of the condemnor and if that date is lost then it does seem equitable that the trial date should be the date of valuation. I would, therefore, urge the Commission to reconsider its position on this matter and consider either the possibility of a uniform rule

as to date of trial or retention of the existing rule.

In the same connection, the Commission does make a recommendation (on page 20 and in the revision of Section 1249) relating to the effect of enhancement or blight. The proposal of Section 1249(b) seems to me to be a good one and incorporates the concept of the existing law except that, as I understand the discussion on page 20, the intent is that the property owner should be entitled to show that there has been a decrease in the market resulting from the proposed improvement and the condemnor should be entitled to show that there has been an enhancement in the market resulting from the proposed improvement. I believe the language of Section 1249(b) as it is presently set out may be interpreted by some courts to mean that no testimony in that regard is to be admitted into evidence. I would like to suggest that there be some additional language added to the section so as to make clear that testimony is admissible which is intended to show either increase or decrease from the improvement.

I would also like to endorse the discussion made on the subject of abandonment, particularly the recommendation that the law be amended to provide the recovery of fees and costs in every case of abandonment whether or not it be forty days or more before the date set for pre-trial. May I suggest in this connection that it not be deemed necessary that the plaintiff undertake the formal procedural steps for abandonment in order to constitute an abandonment. I have personally had the situation where the plaintiff did nothing more than dismiss the action and took the position that this did not constitute an abandonment. It should be provided that any dismissal should also be construed to be an abandonment and the defendant should be entitled to the same rights as any condemnee whose property has been formally abandoned.

Very truly yours,

ROSS AND WEBBER

Robert S. Webber

cc: Frederick H. Ebey, Esq.
Senate Fact Finding Committee on Judiciary

Memo 66-62

MAURICE J. ATTIE
ATTORNEY AT LAW
356 NO. ALTA VISTA BLVD.
LOS ANGELES, CALIF. 90036
PHONE: 935-1129

September 14, 1966

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

Gentlemen:

The undersigned, all members of the California Bar, suggest as follows:

1) Add the words "or an expert condemnation panel" to proposed Constitution Sec. 14 (a) (2). Add a new provision to the Government Code which enables the Board of Supervisors of any County to establish an expert condemnation panel or panels each consisting of the following five members: a) One M.A.I. representative; b) One A.S.A. representative; c) One representative from a condemnor agency operating in that county; d) One condemnee attorney who has practiced in that county; e) Presiding, one Superior Court Commissioner. The litigants would be given an opportunity to choose between a lay jury and an expert condemnation panel.
Comment: In the simplest condemnation case, a jury is requested to make a "more correct" determination of value than either of the two qualified experts. It is asked to take into consideration evidence that would otherwise be inadmissable, but only when it evaluates expert valuation testimony. The jury often must deal with the grey areas of mixed fact and law that confounds the most competant of judges--e.g. factors which in the opinion of an expert diminish fair market value, even though those factors individually or collectively would not be compensible items of damage. On the other hand, many litigants prefer not to leave the question of just compensation with any of the many Superior Court judges who have little or no experience in the condemnation field. The suggested alternative provides a means of saving court and litigant time and money while assuring the parties of a well informed decision.

2) Delete proposed Constitution Sec. 14 (b) and applicable wording in 14 (a) and 14 (c), then re-letter the section. Delete proposed C.C.P. Sec. 1269.01 and applicable wording in other sections referring thereto,

then re-number the chapter.
Comment: Whatever might have been the historical justification for setting right of way and reservoir purposes apart from all other acquisitions, we can see no purpose for it now. The condemnor either requires immediate possession to proceed with its proposed project or it does not. If the listing of "necessity is conclusive" bodies becomes too burdensome for the legislature, then perhaps the wording "state or county, city, district, or other public entity" can be substituted.

3) Delete the last sentence of proposed C.C.P. Sec. 1268.04 (a) and substitute "The applicant shall mail a copy of the application to the plaintiff as per its address on the Complaint."
Comment: When read together with proposed C.C.P. Secs. 1269.04 (c) and 1270.03, one could construe Sec. 1268.04 (a) as it is now proposed to require personal service upon an agent of plaintiff.

4) Proposed C.C.P. Sec. 1268.06 (a) should be altered to conform with the discretion of the Court theory promulgated on page 13 of the Outline of Recommended Legislation and incorporated in proposed C.C.P. Sec. 1268.05 (e).
Comment: Why should we assume that the Court can be relied upon to protect the parties in one situation but not the other?

5) Delete the words "the date on which the plaintiff makes a" in proposed C.C.P. Sec. 1249a (b) and substitute "twenty days after plaintiff serves notice of."
Comment: Since proposed C.C.P. Sec. 1268.05 (a) requires applicant to wait twenty days for his money and proposed C.C.P. Sec. 1268.03 requires plaintiff to give notice of deposit, presumably within a reasonable time, the suggested alternative appears to be more logical.

6) In proposed C.C.P. Secs. 1249a (c)-(f), delete the words "filing of the complaint" and substitute "issuance of summons."
Comment: It is true that there is no longer any reason to retain the old rule in a jurisdictional sense. However, there is no particular reason to adopt the proposed rule. Why burden our dockets with cases operating under two different rules for perhaps several years?

7) Between the number (2) and the word "reasonable" in proposed C.C.P. Sec. 1255a (c), add the words "necessary and."
Comment: Condemnors should be entitled to question the propriety as well as the amount of the expenditure.

8) The whole concept embodied in proposed C. C. P. Secs. 1268.10 and 1270.08 and Government Code Secs. 16425-7 should be reevaluated in light of the increases in deposits that this proposed legislation will bring about. We understand that the Condemnation Deposits Fund pays depositors approximately 2% interest. Condemnors must pay 7% interest to condemnees who wish to sit tight and not withdraw deposits. Why not allow condemnors, pursuant to appropriate order of Court, to deposit funds in trust in a Savings and Loan? The 5+% interest would accrue to the benefit of the defendants. If a defendant feels he can earn a better return on his money, he can apply for withdrawal via the usual statutory procedures.

Very truly yours,

MAURICE ATTIE

GARY R. NETZER

W. BRUIN BARR

Memo 66-62

EXHIBIT VIII

GIBSON, DUNN & CRUTCHER
LAWYERS
634 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90014

TELEPHONE 620-9300
TELEX: 67-4930
CABLE ADDRESS: GIBTRASK

August 26, 1966

Mr. John DeMoully, Executive Secretary
California Law Revision
Room 30 Carruthers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Thank you for sending to me the draft (revised July 30, 1966) relating to Tentative Recommendations Relating to Condemnation Law and Procedures, No. 5, Possession Prior to Final Judgment and Related Problems. From a brief review of this I think the work suggests a considerable improvement of the existing statutory law.

I have been troubled by one matter which I think is not covered which might also be referred to as Pre-Condemnation rather than condemnation proceedings themselves. Since the whole framework is under discussion I believe I should mention this to you.

As far as the general public is concerned, the final adoption of a freeway route or of a project limits of an urban renewal project just about eliminates transactions on property along a freeway route or within a project boundary. In the normal course of things condemnation does not start for varying lengths of time, sometimes as long as many years. If the owner has his property rented he, of course, will not lose much unless the tenant moves away and he cannot enter into another lease. On the other hand, the home owner is at a disadvantage because there is very little he can do to dispose of his property because of the uncertainty involved in the various filings. This has brought about almost a universal smouldering sense of injustice.

To shorten the length of time within which the project must get under way or the freeway started after condemnation, I would like to suggest that the interest to be paid in the later condemnation case start from the time the project limits were finally determined or the freeway route finally established. As in other connections,

if there are rents or profits they can be offset against the interest, but if not, the mere fact of making the interest start at the time the final plans are on file should furnish quite an incentive to get the condemnation over quickly.

Yours sincerely,

Homer D. Crotty

HDC:JRB
CC Mr. Thomas E. Stanton, Jr.

Memo 66-62

EXHIBIT IX

PACIFIC LIGHTING SERVICE AND SUPPLY COMPANY

MAILING ADDRESS: P.O. BOX 54790 TERMINAL ANNEX, LOS ANGELES 90054
GENERAL OFFICES: 720 WEST EIGHTH STREET, LOS ANGELES, CALIFORNIA

JOHN ORMASA
VICE PRESIDENT AND SYSTEM GENERAL COUNSEL

September 6, 1966

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Gentlemen:

Pacific Lighting Companies (Southern California Gas Company, Southern Counties Gas Company of California, and Pacific Lighting Service and Supply Company) purchase, transport, and distribute natural gas throughout the Southern California area as regulated public utilities. In addition, the Companies transport and sell gas at wholesale to the City of Long Beach and to San Diego Gas & Electric Company. The Pacific Lighting system is the largest gas distribution system in the world.

Most of our rights-of-way and other needed property are purchased by negotiation, and it is very infrequently that we find it necessary to resort to the right of eminent domain to complete a project. However, when we have had to use the condemnation process, we have found the lack of the right to possession prior to judgment a severe handicap. Our infrequent eminent domain case seems to usually involve a property owner and an attorney who are highly skilled in dilatory tactics, and it has sometimes been necessary for us to pay several times market value in order to obtain possession in time to meet construction deadlines. It is for this reason that we have advocated a change in the law which would give public utilities the right to obtain possession prior to judgment.

We have followed the Law Revision Commission's work on this problem for some time. The Commission is to be commended for its efforts. For the most part, this year's recommendation, if enacted, would accomplish much in solving the possession problem in an equitable and fair manner to both the property owner and the condemnor.

There are, however, some areas where the Commission's recommendation can be improved upon. We hope that the following comments will be of help to the Commission:

1. Your proposed legislation concerning possession by public utilities (proposed Code of Civil Procedure, Section 1269.03) may not be as helpful to public utilities as it could be. The basic problem is the requirement in the section that a certificate of public convenience and necessity be issued by the Public Utilities Commission prior to the time an order of immediate possession is desired.

As presently framed, the Public Utilities Code does not require a certificate of public convenience and necessity for all projects constructed by a public utility. Public Utilities Code Section 1001 * requires certificates only for improvements or new

* "§1001. Construction or extension of facilities; requirement of certificate; interference with operation of another utility

"No railroad corporation whose railroad is operated primarily by electric energy, street railroad corporation, gas corporation, electrical corporation, telegraph corporation, telephone corporation, or water corporation shall begin the construction of a street railroad, or of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.

"This article shall not be construed to require any such corporation to secure such certificate for an extension within any city or city and county within which it has theretofore lawfully commenced operations, or for an extension into territory either within or without a city or city and county contiguous to its street railroad, or line, plant, or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility, already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable. (Stats.1951, c.764, p.2063, § 1001.)"

facilities outside of the present service area of the utility. To a great extent most of utility improvements requiring eminent domain, such as rights-of-way for electric transmission lines and gas transmission lines, are built within the service area of the utility and a certificate is not required.

Proceedings involving certificate applications are somewhat time consuming on both the utility and the Commission, and it is, therefore, wise not to require a certificate when the improvement is within the present service area.

Since a certificate will not be obtained in most instances involving eminent domain, we would suggest the deletion of the provision requiring the certificate of public necessity and convenience as a condition for possession prior to judgment. The necessity can be left to the Judge's decision.

We are also somewhat concerned about the standard set to enable a utility to enter into possession. This standard requires the plaintiff to show "the need of the plaintiff for possession of the property outweighs any hardship the owner or occupant of the property will suffer if possession is taken" [§1269.03 (c)(2)]. We believe this standard is somewhat vague and may be difficult for a judge to apply. We think instead that the plaintiff should be required to prove a prima facie need for the property. This necessity can be shown in some sort of abbreviated hearing on notice motion and upon such a showing the plaintiff should then have the right to take possession, as otherwise provided in your proposal.

We believe that as far as utilities are concerned this arrangement would not be too onerous on the property owner. For the most part, utility facilities involve rights-of-way in which an easement only can be required. These condemnation cases seldom involve the taking or subsequent destruction of any structures, and usually the owner is not displaced from enjoying his property, although he might suffer some minor inconvenience during the course of construction.

2. Proposed Code of Civil Procedure Sections 1269.01 and 1269.02 both deal with applications for immediate possession by public entities. Both of these sections re-enact current law as far as notice is concerned and allow the plaintiff to make application to the court ex parte.

We believe that there is no need for allowing a plaintiff the right to ex parte application for immediate possession. It is our view that the application should be made on notice motion following the procedure set forth in Section 1269.03. This procedure in our view would be fairer to the property owner and would give

him an opportunity to contest the application for possession prior to the time an order for possession is granted.

3. We are a little unsure of the Commission's recommendation concerning evidence relating to alleged increases or decreases in market value said to result from the pendency of proposed public improvement which will involve eminent domain.

In the text, the following statement is made at page 20:

> "The Commission believes that such influence can be shown by expert testimony and by direct evidence as to the general condition of the property and its surroundings as well where the value is depressed as where the value is enhanced. It therefore recommends enactment of a provision requiring that any such changes in value be taken into account and providing a uniform rule for both increases and decreases."

However, the statutory proposal [Code of Civil Procedure §1249 (b)] is as follows:

> "(b) For the purpose of assessing compensation and damages, any increase or decrease in market value prior to the date of valuation that is substantially due to the general knowledge that the public improvement or project was likely to be made or undertaken shall be disregarded."

We disagree with the text. It is our view that evidence concerning changes in market value caused supposedly by the pendency of a public improvement is most speculative and conjectural. However, we have no objection to the statutory proposal. The proposal is fair and equitable.

4. The Commission recommends a change in Code of Civil Procedure Section 1255(a) which will allow the defendant to recover both attorney's and appraisal fees actually incurred whether such fees were incurred for service rendered before or after the proceeding was commenced.

The present statutory provisions which have been liberalized substantially over recent years provide a fair and equitable means of handling situations where there is an abandonment, and it is our view that no change need be made in these provisions. To allow appraisal fees for service rendered prior to the initiation

of litigation may encourage property owners to expend unnecessary money on appraisers, the expense of which may prevent them from accepting a reasonable offer from the condemning agency prior to the filing for litigation.

Sincerely,

PACIFIC LIGHTING SERVICE
AND SUPPLY COMPANY

John Ormasa

JOHN ORMASA
Vice President and System
General Counsel

RJN:mw

Item 66-62

EXHIBIT I

OFFICES OF
LINNEMAN, BURGESS, TELLES & VAN ATTA
ATTORNEYS AT LAW

L. M. LINNEMAN
JOSEPH B. BURGESS
JESS P. TELLES, JR.
C. E. VAN ATTA
JAMES E. LINNEMAN

R. M. ELICECHE

P. O. BOX 1386
550 WEST 22ND STREET, SUITE 3
MERCED, CALIFORNIA 95340
TELEPHONE 723-2137

P. O. BOX 156
1820 MARGUERITE STREET
DOS PALOS, CALIFORNIA 93620
TELEPHONE 392-2141

P. O. BOX 1046
1316 SIXTH STREET
LOS BANOS, CALIFORNIA 93635
TELEPHONE 826-4911

PLEASE REPLY TO

MERCED OFFICE

September 1, 1966

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

Re: Tentative recommendation of the California Law Revision Commission relating to possession prior to final judgment and related problems.

Gentlemen:

In accordance with your letter of August 3, 1966, I am sending a few comments with relation to the above mentioned tentative recommendations. With relation to proposed Section 1268.07, I believe that the withdrawal of money deposited should constitute a waiver of claims and defenses, except a claim for greater compensation, only with relation to the parcel for which the money was deposited. In many cases several parcels belonging to one defendant are condemned in a single action. The defendant may have a defense, such as a lack of public use, as to one parcel, and have no such defense with relation to the other parcels. In such a case it appears to me that the defendant should be allowed to withdraw the money deposited with relation to the other parcels, without waiving his defense of lack of public use.

Although nothing on the exact subject is mentioned in your tentative recommendations, I mention the following because your recommendations relate to possession prior to final judgment and related problems. Under Section 1249.2 of the Code of Civil Procedure, if a condemning agency takes possession at a time when such action prevents the property owner from harvesting crops planted before or after service of summons, the value of such crops are to be included in the compensation awarded for the property taken. I believe

that this code section should be amended to cover situations in which the owner has not yet planted crops but has spent money in preparing the land for planting. These preplanting costs can amount to as much as $100.00 per acre and the condemning agency sometimes takes possession after such costs but prior to the planting of any crops. In negotiated settlements, the State highway attorneys ordinarily pay these preplanting costs; however, in cases which are not settled, the State's attorneys take the position that such costs are not recoverable. Theoretically the appraiser's opinion of fair market value could possibly take such costs into consideration, but, as a practical matter, this is difficult to do and is not done; therefore, I believe that Section 1249.2 should be amended to cover this relatively common situation.

I hope you will consider the above mentioned proposals, since I feel that they are worthwhile.

Very truly yours,

LINNEMAN, BURGESS, TELLES
& VAN ATTA

By
James E. Linneman

JEL:jb

Memo 66-62

EXHIBIT XI

G. J. CUMMINGS
PROFESSIONAL ENGINEER
LICENSE M. E. 2424
648 CARLSTON AVENUE
OAKLAND, CALIFORNIA 94610

PHONE 832-4843

SEPT. 5-66.

CALIFORNIA LAW REVISION COMMISSION,
ROOM 30 CROTHERS HALL
STANFORD UNIVERSITY,
STANFORD, CALIF. ATT: MR. JOHN H. DEMOULLY.

DEAR MR. DEMOULLY:

REPLYING TO YOUR LETTERS OF JAN. 31 1ST AND AUGUST 3 RD-66, I DO NOT CONSIDER MYSELF COMPETENT TO COMMENT ON LEGAL PROCEDURE: HOWEVER I HAVE BEEN INTERESTED IN THE SUBJECT FOR SOME TIME.

FIRST--I THINK THAT IN GENERAL WE ARE DOING A RATHER COMPETENT AND HONEST JOB OF WHAT I THINK IS A PUBLIC NECESSITY: HOWEVER THERE ARE SOME AREAS WHERE THE TAKING OVER OF PRIVATELY-HELD LAND FOR SO-CALLED PUBLIC USE IS A PUBLIC HARDSHIP AND THE LAND MISUSED.

AS AN EXAMPLE OF THIS TAKE THE CASE OF THE EAST-SHORE AND MACARTHUR FREEWAYS WHICH PASS THRU OAKLAND. BOTH OF THESE ROADWAYS PASS THRU COMMERCIAL, INDUSTRIAL, AND RESIDENTIAL AREAS. I AM NOT PERSONALLY AFFECTED BY EITHER OF THESE TWO ROADWAYS BUT BOTH HAVE TAKEN MILES OF PRIVATE PROPERTY OUT OF PRIVATE USE AND LOCAL TAXES.

BOTH OF THESE ROADWAYS SHOULD HAVE BEEN CONSTRUCTED UNDERGROUND AND THEN SURFACE RIGHTS LEASED OUT FOR PRIVATE USE OR THE OWNERS PAID A LEASE RENTAL FOR THE UNDERGROUND USE OF THE AREA AND THE SURFACE RIGHTS RESTORED FOR PRIVATE USE AND TO GO BACK ON THE TAX ROLLS.

THE ABOVE SHOULD ALSO HAVE BEEN THE RULE APPLIED TO THE SAN FRANCISCO SITUATION: THE COST OF USING THE UNDERGROUND CHOICE INSTEAD OF OVER-GROUND WOULD BE JUSTIFIED AS TO COSTS AND INCOME AMMORTIZED OVER A PERIOD OF ABOUT TWENTYFIVE YEARS -- NOT, CONSIDERING THE DEPRECIATION OF ADJACENT LAND VALUES DUE TO NOISE, AIR CONTAMINATION, AND STREET BLOCKAGE ALONG AND CLOSE TO THESE ROADWAYS.

LDS
AC

CAREFUL STUDIES OF LAND UTILIZATION SHOULD BE MADE BEFORE PUBLIC PROJECTS ARE ALLOWED TO CONDEMN PRIVATE PROPERTY. LOOKING AT OUR SITUATIONS IN SAN FRANCISCO, OAKLAND, AND LOS ANGELES, I HAVE THE IMPRESSION THAT OUR HIGHWAY DEPARTMENT IS ARROGANT, RUTHLESS, AND NOT TOO COMPETENT.

IN SMALL CONDEMNATION CASES, SAY $3000.- OR UNDER, THE COURT SHOULD APPOINT LEGAL REPRESENTATION FOR (AND WITHOUT COST TO) THE OWNER OF THE PROPERTY. I HAVE IN MIND A CASE WHERE THE AMOUNT INVOLVED WAS ABOUT $3000.- SUCH A SUM WOULD NOT JUSTIFY THE LAND OWNER GOING TO COURT, SO THE CITY TOOK OVER THE PROPERTY FOR A $350.- OFFER WHICH THE OWNER REFUSED--- THE CITY GOT SOME 3000 SQ.FT. OF LAND FOR NOTHING; THEN THE CITY PROCEEDED TO TURN THE LAND IN QUESTION OVER TO A PRIVATE CORPORATION FOR DEVELOPEMENT.--- MUCH OF OUR SO-CALLED INTERNAL CITY REHABILITATION INVOLVES THIS SORT OF OUTLAWRY.

OUR CONDEMNATION PROCEDURES SHOULD BE REVISED SO THAT NO PUBLIC AGENCY COULD USE THE LAW OF CONDEMNATION TO TAKE OUR PRIVATE PROPERTY AND THEN LEASE, RENT, OR SELL IT FOR PRIVATE EXPLOITATION.

THE SMALL LAND HOLDER SHOULD BE PROTECTED IN HIS RIGHTS BY BEING GIVEN LEGAL RIGHTS (REPRESENTATION) AT PUBLIC EXPENSE AND THE CONDEMNATION HEARINGS SHOULD INCLUDE A JUSTIFICATION BY THE CONDEMNER SHOWING THAT THE LAND IN QUESTION WAS BEING UTILIZED IN THE PUBLIC INTEREST AND THE AMOUNT OF LAND INVOLVED SHOULD BE CAREFULLY SCRUTINIZED TO SEE THAT NO MORE THAN IS NECESSARY IS INVOLVED IN THE CONDEMNATION PROCEEDINGS.

IN OUR SO-CALLED WAR AGAINST COMMUNISM THE AMERICAN PEOPLE FAIL TO REALIZE THAT THE PEOPLE IN ALL THESE COUNTRIES GOING TO COMMUNISM AND ESPECIALLY TO PUBLIC OWNERSHIP OF ALL LAND, IN GENERAL HUNGER AND THE ABUSE OF PRIVATE LAND HOLDERS BRINGS ON PUBLIC RETRIBUTION.

WE HAD BETTER GIVE THE PUBLIC INTEREST SOME CONSIDERATION OR IN ANOTHER TWO OR THREE GENERATIONS WE WILL FIND OUR OWN COUNTRY HOLDING TITLE TO ALL LAND: SOUNDS FANTASTIC BUT IF ONE STUDIES THE HISTORY OF RUSSIA THREE GENERATIONS AGO IT WAS A FANTASTIC IDEA TO RUSSIANS ALSO.

I THANK YOU FOR THIS OPPORTUNITY TO BE OF SERVICE TO YOUR PROJECT. IF I CAN BE OF HELP IN ANY WAY PLEASE FEEL FREE TO CALL ON ME: I WOULD BE GLAD TO GIVE THE TIME REQUIRED FOR YOUR PROJECT.

SINCERELY

Memo 66-62

EXHIBIT XII

HAROLD W. KENNEDY
COUNTY COUNSEL

GEORGE W. WAKEFIELD
CHIEF ASSISTANT

JOHN D. MAHARG
SENIOR ASSISTANT

CLARENCE H. LANGSTAFF
DAVID D. MIX
EDWARD H. GAYLORD
ROBERT C. LYNCH
JOEL R. BENNETT
ASSISTANTS

LLOYD S. DAVIS
CHIEF TRIAL DEPUTY

OFFICES OF
THE COUNTY COUNSEL
OF LOS ANGELES COUNTY
SUITE 648 HALL OF ADMINISTRATION
500 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012

MADISON 5-3611

HENRY W. GARDETT
JAMES W. BRIGGS
A. R. EARLY
ALFRED C. DE FLON
JOHN D. CAMILL
WILCOX R. STODDARD
DONALD K. BYRNE
EDWARD A. NUGENT
TERRY C. SMITH
RONALD L. SCHNEIDER
PETER R. KRICHMAN
JEAN LOUISE TARR
JEROME A. JOHNSON
IRVIN TAPLIN, JR.
DAVID M. AGER
GORDON W. TREHARNE
DEWITT W. CLINTON
PAUL G. SEEHUSEN
RAYMOND W. SCHNEIDER
NORMAN J. GILBERT
WILLIAM J. BIRNEY
S. ROBERT AMBROSE
WILLIAM F. STEWART
RON APPERSON
CHARLES ROSS JENNINGS
MARTIN E. WEEKES
GERALD F. CRUMP
FRED W. BRANDT, JR.
RICHARD F. CHARVAT
ALLAN B. McKITTRICK
MARTIN PETER SHERMAN
TIMOTHY L. STRADER
JOHN F. KEATING
WILLIAM L. OWEN
SIDNEY F. CROFT
WAYNE R. PARRISH
JERALD WHEAT
JAMES H. HARMON
MICHAEL DOUGHERTY
ELAINE MARIE GRILLO
RICHARD C. GREENBERG
DEPUTIES

September 7, 1966

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

Attention: Mr. John H. DeMoully
Executive Secretary

Gentlemen:

We enclose a copy of a letter prepared for the Los Angeles County Flood Control District by its Chief Valuation Engineer who is in charge of all right-of-way acquisitions for the District. The District has also pointed out to the writer in oral discussions that any increase in the time necessary to serve Orders of Immediate Possession will create many problems in planning their flood control projects.

The District constructs much of its flood control improvements on a joint basis with the Army Corps of Engineers and the State Department of Water Resources. Particularly, on Corps of Engineers' contracts, time is of the essence as the Corps prepares plans, decides what right of way is necessary and then gives the Flood Control District a deadline for delivering possession.

We are sure that the Commission will be interested in the views of an agency with the volume of right-of-way acquisition and construction which is conducted by the Los Angeles County Flood Control District.

Very truly yours,

HAROLD W. KENNEDY, County Counsel

By Terry C. Smith
Terry C. Smith
Deputy County Counsel

TCS:mzs
Enc.
cc: Mr. George W. Stenquist

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT
P O BOX 2415, TERMINAL ANNEX
LOS ANGELES, CALIFORNIA 90054
TELEPHONE 223-2111

WALTER J. WOOD
CHIEF ENGINEER

2250 ALCAZAR STREET
LOS ANGELES

August 31, 1966

FILE NO. 2-5.12
California Law Revision Commission
Proposed Changes in Condemnation
Procedure

Mr. Harold W. Kennedy
County Counsel
Room 648, Hall of Administration
500 West Temple Street
Los Angeles, California 90012

Attention Mr. Edward A. Nugent and
Mr. Terry C. Smith

Dear Sir:

In a telephone conversation on August 29, 1966 between your Mr. Terry C. Smith and our Mr. Raymond F. Ray, Mr. Smith asked for our comments on the changes in condemnation procedure proposed by the California Law Revision Commission as of July 30, 1966.

1. The Commission proposes to add Sections 1268.03, 1269.01 and 1269.02, Code of Civil Procedure to require notice of individual amounts deposited in connection with Orders for Immediate Possession. This would create problems and protracted discussions on Federal Projects with the State Department of Water Resources, since in most instances our deposits are made on the basis of staff appraisals--whereas the fee appraisals which normally justify the ultimate awards are not obtained until a later date. We have not encountered many instances of hardship caused by existing law. Moreover, experience has shown that withdrawal of funds by owners prior to judgment are relatively infrequent.

2. The present law, in general, provides for 20 days to lapse before Orders for Immediate Possession are effective. The Commission proposes to add Section 1269.04 to provide, in general, for extension of this period to 30 days. Our shortness of lead time on our projects is so acute that this additional time might seriously jeopardize and delay our construction schedules. Here again, our experience with the existing 20-day period has shown no hardship inflicted on owners.

3. Existing law provides that the date of valuation is fixed as of the date of issuance of summons, unless the case is not tried within one year, through no fault of the defendant, in which case the date valuation is the date of trial.

The Commission proposes adding Section No. 1249a:

"(a) The date of valuation shall be determined as provided in this section.

(b) Unless an earlier date of valuation is applicable under subdivision (c), (d) or (g), the date of valuation is the date on which the plaintiff makes a deposit in accordance with Chapter 1 (commencing with Section 1268.01) of Title 7.1.

In all cases in which this subdivision does not determine the date of valuation is determined under subdivisions (c), (d), (e), (f), and (g).

(c) If the issue of compensation is brought to trial within six months from the filing of the complaint, the date of valuation is the date of trial.

(d) If the issue of compensation is not brought to trial within six months from the filing of the complaint but is brought to trial within one year from such date, the date of valuation is the date six months after the filing of the complaint.

(e) If the issue of compensation is not brought to trial within one year after the filing of the complaint and the delay is not caused by the defendant, the date of valuation is the date of trial.

(f) If the issue of compensation is not brought to trial within one year after the filing of the complaint and the delay is caused by the defendant, the date of valuation is the date six months after the filing of the complaint.

(g) In any case in which there is a new trial, the date of valuation is the date of such new trial, except that the date of valuation in the new trial shall be the same date as in the previous trial if:

(1) The plaintiff has deposited the probable just compensation in accordance with Chapter 1 (commencing with Section 1262.01) of Title 7.1; or

(2) The plaintiff has deposited the amount of the judgment in accordance with Chapter 3 (commencing with Section 1270.01) of Title 7.1 within 30 days after the entry of judgment or, if a motion for new time or to vacate or set aside the judgment has been made, within 10 days after disposition of such motion."

We can see no reason for changing the existing law as to date of valuation. We believe the proposed new law would be to complex, unwieldy and probably unworkable. We would encounter substantial additional expense in dealing with our fee appraisers and, in our opinion, neither the condemnor or the owner would benefit.

Yours very truly,

Walter J. Wood, Chief Engineer

By
C. W. Stenquist
Chief Valuation Engineer

Memo 66-62 EXHIBIT XIII

ROBERT J. WILLIAMS
ATTORNEY AT LAW
SUITE 705 COMMUNITY BANK BUILDING
SAN JOSE, CALIFORNIA 95113
TELEPHONE 298-2400

August 26th, 1966

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

Gentlemen:

Having reviewed your tentative recommendation concerning possession prior to final judgment in emminent domain proceedings, I wonder if the proposed legislation adequately protects whatever procedural right a property owner may now have to have the jury considering the issue of valuation view the property. The present provisions for immediate possession do certainly limit the property owner in that respect; however, the circumstances are such that, practically speaking, one viewing property which has been devoted to roadway or reservoir use can gain some appreciation of what the property was like in its raw state. However, the same might not be said of property on which the erection of a structure has been commenced. Particularly does the distinction seem significant when applied to potentially commercial property now undeveloped.

In other respects, the proposed legislation deals adequately with the problem.

Very truly yours,

ROBERT J. WILLIAMS

RJW:dj

Memo 66-62

EXHIBIT XIV

STATE OF WASHINGTON
JOHN J. O'CONNELL
ATTORNEY GENERAL
TEMPLE OF JUSTICE
OLYMPIA, WASHINGTON 98501

September 14, 1966

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

Attn: Mr. John H. DeMoully

Dear Mr. DeMoully:

Your committee's proposed revisions to the California "quick-take" statutes have been reviewed, and following is the one comment or suggestion regarding the same.

§1268.05 -- Withdrawal of Deposit. This section places the burden on the condemnor to notify persons having an interest in the property when one of the condemnees of the condemned property applies for withdrawal of the deposited funds. Such a burden should properly be placed on the condemnee withdrawing the money. Upon deposit of the money by the condemnor, the condemnor should have no further interest in the disposition of funds, save for specific instances, i.e., abandonment of the condemnation case. It should be the duty of the condemnee to notify other interested persons, and the court should not grant an order to withdraw funds without proof that all other interested parties received sufficient notice from the condemnee.

Regarding the text of "Recommendations of the Commission," the term "prompt compensation" is used throughout. Compensation or the deposit should be made prior to possession, hence a better term might be "concurrent," or "simultaneous compensation."

The section on deposits in cases of condemned property being residential provides for the accrual of interest. The proposed federal legislation may implement this proposed section in that additional burdens may be placed on condemnors when dealing with residence property, and your committee should refer to said federal legislation.

I hope the above will be of some help to you and your committee.

Yours truly,

JOHN J. O'CONNELL
Attorney General

EDWARD W. HUNEKE
Assistant Attorney General

JJO

Memo 66-62 EXHIBIT XV

BLADE AND FARMER
ATTORNEYS AT LAW
POST OFFICE DRAWER III
1849 ROBINSON STREET
OROVILLE, CALIFORNIA

ROBERT V. BLADE
PERRY M. FARMER
EUGENE H. BRAMHALL

TELEPHONE 533-5681
AREA CODE 916

September 14, 1966

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

Gentlemen:

I enclose herewith comment upon the Law Revision Commission's Eminent Domain proposals. As explained therein my comment lacks the care and consideration desired because of the pressure of time. I would welcome an opportunity to submit further comment or to meet with you and to discuss the matters at length. It is my belief that some of the proposals should be seriously reconsidered.

Thank you for the opportunity of allowing me to submit the comment herewith.

Yours very truly,

Robert V. Blade
For Blade and Farmer

RVB:zp
Enclosure

COMMENT UPON TENTATIVE RECOMMENDATION
RELATING TO CONDEMNATION LAW AND
PROCEDURE OF THE CALIFORNIA LAW
REVISION COMMISSION.

Comment contained herein is not of the quality desired because of the time limitation imposed. The document comprising the tentative recommendation was not received by the writer until August 24, 1966 and it was noted that any comment had to be sent in time to be received by the Law Revision Commission not later than September 15, 1966. During this interval the law office of the writer was in the process of being moved, his partner was seriously ill in a hospital and it was impossible to devote the time and attention to the matter which it obviously deserves. Nevertheless, the within comments are forwarded because of the strong beliefs of the writer on some of the subjects commented upon.

1. Amendment of the constitution so as to require that compensation be paid or deposit of probable just compensation for the benefit of the persons entitled thereto is desirable. The requirement of security for the withdrawal of funds entirely negates the purpose of the deposit for the possession of the land is the security of the condemnor.

2. If the constitution is to be amended so as to permit the legislature to authorize immediate possession in other cases, there is clearly no reason to retain the present provisions concerning rights of way and lands for reservoir purposes, since the legislature can do this by enactment. It is quite likely, additionally, that the legislature will at the instance of various governmental agencies authorize immediate possession in almost all other cases where it is requested. If proper safeguards were given to landowners for

compensation, such blanket authorization of the legislature is probably desirable.

3. Notice should be required before an order authorizing immediate possession is sought. The nature and extent of such notice should be prescribed by the legislature but the constitution should include language that will authorize and require enabling legislation requiring notice to landowners before an order for possession is procured. (See below)

4. Orders for Possession Ex-parte. It would be an unusual and rare experience where a condemning agency could not plan and know when it will require possession of property. The broadening of the scope of immediate possession should bring with it the correlative right on the part of property owners to be notified in advance of the application for an order for possession. Allowing the condemnor to obtain the order ex parte and placing upon the landowner the burden of presenting and filing a motion concerning the right to possession and the sufficiency of the deposit places the burden on the wrong party. The legislature should prescribe a notice provision which is calculated to give reasonable notice to landowners and which would not unreasonably impair a condemning agency acting with reasonable efficiency.

One suggestion as to reasonable notice would be to require that the condemning agency give notice ten days in advance of the application for the order for possession, by certified mail to the owner or owners in accordance with the names as they appear upon the tax rolls at addresses to which tax statements are sent, if any. Proof of good faith in compliance with this requirement should be pre-requisite before the Court should entertain the order. The application

should be placed on the calendar and heard in open court rather than ex parte in Chambers.

5. The proposal that existing procedure for determining the amount of probable just compensation on page 12 is undesirable. As pointed out above, to require a landowner to provide a bond or undertaking in order to withdraw funds for the taking of his property is to negate the principle that he is entitled to just compensation before his property is taken. The protection of the condemning agency is its right to have probable just compensation determined in a judicial manner. Having the condemning agency pay the premium on a bond is insufficient. The landowner may not be able to satisfy a bonding company. As a result he would be unable to withdraw funds but would lose possession of his property. Furthermore, the landowner is required, in effect, to underwrite any withdrawal by virtue of indemnity provisions in any application for an undertaking. The entire bond and undertaking procedure as proposed, is in the opinion of this writer, unrealistic and unjust to landowners. Indeed, it is doubted whether it is consistent with the federal constitution.

6. The existing procedure for determining probable just compensation is highly unsatisfactory. In most cases, a right of way agent for a state condemning agency presents an affidavit in which he recites his knowledge of land values and then states that in his opinion probable just compensation is the sum of x dollars. Upon the basis of this ultimate conclusion of law, busy overworked Judges are signing orders determining that x dollars is probable just compensation, rather than hearing evidence of market value and forming their own independent judgment. Placing upon the landowner the

burden of overturning these ex parte orders is unjust to landowners because it entails substantial initial expense without any compensation for errors corrected thereby. Indeed, the writer suggests that estimated just compensation be determined by the acquiring agency itself, as is the case with the Declaration of Taking Act of the federal government. (40 U.S.C.A. 250(a)) with penalties provided for underestimating, or in the alternative, that the agency be required to place a witness on the stand in open court after notice in the manner above suggested, with the landowners having an opportunity of cross-examination.

7. The suggestion on page 13 that the requirement of an undertaking being left to the "sound discretion of the court" subjects landowners to a variety of interpretations throughout the state, and certainly lack of consistency and uniformity.

8. On page 14 the suggestion is made that greater incentive be required to deposit probable just compensation in cases of residences. This discrimination does not seem to be justified, at least, in the manner attempted. A more just approach would be compensation to all persons for moving costs as is true in the federal procedure. Otherwise, there appears to be no just and reasonable theory why one landowner should be treated differently than any other landowner merely because one of the landowners qualifies under the residence requirements of the proposed legislation. It is believed that such legislation will simply add confusion to an existing confusing and perplexing situation which attend the growing activity of eminent domain.

9. The proposal that a uniform procedure for making deposits after entry of judgment and withdrawal of such

deposits in Paragraph 4 on page 16 is certainly commendatory. The proposal immediately preceding it requiring undertaking for withdrawal is unsatisfactory for the reasons mentioned.

10. The suggestion on page 21 that interest should cease running on a judgment upon payment of the funds into court is unsatisfactory. This seems to be the present procedure and is unfair to landowners. The burden of attempting to extract the money from the court thus falls upon the landowners. A bewildering variety of practice exists throughout the state since the buck is passed back and forth between the clerk, the auditor and the court, all having something to do with the problem. If the landowner is somewhat distant, he loses valuable interest. There is no provision for notice to the landowner of the deposit nor has the commission suggested it. The undersigned knows of no reason why a judgment cannot be satisfied in the same manner as other civil judgments by simply paying the same directly to the landowner and obtaining a satisfaction. If, as occasionally exists, there is a conflict between various interest owners which they want resolved by the court, all that is necessary is for one of them to move the court to determine the apportionment and in such case by appropriate order the court can require the funds to be paid into court and the running of interest would stop. Under the present procedure the funds are paid into court in all instances regardless of whether there is a conflict or not and the landowner is required to satisfy various requirements of various judges and officials in obtaining the funds. It is recommended strongly that payment into court be made only upon prior order of the court upon application of one of the parties. Even if this recommendation is rejected it is strongly recommended

that interest cease only upon proof that the judgment creditor has been notified of the deposit of the funds rather than the mere deposit. In the experience of the undersigned, in one instance the judgment was satisfied by deposit in court, no notice was given and no action was taken by the clerk despite an existing order directing immediate payment to the landowner for more than thirty days. No remedy exists for this failure. The landlord simply lost interest. He should not be compelled to inquire daily of the clerk whether the moneys have been paid. The condemning agency should be compelled to notify him of such deposit or be penalized with the continuing of running of interest. The statement on page 22 that upon deposit of the funds the money becomes immediately available for withdrawal" is not accurate as has been pointed out.

11. The suggestion on page 23 that Section 1255b be amended by allowing the court to determine the amount of interest in all cases is unsatisfactory. There is an unfortunate variety of viewpoints of judges throughout the state. The determination of a proper interest rate in one county should be the same in every other county. The landowner should not be penalized by the personal viewpoints of judges, which this section would invite.

12. The proposal to correct the inequity existing concerning decreases in the value of property which commences on page 19 and concludes on page 20 is noted and is highly commendable. There is a further injustice to landowners now existing which it is proposed to be corrected. This pertains to the disparate treatment of severance damage and special benefits.

The Commissioners are aware of the existing rule

reflected in People v. Symons, 54 C. 2d 855 wherein it is held that any damage to the value of a remainder caused by a project cannot be recovered except resulting from use of the land of which such remainder constituted a whole parcel before such taking. In other words, in Symons the damage to property values caused by the freeway which was the project, could not be considered. A portion of defendant's land was taken for a turnaround or culdesac and only the damage to the remainder caused by the taking and use of this portion for a culdesac was proper for compensation and severance damages. If this rule is sound for the reason that other landowners no portion of whose land is being taken are similarly adversely affected and are not compensated (p.860) then certainly the same rule should apply in the offsetting of special benefits. By this, the writer proposes that only that special benefit which is conferred upon a remainder by the portion of the project which actually occupies his land of which his remainder was formerly a whole part, may be considered in offsetting special benefit. It is simply applying the same rule to the landowner which the condemning agency enjoys as to severance damage. Under the present practice we have only a few vague rules defining general benefits and special benefits which are read to the jury. Condemning agency appraisers are given practically carte blanche in simply expressing an opinion as to what constitutes a special benefit. Benefits of the entire project are therefore offset against severance damage. In this fashion persons who have portions of their property taken are penalized for the cost of the project by the reduction of severance damage, whereas persons who had no portion of their properties taken receive the benefit of the project

without having to make payment for it. A clear definition which requires only that portion of the project which covers or utilizes the land taken from the specific property owner would be a fair and just rule and would work equally with the rule reflected in Symons. In the alternative, the principle of Symons should be rescinded so that the remainder may enjoy severance damage from the entire project. Thus, the extent of damage would be a broad question of fact as is the case with special benefit. An equalization of this unequaled condition is therefore respectfully recommended.

13. Time prevents a more accurate comment. It is the opinion of the undersigned that the Commission has undertaken to correct and improve the laws in good faith. It is further his opinion that the Commission has failed in some respects as pointed out. Despite the September 15th deadline, if it is possible the undersigned will further review, study the recommendations and will submit a supplement hereto.

Respectfully submitted,

Dated: September 14, 1966

Robert V. Black

Memo 66-62 EXHIBIT XVI

SAN DIEGO CITY SCHOOLS

EDUCATION CENTER

PARK BOULEVARD AT EL CAJON

SAN DIEGO 3, CALIFORNIA

BUSINESS DIVISION

September 15, 1966

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

Attention: Mr. John H. DeMoully, Executive Secretary

Thank you for the "Tentative Recommendation relating to Condemnation Law and Procedure, Number 5 - Possession Prior to Final Judgment and Related Problems" revised July 30,1966.

I have reviewed these tentative recommendations on the basis of my personal experience, and find that I am in substantial agreement with the changes made. I question two sections as follows:

Section 1269.05. Deposit and possession on motion of certain defendants

I forsee conditions under which the defendants may move the court for an order determining the amount of compensation and requiring the plaintiff to make deposit of funds in an amount of money not then available. I fear the defendant could use the provisions of this section to hinder the land acquisition program of school districts, particularly those districts which are using state allotments to purchase the land for school sites. The results of these provisions may also limit the right of the districts to abandon proceedings after the amount of the award has been determined. Neither of these acts would be in the public interest.

Section 1249a (g) (2) of the Code of Civil Procedure

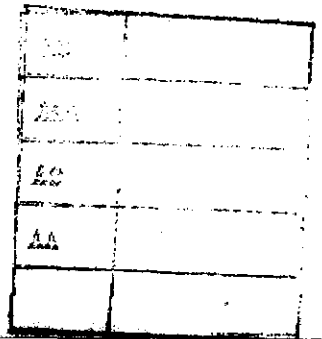
I am aware of at least one instance where the award of the court was far in excess of the true market value of the property as shown by voluntary negotiation after abandonment of the suit by the public agency. This subsection could require the district to deposit funds in an amount materially exceeding the true market value of the property. This problem would particularly affect smaller districts and those districts using state allotments to purchase land, where available funds might not be adequate to make a deposit in the amount of the judgment. This inability to make the required deposit could result in the date of the valuation being set as the date of the new trial; such a deferral could result in a substantial increase in value.

I appreciate the opportunity to provide opinion to be considered in the development of these recommendations and to review these tentative recommendations prior to their submission to the legislature.

Sincerely,

Harold W. Culver
Director of Building
Planning and Construction

HWC:fw
cc: Geyer Walker
Minor Shannon



Memo 66-62

EXHIBIT XVII

BERTRAM MC LEES, JR.
COUNTY COUNSEL

County of San Diego

OFFICE OF

COUNTY COUNSEL

302 COUNTY ADMINISTRATION CENTER
SAN DIEGO, CALIFORNIA 92101

ROBERT G. BERREY
ASSISTANT COUNTY COUNSEL

DEPUTIES
DUANE J. CARNES
DONALD L. CLARK
DAVID B. WALKER
JOSEPH KASE, JR.
FREDRIC G. DUNN
JAMES E. MILLER
LAWRENCE KAPILOFF
FRANK L. ASARO
LLOYD M. HARMON, JR.
ROY H. GANN

September 16, 1966

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

Attention Mr. John H. DeMoully
Executive Secretary

Gentlemen:

We have reviewed the tentative recommendation relating to Condemnation Law and Procedure No. 5, Possession Prior to Final Judgment and Associated Problems.

We are in substantial agreement with the tentative recommendation including the proposed constitutional revision, except we are very much opposed to Sections 1269.05 and 1249a (g).

1. DISCUSSION REGARDING SECTION 1269.05. The majority of cases handled by our office where the County is plaintiff would not be affected by the proposed section in that possession is usually taken. This would apply to the vast majority of road acquisitions and right of way for sewer and other purposes. However, the application of the section to a minority of County cases and to those cases where small districts and school districts are the plaintiffs could create substantial hardship.

For example, the County must plan to acquire sanitary disposal sites well in advance of the contemplated use of the facility in order that the public may have a facility to use when existing disposal facilities are exhausted. The County would have no need for immediate possession of a proposed sanitary disposal site which is to replace an existing partially filled site. In addition, in order to properly plan for future service to the public, the County would seek to acquire a sufficiently large acreage, usually a canyon, for future disposal facilities to provide a site for several years in the future. Under these

circumstances, there would be no need for the County to deposit probable just compensation to obtain an order for immediate possession. At present, the County would not have to tie up the appraised value of such a facility; the owner would still have full use of his property and the County could apply its funds to more urgently needed public projects, such as police service, highways and the like. However, Section 1269.05 would permit a defendant to move the court for an order requiring the plaintiff to make a deposit of the probable just compensation in court if there is a dwelling located on the property containing not more than two residential units. If the County sought to acquire for some public use a small vacant portion of a 100 acre parcel which happened to have a farmhouse located elsewhere on the parcel, the farm owner, regardless of the needs of the public for its funds for other more urgent public uses, could require the County to deposit the probable just compensation approximately a year before it ordinarily would be required. In addition to the loss of the use of urgently needed public funds in the manner the legislative body or administrative arm of the government in its discretion gave priority, the public agency usually would lose its right to abandon. If funds are not deposited in court, it would be much more unlikely that a property owner would be able to successfully assert that the public agency is estopped from abandoning if the award is excessive or if at the time the property is actually needed, plans are altered and different property is sought to be acquired.

We believe that the section would create a problem with school districts who must comply with the rules, regulations and policy of the Department of General Services of the State of California whenever they seek State aid or financing for the acquisition of school property. Regardless of the statutory authority given school districts to take immediate possession or to deposit money in court, school districts are frequently in the position of not being able to obtain reimbursement or State financing at all unless the proposed acquisition meets the "policy" of the State Board of Education and Department of General Services. That the policy and rules of the Departments of the State may be somewhat arbitrary in their application is, we submit, demonstrated by analysis of the following flood control project which was constructed in San Diego County:

Under Public Law 566, the federal government will allocate funds to local agencies to construct much needed flood control works, if the State law provides for assistance as to acquisition of necessary land. The California Watershed and Flood Prevention Law, Section 12850, et seq. of the California Water Code, provides that it is the intention of the Legislature to pay the cost of local cooperation required by Public Law 566, to the limit of the cost of lands, easements, and rights of way.

Under this program a local soil conservation district obtained, after 6-8 years' negotiation, federal assistance for the construction of a flood control channel through land that in the meantime had become a developed portion of the City of Vista, California. The most economical and best engineering location to place the channel was diagonally across a football field of a local high school athletic plant. The federal government would not pay for the cost of a cover for the channel as it was not needed from a hydraulic standpoint. The State would not pay for the cost of a cover. The State would pay all right of way costs including damages if the local agency would either take the fee title or otherwise prohibit the covering of the channel. Thus, the State probably would have had to pay for a new stadium as severance damage, plus the fair market value of the land taken as right of way cost even though the cost of covering the channel, if reimbursible, would have been much less. Upon inquiry the State also refused to pay the cost of an open channel so that the school district could apply the award towards the cost of covering the channel and restoring the football field. In this instance, the project was not abandoned as local interests were able to pay for the cost of the cover.

The State also as a matter of policy refuses to pay for the cost of cover even though the channel is presently covered except to the extent the State believes cover is necessary for access purposes. Therefore, commercial properties with a covered channel across their frontage were forced to "contribute" the cost of cover except for driveway crossings.

Another effect of this section would be to cause small districts to lose their right of abandonment in the event the award of the jury were out of line or the cost of the proposed acquisition was more than the funds budgeted. For example, in special assessment proceedings for many improvement districts, the cost of the proposed acquisitions are a determining factor as to whether or not to proceed with the proposed improvements.

In our opinion, the public agency should be entitled to exercise its discretion as to whether or not probable just compensation should be deposited and it should not be penalized for determining that other projects are more urgently needed, that bonds will be used to finance the acquisitions after the costs are ascertained, or that the proceedings will be abandoned if the people feel the costs are excessive. We recommend that legislative discretion of this sort be vested in public officials and not private property owners. We further recommend that the power to abandon not be abridged.

2. DISCUSSIONS REGARDING SECTION 1249a (g). In those instances where a public agency had determined that it was to its best interest not to deposit probable just compensation; for example, a sanitary disposal site to be acquired for future public use by a County, the public would be penalized or deprived of the fruits of their appeal as demonstrated by the decision of the Supreme Court in People v. Murata (1960) 55 Cal.2d 1. We believe the proposed section would not create too great a hardship on the large agencies such as the State Division of Highways in its highway program, in that in most instances it acquires immediate possession, and accordingly, would deposit probable just compensation well in advance of judgment. However, the State Department of Water Resources in its reservoir acquisition program, many school districts, and other public agencies in many instances would be deprived of an effective appeal as set forth in People v. Murata, supra.

We also recommend that Section 1268.02 relating to increase or decrease in amount of deposit, be revised so as to permit the court to redetermine probable just compensation to an amount less than that which has been withdrawn by a defendant. To illustrate,

a public agency appraised a parcel at $1,000, by clerical error the decimal was misplaced in preparing the security deposit and $10,000.00 was deposited in court for said parcel. The error was not discovered until after the withdrawal due to the large number of parcels in the case. We believe the public agency should be able to seek modification of the order before the defendant owner has disposed of the original amount withdrawn so as to prevent future hardship to the defendant and also so that the public may recover as much security as possible.

Finally, we recommend that proposed Section 1255 (c) be revised to make the recoverable costs and disbursements taxable costs and disbursements with the exception of special costs and disbursements enumerated in (2) thereof, that is, attorney's fees and appraisal fees. We believe that the public should not be required to pay either appraisal or attorney's fees for services rendered prior to the commencement of the action. Under the proposed section, if a master road plan were adopted indicating that the parcel to be acquired was within a proposed major highway, consultation fees of attorneys and appraisers from the date of adoption of the road plan could be asserted under this section, even though an eminent domain action was not actually commenced for ten to twenty years. We believe the commencement of an action is a date certain and represents action on behalf of the public upon which the defendant should justifiably rely; prior to that time, no definitive action has been taken by the public.

Very truly yours,

BERTRAM McLEES, JR., County Counsel

By
DAVID B. WALKER, Deputy

DBW:MAB

Memo 66-62 EXHIBIT XVIII

FERDINAND P. PALLA
CITY ATTORNEY

OFFICE OF THE CITY ATTORNEY

CITY OF SAN JOSE
CALIFORNIA

TELEPHONE
292-3141

RICHARD K. KARREN
ASST. CITY ATTORNEY
HARRY KEVORKIAN
FRANKLIN T. LASKIN
DONALD C. ATKINSON
KEITH L. GOW
ROY W. HANSON
W. W. ARMSTRONG
ROBERT R. CIMINO
DEPUTY CITY ATTORNEYS

September 19, 1966

Senate Fact Finding Committee
on Judiciary
California Legislature
Lettunich Building
Watsonville, California 95076

Attention: Frederick H. Ebey, Counsel

Gentlemen:

We have reviewed the proposed constitutional amendment and implementing legislation relating to condemnation law and procedure of the California Law Revision Commission.

We are in general accord with it and we particularly favor the constitutional amendment allowing the Legislature to expand the instances in which an order of immediate possession may be employed by a condemning body.

We do, however, feel that some serious consideration should be given to amending C.C.P. Section 1266. Specifically, we feel all cities should have the right to excess condemnation as does the State of California without having to prove, as required by the said section, that severance damage to the remainder is such that the cost of acquiring the part equals the cost of acquiring the whole. We have attempted to employ C.C.P. Section 1266 in many situations and have found it to be entirely unworkable.

We would appreciate it if this letter were presented in testimony at the hearings in Anaheim.

Very truly yours,

FERDINAND P. PALLA
City Attorney

By Donald C. Atkinson
Deputy City Attorney

FPP:DCA:lb

Memo 66-62 EXHIBIT XIX

PACIFIC GAS AND ELECTRIC COMPANY

PG&E — 245 MARKET STREET · SAN FRANCISCO, CALIFORNIA 94106 · TELEPHONE 781-4211

RICHARD H. PETERSON
SENIOR VICE PRESIDENT
AND GENERAL COUNSEL

FREDERICK T. SEARLS
GENERAL ATTORNEY

WILLIAM B. KUDER
WILLIAM E. JOHNS
MALCOLM H. FURBUSH
JOHN A. SPROUL
PHILIP A. CRANE, JR.
HENRY J. LAPLANTE
EDWARD J. MCGANNEY
JOHN B. GIBSON
ARTHUR L. HILLMAN, JR.
ROBERT M. DELLA VALLE
RICHARD J. KOHLMAN
SANFORD M. SKAGGS
JOHN C. MORRISSEY
RICHARD A. RAFFERTY
CHARLES T. VAN DEUSEN
MALCOLM A. MACKILLOP
NOEL KELLY
GILBERT L. MARRICK
JOHN E. COOPER
GLENN WEST, JR.
CHARLES W. THISSELL
ROSS WORKMAN
ROBERT OHLBACH
STANLEY T. SKINNER
ATTORNEYS

October 6, 1966

Mr. John R. De Moully, Executive Secretary
State of California
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Tentative Recommendations of the California Law Revision Commission Relating to Condemnation Law and Procedure

Dear Mr. DeMoully:

I have a copy of the letter dated September 16, 1966, which Mr. Tom P. Gilfoy, Assistant Counsel for Southern California Edison Company, sent you regarding the tentative recommendations of the Law Revision Commission concerning the taking of early possession in eminent domain. Mr. Gilfoy made one specific recommendation for modification of the commission's present proposals. That involved the requirement of proposed section 1269.03(c) that a public utility applying for early possession must produce a certificate of public convenience and necessity for the facility issued by the Public Utilities Commission.

As Mr. Gilfoy points out, such certificates are virtually never issued for the great bulk of utility facilities in behalf of which the right of eminent domain is exercised. The second paragraph of section 1001 of the Public Utilities Code dispenses with the certificate requirement for facilities which are extensions of existing plants necessary in the ordinary course of business.

I agree with Mr. Gilfoy that the requirement of a certificate as a condition of early possession in eminent domain would tend to frustrate the purpose of the Law Revision Commission's recommendations, which I understand to be, among other things, an expedition and simplification of the right to possession. As

presently constituted, proposed section 1269.03(c) would cause proceedings before the Public Utilities Commission which do not now occur.

I also agree with Mr. Gilfoy that the rest of the Law Revision Commission's proposed section contains adequate safeguards against error or abuses in the granting of early possession to a public utility.

Accordingly, I join in Mr. Gilfoy's letter and support his recommendation.

I am sorry I have not communicated my position to you sooner, but I trust it is not too late to be considered. Thank you very much for providing me the various law revision studies and communications pertaining to eminent domain as they are developed.

Very truly yours,

Charles T. Van Deusen

CHARLES T. VAN DEUSEN

CTVD:avs

cc: Mr. Tom P. Gilfoy

Memo 66-62 **EXHIBIT XX**

RICHARD V. BRESSANI
(1894-1959)

LAW OFFICES OF
BRESSANI AND HANSEN
1205 BANK OF AMERICA BLDG.
TELEPHONE 294-0868
SAN JOSE 13, CALIFORNIA

GERALD B. HANSEN
CLARENCE J. SHUH
RICHARD B. BLOS

August 10, 1966

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

John H. De Moully
Executive Secretary

RE: Tentative Recommendations of Commission re:
Condemnation Law and Procedure

Gentlemen:

After examination of the recommendations under date of your letter of August 3, 1966, we affirmatively recommend in favor of this form of tentative recommendation.

This firm is regularly rather heavily involved in condemnation litigation and we particularly commend your proposed form of Section 1249 (b) of the C.C.P. providing for the valuation process to disregard any increase or decrease in market value arising from the advance general knowledge of the condemnation project.

This has always been a bad area.

May I add my thanks and congratulations for your good work.

Yours very truly,

BRESSANI AND HANSEN

By
Gerald B. Hansen

GBH:f

EXHIBIT XXI
Memo 66-62

GEORGE C. HADLEY

PAUL E. OVERTON
Suite 1100
3540 Wilshire Boulevard
Los Angeles 5, California
Telephone: DUnkirk 5-0431

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works, Plaintiff, -vs- GEORGE J. PERNICANO, et al., Defendants.	NO. 267309 Parcels 4A and 4B

THE EFFECT OF KNOWLEDGE OF AN IMPENDING PUBLIC IMPROVEMENT UPON THE SUBJECT PROPERTY OR UPON SALES IN THE NEIGHBORHOOD OF SUBJECT PROPERTY IS NOT COMPETENT EVIDENCE

The law is crystal clear that a property owner may show that the market value of his property has been depressed or increased by knowledge of the impending freeway construction. This rule is well stated in Bacich v. Board of Control (1943) 23 Cal. 2d 343, 355-356.

> "The other items of damages claimed by plaintiff are not compensable. He asserts that all the residences, except his own, in a described area in which his property is situated were

eliminated by defendants, and that a street railway formerly operating on Sterling Street has been removed. There is no property right appurtenant to plaintiff's property on Sterling Street which entitles him to the maintenance of the residences or the continuous operation of the existing street railway. . ."

In the very recent case of City of Oakland v. Partridge (1963) 214 A.C.A. 211 at 218 the court said:

"In his opening statement, defendant's counsel had stated that the expert would testify that 'it was difficult to obtain good income on this property with that freeway going to shoot through there for a considerable length of time beforehand.' This evidence as to 'blight' is not admissible. (Atchison T. & S. F. Ry. v. Southern Pac. Co., 13 Cal. App. 2d 505, 517 [57 P.2d 575]; People v. Lucas, 155 Cal. App. 2d 1, 6 [317 P.2d 104].) As stated in Atchison, supra, it would be indulging in 'unfathomable speculation' to permit such testimony."

Likewise, a property owner may not show that the market value of land sold in the neighborhood of subject property has been depressed or increased by knowledge of the impending freeway construction. The authorities clearly establish that such evidence is legally incompetent.

Atchison, T. & S.F. Ry. Co. v. Southern Pac. Co., (1936) 13 Cal. App. 2d 505, 517;

People v. Lucas (1957) 155 Cal. App. 2d 1, 5-7;

Co. v. Southern Pac. Co. (1959) 176 Cal. App. 2d 255, 258;

Bacich v. Board of Control (1943) 23 Cal. 2d 343, 355;

U.S. v. Certain Lands in Town of Highlands (1952) S.D.N.Y. 57 F. Supp. 934, 937;

Gettelman Brewing Co. v. Milwaukee (Wisc. 1944) 18 N.W. 2d 541;

Chicago Housing Auth. v. Lamar (Ill. 1961) 172 N.E. 2d 790.

The leading California case establishing this exclusionary rule is Atchison T. & S.F. Ry. Co. v. Southern Pac. Co., (1936) 13 Cal. App. 2d 505, 517. The Santa Fe case is succinctly summarized with approval in People v. Lucas (1957) Cal. App. 2d 1 at page 6;

> "In Atchison T. & S.F. Ry. Co. v. Southern Pac. Co., 13 Cal. App. 2d 505, 517, [57 P. 2d 575], the court held in determining the market value of land at the time of filing the complaint in December 1933, it would be speculative to allow evidence that the area was 'stigmatized' and the market value of land therein affected by the fact that a Railroad Commission order made in 1927, requiring the construction of a depot which would require the condemnation of the defendant's land. The court said that permitting the examination of witnesses using that order as a basis in order to determine whether there was a market slump in the area during the period between the making of the order and filing suit, and what it was due to, would be indulging in 'unfathomable speculation'".

In People v. Lucas (1957) 155 Cal. App. 2d 1, 5-7, the property owner sought to cross-examine the condemnor's valuation witness regarding the effect of consideration by the Highway Commission of two alternative freeway locations upon property located in the neighborhood of subject property. The court sustained the objection to the cross-examination "principally upon the ground that the answer would be a matter of speculation", Supra at page 6. Notwithstanding that the property owner contended that knowledge of impending freeway improvement would "in all probability ... tend to depreciate the price to be paid for their property" the appellant tribunal sustained the trial court. It is interesting to note that Justice Peters of our Supreme Court, who was sitting as a District Court Judge at the time, concurred in the Lucas decision.

In Beich v. Board of Control (1943) 23 Cal. 2d 345, 355, the property owner asserted a damage caused by a blight on his residence. The condemnor had removed all the residences in the neighborhood of his property, leaving only his own standing in a sea of vacant property. The Supreme Court held that even assuming that property owner's residence had been stigmatized by the effects of condemnation on the neighborhood, such damage was not compensable.

That the Supreme Court has not budged one iota from the exclusionary position is demonstrated in the recent case of People v. Symons (1960) 54 Cal. 2d 855, 561, 862. The Symons case established the rule that the effect of a freeway built on neighboring property, on the market value of subject property is not a legally competent consideration. If our Supreme Court will not allow evidence of the effect of actual freeway construction in the neighborhood of subject property, how much more compelling is it to exclude evidence of the speculative effect of the flitting shadow of future construction?

Summary

The ruling of Bacich v. Board of Control and Santa Fe v. Southern Pacific is firmly implanted in our law. In unmistakable terms, our appellate tribunals have laid down the mandate that evidence is legally incompetent when its effect is to show that subject property and its neighborhood have been stigmatized, and so depressed in value, by reason of knowledge of a future public improvement.

All testimony of the Witness Lane relating to the effect of knowledge of the freeway had on prices paid for properties in the area and on the quantity of sales should be stricken. In addition, any future such evidence should be excluded. The "motion to exclude" is the proper remedy. Sacramento & San Joaquin Drainage Dist. v. State Reclamation Board (1963) 215 A.C.A. 59, 67, 69.

Dated: July 10, 1963.

Respectfully submitted,

GEORGE C. HADLEY, PAUL E. OVERTON

By Sherman E. Hollingsworth
Attorneys for Plaintiff

#36 Revised September 15, 1966

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

CONDEMNATION LAW AND PROCEDURE

NUMBER 5 - POSSESSION PRIOR TO FINAL JUDGMENT AND RELATED PROBLEMS

September 15, 1966

California Law Revision Commission
School of Law
Stanford University
Stanford, California

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Tentative Recommendation of

CALIFORNIA LAW REVISION COMMISSION

re CONDEMNATION LAW AND PROCEDURE—POSSESSION PRIOR TO FINAL JUDGMENT AND RELATED PROBLEMS

In 1965, the Legislature directed the Law Revision Commission to study the question "whether the law and and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings." This recommendation (one of a contemplated series) covers several problems that inhere in the timing and sequence of steps in condemnation procedure from the governmental decision to acquire the property through final judgment in the eminent domain proceeding. Both legally and practically, the most important of these problems is establishing the point in the procedure at which the condemnor may take possession of the property and the condemnee may receive the property's value. Closely related questions involve determination of (1) the date as of which the property is to be valued, (2) the dates when interest begins to accrue and ceases, and (3) the conditions under which the condemnor may abandon the proceeding.

In 1961, on recommendation of the Law Revision Commission,* the Legislature enacted legislation that partially systematized the law on these and related questions.** The Commission has concluded that further improvements are needed and that the probems deserve legislative attention as a first step in the revision and recodificaton of the law of eminent domain.

Possession Prior to Judgment—Constitutional Revision

Section 14 of Article I of the California Constitution requires that the power of eminent domain be exercised through judicial proceedings and confers the right to jury trial of the issue of compensation. Under that section and the Code of Civil Procedure, a taking by eminent domain is an ordinary civil proceeding at both the trial and appellate levels. The only distinctive treatment given the eminent domain proceeding is a preferred setting on the trial calendar. Until the end of the proceeding the condemnor is not entitled to possession, nor is the property owner entitled to compensation.

A limited exception to these rules has been created by two amendments to Section 14 which provide for so-called "immediate possession" in takings by the state, cities, counties, and certain districts for rights of way or reservoir purposes. These amendments require that the condemning agency deposit a sum of money determined by the court to be adequate to secure eventual payment of the award. They do not require, however, that the amount deposited be paid or made available to the owner when possession of his property is taken or at any time prior to final judgment. Before 1957, there were no statutory provisions for withdrawal by the property owner of the required deposit. Furthermore, there was no requirement that notice be given the property owner of the effective date of the order for possession, and the order could be made effective when granted. These rules afforded at least a possibility of administrative abuse and gave rise to the unanalyzed impression that the best interests of the property owner always lie in postponing the inevitable relinquishment of possession as long as possible.

The Commission believes, however, that more general provisions for possession prior to judgment can be made to be of benefit to both condemnors and condemnees. To the public agencies a right to earlier possession facilitates an orderly and systematic program of property acquisition and project construction. An undue delay in acquiring even one essential parcel can prevent construction of a vitally needed public improvement and can complicate financial and contracting arrangements for the entire project. To avoid such a delay, the condemnor may be forced to pay the owner of that parcel more than fair value and more than the owners of similar property received. Also, in acquiring property for public use, it is virtually essential that there be a definite future date as of which all property needed for the public improvement will be available. In brief, the need is not for haste, but for certainty. The variable conditions of court calendars and the unpredictable eventualities inherent in the trial, appeal, and possible retrial of the issue of compensation preclude any such certainty of future date if that date is determined solely by the final judgment in the proceeding. [redacted] can lead to precipitant filing of proceedings and premature acquisition of property, all to the disadvantage of both taxpayers and property owners.

From the condemnee's point of view, if reasonable notice is given before possession is taken, and if prompt receipt of the probable value of the property is assured, possession prior to judgment frequently will be advantageous. Upon filing of the condemnation proceeding, the land owner loses many of the valuable incidents of ownership. He is practically precluded from selling or financing the property and is legally deprived of any further increase in the value of the property. He is also denied compensation for any improvements or repairs made after service of the summons in the proceeding. As a practical matter, the property owner usually must find and purchase another property prior to termination of the litigation. He must also defray the expenses of litigation. It is possible that because of these difficulties he will be forced to settle for an amount less than he would have received eventually in the condemnation proceeding. In contrast, the taking of possession and payment of estimated compensation prior to judgment permits the condemnee to meet these problems and expenses while proceeding with the trial on the issue of compensation. Even if the condemnee has no urgent need for prompt payment, he may withdraw the deposit and invest in other property or he may leave the amount on deposit and receive interest at the legal rate of 7% throughout the proceeding.

The technical necessity of determining the right of the condemnor to take the property by eminent domain before any exchange of possession and compensation does not preclude broadening the provisions for deposit and possession prior to judgment. Notwithstanding the important roles the limiting doctrines of "public use" and "public necessity" played in condemnation cases in the 19th century, the only substantial question for judicial decision in virtually all contemporary condemnation proceedings is the amount of compensation. And, because the question of the condemnor's right to take the property is decided by the court, rather than by the jury, procedures can be fashioned that will permit the expeditious determination of the question in the cases in which it arises.

In its general application, Section 14 forbids the "taking" of property "without just compensation having first been made to, or paid into court for, the owner." In

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* See CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-1 (1961).

** See Cal. Stats. 1961, Ch. 1313, p. 3442, amending or adding CCP §§ 1243.4, 1243.5, 1243.6, 1243.7, 1249, 1249.1, 1253, 1254, 1255a and 1255b.

reliance upon this provision, the Supreme Court of California invalidated certain legislation enacted in 1897 that authorized the taking of "immediate possession" in any condemnation case (Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902)). That decision has been considered by some to be a bar to any statutory extension of the existing limited provisions for possession prior to judgment. The legislation of 1897, however, required only the posting of security by bond and did not provide for any payment to the owner of the property. The decision invalidating that legislation was based upon the logical ground that, even if money is deposited, it is not deposited "for the owner" unless it is available to him. The provisions of the Constitution that now authorize immediate possession without payment to the owner "having first been made" were adopted to overcome this decision of the Supreme Court.

The policy underlying that decision and the original and fundamental provisions of Section 14 are sound. Possession of property should not be taken from the owner unless he has the right to be paid concurrently. It is possible that the Supreme Court of California would sustain broader statutory provisions for possession prior to judgment if they adequately implement the property owner's right to concurrent payment. The wording of Section 14 is ambiguous, however, and the Commission believes that the section should be clarified by amendment. Not the least of the benefits to be derived from the amendment would be the restoration of clarity and precision to the principal section of the California Constitution dealing with eminent domain. Moreover, the amendment would restore to the Constitution the right of a property owner to compensation at the time his property is taken for any purpose.

Accordingly, the Commission recommends that Section 14 of Article I be amended as follows:

1. An explicit provision should be added guaranteeing the owner the right, in all cases, to be compensated promptly whenever possession or use of his property is taken.

2. The existing authorization for possession prior to judgment in right of way and reservoir cases should be retained, but should be subjected to the requirement of prompt compensation. The authorization in such cases also should be extended to all governmental entities and agencies having the right to take for right of way or reservoir purposes. The existing list of entities has resulted from piecemeal amendments adding one or more new entities at various times, and there is no logical basis for a distinction between the public entities listed and those not listed.

3. The Legislature should be authorized to specify the other purposes for which, and entities by which, possession may be taken prior to judgment. The authorization should include the power to classify condemnors and classes of takings for this purpose. Subject to the basic constitutional guarantees, the Legislature also should be authorized to establish and change procedure for such cases.

4. The uncertain and partially obsolete language of Section 14 should be clarified or deleted, as follows:

(a) The phrase, "which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law" should be clarified to make the latter two phrases refer to the total process for ascertainment of compensation, rather than merely to waiver of jury.

(b) The lengthy proviso to the first sentence, dealing with "immediate possession," should be replaced with clearly stated provisions (1) authorizing possession prior to judgment in right of way and reservoir cases, (2) authorizing possession in such other cases as are prescribed by statute, and (3) requiring prompt compensation to the property owner in all cases.

(c) The second portion of the first sentence, prohibiting "appropriation" of property "until full compensation therefor be first made in money or ascertained and paid into court for the owner" should be deleted as surplusage.

(d) The language of the first sentence requiring that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed by such corporation" should be deleted. By its terms the phrase applies only to "corporations other than municipal" and, oddly, only to takings for right of way or reservoir purposes. Insofar as the language undertakes to make any distinction in the offsetting of benefits, other than distinguishing between "special" benefits (which are offset in all cases) and "general" benefits (which are not offset in any case), the language has been held inoperative because it conflicts with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States (Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1085 (1902)). The complex question of the offsetting of benefits in cases of partial takings should be left to treatment by the Legislature subject to the fundamental guarantees of other provisions of the Constitution.

(e) The last sentence of the section, which provides, in effect, that property may be taken for certain logging and lumbering railroads, and that such taking constitutes the taker a common carrier, should be deleted. Takings for such purposes are authorized by existing legislation, and the statement that the taker becomes a common carrier is merely an application of a broader proposition that characterizes any acquisition of property through exercise of the power of eminent domain.

Possession Prior to Judgment—Implementing Legislation

The existing constitutional authorization for possession prior to judgment applies in a wide range of cases. The authorization for such possession in takings of "rights of way" has proven effective in most acquisitions for highway, freeway, and street purposes. As expansively interpreted, the authorization for such possession in takings of "lands for reservoir purposes" has facilitated the acquisition of property needed to develop and conserve water resources. It has become apparent, however, that these two classes are neither entirely logical nor sufficiently inclusive. For example, a county, city, or district may obtain possession of the rights of way for a sewerage system, but may not obtain possession for the site for the sewage treatment plant or other facility itself.

The development of highways, and especially freeways, sometimes necessitates the taking of property outside the right of way. Even though the acquisition is by the State

Division of Highways, no authorization exists for early possession of property outside the boundaries of the right of way. Similarly, many acquisitions in which possession prior to judgment would be appropriate are excluded by both the limitation as to entities and by the limitation as to the public purpose for which the property is being acquired. As an example, an assured date of possession is not available in acquisitions for school purposes, however great the need and whatever the size or responsibility of the school district.

The Commission, therefore, has concluded that legislation should be enacted that substantially extends the categories of cases in which possession is available prior to judgment. Such legislation should classify condemnors in accordance with the nature of the litigable issues that may be raised in the condemnation proceeding and specify procedures applicable to each class of condemning agency that will fully protect the rights of persons whose property is being taken.

For this purpose, the Commission recommends enactment of the following provisions:

1. The procedure now followed in cases where property is taken prior to judgment for right of way or reservoir purposes should be retained in such cases, except that the period of notice to the property owner before possession is taken should be extended. Prior to 1957, there was no requirement that the property owner be notified. In 1957, a requirement of three days' notice was enacted. In 1961, on recommendation of the Law Revision Commission, this period was extended to 20 days. The Commission now recommends that this period be extended to 30 days. The change will make possible the actual disbursement to the property owner of the required deposit before he is required to relinquish possession of the property and thus will further reduce the possibility of serious inconvenience to the property owner.

2. The statutes of California now provide that the governing bodies of many condemning agencies may adopt a resolution or ordinance that is "conclusive evidence" in the condemnation proceeding of (1) the public necessity for the public improvement, (2) the necessity for taking the property for the improvement, and (3) the planning and location of the improvement in the manner most compatible with the greatest public good and the least private injury. The effect of such a resolution or ordinance is substantially to reduce the possibilities of defeating the condemnation action and to make the only significant issue between the parties in at least 99% of the cases that of just compensation. Because of the resulting inevitability of the taking, such agencies should be authorized to take possession of property prior to judgment in accordance with a procedure that will fully protect the rights of property owners.

In such cases, the order for possession should be issued ex parte upon application of the plaintiff, but should not be effective to transfer the right of possession until at least 30 days after notice to the property owner. Within the 30-day period after notice, the property owner should be entitled to obtain a stay of the order if the hardship to him of losing possession outweighs the need of the plaintiff-condemnor to avoid delay. Also within the 30-day period after notice, the property owner should have the right to obtain a vacation of the order for possession in those rare cases in which he can show that the plaintiff is not empowered to take the property by eminent domain or that the taking is not actually authorized by a conclusive resolution or ordinance.

3. In most other condemnation actions, the plaintiff should be entitled to obtain possession prior to judgment if, upon regularly noticed motion, the court determines that (a) the plaintiff is entitled to take the property, (b) the plaintiff has a need for early possession, and (c) the plaintiff's need for such early possession outweighs any hardship to the owner or occupant of the property. This right to obtain possession upon noticed motion should, however, be limited to public entities, public utilities, common carriers, and public service corporations to avoid extending the right to possession prior to judgment to the exceptional cases of so-called "private" condemnation. And, in the case of public utilities, common carriers, and public service corporations, the procedure should be available only when the need for the proposed improvement or project is evidenced by a certificate of public convenience and necessity obtained from the Public Utilities Commission.

Deposit by the Condemnor

Existing law provides for the deposit of probable just compensation only in connection with an application for an order of possession prior to judgment. There should, however, be provision for making such a deposit whether or not immediate possession is contemplated or taken. Such a deposit procedure can serve a valuable role in condemnation proceedings. The defendant's right to withdraw the deposit prior to judgment enables him to finance the acquisition of property to replace that being taken and to defray the expenses of the condemnation litigation. These advantages will accrue to the condemnee even though the condemnor is not entitled to or does not seek possession prior to judgment.

From the condemnor's viewpoint also, the deposit procedure can be of value if provision is made that the defendant, by withdrawing the deposit, waives all defenses except his claim to greater compensation. Under such a provision the defendant's withdrawal of the deposit confirms the plaintiff's right to take the property. (See People v. Gutierrez, 207 Cal. App.2d 529, 24 Cal. Rptr. 441 (1962).) Thus, in sum, a deposit and withdrawal procedure provides a method by which the parties can effect a transfer of the right to possession in exchange for substantial compensation without prejudice to their rights to fully litigate the compensation issue.

Accordingly, the Commission recommends the enactment of legislation authorizing any condemnor, whether or not it seeks possession prior to judgment, to deposit for the condemnee an amount determined by the court to be the probable just compensation that will be awarded to the defendant in the action. The Commission further recommends:

1. The existing procedure for determining the amount of the probable just compensation should be retained. The existing system for withdrawing the deposit, however, should be streamlined to eliminate, insofar as possible, obstacles to withdrawal. Any justifiable fear that the amount withdrawn will exceed the eventual award, or that the deposit will be withdrawn by a person other than the one entitled to it, can be obviated by requiring the filing of a bond or other undertaking.

2. Existing law requires the condemnor to pay the cost of bond premiums for such purposes if the need for

the bond arises from the condemnee's efforts to have the court fix as probable just compensation an amount greater than that originally deposited and then to withdraw all or part of the excess. No provision for such payment is now made if the bond is required because of competing claims among defendants to the amount originally deposited. These claims usually result from the need to allocate the award among owners of separate interests in the property, and the necessity for such allocation arises from the condemnation proceeding itself. The Commission therefore recommends adoption of a requirement that the condemnor pay bond premiums in such instances unless the need for the bond arises primarily from an issue as to title between defendants.

3. Under existing practice no withdrawal is permitted unless personal service of the application to withdraw is made upon all parties. This requirement should be simplified by permitting service by mail upon the other parties and their attorneys, if any, in all cases in which the party has appeared in the proceedings or has been served with the complaint and summons. Further, the existing absolute prohibition of withdrawal for lack of personal service should be eliminated. Quite often "defendants" named in eminent domain proceedings can easily be shown to have no compensable interest in the property. In such cases, withdrawal should be permitted upon the furnishing of adequate security. Further, the requirement of an undertaking for withdrawal should be left to the sound discretion of the court, rather than being required as a matter of course upon the appearance of any possible conflict, however technical, in claims to the eventual award.

4. Because the condemnee is entitled to receive substantial compensation when the deposit is made—the amount determined by the court to be the probable compensation that eventually will be awarded to the condemnee—the date of valuation should be fixed by the deposit. See below at page 5.

5. After a deposit is made, the condemnor should be given the right to obtain an order for possession of the property when the defendants entitled to possession either vacate the property or withdraw the deposit.

Deposit on Demand of the Defendant

The Commission has considered provisions recently enacted in other states that permit the condemnee to demand and receive probable compensation at the beginning of the proceedings or soon thereafter. Under these provisions, the condemnor is given the right to possession upon complying with the demand of the condemnee. Although the objective has merit, integration of such a requirement into California condemnation procedure does not appear feasible. Such provisions eliminate, in effect, any privilege of the condemnor to abandon the proceedings. More importantly, in California there are instances in which the public funds for eventual acquisition of the property are not available at the outset of the proceeding. Improvement, revenue, or general obligation bonds may have to be sold. And, as a practical matter in certain cases, it is necessary for the value of the property to be determined before the amount of the bond issue can be established.

Nonetheless, the Commission believes that a greater incentive should be provided to the condemnor for the deposit of probable just compensation in cases where the condemnor seeks to condemn the defendant's residence, and the defendant requests that such a deposit be made. The need to find another home places a particularly onerous burden upon such a defendant. While a requirement that the proceeding be dismissed if the deposit is not made would be too drastic, an appropriate sanction would be the allowance of interest on the amount of the eventual award from the date that the deposit should have been made. The Commission recommends enactment of such a provision limited in application to cases in which the property being taken is residential property having not more than two dwelling units and the defendant is a resident of one of the units.

Possession After Entry of Judgment

California law distinguishes sharply between the taking of possession before entry of the "interlocutory judgment" of condemnation, and the taking of possession after that event. Since enactment of the Code of Civil Procedure in 1872, Section 1254 has permitted any condemnor to obtain possession following entry of judgment by depositing for the defendant the amount of the award and also depositing an additional sum to secure payment of any additional amount that may be recovered in the proceeding. The procedure is available even though the award is attacked by either party by motions in the trial court or by appeal. The only right waived by either party under the procedure is that withdrawal of the deposit by the condemnee waives his right to contend that the property may not be taken by eminent domain. Unlike provisions for possession prior to judgment, this authorization for possession after judgment does not raise constitutional problems. (Heilbron v. Superior Court, 151 Cal. 271, 90 Pac. 706 (1907).)

Even though the judgment may be reversed or set aside, provisions for possession after entry of judgment are properly distinguished from similar provisions for possession prior to judgment. The judgment determines the condemnor's right to take the property, the [redacted], and the allocation of the award among defendants. Since motions in the trial court, appeals, and possible new trials may consume a period of years, the procedure is beneficial to both parties. From the condemnee's standpoint, the period during which he is effectively precluded from renting, selling, or improving the property is reduced, and he may withdraw the deposit and carry out his plans for the future. From the condemnor's standpoint, the procedure is virtually essential to prevent the public improvement from being delayed for a protracted period or abandoned entirely.

The Commission recommends retention of the procedure and restatement of the authorizing provisions with the following changes:

1. The provisions should be redrawn to distinguish clearly between the procedures for, and consequences of, possession and deposits before entry of judgment, and possession and deposits after entry of judgment.

2. The court should not be required in every case to determine an additional amount to be deposited as security for any further compensation, costs, or interest that may be recovered in the proceeding. A procedure exists for the increase or decrease of the amount deposited on motion of either party. This procedure should be adapted to permit a defendant to make a motion to compel deposit of an additional amount as security for the payment of additional compensation, costs, or interest if he deems such action necessary.

3. Existing law should be clarified to permit the condemnee, after entry of judgment, to withdraw a deposit made prior to judgment under the simpler provisions for withdrawal of a deposit made after entry of judgment. However, the trial court should be authorized to require, in its discretion and upon objection to withdrawal by any other party, that an undertaking be filed by the withdrawing party.

4. A uniform procedure should be provided for making deposits after entry of judgment and for the withdrawal of such deposits.

Date of Valuation

Since 1872 the date of issuance of summons has been fixed as the date of valuation in eminent domain proceedings. In an attempt to improve the position of the property owner and to compel the condemnor to expedite the proceeding, a provision was added in 1911 specifying that, if a case is not tried within one year from its commencement, and the delay is not caused by the defendant, the date of valuation is the date of trial. Under existing law, neither the taking of possession by the condemnor, nor the depositing of probable just compensation, has any bearing in determining the date of valuation. In cases in which the issue of compensation is once tried, and a new trial is necessary, the Supreme Court of California has held that the date of valuation remains the same date used for that purpose in the original trial.

Fixing the date of valuation as of the date of the issuance of summons is supported by analogy to other civil actions. In such actions, for many purposes, conditions are considered to remain static as of the commencement of the action. In eminent domain proceedings, however, commencement of the proceedings is not logically relevant to ascertaining the date as of which the level of the general market, and the value of the particular property in that market, should be considered. Unless the condemnor deposits probable just compensation and takes possession of the property, the property owner is left in possession and control of the property, however hampered he may be in dealing with it. In a rising market by the time he receives the award property values often will have increased so much that he cannot purchase equivalent property with the award.

In approximately half of the states and in federal practice, property is taken at the beginning of the eminent domain proceeding and the proceeding continues for the purpose of determining the amount of compensation. In these jurisdictions the usual practice is to fix the date of valuation as of the date of the preliminary taking and to allow interest on the award from the date of that taking. In other states where the power of eminent domain is exercised exclusively through judicial proceedings, the majority rule is to fix the date of valuation as of the date of trial.

The Commission has considered the oft-made proposal that the date of valuation be, in all cases, the date of trial. Although the simplicity of such a rule is desirable, the rule would provide an undesirable incentive to condemnees to delay the proceedings to obtain the latest possible date of valuation.

As a matter of convenience, there is merit in fixing the date of valuation as of a date certain, rather than by reference to the uncertain date when the trial begins. Appraisals and appraisal testimony must be directed to market value as of a specific date.

The Commission therefore recommends enactment of the following rules for determining the date of valuation:

1. The condemnor should be permitted to establish the date of valuation by depositing the amount of probable just compensation for withdrawal by the property owner. If it does so, the date of valuation should be the date of deposit unless an earlier date is fixed by the rules stated below. A date of valuation thus established should not be subject to change by any subsequent development in the proceeding.

2. In other cases, a compromise should be made between California's two existing rules, and the date of valuation fixed as the date six months after the filing of the complaint.

3. The provision making the date of valuation the date of trial if, without fault of the defendant, the case is not tried within one year, should be retained.

4. In case of a new trial, the date of the new trial, rather than the date used in the original trial, should be the date of valuation unless the condemnor deposits the amount awarded in the original trial within a reasonably brief period after the entry of judgment in the original trial.

5. As a technical matter, provisions respecting the date of valuation should be changed to compute that date from the filing of the complaint rather than the issuance of summons. Under early law, the issuance of summons was deemed to mark the inception of the court's jurisdiction over the property. As that rule no longer prevails, the date of filing of the complaint is a more appropriate date.

6. The Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443) and the Park and Playground Act of 1909 (Government Code Sections 38000-38213) specify dates of valuation that differ from the dates specified by the Code of Civil Procedure. As there appears to be no justification for the discrepancy between these provisions and the rules generally applicable, these acts should be amended to conform them to the provisions of the Code of Civil Procedure.

Decreases in Value Prior to the Date of Valuation

It is generally recognized that the announcement of the undertaking of a public improvement may cause particular property to fluctuate in value before commencement of any eminent domain proceeding respecting the property. This problem of increase or decrease in market value prior to the date of valuation is not dealt with by the Code of Civil Procedure. Case law establishes, however, that any increase in the value of the property directly resulting from the improvement itself is to be ascertained and deducted in arriving at the compensation to be made for the property. Decisions as to the treatment of any decrease in value are uncertain. Notwithstanding the rule as to increases in value, demands by property owners that alleged decreases in value be ascertained and added to the value at the date of valuation have most frequently been denied. The reason commonly given is that any attempt to determine the existence or amount of such a decrease would be to engage in "unfathomable speculation." The injustice to

or the amount of the probable just compensation

the property owner is clear, however, if the proposed improvement has actually depreciated the value of the property prior to the date of valuation. Equitably, the amount awarded to the owner should be equivalent to what the "market value" of the property would have been on the date of valuation irrespective of the proposed improvement's influence on the market. The Commission believes that such influence can be shown by expert testimony and by direct evidence as to the general condition of the property and its surroundings as well where the value is depressed as where the value is enhanced. It therefore recommends enactment of a provision requiring that any such changes in value be taken into account and providing a uniform rule for both increases and decreases.

Interest on the Amount Awarded

By analogy to other civil actions, interest in eminent domain proceedings runs from entry of judgment to the time of payment of the award. If possession is taken prior to judgment, interest begins on the date upon which the condemnor is authorized to take possession. The latter rule is constitutionally required as the owner must be compensated for the use of his property prior to receipt of the award. The courts have held that interest on the eventual award at the legal rate of 7% is an adequate way to compute the amount of this element of compensation.

Interest ceases when the full amount of the award, together with the amount of interest then accrued, is paid into court for the defendant. The same rule applies if the deposit is made to obtain possession under the provisions for taking possession after entry of judgment. As to any amount deposited to obtain possession prior to judgment, however, interest does not cease until and unless the amount is withdrawn.

Thus, under existing law the property owner has the option of withdrawing the deposit and foregoing any further accrual of interest or leaving the amount on deposit and accruing interest at 7%. While the condemnor may offset a portion of its interest obligation by placing the amount deposited in the Condemnation Deposits Fund in the State Treasury, the rate of return from that fund is lower than the 7% rate that accrues to the property owner on the amount deposited. The denial of interest on the deposit could be justified, however, only if the amount deposited could be withdrawn promptly and easily. Although the provisions for withdrawal of a deposit made prior to judgment can and should be streamlined, there appears to be no way to overcome the obstacle presented by the possible existence of separate interests in the property. On trial of the issue of compensation, the condemnor is entitled to have the property valued as a whole, irrespective of the existence of separate interests. The award is segregated only after its total amount has been determined. Deposits prior to judgment are made in the aggregate and are not segregated among severable interests in the property. Condemnors consider it essential to retain these features of the existing law. Hence, there is little justification for tolling interest at the time of the deposit as the condemnee may no longer have possession and yet be faced with serious obstacles in withdrawing the deposit.

Accordingly, the Commission recommends retention of existing policy on payment of interest. Various relatively minor and clarifying changes should be made, however.

Under existing law, interest does not cease upon an amount deposited prior to judgment even upon entry of judgment. Since the justification for the rule requiring payment of interest on amounts deposited prior to judgment is that the property owner may not be free to withdraw the amount deposited, and since upon the entry of judgment such amount becomes immediately available for withdrawal, the Commission recommends that interest on amounts deposited prior to judgment cease upon the entry of judgment.

Subdivision (b) of Code of Civil Procedure Section 1255b provides that, if the defendant "continues in actual possession of or receives rents, issues, and profits from the property" after interest begins to accrue, the "value of such possession and of such rents, issues, and profits" are to be offset against the interest. The section should be amended, in the interest of clarity, to provide that it is the value of possession and the net amount of rents or other income that are to be offset.

Before 1959, case law permitted the defendant to show that a higher rate of return than the legal rate of interest was required to give him fair compensation for the loss of possession prior to judgment. In 1959 the Legislature provided, in the interest of simplicity, that such compensation should be computed in all cases as 7% per annum upon the award. In 1961, the provisions of interest were amended to permit the value of the condemnee's use and occupancy to be set off against the accruing interest. Since 1961 it has been uncertain whether interest, and the offset against interest, are to be determined by the court or by the jury. Apart from the tendency of such issues to confuse the jury, determination by jury requires each of the parties to present evidence inconsistent with the position taken upon trial of the main issue of compensation. For example, if a capitalization-of-income approach is taken to value, the property owner seeks to show a maximum value of such income. However, in attempting to show a minimum offset of rentals against interest, he must show a minimum rental value. The Commission therefore recommends that Section 1255b be clarifed to provide that the court shall determine the amount of the interest in all cases, including interest constitutionaliy required as compensation for possession prior to payment. The section also should provide that the amount of any offset against interest should be determined by the court, and that evidence on that issue should be presented to the court, rather than to the jury.

Abandonment of the Proceeding

Under the law of California as it existed prior to 1961, the condemnor could abandon a condemnation proceeding at any time after the filing of the complaint and before expiration of 30 days from final judgment, even in a case where it had taken possession of the property prior to judgment. In the great majority of the states, on the other hand, abandonment is precluded after the taking, damaging, or use of the property by the condemnor. As a result of the Commission's recommendations, the Legislature in 1961 enacted the equitable principle that abandonment without the consent of the condemnee will be denied if the court determines that the condemnee has changed his position in justifiable reliance upon the proceeding and cannot be restored to substantially the same position as if the proceeding had not been begun. This equitable rule applies whether or not the plaintiff has taken possession prior to judgment, but it has particular application to a case where possession has been taken

and the property owner has withdrawn the amount deposited.

The Commission therefore does not recommend any change in the basic rule governing abandonment, even in connection with enactment of more widespread provisions for the taking of possession prior to judgment. There are, however, two changes that should be made in the consequences of abandonment. Existing law permits recovery by the defendant of his costs and necessary expenses upon abandonment. The general purpose of this provision is to compensate the defendant for all expenses necessarily incurred whenever the plaintiff fails to carry the proceeding through to its conclusion. It has been held that the defendant may recover reasonable attorney's fees actually incurred in connection with a proceeding, even though a portion of the legal services were rendered before the complaint was filed. Other expenses, however, including appraisal fees, may not be recovered if the proceeding is discontinued 40 or more days before the date set for pretrial. Since this distinction is not founded on any substantive difference between the two types of expenditures, the Commission recommends that the law be amended to provide a uniform rule governing attorney's and appraiser's fees and that both be recoverable if reasonable in amount and actually incurred. Recovery of these fees, and all other expenses necessarily incurred in the proceeding, should be permitted without regard to the particular stage at which the proceeding is abandoned.

Recodification and Miscellaneous Changes

Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure, which deals with eminent domain, has been amended many times since its enactment in 1872. Certain sections have grown to several pages in length. Also, the allocation of provisions between that title and parts of other codes dealing with particular condemnors, condemnations for particular purposes, and related matters can be improved. For example, the detailed provisions respecting the Condemnation Deposits Fund should be removed from Title 7 and added to the part of the Government Code that deals with deposits in the State Treasury. Provisions for deposit and withdrawal of just compensation and possession prior to the termination of the proceeding should be organized in a new title of the Code of Civil Procedure consisting of three chapters dealing, respectively, with the deposit and withdrawal of probable just compensation, possession before entry of judgment, and possession after entry of judgment.

In connection with the recodification of the provisions of Title 7 that deal with possession prior to final judgment and related matters, there are numerous changes that should be made in existing statutory language. Some of these changes reflect appellate decisions construing existing provisions. Other changes are made appropriate by the simplicity achieved through reorganization and restatement of existing provisions. The reasons for, and effects of, these changes are indicated in the comments to the particular sections of the legislation recommended by the Commission.

The Commission's recommendations would be effectuated by enactment of the following measures:

RECOMMENDED LEGISLATION

An act to amend Sections 1247, 1249, 1249.1, 1252, 1253, 1255a, 1255b, and 1257 of, to add Title 7.1 (commencing with Section 1268.01) to Part 3 of, to add Section 1249a to, and to repeal Sections 1243.4, 1243.5, 1243.6, 1243.7, and 1254 of, the Code of Civil Procedure and to amend Sections 38090 and 38091 of, and to add Article 9 (commencing with Section 16425) to Chapter 2 of Part 2 of Division 4 of Title 2 of, the Government Code and to amend Sections 4203 and 4204 of the Streets and Highways Code, relating to eminent domain.

The people of the State of California do enact as follows:

SECTION 1. Section 1243.4 of the Code of Civil Procedure is repealed.

~~1243.4. In any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the plaintiff may take immediate possession and use of any right-of-way, or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought, in the manner and subject to the conditions prescribed by law.~~

s/o reservoir

Comment. Section 1243.4 is superseded by Code of Civil Procedure Sections 1269.01, 1269.02, and 1269.03.

SEC. 2. Section 1243.5 of the Code of Civil Procedure is repealed.

~~1243.5. (a) In any proceeding in eminent domain, if the plaintiff is authorized by law to take immediate possession of the property sought to be condemned, the plaintiff may, at any time after the issuance of summons and prior to the entry of judgment, apply ex parte to the court for an order determining the amount to be deposited as security for the payment of the just compensation which will be made for the taking of the property and any damage incident thereto. Such security shall be in the amount the court determines to be the probable just compensation which will be made for the taking of the property and any damage incident thereto. After depositing the security, the plaintiff may, at any time prior to the entry of judgment, apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property sought to be condemned.~~

~~(b) If the court determines that the plaintiff is entitled to take the property by eminent domain and to take immediate possession thereof, and if the court determines that the plaintiff has deposited the security, the court shall by order authorize the plaintiff to take immediate possession of and to use the property sought to be condemned. The order authorizing immediate possession shall:~~

~~(1) Describe the property and the estate or interest therein sought to be condemned, which description may be made by reference to the complaint.~~

~~(2) State the purposes of the condemnation.~~

~~(3) State the amount of the deposit.~~

~~(4) State the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under subdivision (c) of this section on the day the order is made.~~

~~(c) At least 20 days prior to the time possession is taken, the plaintiff shall serve a copy of the order on the record owner or owners of the property and on the occupants, if any. Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or has previously been served with a copy of the summons and complaint in the manner prescribed by law, in which case service of the order may be made by mail upon such person and his attorney of record, if any. If a person upon whom a copy of the order authorizing immediate possession is required to be personally served under this section resides out of the State, or has departed from the State or cannot after due diligence be found within the State, the plaintiff may in lieu of such personal service send a copy of the order by registered or certified mail addressed to such person at his last known address. If a copy of the order is sent by registered or certified mail in lieu of personal service, the plaintiff shall file an affidavit in the proceeding setting forth the facts showing the reason personal service could not have been made. The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property without serving a copy of the order of immediate possession upon a record owner not occupying the property. A single service upon or mailing to those at the same address shall be sufficient. The court may, for good cause shown by affidavit, shorten the time specified in this subdivision to a period of not less than three days.~~

~~As used in this subdivision, "record owner or owners of the property" means both the person or persons in whose name~~

the legal title to the fee appears by deeds or other instruments duly recorded in the recorder's office of the county in which the property is located and the person or persons, if any, in possession of the property under a written and duly recorded lease or agreement of purchase.

(d) At any time after the court has made an order authorizing immediate possession, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the security that the plaintiff is required to deposit pursuant to this section if the court determines that the security which should be deposited for the taking of the property and any damage incident thereto is different from the amount of the security theretofore deposited. Prior to judgment, such security may not be reduced to an amount less than that already withdrawn pursuant to Section 1243.7.

(e) The amount required to be deposited by the plaintiff and the amount of such deposit withdrawn by the defendant may not be given in evidence or referred to in the trial of the issue of compensation.

(f) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by taking possession of the property pursuant to this section.

Comment. Section 1243.5 is superseded by Chapter 1 (commencing with Section 1268.01) and Chapter 2 (commencing with Section 1269.01) of Title 7.1 of Part 3 of the Code of Civil Procedure. The provisions relating to the deposit are superseded by provisions contained in Chapter 1; the provisions relating to an order for possession prior to judgment are superseded by provisions contained in Chapter 2.

The disposition of the various provisions of Section 1243.5 is indicated below:

Section 1243.5	Recommended Legislation (Code of Civil Procedure)
Subdivision (a)	1268.01, 1269.01, 1269.02, 1269.03
Subdivision (b)	1269.01, 1269.02, 1269.03
Subdivision (c)	1269.04
Subdivision (d)	1268.02
Subdivision (e)	1268.09
Subdivision (f)	1269.07

SEC. 3. Section 1243.6 of the Code of Civil Procedure is repealed.

~~1243.6. When money is required to be deposited as provided by Section 1213.5, the court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section it shall be held, invested, deposited, and disbursed in the manner specified in Section 1254, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that section.~~

Comment. Section 1243.6 is superseded by Section 1268.10 of the Code of Civil Procedure.

SEC. 4. Section 1243.7 of the Code of Civil Procedure is repealed.

~~1243.7. (a) At any time after money has been deposited as provided in Section 1243.5, the party whose property or interest in property is being taken may apply to the court, in the manner hereinafter provided, for the withdrawal of all or any portion of the amount deposited for his property or property interest. Upon such application, the court shall order that portion of the amount applied for, which the applicant is entitled to withdraw under the provisions of this section, to be paid to such applicant from the money deposited in connection with such property or property interest.~~

~~(b) If the total amount sought to be withdrawn prior to judgment exceeds the amount of the original deposit, each applicant, before any of such excess is withdrawn, shall file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicant that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal.~~

~~If there is more than one applicant and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicants, in lieu of filing separate undertakings, may jointly file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicants that exceeds the amount to which the applicants are entitled as finally determined in the eminent domain proceeding together with legal interest from the date of its withdrawal.~~

~~If the undertaking required by this subdivision is executed by an admitted surety insurer, the undertaking is sufficient in amount if the surety is bound only to the extent that the amount sought to be withdrawn exceeds the amount originally deposited.~~

~~The plaintiff may consent to an undertaking that is less than the amount required under this subdivision.~~

~~If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking is entitled to recover the premium paid for the undertaking, but not to exceed 2 percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.~~

~~(c) The application shall be made by affidavit wherein the applicant shall set forth his interest in the property and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff and no withdrawal shall be made until at least 20 days after such service of the application, or until the time for all objections has expired, whichever is later.~~

~~(d) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the ground that an undertaking should be filed or that the amount of, or the sureties upon, such an undertaking are insufficient.~~

~~(e) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the grounds that other persons are known or believed to have interests in the property. In this event the plaintiff shall attempt to personally serve on such other persons a notice to such persons that they may appear within 10 days after such service and object to such withdrawal, and that failure to appear will result in the waiver of any right to such amount withdrawn or further rights against the plaintiff to the extent of the sum withdrawn. The plaintiff shall state in such objection the names and last-known addresses of other persons known or believed to have an interest in the property, whether or not it has been able to serve them with such notice and the date of such service. If the plaintiff in its objection reports to the court that it is unable to personally serve persons known or believed to have interests in the property within the 20-day period, said money shall not be withdrawn until the applicant causes such personal service to be made.~~

~~(f) If the persons so served appear and object to the withdrawal, or if the plaintiff so requests, the court shall thereupon hold a hearing after notice thereof to all parties and shall determine the amounts to be withdrawn, if any, and by whom. If the court determines that a party is entitled to withdraw any portion of a deposit which another person claims, the court may require such party, before withdrawing such portion, to file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the adverse claimant in such amount as is fixed by the court, but not to exceed double the portion claimed by the adverse claimant, for the payment to the person entitled thereto of any amount withdrawn that exceeds the amount to which such party is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. No persons so served shall have any claim against the plaintiff for compensation for the value of the property taken or severance damages thereto, or otherwise, to the extent of the amount withdrawn by all parties; provided, the plaintiff shall remain liable for said compensation to persons having an interest of record who are not so served.~~

~~(g) If withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all defenses in favor of the person receiving such payment except his claim for greater compensation. Any amount so paid to any party shall be credited upon the judgment in the eminent domain proceeding.~~

~~(h) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the party entitled thereto together with legal interest thereon from the date of its withdrawal, and the court in which the eminent domain proceeding is pending shall enter judgment therefor against the defendant. If the defendant does not pay the judgment within 30 days after the judgment is entered, the court may, on motion, enter judgment against the sureties for such amount together with the interest that may be due thereon.~~

Comment. Section 1243.7 is superseded by Chapter 1 (commencing with Section 1268.01) of Title 7.1 of Part 3 of the Code of Civil Procedure. The disposition of the various provisions of Section 1243.7 is indicated below.

Section 1243.7	Recommended Legislation (Code of Civil Procedure)
Subdivision (a)	1268.04, 1268.05
Subdivision (b)	1268.06
Subdivision (c)	1268.04, 1268.05
Subdivision (d)	1268.05
Subdivision (e)	1268.05
Subdivision (f)	1268.05
Subdivision (g)	1268.07
Subdivision (h)	1268.08

SEC. 5. Section 1247 of the Code of Civil Procedure is amended to read:

1247. The court shall have power:

~~1.~~

(1) To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in subdivision (6) of Section 1240;

~~2.~~

(2) To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor;

~~3.~~

(3) To determine the respective rights of different parties seeking condemnation of the same property ~~.~~ ;

(4) To determine and regulate, as between the plaintiff and the defendants, the right to possession of the property as provided in Title 7.1 (commencing with Section 1268.01), to enforce its orders for possession by appropriate process, and to stay any other actions or proceedings arising from possession of the property.

Comment. Subdivision (4) is added to Section 1247 to codify judicial decisions which hold that the court in which the eminent domain proceeding is pending has the power to control possession of the property to be taken and to enforce its orders made in this connection. See Marblehead Land Co. v. Los Angeles County, 276 Fed. 305 (S.D. Cal. 1921); Montgomery v. Tutt, 11 Cal. 190 (1858); Sullivan v. Superior Court, 185 Cal. 133, 195 Pac. 161 (1921); Rafftery v. Kirkpatrick, 29 Cal. App.2d 503, 88 P.2d 147 (1938)(placing the plaintiff in possession); Neale v. Superior Court, 77 Cal. 28, 18 Pac. 790 (1888); In re Bryan, 65 Cal. 375, 4 Pac. 304 (1884) (preventing the plaintiff from taking possession or restoring the defendant to possession). The phrase which empowers the court to stay other actions or proceedings is derived from a sentence formerly found in Code of Civil Procedure Section 1254. In addition to the writs of possession or writs of assistance which the court may issue and enforce in exercise of its general jurisdiction (see the cited decisions), orders for possession contemplated by the subdivision include those made under Chapter 2 (commencing with Section 1269.01) of Title 7.1, Chapter 3 (commencing with Section 1270.01) of Title 7.1, and Section 1253 of Title 7.

SEC. 6. Section 1249 of the Code of Civil Procedure is amended to read:

1249. *(a) Except as provided in subdivision (b),* for the purpose of assessing compensation and damages, the ~~right thereto shall be deemed to have accrued at the date of the issuance of summons and its~~ actual value *of the property on the date of valuation determined under Section 1249a* ~~at that date~~ shall be the measure of compensation for ~~all~~ property ~~to be~~ actually taken; and the basis of damages to property not ~~actually~~ taken but injuriously affected; in ~~all~~ cases where such damages are allowed ~~as provided in~~ *under Section 1248*; ~~provided that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.~~

(b) For the purpose of assessing compensation and damages, any increase or decrease in market value prior to the date of valuation that is substantially due to the general knowledge that the public improvement or project was likely to be made or undertaken shall be disregarded.

Comment. Section 1249 states the measure of compensation for proceedings in eminent domain. The provisions relating to dates of valuation formerly contained in this section are superseded by Section 1249a. The provision on improvements subsequent to the service of summons is superseded by subdivision (b) of Section 1249.1.

Decisions construing Code of Civil Procedure Section 1249 held that its provisions governing the date of valuation and the making of subsequent improvements do not apply in proceedings for the taking by politican subdivisions of the property of a public utility under the provisions of the Public Utilities Code and Section 23a of Article XII of the California Constitution. Citizen's Util. Co. v. Superior Court, 59 Cal.2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963); Marin Municipal Water Dist. v. Marin Water & Power Co., 178 Cal. 308, 173 Pac. 469 (1918). This construction is continued under this section and Sections 1249a and 1249.1(b).

Subdivision (a). In restating the "actual value" measure of compensation, this subdivision retains the language employed since adoption of the Code of Civil Procedure in 1872. The term "actual value" and the word "value" in subdivision 1 of Section 1248 are equivalent, and both refer to "market value." See People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943); Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979 (1909); Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585 (1899).

The phrase "date of valuation" has been substituted for language concerning accrual of the right to compensation and damages in the interest of clarity. No change is made in existing rules as to persons entitled to participate in the award of compensation or damages (see People v. City of Los Angeles, 179 Cal. App.2d 558, 4 Cal. Rptr. 531 (1960); People v. Klopstock, 24 Cal.2d 897, 151 P.2d 641 (1944)). Further, no change is made in the effect of a lis pendens (see Lansburgh v. Market St. Ry.,

98 Cal. App.2d 426, 220 P.2d 423 (1950) or in the rule that, as against intervening rights of persons having actual or constructive notice of the proceeding, the title of the plaintiff relates back to the commencement of the proceeding (see East Bay Mun. Utility Dist. v. Kieffer, 99 Cal. App. 240, 278 Pac. 476 (1929)).

Subdivision (b). This subdivision is new. The problem to which it relates have not heretofore been dealt with in California statutory law or constitutional provisions. Subdivision (b) requires that the property be valued at the "market value" it would have had if there had been no enhancement or diminution in value that was substantially due to the general knowledge that the public improvement or project was likely to be made or undertaken.

In San Diego Land and Town Company v. Neale, 78 Cal. 63, 20 Pac. 372 (1888), and subsequent decisions, the courts have held that any increase in the value of the property to be taken that results directly from the proposed public improvement is to be deducted in arriving at "market value." See U.S. v. Miller, 317 U.S. 369 (1943); City of San Diego v. Boggeln, 164 Cal. App.2d 1, 330, P.2d 74 (1958); County of Los Angeles v. Hoe, 138 Cal. App.2d 74, 291 P.2d 98 (1955). This subdivision is intended to codify the results of these and similar decisions.

Notwithstanding the rule as to enhancement in value, the California decisions are uncertain respecting any decrease in value due to popular knowledge of the pendency of the public project. Several decisions seem to indicate that the rules respecting enhancement and diminution are not parallel, and that value is to be determined as of the date of valuation notwithstanding that such value reflects a decrease due to general knowledge

of the pendency of the public project. See City of Oakland v. Partridge, 214 Cal. App.2d 196, 29 Cal. Rptr. 388 (1963); People v. Lucas, 155 Cal. App.2d 1, 317 P.2d 104 (1957); and Atchison, Topeka and Santa Fe Railroad Co. v. Southern Pacific, 13 Cal. App.2d 505, 57 P.2d 575 (1936). Seemingly to the contrary are Redevelopment Agency of the City of Santa Monica v. Zwerman, 240 A.C.A. 70 (1966); People v. Lillard, 219 Cal. App.2d 368, 33 Cal. Rptr. 189 (1963); Buena Park School Dist. v. Metrim Corp., 176 Cal. App.2d 255, 1 Cal. Rptr. 250 (1959); and County of Los Angeles v. Hoe, 138 Cal. App.2d 74, 291 P.2d 98 (1955). Subdivision (b) is intended to make the rules respecting appreciation and depreciation parallel. Thus, any increase or decrease in market value (prior to the date of valuation) that is substantially due to general knowledge of the public improvement is not to be considered in arriving at the value of the property, or the amount of severance damages and special benefits, under Code of Civil Procedure Sections 1248 and 1249.

See generally 4 NICHOLS, EMINENT DOMAIN § 12 at 3151 (3d ed. 1963); 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 105 (2d ed. 1953); Anderson, Consequence of Anticipated Eminent Domain Proceedings - Is Loss of Value a Factor, 5 SANTA CLARA LAWYER 35 (1964); Annotation, Depreciation in Value, From the Project for Which Land is Condemned, as a Factor in Fixing Compensation, 5 A.L.R.3d 901 (1966). For analogous provisions in other jurisdictions, see Section 604, Pennsylvania Eminent Domain Code (Act of June 22, 1964, P.L. 84); Md. Stat. 1962, Ch. 52, § 6. For proposed federal legislation to the same effect, see Sections 102(a)(b)(1)(A) and 112(c)(2) of the "Fair Compensation Act of 1965" as that act would have been adopted by Senate Bill 1201, 89th Cong. (1st Sess.).

The method of proving value, including a statement of the matters upon which an expert opinion of market value may be based, is set forth in Article 2 (commencing with Section 810) of Division 7 of the Evidence Code.

SEC. 7. Section 1249a is added to the Code of Civil Procedure immediately following Section 1249, to read:

1249a. (a) The date of valuation shall be determined as provided in this section.

(b) Unless an earlier date of valuation is applicable under subdivision (c), (d), or (g), the date of valuation is the date on which the plaintiff makes a deposit in accordance with Chapter 1 (commencing with Section 1268.01) of Title 7.1. In all cases in which this subdivision does not determine the date of valuation, the date of valuation is determined under subdivisions (c), (d), (e), (f), and (g).

(c) If the issue of compensation is brought to trial within six months from the filing of the complaint, the date of valuation is the date of trial.

(d) If the issue of compensation is not brought to trial within six months from the filing of the complaint but is brought to trial within one year from such date, the date of valuation is the date six months after the filing of the complaint.

(e) If the issue of compensation is not brought to trial within one year after the filing of the complaint and the delay is not caused by the defendant, the date of valuation is the date of trial.

(f) If the issue of compensation is not brought to trial within one year after the filing of the complaint and the delay is caused by the defendant, the date of valuation is the date six months after the filing of the complaint.

(g) In any case in which there is a new trial, the date of valuation is the date of such new trial, except that the date of valuation in the new trial shall be the same date as in the previous trial if, within 30 days after the entry of judgment or, if a motion for new trial or to vacate or set aside the judgment has been made, within 10 days after disposition of such motion, the plaintiff has deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01) of Title 7.1; or

(2) [redacted] The amount of the judgment in accordance with Chapter 3 (commencing with Section 1270.01) of Title 7.1.

Comment. Section 1249a states exhaustively the methods for determining the date of valuation in eminent domain proceedings. The section supersedes those portions of Code of Civil Procedure Section 1249 that formerly specified dates of valuation. Under the Evidence Code, value may be evidenced by transactions made within a reasonable time before or after the date of valuation. See Evidence Code Sections 815-818.

Subdivision (b). This subdivision permits the plaintiff, by depositing probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) or the amount of the judgment pursuant to Chapter 3 (commencing with Section 1270.01) of Title 7.1 of the Code of Civil Procedure, to fix the date of valuation as of a date no later than the date of the deposit. The date of valuation may be earlier than the date of the deposit, and subsequent events may cause an earlier date of valuation to shift to the date of deposit. But the date of valuation cannot be shifted to a later date by any of the circumstances mentioned in the following subdivisions. The rule under former Section 1249 was to the contrary; neither the depositing of probable just compensation nor the taking of possession had any bearing on the date of valuation. See City of Los Angeles v. Tower, 90 Cal. App.2d 869, 204 P.2d 395 (1949).

Subdivisions (c)-(f). Subdivisions (c) through (f) provide alternative dates of valuation for cases in which probable just compensation is not deposited. With respect to the phrase, "six months from the filing of the complaint," Code of Civil Procedure Section 17(4) provides that, "The word 'month' means a calendar month, unless otherwise expressed." For the method of resolving any difficulty arising from months having an unequal number of days, see Messner v. Superior Court, 101 Cal. App. 172, 281 Pac. 503 (1929); Church Mfg. Co. v. Superior Court, 79 Cal. App. 637, 250 Pac. 705 (1926); Barbee v. Young, 79 Cal. App. 119, 249 Pac. 15 (1926).

The date of the filing of the complaint, rather than the date of the issuance of summons, is used in determining the date of valuation. Code of Civil Procedure Section 1243 requires that all proceedings in eminent domain "be commenced by filing a complaint and issuing a summons." Ordinarily the dates are the same, but this is not always the case. See Harrington v. Superior Court, 194 Cal. 185, 228 Pac. 15 (1924). As the issuance of summons is no longer essential to establish the court's jurisdiction over the property (see Harrington v. Superior Court, supra, and Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964)), the date of the filing of the complaint is a more appropriate date.

Subdivision (c) fixes the date of valuation for the relatively infrequent cases in which the trial is had within six months from the filing of the complaint.

Subdivision (d) establishes the principal date of valuation for cases in which the date of valuation has not been established by deposit of probable just compensation in accordance with subdivision (b). The date specified is new to California practice and supersedes the former basic date of valuation (date of issuance of the summons) and the alternate date (date of trial if the issue of compensation is not tried within one year).

Subdivision (e) continues in effect the proviso formerly contained in Section 1249.

Subdivision (f) retains the date specified in subdivision (d) as the date of valuation in any case in which the delay in reaching trial is caused by the defendant. This retains the effect of the proviso formerly contained in Section 1249.

Subdivision (g). Under the language of former Section 1249, questions arose whether the original date of valuation or the date of the new trial should be employed in new trials in eminent domain proceedings. The Supreme Court of California ultimately held that the date of the first trial, rather than the date of the new trial, should be used. See People v. Murata, 55 Cal.2d 1, 357 P.2d 833 (1960). This subdivision reverses the result obtained by that decision unless the date of valuation has been established by the deposit of probable just compensation or the plaintiff deposits the amount of the judgment in accordance with Code of Civil Procedure Section 1270.01. The subdivision applies whether the new trial is granted by the trial court or by an appellate court. However, if a mistrial is declared, further proceedings are not considered a "new trial," and the date of valuation is determined under subdivisions (b) through (f), rather than under this subdivision. Under subdivision (g), the date of valuation is the date of valuation used in the previous trial if the amount of the judgment is deposited within 30 days after entry of judgment or, if a motion for a new trial or to vacate or set aside the judgment has been made, within ten days after disposition of such motion. If the amount of the judgment is deposited thereafter, the date of valuation is the date of deposit under subdivision (b).

SEC. 8. Section 1249.1 of the Code of Civil Procedure is amended to read:

1249.1. *(a)* All improvements pertaining to the realty that are on the property at the time of the service of summons and which affect its value shall be considered in the assessment of compensation, damages and special benefits unless they are removed or destroyed before the earliest of the following times:

~~(a)~~

(1) The time the title to the property is taken by the plaintiff.

~~(b)~~

(2) The time the possession of the property is taken by the plaintiff.

~~(c)~~

(3) The time the defendant moves from the property in compliance with an order of possession.

(b) No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

Comment. Subdivision (b) of Section 1249.1 restates and supersedes a provision of Section 1249.

SEC. 9. Section 1252 of the Code of Civil Procedure is amended to read:

1252. Payment may be made to the defendants entitled thereto, or the money may be deposited ~~in Court for the defendants, and be distributed to those entitled thereto~~ *as provided in Chapter 3 (commencing with Section 1270.01) of Title 7.1 and withdrawn by those entitled thereto in accordance with that chapter*. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

Comment. Section 1252 is amended in order to eliminate any distinction between the kinds of deposits that may be made after entry of judgment. Statements have appeared in cases indicating that the defendant's withdrawal of a deposit made under Section 1252 waives the defendant's right of appeal while withdrawal of a deposit made under Section 1254 does not. See People v. Neider, 55 Cal.2d 832, 13 Cal. Rptr. 196, 361 P.2d 916 (1961); People v. Dittmer, 193 Cal. App.2d 681, 14 Cal. Rptr. 560 (1961). People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962), has cast doubt on the validity of such statements by holding that a defendant may withdraw a deposit made under Section 1252 without waiving his right to a new trial on the issue of compensation by filing the receipt and waiver of claims and defenses, except the claim for greater compensation, provided in Section 1254 (recodified in Section 1270.05).

This amendment of Section 1252 and enactment of Sections 1270.01-1270.07 makes it clear that withdrawal of any deposit does not result in a waiver of appeal or a right to new trial on the issue of compensation if that issue is preserved in accordance with Section 1270.05.

SEC. 10. Section 1253 of the Code of Civil Procedure is amended to read:

1253. When payments have been made and the bond given, if the plaintiff elects to give one, as required by Sections 1251 and 1252, the court shall make a final order of condemnation, which shall describe the property condemned, the estate or interest acquired therein, the purposes of such condemnation, and if possession is taken pursuant to ~~Section 1243.5 or 1254~~ *Chapter 2 (commencing with Section 1269.01) or Chapter 3 (commencing with Section 1270.01) of Title 7.1* prior to the making and entry of the final order of condemnation, the date of such possession. For the purposes of this section, the date of possession shall be the date upon or after which the plaintiff is authorized by order of the court to take possession of the property. A certified copy of the order shall thereupon be recorded in the office of the recorder of the county in which the property is located. The title to the property described in the final order of condemnation vests in the plaintiff for the purposes described therein upon the date that a certified copy of the final order of condemnation is recorded in the office of the recorder of the county.

Comment. Section 1253 is amended to change the references to the appropriate statutory provisions.

SEC. 11. Section 1254 of the Code of Civil Procedure is repealed.

~~1254. (a) In any case in which the plaintiff is not in possession of the property sought to be condemned, the plaintiff may, at any time after trial and judgment entered or pending an appeal from the judgment and after payment into court for the defendant of the full amount of the judgment and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in the proceeding, apply ex parte for an order authorizing it to take possession of and to use the property sought to be condemned.~~

~~(b) If in the judgment the court determined that the plaintiff is entitled to acquire the property by eminent domain and if the court determines that the plaintiff has made the required payment into court, the court shall by order authorize the plaintiff to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and shall, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The order shall state the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be 10 days after the date of the order.~~

~~(c) At least 10 days prior to the time possession is taken, the plaintiff shall serve upon the defendants and their attorneys, either personally or by mail, a copy of the order of the court authorizing it to take possession of the property. A single service upon or mailing to those at the same address is sufficient.~~

~~(d) At any time after the court has made an order authorizing the plaintiff to take possession pursuant to this section, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the amount that the plaintiff is required to pay into court as a further sum pursuant to this section.~~

~~(e) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by paying into court the amount of the judgment and such further sum as may be required by the court and taking possession of the property pursuant to this section.~~

~~(f) The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the full amount of the judgment at any time thereafter upon obtaining an order therefor from the court. The court, or a judge thereof, upon application by such defendant, shall order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial is granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation.~~

~~(g) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid without interest to the party entitled thereto, and the court in which the eminent domain proceeding is pending shall enter judgment therefor against such party.~~

~~(h) The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution, but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceeding), at the risk of the plaintiff, and shall so remain until the amount~~

of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise obstructed or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided. The court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If the court orders deposit in the State Treasury, it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and to safely keep the same in the Condemnation Deposits Fund, which fund is hereby created in the State Treasury and for such duty he shall be liable to the plaintiff upon his official bond. Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Section 16430, Government Code, or deposited in banks as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2, Government Code. The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the Treasurer shall invest or make deposits in bank accounts in accordance with the designations.

(i) For the purposes of this section, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

(j) Interest earned and other increment derived from investments or deposits made pursuant to this section, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the Treasurer in taking and making delivery of bonds or other securities under this section, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

(k) In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

SEC. 12. Section 1255a of the Code of Civil Procedure is amended to read:

1255a. (a) The plaintiff may abandon the proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment ~~; and~~. Failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceeding.

(b) The court may, upon motion made within 30 days after such abandonment, set aside the abandonment if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

(c) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements ~~which~~. *Recoverable costs and disbursements* ~~shall~~ include *(1)* all necessary expenses incurred in preparing for trial and during trial, and *(2)* reasonable attorney *and appraisal fees actually incurred as a result of the plaintiff's determination to take the property, whether such fees were incurred for services rendered before or after the proceeding was commenced*. These costs and disbursements, including expenses and ~~attorney~~ fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions. ~~; provided, however, that~~ Upon judgment of dismissal on motion of *the* plaintiff, *the* ~~defendants, and each of them, may file a~~ cost bill *shall be filed* within 30 days after notice of entry of such judgment ~~; that said costs and disbursements shall not include expenses incurred in preparing for trial where the action is dismissed 10 days or more prior to the time set for the pretrial conference in the action or, if no pretrial conference is set, the time set for the trial of the action~~.

(d) If, after the plaintiff takes possession of or the defendant moves from the property sought to be condemned in compliance with an order of possession, the plaintiff abandons the proceeding as to such property or a portion thereof or it is determined that the plaintiff does not have authority to take such property or a portion thereof by eminent domain, the court shall order the plaintiff to deliver possession of such property or such portion thereof to the parties entitled to the possession thereof and shall make such provision as shall be just for the payment of damages arising out out of the plaintiff's taking and use of the property and damages for any loss or impairment of value suffered by the land and improvements after the time the plaintiff took possession of or the defendant moved from the property

Comment. The purpose and effect of subdivision (c) of Section 1255a is to

Comment. The purpose and effect of subdivision (c) of Section 1255a is to recompense the defendant for all expenses necessarily incurred whenever the plaintiff fails to carry an eminent domain proceeding through to conclusion. Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co., 234 Cal. App.2d 352, 44 Cal. Rptr. 410 (1965); Oak Grove School Dist. v. City Title Ins. Co., 217 Cal. App.2d 678, 32 Cal. Rptr. 288 (1963); Kern County v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962). Under prior law, reasonable attorney's fees actually incurred were recoverable irrespective of the time when the legal services were rendered. Decoto School Dist. v. M. & S. Tile Co., 225 Cal. App.2d 310, 37 Cal. Rptr. 225 (1964). This construction is continued and extended to include appraisal fees. Under prior law, all other necessary expenses in preparing for trial and during trial were subject to a proviso precluding their recovery if the action was dismissed 40 days or more prior to pre-trial or trial. La Mesa-Spring Valley School Dist. v. Otsuka, 57 Cal.2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962). This subdivision provides that such expenses may be recovered without regard to the date that the proceeding was abandoned or dismissed.

SEC. 13. Section 1255b of the Code of Civil Procedure is amended to read:

1255b. (a) The compensation and damages awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

(1) The date of the entry of judgment.

(2) The date that ~~the~~ possession of the property ~~sought to be condemned~~ is taken or the damage thereto occurs.

(3) The date after which the plaintiff may take possession of the property as stated in an order ~~authorizing the plaintiff to take~~ *for* possession.

(4) If the amount determined to be probable just compensation on motion of a defendant made under Section 1269.05 is not deposited before such date, the 21st day following the date of the order determining such amount.

(b) If, after the date that interest begins to accrue, the defendant continues in actual possession of ~~or receives rents, issues and profits from~~ the property *or receives rents or other income therefrom attributable to the period after interest begins to accrue*, the value of such possession and *the net amount* of such rents *or other income*, ~~issues and profits~~ shall be offset against the interest ~~that accrues during the period the defendant continues in actual possession or receives such rents, issues and profits~~. *This subdivision shall not apply to interest accrued under Section 1269.05.*

(c) Interest, including interest accrued due to possession or damaging of the property by the plaintiff prior to the final order in condemnation, and any offset against interest as provided in subdivision (b), shall be assessed by the court rather than by jury.

~~(c)~~

(d) The compensation and damages awarded in an eminent domain proceeding shall cease to draw interest on the earliest of the following dates:

(1) As to any amount deposited pursuant to *Chapter 1 (commencing with* Section ~~1243.5~~ *1268.01) of Title 7.1*, the date that such amount is withdrawn by the person entitled thereto, *or if not withdrawn, on the date that judgment is entered*.

thereafter

(2) As to any amount deposited pursuant to Section 1269.05, the date of such deposit.

~~(2)~~

(3) As to any amount ~~paid into court~~ *deposited* pursuant to *Chapter 3 (commencing with* Section ~~1251~~ *1270.01) of Title 7.1*, the date of such ~~payment~~ *deposit*.

~~(3)~~

(4) As to any amount paid to the person entitled thereto, the date of such payment.

~~(4) If the full amount the defendant is then entitled to receive as finally determined in the eminent domain proceeding together with the full amount of the interest then due thereon is paid into court for the defendant after entry of judgment, the date of such payment.~~

Comment. Section 1255b states the rules that determine when interest begins to accrue and when interest ceases to accrue.

In subdivision (a), paragraphs (2) and (3) are modified, without substantive change, to conform to usage throughout Title 7.1 (commencing with Section 1268.01). Paragraph (4) is added to reflect the effect of Section 1269.05.

Subdivision (b) is changed to clarify existing language. Under the subdivision, the plaintiff is entitled to offset against interest (1) the value of possession and (2) the net amount of rents or other income received, if such rents or income are attributable to the period after the date interest begins to accrue. The last sentence of the subdivision is added to conform to Section 1269.05.

Subdivision (c) is added to clarify existing law and to specify that the court, rather than the jury, assesses interest, including interest constitutionally required as compensation for possession or damaging of property prior to conclusion of the eminent domain proceeding. The subdivision also clarifies existing law to specify that the amount of the offset against interest provided by subdivision (b) is assessed by the court and to provide, in effect, that any evidence on that issue is to be heard by the court, rather than the jury.

Subdivision (d) is changed to make paragraphs (1) and (3) refer to the appropriate statutory provisions. Paragraph (1) is also changed to terminate interest, on entry of judgment, upon an amount deposited pursuant to Chapter 1 (commencing with Section 1268.01) of Title 7.1. After entry of judgment, such a deposit may be withdrawn pursuant to Section 1270.05. See the

Comment to that section. Judicial decisions are uncertain as to the time interest ceases on a deposit made prior to entry of judgment if the amount is not withdrawn. See People v. Loop, 161 Cal. App.2d 466, 326 P.2d 902 (1958); compare People v. Neider, 55 Cal.2d 832, 13 Cal. Rptr. 196, 361 P.2d 916 (1961). Under this paragraph, interest on the amount on deposit terminates on entry of judgment even though the amount is less than the award. If the amount on deposit is less than the amount of the award, the deposit must be increased, on motion of the defendant, under Section 1268.02. See Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934). Paragraph (2) has been added to conform to Section 1269.05, which permits certain defendants to obtain an order determining probable just compensation.

Paragraph (5) has been eliminated as unnecessary. All post-judgment deposits are made under Chapter 3 (commencing with Section 1270.01) of Title 7.1 and, hence, are covered by paragraph (3). Paragraph (5) referred to the practice of payment into court pursuant to Section 1952, which practice is terminated by the amendment of Section 1952.

SEC. 14. Section 1257 of the Code of Civil Procedure is amended to read:

1257. *(a)* The provisions of Part II of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; ~~provided, that upon the payment of the sum of money assessed, and upon the execution of the bond to build the fences and cattle guards, as provided in section twelve hundred and fifty-one, the plaintiff shall be entitled to enter into, improve, and hold possession of the property sought to be condemned (if not already in possession) as provided in section twelve hundred and fifty-four, and devote the same to the public use in question; and no motion for new trial or appeal shall, after such payment and filing of such bond as aforesaid, in any manner retard the contemplated improvement. Any money which shall have been deposited, as provided in section twelve hundred and fifty-four, may be applied to the payment of the money assessed, and the remainder, if any there be, shall be returned to the plaintiff~~.

(b) In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

Comment. The proviso to Section 1257 was added in 1877 in connection with related changes to Code of Civil Procedure Section 1254, which deals with possession after entry of judgment. See Code Am. 1877-78, Ch. 651, p. 109, §§ 1-2. Several subsequent changes to Section 1254 have deprived the proviso of any effect. See Housing Authority v. Superior Court, 18 Cal.2d 336, 115 P.2d 468 (1941). The general provision as to fences and cattle-guards remains in Code of Civil Procedure Section 1251.

Subdivision (b) is the same as and supersedes subdivision (k) of Code of Civil Procedure Section 1254. With respect to the construction and constitutionality of the provision, see Los Angeles, P. & G. Ry. Co. v. Rump, 104 Cal. 20, 37 Pac. 859 (1894).

SEC. 15. Title 7.1 (commencing with Section 1268.01) is added to Part 3 of the Code of Civil Procedure, to read:

TITLE 7.1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT; OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT

Note. A Title 7.1 (commencing with Section 1268), relating to evidence in eminent domain and inverse condemnation proceedings, was added to Part 3 of the Code of Civil Procedure by Section 1 of Chapter 1151 of the Statutes of 1965, but Section 7 of Chapter 1151 repeals that title on the operative date of the Evidence Code (January 1, 1967). The content of the repealed title is superseded by Sections 810-822 of the Evidence Code.

Chapter 1. Deposit of Probable Just Compensation Prior to Judgment

Comment. This chapter supercedes Code of Civil Procedure Sections 1243.6 and 1243.7 and those portions of Section 1243.5 that relate to the deposit and withdrawal of probable just compensation. Under this chapter, the condemnor may deposit an amount determined by the court to be the probable just compensation which will be made for the taking of the property (including any damage incident to the taking) at any time after filing the complaint and prior to the entry of judgment. A deposit may also be made under this chapter after the original entry of a judgment in the proceeding if that judgment has been reversed, vacated, or set aside by the trial or appellate courts. The deposit may be made whether or not possession of the property is to be taken. This deposit serves several purposes: First, it is a condition to obtaining an order for possession under Section 1269.01, 1269.02, 1269.03(3), or 1269.05. Second, in most cases, it fixes the date of valuation. See Section 1249a. Third, if the deposit is withdrawn, interest ceases on the amount withdrawn on the date of withdrawal, and interest ceases in any event on the amount deposited upon entry of judgment. See Section 1255b. Fourth, if the deposit is withdrawn, the withdrawal entitles the plaintiff to an order of possession prior to judgment. See Section 1269.06.

The deposit to be made after judgment is not governed by Chapter 1, but is covered by Chapter 3 (commencing with Section 1270.01).

1268.01. Order for determining amount of probable just compensation

1268.01. (a) In any proceeding in eminent domain, the plaintiff may, at any time after filing the complaint and prior to entry of judgment, apply ex parte to the court for an order determining the probable just compensation which will be made for the taking of any parcel of property included in the complaint. Such application may also be made after entry of judgment in the proceeding if that judgment has been reversed, vacated, or set aside and no other judgment has been entered. Upon such application the court shall make and enter its order determining the amount of such probable just compensation.

(b) At any time after the making of the order, the plaintiff may deposit the amount specified in the order. Such deposit may be made whether or not the plaintiff applies for, or is authorized by law to apply for, an order for possession.

Comment. Section 1268.01 restates the substance of Code of Civil Procedure Section 1243.5(a). In contrast with that section, however, the application and deposit may be made without regard to an order for possession. See the initial Comment to this chapter.

The words "any parcel of property included in the complaint" have been used to make clear that a deposit may be made for one parcel only even though, under Code of Civil Procedure Section 1244, several parcels may be included in the one complaint. See Weiler v. Superior Court, 188 Cal. 729, 207 Pac. 247 (1922).

As used in this section and in this chapter, "compensation" refers to all elements of compensation, including the value of the property actually taken and any severance or other damages less those special benefits, if any, that are required to be offset against such damages. See Code of Civil Procedure Section 1248. The phrase is also intended to coincide in meaning with the phrase "just compensation for such taking and any damage incident thereto" in Section 14 of Article I of the Constitution of California.

1268 .02. Increase or decrease in amount of deposit

1268.02. At any time after the court has made an order determining the amount of probable just compensation, the court may redetermine the amount upon motion of the plaintiff or of any party having an interest in the property for which the deposit is made. If the court redetermines the amount after entry of judgment and before that judgment has been reversed, vacated, or set aside, it shall redetermine the amount to be the amount of the judgment. If the plaintiff has taken possession or obtained an order for possession and the court, on redetermination, determines that such amount is larger than previously determined, the court shall order the amount previously deposited to be increased accordingly. After any amount deposited pursuant to this chapter has been withdrawn by a defendant, the court may not redetermine probable just compensation to be less than the total amount already withdrawn.

Comment. Section 1268.02 restates the substance of Code of Civil Procedure Section 1243.5(d) except that reference to the order for possession is eliminated. As to the duty of the plaintiff and the powers of the court to maintain the deposit in an adequate amount, see G. H. Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934); Marblehead Land Co. v. Superior Court, 60 Cal. App. 644, 213 Pac. 718 (1923).

Section 1268.08 provides for recovery of any excessive withdrawal after final determination of amounts in the eminent domain proceeding. No provision is made for recovery, prior to such final determination, of any amount withdrawn.

1268.03. Service of notice of deposit

1268.03. If the plaintiff deposits the amount determined by the court, the plaintiff shall serve a notice that the deposit has been made on all of the other parties to the proceeding who have an interest in the property for which the deposit was made. Service of such notice shall be made in the manner provided in Section 1269.04 for service of an order for possession. Service of an order for possession that recites the amount deposited pursuant to this chapter is sufficient compliance with the requirement of this section.

Comment. Section 1268.03 is new. It requires that notice of the deposit be given in all cases to facilitate withdrawal of the funds by the defendants.

Sections 1269.01 and 1269.02 require that information respecting the deposit be recited in any order for possession under one of those sections. This section dispenses with separate notice of the deposit if such an order is obtained and served.

1268.04. Application for withdrawal of deposit

1268.04. (a) Except as provided in subdivision (b), after the plaintiff has deposited the amount determined by the court, any defendant who has an interest in the property for which the deposit was made may apply to the court for the withdrawal of all or any portion of the amount deposited. The application shall be verified, set forth the applicant's interest in the property, and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff.

(b) Application for withdrawal after entry of judgment shall be made under the provisions of Section 1270.05 unless the judgment has been reversed, vacated, or set aside and no other judgment has been entered.

Comment. Section 1268.04 restates existing law. It is derived from Code of Civil Procedure Section 1243.7(a) and (c).

After entry of judgment, providing the judgment entered has not then been reversed, vacated, or set aside, application for withdrawal is made under Section 1270.05, rather than under this section.

1268.05. (a) Subject to subdivisions (c) and (d) of this section, the court shall order the amount requested in the application, or such portion of that amount as the applicant may be entitled to receive, to be paid to the applicant. No withdrawal may be ordered until 20 days after service of a copy of the application on the plaintiff, or until the time for all objections has expired, whichever is later.

(b) Within the 20-day period, the plaintiff may file objections to withdrawal on the grounds:

(1) That other parties to the proceeding are known or believed to have interests in the property; or

(2) That an undertaking should be filed by the applicant as provided in subdivision (e) of this section or in Section 1268.06, or that the amount of such an undertaking or the sureties thereon are insufficient.

(c) If an objection is filed on the ground that other parties are known or believed to have interests in the property, the plaintiff shall serve or attempt to serve on such other parties a notice that they may appear within 10 days after such service and object to the withdrawal. The notice shall advise such parties that their failure to object will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn. The notice shall be served in the manner provided in subdivision (c) of Section 1269.04 for service of an order for possession. The plaintiff shall report to the court (1) the names of parties served and the dates of service, and (2) the names and last known addresses of parties who have neither appeared in the proceeding nor been served with process and whom the plaintiff was unable to serve personally. The applicant may serve parties whom the plaintiff has been unable to serve. Parties served in the manner provided in subdivision (c) of Section 1269.04 shall have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants. The plaintiff shall remain liable to parties having an interest of record who are not so served, but if such liability is enforced the plaintiff shall be subrogated to the rights of such parties under Section 1268.08.

(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.

(e) If the court determines that an applicant is entitled to withdraw any portion of a deposit that another party claims or to which another person may be entitled, the court may require the applicant, before withdrawing such portion, to file an undertaking. The undertaking shall secure payment to such party or person any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. If withdrawal is permitted notwithstanding the lack of personal service of the application for withdrawal upon any party to the proceeding, the court may also require that the undertaking indemnify the plaintiff against any liability it may incur under subdivision (c). The undertaking shall be in such amount as is fixed by the court, but if executed by an admitted surety insurer the amount shall not exceed the portion claimed by the adverse claimant or appearing to belong to another person. If the undertaking is executed by two or more sufficient sureties approved by the court, the amount shall not exceed double such portion.

(f) Unless the undertaking is required primarily because of an issue as to title between the applicant and another party or person, if the undertaking is executed by an admitted surety insurer the applicant filing the undertaking is entitled to recover the premium paid for the undertaking, but not to exceed 2 percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

Comment. Section 1268.05 is based on Code of Civil Procedure Section 1243.7(a), (c), (d), (e), and (f). Unlike the section on which it is based, Section 1268.05 does not forbid withdrawal of any portion of the deposit if notice of the application cannot be personally served upon all parties. The section permits the court to exercise its discretion as to withdrawal in such cases and as to the requirement of an undertaking.

Nothing in this section precludes withdrawal of the deposit upon stipulation of all parties having an interest in the property for which the deposit was made.

Subdivision (f) has been added to permit recovery of the bond premium as costs in the proceeding unless the necessity for the undertaking arises primarily from an issue of title. For use of the same distinction in assessing the costs of apportionment proceedings. See Code of Civil Procedure Section 1246.1; People v. Nogarr, 181 Cal. App.2d 312, 5 Cal. Rptr. 247 (1960).

1268.06. Security when amount in excess of original deposit is withdrawn

1268.06. (a) If the amount originally deposited is increased pursuant to Section 1268.02 and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicant, or each applicant if there are two or more, shall file an undertaking. The undertaking shall be in favor of the plaintiff and shall secure repayment of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. If the undertaking is executed by an admitted surety insurer, the undertaking shall be in the amount by which the total amount to be withdrawn exceeds the amount originally deposited. If executed by two or more sufficient sureties approved by the court, the undertaking shall be in double such amount.

(b) If there are two or more applicants, the applicants, in lieu of filing separate undertakings, may jointly file a single undertaking in the amount required by subdivision (a).

(c) The plaintiff may waive the undertaking required by this section or may consent to an undertaking that is less than the amount stated by this section.

(d) If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking may recover the premium paid for the undertaking, but not to exceed two percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

Comment. Section 1268.06 is the same in substance as subdivision (b) of Code of Civil Procedure Section 1243.7. Withdrawal by one or more defendants of an amount in excess of the original deposit is possible if the deposit has been increased as provided for by Section 1268.02.

1268.07. Withdrawal waives all defenses except claim to greater compensation

1268.07. If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation. Any amount so paid to any party shall be credited upon the judgment in the eminent domain proceeding.

Comment. Section 1268.07 restates the substance of subdivision (g) of Code of Civil Procedure Section 1243.7. In addition to waiving claims and defenses other than the claim to greater compensation, withdrawal of the deposit also entitles the plaintiff to an order for possession. See Section 1269.06. Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

1268.08. Repayment of amount of excess withdrawal

1268.08. Any amount withdrawn by a party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the party entitled to such amount, together with legal interest from the date of its withdrawal. The court in which the eminent domain proceeding is pending shall enter judgment accordingly. If the judgment is not paid within 30 days after its entry, the court may, on motion, enter judgment against the sureties, if any, for such amount and interest.

Comment. Section 1268.08 restates the substance of subdivision (h) of Code of Civil Procedure Section 1243.7.

1268.09. Amount of deposit or withdrawal inadmissible in evidence

1268.09. Neither the amount deposited nor any amount withdrawn pursuant to this chapter shall be given in evidence or referred to in the trial of the issue of compensation.

Comment. Section 1268.09 restates the substance of subdivision (e) of Code of Civil Procedure Section 1243.5.

1268.10. Deposit in State Treasury unless otherwise required

1268.10. (a) When money is deposited as provided in this chapter, the court shall order the money to be deposited in the State Treasury or, upon written request of the plaintiff filed with the deposit, in the county treasury. If money is deposited in the State Treasury pursuant to this section, it shall be held, invested, deposited, and disbursed in the manner specified in Article 9 (commencing with Section 16425) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that article.

(b) As between the parties to the proceeding, money deposited pursuant to this chapter shall remain at the risk of the plaintiff until paid or made payable to the defendant by order of the court.

Comment. Subdivision (a) of Section 1268.10 is the same in substance as Code of Civil Procedure Section 1243.6. Subdivision (b) is based on the first two sentences of subdivision (h) of Code of Civil Procedure Section 1254.

1269.01. Possession by public entity for right of way or reservoir

1269.01. (a) In any proceeding in eminent domain brought by the state or a county, city, district, or other public entity to acquire (1) any right of way or (2) lands to be used for reservoir purposes, the plaintiff may take possession of the property or property interest in accordance with this section.

(b) At any time after filing the complaint and prior to entry of judgment, the plaintiff may apply ex parte to the court for an order for possession. Such application also may be made after entry of judgment if that judgment has been reversed, vacated, or set aside and no other judgment has been entered. The court shall authorize the plaintiff to take possession of the property if the court determines that the plaintiff:

(1) Is entitled to take the property by eminent domain; and

(2) Has deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01).

(c) The order for possession shall:

(1) Recite that it has been made under this section and Article I, Section 14 of the Constitution of California.

(2) Describe the property and the estate or interest to be acquired, which description may be by reference to the complaint.

(3) State the purpose of the condemnation.

(4) State the amount deposited as probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01).

(5) State the date after which the plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under Section 1269.04 on the day the order is made.

Comment. This chapter provides for orders for possession prior to judgment, and supersedes Code of Civil Procedure Sections 1243.4 and 1243.5. Orders for possession subsequent to judgment are governed by Chapter 3 (commencing with Section 1270.1). Subdivision (a) of Section 1269.01 restates the substance of Code of Civil Procedure Section 1243.4. The words "the State or a county, city, district, or other public entity" have been substituted for the words "the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation." The new language encompasses all proceedings by governental entities, agencies, or officers to acquire rights of way or lands for reservoir purposes, whether the interest to be acquired is a fee, easement, or other interest.

Subdivision (b) restates the substance of subdivision (a) and a portion of subdivision (b) of Code of Civil Procedure Section 1243.5. The ex parte procedure for obtaining the order for possession is a continuation of existing law.

Subdivision (c) is the same in substance as Code of Civil Procedure Section 1243.5(b), except that the requirement that the order recite its authority has been added. The requirement is intended to avoid confusion with similar orders obtained under Section 1269.02.

With respect to the appellate relief available as to orders for possession, see the Comment to Section 1269.02.

1269.02. Possession where plaintiff's determination of necessity is conclusive

1269.02. (a) In any proceeding in eminent domain in which the resolution, ordinance, or declaration of the plaintiff is made conclusive evidence of the public necessity for taking the property (whether by subdivision (2) of Code of Civil Procedure Section 1241 or by a statute applicable to the particular agency, entity, or officer), the plaintiff may take possession of the property or property interest in accordance with this section.

(b) At any time after filing of the complaint and prior to the entry of judgment, the plaintiff may apply ex parte to the court for an order for possession. Such application also may be made after entry of judgment if that judgment has been reversed, vacated, or set aside and no other judgment has been entered. The court shall authorize the plaintiff to take possession of the property if the court determines that the plaintiff:

(1) Is entitled to take the property by eminent domain;

(2) Has adopted or made a resolution, ordinance, or declaration that is conclusive evidence of the public necessity for such taking; and

(3) Has deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01).

(c) The order for possession shall:

(1) Recite that it has been made under this section and refer to the resolution, ordinance, or declaration authorizing the taking.

(2) Describe the property and the estate or interest to be acquired, which description may be made by reference to the complaint.

(3) State the purpose of the condemnation.

(4) State the amount deposited in accordance with Chapter 1 (commencing with Section 1268.01).

(5) State the date after which the plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under Section 1269.04 on the day the order is made.

(d) At any time within 20 days after being served with an order obtained pursuant to this section any owner or occupant of the property may move for a stay or vacation of the order. On such motion the court shall:

(1) Stay the effect of the order if the court determines that the hardship to the owner or occupant of having possession taken clearly outweighs any need of the plaintiff for earlier possession. Such stay shall be for a reasonable time, but shall not exceed 90 days from the date of service of the original order for possession upon the moving party.

(2) Vacate the order if the court determines that the plaintiff is not entitled to take the property by eminent domain or that the taking is not provided for by a resolution, ordinance, or declaration that is conclusive evidence of the public necessity for the taking.

Comment. Section 1269.02 is new.

Subdivision (a). Section 1269.01 provides for possession prior to judgment if the taking is for right of way or reservoir purposes. Section 1269.02 provides for possession prior to judgment--whatever the purpose of the acquisition--if the proceeding is authorized by a resolution, ordinance, or declaration that is conclusive evidence of the public necessity for taking the property. These two sections and Section 1269.03 are not mutually exclusive. In a proceeding falling within more than one of the sections, the plaintiff may elect the section under which to obtain possession prior to judgment.

Subdivision (2) of Code of Civil Procedure Section 1241 and other statutes give a conclusive effect to the resolutions and ordinances of various public entities. Under these statutes, the procedure stated in Section 1269.02 is available to the following agencies and entities:

STATE OF CALIFORNIA	STATUTE
AGENCY	
University of California	EDUC. CODE § 23152
State Pub. Works Bd.	GOVT. CODE § 15855
State Housing Comm'n	HEALTH & SAF. CODE § 34878
State Lands Comm'n	PUB. RES. CODE § 6808
State Hwy. Comm'n	STS. & HWYS. CODE § 103
Cal. Toll Bridge Auth.	STS. & HWYS. CODE § 30404
Dep't of Water Resources	WATER CODE § 251
Dep't of Water Resources (Central Valley Project)	WATER CODE § 11582
State Reclam. Bd.	WATER CODE § 8595

LOCAL PUBLIC ENTITIES	
ENTITY	
County	CODE CIV. PROC. § 1241(2)
	STS. & HWYS. CODE § 4189 (Street Opening Act of 1903)
	STS. & HWYS. CODE § 6121 (Improvement Act of 1911)
	STS. & HWYS. CODE § 11400 (Pedestrian Mall Law of 1960)
City	CODE CIV. PROC. § 1241(2)
	GOVT. CODE § 38081 (Park and Playground Act of 1909)
	STS. & HWYS. CODE § 4189 (Street Opening Act of 1903)
	STS. & HWYS. CODE § 6121 (Improvement Act of 1911)
	STS. & HWYS. CODE § 11400 (Pedestrian Mall Law of 1960)

LOCAL PUBLIC ENTITIES (continued)

ENTITY	STATUTE
City	STS. & HWYS. CODE §§ 31590, 31592 (Acquisitions for parking districts).
	WATER CODE § 71694 (Municipal Water District Law of 1911)
	WATER CODE APP. § 20-12(7) (Municipal Water District Act of 1911)
OTHER PUBLIC ENTITIES	
County Sanitation Dist.	CODE CIV. PROC. § 1241(2)
Irrigation Dist.	CODE CIV. PROC. § 1241(2)
Public Utility Dist.	CODE CIV. PROC. § 1241(2); PUB. UTIL. CODE § 16404
Rapid Transit Dist.	CODE CIV. PROC. § 1241(2)
Sanitary Dist.	CODE CIV. PROC. § 1241(2)
School Dist.	CODE CIV. PROC. § 1241(2)
Transit Dist.	CODE CIV. PROC. § 1241(2)
Water Dist.	CODE CIV. PROC. § 1241(2)
San Francisco Harbor	HARB. & NAV. CODE § 1917
Harbor Improvement Dist.	HARB. & NAV. CODE § 5900.4
Harbor Dist.	HARB. & NAV. CODE § 6076
Port Dist.	HARB. & NAV. CODE § 6296
Recreational Harbor Dist.	HARB. & NAV. CODE §§ 6590, 6593, 6598 (repealed)
River Port Dist.	HARB. & NAV. CODE § 6896
Small Craft Harbor Dist.	HARB. & NAV. CODE § 7147
San Diego Unified Port Dist.	HARB. & NAV. CODE APP. § 27
Joint Muni. Sewage Disp. Dist.	HEALTH & SAF. CODE §§ 5740.01, 5740.06 (repealed)
Regional Sewage Disp. Dist.	HEALTH & SAF. CODE §§ 5991, 5998 (repealed)

OTHER PUBLIC ENTITIES (continued)

ENTITY	STATUTE
Regional Park Dist.	PUB. RES. CODE § 5542
Regional Shoreline Park and Recreation Dist.	PUB. RES. CODE § 5722 (repealed)
Municipal Utility Dist.	PUB. UTIL. CODE § 12703
Transit Dist. (Alameda or Contra Costa Counties)	PUB. UTIL. CODE § 25703
S.F. Bay Area Rapid Transit Dist.	PUB. UTIL. CODE § 28954
Orange County Transit Dist.	PUB. UTIL. CODE § 40162
Stockton Metropolitan Transit Dist.	PUB. UTIL. CODE § 50162
Marin County Transit Dist.	PUB. UTIL. CODE § 70162
San Diego County Transit Dist.	PUB. UTIL. CODE § 90402
Santa Barbara Metropolitan Transit Dist.	PUB. UTIL. CODE § 96002
Los Angeles Metropolitan Auth.	PUB. UTIL. CODE APP. 1, § 4.7
Fresno Metropolitan Transit Auth	PUB. UTIL. CODE APP. 2, § 6.3
West Bay Rapid Transit Auth.	PUB. UTIL. CODE APP. 3, § 6.6
Joint Highway Dist.	STS. & HWYS. CODE § 25052
Bridge & Highway Dist.	STS. & HWYS. CODE § 27166
Parking Dist.	STS. & HWYS. CODE § 35401.5
Water Replenishment Dist.	WATER CODE § 60230(8)
American River Flood Control Dist.	WATER CODE APP. § 37-23
Antelope Valley-East Kern Water Agency	WATER CODE APP. § 98-61(7)
Crestline-Lake Arrowhead Water Agency	WATER CODE APP. § 104-11(9)
Desert Water Agency	WATER CODE APP. § 100-15(9)
Donner Summit Public Utility Dist.	WATER CODE APP. § 58-3
Lassen-Modoc County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 92-3(f)

OTHER PUBLIC ENTITIES (continued)

ENTITY	STATUTE
Mendocino County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 54-3(f)
Metropolitan Water Dist.	WATER CODE APP. § 35-4(5)
Morrison Creek Flood Cont. Dist.	WATER CODE APP. § 71-3(f) (repealed)
Olivehurst Public Utility Dist.	WATER CODE APP. § 56-3
Orange County Water Dist.	WATER CODE APP. § 40-2(8)
Plumas County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 88-3(f)
San Diego County Flood Control Dist.	WATER CODE APP. § 105-6(12)
San Gorgonio Pass Water Agency	WATER CODE APP. § 101-15(9)
San Mateo County Flood Cont. Dist.	WATER CODE APP. § 87-3(8)
Santa Cruz County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 77-24
Sierra County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 91-3(f)
Siskiyou County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 89-3(f)
Sonoma County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 53-3(f)
Tehama County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 82-3(f)
Upper Santa Clara Valley Water Agency	WATER CODE APP. § 103-15(7)
Vallejo Sanitation & Flood Cont. Dist.	WATER CODE APP. § 67-23
Yolo County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 65-3(f)
Bethel Island Municipal Improvement Dist.	Cal. Stats. (1st Ex. Sess.) 1960, Ch. 22, § 80, p. 333, CAL. GEN. LAWS ANN. Act 5239e (Deering Supp. 1965)
Embarcadero Municipal Improvement Dist.	Cal. Stats. (1st Ex. Sess.) 1960, Ch. 81, § 81, p. 447, CAL. GEN. LAWS ANN. Act 5239c (Deering Supp. 1965)

OTHER PUBLIC ENTITIES (Continued)

ENTITY	STATUTE
Estro Municipal Improvement Dist.	Cal. Stats. (1st Ex. Sess.) 1960, Ch. 82, § 81, p. 464, CAL. GEN. LAWS ANN. Act 5239d (Deering Supp..1965)
Fairfield-Suisun Sewer Dist.	Cal. Stats. 1951, Ch. 303, § 44 p. 555, CAL. GEN. LAWS ANN. Act 7551a (Deering Supp. 1965)
Guadalupe Valley Municipal Improvement Dist.	Cal. Stats. 1959, Ch. 2037, § 80, p. 4710, CAL. GEN. LAWS ANN. Act 5239b (Deering Supp. 1965)
Montalvo Municipal Improvement Dist.	Cal. Stats. 1955, Ch. 549, § 45, p. 1018, CAL. GEN. LAWS ANN. Act 5239a (Deering Supp. 1965)
Mt. San Jacinto Winter Park Auth.	Cal. Stats. 1945, Ch. 1040, § 4.9, p. 2013, CAL. GEN. LAWS ANN. Act 6385 (Deering Supp. 1965)
Solvang Municipal Improvement Dist.	Cal. Stats. 1951, Ch. 1635, § 45, p. 3680, CAL. GEN. LAWS ANN. Act 5239 (Deering Supp. 1965)

The procedure will also be available to other entities or agencies whose resolution or ordinance is made conclusive evidence of the public necessity for taking the property.

Subdivisions (b) and (c). These subdivisions are patterned after Code of Civil Procedure Section 1243.5(a) and (b).

Subdivision (d). This subdivision provides a new procedure by which the property owner may contest the granting of the order for possession. For the source of this provision, see Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, B-7, B-14 (1961). See also Darbee v. Superior Court, 138 Cal. App. 710, 33 P.2d 464 (1934).

An appeal may not be taken from an order authorizing or denying possession prior to entry of judgment. Mandamus, prohibition, or certiorari are the appropriate remedies. See 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 Pac. 247 (1922); State v. Superior Court, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962); City of Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961). However, the order for possession following entry of judgment is an appealable order. San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App.2d 668, 267 P.2d 349 (1954); Housing Authority v. Forbes, 47 Cal. App.2d 358, 117 P.2d 722 (1941). These rules have not been changed in connection with this section, or with Sections 1269.01 and 1269.03. Existing writ practice, rather than appeals, is continued as to orders made under subdivision (d) of this section and under Section 1269.03.

1269.03. Possession in other cases

1269.03. (a) In any proceeding in eminent domain brought by or on behalf of any public entity, public utility, common carrier, or public service corporation to acquire any property or property interest, the plaintiff may obtain an order for possession of the property or property interest in accordance with this section.

(b) At any time after filing the complaint and prior to the entry of judgment, the plaintiff may apply to the court for an order for possession. Such application also may be made after entry of judgment if that judgment has been reversed, vacated, or set aside and no other judgment has been entered. The application shall be made by noticed motion, and the notice of motion shall be served in the same manner as an order for possession is served under Section 1269.04.

(c) On hearing of the motion, the court shall consider all relevant evidence, including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to such schedule or plan, and shall make an order that authorizes the plaintiff to take possession of the property if the court determines that:

(1) The plaintiff is entitled to take the property by eminent domain;

(2) The need of the plaintiff for possession of the property outweighs any hardship the owner or occupant of the property will suffer if possession is taken;

(3) The plaintiff has deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01); and

(4) If the plaintiff is not a public entity and is a public utility, common carrier, or public service corporation, the public necessity of the proposed improvement is evidenced or supported by a certificate of public convenience and necessity issued by the Public Utilities Commission under the provisions of the Public Utilities Code.

(d) The date after which the plaintiff is authorized to take possession of the property shall not be less than 30 days after the making of the order and may be any later date specified by the plaintiff.

Comment. Section 1269.03 is new.

Subdivision (a). This section provides a procedure for obtaining possession prior to judgment in case in which such possession might not be obtainable under Sections 1269.01 or 1269.02. The words "the State or a county, city, district, or other public entity" include all governmental entities. The words "public utility, common carrier, or public service corporation" include business entities subjected to public regulation by provisions of the Public Utilities Code and court decisions.

Subdivisions (b) and (c). Subdivisions (b) and (c) are patterned after provisions in other states which provide for obtaining possession prior to judgment by noticed motion procedure and which require the plaintiff to show a need for such possession. See, e.g., ILL. REV. STAT. 1957, Ch. 47, § 2.1; Dept. of Pub. Works & Bldgs. v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958). These subdivisions provide for determination of the motion in keeping with motion practice generally. Paragraph (4) of subdivision (c) limits application of the section to those cases in which the Public Utilities Commission has issued its certificate of public convenience and necessity applicable to the proposed project or improvement. See Public Utilities Code Section 1000; San Diego Gas & Electric Co. v. Lux Land Co., 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961).

Subdivision (d). This subdivision is based on Code of Civil Procedure Section 1243.5(b)(4). As the order is obtained by regularly noticed motion, however, the period specified is computed from the date of the order, rather than the date of its service.

With respect to the appellate relief available as to orders for possession, see the Comment to Section 1269.02.

1269.04. Service of the order for possession

1269.04. (a) As used in this section, "record owner" means both (1) the person in whom the legal title to the fee appears to be vested by duly recorded deeds or other instruments and (2) the person, if any, who has an interest in the property under a duly recorded lease or agreement of purchase.

(b) At least 30 days prior to the time possession is taken pursuant to an order for possession obtained pursuant to this chapter, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any. If the order was obtained under Section 1269.01 or 1269.06, the court may, for good cause shown on ex parte application, shorten the time specified in this subdivision to a period of not less than three days.

(c) Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or been served with summons in the proceeding. If the person has appeared or been served with the summons, service of the order for possession may be made by mail upon such person and his attorney of record, if any.

(d) If a person required to be personally served resides out of the state, or has departed from the state or cannot with due diligence be found within the state, the plaintiff may, in lieu of such personal service, send a copy of the order by registered or certified mail addressed to such person at his last known address.

(e) The court may, for good cause shown on ex parte application, authorize the plaintiff to take possession of the property without serving a copy of the order for possession upon a record owner not occupying the property.

(f) A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

Comment. Section 1269.04 is the same in substance as Code of Civil Procedure Section 1243.5(c), except the period of notice has been increased from 20 to 30 days. The requirement that an affidavit be filed concerning service by mail has been eliminated. Subdivision (f) is a clarification of a sentence in the first paragraph of Section 1243.5(c). The term "address" refers to a single residential unit or place of business, rather than to several such units or places that may happen to have the same street or post-office "address." For example, each apartment is regarded as having a separate address although the entire apartment house may have a single street address.

1269.05. Deposit and possession on motion of certain defendants

1269.05. (a) If the property to be taken is a dwelling containing not more than two residential units and the dwelling or one of its units is occupied as his residence by a defendant, and if the plaintiff has not deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01), such defendant may move the court for an order determining the amount of such compensation. The motion shall be heard and determined in the same manner as a motion made to modify an existing deposit under Section 1268.02.

(b) The court shall enter its order determining the probable just compensation and authorizing the plaintiff to take possession of the property 30 days after the date the plaintiff deposits the determined amount in accordance with Chapter 1 (commencing with Section 1268.01). If the deposit is not made within 20 days after the date of the order, the compensation awarded in the proceeding to the moving party shall draw legal interest from the 21st day after the date of the order.

(c) If the proceeding is abandoned by the plaintiff, the amount of such interest may be recovered as costs in the proceeding in the manner provided for the recovery of other costs and disbursements on abandonment. If, in the proceeding, the court or a jury verdict eventually determines the compensation that would have been awarded to the moving party, then such interest shall be computed on the amount of such award. If no such determination is ever made, then such interest shall be computed on the amount of probable just compensation as determined on the motion. The moving party shall be entitled to the full amount of such interest without offset for rents or other income received by him or the value of his continued posesssion of the property.

(d) The filing of a motion pursuant to this section constitutes a waiver by operation of law, conditioned upon subsequent deposit by the plaintiff of the amount determined to be probable just compensation, of all claims and defenses in favor of the moving party except his claim for greater compensation.

Comment. Section 1269.05 is new. Except as provided in this section, the depositing of probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) or the taking of possession pursuant to this chapter is optional with the plaintiff. If a deposit is not made and possession is not taken, a defendant is not entitled to be paid until 30 days after final judgment. Code of Civil Procedure Sections 1251 and 1268. If bonds must be issued and sold to pay the award, payment need not be made until one year after final judgment. Code of Civil Procedure Section 1251.

This section is intended to make available to homeowners a procedure by which probable just compensation may be determined, deposited and withdrawn within a brief period after the beginning of the proceeding. For a comparable provision applicable to all eminent domain proceedings, see PENN. EMINENT DOMAIN CODE § 407(b). Although this section does not require the plaintiff to deposit the amount determined, if no deposit is made, interest on the eventual award begins to accrue. If the proceeding is abandoned or dismissed, the interest is computed on the amount determined by the court to be probable just compensation. This section apart, interest would not begin to accrue until entry of judgment. See Code of Civil Procedure Section 1255d.

1269.06. Right of plaintiff to take possession after vacation of property or withdrawal of deposit

1269.06. (a) If the plaintiff has deposited probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01), possession of the property or property interest for which the deposit was made may be taken in accordance with this section at any time after each of the defendants entitled to possession:

(1) Vacates the property; or

(2) Withdraws any portion of the deposit.

(b) The plaintiff may apply ex parte to the court for an order for possession. The court shall authorize the plaintiff to take possession of the property if the court determines that the plaintiff has deposited probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) and that each of the defendants entitled to possession have:

(1) Vacated the property; or

(2) Withdrawn any portion of the deposit.

(c) The order for possession shall:

(1) Recite that it has been made under this section.

(2) Describe the property and the estate or interest to be acquired, which description may be by reference to the complaint.

(3) State the date after which plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under Section 1269.04 on the day the order is made.

Comment. Section 1269.06 is new. Chapter 1 (commencing with Section 1268.01) permits the plaintiff to deposit probable just compensation whether or not it obtains an order for possession.

This section makes applicable to withdrawal of a deposit made prior to judgment the analogous rule that applies when a deposit made after judgment is withdrawn. Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962). It also permits the plaintiff to obtain possession of the property after it has been vacated by all the persons who are entitled to possession. Service of the order for possession is required by Section 1269.04. The time limits for service of the order for possession on the record owner and occupants are the same as for an order for possession under Section 1269.01.

1269.07. Taking possession does not waive right of appeal

1269.07. The plaintiff does not abandon or waive the right to appeal from the judgment in the proceeding or request a new trial by taking possession of the property pursuant to this chapter.

Comment. Section 1269.07 is the same in substance as Code of Civil Procedure Section 1243.5(f). The language has been changed to preclude implied waiver of appeal or right to new trial by taking possession pursuant to any order obtained under this chapter, including orders under Sections 1269.01, 1269.02, 1269.03, and 1269.05. Under Section 1268.07, the defendant also retains his right to appeal or to request a new trial upon the issue of compensation even though he withdraws the deposit made by the plaintiff. However, such withdrawal does waive all claims and defenses other than the claim to compensation.

1270.01. Deposit after judgment

1270.01. (a) If the plaintiff is not in possession of the property to be taken, the plaintiff may, at any time after entry of judgment, deposit for the defendants the amount of the judgment together with the interest then due thereon, but a deposit may not be made under this section after the judgment entered has been reversed, vacated, or set aside and no other judgment has been entered.

(b) Upon making the deposit, the plaintiff shall serve a notice that the deposit has been made on all of the other parties to the proceeding determined by the judgment to have an interest in the money deposited thereon. Service of the notice shall be made in the manner provided in Section 1270.03 for the service of an order for possession. Service of an order for possession under Section 1270.03 is sufficient compliance with this subdivision.

Comment. This chapter relates to deposits that may be made and orders for possession that may be obtained after entry of the "interlocutory judgment" in condemnation. The procedures of the chapter apply notwithstanding the pendency of an appeal from the judgment or a motion to vacate or set aside the judgment. However, after the "interlocutory judgment" has been reversed, vacated, or set aside, deposit and possession procedures are governed by Chapter 1 (commencing with Section 1268.01) and Chapter 2 (commencing with Section 1269.01), rather than this chapter. See Sections 1268.01 and 1269.01. The chapter supersedes Code of Civil Procedure Section 1254 and eliminates whatever distinction there may have been between deposits made under Section 1252 and Section 1254. Under this chapter, there is but one uniform post-judgment deposit procedure. As to the distinction between the "judgment" and the "final judgment" in eminent domain proceedings, see Code of Civil Procedure Section 1264.7 and Bellflower City School Dist. v. Skaggs, 52 Cal.2d 278, 339 P.2d 848 (1959).

Subdivision (a) is similar to subdivision (a) of Code of Civil Procedure Section 1254. However, the deposit required here is merely the amount of the judgment and accrued interest. The provision for an additional sum to secure payment of further compensation and costs is contained in Section 1270.04. In addition, the deposit may be made under this section without regard to an order for possession. This section thus encompasses the deposit procedures of both Sections 1252 and 1254.

Subdivision (b) is new. In requiring that notice of the deposit be given, it parallels Section 1268.03 which requires that notice of a pre-judgment deposit be sent to the parties having an interest in the property for which the deposit is made. Under Section 1254, the defendant received notice that the deposit had been made only when served with an order for possession.

1270.02. Order for possession

1270.02. If the judgment determines that the plaintiff is entitled to take the property and the plaintiff has made the deposit provided in Section 1270.01, the court, upon ex parte application of the plaintiff, shall authorize the plaintiff to take possession of the property pending conclusion of the litigation. The court's order shall state the date after which the plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be 10 days after the date the order is made.

Comment. Section 1270.02 restates the substance of a portion of subdivision (b) of Code of Civil Procedure Section 1254.

1270.03. Service of order

1270.03. At least 10 days prior to the date possession is to be taken, the plaintiff shall serve a copy of the order for possession upon the defendants and their attorneys, either personally or by mail. A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

Comment. Section 1270.03 is the same in substance as subdivision (c) of Code of Civil Procedure Section 1254. With respect to the last sentence, see the Comment to Section 1269.04.

1269.04. Increase or decrease in amount of deposit

1270.04. At any time after the plaintiff has made a deposit upon the judgment pursuant to this chapter, the court may, upon motion of any defendant, order the plaintiff to deposit such additional amount as the court determines to be necessary to secure payment of any further compensation, costs, or interest that may be recovered in the proceeding. After the making of such an order, the court may, on motion of any party, order an increase or a decrease in such additional amount.

Comment. Section 1270.04 supersedes subdivision (d) of Code of Civil Procedure Section 1254. For the parallel provision permitting increase or decrease in a deposit made prior to entry of judgment, see Section 1268.02.

Decisions under Section 14 of Article I of the California Constitution and Code of Civil Procedure Section 1254 have held that, where the plaintiff has taken possession prior to judgment, and judgment is entered for an amount in excess of the amount deposited, the defendant is entitled to have the deposit increased to the amount of the judgment. See, G.H. Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934). That rule is continued in existence, but the motion to obtain the increase is appropriately made under Section 1268.02, rather than under this section.

The additional amount referred to in this section is the amount determined by the court to be necessary, in addition to the amount of the judgment, to secure payment of any further compensation, costs, or interest that may be recovered in the proceeding. See People v. Loop, 161 Cal. App.2d 466, 326 P.2d 902 (1958); City of Los Angeles v. Oliver, 110 Cal. App. 248, 294 Pac. 760 (1930). Deposit of the amount of the judgment itself is required by Sections 1270.01 and 1270.02.

Code of Civil Procedure Section 1254 was construed to make the amount, if any, to be deposited in addition to the judgment to be discretionary with the trial court. Orange County Water Dist. v. Bennett, 156 Cal. App.2d 745, 320 P.2d 536 (1958). This construction is continued under this section.

1270.05. Withdrawal of deposit

1270.05. (a) Subject to subdivision (c), any defendant for whom an amount has been deposited upon the judgment, or any defendant determined by the judgment to be entitled to an amount deposited prior to entry of that judgment, is entitled to demand and receive the amount to which he is entitled under the judgment upon obtaining an order from the court. Upon application by such defendant, the court shall order that such money be paid to him upon his filing (1) a satisfaction of the judgment or (2) a receipt for the money and an abandonment of all claims and defenses except his claim to greater compensation.

(b) Upon objection to such withdrawal made by any party to the proceeding, the court, in its discretion, may require the defendant to file an undertaking in the manner and upon the conditions specified in Sections 1268.05 and 1268.06 for withdrawal of a deposit prior to judgment.

(c) Application for withdrawal after entry of judgment shall be made under the provisions of Section 1268.04 if the judgment has been reversed, vacated, or set aside and no other judgment has been entered.

Comment. Section 1270.5 is based on subdivision (f) of Code of Civil Procedure Section 1254. For the parallel provisions for withdrawal of a deposit prior to judgment, see Sections 1268.05 and 1268.06.

Decisions under Section 14 of Article I of the California Constitution and Code of Civil Procedure Section 1254 held that, where a deposit was made to obtain possession prior to judgment, the defendant was nonetheless entitled to proceed under the provisions of this the entry of judgment. People v. Dittmer, 193 Cal. App.2d 681, 14 Cal. Rptr. 560 (1961). See also People v. Neider, 55 Cal.2d 832, 361 P.2d 916 (1961). Compare G.H. Deacon Inv. Co. v. [illegible] Court, 220 Cal. 392, 31 P.2d 372 (1934)(practice before any provision existed for withdrawal of a deposit made before judgment). The language of this section has been changed to incorporate this construction. The section also has been changed to permit the court to require security as a condition to withdrawal in appropriate cases.

Code of Civil Procedure Section 1254 was construed to permit the defendant to withdraw any amount paid into court upon the judgment, whether or not the plaintiff applied for or obtained an order for possession. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962). That construction is continued in effect. Inferentially, Section 1254 permitted withdrawal only of the amount deposited upon the judgment and not the additional amount, if any, deposited as security. See People v. Loop, 161 Cal. App.2d 466, 326 P.2d 902 (1958). That construction also is continued in effect.

The remedy of a party entitled to an amount upon a judgment where that amount has been withdrawn prior to judgment by another party is set forth in Section 1268.08.

1270.06. Repayment of amount of excess withdrawal

1270.06. When money is withdrawn pursuant to this chapter, any amount withdrawn by a person in excess of the amount to which he is entitled as finally determined in the proceeding shall be paid without interest to the plaintiff or other party entitled thereto, and the court shall enter the judgment accordingly.

Comment. Section 1270.06 is the same in substance as subdivision (g) of Code of Civil Procedure Section 1254.

1270.07. Taking possession does not waive right of appeal

1270.07. The plaintiff does not abandon or waive the right to appeal from the judgment or request a new trial by depositing the amount of the judgment or taking possession pursuant to this chapter.

Comment. Section 1270.07 is the same in substance as subdivision (e) of Code of Civil Procedure Section 1254. Under the provisions of Section 1270.05, the defendant may also retain his right to appeal or request a new trial upon the issue of compensation only even though he withdraws the deposit. This may be accomplished by filing a receipt and waiver of all claims and defenses except the claim to greater compensation. Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

1270.08. Deposit in State Treasury unless otherwise required

1270.08. Money deposited as provided in this chapter shall be deposited in accordance with Section 1268.10 and the provisions of that section are applicable to the money so deposited.

Comment. Section 1270.08, which incorporates by reference Section 1268.10, supersedes the first three sentences of subdivision (h) of Code of Civil Procedure Section 1254.

SEC. 16. Article 9 (commencing with Section 16425) is added to Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, to read:

Article 9. Condemnation Deposits Fund

16425. Condemnation Deposits Fund

16425. The Condemnation Deposits Fund in the State Treasury is continued in existence. The fund consists of all money deposited in the State Treasury under Title 7.1 (commencing with Section 1268.01) of Part 3 of the Code of Civil Procedure and all interest earned or other increment derived from its investment. The State Treasurer shall receive all such moneys, duly receipt for, and safely keep the same in the fund, and for such duty he is liable upon his official bond.

Comment. Sections 16425-16427 restate the substance of a portion of subdivision (h) and all of subdivisions (i) and (j) of Section 1254 of the Code of Civil Procedure.

16426. Investment of fund

16426. (a) Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Section 16430 of the Government Code or deposited in banks as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2 of the Government Code.

(b) The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the State Treasurer shall invest or make deposits in bank accounts in accordance with the designations. For the purposes of this subdivision, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

Comment. See the Comment to Section 16425.

16427. Apportionment and disbursement of fund

16427. Interest earned and other increment derived from investments or deposits made pursuant to this article, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the State Treasurer in taking and making delivery of bonds or other securities under this article, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

Comment. See the Comment to Section 16425.

SEC. 17. Section 38090 of the Government Code is amended to read:

38090. The ~~right to compensation or damages accrues at the date of the order appointing referees or the order setting the cause for trial. The actual value of the property at that date is the measure of compensation for property actually taken and the basis of damages to property not taken but injuriously affected.~~ *date of valuation in proceedings under this article shall be determined in accordance with Section 1249a of the Code of Civil Procedure. In cases in which compensation is ascertained by referees appointed pursuant to this article, the date of the filing of their report with the court shall be deemed the date of trial for the purpose of determining the date of valuation.*

Comment. This section of the Park and Playground Act of 1909. (Government Code Sections 38000-38213) was enacted in 1913 (Stats. 1913, Ch. 246, p. 417, § 3). It has not been amended previously to conform to the various changes that have been made over the years in the Code of Civil Procedure. The section is amended to conform, as near as may be, to the Code of Civil Procedure. See new Code of Civil Procedure Section 1249a.

SEC. 18. Section 38091 of the Government Code is amended to read:

38091. Improvements placed upon the property after ~~publication of the notice of passage of the ordinance of intention~~ *the service of summons* shall not be included in the assessment of compensation or damages.

Comment. This section of the Parks and Playgrounds Act of 1909 (Government Code Sections 38000-38213) was enacted in 1913 (Stats. 1913, Ch. 246, p. 417, § 3). With respect to the construction of this section and related sections, see City of Los Angeles v. Glassell, 203 Cal. 44, 262 Pac. 1084 (1928). The section is amended to conform to Code of Civil Procedure Section 1249.1 which provides that improvements placed upon the property after the service of summons shall not be included in the assessment of compensation of damages.

SEC. 19. Section 4203 of the Streets and Highways Code is amended to read:

4203. ~~For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the issuance of summons, and the actual value at that date shall be the measure of compensation for all property to be actually taken, and also the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed by the provisions of this part. If, however, a motion to set the action for trial is not made within one year after the date of the issuance of the summons in the action, the right to compensation and damages shall be deemed to have accrued at the date of the hearing of the motion to set the action for trial, and the actual value at that date shall be the measure of compensation and the basis of damages.~~

The date of valuation in proceedings under Chapters 7 (commencing with Section 4185) through 10 (commencing with Section 4255) of this part shall be determined in accordance with Section 1249a of the Code of Civil Procedure. In cases in which compensation is ascertained by referees appointed pursuant to this chapter, the date of the filing of their report with the court shall be deemed the date of trial for the purpose of determining the date of valuation.

Comment. This section of the Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443) derives from an enactment of 1909 (Stats. 1909, Ch. 384, p. 1038, § 5). The section is intended to accord, as near as may be, with provisions of Code of Civil Procedure Section 1249a that specify the date of valuation for condemnation proceedings generally. See City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 Pac. 298 (1929); City of Los Angeles v. Morris, 74 Cal. App. 473, 241 Pac. 409 (1925). The section is amended to accord with Code of Civil Procedure Section 1249a.

SEC. 20. Section 4204 of the Streets and Highways Code is amended to read:

4204. No improvements placed upon the property ~~proposed to be taken,~~ subsequent to the ~~date at which the right to compensation and damages has accrued,~~ *service of summons* shall be included in the assessment of compensation or damages.

Comment. This section of the Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443) is amended to conform to Code of Civil Procedure Section 1249.1 which provides that improvements placed upon the property after the service of summons shall not be included in the assessment of compensation or damages.

SEC. 21. This act shall become operative only if Senate Constitutional Amendment No. ___ of the 1967 Regular Session of the Legislature is approved by the vote of the electors, and in such case this act shall become operative on January 1, 1969.

Comment. There is some doubt whether the right to take possession of property prior to judgment can be extended to condemnors and for purposes not listed in Section 14, Article I, of the California Constitution. See Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902). Compare Spring Valley Water Works v. Drinkhouse, 95 Cal. 220, 30 Pac. 218 (1892); Heilbron v. Superior Court, 151 Cal. 271, 90 Pac. 706 (1907). The Constitutional Amendment referred to in this section would make it clear that the Legislature may by statute extend this right to additional entities and for additional purposes. The recommended legislation would become effective only if the Constitutional Amendment is adopted by the voters.

Senate Constitutional Amendment No. ___—A resolution to propose to the people of the State of California an amendment to the Constitution of the state, by amending Section 14 of Article I thereof, relating to eminent domain.

Resolved by the Senate, the Assembly concurring, That the Legislature of the State of California at its 1967 Regular Session commencing on the 2nd day of January, 1967, two-thirds of the members elected to each of the two houses of the Legislature voting therefor, hereby proposes to the people of the State of California that the Constitution of the state be amended by amending Section 14 of Article I thereof, to read:

SEC. 14. *(a) Except as provided in subdivisions (b), (c), and (d) of this section:*

(1) Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner; ~~and no right-of-way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law, provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of com-~~

~~petent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings.~~

~~The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier.~~

(2) Subject to the provisions of Section 23a of Article XII, just compensation shall be assessed in a court of record as in other civil cases and, unless a jury is waived, shall be determined by a jury.

(b) Subject to subdivision (d) of this section, in a proceeding in eminent domain brought by the state or a county, city, district, or other public entity to acquire any property, whether a fee or other interest be sought, the plaintiff may take possession of the property or property interest following commencement of the proceeding and prior to the final judgment if the property or property interest being acquired is (1) any right-of-way, or (2) lands to be used for reservoir purposes.

(c) Subject to subdivision (d) of this section, with respect to any cases not covered by subdivision (b) of this section, the Legislature may specify and classify the entities or persons by which, the public purposes for which, and the manner in and the time at which, possession of any property or property interest may be taken following commencement of the eminent domain proceeding and prior to final judgment.

(d) Before possession of any property or property interest is taken in an eminent domain proceeding, just compensation shall be made to the owner or the plaintiff shall deposit such amount of money as the court determines to be the probable just compensation to be made for the property or property interest and any damage incident to the taking. The money so deposited shall be available immediately to the person or persons the court determines to be entitled thereto and may be withdrawn in accordance with such procedure and upon such security as the Legislature may prescribe.

Comment. The effect of this amendment is as follows:

Subdivision (a). The amendment makes no change in existing constitutional law respecting "public use," "just compensation,""inverse condemnation proceedings," "date of valuation," or the general requirement that property not be taken or damaged until compensation is made to or paid into court for the owner. See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959), and City and County of San Francisco v. Ross, 44 Cal.2d 52, 279 P.2d 529 (1955)(public use); Metropolitan Water Dist. v. Adams, 16 Cal.2d 676, 107 P.2d 618 (1940), and Sacramento etc. R.R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979 (1909)(just compensation); Bauer v. Ventura County, 45 Cal.2d 276, 289 P.2d 1 (1955), and Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505 (1942)(inverse condemnation proceedings); Heilbron v. Superior Court, 151 Cal. 271, 90 Pac. 706 (1907), and McCauley v. Weller, 12 Cal. 500 (1859)(pre-payment or deposit). Section 14 has been held not to prescribe the date of valuation for property taken by eminent domain proceedings, nor to restrict the Legislature in fixing such date at any point of the proceedings. See City of Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526 (1927); Tehama County v. Brian, 68 Cal. 57, 8 Pac. 673 (1885); City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 Pac. 298 (1929). This is so even in those cases in which the condemnor takes possession of the property prior to judgment. See City of Los Angeles v. Tower, 90 Cal. App.2d 869, 204 P.2d 395 (1949). This amendment makes no change in these principles.

The second paragraph of this subdivision states the established judicial construction of the deleted language requiring that "compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." See City of Los Angeles

v. Zeller, 176 Cal. 194, 167 Pac. 849 (1917). With respect to the requirement that the power of eminent domain be exercised through judicial proceedings, see Wilcox v. Engebretsen, 160 Cal. 288, 116 Pac. 750 (1911); and Weber v. Board of Suprs. Santa Clara Co., 59 Cal. 265 (1881). Regarding the assurance of trial by jury in condemnation and inverse condemnation proceedings, see Vallejo etc. R.R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238 (1915), and Highland Realty Co. v. San Rafael, 46 Cal.2d 669, 298 P.2d 15 (1956).

The purpose of making the second paragraph "subject to the provisions of Section 23a of Article XII" is to prevent any implication that Section 23a is superseded by the readoption of this section. Section 23a empowers the Legislature to authorize the Public Utilities Commission to determine the compensation to be made in takings of public utility property. Section 23a is limited in application to property that is already devoted to a public use. See S.H. Chase Lumber Co. v. R.R. Commission, 212 Cal. 691, 300 Pac. 12 (1931). The procedure for determining just compensation adopted pursuant to Section 23a (see Public Utilities Code Sections 1401-1421) is not exclusive and is an alternative to proceedings under Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure. Further, in cases in which compensation is determined by the Public Utilities Commission, the procedures of the Code of Civil Procedure other than those for assessing compensation are available to the parties. See Citizen's Utilities Co. v. Superior Court, 59 Cal.2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963). This amendment makes no change in these rules.

Subdivision (b). This subdivision restates the existing authorization for the taking of immediate possession in right-of-way and reservoir cases, except that the subdivision has been extended to include all governmental entities and agencies. The former language included most, but not all, public entities, and created serious questions whether or not particular entities were included. See Central Contra Costa etc. Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950).

Subdivision (c). This subdivision is new, and clarifies the power of the Legislature to determine which public entities should have the right to immediate possession and the public purposes for which the right may be exercised. Essentially, the subdivision removes any doubt whether the Legislature may authorize possession prior to judgment in cases other than those provided for by the amendments of 1918 (rights-of-way) and 1934 (reservoirs). See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, at B-1 (1961).

Subdivision (d). This subdivision makes explicit the requirement that, before possession or use of property is taken, there be a deposit of the probable amount of compensation that eventually will be awarded in the proceeding. The subdivision also adds a requirement, not heretofore imposed by this section, that the funds be available to the property owner, rather than merely be deposited as security. The subdivision thus accords with decisions of the California Supreme Court holding that, before property is taken, compensation must be paid into court for the owner. See Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902). The subdivision contemplates that the amount to be deposited be determined by the court, rather than by jury, and upon ex parte or other procedure provided by legislation.

Language deleted. In deleting the second portion of the first sentence of this section, this amendment eliminates language prohibiting "appropriation" of property in certain cases, "until full compensation therefor be first made in money or ascertained and paid into court for the owner." This language adds nothing to the meaning of subdivision (a)(1). See Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902). A more explicit requirement is imposed by new subdivision (d).

Also deleted is the language requiring that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed." This requirement respecting the offsetting benefits has been held inoperative because of its conflict with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. See Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083 (1902); People v. McReynolds, 31 Cal. App.2d 219, 87 P.2d 734 (1939). In deleting the language, this amendment clarifies the power of the Legislature to deal with the offsetting of benefits in eminent domain proceedings. The subject is now governed by Section 1248 of the Code of Civil Procedure.

The proviso to the first sentence of this section, and the next following sentence, dealing with "immediate possession" in right of way and reservoir cases are superseded by subdivisions (b), (c), and (d).

In deleting the last sentence of this section, this amendment eliminates the provision that, in effect, property may be taken by eminent domain for certain logging or lumbering railroads, and that such taking constitutes the taker a common carrier. This provision, added in 1911, has never been construed or applied by the California appellate courts. Takings for the purposes mentioned in the sentence are authorized by Section 1238 of the Code of Civil Procedure and Section 1001 of the Civil Code. The portion

of the sentence making the taker a common carrier is merely an instance of a broader proposition inherent in the nature of the power of eminent domain. See Traber v. Railroad Commission, 183 Cal. 304, 191 Pac. 366 (1920); Western Canal Co. v. Railroad Commission, 216 Cal. 639, 15 P.2d 853 (1932). Deletion of the sentence is intended to clarify, rather than change, existing law.