

#36

8/30/67

Memorandum 67-50

Subject: Study 36 - Condemnation Law and Procedure (Recovery of
Condemnee's Expenses on Abandonment)

The attached recommendation is presented for your approval prior to printing. The recommendation includes various revisions suggested by the Commissioners who reviewed it before it was set in type. This recommendation will be included as an appendix to our Annual Report for 1967.

The substance of this recommendation was included in the tentative recommendation on possession prior to final judgment and related problems which we distributed for comment to interested persons. The substance of the recommendation was approved when those comments were considered. Nevertheless, we have distributed the attached recommendation for comment and we hope to have those comments for your consideration at the September meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

APPENDIX XI

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

**Recovery of Condemnee's Expenses on
Abandonment of an Eminent
Domain Proceeding**

September 1967

CALIFORNIA LAW REVISION Co. MISSION
School of Law
Stanford University
Stanford, California 94305

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NOTE

This 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.

[To be printed on Commission letterhead as of
September 22, 1967]

September 22, 1967

TO HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study condemnation law and procedure.

The Commission submits herewith its recommendation on one aspect of this subject that appears to be in need of immediate attention--recovery of the condemnee's expenses on abandonment of an eminent domain proceeding. In 1961, the Legislature enacted legislation recommended by the Commission that provided an equitable rule for determining when an eminent domain proceeding may or may not be abandoned, but that recommendation and legislation were not directed to the subject of this recommendation. 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 at B-1 (1961) and Cal. Stats. 1961, Ch. 1613, p. 3442.

For the research study upon which this recommendation is based, see Taylor, *Possession Prior to Final Judgment in California Condemnation Procedure*, 7 SANTA CLARA LAWYER 37, 98-101 (1966), reprinted in the Commission's *Tentative Recommendation and a Study Relating to Possession Prior to Final Judgment and Related Problems* (September 1967).

Respectfully submitted,

RICHARD H. KEATINGE
Chairman

RECOMMENDATION
OF THE
CALIFORNIA LAW REVISION COMMISSION

relating to

**Recovery of Condemnee's Expenses on Abandonment
of an Eminent Domain Proceeding**

Section 1255a of the Code of Civil Procedure permits the condemnor to abandon an eminent domain proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment. The section provides, however, that upon motion of the condemnee the court may set aside such an 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."

Section 1255a also includes a provision that permits the condemnee to recover certain expenses upon abandonment:

(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 shall include all necessary expenses incurred in preparing for trial and during trial and reasonable attorney fees. 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 plaintiff, defendants, and each of them, may file a cost bill 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 40 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.

The general purpose of this provision is to reimburse the condemnee for the expenses he necessarily incurs by reason of the condemnor's failure to carry the eminent domain proceeding through to its conclusion.¹ It has been held that reasonable attorney's fees may be re-

¹ See *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); *County of Kern v. Galatas*, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962). For a summary of California decisions, see Annot., 92 A.L.R. 2d 355, 377 (1963).

If the proceeding is carried through to its conclusion, attorney, appraisal, and expert witness fees are not recoverable. *City of Los Angeles v. Vickers*, 81 Cal. App. 737, 254 Pac. 687 (1927); *Pacific Gas & Elec. Co. v. Chubb*, 24 Cal. App. 265, 141 Pac. 36 (1914). See also *Frustuck v. City of Fairfax*, 230 Cal. App.2d 412, 41 Cal. Rptr. 56 (1964).

covered regardless of when the proceeding is dismissed but that no other expense incurred in preparing for trial may be recovered if the proceeding is dismissed 40 days or more prior to the day set for the pretrial conference or, if no pretrial conference is set, the day set for the trial.²

² *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 10 Cal. Rptr. 479, 369 P.2d 7 (1962).

Section 1255a itself states the explicit policy that abandonment should not be permitted if the condemnee "cannot be restored to substantially the same position as if the proceeding had not been commenced." Yet, the 40-day restriction on recovery of fees for the services of appraisers and other experts and other expenses of preparing for trial may preclude the condemnee from recovering a substantial portion of the expenses he necessarily incurred as a result of the proceeding. The 40-day restriction upon "expenses incurred in preparing for trial" was included in Section 1255a when that section was added in 1911 to assure the condemnee that his costs, fees, and expenses would be defrayed upon abandonment of the proceeding.³ The apparent purpose

³ See Cal. Stats. 1911, Ch. 203, § 1, p. 377.

of imposing the restriction was to prevent reconpmment of expenses needlessly incurred in view of the early dismissal, but it is far from clear that the restriction was intended to apply to fees reasonably incurred for the services of appraisers and other experts.⁴ In any

⁴ For the probable source of Section 1255a and a statement of the law as it existed before enactment of that section, see *Southern Pac. R.R. v. Reis Estate Co.*, 15 Cal. App. 216, 114 Pac. 808 (1911).

event, the courts in applying Section 1255a have imposed a requirement that, to be recoverable, any fees, disbursements, or expenses must be incurred reasonably.⁵ To effectuate the salutary policy of restoring

⁵ See *California Interstate Tel. Co. v. Prescott*, 228 Cal. App.2d 408, 39 Cal. Rptr. 472 (1964); *Decoto School Dist. v. M. & S. Title Co.*, 225 Cal. App.2d 310, 37 Cal. Rptr. 225 (1964).

the condemnee "to substantially the same position as if the proceeding had not been commenced," the Commission recommends that the 40-day limitation be deleted. That arbitrary limitation should be replaced by a general requirement that, to be recoverable, any expense must be reasonably and necessarily incurred.

The Commission further recommends that Section 1255a be amended to codify what appears to be the rule under existing law that the condemnee's recoverable costs and disbursements upon abandonment of the proceeding include reasonable attorney's fees, appraisal fees, and fees for the services of other experts where such fees were actually incurred and were reasonably necessary to protect the defendant's interests in the proceeding, *whether such fees were incurred for services rendered before or after the proceeding was commenced.*⁶ This rule

⁶ *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962) (attorney's fee); *Port San Luis Harbor Dist. v. Port San Luis Transp. Co.*, 213 Cal. App.2d 659, 29 Cal. Rptr. 136 (1963) (engineers' fees).

recognizes that the attorney may render substantial services in protecting his client's interests in the proceeding even before the complaint is filed. In the leading decision, *La Mesa-Spring Valley School Dist. v. Otsuka*,⁷ the California Supreme Court reasoned as follows:

⁷ 57 Cal.2d 309, 317-318, 19 Cal. Rptr. 479, 484, 369 P.2d 7, 12-13 (1962).

Eminent domain, so far as the defendant is concerned, is not based upon any activity on his part. There is no voluntary element in such an action. When the public agency announces its intention to take his property, it is telling the owner that he must sell his property whether he wants to or not . . . Faced with such a threat, any reasonably prudent property owner would retain an attorney to protect his interests, even before the filing of suit. The careful lawyer, to adequately represent his client in this stage of negotiations, will perform many services which will be helpful and necessary if a complaint is filed and the case goes to trial. The condemnation defense lawyer, for both trial and pretrial negotiations, must acquire a working knowledge not only of the legal principles involved, but also of local real estate practices, appraisal

theories and engineering techniques . . . Almost necessarily, whether suit has been filed or not, he must inspect the property, prepare demonstrative evidence, look up the applicable law and engage in conferences with appraisers and lay witnesses in an effort to ascertain land use and value . . . If these services are rendered after the filing of suit they clearly are recoverable . . . Of course, if suit is never filed the land owner would have to pay the fees of his attorney, because it is only in the event suit is filed that attorney fees are recoverable. If suit is not filed the landowner must pay the price of his diligence in protecting his property. But if suit is filed, there is no sound reason why the trial court should exclude these prior services in determining a reasonable fee merely because performed before the action is commenced. The statute contemplates reimbursement for the attorney's fees reasonably incurred in preparing for trial. It would be ridiculous to require the attorney to repeat formally all of this work after the complaint is filed in order to protect his client's rights under section 1255a in the event of an abandonment.

For these reasons, in the event of abandonment, section 1255a, properly interpreted, permits attorney's fees to be allowed for services rendered in connection with the proposed taking whether those services are rendered before or after the filing of the action, provided only that they are the type of services that are reasonably necessary to protect the defendant's interests at the expected trial. The plaintiff should not escape liability because of the defendant's foresight and the fortuitous dates upon which the suit and the notice of abandonment happened to be filed. Plaintiff could have avoided assessment of costs by not filing the suit. Having done so, without prosecuting the suit to its conclusion, plaintiff has brought itself within the provisions of section 1255a and must now pay the penalty imposed by that section. [Citations omitted.]

Although the court's holding is limited to attorney's fees, its reasoning applies with equal force to the fees of appraisers and other experts necessarily incurred for the protection of the condemnee's interests.⁸

⁸ Indeed, as the Court points out, the attorney for the property owner cannot effectively handle settlement negotiations without the services of such experts. The rule applied by the Court to attorney's fees has been applied to fees for the services of other experts. See *Port San Luis Harbor Dist. v. Port San Luis Transp. Co.*, 213 Cal. App.2d 688, 29 Cal. Rptr. 136 (1963) (engineers' fees).

Considerations of fairness require not only that the condemnee be reimbursed for the fees of his attorney in conferring with appraisers and other experts but also that he be reimbursed for the fees of the experts with whom his attorney confers. The Commission believes, further, that the condemnee and his attorney should be encouraged, rather than discouraged, in obtaining information from appraisers and other experts that will enable the attorney to negotiate a settlement of the matter before a complaint is filed. The recommended revision of Code of Civil Procedure Section 1255a would accomplish this objective.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to amend Section 1255a of the Code of Civil Procedure, relating to eminent domain.

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

SECTION 1. 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 proceedings.

(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 recoverable costs and disbursements, ~~which~~. Recoverable costs and disbursements shall include (1) all necessary expenses reasonably and necessarily incurred in preparing for trial and during trial, and (2) reasonable attorney fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendant's interests in the proceeding, whether such fees were incurred for services rendered before or after the filing of the complaint. 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 40 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 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 sought to be condemned in compliance with an order of possession, whichever is the earlier.

Comment. Subdivision (c) of Section 1255a requires that the plaintiff reimburse the defendant for all expenses reasonably and necessarily incurred in preparing for trial and during trial if the plaintiff fails to carry an eminent domain proceeding through to its conclusion.

Under prior law, reasonable attorney's fees were recoverable regardless of when the proceeding was dismissed, but other expenses incurred in preparing for trial were subject to a limitation that precluded their recovery if the action was dismissed 40 days or more prior to pretrial or trial. *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962). This limitation has been deleted and such expenses may now be recovered without regard to the date that the proceeding is dismissed.

Subdivision (c) provides for the recovery of attorney's fees, appraisal fees, and fees for services of other experts if the fees are reasonable in amount and are reasonably incurred to protect the defendant's interests in the proceeding. If they are so incurred, they may be recovered even though the services are rendered before the filing of the complaint in the eminent domain proceeding. In this respect, the subdivision continues prior law. See *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962) (attorney's fees); *Port San Luis Harbor Dist. v. Port San Luis Transp. Co.*, 213 Cal. App.2d 689, 29 Cal. Rptr. 136 (1963) (engineers' fees). See also *Decoto School Dist. v. M. & S. Tile Co.*, 225 Cal. App.2d 310, 37 Cal. Rptr. 225 (1964) (attorney's fees allowed under Section 1255a for services in connection with an appeal).

Subdivision (c), of course, permits recovery of fees and expenses only if a complaint is filed and the proceeding is later dismissed. The subdivision has no application if the efforts or resolution of the plaintiff to acquire the property do not culminate in the filing of a complaint.