

# 36.95

4/22/70

Memorandum 70-46

Subject: Study 36.95 - Condemnation (Constitutional Revision)

The Law Revision Commission has been following the work of the Constitution Revision Commission on the revision of the eminent domain provisions of Article I of the California Constitution.

Attached (pink) is a report of the Article I Committee of the Constitution Revision Commission. This report contains the Committee's recommendation to the Constitution Revision Commission for revision of Sections 14 and 14-1/2 of the Constitution.

The staff has reviewed the Committee's proposals as set out in the attached report and they are consistent with the conclusions and recommendations of the Law Revision Commission. The technical defect that previously existed in Section 14 has, in the staff's opinion, been corrected.

The staff still believes that the last paragraph on page 4 of the report contains a statement that is not correct; we do not believe that the Legislature would be precluded from providing that, as a condition to the exercise of the right of eminent domain, the condemnor must follow a procedure that does not provide the condemnor with a jury trial. The staff has previously indicated its concern to the Article I Committee concerning the statement relating to the condemnor's "right" to a jury trial. Accordingly, we do not recommend that any further suggestions be made to the Constitution Revision Commission concerning its recommendation on Sections 14 and 14-1/2.

Respectfully submitted,

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Executive Secretary

ARTICLE I (DECLARATION OF RIGHTS)

REVISED REPORT I

PROPOSED REVISION OF SECTIONS 14 and 14 1/2

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### Introduction

Article I contains significant guarantees of personal freedom. For purposes of analysis this Article was divided by the Article I Committee into four topics - Eminent Domain, Government and Laws, Civil Rights, and Criminal Procedure. This initial report contains Committee recommendations for the first topic.

Members of the Committee were Commissioners Babich, Babbage, Busterud, Gruhn, Jackson, McClure, Nakamura, Nissen, Patsey and Rood. Commissioner Ehersen was Chairman.

## Section 14

### Committee Proposal

Private property may not be taken or damaged for public use without just compensation, ascertained by a jury unless waived, having first been paid to, or paid into court for, the owner. The Legislature may provide for possession of the property by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

### Existing Constitution

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.

## Committee Proposal

## Existing Constitution

proceedings according to law in a court of competent 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.

## Comment

Eminent domain is the right of the people or government to take private property for public use. Code Civ. Proc. Section 1237. It is an inherent power of sovereignty freely exercised by the Legislature subject only to constitutional limitation.

Existing Section 14 contains three basic provisions. The first requires that "just compensation" be paid "first" to the owner of property before it may be taken or damaged for public use. The second contains an important exception to the "pay first" rule by permitting specified governmental agencies to take possession of land used for rights of way and reservoirs before payment is made. Finally, Section 14 declares that certain logging railroads constitute a "public use."

#### Payment of Just Compensation

The requirement of payment of just compensation is an important limitation on the power of eminent domain. The Article I Committee recommends that it be retained in the Constitution.

The Fifth Amendment to the United States Constitution provides ". . . nor shall private property be taken for public use, without just compensation." This provision is applicable to the state through the due process clause of the Fourteenth Amendment. Chicago, B & O R. R. v. Chicago, 166 U.S. 226 (1896). The federal guarantee is not identical to that provided by Section 14 because judicial standards of "just compensation" differ. Further, Section 14 specifically provides for payment for "damage" to property as well as an outright taking.

Section 14 also declares a right to a jury trial on the amount of damages. This right extends to the State as well as the private property owner. The Committee recommends no change in this procedure.

### Preliminary Possession

A significant change recommended by the Committee is a general provision for "preliminary possession", i.e., actual possession of the land by the condemning agency before the amount of the award is determined by a jury. The current exceptions in favor of specified agencies for certain purposes were created through a series of amendments. The ballot arguments favoring these amendments -- there were none in opposition -- stressed the fact that a few private property owners could impair the completion of high-priority public works through prolonged litigation and appeals on the question of damages. Since these owners would ultimately receive payment, the preliminary possession technique was adopted in recognition of an overriding public concern.

The Committee proposal does require payment into court of the "probable amount" of just compensation as a prerequisite to preliminary possession and continues to require that the money "be available immediately to the owner." This device, which is currently used in preliminary possession cases, assures the property owner funds to relocate.

Under the Committee proposal the Legislature is free to specify which agencies are entitled to take preliminary possession and for what purposes. There have been well over thirty attempts to add existing agencies and purposes by amendment which demonstrate the desirability of legislative flexibility in this area.

The final sentence declares that certain logging railroads are a public use and are common carriers. This declaration thus lends the power of eminent domain to these railroads. Normally the

Legislature is competent to declare public uses and does so frequently by statute. The railway provision in Section 14 was enacted for historic rather than legal reasons. Some small logging companies were unable to transport their timber across adjacent land held by large lumber companies. To break this deadlock a declaration of public use was written into the Constitution. The Article I Committee feels that this is not a necessary or suitable constitutional provision and accordingly recommends that it be deleted or placed in statute.



Section 14 1/2

Committee Proposal

DELETION

Existing Constitution

The State, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvements; provided that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from said closest boundary and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works.

The Legislature may, by statute, prescribe procedure.

### Comment

Section 14 1/2 was adopted on November 6, 1928 by legislatively proposed amendment. It provides in certain cases for "excess condemnation." Such condemnation occurs when more property is taken than is physically needed for the public work involved. A typical example would be a median strip around a public building or highway to provide for aesthetic isolation of the work from its surroundings.

When this provision was enacted, courts construed "public work" quite narrowly and consistently refused to permit a taking of property not physically required. Section 14 1/2 was enacted to permit taking of excess land up to 150 feet from specified projects, or up to 200 feet in case of lots lying only partially within the 150 foot zone.

Since the adoption of this Section, courts have become much more liberal in defining the permissible scope of "public use."

The utility of Section 14 1/2 has been further reduced by a decision of the California Supreme Court which refused to construe Section 14 1/2 as a limitation on the power of the Legislature to authorize excess condemnation. The case of People v. Superior Court of Merced, 65 Cal. Rptr. 342, involved the condemnation of highway rights of way by the Department of Public Works. The acquisition by the Department of .65 acres actually needed for the highway resulted in a landlocked 54 acre tract. The Department was permitted to take the entire 54 acres because the cost of compensating the owner for the loss of access to this plot would be greater than the cost to the State of purchasing it. The owners of the property argued that Section 14 1/2 would prevent the State from condemning any land beyond a 150 strip on either side of the highway. The Supreme Court held that Section 14 1/2 did not impose any such inhibition and stated

Section 14 1/2 was adopted in 1928 at a time when the validity of any excess condemnation was doubtful. It was not adopted to limit the power of eminent domain but to authorize condemnations that its sponsors believed would not be permitted under the current rules of constitutional law. (1929 Ballot Pamphlet, Argument for Proposed Senate Constitutional Amendment No. 16). Although it includes limitations on the condemnations it authorizes and to that extent limits the state's inherent power of eminent domain, it in no way limits those condemnations which it does not authorize. Accordingly, since it only authorizes condemnations for protective purposes it does not restrict condemnations for other purposes.

Because Section 14 1/2 does not limit the power of the Legislature in any significant manner, and because courts have expanded the concept of "public use", the Committee recommends deletion.