

4/6/71

Memorandum 71-33

Subject: Study 36.300 - Condemnation Law and Procedure (Abandonment of Condemnation Proceeding)

Summary. This memorandum presents for Commission consideration the existing provision on abandonment of a condemnation proceeding. This section should be reviewed to determine whether any changes are needed before it is incorporated into the comprehensive statute. The section appears to be generally satisfactory, but it has been suggested that the condemnor should not be permitted to abandon after it has taken possession.

Background. Abandonment of eminent domain proceedings is covered by Section 1255a of the Code of Civil Procedure. (See Exhibit I for text of section.) Whether or not possession has been taken, the section permits the condemnor to abandon the proceeding at any time after the filing of the complaint and before expiration of 30 days after final judgment. In other words, the proceeding may be abandoned at any time before payment of the final award is required. However, upon motion of the condemnee, the court may set aside 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." (See Section 1255a(b).)

This express restriction upon abandonment was added to Section 1255a in 1961 upon recommendation of the Law Revision Commission.

From the condemnor's point of view, abandonment after possession is taken may also be precluded, as a practical matter, after the required deposit has been withdrawn by the property owner. Although both Code of Civil Procedure Sections 1243.7 and 1254 provide for recovery of an excessive withdrawal if the excess results from over-valuation of the property or payment to an improper person, no provision is made for recoupment in the case of abandonment.

Suggested change. Assemblyman Mobley has forwarded the attached letter from Richard L. Riemer (Exhibit II) who suggests that abandonment not be permitted if the condemnor has taken possession of the property. This problem was discussed in a 1967 background study published by the Law Revision Commission:

In federal practice and in a growing majority of states, the proceeding may not be abandoned without consent of the condemnee after possession is taken.²⁰⁹ Some California practitioners consider elimination of the privilege of abandonment important even though the equitable principle enacted in 1961 would appear to prevent abandonment in virtually all cases in which possession has been taken.²¹⁰ If a homeowner has moved, a business has been relocated, a deposit has been withdrawn and expended, or property cannot be restored to its original condition, the statutory restriction should apply.

Absolute prohibition of abandonment after an order for possession is obtained usually would force the condemning agency to devote the property to another use, dispose of it on the market, or compromise with the condemnee. While these consequences can be justified theoretically, they would not appear necessary to adequate protection of property owners.

California experience has indicated that there have been and will be very few abandonments following possession. As an official of the Department of Public Works has written:

There are not many examples of total abandonments after entry into possession by any of the condemnors who presently have the right to immediate possession, due to the fact that such possession is taken for the purpose of immediate construction of expensive public improvements, which projects would be highly uneconomical to abandon. . . .

[M]ost "abandonments" are not total abandonments but are slight

²⁰⁹ See Wasserman, *Procedure in Eminent Domain*, 11 MERCER L. REV. 245, 277 (1960). See also 6 NICHOLS, EMINENT DOMAIN §§ 26.42[1], 27.4 (3d rev. ed. 1966).

²¹⁰ See Riemer, *Abandonment of an Eminent Domain Action: The Buyer Disappears*, 9 ORANGE COUNTY BAR BULL. 85 (1966).

changes in right of way alignments such as where by mistake the taking line has gone through a small portion of an existing building where the alignment can be drawn back to protect the improvements and minimize damages. In this situation a statute . . . [precluding abandonment] would permit the condemnee to force the state into compensating him to obtain his consent to an abandonment. Another example of the same type of situation is an amendment to take a lesser interest, such as a reservation of mineral and oil interests to the property owner. . . .²¹¹

There are also reported instances in which proceedings have had to be abandoned because of the taking or proposed taking of the property by another condemnor having a superior power of eminent domain.²¹² To allow for these highly technical cases of abandonment, the privilege should not be eliminated altogether even in connection with the enactment of broad provisions for possession prior to final judgment.

²¹¹ Letter From Robert E. Reed, California Department of Public Works, to California Law Revision Commission, Sept. 1, 1960.

²¹² See, e.g., *Torrance Unified School Dist. v. Alwag*, 145 Cal. App. 2d 596, 302 P.2d 881 (1956).

The Commission might adopt the policy that a condemnation proceeding may not be abandoned without consent of the condemnee after possession is taken. If this policy is adopted, special rules might be included to meet the problems identified in the Commission's background study. For example, provisions might be included that the prohibition against abandonment without the condemnee's consent does not prevent the condemnor from (1) a partial abandonment that does not significantly reduce the amount of property taken or merely takes a lesser interest than originally sought to be taken or (2) an abandonment because of the taking or proposed taking of the property by another condemnor having a superior power of eminent domain. The drafting of appropriate language to provide such exceptions will not be an easy task.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

CODE OF CIVIL PROCEDURE SECTION 1255a

§ 1255a. Abandonment

(a) Written notice; implied abandonment.

(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. * * * Failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceeding.

(b) Setting aside abandonment; motion.

(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) Judgment dismissing proceeding; costs and disbursements.

(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 * * *. Recoverable costs and disbursements include (1) all expenses reasonably and necessarily incurred in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action 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 preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action, whether such fees were incurred for services rendered before or after the filing of the complaint. In case of a partial abandonment, recoverable costs and disbursements shall include only those recoverable costs and disbursements, or portions thereof, which would not have been incurred had the property or property interest sought to be taken after the partial abandonment been the property or property interest originally sought to be taken. Recoverable costs and disbursements, including expenses and fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions. Upon judgment of dismissal on motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of such judgment.

(d) Delivery of possession to parties entitled to possession; court order; damages to property.

(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.

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EXHIBIT II

RIEMER & ANDERSON

ATTORNEYS AT LAW

SUITE 204 ORLEANS BUILDING

1212 NORTH BROADWAY

SANTA ANA, CALIFORNIA 92701

December 23, 1970

RICHARD L. RIEMER
HUGO WILLIAM ANDERSON, JR.

Mr. Ernest N. Mobley
600 W. Shaw, Suite 210
Fresno, California 93704

Dear Ernie:

Preliminarily, I would offer my congratulations on your reelection; I am only sorry that you, unfortunately, are no longer in the majority party in the Assembly, but let us hope that perhaps that condition will change as a result of the next few special elections. You might be interested to know also that I was lucky enough to have the General pin Eagles on my shoulder about two weeks ago, and thus it would seem that my course at Fort Leavenworth has already begun to pay off.

The reason for this letter is to forward to you a proposed item of legislation as per our discussion last March. The Bill that I would propose to have introduced deals, naturally, in the field of eminent domain, and specifically deals with the power of the condemning agency to abandon a condemnation action once it is initiated. As the law presently reads the condemnor can file a Notice of Abandonment at any time "after the filing of the complaint and before the expiration of 30 days after final judgment". Under normal circumstances this language is fine and I would have no quarrel with the same; however, there are instances where the proposed language is, in my opinion, quite inequitable. In the course of my fifteen years of experience in the field of eminent domain, I have seen a number of instances where a condemning agency has taken immediate possession of a parcel of property and has proceeded to either demolish existing improvements, or to construct new improvements on the parcel, only to find at a later date that they do not desire to proceed with the acquisition. An abandonment at that time causes innumerable

Mr. Ernest N. Mobley
December 23, 1970

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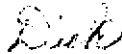
problems.

I would suggest that the rule utilized by the Federal Government is more logical; that is, under the Federal statutes where immediate possession is sought, it is done by and through the means of a "Declaration of Taking" which immediately transfers title. Our Constitution is not constructed so as to permit transfer of title at this time, however the same result can be accomplished by eliminating the right of abandonment in those cases where the condemning agency has taken possession.

I would hope that you might consider the enclosed proposal, and, if you deem it worthy, you might introduce the same at the next session of the legislature. If I can be of further assistance, please do not hesitate to contact me.

Finally, I would wish you and yours the very merriest of Christmases and the happiest of New Years.

Sincerely,



RICHARD L. RIEMER

RLR/mf

Enc.