#36.80 1/5/72

Memorandum 72-5

Subject: Study 36.80 - Condemnation (Procedure--Contesting Right to Take)

Summary

This memorandum presents for the Commission's review miscellaneous procedural provisions relating to the right to take. These provisions may be grouped generally as follows:

Contesting right to take (Exhibit I)

Direct attack on judgment (Exhibit II)

The substance of these provisions is outlined below.

Contesting Right to Take (Exhibit I)

The basic scheme the Commission has previously approved for contesting the right to take is one in which objections are raised at one time and resolved prior to the valuation portion of the proceeding. The draft provisions attached as Exhibit I permit any person who has answered to raise objections. The objections must be raised within a relatively brief time, if at all. If not raised, they are deemed waived unless the court for good cause later allows them. The time to object is basically the time allowed for filing the answer. This time may be extended by stipulation of the parties or, if they are unable to agree, by order of the court upon good cause.

The "objection" is visualized as a pleading much like the answer in civil actions, raising special defenses of lack of right to take. It may be included in the answer or filed and served separately. The defenses it raises must be

specifically alleged and supporting facts stated. If this is not done, or if it is done in an unclear manner, the plaintiff may demur to the objections. The defendant has the opportunity to amend his objections so that they are not demurrable or to make other changes, just as answers in civil actions generally may be amended.

Either party may set the objections for hearing, but the proceeding may not move forward to valuation problems until the objections are disposed of. At hearing, the burden of proof is on the plaintiff (see below). All the normal rules of civil procedure relating to the gathering and production of evidence are applicable in such a hearing.

The court then determines whether there is a right to take the property. If it finds a right to take all the property, it so orders, and the proceeding continues. The issue may in an appropriate case be reviewed upon writ and is appealable following judgment. If the court finds a right to take only some of the property, it so orders and dismisses the proceeding as to the rest. Recoverable costs and disbursements are available to the defendant upon dismissal for lack of right to take. The order of dismissal may be appealed while the proceeding as to the rest continues. And, if the court finds no right to take any of the property, it dismisses the proceeding entirely. The order of dismissal is a final judgment and is appealable.

A final judgment may be subsequently attacked under the draft if new evidence comes to light. See discussion below.

Relation Between Answer and Objection

As originally envisioned, the staff's scheme for defending an eminent domain proceeding involved two separate pleadings--an answer, which is equivalent to a notice of the defendant's appearance, and, if the defendant wished to contest the right to take, an objection.

Since that time, as a result of the Commission's decisions, the answer and the objection have evolved to the point where they are quite similar--they both must be filed within the same period of time, they both are subject to demurrer and amendment, and, in fact, objections may be asserted in the answer. The staff wonders whether there is still justification for maintaining these two separate pleadings or whether they might be better merged into one.

Various jurisdictions apply differing approaches to challenging the right to take. Pennsylvania uses preliminary objections without the requirement of an answer. Wisconsin requires an affirmative, separate action by the defendant to challenge the right to take. Perhaps the most interesting approach is the dual scheme of the federal courts: If the defendant has no objection, he files only a notice of appearance; if the defendant has objections, he files an answer that incorporates the notice of appearance information.

Federal Rules Civ. Proc. § 71A

> (e) APPEARANCE OR ANSWER. If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

The major virtue of this dual scheme of appearance-answer appears to be that, if a defendant has objections, those objections are not buried under the label "Notice of Appearance" as a potential trap for the unwary.

The staff feels that the objection and answer should be either completely separate or else merged, but not half-way integration as in the present draft.

Perhaps, in this case, simplicity is a virtue and the objection should be deleted, leaving only the answer to raise defenses to a taking.

Grounds for contesting. The draft contains a listing of all possible grounds for objecting to the right to take. Objections to the complaint on its face, e.g., that it is unclear or that it does not contain all required information, are to be made by demurrer to the complaint.

The grounds for objection listed are all those that may be raised under the Commission's right to take proposal. One major change from present law is that, at present, the only way a defendant may assert lack of public use is by alleging fraud or abuse of discretion in the sense that the plaintiff does not intend to use the property as it declares. The attached draft, recognizing that it is nearly impossible to demonstrate subjective intent, proposes as an alternate ground that there is no reasonable probability that the property will be devoted to the use declared within a reasonable time. The listing is not exclusive, but allows objections on other grounds provided by statute even though they may not appear in the Eminent Domain Law.

Burdens and presumptions. The law governing which parties must plead and prove different facts, and the applicable presumptions governing the proof, is sufficiently confused to warrant statutory clarification in the comprehensive statute.

As nearly as we have been able to discern, the following represents present law governing right to take issues:

(1) The plaintiff in all cases has the burden of pleading public use and necessity.

(2) The defendant may contest the public use of the property--whether or not the plaintiff has the benefit of a conclusive resolution on the issue of

necessity--by pleading specific facts indicating fraud or abuse of discretion in that the plaintiff does not intend to put the property to a public use. The burden of proof is upon the defendant on this issue. The plaintiff is aided by a presumption of regularity of official action if the plaintiff is a public entity.

(3) The defendant may contest the public necessity of the project by a specific denial in his answer if the resolution of the condemnor is not conclusive on the issue of necessity. Where the issue of necessity is for judicial determination, the three aspects of necessity are treated disparately:

(a) Whether the proposed improvement is necessary is not subject to judicial review.

(b) Whether the property is necessary for the project, the burden of proof is on the plaintiff. Where the plaintiff is a public entity, the resolution of necessity (in cases where it is not conclusive) appears to create a presumption that shifts to the defendant the burden of going forward with the evidence. Where the plaintiff is a private person, it must prove the aspect of necessity by a preponderance of the evidence.

(c) Whether the project is located in a manner most compatible with greatest public good and least private injury, the burden of proof is on the defendant. The burden on the defendant is a difficult one since he must establish another location that is clearly better than that selected by the plaintiff.

The reasons for these varying burdens and presumptions are not clear. They appear from the few cases to have developed in a haphazard manner on an ad hoc basis. The staff proposes the following uniform set of burdens and presumptions:

(1) The defendant has the burden to raise any objections to the right to take, or else they are waived.

(2) The plaintiff has the burden of proof on all objections to the right to take. The burden should be one of "clear and convincing proof."

(3) If the plaintiff is a public entity, it will be aided by presumptions. In certain cases, the resolution of necessity will be given conclusive effect; in others, merely rebuttable effect.

The justification for such a system is that a person ought not to have his property taken unless the taker can clearly and convincingly demonstrate to a court that it has the right to do so. As a practical matter, this amounts largely to a restriction on private condemnors only who are not aided by any presumption.

Exhibit III is a letter objecting to placing the burden of proof on the plaintiff with regard to the issue whether the project is located in the manner most compatible with the greatest public good and least private injury. The thrust of the letter is basically that public utilities and other private condemnors should be afforded a presumption of propriety that the property owner must rebut. The letter asserts that a burden on the condemnor may cause its acquisition costs to rise and may result in disparate decisions in neighboring counties.

In addition to these general rules on burdens, there are provisions designed for special cases, e.g., future use, excess, more necessary, compatible. These provisions specify their own burdens and presumptions.

Direct Attack on Judgment (Exhibit II)

In the past, the Commission has expressed concern about the possibility of a fraudulent acquisition by the condemnor. This concern arises from the

fact that the defendant contesting a taking is under a handicap, particularly if the plaintiff is a public entity aided by a presumption of regularity. All the evidence is in the hands of the plaintiff and will often be inaccessible.

One possible way to limit fraud is to give the former owner a repurchase right at original acquisition cost. The Commission rejected this approach as unwieldy and suggested we might do more directly what a repurchase right would have accomplished indirectly.

The attached proposal is to allow direct attack on the judgment where evidence comes to light sometime later, as will happen on occasion, that reveals the plaintiff had no right to take, perhaps because it did not intend to devote the property to the use alleged. Obviously, the problems that will arise under this sort of scheme are as numerous as those that arise under an owner's right to return. However, these problems can be resolved by statute should the Commission determine that the underlying idea of direct attack where no right to take existed is meritorious.

Section 1260.810 (Exhibit II) is a draft of a provision permitting attack on the judgment on the ground of newly discovered evidence. The right to attack the judgment has been limited to the period of seven years after the judgment becomes final. The judgment may be successfully attacked only if evidence is brought to light that was previously not discoverable with reasonable diligence. And the new evidence must be such as to have caused a denial of plaintiff's right to take if produced at the original trial.

Where the court finds for the condemnee on the basis of the subsequent evidence, it may dismiss the original proceeding and order the property reverted to the condemnee who must, in turn, surrender the award. If, however, the property has changed hands or is presently in public use, the subsequent

holders and present users are protected: The condemnee is awarded damages in the amount of the increase in value of the property, plus his recoverable disbursements as if he had defeated the right to take initially.

Respectfully submitted,

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Legal Counsel

Memorandum 72-5

EXHIBIT I

EMINENT DOMAIN LAW § 1260.310

Staff recommendation January 1972

CHAPTER 8. PROCEDURE

Article 4. Contesting Right to Take

§ 1260.310. Time and manner of objection

1260.310. (a) Only a party who has answered may object to the right to take. Such objection may be stated in the answer or by a separate pleading filed with the court and served on the plaintiff in the same manner as pleadings in civil actions generally.

(b) An objection to the right to take shall be made no later than the time within which the party is permitted to answer or such longer time as he is allowed by stipulation of the parties.

(c) An objection to the right to take not made within the time specified in this section is waived unless the court for good cause determines otherwise.

Comment. Section 1260.310 prescribes the time and manner and indicates the proper persons for contesting the right to take. The contents and grounds for objection are specified in Sections 1260.330 and 1260.340. Provisions for hearing the objections are contained in Section 1260.360 et seq.

Subdivision (a). Only a party who has filed an answer may object to the right to take. Such a person may either be named in the complaint and served or may appear in the proceeding by filing an answer if he has or claims an interest in the property sought to be acquired. See Sections .

Objections may be filed with the answer or in a separate pleading. Such a pleading is new to California eminent domain law. It supplants the demurrer and the answer as the means to challenge the taking of property. See People v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968)(answer); People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959)(answer); Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955)(demurrer).

Under the Eminent Domain Law, the objection is the mechanism, whether contained in the answer or a separate pleading, whereby the defendant raises defenses he may have to the complaint other than defects on the face of the complaint which are raised by demurrer. See Section . Whereas both the answer and demurrer are pleadings responsive to the complaint, an objection is not a responsive pleading and may be filed with or apart from the answer, but not in lieu of the answer. Questions as to just compensation for the taking are raised at a later stage in the proceeding. See Section .

An objection to the right to take, if made separately from the answer, must be filed and served within the time limits specified in subdivision (b). The manner of service is provided in Section 465 and Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of this code. See Section 1235.020.

Subdivision (b). Subdivision (b), in conjunction with subdivision (a), provides the basic time limits within which objections to the right to take must be raised.

Objections to the right to take may not be made until the defendant has answered the complaint. If the defendant answers within the 30-day period prescribed for responsive pleadings by Section , he may object concurrently with the answer, either in the answer or in a separate pleading. Or, he may object at some later time within the 30-day period by separate pleading. If, on the other hand, the defendant files a responsive pleading other than an answer within the 30-day period and is then permitted to answer at some time beyond that period, the defendant must object concurrently with the answer.

If the parties have stipulated some longer period either to answer or object, or both, the defendant has until the end of the period to object. He may not do so, of course, before answering.

In an appropriate case, the court may grant the defendant additional time to object after filing an answer. See Sections 1235.020 and 1054.

Subdivision (c). Failure to timely object is a waiver of the objection except where judicial relief is granted upon a showing of good cause. An example of such cause might be where the defendant has been misled by a plaintiff's failure to properly plead its statutory authority.

It should be noted that a judgment may be vacated for lack of right to take pursuant to Section 1260.810.

§ 1260.320. Content of objection

1260.320. An objection to the right to take shall include (1) the ground for each objection and (2) the specific facts upon which each ground is based. The grounds stated may be inconsistent.

Comment. Section 1260.320, which prescribes the content of an objection to the right to take, is generally consistent with prior law. See, e.g., People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959); People v. Olsen, 109 Cal. App. 523, 293 P. 645 (1930); County of San Mateo v. Bartole, 184 Cal. App.2d 422, 433, 7 Cal. Rptr. 569, (1960); People v. Nahabedian, 171 Cal. App.2d 302, 340 P.2d 1053 (1959).

The possible grounds for objection are set out in Sections 1260.330 and 1260.340.

§ 1260.330. Grounds for objection where resolution conclusive

1260.330. Grounds for objection to the right to take, regardless whether the plaintiff has duly adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1240.110) of Chapter 4, include:

(a) The plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint.

(b) The stated purpose is not a public use.

(c) The plaintiff does not intend to devote the property described in the complaint to the stated purpose.

(d) There is no reasonable probability that the plaintiff will devote the described property to the stated purpose within seven years or such longer period as is reasonable.

(e) The described property is not subject to acquisition by the power of eminent domain for the stated purpose.

(f) The described property is sought pursuant to Section 1240.330, 1240.420, 1240.510, or 1240.610, but the acquisition does not satisfy the requirements of those provisions.

(g) Any other ground provided by statute.

Comment. Section 1260.330 prescribes the grounds for objection to the right to take that may be raised in any eminent domain proceeding regardless whether the plaintiff has adopted a resolution of necessity that is given conclusive effect on other issues. See Section 1260.340 for a listing of grounds for objection that may be raised only where there is no conclusive resolution of necessity.

Subdivision (a). The power of eminent domain may be exercised to acquire property for a public use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use. Section 1240.020.

Subdivision (b). The power of eminent domain may be exercised only to acquire property for a public use. Section 1240.010. Cal. Const., Art. I, § 14. U.S. Const., Amend. XIV.

Subdivision (c). This subdivision codifies the classical test for lack of public use: whether the plaintiff intends to apply the property to the proposed use. See People v. Chavalier, 52 Cal.2d 299, 340 P.2d 598 (1959). Once the acquisition has been found initially proper, the plaintiff may thereafter devote the property to any other use, public or private. See Arechiga v. Housing Authority, 159 Cal. App.2d 657, 324 P.2d 973 (1958). It should be noted, however, that, where the condemnation judgment is procured by fraud or bad faith, the judgment may be subject to attack in a separate proceeding.

See Section 1235.020; Capron v. State, 247 Cal. App.2d 212, 55 Cal. Rptr. 330 (1966). The statute of limitations for collateral attack on the basis of fraud in acquisition is three years from discovery of the fraud. See Code Civ. Proc. § 338(4). In addition, the judgment may be subject to attack on the basis of newly discovered evidence. See Section 1260.810.

Subdivision (d). This subdivision adds a test for public use new to California law. If the defendant is able to demonstrate that there is no reasonable probability that the plaintiff will apply the property to the proposed use within seven years or within a reasonable period of time, the plaintiff may not take the property. Cf. Section 1260.220 (future use).

Subdivision (e). Certain property may not be subject to condemnation for specified purposes. For example, a city may not acquire by eminent domain an existing golf course for golf course purposes. Govt. Code § 37353(c). Property appropriated to a public use may not be taken except for more necessary or compatible uses. Sections 1240.510 and 1240.560. Cemetery land may not be taken for rights of way. Health & Saf. Code §§ 8134, 8560, 8560.5. Certain land in the public domain may not be taken at all. Pub. Res. Code § 7994. An industrial farm may not be established by a county on land outside the county. Penal Code § 4106. The Department of Commerce may not condemn for World Trade Centers. Govt. Code § 8324. The Department of Aeronautics may not take an existing airport owned by local entity. Pub. Util. Code § 21632. See also Section 1240.___ (property exempt from condemnation) and Section 1240.020 and Comment thereto (eminent domain only for purposes authorized by statute); cf. subdivision (f) infra (more necessary public use).

Subdivision (f). Property may be taken for substitute purposes only if: (1) the owner of the property needed for the public use has agreed in writing to the exchange and, under the circumstances of the particular case, justice requires that he be compensated in whole or in part by substitute property rather than by money; (2) the property to be exchanged is in the vicinity of the public improvement for which the property needed is taken; and (3) taking into account the relative hardship to the owners, it is not unjust to the owner of the property to be exchanged that his property be taken so that the owner of the needed property may be compensated by such property rather than by money. Section 1240.330.

Property excess to the needs of the proposed project may be taken if it would be left as a remainder in such size, shape, or condition as to be of little market value or to give rise to a substantial risk that the entity will be required to pay in compensation an amount substantially equivalent to the amount that would be required to be paid for the whole parcel. Section 1240.420.

Property appropriated to a public use may be taken by eminent domain if the proposed use is compatible with or more necessary than the existing use. See generally Sections 1240.640-1240.690 for the hierarchy of uses.

Subdivision (g). While the provisions of Section 1260.330 catalog the objections to the right to take available under the Eminent Domain Law, there may be other grounds for objection not included in this title. Instances where subdivision (g) might allow objection are where there exist federal or constitutional grounds for objection (see Section 1230.110 ["statute" defined]), or where prerequisites to condemnation are located in other codes. See, e.g., Northwestern Pac. R. Co. v. Superior Court, 34 Cal.2d 454, 211 P.2d 571 (1949) and Great Northern Pac. Ry. Co. v. Superior Court, 126 Cal. App. 575, 14 P.2d 899 (1932)(statutory requirement that Public Utilities Commission approve railroad crossing or relocation is prerequisite to condemnation). Contrast Northwestern Pac. R. Co. v. Lambert, 166 Cal. 749, 137 P. 1116 (1913)(map filing required by Public Utilities Code Section 7530 not prerequisite to condemnation).

§ 1260.340. Grounds for objection where resolution not conclusive

1260.340. Grounds for objection to the right to take where the plaintiff has not adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1240.110) of Chapter 4 include:

(a) The plaintiff is a public entity and has not adopted a resolution of necessity that satisfies the requirements of Article 2 of Chapter 4.

(b) The public interest and necessity do not require the proposed project.

(c) The proposed project is not planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(d) The property described in the complaint, or right or interest therein, is not necessary for the proposed project.

Comment. Section 1260.340 lists the grounds for objection to the right to take that may be raised only where there is not a conclusive resolution of necessity. Thus, they may be raised against a plaintiff that is not a public entity in all cases and against a plaintiff that is a public entity in cases where it has not duly adopted a resolution or where the resolution is not conclusive. See Section 1240.150 for the effect of the resolution.

Subdivision (a). This subdivision applies only to public entities. A public entity may not commence an eminent domain proceeding until after it has adopted a resolution of necessity that meets the requirements of Article 2 of Chapter 4. Section 1240.120. The resolution must contain all the information required in Section 1240.130 and must be adopted by a vote of a majority of all the members of the governing body of the local public entity. Section 1240.140.

Subdivision (b). The power of eminent domain may be exercised to acquire property for a proposed project only if the public interest and necessity require the proposed project. Section 1240.030(a).

Subdivision (c). The power of eminent domain may be exercised to acquire property for a proposed project only if the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. Section 1240.030(b).

Subdivision (d). The power of eminent domain may be exercised to acquire property for a proposed project only if the property and particular interest sought to be acquired are necessary for the proposed project. Section 1240.030(c). See also Sections 1230.070 and 1240.040.

§ 1260.350. Response to objections

1260.350. (a) The plaintiff within 10 days after service of an objection to the right to take may respond to the objection upon either or both of the following grounds:

(1) The objection to the right to take does not state facts sufficient to constitute a ground for objection.

(2) The objection to the right to take is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

(b) Any objection to the right to take is deemed controverted by the plaintiff.

Comment. Like the answer, the objections to the right to take are deemed denied. See Section 431.20(b). However, they may be demurred to by the plaintiff, either because they do not state a ground for objection or because their import is not sufficiently clear to enable the plaintiff to prepare its case. Compare Section 430.20(a) and (b). The demurrer must be made within 10 days after service of objections. Compare Section 430.40.

The procedures for hearing the demurrer to the objections are the same as those for a demurrer to an answer. The objections may be amended in the same manner as other pleadings. See Sections 472, 473.

§ 1260.360. Hearing

1260.360. (a) Objections to the right to take shall be heard on motion and notice by either party to the adverse party.

(b) Until all such objections are resolved, there shall be no further action before the court in the proceeding with regard to the determination of compensation.

Comment. Section 1260.360 makes provision for bringing to trial the objections, if any, that have been raised against the plaintiff's right to take the property it seeks. It should be noted that no time limits are specified in this section.

Subdivision (a). Either party may set the issues for hearing. Failure to bring them to trial within the time specified in Code of Civil Procedure Section 583 is ground for dismissal of the proceeding. See Section 1235.020.

Subdivision (b). Disposition of the right to take is a prerequisite to further proceedings relating to just compensation. This does not preclude such activities as depositions and discovery related to the right to take.

§ 1260.370. Evidentiary burdens

1260.370. Exept as otherwise provided by statute, the plaintiff has the burden of proof on all issues of fact raised by an objection to the right to take. This burden is one of clear and convincing proof.

Comment. Section 1260.370 specifies the allocation of the burden of proof in hearings on right to take issues. Generally, the burden to plead or raise such issues is on the defendant. Section 1260.310. The issues must be raised specifically and factual allegations stated. Section 1260.320. The issues thus raised are of two general types, legal and factual. Legal issues--such as whether the use alleged is a public use, whether the plaintiff is authorized by law to condemn the particular property for the particular purpose alleged, and what the requisite formalities are for proper adoption of the resolution of necessity--have no specific burdens assigned other than those that may be applicable in civil actions generally.

Factual questions--such as whether the plaintiff intends to use the property as alleged or whether the property is necessary for the proposed project--must be proved by the plaintiff by clear and convincing proof. Under prior law, the plaintiff bore the burden of demonstrating necessity issues generally by a "preponderance" of the evidence. See, e.g., Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955). But the issues whether the plaintiff intended to use the property for the purpose alleged and whether the project was located in a manner most compatible with the greatest public

good and least private injury were required to be proved by the defendant. People v. Lagiss, 160 Cal. App.2d 28, 324 P.2d 926 (1958); Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891). Section 1260.370 places a uniform burden of all factual right to take issues on the plaintiff and raises the evidentiary standard to one of "clear and convincing" proof.

The plaintiff may be aided in satisfying this burden by presumptions if the plaintiff is a public entity. A public entity must enact a resolution of necessity before it may condemn. Section 1240.120. But once it has enacted such a resolution, the resolution may be conclusive on many of the issues of necessity. Section 1240.150. Of course, the resolution must have been properly adopted if it is to be given any effect at all. Section 1260.340(a). In addition, it is presumed that official duty has been regularly performed. Evid. Code § 664. Plaintiffs that are not public entities do not have the advantage of any such presumptions but must prove the right to take issues on the basis of the evidence they present.

The burden specified in Section 1260.370 is applicable generally to right to take issues, absent express statutory provisions indicating other burdens or other quanta of proof required. Other express statutory provisions include: Sections 1240.230 (future use), 1240.420 (remnants), 1240.520 (compatible use), 1240.620 (more necessary use).

§ 1260.380. Court orders

1260.380. (a) The court shall hear and determine all objections to the right to take brought before it pursuant to Section 1260.360.

(b) If the court determines that the plaintiff does not have the right to acquire by eminent domain any property described in the complaint, it shall dismiss the proceeding as to that property. Such dismissal is a final judgment and entitles the defendant to his recoverable costs and disbursements as prescribed in Section 1245.610.

(c) If the court determines that the plaintiff has the right to acquire by eminent domain the property described in the complaint, the court shall so order. Such order is an interlocutory judgment.

Comment. Section 1260.380 provides for a court determination of right to take issues.

Subdivision (a). Court determination of the right to take is consistent with the California Constitution and with prior law. Cal. Const., Art. I, § 14 (jury determination of compensation) and People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

The court has general authority to determine all issues and make all orders necessary and appropriate to its determinations.

Subdivision (b). A determination that the plaintiff has no right to condemn the defendant's property requires an order of dismissal. In case the complaint

alleges alternative grounds for condemnation, a dismissal as to one ground does not preclude a finding of right to take on another ground. An order of dismissal is a final judgment as to the property affected and is appealable. See Code Civ. Proc. § 904.1. Contrast People v. Rodoni, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966). Such order also entitles the defendant to recoverable costs and fees. See Section 1245.610 and former Code Civ. Proc. § 1246.4.

Subdivision (c). A determination that the plaintiff may condemn the defendant's property is not a final judgment. An appeal must await the conclusion of the litigation. See Code Civ. Proc. § 904.1. Review by writ may be available in an appropriate case. See, e.g., Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955).

Memorandum 72-5

EXHIBIT II

EMINENT DOMAIN LAW § 1260.810

Staff recommendation January 1972

CHAPTER 8. PROCEDURE

Article 9. New Trials and Appeals

§ 1260.810. Vacating judgment on basis of new evidence

1260.810. (a) A person from whom property was taken by eminent domain may, upon discovering the facts described in subdivision (b) but no later than seven years after the judgment of condemnation became final, upon notice to the person who took the property, move the court to vacate the judgment or to award damages as provided in this section.

(b) If, upon hearing the motion, the court determines that the person from whom property was taken has presented evidence that (i) was unknown and not reasonably available to him at the time the judgment became final and (ii) would have required dismissal of the proceeding on any of the grounds specified in Sections 1260.330 and 1260.340, the court shall:

(1) Vacate the judgment and dismiss the prior proceeding as to any of the property still owned by the person who acquired the property and not devoted to public use.

(2) Award as damages the amount that would be recoverable under Section 1245.610 and the amount, if any, by which the market value of the

property at the time the motion was filed exceeds the condemnation award as to any property not described in paragraph (1).

Comment. Section 1260.810 establishes a procedure new to California law, allowing for direct attack upon a final judgment of condemnation on the basis of newly discovered evidence. The motion to vacate or award damages is analogous to the equitable bill of review for a new trial. See San Joaquin etc. Irr. Co. v. Stevinson, 175 Cal. 607, 166 P. 338 (1917). Contrast Walls v. System Freight Service, 94 Cal. App.2d 702, 211 P.2d 306 (1949). The motion to vacate must be brought as soon as the condemnee discovers the underlying facts, but within seven years after the time the judgment became final. The judgment will be vacated or damages awarded only if the newly discovered evidence is such that it would have required reversal on the right to take issues specified in Sections 1260.330 and 1260.340.

The procedure established by this section is in addition to and does not limit any other procedures to attack an eminent domain judgment, whether directly or collaterally, in the original or subsequent proceedings. Cf. 5 B. Witkin, California Procedure 2d Attack on Judgment in Trial Court (2d ed. 1971).

Subdivision (a). For "final judgment," see Section . The motion should be filed in the superior court that rendered judgment even though that court may have been a transfer court not located in the same county as the

subject property. The motion should, of course, contain such essential information as identification on the judgment sought to be vacated, a description of the new evidence, and the reasons for its previous unavailability. The motion should be filed and served as are motions and papers in civil actions generally. Code Civ. Proc. § 1010 et seq. It is the obligation of the moving party to set the motion for hearing although either party may do so.

Subdivision (b). The new evidence alleged must have been unknown at the time of trial and not reasonably available to the condemnee. It must have been of the type that the moving party could not, with all proper diligence, have discovered.

Paragraph (1). A court order of vacation and dismissal is equivalent to a dismissal of the original proceeding. If the moving party is the defendant in the prior proceeding, he is entitled to be restored to possession of the property, to reimbursement for any damages suffered, and to his recoverable costs and expenses. See Sections 1245.610 and 1255.420. He must, of course, refund the award received.

Paragraph (2). If property is devoted to a public use or is no longer in the hands of the original condemnor, the condemnee may receive damages rather than return of his property. The measure of damages is the increased value of the property plus the recoverable costs that would have been available under Section 1245.610 were the proceeding dismissed at its conclusion.

Memorandum 72-5

EXHIBIT III

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October 7, 1971

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

Re: Memorandum 71-68
Study 36.80 - Condemnation
(Procedural Aspects)

Dear Mr. DeMoully:

These comments are directed towards the recommendation contained in the above memorandum for changing some of the present presumptions and burdens relating to the right to take issues in a condemnation action. More specifically, they are directed toward a Staff recommendation that present law be changed so that in all cases where such issues may properly be raised, the condemnor shall have the burden of establishing the necessity for a proposed public use facility and the propriety of its location by "clear and convincing proof" (See proposed Section 2101 Evidentiary Burdens).

The reason given by the Staff for the suggested change is a desire to accomplish some kind of uniformity. They suggest in this regard that present law has developed on an "ad hoc basis in a rather haphazard manner" and that "the reasons for the present rules are unclear." While this observation may be true with respect to some of the rules, it is my judgment that it is not true as to others and that to change all rules for the sake of uniformity would be to overlook some very well reasoned decisions of the California courts.

Falling into the latter category are those rules that have developed with respect to the so-called "compatibility of location issues." In this area, present law is just the opposite of the Staff recommendation; i.e., the defendant-property owner, under present law, has the burden of prevailing on the basis of a clear and convincing evidence criterion. The California Supreme Court in the case of City of Pasadena vs. Stimson, 91 Cal. 238 (1891), explains the reason for this in this way:

> "The state, or its agents in charge of a public use, must necessarily survey and locate the land to be taken, and are by statute expressly authorized to do so. (Code Civ. Proc., sec. 1242). Exercising, as they do, a public function under express statutory authority, it would seem that in this particular their acts should, in the absence of evidence to the contrary, be presumed correct and lawful. The selection of a particular route is committed in the first instance to the person in charge of the use, and unless there is something to show an abuse of the discretion, the propriety of his selection ought not to be questioned; for certainly it must be presumed that the state or its agent has made the best choice for the public, and if this occasions peculiar and unnecessary damage to the owners of the property affected, the proof of such damage should come from them. And we think that when an attempt is made to show that the location made is unnecessarily injurious, the proof ought to be clear and convincing; for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so ad infinitum. The improvement could never be secured, because whatever location was proposed, it could be defeated by showing another just as good." (Emphasis added)

The foregoing language or excerpts thereof have been quoted with approval in a myriad of subsequent California decisions on the subject. One of the latest which applied the criteria to a public utility condemnor is San Diego Gas & Electric Company vs. Lux Land Company, 194 Cal.App.2d 472 (1961).

There are some very good practical reasons why this should remain the law. For example, those agencies faced with the problem of prevailing on an issue of location may not go into court in advance of the initiation of a large and sometimes very complicated right of way acquisition program to seek some sort of an advisory opinion about the propriety of the route they have selected. Rather, in most cases they must rely on their own judgment of the best route available. Substantial expenditures in right of way acquisition, engineering and other costs must then be made in reliance on this judgment at a time prior to condemnation actions being filed and the courts finally being presented with the problem (initially filing a condemnation action against all property owners

along a given route and forcing them into early litigation hardly being a satisfactory alternative). Under such circumstances, it seems altogether proper and in the public interest for the property owner who wishes to contest the location of the entire route to have the greater evidentiary burden.

This is particularly true when it is considered that right of way acquisition programs by agencies exposed to this issue extend across county lines. There is no rule that indicates the judge in one county must follow the decision of another judge in a sister county. If a property owner can prevail on the basis of slight or doubtful proof in one county, he could do so in another county with the result possibly being an unconnected right of way and the complete blockage of a much needed public improvement.

One final point--I wonder if the Staff really realizes just what kind of a change they are suggesting when they suggest that a condemning agency should prevail on the basis of "clear and convincing evidence." The California Supreme Court in the early case of Sheehan vs. Sullivan, 126 Cal. 189 (1899), has interpreted clear and convincing evidence as being that kind of evidence that would be "sufficiently strong to command the unhesitating assent of every reasonable mind." To my knowledge, this interpretation remains the law of California today. It doesn't take much familiarity with the greater environmental issues of the day to realize that no matter what the equities may be weighing in favor of one location over another, it will never be possible to secure the unhesitating assent of "every reasonable mind."

It is respectfully requested that these comments be given serious consideration and that if further clarification or amplification of the points made appears desirable that I and perhaps other representatives from other affected agencies be given the opportunity to appear at one of your meetings.

Respectfully submitted,

Tom P. Gilroy
Assistant Counsel

TPG:bjs