

Memorandum 73-19

Subject: Study 36.470 - Condemnation (Comprehensive Statute--Chapter 7--
Deposits and Possession Prior to Final Judgment)

Attached to this memorandum is the latest revised version of Chapter 7 of the Eminent Domain Law (Deposits and Possession Prior to Final Judgment) along with a draft of the preliminary portion of the recommendation relating to this chapter. We would like approval to send the statute to the printer; we do not plan to send the preliminary portion of the recommendation to the printer, but we have prepared it to give a bird's-eye view of the chapter.

The draft statute reflects all the decisions previously made by the Commission on Chapter 7, including decisions made by the Commission in response to comments of the Southern Section of the State Bar Committee at the Commission's September 1972 meeting. Also, the statute includes various editorial changes made by the staff. Some sections have been renumbered, and we have made various technical changes.

Significant substantive changes made by the staff are listed below:

(1) The statute is drafted on the assumption that, when judgment is entered, the rights of the defendants in the award are known. This assumption is not necessarily accurate, however, for there may be a delay between the entry of judgment (which determines the right of the plaintiff to the property and the amount of compensation) and the apportionment of the award in cases where the plaintiff has elected a two-phase valuation proceeding. Because of this delay, it is necessary to make clear in the statute that the

procedures whereby a defendant can withdraw his probable share of the award prior to judgment should apply up until the time the award is apportioned. Likewise, it must be made clear that the procedures by which the plaintiff may deposit the award following judgment apply whether or not the award has been apportioned. The staff has gone through the statute making the appropriate changes.

In this connection, it should be noted that there are definitions of "judgment" and "final judgment" applicable to eminent domain proceedings. Code Civ. Proc. § 1264.7. The staff proposes to recodify these definitions in the definitional chapter of the Eminent Domain Law. See Exhibit I.

(2) A new section--Section 1255.420--has been added to make clear that the restrictions on possession prior to judgment in no way limit the power of a public entity to seize property pursuant to its police power in emergency cases.

(3) The time before which the condemnor may take possession of property following judgment has been increased from 10 to 30 days in the case of property lawfully occupied by a person dwelling thereon or by a farm or business operation. See Sections 1255.320 and 1255.330. This change is in accord with a suggestion made by the Southern Section of the State Bar Committee. The Commission considered this suggestion at the September 1972 meeting but deferred action pending receipt of further information concerning the legal incidents of transfer of possession as opposed to transfer of title. The information requested by the Commission is contained in Memorandum 73-18 (Just Compensation and Measure of Damages). The staff sees nothing in the new information that would affect the time before which possession is transferred following judgment and believes that occupants of property need a month to move; accordingly, we have implemented the Southern Section's suggestion.

On February 10, 1973, the Northern and Southern Sections of the State Bar Committee had a joint meeting. Two suggested revisions of the immediate possession procedures are included in the Minutes of that meeting, the pertinent portions of which are set out as Exhibit II of this memorandum. The suggestions are summarized below:

Section 1255.210 (Order for Possession Prior to Judgment)

The State Bar Committee suggests that an additional paragraph be added to subdivision (a) of Section 1255.210 to read substantially as follows:

(4) The plaintiff has an actual need for possession as of the effective date of the requested order for possession.

This suggestion previously has been considered and rejected by the Commission. Under Section 1255.210, the plaintiff is entitled to an ex parte order for possession upon a showing of three simple facts. See Section 1255.210. There is no need to require the public entity to provide additional affidavits to justify the need for the property on the requested date unless the property owner will suffer hardship. To determine the need of the public entity at an ex parte hearing and then require the property owner to later attempt to get the court to set aside that ex parte determination of need does not necessarily benefit the property owner. And, if the property owner would suffer no hardship, the production of evidence to justify the plaintiff's need becomes a useless exercise. The statute in its present form provides a procedure whereby the property owner can obtain relief from the order if he will suffer substantial hardship and the plaintiff is unable to prove its need. Moreover, the procedure presently provided for relief from an ex parte order for possession contemplates a noticed hearing at which both parties will be present, and this affords the court an opportunity to fix terms and conditions on the operation of the order that will minimize the hardship to the property

owner and, at the same time, permit the public entity to go ahead with its project. The staff believes that the addition recommended by the State Bar Committee would be undesirable.

Section 1255.350 (Withdrawal of Deposit)

The State Bar Committee objects to the provision in Section 1255.350 (formerly numbered 1255.070 in part) whereby the defendant may draw down the deposit following judgment and still appeal the amount of the award. The staff sees little merit in this objection. The reason the plaintiff deposits the amount of the award is either to acquire the right to possession or to stop the running of interest, or both. If the plaintiff is reluctant to deposit the award for fear the defendant will draw it down and change his position in justifiable reliance so that the plaintiff may not thereafter be able to abandon, the plaintiff need not make the deposit; after all, it is not required to make a deposit until 30 days after final judgment. Code Civ. Proc. § 1251. Existing law permits the defendant to draw down the award and still contest the amount of compensation; all the pressure the Commission has heretofore received has been to permit the defendant to draw down the award and still contest the right to take as well as the amount of compensation.

Respectfully submitted,

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Staff Counsel

EXHIBIT I

§ 1230.038. Judgment; final judgment

1230.038. "Judgment" means the judgment determining the right to acquire property by eminent domain and fixing the amount of compensation to be paid by the plaintiff. A judgment is a "final judgment" when all possibility of direct attack thereon by way of appeal, motion for a new trial, or motion to vacate the judgment has been exhausted.

Comment. Section 1230.038 is the same in substance as former Section 1264.7.

EXHIBIT II

Immediate Possession Before Judgment

It was moved and seconded, but defeated by a 3 to 6 vote, that the Committee disapprove any change or modification in the present procedures of C.C.P. §1243.4 through §1243.7, inclusive, relating to the procedures for obtaining and Order of Immediate Possession before Judgment.

It was moved, seconded and passed (6-3), that the proposed repeal of C.C.P. §§1243.4 through 1243.7 be approved upon condition that proposed C.C.P. §1255.210 which is intended to supercede repealed §1243.4 be amended to add sub-paragraph (4) to paragraph (a) thereof, as follows:

"(4) Plaintiff show actual need for possession as of the effective date of the requested Order of Possession."

Possession and Payment After Judgment

It was moved, and seconded, but defeated by a 4 to 5 vote that the proposed repeal of C.C.P. §1254 be approved.

It was moved, seconded and passed (5-4), that the proposed repeal of C.C.P. §1254 be approved upon condition that the Commission reconsider the content of proposed C.C.P. §1255.070 which, as presently proposed, would permit a property owner to hold both the award of compensation and retain possession of the land where the condemnor does not wish to waive its ultimate right of abandonment. Such occurred in the recent case of S.F. Bay Area Rapid Transit Dist. vs. Fremont Meadows, where the property owner withdrew the deposit of compensation without waiver of the right to seek greater compensation, and then moved for and obtained a new trial. The majority of the Committee proposed that proposed §1255.070 should provide, in substance as follows:

"(a) When the plaintiff, after entry of Judgment, has deposited the compensation awarded and there has been no Order for Possession issued by the Court, nor is the plaintiff in possession of the condemned property, the defendant may:

"(1) Apply ex parte and withdraw the Judgment award on an entry of a full satisfaction of judgment executed by all defendants having an

interest in the item of compensation awarded and, in cases where the plaintiff has elected to proceed to determine compensation inclusive of the interest of all persons claiming an interest in the parcel being acquired, a full satisfaction of judgment executed by all persons designated to receive any part of said inclusive compensation; or

"(2) If the defendants do not intend to file a satisfaction of judgment but intend to move for a new trial or appeal, and seeks greater compensation, defendant shall give the plaintiff 10 days notice of their application to withdraw the judgment award. After receipt of a notice of withdrawal under this sub-paragraph, the plaintiff may consent to the withdrawal and retain possession of the property or object to such withdrawal and request an order returning the compensation awarded to plaintiff. If the plaintiff is not in possession of the property, it shall be entitled to an order vacating any final Order of Condemnation theretofore entered and returning the judgment deposit upon showing a certified copy of the order vacating the prior final order of condemnation, if any, has been recorded. If the plaintiff consents to the withdrawal under this sub-paragraph, the defendant may withdraw the judgment award upon filing a receipt for said money and an abandonment of all claims and defenses except his claim to greater compensation.

"(b) When the judgment award has been deposited and the Plaintiff is in possession of the condemned property, or has previously obtained an order for possession, the defendant may apply ex parte and withdraw the judgment award upon filing a receipt for money and an abandonment of all claims and defenses except his claim to greater compensation."

DEPOSIT OF PROBABLE COMPENSATION; POSSESSION

PRIOR TO FINAL JUDGMENT

Extension of Provisions for Possession and Payment Prior to Judgment

The Constitution of California, in Section 14 of Article I, authorizes the state, cities, counties, and certain districts to take possession of the property to be condemned immediately upon commencement of an eminent domain proceeding, or at any time thereafter, if the condemnation is for any "right of way" or "lands to be used for reservoir purposes." Except to this limited extent, there is no procedure under the California Constitution and statutes by which the condemnor may obtain possession prior to entry of judgment and, of course, no procedure under which the property owner may receive compensation until that time.¹

The narrow limits of the authorization for early possession in Section 14 reflect a fairly general impression that the best interests of the property owner always lie in postponing the inevitable relinquishment of possession as long as possible. There is some justification for this impression because the California Constitution and statutes for many years failed to provide adequate procedural safeguards for the property owner. Before 1957, there were no provisions for withdrawal of the required deposit. Furthermore, no period of notice to the property owner was specified and the order for possession could be made effective when granted. These pre-1957 rules afforded at least the possibility of serious inconvenience to the property owner.²

Nevertheless, upon careful analysis, it becomes apparent that more general provisions for early possession, with appropriate safeguards for both parties, would be of benefit to both condemnors and condemnees. To the public agencies, an assurance of timely possession facilitates an orderly program of property acquisition. 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. An undue delay in acquiring even one essential parcel can prevent construction of a vitally needed public improvement and can complicate financial and contractual arrangements for the entire project. To avoid such a delay, the condemnor may be forced to pay the owner of that parcel more than its fair value and more than the owners of similar property received. In general, the need of the public agencies is not for haste, but for certainty in the date of acquisition. The variable conditions of court calendars and the unpredictable period required for the trial, appeal, and possible retrial of the issue of compensation preclude any certainty in the date of acquisition if that date is determined solely by the final judgment in the proceeding. Lack of the right to obtain possession prior to final judgment thus may lead to precipitate filing of proceedings and premature acquisition of property, all to the disadvantage of both taxpayers and property owners.

¹ Code of Civil Procedure Section 1254 provides a procedure whereby any condemnor may obtain possession "at any time after trial and judgment entered or pending an appeal from the judgment."

² Certain improvements in these rules were made in 1957 and, in 1961, the Legislature enacted legislation recommended by the Commission that partially systematized the law on this subject. 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). See also Cal. Stats. 1961, Ch. 1613, p. 3442, amending or adding Code Civ. Proc. §§ 1243.4, 1243.5, 1243.6, 1243.7, 1249.1, 1253, 1254, 1255a, and 1255b.

From the condemnee's point of view, if reasonable notice is given before possession is required 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 landowner loses most 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 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 the litigation. It is possible that these difficulties will force him to settle for an amount less than he would have eventually received in the condemnation proceeding. In contrast, the taking of possession and payment of approximate 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 invest the amount he receives as approximate compensation in other property or he may leave it on deposit and receive interest at the legal rate of seven percent.

The necessity of determining the right of the condemnor to take the property before such an exchange does not preclude broadened provisions for exchanging probable compensation and possession prior to judgment. The limiting doctrines of "public use" and "public necessity" once played important roles in condemnation cases. Now, however, the only substantial question to be determined in virtually all 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 to permit expeditious determination of that question in the cases in which it arises.

The existing constitutional authorization for immediate possession in takings for rights of way applies to most acquisitions for highway, freeway, and street purposes. As expansively interpreted, the authorization for such possession in takings of lands for reservoir purposes applies to most acquisitions 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 local government may obtain possession of the rights of way for a sewerage system, but may not obtain possession of the site for the sewage treatment plant or other facility.

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, 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 both by 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 for the acquisition of a school site, however great the need and whatever the size or responsibility of the school district.

The Commission has concluded that the range of cases in which possession prior to judgment is available should be substantially extended.³ At the same time, procedures should be provided that will fully protect

3. As to whether it is necessary to amend Article I, Section 14, of the California Constitution in order to implement the following recommendations, see Taylor, Possession Prior to Final Judgment in California Condemnation Procedure, 7 Santa Clara Lawyer 37 (1966), reprinted in 8 Cal. L. Revision Comm'n Reports 1101, 1173 (1967).

the rights of property owners and assure them of the actual receipt of approximate payment at the time possession is taken. Accordingly, the Commission recommends:⁴

1. Any public entity or public utility should be authorized to obtain possession prior to judgment of any property which it is authorized to condemn. The reasons for this recommendation are stated above. While this recommendation would extend the right of prejudgment possession to public utilities, which at present do not have the right, it would avoid extension of the right to the exceptional cases in which so-called private condemnation is authorized. See discussion of the right to take, supra.

2. The present procedure by which prejudgment possession is obtained on ex parte motion should be retained with the following changes to protect the rights of owners and occupants of property. The present 20 days' notice to the owners and occupants of the condemnor's right to possession should be extended to 90 days in the case of property occupied by a dwelling, business, or farm and to 30 days in all other cases. The present 20 days' notice can result in serious hardship and inconvenience. The longer notice requirements will not only serve to reduce the possibility of hardship and inconvenience but will also make possible the actual disbursement to the property owner of the required deposit before he is obligated to relinquish possession. In addition to a lengthened period of notice, the owner or occupant of property should be able to obtain relief from the order for possession prior to judgment if the hardship to him will be substantial and the condemnor does not need possession or will suffer insignificant hardship by having possession delayed.

4. Where possession is authorized or taken prior to judgment, there may be legal incidents, such as the commencement of interest, shifting of risk of loss, and the like, despite the fact that title to the property has not yet passed. For the Commission's recommendations on these matters, see discussion of compensation, supra.

Deposit and Withdrawal of Probable Compensation

The Commission recommends that the substance of the existing procedure for making deposits prior to judgment be retained with the following principal modifications:

1. Existing law provides for the depositing of approximate compensation only in connection with an order for possession. However, any condemnor, whether or not it seeks possession prior to judgment, should be authorized to make a deposit of the probable amount of compensation that will be awarded in the proceeding. After a deposit is made, the condemnor should be entitled to an order for possession, effective 30 days after the making of the order, if the defendants entitled to possession either express their willingness to surrender possession of the property or withdraw the deposit.

The recommended procedure would provide a method by which the parties could effect a transfer of the right to possession in exchange for substantial compensation without prejudice to their rights to litigate the issue of compensation. It would benefit both parties to the proceeding. The property owner could withdraw the deposit and thus finance the acquisition of other property and defray other expenses incident to the taking. The withdrawal would benefit the condemnor; the condemnnee would, as under existing law, thereby waive all defenses to the proceeding except the claim to greater compensation, and withdrawal would also permit the condemnor to obtain possession without regard to the uncertain date that the trial and possible appeals may be concluded.

2. Before making the deposit, the condemnor should be required to have an appraisal made by an expert appraiser. The amount deposited should be the amount determined by the appraiser to be the probable amount of compensation that will be awarded in the proceeding. The condemnor should be required to notify interested parties of its having made a deposit and to make available a statement of valuation data containing the valuation data upon which

the amount of the deposit is based. The amount deposited should be subject to review and change by the court on motion of any interested party. Under existing law, the court fixes the amount of the deposit on ex parte application of the condemnor. Necessarily, the amount fixed is almost always the amount suggested by the condemnor. Although existing law gives the condemnnee the right to have the court redetermine the amount of the deposit, experience has demonstrated that the court, having once made an order fixing the amount of the deposit, is reluctant to reconsider that decision even though the initial order was made on ex parte application.

The recommended procedure would simplify existing practice by eliminating the need for an ex parte application to have the court fix the amount of the deposit in every case. Yet it would fully protect the property owner because he will be entitled to consider the statement containing the valuation data on which the amount of the deposit is based and to have the court review and revise that amount in any case where the deposit is inadequate.

3. The existing system for withdrawing the deposit should be streamlined to eliminate obstacles and delays. The following changes are recommended:

(a) A party seeking to withdraw a deposit should be permitted to serve the notice of his application by mail on the other parties and their attorneys, if any, in all cases in which the other party has appeared or been served with the complaint and summons. Under existing practice, withdrawal is not permitted unless personal service of the notice is made upon all parties.

(b) The existing absolute prohibition of withdrawal if personal service cannot be had should be eliminated. Quite often "defendants" in eminent domain proceedings can easily be shown to have no compensable interest in the property. The courts can protect the rights of persons upon whom it is not possible to make service by requiring a bond or limiting the amount withdrawn in any case where it appears that the party not served actually has a compensable interest in the property.

(c) Where there are conflicting claims to the amount to be withdrawn, the requirement of an undertaking should be left to the discretion of the court, rather than being required as a matter of course. In many cases, there will be no practical danger that the amount withdrawn will exceed the eventual award to the party. In such cases, the existing requirement that an undertaking be provided imposes an unnecessary obstacle to withdrawal. In any case where there is an actual risk of an excessive withdrawal, the court can require an undertaking or limit the amount to be withdrawn.

4. Existing law requires the condemnor to reimburse the cost of bond premiums where the need for the bond arises from the condemnnee's efforts to withdraw an amount greater than that originally deposited. Reimbursement is not required under existing law if the bond is required because of competing claims among defendants. The latter rule should be changed to require reimbursement unless the need for the bond arises primarily from an issue as to title between the claimants.

Conflicting claims to a deposit usually result from the need to allocate the award among owners of separate interests in the property. Hence, the need for the allocation—as well as for the bond—arises from the condemnation proceeding rather than from any act or omission of the defendants. Imposition of the cost of the bond on the condemnor is therefore justified.

Deposit on Demand of Property Owner

The Commission has considered provisions in other states that permit the condemnnee, in all cases, to demand approximate compensation at the beginning of the proceedings. Under these provisions, the condemnor usually is given the right to possession upon complying with the demand of the condemnnee. Although these provisions have obvious merit, integration of such a requirement into California condemnation procedure does not appear feasible at this time. Nonetheless, a greater incentive should be provided to the condemnor to deposit approximate compensation in cases in which the condemnnee's residence is being taken. The need to purchase another home before he receives the final award places a particularly onerous burden upon such a condemnnee. The Commission therefore recommends enactment of a provision permitting the condemnnee to demand that a deposit be made if the property being taken is residential property having not more than two dwelling units and the condemnnee resides thereon. If the deposit is not made, interest at the legal rate of seven percent should be allowed on the amount of the eventual award from the date that the deposit should have been made.

Possession After Entry of Judgment

Code of Civil Procedure Section 1254 permits any condemnor to obtain possession following entry of judgment by depositing the amount of the judgment and an additional sum determined by the court to be adequate to secure payment of any additional amount that may be recovered in the proceeding. The procedure is available even though either party appeals or makes a motion for a new trial.

Even though the judgment may be reversed or set aside, provisions for possession after entry of judgment are properly distinguished from those for possession prior to judgment. The judgment determines the condemnor's right to take the property, the amount of the award, and the allocation of the award among defendants. Since motions in the trial court, appeals, and possible new trials may take years, the procedure is beneficial to both parties. The period during which the property owner is 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 public improvements being delayed for protracted periods or having to be abandoned altogether. The Commission therefore recommends retention of this post-judgment procedure with the following principal modifications:

1. The court should not be required in every case to determine an amount, in addition to the amount of the judgment, that the condemnor must deposit to secure payment of any further recovery in the proceeding. A procedure already exists for increasing or decreasing the amount on deposit on motion of either party. This procedure should be adapted to permit the property owner to make a motion to compel deposit of an additional amount if he deems that course necessary.

2. Existing law should be clarified to permit the condemnee, after entry of judgment apportioning the award, to withdraw a deposit that was made prior to judgment under the same simple procedure provided for withdrawal of a deposit made after entry of judgment. Upon entry of the judgment apportioning the award, any reason for use of the more complex prejudgment procedure disappears.

3. One uniform procedure should be provided for paying the amount of the award into court after entry of judgment, whether or not either party plans to appeal or move for a new trial, and for withdrawing the amount so paid. Under existing law, unnecessary confusion has arisen from the purely theoretical distinction between a payment into court to satisfy the judgment (Code Civ. Proc. § 1252) and a deposit made pending appeal or motion for new trial (Code Civ. Proc. § 1254).

4. The court should be authorized to require, in its discretion, that the condemnee provide an undertaking to secure repayment of any excessive withdrawal made after entry of judgment. This will permit the courts to protect the condemnor in cases where it appears that the final judgment will be less than the amount withdrawn. For example, the court might require an undertaking in a case where the condemnor has made a motion for a new trial or has appealed from the judgment and the court believes that it is likely that the judgment will be vacated, reversed, or set aside and a new trial granted.

5. The 10-day notice period before which possession may be taken by the condemnor following an order for possession should be extended to 30 days in cases where the property is occupied by a dwelling, business, or farm.

E M I N E N T D O M A I N L A W

CHAPTER 7. DEPOSIT OF PROBABLE COMPENSATION; OBTAINING
POSSESSION PRIOR TO FINAL JUDGMENT

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CHAPTER 7. DEPOSIT OF PROBABLE COMPENSATION; OBTAINING
POSSESSION PRIOR TO FINAL JUDGMENT

Article 1. Deposit of Probable Compensation
Prior to Judgment

Comment. This article supersedes Code of Civil Procedure Sections 1243.6 and 1243.7 and those portions of Code of Civil Procedure Section 1243.5 that related to the deposit and withdrawal of compensation prior to judgment. Under this article, the condemnor may deposit the amount indicated by an appraisal to be the compensation 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. The deposit may be made whether or not possession of the property is to be taken. This deposit serves a number of purposes:

(1) It is a condition to obtaining an order for possession prior to entry of judgment under Article 2 (commencing with Section 1255.210).

(2) It may entitle the condemnor to obtain an order for possession after entry of judgment under Article 3 (commencing with Section 1255.310). See Section 1255.320.

(3) In some cases, it fixes the date of valuation. See Section 1245.110.

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to Judgment

EMINENT DOMAIN LAW § 1255.010

Tentatively approved September 1970

(4) 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 1245.520.

(5) If the deposit is withdrawn, the withdrawal entitles the plaintiff to an order for possession. See Section 1255.260.

The deposit to be made after judgment is not governed by Article 1 but is covered by Article 3 (commencing with Section 1255.310). However, deposits made under Article 1 may be increased to the amount of the judgment after entry of judgment. See Section 1255.030(b).

§ 1255.010. Deposit of amount of appraised value of property

1255.010. (a) At any time after filing the complaint and prior to entry of judgment, the plaintiff may deposit with the court the amount indicated by the appraisal referred to in subdivision (b) to be the compensation for the taking of any parcel of property included in the complaint. The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

(b) Before making a deposit under this section, the plaintiff shall have an appraisal made of the property for which the deposit is to be made. The appraisal shall be made by an expert qualified to express an opinion as to the value of the property.

(c) Subject to subdivision (d), before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property prepare a statement of valuation data justifying the appraisal referred to in subdivision (b). The statement of valuation data shall set forth all amounts, opinions, and supporting data required by [Code of Civil Procedure Section 1272.02] to be included in a statement of valuation data with respect to:

(1) The value of the property to be taken.

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(2) If the property is part of a larger parcel, the amount of the damage, if any, to the remainder.

(3) If the property is part of a larger parcel, the amount of the benefit, if any, to the remainder.

(d) Upon ex parte application, the court may make an order permitting the plaintiff to defer preparation of the statement of valuation data for a reasonable time not exceeding 50 days from the date the deposit is made if the plaintiff, by affidavit, presents facts showing that an emergency exists and that the statement of valuation data cannot reasonably be prepared prior to making the deposit.

Comment. Section 1255.010 is new. In contrast with former practice, (1) the deposit may be made without obtaining the court's order therefor and without regard to an order for possession and (2) the amount of the initial deposit is determined by an appraisal obtained by the plaintiff rather than by the court upon ex parte application of the plaintiff. Under Section 1255.030, however, the amount deposited may be determined or redetermined by the court on motion of any interested party.

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

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be included in one complaint. See Weiler v. Superior Court, 188 Cal. 729, 207 P. 247 (1922).

As used in this section and in this article, "compensation" refers to all elements of compensation, including the value of the property actually taken and any severance or other damages less those benefits, if any, that are required to be offset against such damages. See Section 1245.410 et seq. However, prejudgment interest is not required to be estimated or deposited under this section because the termination date of such interest and the ultimate effect of any offsets would be speculative at the time the deposit is made.

The appraisal required by subdivision (b) and the statement of valuation data required by subdivision (c) may be made either by a member of the condemnor's appraisal staff or by an independent appraiser.

The statement of valuation data required by subdivision (c) is necessary to enable the plaintiff to comply with Section 1255.020 which requires the notice of the deposit to be accompanied by or to refer to the statement of valuation data which justifies the amount of the deposit. The required statement must contain all the information required to be included in a statement of valuation data. See [Code Civ. Proc. § 1272.02] which requires that such a statement set forth the appraiser's opinions

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as to the property's value, severance damages, and benefits and specified items of supporting data--such as "comparable" transactions--to the extent that the opinions are based thereon. An appraisal report containing all of such information could be used as a statement of valuation data. See [Code Civ. Proc. § 1272.02(f)].

The making of a deposit by the plaintiff, and any subsequent possession of the property by the plaintiff, does not waive its right to appeal in the proceeding. See Sections 1255.270 and 1255.370. Cf. Annot., Eminent Domain: Payment or Deposit of Award in Court as Affecting Condemnor's Right to Appeal, 40 A.L.R.3d: 203 (1971).

Under emergency circumstances, it may be possible to make only a rough, preliminary appraisal of the property. In such cases, subdivision (d) permits the plaintiff to apply ex parte to the court for an order permitting the plaintiff to defer preparation of the statement of valuation data for a reasonable time not exceeding 50 days from the date of the deposit. Even where the plaintiff obtains such an order, the order does not relieve the plaintiff from depositing the amount of its appraisal of the property.

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EMINENT DOMAIN LAW § 1255.020

Tentatively approved September 1970
Revised September 1972

§ 1255.020. Service of notice of deposit

1255.020. (a) On making a deposit pursuant to Section 1255.020, 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 1255.250 for service of an order for possession.

(b) The notice shall either (1) be accompanied by a copy of the statement of valuation data referred to in subdivision (c) of Section 1255.010 or (2) state that, upon written request, the plaintiff will send the party a copy of the statement and also state the place where and the times when such statement may be inspected and copied. If the notice is not accompanied by the copy of the statement, the plaintiff shall, at the places and times indicated in the notice, make the statement available for inspection and copying to any party who has an interest in the property and also shall, within 10 days after receipt of a written request from any such party, send that party a copy of the statement.

(c) If the plaintiff has obtained an order under Section 1255.010 deferring completion of the statement of valuation data, the plaintiff shall comply with subdivision (a) on making the deposit and shall comply with subdivision (b) upon completion of the statement.

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EMINENT DOMAIN LAW § 1255.020

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Comment. Section 1255.020 is new. It requires that notice of the deposit be given in all cases to facilitate motions to change the amount of the deposit (Section 1255.030) or applications to withdraw the funds deposited (Sections 1255.050 and 1255.080).

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to Judgment

EMINENT DOMAIN LAW § 1255.030

Tentatively approved September 1970
Revised September 1972

§ 1255.030. Increase or decrease in amount of deposit

1255.030. (a) At any time after a deposit has been made pursuant to this article, the court shall, upon motion of the plaintiff or of any party having an interest in the property for which the deposit was made, determine or redetermine whether the amount deposited is the probable amount of compensation that will be made for the taking of the property.

(b) 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 a motion for redetermination of the amount is made after entry of judgment and a motion for a new trial is pending, the court may stay its redetermination until disposition of the motion for a new trial.

(c) If the plaintiff has taken possession or obtained an order for possession and the court determines that the probable amount of compensation exceeds the amount deposited, the court shall order the amount deposited to be increased to the amount determined to be the probable amount of compensation and, if the amount on deposit is not increased accordingly within 30 days from the date of the court's order, the defendant may serve on the plaintiff a notice of election to treat such failure as an abandonment of the proceeding. If the plaintiff does not cure its failure within 10 days after receipt of

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EMINENT DOMAIN LAW § 1255.030

Tentatively approved September 1970
Revised September 1972

such notice, the court shall, upon motion of the defendant, enter judgment dismissing the proceeding and awarding the defendant his recoverable costs, disbursements, and damages as provided in [Code of Civil Procedure Section 1255a(c)].

(d) After any amount deposited pursuant to this article has been withdrawn by a defendant, the court may not determine or re-determine the probable amount of compensation to be less than the total amount already withdrawn. Nothing in this subdivision precludes the court from making a determination or redetermination that probable compensation is greater than the amount withdrawn.

(e) The plaintiff may at any time increase the amount deposited without making a motion under this section. In such case, notice of the increase shall be served as provided in subdivision (a) of Section 1255.020.

Comment. Section 1255.030 is new. It supersedes Code of Civil Procedure Section 1243.5(d) which provided for redetermination of the amount of probable compensation. As to the duty of the plaintiff and the power 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 P. 718 (1923).

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EMINENT DOMAIN LAW § 1255.030

to Judgment

Tentatively approved September 1970

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Subdivision (c) requires that the plaintiff increase the amount of the deposit in accordance with the court's order. Failure to so increase the deposit while in possession may result in an abandonment with attendant costs, fees, and damages. Cf. Section 1245.110 (effect on date of valuation of failure to increase deposit).

Section 1255.100 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. Accordingly, subdivision (d) prevents determination or redetermination of the amount of probable compensation to be less than the total sum withdrawn.

Subdivision (e) of Section 1255.030 is included primarily so that the deposit may be increased after entry of judgment without the need for a court determination under this section.

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EMINENT DOMAIN LAW § 1255.040

Tentatively approved September 1970
Renumbered March 1973

§ 1255.040. Deposit for relocation purposes on motion of certain defendants

1255.040. (a) If the property to be taken includes 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 made a deposit that satisfies the requirements of this article, such defendant may move the court for an order determining the amount of such compensation for the dwelling and so much of the land upon which it is constructed as may be required for its convenient use and occupation. The notice of motion shall specify the date on which the moving party desires the deposit to be made. Such date shall not be earlier than 30 days after the date noticed for the hearing of the motion and may be any later date. The motion shall be heard and determined in the same manner as a motion made to modify a deposit under Section 1255.030.

(b) The court shall make its order determining the probable compensation if the court determines that the defendant will use the amount deposited for relocation purposes only. Notwithstanding Section 1245.520, if the plaintiff deposits the amount stated in the order on or before the date specified by the moving party, (1) interest upon that amount shall not accrue and (2) the plaintiff may, after making the deposit and upon ex parte application to the court, obtain an order for possession that authorizes the plaintiff to take possession of the

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Tentatively approved September 1970
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property 30 days after the date for the deposit specified by the moving party. Notwithstanding Section 1245.510, if the deposit is not made on or before the date specified by the moving party, the compensation awarded in the proceeding to the moving party shall draw legal interest from that date.

(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 compensation as determined on the motion. The moving party is entitled to the full amount of such interest without offset for rents or other income received by him or the value of his continued possession 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

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compensation, of all claims and defenses in favor of the moving party except his claim for greater compensation.

(e) Notice of a deposit made under this section shall be served as provided by subdivision (a) of Section 1255.020. The defendant may withdraw the deposit as provided in Sections 1255.050 to 1255.090, inclusive, on condition the deposit is used for relocation purposes only.

(f) No motion may be made by a defendant under subdivision (a) after entry of judgment unless the judgment is reversed, vacated, or set aside and no other judgment is entered.

Comment. Section 1255.040 is new. Section 1255.040 makes available to homeowners a procedure by which probable just compensation may be determined, deposited, and withdrawn for relocation purposes within a relatively brief period after the beginning of the proceeding. For a comparable but much broader provision, see Pa. Stat. Ann., Tit. 26, § 1-407(b)(Supp. 1966).

Except as provided in this section, the depositing of probable just compensation pursuant to this article 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 Civ. Proc. § 1251.]

The reference in subdivision (a) to the amount of land required for the "convenient use and occupation" of the dwelling is taken from Section

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1183.1 of the Code of Civil Procedure which deals with mechanic's liens. The limitation precludes application of this section to land being taken and owned in common with the dwelling but unnecessary to the convenient use of the dwelling.

Under subdivision (b), the timely making of a deposit under this section entitles the plaintiff to an order for possession effective 30 days after the date for the making of the deposit specified in the notice of motion served by the moving party.

Subdivision (b) provides special rules governing when interest commences to accrue and ceases to accrue. If the deposit is not made on or before the date specified by the moving party, interest commences to accrue on the date specified by the moving party. On the other hand, if the required deposit is made on or before the date specified by the moving party, interest on the amount deposited does not accrue. If a deposit is thereafter made, subdivision (a) of Section 1245.520 provides that interest ceases to accrue on the date such amount is withdrawn by the person entitled thereto or, if not withdrawn, the date that judgment is thereafter entered.

Under subdivision (c), abandonment by the plaintiff entitles the defendant to recover interest in the manner provided for recovery of other costs, as prescribed in [subdivision (c) of Code of Civil Procedure Section 1255a]. The plaintiff may not abandon, however, if the defendant, to his detriment, has substantially changed his position in justifiable reliance upon the proceeding. [Code Civ. Proc. § 1255a(b).]

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EMINENT DOMAIN LAW § 1255.050

Tentatively approved September 1970
Renumbered March 1973

§ 1255.050. Withdrawal of deposit prior to judgment

1255.050. Prior to entry of judgment apportioning the award, any defendant who has an interest in the property for which a deposit has been made under this article 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.

Comment. Section 1255.050 is derived from former Code of Civil Procedure Section 1243.7(a), (c).

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EMINENT DOMAIN LAW § 1255.060

Tentatively approved September 1970
Renumbered March 1973

§ 1255.060. Procedure for withdrawal

1255.060. (a) Subject to subdivisions (c) and (d), 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 on the plaintiff of a copy of the application 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 either or both of the following grounds:

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

(2) That an undertaking should be filed by the applicant as provided in subdivision (e) or in Section 1255.070, 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

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be served in the manner provided in Section 1255.250 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 Section 1255.250 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 1255.100.

(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.

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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 interest as provided in Section 1255.100. 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. The undertaking may be executed by two or more sufficient sureties approved by the court, and in such case 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 reasonably paid for the undertaking as a part of the recoverable costs in the eminent domain proceeding.

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Comment. Section 1255.060 is based on subdivisions (a), (c), (d), (e), and (f) of former Code of Civil Procedure Section 1243.7. Unlike the subdivisions on which it is based, Section 1255.060 does not forbid withdrawal 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, as to the amount to be withdrawn, 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 Section 1250.030 and People v. Nogarr, 181 Cal. App.2d 312, 5 Cal. Rptr. 247 (1960).

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EMINENT DOMAIN LAW § 1255.070

Tentatively approved September 1970
Renumbered March 1973

§ 1255.070. Security when amount in excess of original deposit is withdrawn

1255.070. (a) If the amount originally deposited is increased pursuant to Section 1255.030 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 interest as provided in Section 1255.100. 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. The undertaking may be executed by two or more sufficient sureties approved by the court, and in such case the undertaking shall be in double such amount, but the maximum amount that may be recovered from such sureties is the amount by which the total amount to be withdrawn exceeds the amount originally deposited.

(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).

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(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 reasonably paid for the undertaking as a part of the recoverable costs in the eminent domain proceeding.

Comment. Section 1255.070 is the same in substance as subdivision (b) of former Code of Civil Procedure Section 1243.7 except that the former two-percent limitation of the amount recoverable for a premium on an undertaking has been replaced by the "reasonably paid" limitation. 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 1255.030.

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EMINENT DOMAIN LAW § 1255.080

Tentatively approved September 1970
Renumbered March 1973

§ 1255.080. Withdrawal of deposit after entry of judgment

1255.080. (a) After entry of judgment apportioning the award, whether or not the judgment has been reversed, vacated, or set aside, any defendant who has an interest in the property for which a deposit has been made under this article may apply to the court for the withdrawal of all or any portion of the amount deposited.

(b) Subject to subdivisions (c), (d), and (e), upon application of a defendant under this section, the court shall order that the defendant be paid the amount to which he is entitled under the judgment apportioning the award, whether or not such judgment has been reversed, vacated, or set aside.

(c) If the amount deposited is not sufficient to permit payment to all defendants of the amount to which they are entitled under the judgment apportioning the award, the court, upon application of a defendant under this section, shall order that the defendant be paid that portion of the amount deposited that the amount to which he is entitled under the judgment apportioning the award bears to the total amount of the award. Nothing in this subdivision relieves the plaintiff from the obligation imposed by subdivision (c) of Section 1255.030 to increase the amount of the deposit.

(d) Upon objection to such withdrawal made by any party to the proceeding, the court, in its discretion, may require the defendant to

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Tentatively approved September 1970
Renumbered March 1973

file an undertaking in the manner and upon the conditions specified in Sections 1255.060 and 1255.070 for withdrawal of a deposit prior to entry of judgment.

(e) No payment shall be made under this section unless the defendant receiving payments files (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.

Comment. Section 1255.080 is new, but it provides a procedure for withdrawing deposits that was available under former Code of Civil Procedure Sections 1243.7 and 1254. Under former practice, where a deposit was made to obtain possession prior to judgment, the defendant was nonetheless entitled to proceed under the comparatively simple provisions for withdrawal provided by Code of Civil Procedure Section 1254 after the entry of judgment apportioning the award. See People v. Dittmer, 193 Cal. App.2d 681, 14 Cal. Rptr. 560 (1961). Section 1255.080 has been added to provide explicitly for this practice. Section 1255.080 thus permits a defendant, after entry of judgment apportioning the award, to withdraw a deposit that was made before judgment under the same simple procedure provided for withdrawal of a deposit made after entry of judgment apportioning the award. Compare Section 1255.350 (withdrawal of a deposit made after entry of judgment apportioning the award). Upon entry of the judgment apportioning the award, any reason for use of the more complex

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prejudgment withdrawal procedure (see Sections 1255.060 and 1255.070) disappears.

Subdivision (c) provides for the possible situation in which a defendant applies to withdraw the amount to which he is entitled under the judgment apportioning the award but the amount then on deposit is insufficient to satisfy the total award. The subdivision permits him to withdraw his proportionate part of the amount on deposit. For example, if the amount of the deposit is \$20,000, the total award is for \$30,000, and the particular defendant is entitled to \$15,000 under the judgment apportioning the award, the subdivision permits him to withdraw \$10,000. The subdivision thus obviates any question as to a defendant's rights in such a situation and prevents withdrawal of a disproportionate share of the deposit by any particular defendant.

Subdivision (d) authorizes the court to require an undertaking to secure repayment of an excessive withdrawal. The subdivision thus permits the court to protect the condemnor or another defendant in a case in which the court believes that there is a fair chance that the judgment entered will be vacated, reversed, or set aside and that the ultimate recovery by the applicant in the proceeding will be less than the amount to which he is entitled under the judgment. The subdivision makes any such requirement discretionary with the court; it does not entitle any party to the proceedings to insist upon an undertaking. Further, the subdivision contemplates that any objection to withdrawal will be made known to the court by the objecting party; it imposes no

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duty upon either the court or the applicant to ascertain whether a party may have such an objection.

Subdivision (e) requires the defendant receiving payment to file either (1) a satisfaction of judgment or (2) a receipt and an abandonment of claims and defenses other than his claim to greater compensation. The requirement is the same as the one imposed in connection with the withdrawal of a deposit made after entry of judgment apportioning the award. See Section 1255.350(b).

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EMINENT DOMAIN LAW § 1255.090
Tentatively approved July 1971
Renumbered March 1973

§ 1255.090. Withdrawal waives all defenses except claim to greater compensation

1255.090: If any portion of the money deposited pursuant to this article 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 1255.090 restates the substance of subdivision (g) of former Code of Civil Procedure Section 1243.7. In addition to the defendant's waiving claims and defenses other than the claim to greater compensation, withdrawal of the deposit may also entitle the plaintiff to an order for possession. See Section 1255.260. Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

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EMINENT DOMAIN LAW § 1255.100

Judgment

Tentatively approved September 1970

Revised September 1972

Renumbered March 1973

§ 1255.100. Repayment of amount of excess withdrawal

1255.100. (a) 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 parties entitled thereto. The court that ordered the withdrawal shall enter judgment accordingly.

(b) The judgment so entered shall not include interest except in the following cases:

(1) Any amount that is to be paid to a defendant shall include legal interest from the date of its withdrawal.

(2) If the amount originally deposited by a plaintiff was increased pursuant to Section 1255.030 on motion of a party obligated to pay under this section, any amount that is attributable to such increase and that is to be repaid to the plaintiff shall include legal interest from the date of its withdrawal.

(c) If the judgment so entered is not paid within 30 days after its entry, the court may, on motion, enter judgment against the sureties, if any, for the amount of such judgment.

(d) The court may, in its discretion, grant a party obligated to pay under this section a stay of execution for any amount to be paid to a plaintiff. Such stay of execution shall not exceed one year following entry of final judgment in the eminent domain proceeding.

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EMINENT DOMAIN LAW § 1255.100
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Comment. Section 1255.100 supersedes former Code of Civil Procedure Section 1243.7. Unlike former Section 1243.7, which required the payment of interest upon the return of excess amounts withdrawn, Section 1255.100 requires payment of interest only where the excess is to be redistributed among defendants or where the excess is to be repaid to a plaintiff to the extent the excess was procured upon motion for increased deposit by a defendant.

Section 1255.100 also provides for a stay of execution on the return of the excess for a period of up to one year. See subdivision (d). It should be noted, however, that the stay is available only as against amounts to be repaid to a plaintiff. Moreover, because the judgment has been stayed, interest will accrue during the period of the stay regardless of the means by which the excess was obtained. Cf. Bellflower City School Dist. v. Skaggs, 52 Cal.2d 278, 282, 339 P.2d 848, (1959).

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EMINENT DOMAIN LAW § 1255.110

Tentatively approved September 1970
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§ 1255.110. Limitation on use of evidence submitted in connection with deposit

1255.110. Neither the amount deposited nor any amount withdrawn pursuant to this article shall be given in evidence or referred to in the trial of the issue of compensation.

Comment. Section 1255.110 restates the substance of subdivision (e) of former Code of Civil Procedure Section 1243.5. Its purpose is to encourage the plaintiff to make an adequate deposit by preventing the amount deposited or withdrawn from being given in evidence on the issue of compensation. This section does not prevent the defense either from using the appraisal data for impeachment purposes or from calling the appraiser as an expert witness on its own behalf. See People v. Cowan, 1 Cal. App.3d 1001, 81 Cal. Rptr. 713 (1969); People v. Douglas, 15 Cal. App.3d 814, 93 Cal. Rptr. 644 (1971).

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EMINENT DOMAIN LAW § 1255.210

Tentatively approved September 1970

Article 2. Possession Prior to Judgment

Comment. This article 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 Article 3 (commencing with Section 1255.310). See Section 1255.320.

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EMINENT DOMAIN LAW § 1255.210
Tentatively approved July 1971
Revised November 1971

§ 1255.210. Order for possession prior to judgment

1255.210 (a) At the time of filing the complaint or 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 under this article, and the court shall make an order authorizing the plaintiff to take possession of the property if all of the following are shown:

- (1) The plaintiff is a public entity or public utility.
- (2) The plaintiff is entitled to take the property by eminent domain.
- (3) The plaintiff has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article.

(b) The order for possession shall describe the property of which the plaintiff is authorized to take possession, which description may be by reference to the complaint, and shall state the date after which the plaintiff is authorized to take possession of the property.

Comment. Section 1255.210 states the requirements for an order for possession of property prior to judgment and describes the content of the order. With respect to the relief available from an order for possession prior to judgment, see Sections 1255.220, 1255.230, and 1255.240.

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Subdivision (a). Subdivision (a), like former Code of Civil Procedure Section 1243.5(a), provides an ex parte procedure for obtaining an order for possession prior to judgment.

Subdivision (a) states three prerequisites to issuance of an order for possession:

(1) The plaintiff must be a public entity or public utility. Under former Code of Civil Procedure Section 1243.4, possession prior to judgment was limited to certain public entities; public utilities did not have the right to obtain possession prior to judgment.

(2) The plaintiff must be entitled to take the property by eminent domain. This requirement is derived from former Code of Civil Procedure Section 1243.5(b). However, under former Code of Civil Procedure Section 1243.4, possession prior to judgment was permitted only if the taking was for right of way or reservoir purposes. This limitation is not continued. Likewise, the requirement formerly found in Code of Civil Procedure Section 1243.5(b) that the plaintiff was authorized to take possession prior to judgment is no longer continued since any public entity or utility may take possession in any case in which it is entitled to take by eminent domain.

(3) The plaintiff must have made the deposit required by Article 1. This requirement is derived from former Code of Civil Procedure Section 1243.5(b).

The issue of the plaintiff's need for possession prior to judgment is a matter that is incorporated in the provisions of Section 1255.220. And provision of relocation assistance is not necessarily prerequisite to an order for possession. Cf. 815 Mission Corp. v. Superior Court, ²² Cal. App.3d 604, 99 Cal. Rptr.538 (1971)(relocation of business).

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Revised November 1971

It should be noted that the determination of the plaintiff's right to take the property by eminent domain is preliminary only. The granting of an order for possession does not prejudice the defendant's right to demur to the complaint under Section [xxxx.xxx] or to contest the taking under [Section xxxx.xxx]. See also Sections 1255.230 and 1255.240. Conversely, the denial of an order for possession does not require a dismissal of the proceeding and does not prejudice the plaintiff's right to fully litigate the issue if raised by the defendant.

Subdivision (b). Subdivision (b) describes the contents of an order for possession. The contents are substantially the same as those of former Code of Civil Procedure Section 1243.5(b). However, the requirement that the order state the amount of the deposit has been eliminated since Section 1255.020 requires that a notice of the making of a deposit be served on interested parties. The requirement that the order state the purpose of the condemnation has been omitted since possession prior to judgment is now authorized for any public use by a public entity or public utility. And, the requirement that the order describe the "estate or interest" sought to be acquired has been omitted as unnecessary since the term "property" includes rights and interests therein. See Section 1230.070 (defining "property").

Subdivision (b) is limited by the requirement of a 30-day or 90-day period following the service of the order before possession can be physically assumed. See Section 1255.250.

It should be noted that the court may, under subdivision (b), authorize possession of all, or any portion or interest, of the property sought to be taken by eminent domain.

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EMINENT DOMAIN LAW § 1255.220
Tentatively approved December 1971

§ 1255.220. Stay of order for hardship

1255.220. At any time after the plaintiff has been authorized to take possession of property under Section 1255.210, any defendant or occupant of the property may move for relief from the order if the hardship to him of having possession taken at the time specified in the order is substantial. If the court determines that the hardship to the defendant or occupant is substantial, the court may stay the order or limit by terms and conditions its operation unless, upon considering all relevant facts (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), the court further determines (a) that the plaintiff needs possession of the property within the time specified in the order for possession and (b) that the hardship the plaintiff would suffer as a result of a stay or limitation of the order would be substantial.

Comment. Section 1255.220 is new. It permits the court to stay an order for possession issued ex parte under Section 1255.210 or to limit the operation of the order by fixing terms and conditions of the plaintiff's possession. The court may do this only after making a dual finding of fact. The court must first find that having possession of the property specified

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EMINENT DOMAIN LAW § 1255.220

Tentatively approved December 1971

in the order taken at the time specified in the order would be a substantial hardship to the defendant. If the court finds this fact, it next looks to the plaintiff's interest in early possession of the property. If it finds both that the plaintiff needs possession of the property at the time specified and that the plaintiff would suffer substantial (as distinguished from trivial) injury from a stay or other limitation of the order, the court may not stay or limit the order.

Section 1255.220 gives the court broad authority to draft an order that is appropriate to the circumstances. The court may, for example, impose limitations on the order that will permit the plaintiff and defendant to have possession of portions of the property or to jointly use the property.

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EMINENT DOMAIN LAW § 1255.230
Tentatively approved November 1971

§ 1255.230. Stay of order where right to take contested

1255.230. If the plaintiff has been authorized to take possession of property under Section 1255.210 and the defendant has objected in the manner provided in [Article x (commencing with Section xxxx.xxx) of Chapter 8] to the plaintiff's right to take the property by eminent domain, the court, if it finds there is a reasonable probability the defendant will prevail, shall stay the order for possession until it has ruled on the defendant's objections.

Comment. Section 1255.230 is new. Because the sole means by which the defendant may contest the right to take is the statutory objection, Section 1255.230 is intended to permit the court to mitigate the effect of an order for possession pending resolution of the objection in a case where the court believes there is merit to the objection. Cf. Section 1255.240(b). Because objections to the right to take are expeditiously resolved in the normal course of events (see [Section xxxx.xxx et seq.]), a stay will not be necessary unless the objections will not be resolved by the date of possession specified in the order.

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EMINENT DOMAIN LAW § 1255.240

Tentatively approved November 1971

§ 1255.240. Vacating order for possession

1255.240. (a) Except as provided in subdivision (b), if an order has been made under Section 1255.210 authorizing the plaintiff to take possession of property and the court subsequently determines that the conditions specified in Section 1255.210 for issuance of the order are not satisfied, the court shall vacate the order.

(b) Notwithstanding subdivision (a), the court may vacate an order for possession on the ground that the plaintiff is not entitled to take the property by eminent domain only if the defendant has objected in the manner provided in [Article x (commencing with Section ~~xxxx.xxx~~) of Chapter 8] to the right of the plaintiff to take the property by eminent domain and the court has determined pursuant to that chapter that the plaintiff does not have the right to take the property.

Comment. Because the order for possession is issued following an ex parte application by the plaintiff, subdivision (a) of Section 1255.240 expressly authorizes the court to vacate an order for possession prior to judgment if it subsequently determines, whether upon motion of the defendant or upon its own motion, that the requirements of Section 1255.210 are not satisfied.

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EMINENT DOMAIN LAW § 1255.240

Tentatively approved November 1971

Under subdivision (a), one ground for vacating the order for possession is that the plaintiff is not entitled to take the property by eminent domain. See Section 1255.210. However, the defendant may not raise this issue under Section 1255.240 but may only do so by objection to the right to take. If the proceeding is dismissed for this or any other ground so that the plaintiff is not entitled to take the property by eminent domain, the order must, of course, be vacated.

Under former statutes, judicial decisions held that an appeal may not be taken from an order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari were held to be 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 P. 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, an order for possession following entry of judgment has been held to be an appealable order. San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App.2d 668, 267 P.2d 349 (1954). No change is made in these rules as to orders made under Section 1255.210 or Article 3 (commencing with Section 1255.310).

Deposit and Possession Prior
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EMINENT DOMAIN LAW § 1255.250

Tentatively approved September 1970
Revised July 1971
Revised November 1971
Revised December 1971

§ 1255.250. Service of order

1255.250. (a) As used in this section, "record owner" means the owner of the legal or equitable title to the fee or any lesser interest in property as shown by recorded deeds or other recorded instruments.

(b) The plaintiff shall serve a copy of the order for possession issued under Section 1255.210 on the record owner of the property and on the occupants, if any. If the property is lawfully occupied by a person dwelling thereon or by a farm or business operation, service shall be made not less than 90 days prior to the time possession is to be taken pursuant to the order. In all other cases, service shall be made not less than 30 days prior to the time possession is to be taken pursuant to the order. Service may be made with or following service of summons.

(c) At least 30 days prior to the time possession is taken pursuant to an order for possession made under Section 1255.040 or 1255.260, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any.

(d) Service of the order shall be made by personal service except that:

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EMINENT DOMAIN LAW § 1255.250

Tentatively approved September 1970
Revised July 1971
Revised November 1971
Revised December 1971

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

(2) If the person on whom service is to be made resides out of the state, or has departed from the state or cannot with due diligence be found within the state, service of the order may be made 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 1255.250 is derived from former Code of Civil Procedure Section 1243.5(c).

Subdivision (a). The definition of "record owner" is broadened to include persons not included under the definition found in former Section 1243.5(c). Under the former provision, "record owner" was defined to include only the persons in whose name the legal title to the fee appeared

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Tentatively approved September 1970
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Revised November 1971
Revised December 1971

as of record and the persons in possession of the property under a recorded lease or agreement of purchase.

Subdivision (b). The requirement that, in certain instances, service be made not less than 90 days before possession is to be taken conforms to the requirement of Government Code Section 7267.3 (notice under land acquisition guidelines). Under former Section 1243.5(c), only 20 days' notice was required; and the court, for good cause shown, could shorten this time to not less than three days.

Because the order is obtained ex parte rather than on noticed motion, the time periods under subdivision (b) are computed from the date of service rather than the date of the order. The plaintiff may, of course, obtain a specific date of possession later than the 90-day or 30-day date in his request for an order for possession.

Subdivision (c). Subdivision (c) prescribes the time for service where the order for possession is granted under Section 1255.040 (deposit for relocation purposes) or 1255.260 (possession after vacation of property or withdrawal of deposit). No comparable provision was found in former law because the procedures provided by Sections 1255.040 and 1255.260 are new.

Subdivision (d). Subdivision (d) requires personal service except in certain limited situations. Paragraphs (1) and (2) of subdivision (d)

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specify the situations where personal service need not be made. These paragraphs continue provisions of former Section 1243.5(c) of the Code of Civil Procedure. The requirement that an affidavit be filed concerning the reason personal service was not made has been eliminated.

Subdivision (e). Subdivision (e) continues the substance of a provision of former Section 1243.5(c).

Subdivision (f). Subdivision (f) continues the substance of a provision of former 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.

Deposit and Possession Prior
to Judgment

EMINENT DOMAIN LAW § .1255.260

Tentatively approved September 1970
Renumbered March 1973

§ 1255.260. Right of plaintiff to take possession after vacation of property
or withdrawal of deposit

1255.260. (a) If the plaintiff has made a deposit that satisfies the requirements of Article 1 (commencing with Section 1255.010), 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 does one of the following:

(1) Expresses his willingness to surrender possession of the property.

(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 compensation pursuant to Article 1 (commencing with Section 1255.010) and that each of the defendants entitled to possession has done one of the following:

(1) Expressed his willingness to surrender possession of the property.

(2) Withdrawn any portion of the deposit.

(c) The order for possession shall:

Deposit and Possession Prior
to Judgment

EMINENT DOMAIN LAW § 1255.260

Tentatively approved September 1970
Renumbered March 1973

- (1) Recite that it has been made under this section.
- (2) Describe the property 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 under subdivision (c) of Section 1255.250.

Comment. Section 1255.260 is new. Article 1 (commencing with Section 1255.010) permits the plaintiff to deposit probable 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 take possession of the property after each of the defendants entitled to possession has expressed his willingness to surrender it. Service of the order for possession is required by subdivision (c) of Section 1255.250.

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EMINENT DOMAIN LAW § 1255.310

Tentatively approved September 1970

Article 3. Deposits and Possession After Judgment

Comment. This article relates to deposits that may be made and orders for possession that may be obtained after entry of the judgment in condemnation regardless whether the award has been apportioned. The article supersedes former Code of Civil Procedure Section 1254 and eliminates whatever distinction there may have been between deposits made under former Section 1252 and former Section 1254 of the Code of Civil Procedure. Under this article, there is but one uniform postjudgment deposit procedure. As to the distinction between the "judgment," the apportionment of the award, and the "final judgment" in eminent domain proceedings, see Section 1230.038 and Bellflower City School Dist. v. Skaggs, 52 Cal.2d 278, 339 P.2d 848 (1959).

Deposit and Possession Prior
to Judgment

EMINENT DOMAIN LAW § 1255.310

Tentatively approved September 1970
Staff revision April 1973

§ 1255.310. Deposit after judgment

1255.310. (a) Unless the plaintiff has made a deposit under Article 1 (commencing with Section 1255.010) prior to entry of judgment, the plaintiff may, at any time after entry of judgment, deposit for the defendants the amount of the award together with the interest then due thereon. The deposit may be made notwithstanding an appeal, a motion for a new trial, or a motion to vacate or set aside the judgment, and may be made whether or not the judgment has been reversed, vacated, or set aside.

(b) If the deposit is made prior to apportionment of the award, the plaintiff shall serve a notice that the deposit has been made on all of the other parties to the proceeding who claim an interest in the property taken. If the deposit is made after apportionment of the award, 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 1255.330 for the service of an order for possession. Service of an order for possession under Section 1255.330 is sufficient compliance with this subdivision.

Comment. Subdivision (a) of Section 1255.310 is similar to subdivision (a) of former Code of Civil Procedure Section 1254. However, the deposit provided for in this subdivision is merely the amount of the judgment and accrued interest, and the former provision for an additional sum to secure

Deposit and Possession Prior
to Judgment

EMINENT DOMAIN LAW § 1255.310

Tentatively approved September 1970
Staff revision April 1973

payment of further compensation and costs is contained in Section 1255.340. In addition, the deposit may be made under this section without regard to an order for possession. This section thus supersedes the deposit procedures formerly provided by Code of Civil Procedure Sections 1252 and 1254. Although this section applies only to the making of a deposit after judgment, a deposit made before judgment may be increased after entry of judgment pursuant to subdivision (e) of Section 1255.030. The making of a deposit does not affect the right of plaintiff to appeal. See Section 1255.430. Cf. Annot., Eminent Domain: Payment or Deposit of Award in Court as Affecting Condemnor's Right to Appeal, 40 A.L.R.3d 203 (1971).

Subdivision (b) is new. In requiring that notice of the deposit be given, it parallels Section 1255.020 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 former Code of Civil Procedure Section 1254, the defendant received notice that the deposit had been made only when served with an order for possession

Deposit and Possession Prior
to Judgment

EMINENT DOMAIN LAW § 1255.320

Tentatively approved September 1970
Staff revision April 1973

§ 1255.320. Order for possession

1255.320. (a) If the plaintiff is not in possession of the property to be taken, the plaintiff may, at any time after entry of judgment, whether or not the judgment has been reversed, vacated, or set aside, apply ex parte to the court for an order for possession, and the court shall authorize the plaintiff to take possession of the property pending conclusion of the litigation if:

(1) The judgment determines that the plaintiff is entitled to take the property; and

(2) The plaintiff has deposited for the defendants an amount not less than the amount of the award, together with the interest then due thereon, in accordance with Section 1255.310 or Article 1 (commencing with Section 1255.010).

(b) 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 30 days after the date the order is made where the property is lawfully occupied by a person dwelling thereon or by a farm or business operation, and in all other cases 10 days.

Comment. Section 1255.320 restates the substance of a portion of subdivision (b) of former Code of Civil Procedure Section 1254 except that the time for possession is lengthened from 10 to 30 days after the order for possession where the property is occupied.

Deposit and Possession Prior
to Judgment

EMINENT DOMAIN LAW § 1255.330

Tentatively approved September 1970
Staff revision April 1973

§ 1255.330. Service of order

1255.330. (a) The plaintiff shall serve a copy of the order for possession upon each of the defendants and their attorneys, either personally or by mail:

(1) At least 30 days prior to the date possession is to be taken of property lawfully occupied by a person dwelling thereon or by a farm or business operation.

(2) At least 10 days prior to the date possession is to be taken in any case not covered by paragraph (1).

(b) A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

Comment. Section 1255.330 is the same in substance as subdivision (c) of former Code of Civil Procedure Section 1254 except that the 10-day notice period is lengthened to 30 days where the property is occupied. With respect to subdivision (b), see the Comment to Section 1255.250.

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EMINENT DOMAIN LAW § 1255.340
Tentatively approved September 1970

§ 1255.340. Increase or decrease in amount of deposit

1255.340. At any time after the plaintiff has made a deposit upon the award pursuant to this article, 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 1255.340 supersedes subdivision (d) of former Code of Civil Procedure Section 1254. The additional amount referred to in Section 1255.340 is the amount determined by the court to be necessary, in addition to the amount of the judgment and the interest then due thereon, to secure payment of any further compensation, costs, or interest that may be recovered in the proceeding. Deposit of the amount of the award itself after entry of judgment is provided for by Section 1255.310.

Former Code of Civil Procedure Section 1254 was construed to make the amount, if any, to be deposited in addition to the award 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 Section 1255.340.

For the provision permitting increase or decrease in a deposit made prior to entry of judgment, see Section 1255.030.

Deposit and Possession Prior
to Judgment

EMINENT DOMAIN LAW § 1255.350

Tentatively approved September 1970
Staff revision April 1973

§ 1255.350. Withdrawal of deposit

1255.350. (a) Prior to entry of judgment apportioning the award, any defendant who has an interest in the property for which a deposit has been made under this article may apply to the court for withdrawal of all or any portion of the amount deposited in accordance with the procedure provided in Sections 1255.050, 1255.060, and 1255.070.

(b) Any defendant for whom an amount has been deposited upon the judgment apportioning the award is entitled to demand and receive the amount to which he is entitled under the judgment upon obtaining an order from the court whether or not such judgment has been reversed, vacated, or set aside. 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.

(c) 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 1255.060 and 1255.070 for withdrawal of a deposit prior to entry of judgment.

Comment. Section 1255.350 is based on subdivision (f) of former Code of Civil Procedure Section 1254.

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EMINENT DOMAIN LAW § 1255.350

Tentatively approved September 1970
Staff revision April 1973

Former 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. See People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962); San Francisco Bay Area Rapid Transit Dist. v. Fremont Meadows, Inc., 20 Cal. App.3d 797, 97 Cal. Rptr. 898 (1971). That construction is continued in effect by Section 1255.350. Inferentially, former Code of Civil Procedure Section 1254 permitted withdrawal only of the amount deposited upon the judgment and not the additional amount, if any, deposited as security. That construction also is continued in effect.

For the provision for withdrawal after entry of judgment of a deposit made prior to judgment, see Section 1255.080.

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EMINENT DOMAIN LAW § 1255.360

Tentatively approved September 1970

§ 1255.360. Repayment of amount of excess withdrawal

1255.360. When money is withdrawn pursuant to this article, 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 1255.360 is the same in substance as subdivision (g) of former Code of Civil Procedure Section 1254.

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EMINENT DOMAIN LAW § 1255.410

Tentatively approved September 1970
Revised November 1971

Article 4. Miscellaneous Provisions

§ 1255.410. Court may enforce right to possession

1255.410. The court in which a proceeding in eminent domain is brought has the power to:

(a) Determine the right to possession of the property, as between the plaintiff and the defendants, in accordance with this chapter.

(b) Enforce any of its orders for possession by appropriate process. The plaintiff is entitled to enforcement of an order of possession as a matter of right.

Comment. Section 1255.410 is new. In general, the section codifies judicial decisions which hold that, after an eminent domain proceeding is begun, the court in which that proceeding is pending has the exclusive power to determine the respective rights of the plaintiff and of the defendants to possession and to enforce its determination. See, e.g., Neale v. Superior Court, 77 Cal. 28, 18 P. 790 (1888); In re Bryan, 65 Cal. 375, 4 P. 304 (1884); San Bernardino Valley Municipal Water Dist. v. Gage Canal Co., 226 Cal. App.2d 206, 37 Cal. Rptr. 856 (1964). 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 Marblehead Land Co.

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to Judgment

EMINENT DOMAIN LAW § 1255.410

Tentatively approved September 1970
Revised November 1971

v. Los Angeles County, 276 Fed. 305 (S.D. Cal. 1921); 3 B. Witkin, California Procedure Enforcement of Judgment § 64 (1954)), orders for possession contemplated by the section include those made under Article 2 (commencing with Section 1255.210), Article 3 (commencing with Section 1255.310), and [Section 1253 of the Code of Civil Procedure].

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EMINENT DOMAIN LAW § 1255.420
Staff recommendation March 1973

§ 1255.420. Police power not affected

1255.420. Nothing in this chapter limits the right of a public entity to seize property immediately in the exercise of its police power in emergency situations.

Comment. Section 1255.420 is new. It makes clear that the requirements of this chapter--such as the requirement of a deposit of probable compensation, the obtaining of an order for possession, service of order for possession, and the like--do not limit emergency seizure of property in the exercise of the police power. See Surocco v. Geary, 3 Cal. 69 (1853). See generally Van Alstyne, Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 Stan. L. Rev. 617 (1968), reprinted in Van Alstyne, California Inverse Condemnation Law, 10 Cal. L. Revision Comm'n Reports 111 (1971).

Deposit and Possession Prior
to Judgment

EMINENT DOMAIN LAW § 1255.430

Tentatively approved September 1970
Combination of two former sections
--March 1973

§ 1255.430. Taking possession does not waive right of appeal

1255.430. The plaintiff does not abandon or waive the right to appeal from the judgment or to request a new trial by depositing the amount of the award or by taking possession pursuant to this chapter.

Comment. Section 1255.430 is the same in substance as former Code of Civil Procedure Sections 1243.5(f) and 1254(e). 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 Section 1255.040.

Under Section 1255.090, 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. Similarly, under Section 1255.350, the defendant may retain these rights--even though he withdraws the deposit--if he files 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). See also Annot., Eminent Domain: Payment or Deposit of Award in Court as Affecting Condemnor's Right to Appeal, 40 A.L.R.3d 203 (1971).

Deposit and Possession Prior
to Judgment

EMINENT DOMAIN LAW § 1255.440

Tentatively approved September 1970
Renumbered March 1973

§ 1255.440. Deposit in State Treasury unless otherwise required

1255.440. (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 10 (commencing with Section 16429.1) 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 1255.440 is the same in substance as former Code of Civil Procedure Section 1243.6 and a portion of subdivision (h) of former Code of Civil Procedure Section 1254. Subdivision (b) is based on the first two sentences of subdivision (h) of former Code of Civil Procedure Section 1254.