36.350, 36.380, 36.410 10/11/73

Memorandum 73-89

Subject: Studies 36.350, 36.380, 36.410 - Condemnation (Comprehensive Statute: Chapters 5, 8, and 11)

At the September meeting, the Commission approved for printing with certain revisions Chapters 5 (Commencement of Proceeding), 8 (Procedures for Determining Right to Take and Compensation), and 11 (Postjudgment Procedure). The revised chapters are attached to this memorandum. However, following the September meeting, the State Bar Committee on Governmental Liability and Condemnation was also able to review these chapters, and the staff thinks that it would be worthwhile to consider the State Bar Committee's suggestions prior to sending these chapters to the printer. We have accordingly set forth these suggestions below. (We have not received the committee's minutes for their September meeting; hence, the suggestions below are based on our notes relating to the actions taken by the committee. However, we believe that these notes are reasonably accurate.)

Section 1250.150. The State Bar suggests that the recording of a lis pendens be made mandatory in every case. The suggestion appeared to be based on the view that the notice afforded by such recordation was valuable in alerting all possible claimants to the pendency of the proceeding. The State Bar did not consider what sanctions might be imposed for a failure to record. The staff notes that Section 1243 presently provides that a lis pendens shall be recorded, but the requirement is not jurisdictional and apparently no sanction exists beyond that inherent in failing to bind subsequent transferees. See Comment to Section 1250.150. Representatives of condemnors have stated that they record a lis pendens as a matter of course in any event so, whether the rule is "mandatory" or not, it will not apparently have much practical effect. The staff prefers to leave the section as drafted because we believe that it more accurately states the actual rule. What is the Commission's wish?

Section 1250.310. The State Bar suggests that subdivision (d) be revised and subdivision (e) be added to provide:

> (d) A map or plat delineating the boundaries of the property described in the complaint and showing its relation to the project for which it is sought to be taken.
>
> (e) A statement indicating whether the property sought to be taken is a part of a larger parcel or is an entire parcel.

The staff does not believe that the revisions in subdivision (d) work any substantive change--see Comment to subdivision (d)--and we do not have any objection to this suggestion if the Commission believes that the language proposed is more clear. Subdivision (e) would work a change. The statement is designed to be essentially a notice provision advising the defendant that there may be a "larger parcel" issue, and we do not see the need for it. It seems to us that the contentions of the respective parties concerning the "larger parcel" issue can be worked out satisfactorily in the discovery process, and the defendant's attorney does not need to be alerted by the complaint to the existence of the issue. Moreover, if the plaintiff is to be required to state in the complaint its position on the larger parcel issue, should not the defendant be required to state his position on this issue in his answer?

Section 1250.380. Here the State Bar suggests that subdivision (b) be deleted and that the second sentence of subdivision (a) be revised as follows:

> (a) . . . . In the case of an amendment to the complaint, such terms and conditions may include . . . .

The staff believes that the introductory clause to the second sentence should be added as suggested. This section originally referred only to the complaint, and the second sentence was drafted in that context. When the first sentence of subdivision (a) was changed to refer to "any pleading," we do not believe that the effect of this change on the second sentence was fully considered. The staff, for example, does not believe that payment of attorney's fees by the defendant as a condition to amending his answer to allege a greater interest than originally claimed was ever contemplated or should be permitted. In short, we ask that subdivision (a) be revised as indicated.

Deletion of subdivision (b) is suggested because, as it is now drafted, it would preclude amendment of the complaint to add property if the plaintiff is not a public entity. (Only a public entity could satisfy the prerequisite of adoption of a resolution of necessity.) The point is well taken, but we suggest that the problem be cured by revising the subdivision to provide: "(b) A public entity may add to the property sought to be taken only if it has adopted . . . ."

Commissioner Miller, in his editorial revisions, suggested that this section be further revised to add the words "or supplement" or "or supplemented" where appropriate in this section. His point is that the term

"amendment" is inappropriate where it refers to matters occurring after commencement of the action. We believe that this point is also well taken. To speed the process, we have made the changes in the section suggested above. Is this satisfactory?

Section 1260.220. The State Bar suggests that the statute provide that, where the plaintiff elects a two-stage proceeding and where a defendant can show that it would be a burden upon him to have to present evidence as to the value of the entire property sought to be taken, the court by order can permit such defendant to present evidence as to the value of his interest alone. This suggestion was prompted by a case where property was taken which was being put to an integrated business use--as we recall, a service station, car wash, and perhaps some other related business. The car wash was separately owned and the owner (after some opposition) was finally permitted to put on evidence as to the value of his separate interest alone, e.g., improvements under a leasehold. In the situation described, the staff believes that the court's ruling was proper and that in the future the courts would permit such testimony whether or not the statute specifically so provides.

The State Bar also considered whether a defendant has to participate in the first stage of a two-stage proceeding as a prerequisite to participating in the second stage. Our notes as to whether any action was taken in regard to this point are in conflict. However, we believe that no such prerequisite exists under present law, and our statute would not change this result. We do not believe that any revisions are necessary.

There may, however, be some room for argument concerning the above issues, and the Commission may wish to deal with them by adding the following sentence at the end of subdivision (b):

> Nothing in this subdivision limits the right of a defendant to present during the first stage of the proceeding evidence of the value of, or injury to, his interest in the property; and the right of a defendant to present evidence during the second stage of the proceeding of the value of, or injury to, his interest in the property is not affected by whether or not he avails himself of the right to present evidence during the first stage of the proceeding.

Section 1260.240. The State Bar suggests adding the following sentence to this section: "Such fees are taxable costs in the proceedings." The staff does not believe that any revision is necessary but, if this matter does merit treatment, we suggest a more direct statement to the effect that such fees shall be paid by the plaintiff.

Section 1268.030. The State Bar suggests the deletion of the requirement in paragraph (1) of subdivision (a) that the judgment authorizing the taking be final before a final order of condemnation may be made. The basic reason for this change is that it is desirable for both sides to have title transferred as soon as possible to reduce the possibility of risk of loss problems. (It was also suggested that the procedure we provide would in some way make it more difficult to prorate taxes. The staff does not understand this point and it was not pursued at the State Bar meeting.) The existing law is unclear, but paragraph (1) appears to codify existing law. If paragraph (1) were deleted, then Section 1268.510 (abandonment) should also be revised to make clear that, where a final order of condemnation has been recorded prior to final judgment and the judgment is reversed on appeal and a new and higher award is obtained, the plaintiff retains the right to abandon under Section 1268.510. What is the Commission's wish on this point?

Section 1268.110. The State Bar initially considered a suggestion to make this section mandatory but finally recommended adding a new section to provide substantially as follows:

> § _____. Where deposit has not been made pursuant to Section 1268.110, at any time after entry of judgment, the court, upon defendant's motion, shall order the plaintiff to deposit with the court for the persons entitled thereto the full amount of the award as to all elements of compensation as to which no appeal is pending or contemplated together with an amount equal to the plaintiff's contentions of value as to elements of compensation as to which an appeal is pending or contemplated.

We do not have the language actually approved by the State Bar, but the above is close enough to reflect the substance of the action taken. In short, they want the defendant to have the power to compel a deposit after judgment of at least that amount which the plaintiff concedes should be paid. Certain conforming changes were also suggested. The plaintiff's right to appeal or to move for abandonment would not be affected by a deposit pursuant to this section (see Section 1268.170). Where a defendant seeks to withdraw a deposit made pursuant to this section, the plaintiff can require that he post a bond to cover the withdrawal (see Section 1268.140). Withdrawal of the deposit would not, in and of itself, constitute such a change of position as to preclude abandonment by the plaintiff (see Section 1268.510). The State Bar did not consider sanctions for failing to make a deposit, but

such failure could be made grounds for dismissal. Section 1268.120 would be revised to refer to deposits under the proposed section.

It should be noted that there is no requirement under existing law that the amount of the judgment be deposited prior to 30 days after it becomes final. See Section 1268.010. The State Bar suggestion reflects the premise that it is unfair for the defendant to have his property tied up with no ability to convert his judgment into cash. This is especially true where it is the plaintiff who is appealing. It is true that, until deposit is made, interest will be accruing and, of course, deposit is required if the plaintiff seeks possession so that it may proceed with the project. However, neither of these points completely answers the basic objection. The Commission considered this problem in connection with prejudgment deposits. See Sections 1255.040 (deposit for relocation purposes on motion of certain defendants), 1255.050 (deposit on motion of owner of rental property). You may recall that public entities generally strongly object to mandatory deposits where possession is not sought. Moreover, we have some concern with the method of fixing the amount of the deposit and its practical effect on the right to abandon since the defendant, by withdrawing the deposit, will almost always have changed his position to an extent to preclude abandonment. In any event, the changes would obviously require a decision by the Commission; what is your desire?

Section 1268.410. The State Bar suggests that paragraph (2) of subdivision (a) be revised to read:

> (2) A receipt for the money which shall be deemed to be an abandonment of all claims and defenses except his claim to greater compensation.

Actually, this change would bring this section into closer conformity with Section 1255.260, its prejudgment counterpart, which continues existing law. The staff's only concern with both provisions is that a defendant may inadvertently waive his right to object to the right to take by withdrawing the money. If this is not considered a significant problem--and apparently it has not been under existing prejudgment deposit provisions--we suggest that the language in both sections be conformed. Paragraph (2) should accordingly be revised to read:

> (2) A receipt for the money which shall constitute a waiver by operation of law of all claims and defenses except a claim for greater compensation.

Section 1268.160. The State Bar suggests that this section be revised to provide as follows:

> 1268.160. 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~~ but with interest to any other party entitled thereto, and the court shall enter judgment accordingly.

Here again, the change proposed would bring this section into closer conformity with its prejudgment counterpart, in this case Section 1255.280. The staff believes the suggested change is desirable even though it changes existing law; however, we suggest that the wording be conformed more closely to that of Section 1255.280. Accordingly, we suggest that Section 1268.160 be revised to read as indicated in Exhibit I (pink).

Section 1268.170. The State Bar suggests that this section be revised to read:

> 1268.170. The plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial by making any deposit pursuant to this article.

The staff believes that this change is desirable. It makes clear that deposit does not in itself preclude a subsequent abandonment and refers simply to a waiver of the right to appeal rather than "abandon or waive." Nevertheless, Section 1268.710 continues the language of existing law. If the change is approved, a similar change should be made in Section 1255.080. On the other hand, if deposit is intended to preclude abandonment, the staff believes that this point should be clarified, at least in the Comments to Sections 1255.080 and 1268.170, or better by a revision of Section 1268.510 or the Comment to that section since Section 1268.510 permits the plaintiff to abandon in any case (within specified time limits) and permits the defendant to object on the sole ground stated in that section.

Section 1268.220. The State Bar suggests that subdivision (b) of this section (and subdivision (f) of Section 1255.450) be revised to read:

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

Their obvious concern is that two truly different defendants might have the same address and hence one of them might not receive adequate notice. The staff merely notes that subdivision (b) as presently drafted is based on existing law. See Section 1243.5(c). We are unaware that any problem has actually occurred under the present law; however, we have no objection to making the change either.

Section 1268.230. The State Bar suggested two changes here. The first sentence of the section should be revised to read:

> The plaintiff does not waive the right to appeal from the judgment or the right to request a new trial by taking possession pursuant to this article.

The State Bar considered but did not include here the clause referring to "the right to move to abandon." Compare Section 1268.170. Accordingly, we believe, they propose that, where the plaintiff takes possession following judgment, the plaintiff may not subsequently move to abandon. Moreover, we assume that they would apply the same rule prior to judgment. See Section 1255.470. We note, however, that the State Bar specifically declined to clarify their decision here or resolve the ambiguity. We believe that the matter should not be left to implication but should be made clear by statute or Comment. Moreover, we believe that taking possession should not, in itself, preclude abandonment; whether abandonment should be permitted or not should always be determined under the standards provided by Section 1268.510--i.e., has the position of the defendant been substantially changed to his detriment in justifiable reliance upon the proceeding and can he be restored to substantially the same position as if the proceeding had not been commenced? We would accordingly conform Sections 1268.230 and 1255.470 to the proposal made above under Section 1268.170.

The State Bar also suggested that, where the plaintiff makes a deposit and takes possession following judgment, the defendant may draw down the deposit, without waiving the right to appeal on the issue of "public use," although the right to appeal the right to take generally is waived. The Commission has discussed the suggestion that the defendant should be

permitted to drawn down the deposit and still object to the right to take on numerous occasions and has decided not to adopt it. What is the Commission's desire?

Section 1268.240. The State Bar suggests that we add the word "reasonably" here, i.e., a public entity may exercise reasonably its police power in emergency situations. We see no need for this change; certainly the statute does not imply that the public entity is authorized to act unreasonably.

Section 1268.310. The State Bar suggests two changes here. They would change subdivision (a) from the date of entry of judgment--which is existing law for eminent domain proceedings under Section 1255b(a)(1)--to the time the verdict or decision of the court was rendered or made--see Section 1033 relating to interest in civil actions generally. We do not believe that the change would have much practical effect although occasionally there will be some delay between the time the judgment is rendered and the time it is entered. In short, the staff does not oppose the policy suggestion of the State Bar although we would use the term "judgment" as defined in Section 1235.130 rather than verdict or decision.

The State Bar would also restore the phrase "or damage to the property occurs" to subdivision (b). The staff believes that this change should be made. We now permit recovery for damage to the remainder caused by the construction of the project whether or not the damage is caused by a portion of the project located on the part taken. See Section 1263.420. Therefore, in some circumstances, damage may occur to the remainder prior to the time possession is taken of any of the defendant's property. The staff believes that interest should run from the time such damage occurs; accordingly, we suggest that the phrase referred to above be restored.

Section 1268.430. The State Bar suggests the addition of a subdivision (c) to provide substantially as follows:

> (c) Where the right to such tax refund is attacked by a motion to tax costs, the court shall forthwith order the tax collector to appear before the court, within not less than 20 days from the date of the order, to show cause why the court should not award the refund claimed by the defendant's cost bill.

This provision reflects the asserted need for a statutory procedure and deadline to compel the tax collector to establish the amount of the refund. The discussion at the meeting did not persuade us that a need really does

exist; however, the suggestion was made and we do not oppose the basic principle which in effect is that the tax collector should do his job of allocating the taxes between palintiff and defendant as to given parcels of property. See Section 1268.420. We would expect that the inclusion of the provision would cause objections from local officials and add to the price that will be put on the bill.

Section 1268.610. The staff suggests that this section be revised to make clear that, although there is a dismissal of one or more plaintiffs pursuant to Section 1260.020 (determination of more necessary public use where separate proceedings are consolidated), the defendant is not entitled to recover litigation expenses that would not otherwise have been incurred. It can be argued that dismissal of one or more plaintiffs does not constitute a dismissal of the "proceeding" and hence Section 1268.610 is not applicable at all. Perhaps a Comment to this effect is all that is required. On the other hand, the public entities might feel more secure if subdivision (c) were also revised to provide in part:

> (c) Where there is a partial dismissal . . . , or a dismissal of one or more plaintiffs pursuant to Section 1260.020, ...

Does the Commission believe any action is required?

Section 1268.720. The State Bar suggests this section be revised to provide:

> 1268.720. The defendant in an eminent domain proceeding shall, except in the case of a frivolous appeal, be allowed his costs on appeal, whether or not he is the prevailing party.

The substantive effect of this change is not great. It limits the power of the Judicial Council to provide for costs by rule and it deals with frivolous appeals without waiting for a Judicial Council rule. However, we do not believe that a very different result would be reached under either version. If the State Bar suggestion is adopted, however, we do suggest that it be made clear that the exception as to issues of title between two or more defendants applies on appeal as well as in the trial court. See Section 1268.710.

Subject to any action taken on the suggestions above, we still plan to send Chapters 5, 8, and 11 to the printer as soon as possible, hopefully before the end of October.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

Memorandum 73-89

EXHIBIT I

EMINENT DOMAIN LAW § 1268.160

Tentatively approved September 1970
Renumbered July 1973
Staff revision October 1973

§ 1268.160. Repayment of excess withdrawal

1268.160. (a) Any amount withdrawn by a party pursuant to this article 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 shall enter judgment accordingly.

(b) The judgment so entered shall not include interest except that any amount that is to be paid to a defendant shall include legal interest from the date of its withdrawal by another defendant.

(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.

Comment. Section 1268.160 supersedes subdivision (g) of former Section 1254. Unlike Section 1254, which did not require the payment of interest where excess amounts were withdrawn, Section 1268.160 requires payment of interest where the excess is to be redistributed among defendants but not where the excess is to be paid to the plaintiff. For a comparable provision, see Section 1255.280.

Tentatively approved in part April 1973
Tentatively approved June 1973
Renumbered July 1973

CHAPTER 5. COMMENCEMENT OF PROCEEDING

Article 1. Jurisdiction and Venue

§ 1250.010. Jurisdiction in superior court

1250.010. Except as otherwise provided in Section 1230.060 and in Chapter 12 (commencing with Section 1273.010), all eminent domain proceedings shall be commenced and prosecuted in the superior court.

Comment. Section 1250.010 declares the basic rule that eminent domain proceedings are to be conducted in the superior court. This declaration continues prior law. See former Section 1243. For demurrer based on lack of jurisdiction, see Section 430.10.

However, the jurisdiction of the superior court is not exclusive. The issue of just compensation may be submitted to arbitration. See Chapter 12. Moreover, Section 1230.060 preserves such jurisdiction as the Public Utilities Commission may have over issues in eminent domain proceedings. See Section 1230.060 and Comment thereto.

Tentatively approved November 1971
Renumbered July 1973

§ 1250.020. Place of commencement

1250.020. (a) Except as provided in subdivision (b), an eminent domain proceeding shall be commenced in the county in which the property sought to be taken is located.

(b) When property sought to be taken is situated in more than one county, the plaintiff may commence the proceeding in any one of such counties.

Comment. Section 1250.020 specifies where an eminent domain proceeding must be brought. Failure to bring the proceeding in the proper county is a failure to vest the necessary jurisdiction in the court. For provisions authorizing transfer of the proceedings for trial, see Section 1250.040. For demurrer on ground of lack of jurisdiction, see Section 430.10.

Section 1250.020 does not authorize a condemnor to condemn property beyond its territorial limits. See Section 1240.050 for such authority. For authority to separate property in a complaint for trial, see Section 1048.

Section 1250.020 recodifies the substance of the venue provisions of former Section 1243.

Subdivision (a). Generally speaking, the only place an eminent domain proceeding may be brought is the county in which the property sought to be acquired lies.

Subdivision (b). Where property straddles a county line, the plaintiff has the option to bring suit on either side of the line, and the county so chosen is the proper place of trial for all the property even though a portion is not located in the county. See Section 1250.030. Under former law, where property situated in more than one county was sought to be acquired, the plaintiff could elect to bring separate proceedings relating to separate portions of the property in the county where such portion was situated. See former Section 1243. Subdivision (b), however, requires the plaintiff in this situation to make an election and bring the proceeding in one of the counties in which the tract is situated. In certain situations, relief from the plaintiff's choice of county may be obtained pursuant to Section 1250.040. See Section 1250.040 and Comment thereto.

§ 1250.030. Place of trial

1250.030. (a) Except as provided in subdivision (b), the county in which an eminent domain proceeding is commenced pursuant to Section 1250.020 is the proper county for trial of the proceeding.

(b) Where the court changes the place of trial pursuant to Section 1250.040, the county to which the proceeding is transferred is the proper county for trial of the proceeding.

Comment. Section 1250.030 continues the substance of a portion of former Section 1243.

§ 1250.040. Change of place of trial generally

1250.040. The provisions of the Code of Civil Procedure for the change of place of trial of actions apply to eminent domain proceedings.

Comment. Section 1250.040 makes clear that the rules of practice for civil actions generally govern venue change in eminent domain proceedings. This continues prior law. See former Section 1243 and City of Long Beach v. Lakewood Park, 118 Cal. App.2d 596, 258 P.2d 538 (1953). See also Section 1230.040 and Yolo Water & Power Co. v. Superior Court, 28 Cal. App. 589, 153 P. 394 (1915). Contrast City of Santa Rosa v. Fountain Water Co., 138 Cal. 579, 582, 71 P. 1123, 1136 (1903).

Included in the provisions incorporated by Section 1250.040 is Section 394. Under the applicable portions of Section 394, if a local public entity commences an eminent domain proceeding in a county in which it is situated against a defendant who is not situated, doing business, or residing in such county, either party may move to have the proceeding transferred for trial to another county. Alternatively, if a local public entity commences an eminent domain proceeding in a county in which it is not situated, either the entity or any defendant who is not situated, doing business, or residing in such county may move to have the proceeding transferred for trial to another county. Upon such motion, the court is obligated to transfer the trial to as nearly a neutral county as possible. The county to which the proceeding may be transferred includes the county (1) upon which the parties agree, (2) in which, as nearly as possible, no party is situated, doing business, or residing, or (3) in which, as nearly as possible, all parties are situated, doing business, or residing. Where the property is located in a neutral county to begin with, the court need not transfer the proceeding even though a motion to transfer would be authorized under Section 394. See City of Stockton v. Wilson, 79 Cal. App. 422, 249 P. 835 (1926). See also City of Los Angeles v. Pacific Tel. & Tel. Co., 164 Cal. App.2d 253, 330 P.2d 888 (1958).

Section 394 applies to proceedings commenced by any public entity other than the state. See Section 394(3). See also People v. Spring Valley Co., 109 Cal. App.2d 656, 241 P.2d 1069 (1952)(Section 394 not applicable in action by state); Riverside etc. Dist. v. Joseph W. Wolfskill Co., 147 Cal. App.2d 714, 306 P.2d 22 (1957)(Section 394 not applicable in action by state agency); Georgetown Divide Pub. Util. Dist. v. Bacchi, 204 Cal. App.2d 194, 22 Cal. Rptr. 27 (1962)(Section 394 applicable in action by special district having status of local public entity).

Section 394 applies to any defendant regardless of the interest the defendant claims in the property sought to be taken. See Georgetown Divide Pub. Util. Dist. v. Bacchi, supra (joint owners may take advantage of Section 394); City of Oakland v. Darbee, 102 Cal. App.2d 493, 227 P.2d 909 (1951) (separate owners may take advantage of Section 394); City of Long Beach v. Lakewood Park, supra (owners of oil exploration and development rights may take advantage of Section 394). The mere fact that the proceeding is a "mixed action," one in which only some of the defendants fall within the terms of this section, does not preclude its applicability. See Georgetown Divide Pub. Util. Dist. v. Bacchi, supra; 1 J. Chadbourn, H. Grossman, A. Van Alstyne, California Pleading § 367 (1961). See also People v. Ocean Shore R.R., 24 Cal. App.2d 420, 75 P.2d 560 (1938)(order changing venue on motion by but one of several defendants on grounds of impossibility of impartial trial affirmed).

The term "doing business" as used in Section 394 is intended to mean conducting some substantial activity, e.g., holding one's self out to others as engaged in the selling of goods or services. See City of Los Angeles v. Pacific Tel. & Tel. Co., supra.

Tentatively approved June 1973
Renumbered July 1973

Article 2. Commencement of Proceeding Generally

§ 1250.110. Complaint commences proceeding

1250.110. An eminent domain proceeding is commenced by filing a complaint with the court.

Comment. Section 1250.110 supersedes a portion of former Section 1243 which provided that eminent domain proceedings were commenced by filing a complaint and issuing summons. Section 1250.110 makes clear that the filing of a complaint alone is sufficient to commence an eminent domain proceeding and confers subject matter jurisdiction on the court. See Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924); Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941).

Section 1250.110 is comparable to Section 411.10 which provides that "a civil action is commenced by filing a complaint with the court."

Tentatively approved June 1973
Renumbered July 1973
Revised September 1973

§ 1250.120. Contents of summons

1250.120. (a) Except as provided in subdivision (b), the form and contents of the summons shall be as in civil actions generally.

(b) Where process is served by publication, in addition to the summons, the publication shall describe the property sought to be taken in a manner reasonably calculated to give persons with an interest in the property actual notice of the pending proceeding.

Comment. Section 1250.120, which prescribes the contents of the summons, supersedes former Section 1245. Sections 412.20 and 412.30 specify the matters to be included in the summons.

Since the summons does not contain a description of the property (which formerly was required), the defendant must refer to the complaint for this information. However, where service of the summons is by publication, a copy of the complaint is not published. To assure that a person served by publication will be able to determine if he has an interest in the property, subdivision (b) requires the publication to contain a description of the property where process is served by publication. Cf. Section 413.10 (service required in a manner "reasonably calculated to give actual notice").

§ 1250.130. Additional requirements where service is by publication

1250.130. Where the court orders service by publication, it shall also order the plaintiff (1) to post a copy of the summons and complaint on the property sought to be taken and (2), if not already recorded, to record a notice of the pendency of the proceeding in the manner provided by Section 1250.150. Such posting and recording shall be done not later than 10 days after the date the order is made.

Comment. Section 1250.130 provides additional requirements where service is by publication. The manner of service generally in an eminent domain proceeding is provided by Sections 415.10-415.50. See Section 1230.040 (rules of practice in eminent domain proceeding).

Due process requires that the rights of a person may be adjudicated only if that person is served with process in a manner reasonably calculated to give him actual notice and an opportunity to be heard. See, e.g., Milliken v. Meyer, 311 U.S. 457 (1940); Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356 (1906). If a person cannot, after reasonable diligence, be served personally or by mail, the court may order service by publication. Section 415.50. This may occur either because the whereabouts of a named defendant are unknown or because the identity of the defendant is unknown (as where there are heirs and devisees or all persons unknown are named as defendants pursuant to Section 1250.220). However, where service by publication is ordered pursuant to Section 415.50, Section 1250.130 requires that the court also order the plaintiff to post a copy of the summons and complaint on the property and record a lis pendens within 10 days after the making of the order. This provision is designed to increase the likelihood that interested parties will receive actual notice of the proceeding. Cf. Title & Document Restoration Co. v. Kerrigan, supra. The court should by order also give appropriate directions as to the manner of posting, e.g., location and number of copies. See Section 413.30.

Tentatively approved June 1973
Revised July 1973

Section 1250.130 supersedes a portion of the second sentence of former Section 1245.3 relating to service on heirs and devisees, persons unknown, and others. Section 1250.130 extends the posting requirement to the case where any defendant is served by publication. As to the requirement of recording, compare Sections 749, 749.1 (lis pendens must be filed in quiet title action against unknown claimants).

Although generally service statutes are liberally construed (cf. Sections 4 and 187), the due process considerations involved in service by publication demand strict compliance with the statute. See Stanford v. Worn, 27 Cal. 171 (1865). See also City of Los Angeles v. Glassell, 203 Cal. 44, 262 P. 1084 (1928).

§ 1250.140. Attorney General served where state is a defendant

1250.140. Where the state is a defendant, the summons and the complaint shall be served on the Attorney General.

Comment. Section 1250.140 requires service on the Attorney General when property belonging to the state is sought to be taken. This continues a requirement of subdivision (8) of former Section 1240 which also required service on the Governor and the State Lands Commission. In a special provision relating to the condemnation of a "square," former Section 1245.4 required service on the Director of General Services. These additional service requirements are eliminated. The Attorney General is charged with the responsibility for seeing that the proper agency of the state receives notice of the proceeding.

§ 1250.150. Lis pendens

1250.150. The plaintiff, at the time of the commencement of an eminent domain proceeding, or at any time thereafter, may record a notice of the pendency of the proceeding in the office of the county recorder of any county in which property described in the complaint is located.

Comment. Section 1250.150 makes clear that the plaintiff in an eminent domain proceeding may file a lis pendens after the proceeding is commenced. This provision supersedes a portion of former Section 1243 that required the plaintiff to file a lis pendens after service of summons. Compare Section 1250.130 (lis pendens required where service is by publication). Where a lis pendens is recorded prior to a transfer, the judgment in the proceeding will be binding upon the transferee from a defendant named by his real name who is properly made a party to the proceeding. Drinkhouse v. Spring Valley Water Works, 87 Cal. 253, 25 P. 420 (1890).

Failure to file such a notice of pendency of the eminent domain proceeding does not deprive the court of subject matter jurisdiction. See Housing Authority v. Forbes, 51 Cal. App.2d 1, 124 P.2d 194 (1942). However, where a lis pendens is not recorded prior to a recorded transfer, the transferee will not be bound by the judgment in the proceeding unless he is properly made a party to the proceeding. See Bensley v. Mountain Lake Water Co., 13 Cal. 306, 319 (1859). See also Section 1250.220 (naming defendants).

Section 1250.150 is analogous to Section 409 (obligation to file lis pendens and consequences of failure to do so). See also Roach v. Riverside Water Co., 74 Cal. 263, 15 P. 776 (1887)(Section 409 applicable to condemnation proceedings prior to adoption of former Section 1243).

Article 3. Parties; Joinder of Property

§ 1250.210. Identification of parties

1250.210. (a) A person seeking to take property by eminent domain shall be designated the plaintiff.

(b) A person from whom property is sought to be taken by eminent domain shall be designated the defendant.

Comment. Although an eminent domain proceeding is a special proceeding, the terms "plaintiff" and "defendant" are utilized throughout the Eminent Domain Law. This usage is consistent with the generally judicial nature of eminent domain proceedings in California as well as with past practice and custom. See former Section 1244(1), (2)(parties styled "plaintiff" and "defendant"). See also Section 1063.

The plaintiff must be a person authorized by statute to exercise the power of eminent domain to acquire the property sought for the purpose listed in the complaint. See Section 1240.020. A proceeding may not be maintained in the name of any other person. See People v. Superior Court, 10 Cal.2d 288, 73 P.2d 1221 (1937); City of Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961); Black Rock etc. Dist. v. Summit etc. Co., 56 Cal. App.2d 513, 133 P.2d 58 (1943). Cf. City of Oakland v. Parker, 70 Cal. App. 295, 233 P. 68 (1924)(objection that real party in interest was a private person rejected). As to joinder of the owner of "necessary property" in a proceeding to acquire "substitute property," see Section 1240.340. The defendants can only be those having an interest in the property described in the complaint. San Joaquin etc. Irr. Co. v. Stevinson, 164 Cal. 221, 128 P. 924 (1912); cf. former Sections 1245.3, 1246, 1247.2.

§ 1250.220. Naming defendants

1250.220. (a) The plaintiff shall name as defendants, by their real names, those persons who appear of record or are known by the plaintiff to have or claim any right, title, or interest in the property described in the complaint.

(b) If a person described in subdivision (a) is dead and the plaintiff knows of a duly qualified and acting personal representative of the estate of such person, the plaintiff shall name such personal representative as a defendant. If a person described in subdivision (a) is dead or is believed by the plaintiff to be dead and if plaintiff knows of no duly qualified and acting personal representative of the estate of such person and states these facts in an affidavit filed with the complaint, plaintiff may name as defendants "the heirs and devisees of . . . . . (naming such deceased person), deceased, and all persons claiming by, through, or under said decedent," naming them in that manner and, where it is stated in the affidavit that such person is believed by the plaintiff to be dead, such person also may be named as a defendant.

(c) In addition to those persons described in subdivision (a), the plaintiff may name as defendants "all persons unknown claiming any right, title, or interest in or to the property," naming them in that manner.

(d) Any judgment rendered in a proceeding under this title shall be binding and conclusive upon all persons named as defendants as provided in this section and properly served.

Comment. Section 1250.220 supersedes portions of former Sections 1244 and 1245.3. Subdivision (a) is substantively the same as paragraph 2 of former Section 1244. Subdivisions (b) and (c) are substantively the

same as the first sentence of former Section 1245.3. See also paragraph 2 of former Section 1244. Subdivision (d) is substantively the same as the last paragraph of former Section 1245.3. See also Section 1250.130 and Comment thereto (posting where service is by publication).

The naming of defendants is basically within the control of the plaintiff--People v. Shasta Pipe etc. Co., 264 Cal. App.2d 520, 537, 70 Cal. Rptr. 618, 629 (1964)--but failure to join a proper party to the proceeding leaves his interest unimpaired. Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789 (1957). Nevertheless, a person not named as a defendant who claims an interest in the property sought to be acquired may participate in the proceeding. Section 1250.230.

Subdivision (a). Subdivision (a) reenacts the requirement found in paragraph 2 of former Section 1244 that the names of all owners and claimants of the property must be listed in the complaint. This includes occupants of the property who claim a possessory interest in the property. The form of subdivision (a) has been adapted from former Section 1245.3.

Subdivision (b). Subdivision (b) specifies the requirements for naming defendants where one of the claimants to the property is deceased. The basic rule is that the personal representative of the estate of the decedent must be named as defendant in the decedent's place. This codifies prior law. See Monterey County v. Cushing, 83 Cal. 507, 23 P. 700 (1890)(decided under former Code of Civil Procedure Section 1582, predecessor of Probate Code Section 573).

Where there is no duly qualified and acting personal representative known to the plaintiff, the plaintiff need not await the appointment and qualification of one but may proceed with the suit naming as defendants the heirs and devisees of the deceased person and, if such person is believed to be but not known to be dead, the plaintiff may also name such person as a defendant.

Subdivision (c). Subdivision (c) enables the plaintiff to name unknown holders of interests in the property. A plaintiff may also proceed pursuant to Section 474 by fictitiously naming defendants who claim an interest but whose names are not known. See Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941). When the fictitiously named party's real name is discovered, the pleading must be amended accordingly. Alameda County v. Crocker, 125 Cal. 101, 57 P. 766 (1899).

Subdivision (d). Subdivision (d) assures that persons properly named under this section and served in compliance with the general provisions governing service--Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2--and the requirements for service provided by this title (Sections 1250.120 and 1250.130) are bound by the judgment in the proceeding.

§ 1250.230. Appearance by named and unnamed defendants

1250.230. Any person who claims any right, title, or interest, whether legal or equitable, in the property described in the complaint may appear in the proceeding. Whether or not such person is named as a defendant in the complaint, he shall appear as a defendant.

Comment. Section 1250.230 reenacts without substantive change the second sentence of the second paragraph of former Section 1245.3 and the second paragraph of former Section 1246. It makes clear that all interested persons may participate in an eminent domain proceeding.

An eminent domain judgment is generally binding only on persons, including "unknown persons," named in the complaint and properly served. See Sections 1250.150 (lis pendens), 1250.220 (naming defendants); Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789 (1957)(failure to join interest holder leaves his interest unimpaired). However, any person who has an interest in the property even if he is not named and served may, if he chooses, participate. See Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941); Stratford Irr. Dist. v. Empire Water Co., 44 Cal. App.2d 61, 111 P.2d 957 (1941)(dictum)(persons not defendants who claim any interest may appear and defend). If he does participate by making a general appearance in the proceeding, he will, of course, be bound by the judgment. Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924); Bayle-Lacoste & Co. v. Superior Court, supra.

In order to participate, a person must have a legal or equitable interest in the property described in the complaint. For examples of interest holders who have been permitted to participate, see Harrington v. Superior Court, supra (named defendant holding fee interest not served but appeared voluntarily); County of San Benito v. Copper Mtn. Min. Co., 7 Cal. App.2d 82, 45 P.2d 428 (1935)(successor in interest to fee holder); Bayle-Lacoste & Co. v. Superior Court, supra (lessee); City of Vallejo v. Superior Court, 199 Cal. 408, 249 P. 1084 (1926)("owner and holder" of deed of trust);

City of Los Angeles v. Dawson, 139 Cal. App. 480, 34 P.2d 236 (1934)(assignee of eminent domain proceeds).

Section 1250.230 does not authorize the participation of a person who fails to show that he has an interest in the property sought to be taken. Thus, third parties who would not be affected by the adjudication of either title or compensation in the eminent domain proceeding have been denied the right to participate in the proceeding. See San Joaquin etc. Irr. Co. v. Stevinson, 164 Cal. 221, 235-237, 240-242, 128 P. 924, 929-930, 931-932 (1912)(upstream riparian owners); City of Alhambra v. Jacob Bean Realty Co., 138 Cal. App. 251, 31 P.2d 1052 (1934)(owners of abutting property who might suffer consequential damages from the project for which the property is being acquired). See also City of Riverside v. Malloch, 226 Cal. App.2d 204, 37 Cal. Rptr. 862 (1964)(shareholder in company from which property sought to be acquired not permitted to participate). However, what constitutes "property" is subject to both legislative and judicial change. See Sections 1265.310 (unexercised options) and 1265.410 (contingent future interests); Southern Cal. Edison Co. v. Bourgerie, 9 Cal.3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973). Section 1250.230 is intended to be flexible enough to accommodate such changes and to permit participation by any person with a recognizable interest.

In San Bernardino etc. Water Dist. v. Gage Canal Co., 226 Cal. App.2d 206, 37 Cal. Rptr. 856 (1964), it was suggested in dictum that a person who sought to acquire by eminent domain the same property involved in a pending eminent domain proceeding could appear in such proceeding under former Section 1246. However, under the Eminent Domain Law, his proper remedy is to commence another proceeding and move to consolidate the proceedings. See Section 1048.

§ 1250.240. Joinder of property

1250.240. The plaintiff may join in one complaint all property located within the same county which is sought to be acquired for the same project.

Comment. Section 1250.240, which reenacts the substance of a portion of subdivision 5 of former Section 1244, permits the plaintiff at his option to join an unlimited number of parcels belonging to different defendants in the same eminent domain proceeding provided that the property joined lies wholly or partially in the same county (see Section 1250.020) and it is to be used for the same project. See County of Sacramento v. Glann, 14 Cal. App. 780, 788-790, 113 P. 360, 363-364 (1910). The contents of the complaint must, of course, be complete as to all property joined. See Section 1250.310 and Comment thereto.

Section 1250.240 provides simply for joinder in the initial pleading; it in no way limits the authority of the court to order separate trials where appropriate. See Section 1048. See also Section 1230.040 (rules of practice in eminent domain proceedings). But cf. Section 1260.220 (procedure for compensating divided interests in a single parcel).

Article 4. Pleadings

§ 1250.310. Contents of complaint

1250.310. The complaint shall contain all of the following:

(a) The names of all plaintiffs and defendants.

(b) A description of the property sought to be taken. If the plaintiff claims an interest in the property sought to be taken, the complaint shall indicate the nature and extent of such interest. The description may, but is not required to, indicate the nature or extent of the interest of the defendant in the property.

(c) A statement of the right of the plaintiff to take by eminent domain the property described in the complaint. The statement shall include:

(1) A description of the purpose for which the property is sought to be taken.

(2) An allegation of the necessity for the taking as required by Section 1240.030; where the plaintiff is a public entity, a reference to its resolution of necessity; where the plaintiff is a nonprofit hospital, a reference to the certificate required by Section 1427 of the Health and Safety Code.

(3) A reference to the specific statutes authorizing the plaintiff to exercise the power of eminent domain for the purpose alleged. Specification of the statutory authority may be in the alternative and may be inconsistent.

(d) A map indicating generally the property described in the complaint and its relation to the project for which it is sought to be taken.

Comment. Section 1250.310 prescribes the necessary contents of a complaint in an eminent domain proceeding. A complaint that does not contain the elements specified in this section is subject to demurrer. See Sections

430.10 and 430.30. Section 1250.310 is an exclusive listing of the substantive allegations required to be made by the plaintiff. Other substantive allegations may, but need not, be made. See, e.g., California S.R.R. v. Southern Pac. R.R., 67 Cal. 59, 7 P. 123 (1885)(averment of value not required and is surplusage); County of San Luis Obispo v. Simas, 1 Cal. App. 175, 81 P. 972 (1905)(averment of manner of construction of proposed improvement not required).

Other necessary procedural elements not specified in this section are required to be incorporated in the complaint, however. These include a caption (Sections 422.30 and 422.40), a request for relief (Section 425.10), and a subscription (Section 446). See also Section 1250.330 (signing of pleadings); Pub. Util. Code § 7577 (additional requirement where complaint seeks relocation or removal of railroad tracks).

Subdivision (a). The rules for designating parties to an eminent domain proceeding are prescribed in Sections 1250.210 and 1250.220.

Subdivision (b). Subdivision (b), which requires a description of the property sought to be taken, supersedes subdivision 5 of former Section 1244. The property described in the complaint may consist of anything from a fee interest in land, to water rights, to noise easements, to franchises. See Section 1235.170 ("property" defined).

The description of the property should be sufficiently certain to enable the parties, and any ministerial officer who may be called upon to enforce the judgment, to know precisely what land is to be taken and paid for. See California Cent. R.R. v. Hooper, 76 Cal. 404, 18 P. 599 (1888). See also Section 430.10(g)(demurrer for uncertainty).

Like the former provision, subdivision (b) does not require the complaint to identify the nature of the interests the various parties may have in the property sought to be taken. Specification of the precise interest held by the defendant is left to the defendant. See Section 1250.320 (answer). However, the judgment in an eminent domain proceeding affects only the interests of parties properly joined or appearing. See Sections 1250.220 and 1250.230 and Comments thereto. Where the plaintiff has or claims a preexisting interest in the property sought to be taken, this interest must be described in

the complaint. See People v. Shasta Pipe etc. Co., 264 Cal. App.2d 520, 70 Cal. Rptr. 618 (1968); cf. City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585 (1899); People v. Witlow, 243 Cal. App.2d 490, 52 Cal. Rptr. 336 (1966).

Unlike former Section 1244, subdivision (b) does not require that the complaint indicate whether the property taken is a part of a larger parcel but requires only a description of the property taken. Contrast Inglewood v. Johnson (O.T.) Corp., 113 Cal. App.2d 587, 248 P.2d 536 (1952).

Subdivision (c). Subdivision (c) supersedes subdivision 3 of former Section 1244 requiring a statement of the right of the plaintiff. Subdivision (c) is intended to provide the owner of the property sought to be taken with an understanding of the purpose for which his property is being taken and the authority on which the taking is based. The requirements of subdivision (c) may be satisfied in any way convenient to the plaintiff so long as they are indicated in the complaint. This might include summarizing the resolution of necessity, or attaching the resolution to the complaint and incorporating it by reference.

Paragraph (1) requires a description of the public purpose or public use for which the property is being taken. Property may not be taken by eminent domain except for a public use. Cal. Const., Art. I, § 14; Section 1240.010. The public use must appear on the face of the complaint. See Kern County Union High School Dist. v. McDonald, 180 Cal. 7, 10, 179 P. 180, 182 (1919); cf. Aliso Water Co. v. Baker, 95 Cal. 268, 30 P. 537 (1892).

Paragraph (2) requires a description of the public necessity for the taking. The items of public necessity are listed in Section 1240.030 and include public necessity for the project, plan or location of the project compatible with the greatest public good and least private injury, and necessity of the particular property for the project. This extensive description of the necessity for the taking supplants the general allegation permitted under prior law. See, e.g., Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955). It should be noted that a public entity must first adopt a resolution of necessity before it may proceed to condemn property. Section 1245.220.

Thus, while subdivision (2) requires an extensive statement of the necessity for the acquisition, this statement may be satisfied by incorporation of the resolution containing appropriate findings and declarations. The resolution, under certain conditions, is given conclusive effect in the proceeding. See Section 1245.250. If the resolution is not incorporated, a reference to the resolution should be included which is adequate to identify it so that a copy of the resolution may be obtained. A similar reference to the certificate required by Section 1427 of the Health and Safety Code must be included where applicable.

Paragraph (3) requires specific reference to the authority of the condemnor. The power of eminent domain may be exercised only by persons expressly authorized by statute for purposes expressly designated by statute. Section 1240.020. For other sections that require a statement of statutory authority in the complaint, see Sections 1240.230 (future use), 1240.320-1240.330 (substitute condemnation), 1240.420 (excess condemnation), 1240.510 (compatible use), 1240.610 (more necessary use). The requirement of a specific reference to all authorizing statutes supplants the general allegation of right to condemn permitted under prior law. See, e.g., Kern County High School Dist. v. McDonald, supra, and Los Altos School Dist. v. Watson, 133 Cal. App.2d 447, 284 P.2d 513 (1955). Where the plaintiff may be authorized to take the property on differing and inconsistent grounds, the plaintiff may allege such authority in the alternative.

Subdivision (d). Subdivision (d) broadens the requirement formerly found in subdivision 4 of Section 1244 that the complaint be accompanied by a map where the taking was for a right of way. Subdivision (d) requires a map to be attached to the complaint in all cases. The map should be sufficiently detailed and accurate to enable the parties to identify the property and its relation to the project. Where the taking is for a right of way, the map should show its location, general route, and termini with respect to the property sought to be taken. The map need not indicate whether the property sought is a part of a larger parcel. Cf. Pub. Util. Code § 7557 (map required where complaint seeks relocation or removal of railroad tracks).

§ 1250.320. Contents of answer

1250.320. The answer shall include a statement of the right, title, or interest the defendant claims in the property described in the complaint.

Comment. Section 1250.320 continues the requirement of former Section 1246 that the answer include a statement of the defendant's claimed interest in the property. Unlike former Section 1246, which Section 1250.320 supersedes, Section 1250.320 does not require a defendant to specify the compensation he claims for the proposed taking; the defendant's claims relating to compensation are revealed by discovery and other pretrial procedures.

The allegations of the answer are deemed denied as in civil actions generally. See Section 431.20(b). Amendments to the answer are made as in civil actions generally. See Sections 472 and 473. See also Section 1250.380.

Defenses that the defendant has to the taking may be alleged in the answer or, where appropriate, may be raised by demurrer. See Section 1250.350. See also Sections 1250.360 and 1250.370 (grounds for objecting to right to take). The rules governing demurrers to the complaint are the same as in civil actions generally. See Section 1230.040 (rules of practice in eminent domain proceedings). See generally Sections 430.10, 430.30-430.80.

As to the use of a cross-complaint in an eminent domain proceeding, see Sections 426.70 (compulsory cross-complaints) and 428.10 (when cross-complaint permitted) and the Comments to those sections.

§ 1250.330. Signing of pleadings by attorney

1250.330. Where a party is represented by an attorney, his pleading need not be verified but shall be signed by the attorney for the party. The signature of the attorney constitutes a certificate by him that he has read the pleading, that to the best of his knowledge, information, and belief there is ground to support it, and that, if it is an answer, it is not interposed for delay. If the pleading is not signed or is signed with intent to defeat the purposes of this section, it may be stricken as sham and false.

Comment. Section 1250.330 requires all pleadings to be signed by the attorney where the party in an eminent domain proceeding is represented by an attorney. The effect of signature by the attorney is substantially the same as that under Rule 11 of the Federal Rules of Civil Procedure. For a willful violation of this section, an attorney is subject to appropriate disciplinary action. See Rules 1, 13, 17 of the Rules of Professional Conduct of the State Bar of California. See also Bus. & Prof. Code § 6076.

It should be noted that Section 1250.330 requires both the attorney for the plaintiff and the attorney for the defendant to sign their respective pleadings. The plaintiff may also verify, if it chooses, but such verification will not require verification by the defendant if he is represented by an attorney. Compare Section 446 (verification by defendant generally required where plaintiff is a public entity or where complaint is verified).

§ 1250.340 [Reserved for expansion]

§ 1250.350. Pleading objections to right to take

1250.350. A defendant may object to the plaintiff's right to take, by demurrer or answer as provided in Section 430.30, on any ground authorized by Section 1250.360 or Section 1250.370. The demurrer or answer shall state the specific ground upon which the objection is taken and, if the objection is taken by answer, the specific facts upon which the objection is based. An objection may be taken on more than one ground, and the grounds may be inconsistent.

Comment. Section 1250.350 makes clear the rules governing the pleading of objections to the right to take. See Sections 1250.360 and 1250.370 (listing grounds upon which objection may be taken). The general rules that determine whether the objection may be taken by demurrer or answer (see Section 430.30) apply to pleading an objection to the right to take. Objections to the complaint, other than objections to the right to take, are governed by the rules applicable to civil actions generally. See Section 1230.040 (rules of practice in eminent domain proceedings).

The facts supporting each objection to the right to take must be specifically stated in the answer. This requirement is generally consistent with former law that, for example, required the defendant to allege specific facts indicating an abuse of discretion such as an intention not to use the property as resolved. See, e.g., County of San Mateo v. Bartole, 184 Cal. App.2d 422, 433, 7 Cal. Rptr. 569, 576 (1960). See also People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959); People v. Nahabedian, 171 Cal. App.2d 302, 340 P.2d 1053 (1959); People v. Olsen, 109 Cal. App. 523, 293 P. 645 (1930).

§ 1250.360. Grounds for objection to right to take where resolution conclusive

1250.360. Grounds for objection to the right to take, regardless of whether the plaintiff has adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4, include:

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

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

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

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

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

(f) The described property is sought to be acquired pursuant to Section 1240.340 (substitute condemnation), 1240.410 (excess condemnation), 1240.510 (condemnation for compatible use), or 1240.610 (condemnation for more necessary use), but the acquisition does not satisfy the requirements of those provisions.

(g) The described property is sought to be acquired pursuant to Section 1240.610 (condemnation for more necessary use), but the defendant has the right under Section 1240.630 to continue the public use to which the property is appropriated as a joint use.

(h) Any other ground provided by law.

may not take an existing airport owned by a local entity. Pub. Util. Code § 21632. See also Section 1240.010 and Comment thereto (eminent domain only for purposes authorized by statute); cf. subdivision (f) infra (more necessary public use).

Subdivision (f). Section 1240.340 permits property to be taken for substitute purposes only if: (1) the owner of the property needed for the public use has agreed in writing to the exchange and, under the circumstances of the particular case, justice requires that he be compensated in whole or in part by substitute property rather than by money; (2) the property to be exchanged is in the vicinity of the public improvement for which the property needed is taken; and (3) taking into account the relative hardship to the owners, it is not unjust to the owner of the property to be exchanged that his property be taken so that the owner of the needed property may be compensated by such property rather than by money.

Section 1240.410 permits property excess to the needs of the proposed project to be taken only if it would be left as a remainder in such size, shape, or condition as to be of little market value.

Property appropriated to a public use may be taken by eminent domain only if the proposed use is compatible with or more necessary than the existing use. See Sections 1240.510 (compatible use), 1240.610 (more necessary use).

Subdivision (g). Section 1240.630 gives the prior user a right to continue a public use as a joint use under certain circumstances where the plaintiff seeks to displace the prior use by a more necessary use.

Subdivision (h). While the provisions of Section 1250.360 catalog the objections to the right to take available under the Eminent Domain Law where the resolution is conclusive, there may be other grounds for objection not included in the Eminent Domain Law, e.g., where there exist federal or constitutional grounds for objection or where prerequisites to condemnation are located in other codes. See, for example, Section 1427 of the Health and Safety Code, which imposes certain requirements that must be satisfied before a nonprofit hospital may exercise the right of eminent domain. See also various special district laws that require consent of the board of

supervisors of the affected county before extraterritorial condemnation authority exercised. E.g., Health & Saf. Code §§ 4741 (county sanitation district), 6514 (sanitary district), 13852(c)(fire protection district); Pub. Util. Code § 98213 (Santa Cruz Metropolitan Transit District); Water Code §§ 43532.5 (California water storage district), 60230(8)(water replenishment district), 71694 (municipal water district); Alameda County Flood Control and Water Conservation District Act, § 5(13)(Cal. Stats. 1949, Ch. 1275); Alameda County Water District Act, § 4(d)(Cal. Stats. 1961, Ch. 1942); Alpine County Water Agency Act, § 7 (Cal. Stats. 1961, Ch. 1896); Amador County Water Agency Act, § 3.4 (Cal. Stats. 1959, Ch. 2137); Antelope Valley-East Kern Water Agency Law, § 61(7)(Cal. Stats. 1959, Ch. 2146); Bethel Island Municipal Improvement District Act, § 81 (Cal. Stats. 1960, 1st Ex. Sess., Ch. 22); Castaic Lake Water Agency Act, § 15(7)(Cal. Stats. 1962, 1st Ex. Sess., Ch. 28); Crestline-Lake Arrowhead Water Agency Act, § 11(9)(Cal. Stats. 1962, 1st Ex. Sess., Ch. 40); Embarcadero Municipal Improvement District Act, § 82 (Cal. Stats. 1960, 1st Ex. Sess., Ch. 81); Estero Municipal Improvement District Act, § 82 (Cal. Stats. 1960, 1st Ex. Sess., Ch. 82); Fresno Metropolitan Transit District Act, § 6.3 (Cal. Stats. 1961, Ch. 1932); Guadalupe Valley Municipal Improvement District Act, § 80.5 (Cal. Stats. 1959, Ch. 2037); Kern County Water Agency Act, § 3.4 (Cal. Stats. 1961, Ch. 1003); Lake County Flood Control and Water Conservation District Act, § 5(12)(Cal. Stats. 1951, Ch. 1544); Lake Cuyamaca Recreation and Park District Act, § 35(c) (Cal. Stats. 1961, Ch. 1654); Monterey County Flood Control and Water Conservation District Act, § 4 (Cal. Stats. 1947, Ch. 699); Mountain View Shoreline Regional Park Community Act, § 51 (Cal. Stats. 1969, Ch. 1109); Nevada County Water Agency Act, § 7 (Cal. Stats. 1959, Ch. 2122); North Lake Tahoe-Truckee River Sanitation Agency Act, § 146 (Cal. Stats. 1967, Ch. 1503); Placer County Water Agency Act, § 3.4 (Cal. Stats. 1957, Ch. 1234); Plumas County Flood Control and Water Conservation District Act, § 3(f) (Cal. Stats. 1959, Ch. 2114); Sacramento County Water Agency Act, § 3.4 (Cal. Stats. 1952, 1st Ex. Sess., Ch. 10); San Gorgonio Pass Water Agency Law, § 15(9)(Cal. Stats. 1961, Ch. 1435); Santa Barbara County Flood Control and Water Conservation District Act, § 5.3 (Cal. Stats. 1955, Ch. 1057);

Shasta County Water Agency Act, § 65 (Cal. Stats. 1957, Ch. 1512); Sierra County Flood Control and Water Conservation District Act, § 3(f)(Cal. Stats. 1959, Ch. 2123); Yolo County Flood Control and Water Conservation District Act, § 3(f)(Cal. Stats. 1951, Ch. 1657); Yuba-Bear River Basin Authority Act, § 8 (Cal. Stats. 1959, Ch. 2131); Yuba County Water Agency Act, § 3.4 (Cal. Stats. 1959, Ch. 788).

§ 1250.370. Grounds for objection to right to take where resolution not conclusive

1250.370. In addition to the grounds listed in Section 1250.360, grounds for objection to the right to take where the plaintiff has not adopted a resolution of necessity that conclusively establishes the matters referred to in Section 1240.030 include:

(a) The plaintiff is a public entity and has not adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4.

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

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

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

Comment. Section 1250.370 lists the grounds for objection to the right to take that may be raised where there is not a conclusive resolution of necessity. Thus, they may be raised against a nonpublic-entity plaintiff in all cases and against a public-entity plaintiff in cases where it has not adopted a resolution or where the resolution is not conclusive. See Section 1245.250 for the effect of the resolution. The introductory clause to Section 1250.370 makes clear that the grounds listed here are in addition to those listed in Section 1250.360. See Section 1250.360 and Comment thereto.

Subdivision (a) applies only to public entities. A public entity may not commence an eminent domain proceeding until after it has passed a resolution of necessity that meets the requirements of Article 2 of Chapter 4. Section 1245.220. A duly adopted resolution must contain all the information required in Section 1245.230 and must be adopted by a vote of a majority of all the members of the governing body of the local public entity. Section 1245.240.

Subdivisions (b)-(d) recognize that the power of eminent domain may be exercised to acquire property for a proposed project only if (1) the public

interest and necessity require the proposed project, (2) the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury, and (3) the property and particular interest sought to be acquired are necessary for the proposed project. Section 1240.030. Cf. Health & Saf. Code § 1427 (eminent domain proceeding brought by nonprofit hospital--effect of certificate of Director of State Department of Public Health).

§ 1250.380. Amendment of pleadings

1250.380. (a) Subject to subdivisions (b) and (c), the court may allow upon such terms and conditions as may be just an amendment or supplement to any pleading. In the case of an amendment or supplement to the complaint, such terms and conditions may include a change in the applicable date of valuation for the proceeding and an award of costs, attorney's fees, appraisal fees, and fees for the services of other experts which would not have been incurred had the proceeding as originally commenced been the same as the proceeding following such amendment or supplement.

(b) A public entity may add to the property sought to be taken only if it has adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4 for the property to be added.

(c) Property previously sought to be taken may be deleted from the complaint only if the plaintiff has followed the procedure for partial abandonment of the proceeding as to that property.

Comment. Section 1250.380 supplements the liberal rules applicable to amendments and supplements provided by Sections 464 and 473. Subdivision (a) makes clear that the terms and conditions which may be imposed by the court include a change in the date of valuation for either all or a portion of the property sought to be taken in the proceeding and payment of reasonable costs, disbursements, and expenses which would not have been incurred but for the amendment.

Subdivision (b) makes clear that, in order to add property to the complaint, where appropriate there must be a valid resolution of necessity for the property to be added.

Subdivision (c) makes clear that, in order to delete property from the complaint, the plaintiff must follow the procedures and pay the price for abandonment. See Section 1268.510. This provision continues prior law as to

"partial abandonment"; see, e.g., County of Kern v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962); Metropolitan Water Dist. v. Adams, 23 Cal.2d 770, 147 P.2d 6 (1944); Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971).

Tentatively approved June 1973
Renumbered July 1973

CHAPTER 8. PROCEDURES FOR DETERMINING RIGHT TO TAKE AND COMPENSATION

Article 1. General Provisions

§ 1260.010. Trial preference

1260.010. Proceedings under this title take precedence over all other civil actions in the matter of setting the same for hearing or trial in order that such proceedings shall be quickly heard and determined.

Comment. Section 1260.010 reenacts the substance of former Section 1264.

Tentatively approved June 1973
Renumbered July 1973
Revised September 1973

§ 1260.020. Determination of compatibility and more necessary public use where separate proceedings are consolidated

1260.020. (a) If proceedings to acquire the same property are consolidated, the court shall first determine whether the public uses for which the property is sought are compatible within the meaning of Article 6 (commencing with Section 1240.510) of Chapter 3. If the court determines that the uses are compatible, it shall permit the proceeding to continue with the plaintiffs acting jointly. The court shall apportion the obligation to pay any award in the proceeding in proportion to the use, damage, and benefits attributable to each plaintiff.

(b) If the court determines pursuant to subdivision (a) that the uses are not all compatible, it shall further determine which of the uses is the more necessary public use within the meaning of Article 7 (commencing with Section 1240.610) of Chapter 3. The court shall permit the plaintiff alleging the more necessary public use, along with any other plaintiffs alleging compatible public uses under subdivision (a), to continue the proceeding. The court shall dismiss the proceeding as to the other plaintiffs.

Comment. Section 1260.020 deals with the issues of compatibility and more necessary public use where two proceedings to acquire the same property are consolidated pursuant to Section 1048. Section 1260.020 does not deal with whether consolidation is proper; that is a matter dealt with by Section 1048. Moreover, nothing in this section is intended to limit the authority of the court to consolidate proceedings or sever issues for trial under the latter section. However, where consolidation of two proceedings to acquire the same property is

ordered, subdivision (a) requires the court to determine first whether the public uses for which the property is sought are compatible and, if so, to take the action indicated. Under subdivision (b), if the public uses are not all compatible, the court must determine which are "more necessary" and again take the appropriate action. For reimbursement of expenses and damages on dismissal, see Sections 1268.610 and 1268.620.

Tentatively approved June 1973
Renumbered July 1973

Article 2. Contesting Right to Take

§ 1260.110. Priority for hearing

1260.110. (a) Where objections to the right to take are raised, unless the court orders otherwise, they shall be heard and determined prior to the determination of the issue of compensation.

(b) The court may, on motion of any party, after notice and hearing, specially set such objections for trial.

Comment. Section 1260.110 makes provision for bringing to trial the objections, if any, that have been raised against the plaintiff's right to take. See Sections 1250.350-1250.370. Under subdivision (a), disposition of the right to take is generally a prerequisite to trial of the issue of just compensation. However, this does not preclude such activities as depositions and other discovery, and the court may order a different order of trial. See also Section 1048. Cf. City of Los Angeles v. Keck, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971)(parties stipulated to determination of compensation and tried only issues of public use and necessity).

Subdivision (b) makes clear that the determination of the objections to the right to take may be specially set for trial. See Rule 225 of the California Rules of Court and Swartzman v. Superior Court, 231 Cal. App.2d 195, 198-199, 41 Cal. Rptr. 721, 724-725 (1964).

§ 1260.120. Disposition of defendant's objections to right to take

1260.120. (a) The court shall hear and determine all objections to the right to take.

(b) If the court determines that the plaintiff has the right to acquire by eminent domain the property described in the complaint, the court shall so order.

(c) If the court determines that the plaintiff does not have the right to acquire by eminent domain any property described in the complaint, it shall order either of the following:

(1) Immediate dismissal of the proceeding as to that property.

(2) Conditional dismissal of the proceeding as to that property unless such corrective and remedial action as the court may prescribe has been taken within the period prescribed by the court in the order. An order made under this paragraph may impose such limitations and conditions as the court determines to be just under the circumstances of the particular case including the requirement that the plaintiff pay to the defendant all or part of the reasonable litigation expenses necessarily incurred by the defendant because of the plaintiff's failure or omission which constituted the basis of the objection to the right to take.

Comment. Subdivision (a) of Section 1260.120 provides for a court determination of right to take issues (see Sections 1250.350-1250.370). This is consistent with the California Constitution and with prior law. See Comment to

Section 1230.040 (rules of practice in eminent domain proceedings: court or jury trial).

The form of review of a determination that the plaintiff may condemn the defendant's property is governed by the rules of procedure generally. See Section 904.1 (appeal); Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955)(review by writ).

A determination that the plaintiff has no right to condemn the defendant's property generally requires an order of dismissal. Paragraph (1) of subdivision (c). However, where the complaint alleges alternative grounds for condemnation, a finding which would require dismissal as to one ground does not preclude a finding of right to take on another ground and the proceeding may continue to be prosecuted on that basis. As to whether an order of dismissal is appealable, see Section 904.1. See also People v. Rodoni, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966). As to the recovery of litigation expenses following dismissal, see Section 1268.610.

Paragraph (2) of subdivision (c) is designed to ameliorate the all or nothing effect of paragraph (1). The court is authorized in its discretion to dispose of an objection in a just and equitable manner. This authority does not permit the court to create a right to acquire where none exists, but it does authorize the court to grant leave to the plaintiff to amend pleadings or take other corrective action that is just in light of all of the circumstances of the case. The court may frame its order in whatever manner may be desirable, and subdivision (c) makes clear that the order may include the awarding of attorney's fees to the defendant. For example, if the resolution of necessity was not properly adopted, the court may, where appropriate, order that such a resolution be properly adopted within such time as is specified by the court and that, if a proper resolution has not been adopted within the time specified, the proceeding is dismissed. The plaintiff is not required to comply with an order made under paragraph (2), but a failure to comply results in a dismissal of the proceeding as to that property which the court has determined the plaintiff lacks the right to acquire.

Article 3. Procedures Relating to Determination of Compensation

§ 1260.210. Order of proof and argument; burden of proof

1260.210. (a) The defendant shall present his evidence on the issue of compensation first and shall commence and conclude the argument.

(b) Neither the plaintiff nor the defendant has the burden of proof on the issue of compensation.

Comment. Subdivision (a) of Section 1260.210 requires the defendant to present his evidence on the issue of compensation first and to commence and conclude the argument. This continues former law. See former Section 1256.1 ("the defendant shall commence and conclude the argument"); City & County of San Francisco v. Tillman Estate Co., 205 Cal. 651, 272 P. 585 (1928)(order of proof).

The rule as to burden of proof provided by subdivision (b) changes former law. Compare City & County of San Francisco v. Tillman Estate Co., supra. Assignment of the burden of proof in the context of an eminent domain proceeding is not appropriate. The trier of fact generally is presented with conflicting opinions of value and supporting data and is required to fix value based on the weight it gives to the opinions and supporting data. See, e.g., City of Pleasant Hill v. First Baptist Church, 1 Cal. App.3d 384, 408-410, 82 Cal. Rptr. 1, 16-17 (1969); People v. Jarvis, 274 Cal. App.2d 217, 79 Cal. Rptr. 175 (1969). See also State v. 45,621 Square Feet of Land, 475 P.2d 553 (Alaska 1970); State v. Amunsis, 61 Wash.2d 160, 377 P.2d 462 (1963). Absent the production of evidence by one party, the trier of fact will determine compensation solely from the other party's evidence, but neither party should be made to appear to bear some greater burden of persuasion than the other. Subdivision (b) therefore so provides. Compare Ore. Rev. Stat. § 35.305(2).

§ 1260.220. Procedure where divided interests

1260.220. (a) Except as provided in subdivision (b), where there are divided interests in property acquired by eminent domain, the value of each interest and the injury, if any, to the remainder of such interest shall be separately assessed and compensation awarded therefor.

(b) The plaintiff may require that the amount of compensation be first determined as between plaintiff and all defendants claiming an interest in the property. Thereafter, in the same proceeding, the trier of fact shall determine the respective rights of the defendants in and to the amount of compensation awarded and shall apportion the award accordingly.

Comment. Section 1260.220 retains the existing California scheme of permitting a plaintiff the option of having the interests in property valued separately or as a whole. Subdivision (a) retains the procedure formerly provided by Section 1248(1)-(2). Subdivision (b) retains the procedure formerly provided by the first sentence of Section 1246.1. It is intended as procedural only. It does not, for example, affect the rule that, where the plaintiff elects the two-stage proceeding, the value of the property includes any enhanced value created by the existence of a favorable lease on the property. See People v. Lynbar, Inc., 253 Cal. App.2d 87Q, 62 Cal. Rptr. 320 (1967). See also Section 1263.310 (compensation for property taken).

§ 1260.230. Court determination of compensation for deceased and unknown persons

1260.230. Where any persons unknown or any deceased persons or the heirs and devisees of any deceased persons have been properly joined as defendants but have not appeared either personally or by a personal representative, the court shall determine the extent of the interests of such defendants in the property taken or damaged and the compensation to be awarded for such interests. The court may determine the extent and value of the interests of all such defendants in the aggregate without apportionment between the respective defendants. In any event, in the case of deceased persons, the court shall determine only the extent and value of the interest of the decedent and shall not determine the extent and value of the separate interests of the heirs and devisees in such decedent's interest.

Comment. Section 1260.230 is based on a portion of former Section 1245.3 which provided for the court determination of the compensation to be awarded deceased and unknown persons; however, Section 1260.230 authorizes the court to make a lump sum award where such persons have not appeared. Former law was not clear on this point. For provisions authorizing joinder of deceased persons and persons unknown, see Section 1250.220. For provisions relating to deposit of such compensation, see Section 1268.110.

§ 1260.240. Compensation or fee for appraisers, referees, commissioners, and other such persons

1260.240. In any action or proceeding for the purpose of condemning property where the court may appoint appraisers, referees, commissioners, or other persons for the purpose of determining the value of such property and fixing the compensation thereof, and may fix their fees or compensation, the court may set such fees or compensation in an amount as determined by the court to be reasonable.

Comment. Section 1260.240 is identical to former Section 1266.2 except the last clause of Section 1266.2--which provided that "such fees shall not exceed similar fees for similar services in the community where such services are rendered"--is deleted. The former limitation on the court's power to fix fees is deleted because, where there was no expert available in the immediate community, the court's inability to pay an expert from outside of the community his reasonable fee could prevent the court from obtaining the best qualified expert.

Tentatively approved June 1973
Revised July 1973

CHAPTER 11. POSTJUDGMENT PROCEDURE

Article 1. Payment of Judgment; Final Order of Condemnation

§ 1268.010. Payment of judgment

1268.010. (a) Not later than 30 days after final judgment, the plaintiff shall pay the full amount required by the judgment.

(b) Payment shall be made by either or both of the following methods:

(1) Payment of money directly to the defendant. Any amount which the defendant has previously withdrawn pursuant to Article 2 (commencing with Section 1255.210) of Chapter 6 shall be credited as a payment to him on the judgment.

(2) Deposit of money with the court pursuant to Section 1268.110. Upon entry of judgment, a deposit made pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 is deemed to be a deposit made pursuant to Section 1268.110.

Comment. Section 1268.010 retains the rule under former Section 1251 that the plaintiff must pay the full amount of the judgment not later than 30 days after final judgment. See Section 1235.120 (defining "final judgment"). See also Section 1268.110 (deposit of full amount of award, together with interest then due thereon, less amounts previously paid or deposited). Section 1268.010 omits the provision of former Section 1251 that extended the 30-day time by one year where necessary to permit bonds to be issued and sold.

Subdivision (b) of Section 1268.010 specifies the manner in which payment may be made. The payment can be made directly to the defendant or defendants, or the plaintiff may pay the money into court as provided in Article 2 (commencing with Section 1268.110). See the Comment to Section 1268.110.

§ 1268.020. Remedies of defendant if judgment not paid

1268.020. (a) If the plaintiff fails to pay the full amount required by the judgment within the time specified in Section 1268.010, the defendant may have execution as in a civil case.

(b) Upon noticed motion of the defendant, the court shall enter judgment dismissing the eminent domain proceeding if all of the following are established:

(1) The plaintiff failed to pay the full amount required by the judgment within the time specified in Section 1268.010.

(2) The defendant has filed in court and served upon the plaintiff, by registered or certified mail, a written notice of the plaintiff's failure to pay the full amount required by the judgment within the time specified in Section 1268.010.

(3) The plaintiff has failed for 20 days after service of the notice under paragraph (2) to pay the full amount required by the judgment in the manner provided in subdivision (b) of Section 1268.010.

(c) The defendant may elect to exercise the remedy provided by subdivision (b) without attempting to use the remedy provided by subdivision (a).

Comment. Section 1268.020, which generally continues the substance of portions of former Sections 1252 and 1255a, provides remedies for the defendant if the plaintiff does not pay the judgment as required; the defendant may enforce the plaintiff's obligation to pay by execution or, at the defendant's election, may obtain a dismissal of the proceeding with its attendant award of litigation expenses. See Section 1268.610. Under former Section 1252, these remedies were provided, but the section required that the defendant resort first to execution and, if unsuccessful, he could have the proceeding dismissed. However, former Section 1255a, a later enactment, provided that

failure to pay the judgment within the required time constituted an implied abandonment of the proceeding. The two sections were construed together to give the defendant the option of resorting to execution or to having the proceeding dismissed as impliedly abandoned. See, e.g., County of Los Angeles v. Bartlett, 223 Cal. App.2d 353, 36 Cal. Rptr. 193 (1963). Under the former law, it was possible that an inadvertent failure to pay the judgment within the time specified might result in an implied abandonment even though the plaintiff did not intend to abandon the proceeding. See, e.g., County of Los Angeles v. Bartlett, supra. To protect the plaintiff against this possibility, Section 1268.020 requires that notice of the failure to pay the judgment within the time specified be given to the plaintiff and that he be given 20 days to pay the judgment before the proceeding can be dismissed upon motion of the defendant.

§ 1268.030. Final order of condemnation

1268.030. (a) Upon application of any party, the court shall make a final order of condemnation if the court finds both of the following:

(1) The judgment authorizing the taking of the property is a final judgment.

(2) The full amount of the judgment has been paid as required by Section 1268.010 or satisfied pursuant to Section 1268.020.

(b) The final order of condemnation shall describe the property taken and identify the judgment authorizing the taking.

(c) The party upon whose application the order was made shall serve notice of the making of the order on all other parties affected thereby. Any party affected by the order may thereafter record a certified copy of the order in the office of the recorder of the county in which the property is located and shall serve notice of recordation upon all other parties affected thereby. Title to the property vests in the plaintiff upon the date of recordation.

Comment. Section 1268.030 supersedes former Section 1253. Unlike the former provision, Section 1268.030 permits any interested party to obtain and record a final order of condemnation and requires that affected parties be given notice of the making and of the recording of the order. The requirement that the judgment be final before the final order of condemnation may be issued appears to codify prior law. See Arechiga v. Housing Authority, 183 Cal. App.2d 835, 7 Cal. Rptr. 338 (1960)(semble); but see former Section 1253 (no express statutory requirement of final judgment).

Tentatively approved September 1970
Revised April 1973
Revised July 1973

Article 2. Deposit and Withdrawal of Award

§ 1268.110. Deposit after judgment

1268.110. (a) Except as provided in subdivision (b), the plaintiff may, at any time after entry of judgment, deposit with the court for the persons entitled thereto the full amount of the award, together with interest then due thereon, less any amounts previously paid directly to the defendants or deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6.

(b) A deposit may be made under this section notwithstanding an appeal, a motion for a new trial, or a motion to vacate or set aside the judgment but may not be made after the judgment has been reversed, vacated, or set aside.

(c) Any amount deposited pursuant to this article on a judgment that is later reversed, vacated, or set aside shall be deemed to be an amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6.

Comment. This article (commencing with Section 1268.110) provides generally for postjudgment deposits, superseding portions of former Sections 1245.3, 1252, and 1254.

Subdivision (a) of Section 1268.110 is similar to subdivision (a) of former Section 1254. However, the deposit provided for in this subdivision is in only the amount of the judgment and accrued interest (less amounts previously deposited or paid to defendants); the former provision for an additional sum to secure payment of further compensation and costs is superseded by Section 1268.130. In addition, a deposit may be made under this section without regard to whether an order for possession is sought.

Tentatively approved September 1970
Revised April 1973
Revised July 1973

In case the judgment is reversed, vacated, or set aside, there is no longer a judgment for deposit and possession purposes; subsequent proceedings are under the provisions relating to deposit and possession prior to judgment. See Chapter 6 (commencing with Section 1255.010). Any amount deposited under Section 1268.110 or Section 1268.130 is deemed to be an amount deposited under Chapter 6 if the judgment is reversed, vacated, or set aside; after the judgment is reversed, vacated, or set aside, the procedure for increasing or decreasing the amount of the deposit and withdrawal of the deposit is governed by the provisions of Chapter 6. See subdivision (c) and Section 1268.140(c).

Tentatively approved September 1970
Revised April 1973
Renumbered July 1973
Revised September 1973

§ 1268.120. Notice of deposit

1268.120. If the deposit is made under Section 1268.110 prior to apportionment of the award, the plaintiff shall serve a notice that the deposit has been made on all of the 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 parties to the proceeding determined by the order apportioning the award to have an interest in the money deposited. The notice of deposit shall state that a deposit has been made and the date and the amount of the deposit. Service of the notice shall be made in the manner provided in Section 1268.220 for the service of an order for possession. Service of an order for possession under Section 1268.220 is sufficient compliance with this section.

Comment. Section 1268.120 is new. In requiring that notice of the deposit be given, it parallels Section 1255.020 which requires that notice of a prejudgment deposit be sent to the parties having an interest in the property for which the deposit is made. Under former Section 1254, the defendant received notice that the deposit had been made only when served with an order for possession.

Tentatively approved September 1970
Renumbered July 1973

§ 1268.130. Increase or decrease in amount of deposit

1268.130. At any time after the plaintiff has made a deposit upon the award pursuant to Section 1268.110, 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 1268.130 supersedes subdivision (d) of former Section 1254. The additional amount referred to in Section 1268.130 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 1268.110.

Former 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 1268.130.

Tentatively approved September 1970
Revised May 1973
Revised July 1973

§ 1268.140. Withdrawal of deposit

1268.140. (a) After entry of judgment, any defendant who has an interest in the property for which a deposit has been made may apply for and obtain a court order that he be paid from the deposit the amount to which he is entitled upon his filing either of the following:

(1) A satisfaction of the judgment.

(2) A receipt for the money and an abandonment of all claims and defenses except his claim to greater compensation.

(b) If the award has not been apportioned at the time the application is made, the applicant shall give notice of the application to all the other defendants who have appeared in the proceeding and who have an interest in the property. If the award has been apportioned at the time the application is made, the applicant shall give such notice to the other defendants as the court may require.

(c) Upon objection to the withdrawal made by any party to the proceeding, the court, in its discretion, may require the applicant to file an undertaking in the same manner and upon the conditions described in Section 1255.240 for withdrawal of a deposit prior to entry of judgment.

(d) If the judgment is reversed, vacated, or set aside, a defendant may withdraw a deposit only pursuant to Article 2 (commencing with Section 1255.210) of Chapter 6.

Comment. Section 1268.140 is based on subdivision (f) of former Section 1254 but provides notice requirements to protect the other defendants where money is to be withdrawn.

Former 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 1268.140. Inferentially, former 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 purposes of withdrawal of deposits, a judgment that is reversed, vacated, or set aside has no effect; withdrawal may be made only under the procedures provided for withdrawing deposits prior to entry of judgment. This is made clear by subdivision (d).

Under Section 1268.140, the defendant may retain his right to appeal or to request a new trial upon the issue of compensation even though he withdraws the deposit. This may be accomplished by filing a receipt and waiver of all claims and defenses except the claim to greater compensation. See subdivision (a). Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

Tentatively approved May 1973
Revised May 1973
Revised July 1973

§ 1268.150. Deposit in State Treasury unless otherwise required

1268.150. (a) Except as provided in subdivision (b), when money is deposited as provided in this article, 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 the money is deposited in the State Treasury pursuant to this subdivision, 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. As between the parties to the proceeding, money deposited pursuant to this subdivision shall remain at the risk of the plaintiff until paid or made payable to the defendant by order of the court.

(b) If after entry of judgment but prior to apportionment of the award the defendants are unable to agree as to the withdrawal of all or a portion of any amount deposited, the court shall upon motion of any defendant order that the amount deposited be invested in United States Government obligations or interest-bearing accounts insured by an agency of the federal government for the benefit of the defendants who shall be entitled to the interest earned on the accounts in proportion to the amount of the award they receive when the award is apportioned.

Comment. Subdivision (a) of Section 1268.150 is the same in substance as former Section 1243.6 and a portion of subdivision (h) of former Section 1254. For a comparable section, see Section 1255.070.

Tentatively approved May 1973
Revised May 1973
Revised July 1973

Subdivision (b) is new. It provides a means whereby a defendant may avoid the loss of interest earnings on amounts held on deposit pending resolution of an apportionment dispute. Cf. Section 1268.320 (interest ceases to accrue on judgment upon deposit). Subdivision (c) does not preclude a voluntary agreement among all defendants to draw down the award and place it in an interest-bearing trust fund pending resolution of apportionment issues.

Tentatively approved September 1970
Renumbered July 1973

§ 1268.160. Repayment of excess withdrawal

1268.160. 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 judgment accordingly.

Comment. Section 1268.160 is the same in substance as subdivision (g) of former Section 1254.

Tentatively approved September 1970
Renumbered July 1973

§ 1268.170. Making deposit does not affect right to appeal

1268.170. The plaintiff does not abandon or waive the right to appeal from the judgment or the right to request a new trial by depositing the amount of the award pursuant to this article.

Comment. Section 1268.170 is the same in substance as a portion of subdivision (e) of former Section 1254. For a comparable provision permitting the defendant to withdraw the deposit without waiving his right to appeal or request a new trial on the issue of compensation, see Section 1268.140(a).

Tentatively approved September 1970
Revised May 1973
Renumbered July 1973
Revised September 1973

Article 3. Possession After Judgment

§ 1268.210. Order for possession

1268.210. (a) If the plaintiff is not in possession of the property to be taken, the plaintiff may, at any time after entry of judgment, 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 paid to or deposited for the defendants, in accordance with Section 1268.110 or Article 1 (commencing with Section 1255.010) of Chapter 6, an amount not less than the amount of the award, together with the interest then due thereon.

(b) The court's order shall state the date after which the plaintiff is authorized to take possession of the property. Where deposit is made, the order shall state such fact and the date and the amount of the deposit.

(c) Where the judgment is reversed, vacated, or set aside, the plaintiff may obtain possession of the property only pursuant to Article 3 (commencing with Section 1255.410) of Chapter 6.

Comment. Section 1268.210 restates the substance of a portion of subdivision (b) of former Section 1254. The time for possession is lengthened, however, from 10 to 30 days after the order for possession where the property is occupied. See Section 1268.220. For purposes of possession, a judgment that is reversed, vacated, or set aside has no effect; the plaintiff must utilize procedures for obtaining possession prior to entry of judgment. See Comment to Section 1255.410.

Tentatively approved September 1970
Revised May 1973
Renumbered July 1973

§ 1268.220. Service of order

1268.220. (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 1268.220 is the same in substance as subdivision (c) of former 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 1255.450.

Tentatively approved September 1970
Renumbered July 1973

§ 1268.230. Taking possession does not waive right of appeal

1268.230. The plaintiff does not abandon or waive the right to appeal from the judgment or the right to request a new trial by taking possession pursuant to this article.

Comment. Section 1268.230 is the same in substance as a portion of subdivision (e) of former Section 1254. For a comparable provision, see Section 1255.470.

Tentatively approved May 1973
Renumbered July 1973

§ 1268.240. Police power not affected

1268.240. Nothing in this article limits the right of a public entity to exercise its police power in emergency situations.

Comment. Section 1268.240 is new. It makes clear that the requirements of this article--such as obtaining and serving an order for possession--do not limit 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). See also Section 1255.480.

Tentatively approved April 1973
Revised June 1973
Revised July 1973

Article 4. Interest

§ 1268.310. Date interest commences to accrue

1268.310. The compensation awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

(a) The date of entry of judgment.

(b) The date the plaintiff takes possession of the property.

(c) The date after which the plaintiff is authorized to take possession of the property as stated in an order for possession.

Comment. Section 1268.310 is the same in substance as subdivision (a) of former Section 1255b except that the phrase "or damage to the property occurs" has been deleted from subdivision (b) as unnecessary since severance damage occurs only after possession is taken. This deletion is not intended to affect any rules relating to the time of accrual of interest on a cause of action based on inverse condemnation, whether raised in a separate action or by cross-complaint in the eminent domain proceeding. See, e.g., Youngblood v. Los Angeles County Flood Control Dist., 56 Cal.2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597 (1947). For an exception to the rules stated in Section 1268.310, see Section 1255.040 (deposit for relocation purposes on motion of certain defendants).

Tentatively approved April 1973
Revised May 1973
Renumbered July 1973

§ 1268.320. Date interest ceases to accrue

1268.320. The compensation awarded in an eminent domain proceeding shall cease to draw interest at the earliest of the following dates:

(a) As to any amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 (deposit of probable compensation prior to judgment), the date such amount is withdrawn by the person entitled thereto.

(b) As to the amount deposited in accordance with Article 2 (commencing with Section 1268.110) (deposit of amount of award), the date of such deposit.

(c) As to any amount paid to the person entitled thereto, the date of such payment.

Comment. Section 1268.320 continues the substance of subdivision (c) of former Section 1255b. For an exception to the rule stated in subdivision (a), see Section 1255.040 (deposit for relocation purposes on motion of certain defendants). Subdivision (b) of Section 1268.320 supersedes paragraphs (2) and (4) of subdivision (c) of former Section 1255b. Unlike the former law, there is now only one procedure for payments into court after entry of judgment. See Section 1268.110 and Comment thereto.

Tentatively approved April 1973
Renumbered July 1973

§ 1268.330. Offsets against interest

1268.330. If, after the date that interest begins to accrue, the defendant:

(a) Continues in actual possession of the property, the value of such possession shall be offset against the interest.

(b) Receives rents or other income from the property attributable to the period after interest begins to accrue, the net amount of such rents and other income shall be offset against the interest.

Comment. Section 1268.330 supersedes subdivision (b) of former Section 1255b. Revisions have been made to clarify the meaning of the former language. See also Govt. Code § 7267.4 ("If the public entity permits an owner or tenant to occupy the real property acquired on a rental basis for a short term, or for a period subject to termination by the public entity on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier."). For an exception to the rule stated in Section 1268.330, see Section 1255.040 (deposit for relocation purposes on motion of certain defendants).

§ 1268.340. Interest to be assessed by court

1268.340. Interest, including interest accrued due to possession of property by the plaintiff prior to judgment, and any offset against interest as provided in Section 1268.330, shall be assessed by the court rather than by jury.

Comment. Section 1268.340 is new. It clarifies former law by specifying that the court, rather than the jury, shall assess interest, including interest required to satisfy the defendant's constitutional right to compensation for possession of his property prior to conclusion of the eminent domain proceeding. See Metropolitan Water Dist. v. Adams, 16 Cal.2d 676, 107 P.2d 618 (1940); City of North Sacramento v. Citizens Util. Co., 218 Cal. App.2d 178, 32 Cal. Rptr. 308 (1963); People v. Johnson, 203 Cal. App.2d 712, 22 Cal. Rptr. 149 (1962); City of San Rafael v. Wood, 144 Cal. App.2d 604, 301 P.2d 421 (1956). Section 1268.340 also resolves a further uncertainty by specifying that the amount of the offset against interest provided by Section 1268.330 is likewise assessed by the court, thus requiring that any evidence on that issue is to be heard by the court rather than the jury. Compare People v. McCoy, 248 Cal. App.2d 27, 56 Cal. Rptr. 352 (1967), and People v. Giumarra Vineyards Corp., 245 Cal. App.2d 309, 53 Cal. Rptr. 902 (1966), with City of North Sacramento v. Citizens Util. Co., supra.

Tentatively approved April 1973
Renumbered July 1973

Article 5. Proration of Property Taxes

§ 1268.410. Liability for taxes

1268.410. As between the plaintiff and defendant, the plaintiff is liable for any ad valorem taxes, penalties, and costs upon property acquired by eminent domain that would be subject to cancellation under Chapter 4 (commencing with Section 4986) of Part 9 of Division 1 of the Revenue and Taxation Code if the plaintiff were a public entity and if such taxes, penalties, and costs had not been paid, whether or not the plaintiff is a public entity.

Comment. Section 1268.410 is the same in substance as the first paragraph of former Section 1252.1.

Tentatively approved April 1973
Renumbered July 1973

§ 1268.420. Application for separate valuation of property

1268.420. If property acquired by eminent domain does not have a separate valuation on the assessment roll, any party to the eminent domain proceeding may, at any time after the taxes on such property are subject to cancellation pursuant to Section 4986 of the Revenue and Taxation Code, apply to the tax collector for a separate valuation of such property in accordance with Article 3 (commencing with Section 2821) of Chapter 3 of Part 5 of Division 1 of the Revenue and Taxation Code notwithstanding any provision in such article to the contrary.

Comment. Section 1268.420 is the same in substance as former Section 1252.2.

Tentatively approved April 1973
Renumbered July 1973

§ 1268.430. Reimbursement for taxes

1268.430. (a) If the defendant has paid any amount for which, as between the plaintiff and defendant, the plaintiff is liable under this article, the plaintiff shall pay to the defendant a sum equal to such amount.

(b) The amount the defendant is entitled to be paid under this section shall be claimed in the manner provided for claiming costs and at the following times:

(1) If the plaintiff took possession of the property prior to judgment, at the time provided for claiming costs.

(2) If the plaintiff did not take possession of the property prior to judgment, not later than 30 days after the plaintiff took title to the property.

Comment. Section 1268.430 is the same in substance as the final two paragraphs of former Section 1252.1.

Article 6. Abandonment

§ 1268.510. Abandonment

1268.510. (a) At any time after the filing of the complaint and before the expiration of 30 days after final judgment, the plaintiff may wholly or partially abandon the proceeding by serving on the defendant and filing in court a written notice of such abandonment.

(b) The court may, upon motion made within 30 days after the filing of such notice, set the abandonment aside if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

(c) Upon denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, the court shall, on motion of any party, enter judgment wholly or partially dismissing the proceeding.

Comment. Section 1268.510 is the same in substance as portions of former Section 1255a: subdivision (a) is the same in substance as the first sentence of former Section 1255a; subdivision (b) is the same in substance as subdivision (b) of former Section 1255a; subdivision (c) is the same in substance as the first sentence of subdivision (c) of former Section 1255a. For recovery of litigation expenses and damages on dismissal, see Sections 1268.610 and 1268.620.

Article 7. Litigation Expenses and Damages Upon Dismissal or Defeat of Right to Take

§ 1268.610. Litigation expenses

1268.610. (a) As used in this section, "litigation expenses" includes both of the following:

(1) All expenses reasonably and necessarily incurred in the eminent domain proceeding in preparing for trial, during trial, and in any subsequent judicial proceedings.

(2) Reasonable attorney's fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendant's interests in the eminent domain proceeding in preparing for trial, during trial, and in any subsequent judicial proceedings, whether such fees were incurred for services rendered before or after the filing of the complaint.

(b) Subject to subdivision (c), the court shall award the defendant his litigation expenses whenever:

(1) An eminent domain proceeding is wholly or partly dismissed for any reason; or

(2) Final judgment in the eminent domain proceeding is that the plaintiff cannot acquire property it sought to acquire in the proceeding.

(c) Where there is a partial dismissal or a final judgment that the plaintiff cannot acquire a portion of the property originally sought to be acquired, the court shall award the defendant only those litigation expenses, or portion thereof, that would not have been incurred had the property sought to be acquired following the dismissal or judgment been the property originally sought to be acquired.

(d) Litigation expenses under this section shall be claimed in and by a cost bill to be prepared, served, filed, and taxed as in a civil action. If the proceeding is dismissed upon motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of such judgment.

Comment. Section 1268.610 deals with the litigation expenses that a defendant may recover when an eminent domain proceeding is dismissed for any reason or there is a final judgment that the plaintiff does not have the right to take. The section is based primarily on former Section 1255a but expands the scope of protection afforded the defendant to cover dismissal for any reason. Compare Alta Bates Hosp. v. Mertle, 31 Cal. App.3d 349, 107 Cal. Rptr. 277 (1973).

To a large extent, Section 1268.610 continues provisions of former Section 1255a. Thus, as formerly was the rule under Section 1255a, the plaintiff must reimburse the defendant:

(1) When the plaintiff voluntarily abandons the proceeding. See also Section 1268.510.

(2) When there is an implied abandonment of the proceeding, such as abandonment, resulting from failure to pay the judgment. See Section 1268.020. See County of Los Angeles v. Bartlett, 223 Cal. App.2d 353, 36 Cal. Rptr. 193 (1963); Capistrano Union High School Dist. v. Capistrano Beach Acreage Co., 188 Cal. App.2d 612, 10 Cal. Rptr. 750 (1961).

(3) When the plaintiff amends the complaint to significantly reduce the property or property interest being taken, amounting to a "partial abandonment" of the proceeding (see Section 1250.380). (Reimbursement of defendant's litigation expenses when the complaint is amended to add additional property is not covered by Section 1258.610; this is covered by Section 1250.380.)

Section 1268.610 also continues the rule under former Section 1246.4 that public entity plaintiffs must reimburse the defendant when there is a final judgment that the plaintiff does not have a right to take the property sought to be acquired and expands this rule to apply to nonpublic entity

plaintiffs. See also federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646) § 304.

Section 1268.610 also changes prior law to require reimbursement of the defendant where the eminent domain proceeding is dismissed for failure to prosecute. Under prior law, the defendant was not entitled to reimbursement upon such failure. See City of Industry v. Gordon, 29 Cal. App.3d 90, 105 Cal. Rptr. 206 (1972); Bell v. American States Water Service Co., 10 Cal. App.2d 604, 52 P.2d 503 (1935). But see Alta Bates Hosp. v. Mertle, supra.

Subdivision (a) is the same in substance as the second sentence of former Section 1255a(c).

Subdivision (c) continues the substance of the third sentence of former Section 1255a(c); litigation expenses do not include any items that would have been incurred notwithstanding the "partial abandonment." County of Kern v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962). See also Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833(1971); Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co., 234 Cal. App.2d 352, 44 Cal. Rptr. 410 (1965). Subdivision (c) expands this rule to make it applicable where a final judgment determines that the plaintiff does not have the right to take a portion of the property it originally sought to acquire in the eminent domain proceeding.

Subdivision (d) is the same in substance as the fourth and fifth sentences of former Section 1255a(c).

§ 1268.620. Damages caused by possession

1268.620. If, after the defendant moves from property in compliance with an order or agreement for possession, the proceeding is dismissed with regard to the property for any reason or there is a final judgment that the plaintiff cannot acquire the property, the court shall:

(a) Order the plaintiff to deliver possession of the property to the persons entitled to it; and

(b) Make such provision as shall be just for the payment of (1) damages arising out of the plaintiff's taking and use of the property and (2) damages for any loss or impairment of value suffered by the land and improvements. Such damages shall be measured from the time the plaintiff took possession of or the defendant moved from the property in compliance with an order or agreement for possession, which is earlier.

Comment. Section 1268.620 provides for restoration of possession of the property and damages where the plaintiff took possession of property prior to a dismissal or a final judgment that the plaintiff cannot acquire the property. Section 1268.620 is not intended to limit any remedies the defendant may have for damage to the property during litigation on an inverse condemnation theory.

The provision on restoration of possession of the property supersedes the final portion of the second sentence of former Section 1252 and a portion of subdivision (d) of former Section 1255a. Whereas the prior provisions required possession to be restored to the defendants when the plaintiff failed to deposit the award in a condemnation proceeding, abandoned the proceeding, or because the right to take was defeated, Section 1268.530 requires restoration in any case where the proceeding is dismissed or there is a final judgment that the plaintiff cannot take the property, thus covering, for example, a case where the proceeding is dismissed for delay in bringing it to trial.

The provision relating to the payment of damages supersedes subdivision (d) of former Section 1255a. Whereas the prior provision required payment of

damages when the plaintiff abandoned or the right to take was defeated, subdivision (b) makes clear that this rule applies as well where the proceeding is dismissed, e.g., because the plaintiff fails to prosecute or because the plaintiff fails to deposit the award in a condemnation proceeding.

Article 8. Costs

§ 1268.710. Court costs

1268.710. The defendants in an eminent domain proceeding shall be allowed their costs, including the costs of determining the apportionment of the award made pursuant to subdivision (b) of Section 1260.220, except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.

Comment. Section 1268.710 restates prior law relating to the allowance of costs in the trial court. See Section 1268.720 for costs on appeal and Section 1268.610 (litigation expenses on dismissal). Former Section 1255 provided that, in eminent domain proceedings, "costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." See also Section 1032. However, very early, the California Supreme Court held that the power provided by Section 1255 "must be limited by section 14 of article I of the constitution, which provides that 'private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner.' . . . To require the defendants in [an eminent domain] case to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the plaintiff, would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs." City & County of San Francisco v. Collins, 98 Cal. 259, 262, 33 P. 56, 57 (1893). Accordingly, the defendant in an eminent domain proceeding has as a rule been allowed his ordinary court costs. This rule is subject to the procedural limitation that defendants with a single, unified interest may be allowed only a single cost bill. See City of Downey v. Gonzales, 262 Cal. App.2d 563, 69 Cal. Rptr. 34 (1968). Moreover, the costs of determining title as between two or more defendants has been borne by such defendants. See former Section 1246.1. See also Housing Authority v. Pirrone, 68 Cal. App.2d 30, 156 P.2d 39 (1945). This rule is continued.

Subdivision (k) of former Section 1254 provided that, where a defendant obtained a new trial, he had to be successful in increasing the amount originally awarded or the cost of the new trial would be taxed against him. Los Angeles, Pasadena & Glendale Ry. v. Rumpp, 104 Cal. 20, 37 P. 859 (1894). Section 1268.710 eliminates this exception.

§ 1268.720. Costs on appeal

1268.720. Except as provided by rules adopted by the Judicial Council specifically applicable to eminent domain proceedings, the defendant in an eminent domain proceeding shall be allowed his costs on appeal, whether or not he is the prevailing party.

Comment. Section 1268.720 states the basic rule that the defendant is allowed his costs on appeal in an eminent domain case. This basic rule is an exception to the rule that the prevailing party is entitled to his costs on appeal. Compare Cal. Rules of Ct. 26 (costs on appeal). The basic rule continues case law that the general constitutional principle of "just compensation" requires that the plaintiff-condemnor bear the costs of all parties to the action in case of an appeal. See, e.g., Sacramento & San Joaquin Drainage Dist. v. Reed, 217 Cal. App.2d 611, 31 Cal. Rptr. 754 (1963)(defendant entitled to costs on plaintiff's appeal even if the plaintiff prevails); Regents of Univ. of Cal. v. Morris, 12 Cal. App.3d 679, 90 Cal. Rptr. 816 (1970)(defendant entitled to costs on defendant's appeal where defendant prevails).

Where the defendant is the appellant and loses, the former law was not clear. The trend in recent years was to award the defendant-appellant his costs whether or not he prevailed. See City of Baldwin Park v. Stoskus, 8 Cal.3d 563, 743a, 503 P.2d 1333, 1338, 105 Cal. Rptr. 325, 330 (1972); Klopping v. City of Whittier, 8 Cal.3d 39, 59, 500 P.2d 1345, 1360, 104 Cal. Rptr. 1, 16 (1972); People v. International Tel. & Tel. Corp., 26 Cal. App.3d 549, 103 Cal. Rptr. 63 (1972). See also In re Redevelopment Plan for Bunker Hill, 61 Cal.2d 21, 68-71, 389 P.2d 538, 568-570, 37 Cal. Rptr. 74, 104-106 (1964). However, such action apparently was discretionary with the reviewing court. See City of Oakland v. Pacific Coast Lumber & Mill Co., 172 Cal. 332, 156 P. 468 (1916)(not unconstitutional to award costs to plaintiff-respondent where he is the prevailing party; distinguishing Stevinson where plaintiff was the appellant). See also Stafford v. County of Los Angeles, 219 Cal.

App.2d 770, 33 Cal. Rptr. 475 (1963)(plaintiff in inverse condemnation case taxed costs for frivolous appeal). Moreover, the defendant was not entitled to costs where the issue involved title as between two or more defendants. See former Code Civ. Proc. § 1246.1; Section 1268.710(b) and Comment thereto.

Section 1268.720 preserves the rule allowing defendant costs and makes clear that this rule applies in the event of an appeal by the defendant that fails. The section authorizes the Judicial Council to deviate from this principle by court rule made specifically applicable to eminent domain proceedings. Unless and until such a rule is adopted, there will be no exception to the basic rule stated in Section 1268.720.