

#36.300

11/21/73

Memorandum 73-93

Subject: Study 36.300 - Condemnation Law and Procedure: Comprehensive Statute
Generally (Preliminary Portion of Tentative Recommendation)

Attached to this memorandum are two copies of a staff draft of the preliminary portion of the eminent domain tentative recommendation. The preliminary portion attached hereto lacks a table of contents, a list of acknowledgments, an outline of the statute, and a table of sections affected. We plan to send the remaining material as soon as possible.

Please make your editorial revisions on one copy and return it to the staff at the November meeting. Please raise any substantive questions you may have concerning the preliminary portion at the meeting, for we hope to send it to the printer immediately following the meeting. The preliminary portion is the only part of the eminent domain tentative recommendation that remains to be sent to the printer.

Respectfully submitted,

Nathaniel Sterling
Staff Counsel

November 30, 1973

LETTER OF TRANSMITTAL

The California Law Revision Commission was directed by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether condemnation law and procedure should be revised "to safeguard the property rights of private citizens." Subsequently this direction was broadened by Resolution Chapter 130 of the Statutes of 1956 to direct a revision of condemnation law and procedure in the form of a comprehensive statute "that will safeguard the rights of all parties to such proceedings."

Pursuant to these directions, the Commission has previously submitted recommendations concerning the following eminent domain problems, selected because they appeared to be in need of immediate attention:

Recommendation	Action by Legislature
<u>Evidence in Eminent Domain Proceedings</u> , 3 Cal. L. Revision Comm'n Reports at A-1 (1961)	Not enacted. But see Evid. Code § 810 et seq. enacting substance of recommendation.
<u>Taking Possession and Passage of Title in Eminent Domain Proceedings</u> , 3 Cal. L. Revision Comm'n Reports at B-1 (1961)	Enacted. Cal. Stats. 1961, Chs. 1612, 1613
<u>Reimbursement for Moving Expenses When Property Is Acquired for Public Use</u> , 3 Cal. L. Revision Comm'n Reports at C-1 (1961)	Not enacted. But see Govt. Code § 7260 et seq. enacting substance of recommendation.
<u>Discovery in Eminent Domain Proceedings</u> , 4 Cal. L. Revision Reports 701 (1963); 8 Cal. L. Revision Comm'n Reports 19 (1967)	Enacted. Cal. Stats. 1967, Ch. 1104

Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding,
8 Cal. L. Revision Comm'n Reports 1361 (1967)

Enacted. Cal. Stats. 1968, Ch. 133

Arbitration of Just Compensation, 9 Cal. L. Revision Comm'n Reports 123 (1969)

Enacted. Cal. Stats. 1970, Ch. 417

Revisions of Governmental Liability Act, 9 Cal. L. Revision Comm'n Reports 801 (1969)(entry on property for preliminary location, survey, and tests)

Enacted in part: Cal. Stats. 1970, Chs. 662 (entry on property), 1099

While developing these recommendations, the Commission has also been preparing a comprehensive revision of condemnation law and procedure. The Commission herewith submits a preliminary report containing its tentative recommendation for a comprehensive Eminent Domain Law. This report is one of four related reports. The other three are:

Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts (January 1974), to be reprinted in 12 Cal. L. Revision Comm'n Reports 1001 (1974)

Tentative Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Special District Statutes (January 1974), to be reprinted in 12 Cal. L. Revision Comm'n Reports, _____ (1974)

Tentative Recommendation Relating to Condemnation Law and Procedure: Condemnation Authority of State Agencies (January 1974), to be reprinted in 12 Cal. L. Revision Comm'n Reports, _____ (1974)

This report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and to send comments to the Commission. The comments will be considered by the Commission in formulating its final recommendation. The Commission plans to submit its final recommendation to the 1975 Legislature. Communications concerning

the tentative recommendation should be addressed to the California Law Revision Commission, School of Law, Stanford, California 94305.

In formulating its tentative recommendation, the Commission has been aided in its task by consultants retained to provide expert assistance: Thomas M. Dankert, Ventura attorney; Fadem and Kanner, Los Angeles law firm; Hill, Farrar & Burrill, Los Angeles law firm; Norman E. Matteoni, Deputy Counsel of Santa Clara County; Hon. Paul E. Overton, former San Diego attorney. The Commission has also had the assistance of numerous persons throughout the state who attended Commission meetings, commented on various aspects of the study, and responded to questionnaires, thereby providing the Commission a wealth of empirical data and contributing materially to the quality of the product. The Commission's indebtedness to ~~many of these~~ persons is recorded in the list of acknowledgments that follows.

Respectfully submitted,

John D. Miller
Chairman

PREFACE

The Eminent Domain Package

This report is one of a series published concurrently by the California Law Revision Commission relating to condemnation law and procedure. It contains the comprehensive Eminent Domain Law recommended by the Commission that will replace the existing eminent domain title of the Code of Civil Procedure. The text of the existing eminent domain title is set out in the Appendix to this report; the disposition of each section in the Appendix is noted in the Comment following that section. This report also contains additions, amendments, and repeals of sections of other statutes that will be required upon enactment of the Eminent Domain Law.

Separately published reports in this series indicate the need for revisions in the statutes relating to acquisition of property for state purposes and statutes relating to special districts. See Tentative Recommendation Relating to Condemnation Law and Procedure: Condemnation Authority of State Agencies, 12 Cal.L.Revision Comm'n Reports ____ (1974) and Tentative Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Special District Statutes, 12 Cal.L.Revision Comm'n Reports ____ (1974). These tentative recommendations are dependent upon enactment of the Eminent Domain Law. Also separately published is a recommendation proposing revision of statutes relating to special assessments for improvements, designed to eliminate from them special condemnation provisions. See Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts, 12 Cal.L.Revision Comm'n Reports 1001 (1974). This recommendation (which will be submitted to the 1974 Legislature) is not dependent upon enactment of the Eminent Domain Law.

The statutes proposed in the series of reports described above are

part of a package that must be viewed as a whole. The statutes and the Comments to them are drafted as if the entire package were enacted. Thus, when reference is made to a statute by another statute or a Comment, the reference is to the statute as it would be if the entire package were enacted. So that one can determine whether a particular statute to which reference is made is affected by the package, this report contains a table of sections affected by the whole series of reports. It is important to refer to this table because in some cases a statute referred to in one report of this series may be affected in another report of the series.

SUMMARY OF REPORT

This tentative recommendation proposes the enactment of a new, comprehensive statute governing condemnation law and procedure--the Eminent Domain Law. Although some important changes in existing law are proposed, the Eminent Domain Law is basically a reorganization and restatement of existing California law with numerous minor changes of a technical or corrective nature. A major purpose of the proposed statute is to supply a complete, well-organized compilation of the law that will replace the duplicative, inconsistent, and special provisions of existing law relating to condemnation.

The proposed Eminent Domain Law is composed of 12 chapters that follow generally a temporal sequence through the course of an eminent domain proceeding. An outline of the Eminent Domain Law follows the Table of Contents. The basic content of the statute and the more important changes it will make in the law are summarized below.

Scope of Statute

All eminent domain proceedings will be conducted under the Eminent Domain Law; numerous special provisions will be eliminated from codified and uncoded statutes. The jurisdiction of the Public Utilities Commission is unaffected. The provisions relating to arbitration of compensation are re-enacted without change.

Delegation of Condemnation Authority

The rule that only persons authorized by statute may condemn property is continued. The detailed listing of specific public uses is eliminated from the eminent domain statute, but the right of public entities and public utilities to condemn property for those uses is continued. The right of cities, counties, and school districts to condemn property for their purposes

is made clear, and cities and counties are authorized to condemn property to preserve open space (with limitations to prevent abuse). The right of private persons to condemn property is abolished, but the right of nonprofit hospitals to condemn is broadened (with limitations to prevent abuse), and the right of nonprofit educational institutions of collegiate grade, certain nonprofit housing corporations, and mutual water companies is continued and clarified.

The new statute also makes clear that, unless otherwise limited by statute, a delegation of condemnation authority carries with it the right to acquire the fee or any lesser right or interest in property of any type and the right to take any property necessary for the protection and efficient use of the project. It also makes clear that a local public entity may condemn property only within its boundaries unless extraterritorial condemnation is expressly or impliedly authorized. The existing provisions relating to preliminary surveys and tests by the condemnor to determine the suitability of property for public use are continued in the new statute, but the award of attorney's fees--mandatory under existing law--is permitted only where such an award is in the interests of justice.

Public Use and Necessity

The Eminent Domain Law reiterates the constitutional public use requirement and the statutory public necessity requirement but makes changes in several important aspects of public use and necessity.

The new statute requires that every public entity adopt a resolution of necessity as a prerequisite to condemnation. Unless otherwise provided by statute, a majority vote of all the members of the governing body is required for adoption of the resolution.

The resolution will be conclusive on matters of public necessity for acquisitions within the boundaries of the public entity. Superseded by these gen-

eral provisions will be numerous provisions of existing law that provide a variety of different rules governing the necessity for, adoption of, and effect of, the resolution of necessity.

Acquisition of property by a condemnor for use in the future is permitted if the property will be used within a reasonable period. If the use will be within seven years, it is deemed reasonable; if the use will not be within seven years, the burden of proof is on the condemnor to show that the actual period is reasonable.

The authority of a public entity to condemn a remnant left by a partial taking is continued, provided the remnant is of little market value. If the property owner contests the taking, the public entity must establish that the remnant will be of little market value. Taking the remnant is not permitted if the property owner establishes that the condemnor has a reasonable, practicable, and economically sound "physical solution" to the situation.

The statutory hierarchy of more necessary public uses is retained for the condemnation of property already appropriated to public use. However, the Eminent Domain Law prevents a more necessary public use from displacing a less necessary public use upon objection of the less necessary user if joint use is possible. Likewise, it permits a less necessary user to condemn for joint use with a more necessary use if the uses will be compatible.

The authority of public entities to condemn property to exchange for property needed for public use is continued and clarified in the new statute.

Commencement of Proceeding

The principle that eminent domain proceedings are to be governed by the same general rules as civil actions is continued, but these rules are supplemented with special rules that are required by the unique nature of an eminent domain proceeding. Existing special rules relating to jurisdiction and venue, service, recordation of a lis pendens, parties, and joinder are retained with minor modifications. The pleadings will be simplified by eliminating the

requirements that the complaint indicate whether the part taken is part of a larger parcel and that the answer set forth the amount claimed as compensation.

Possession Prior to Judgment

Major changes are proposed in the procedure by which a condemnor may obtain possession of property following commencement of an eminent domain proceeding but prior to entry of judgment. The Eminent Domain Law authorizes all condemnors to obtain possession prior to judgment; however, it imposes procedural safeguards in the form of the property owner's right to get a copy of the deposit appraisal and request an increased deposit, to obtain a stay of possession for hardship, and to obtain 90 days' notice prior to dispossession. In addition, homeowners and owners of rental property may require the condemnor to make a deposit, with appropriate sanctions for failure to do so.

Discovery

The existing provisions for exchange of valuation data are reenacted with modifications designed to permit follow-up discovery. The time for a demand to be made is advanced, the provision for a cross-demand is eliminated, and the exchange date made 40 days prior to trial. Subsequent discovery without requirement of court order is permitted to within 20 days before trial.

Procedures for Determining Right to Take and Compensation

The eminent domain trial preference is retained, and early disposition of right to take issues encouraged. The order of proof and argument is also unchanged. However, the statute eliminates the assignment to either party of the burden of proof on the issue of compensation.

Compensation

The basic California compensation scheme (awarding the value of the part taken plus the difference, if any, between damages and benefits to the remainder) is continued. However, the Eminent Domain Law incorporates important

changes in several aspects of the computations.

Permission for the plaintiff to establish a fixed valuation date regardless of subsequent occurrences by making a deposit is superimposed on the existing date of valuation scheme. Where a new trial is held, absent a deposit by the plaintiff, the date of valuation will be the date of the new trial rather than the date used in the previous trial. Where there have been fluctuations in the market value of the property prior to the date of valuation that were caused by the imminence of the project, the Eminent Domain Law makes it clear that the property is to be valued as if the project for which it is taken had not existed.

Provision is made for compensation for the goodwill of a business taken or damaged. Also, the rule that manufacturing or industrial equipment is part of the realty for purposes of compensation is broadened to cover any business equipment whose removal cannot be accomplished without a substantial loss in value.

In partial taking cases, the rule of People v. Symons (that the damage-causing portion of the project must be located on the part taken in order to be compensable) is abrogated. The statute provides that damage caused by a project to a remainder is compensable regardless of the location of the damage-causing portion of the project; the equivalent rule as to offsetting benefits is also codified.

Divided Interests

The Eminent Domain Law continues the procedure that permits the plaintiff in an eminent domain proceeding to elect to have compensation determined in a lump sum against all defendants with a second-stage apportionment among the defendants. However, significant changes are made in the substantive rules for compensating particular interests. Where there is a partial taking of property subject to a lease, provision is made for the pro rata reduction of

rent or, if the purpose of the lease is frustrated, for the termination of the lease. The right to compensation of an option holder or a person owning a contingent future interest is recognized.

Postjudgment Procedure

The various postjudgment procedures that are peculiar to eminent domain proceedings are retained. The provisions for payment of a judgment and for deposit pending appeal are consolidated to provide one uniform deposit procedure, thereby enabling uniform provisions for withdrawal of the award and for obtaining possession after judgment. The one-year delay in payment of a judgment afforded certain public entities is eliminated in favor of a uniform 30-day period. The provisions relating to interest on the judgment and proration of property taxes are retained unchanged. Case law relating to costs is codified; the substance of the provisions relating to abandonment and litigation expenses on abandonment and dismissal for other reasons is continued.

INTRODUCTION

Pursuant to a 1965 legislative directive,¹ the California Law Revision Commission presents in this report its tentative recommendation for a comprehensive Eminent Domain Law,² along with necessary conforming changes.³ The proposed comprehensive statute is the culmination of the Commission's exhaustive study of condemnation law and procedure that has previously resulted in the enactment of legislation on several major aspects of eminent domain law.⁴

Although Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure purports to be a comprehensive and systematic statement of

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1. The Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study condemnation law and procedure with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings. This was an expansion of an earlier direction to make such a study with a view to recommending revisions "to safeguard the property rights of private citizens." See Cal. Stats. 1956, Res. Ch. 42, at 263.
 2. The Eminent Domain Law is intended to supply rules for eminent domain proceedings. No recommendation is made as to whether any of its provisions should also be applicable in inverse condemnation actions. This determination is left to judicial development.
 3. This report proposes conforming changes in general statutes relating to eminent domain. For conforming changes in statutes relating to the exercise of eminent domain by the state, see Tentative Recommendation Relating to Condemnation Law and Procedure: Condemnation Authority of State Agencies, 12 Cal. L. Revision Comm'n Reports (1974); for conforming changes in statutes relating to exercise of eminent domain by special districts, see Tentative Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Special District Statutes, 12 Cal. L. Revision Comm'n Reports (1974). Also related is Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts, 12 Cal. L. Revision Comm'n Reports 1001 (1974).
 4. See Condemnation Practice in California xii (Cal. Cont. Ed. Bar 1973):

In dealing with trends and developments in eminent domain law, the major role played by the California Law Revision Commission for more than a decade should be considered. Commission studies and recommendations have led to many statutory changes, e.g., exchange of valuation data, evidence in condemnation cases, immediate possession, possession pending appeal, abandonment, voluntary arbitration, and governmental liability.

For a complete listing of Commission recommendations in this field and the legislative action on the recommendations, see the letter of transmittal accompanying this report.

the law of eminent domain, in fact it falls far short of that. Enacted over 100 years ago, its draftsmanship does not meet the standards of modern California statutes. There are duplicating and inconsistent provisions. There are long and complex sentences that are difficult to read and more difficult to understand. There are sections that are obsolete and inoperative. There is a total lack of statutory guidance in certain critically important areas of the law, and there are other areas that are treated in the most cursory fashion. Nor is Title 7 the exclusive statutory source of eminent domain law. There are hundreds of provisions in other statutes, both codified and uncodified, that duplicate provisions of the general eminent domain statute or that are unnecessarily or undesirably inconsistent with it.

These deficiencies call for a thorough revision and recodification of the California law of eminent domain. In formulating the comprehensive Eminent Domain Law, the Commission has looked to reform efforts in a number of other jurisdictions⁵ and has reviewed the eminent domain law of every jurisdiction in the United States.⁶ The Commission has examined the draft of the Model Eminent Domain Code⁷ and has followed the development of a Uniform Eminent Domain Code by the National Conference of Commissioners on Uniform State Laws.⁸ The Commission has drawn upon all these sources in producing a modern Eminent Domain Law within the California statutory framework.

The comprehensive Eminent Domain Law proposed in this report will replace the existing general eminent domain title of the Code of Civil Procedure.⁹

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5. Recent reports received by the Commission include New York State Commission on Eminent Domain, Report (1971-1972); Virginia Advisory Legislative Council, Laws Relating to Eminent Domain (1972); Iowa Eminent Domain Study Committee, Final Report (1971); Law Reform Commission of British Columbia, Report on Expropriation (1971).
 6. Among the many contemporary revisions of the law of eminent domain, the 1964 Pennsylvania Eminent Domain Code is particularly noteworthy. See Pennsylvania Joint State Government Commission, Eminent Domain Code, as Amended with Comments and Notes (1972).
 7. See Draft of Model Eminent Domain Code, 2 Real Property, Probate & Trust J. 365 (1967).
 8. In progress at the time of publication of this report.
 9. The Commission considered various locations for the Eminent Domain Law, including enactment of a separate code. However, due to the relatively narrow scope of the subject and to the adoption of the general principle that eminent domain proceedings should be governed by the same rules as civil actions generally (see discussion under "Condemnation Procedure" infra), the Commission has determined that the Eminent Domain Law should simply be substituted for the present Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure.

Its major purpose is to cover, in a comprehensive manner, all aspects of condemnation law and procedure.¹⁰ It will constitute a complete and well organized compilation of the law and will provide one uniform statute applicable to all condemnors and all condemnation proceedings.¹¹ Its enactment will permit the repeal of approximately 825 sections and the amendment of approximately 180 sections to delete unnecessary language.¹²

While the Eminent Domain Law mandates that all condemnors must follow its provisions, it imposes no new mandatory costs on local public agencies. A public agency is not required to exercise the power of eminent domain in pursuance of its property acquisition program; the statute provides that any agency authorized to exercise the power of eminent domain to acquire property for a particular purpose may also acquire the property by grant, purchase, lease, gift, devise, contract, or other means. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is left to the discretion of the agency authorized to acquire the property.

Although the Eminent Domain Law will make a number of important changes in existing law, to a large extent it restates existing law, corrects technical defects, eliminates obsolete and inconsistent provisions, and fills gaps in existing law. The more important changes made by the Eminent Domain Law are discussed below. Other changes of less importance are noted in the Comments that follow the text of the proposed legislation.

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10. There are some areas of the law purposely left to judicial development. Moreover, the Eminent Domain Law cannot limit any provisions of the California or United States Constitutions.

It should also be noted that there are some statutes applicable to property acquisition generally and not limited to eminent domain proceedings. See, e.g., Govt. Code §§ 7260-7274 (relocation assistance and fair acquisition policies). Such statutes are not affected by the Eminent Domain Law and continue to remain applicable to eminent domain proceedings.

11. The special provisions relating to valuation of public utility property by the Public Utilities Commission pursuant to California Constitution, Article XII, Section 23a and Public Utilities Code Sections 1401-1421 will not be affected.
12. See "Table of Sections Affected" infra.

THE RIGHT TO TAKE

Delegation of Eminent Domain PowerBasic Statutory Scheme

The power of eminent domain may only be exercised in aid of a recognized public use by a person authorized by statute to exercise such power.¹ In California, the statutory delegation of the power of eminent domain appears to be exceedingly broad. Section 1001 of the Civil Code states in part: "Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure" by exercise of the power of eminent domain.

When enacted in 1872, Section 1238 listed a great number of uses as "public uses," and it has been amended many times since then to list additional uses. Despite the amendments, many recognized public uses are not listed in the section, and the inclusion of a use in the listing is no guarantee that the use is in fact a public use.² Moreover, Section 1001, although unchanged since its enactment in 1872 and purporting to authorize the exercise of eminent domain by "any person," has been narrowly construed by the courts when a person other than a public entity or privately owned public utility has sought to condemn property.³

To a considerable extent, the listing of uses in Section 1238 is surplusage since the Legislature has generally ignored the statutory scheme established by Sections 1001 and 1238 in delegating the power of eminent domain. The Legislature has instead enacted numerous other codified and uncoded sections that authorize condemnation for particular public uses. In fact, there are hundreds of statutes that grant the power of eminent domain to particular persons for particular purposes.

The Commission recommends that clear statements of the extent of eminent domain authority of public entities, public utilities, and others be substituted for the statutory scheme established by Sections 1001 and 1238. In addition, where a statute grants the power of eminent domain to a particular entity for a particular use, this grant should be treated as a legislative declaration

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1. State v. Superior Court, 10 Cal.2d 288, 295-296, 73 P.2d 1221, 1225 (1937).
 2. The question whether a particular use is a public use is always subject to judicial review. See discussion infra under "Public Use."
 3. See discussion infra under "Quasi-public entities and private persons."

that a taking by that entity for that use is a taking for a public use; it should not be necessary to add to the statute the superfluous statement that the taking is for a public use.

The adoption of this approach will eliminate the need for a separate listing of public uses in the general eminent domain law. It will eliminate the need for frequent amendments of eminent domain law to list public uses that merely duplicate grants of eminent domain authority made by other statutes. It will eliminate the existing uncertainty concerning the extent to which private persons may exercise the power of eminent domain and will insure that the power of eminent domain will be construed to extend only to those private persons intended.

The effect of this approach is to recognize the long-standing legislative practice of delegating the power of eminent domain by specific statute despite the listing of public uses in Section 1238. Nonetheless, to assure that no public entity will be deprived of any right it now has to exercise the power of eminent domain, clear statements of condemnation authority should be enacted to cover those few cases where such authority is now based on Sections 1001 and 1238 and is not otherwise specifically provided. Likewise, clear statements of the condemnation authority of privately owned public utilities should be added to the Public Utilities Code. The extent to which other private individuals and corporations should be authorized to exercise the right of eminent domain is discussed later in this recommendation.⁴

Persons Authorized to Exercise Power

State agencies. In a separate publication, the Commission has made the following recommendations with respect to the delegation of condemnation authority to state agencies:

(1) The Department of Transportation, Department of Water Resources, Regents of the University of California, and the Reclamation Board (on behalf of the Sacramento and San Joaquin Drainage District) should continue to be authorized by statute to condemn for their purposes.

(2) Condemnation of property for all other state purposes should be a responsibility of the Public Works Board under the Property Acquisition Law.⁵

4. Id.

5. Govt. Code §§ 15860-15866.

This recommendation will eliminate the delegation of eminent domain authority to those agencies that now have but do not now exercise such authority: the Adjutant General, Department of Aeronautics, Trustees of the California State University and Colleges, Department of Fish and Game, Department of General Services, State Lands Commission, and Department of Parks and Recreation.

For further discussion of these recommendations and the text of the implementing legislation, see Tentative Recommendation Relating to Condemnation Law and Procedure: Condemnation Authority of State Agencies (January 1974), to be reprinted in 12 Cal. L. Revision Comm'n Reports 0000 (1974).⁶

Special districts. The overwhelming majority of special districts have, by virtue of their enabling statutes, general authority to condemn any property necessary to carry out any of their objects or purposes. Thus, approximately 160 different types of special districts, totaling more than 2,000 individual districts, have general condemnation authority.⁷ With respect to these districts, there is no need to rely on Section 1001 of the Civil Code and Section 1238 of the Code of Civil Procedure as the source of condemnation authority, and the repeal of those sections will have no effect on the condemnation authority of these districts.

Approximately 30 different types of districts either are not authorized by their enabling statutes to exercise the power of eminent domain or the grant of eminent domain power in their enabling statutes is not sufficiently broad to permit condemnation of property for some of the district's authorized functions. The Commission has reviewed these enabling statutes and has concluded, with two exceptions noted below, that no revision of these statutes is needed. Some of these districts have no power to acquire or hold property. Others have no corporate power. In some cases, the acquisition of necessary property for the district by eminent domain is accomplished by the county or a city. The omission of a grant in other statutes appears to be a conscious legislative decision. Accordingly, absent any experience that demonstrates a need to grant the power of eminent domain to any of these special districts, the Commission proposes no change in their enabling statutes.

6. This tentative recommendation also indicates the amendments, additions, and repeals needed to conform the state eminent domain provisions to the Eminent Domain Law.

7. For a listing, see Condemnation Practice in California, Appendix A: Tables ID and IE (Cal. Cont. Ed. Bar 1973).

Public cemetery districts and resort improvement districts⁸ derive their power of eminent domain from Sections 1001 and 1238. So that the repeal of these sections will not adversely affect these types of districts, the statutes governing these districts should be revised to preserve their condemnation authority.⁹

Cities and counties. A great number of statutes authorize cities and counties to condemn property for essentially all of their activities.¹⁰ This broad condemnation authority is justified. Accordingly, for purposes of clarification, cities and counties should be specifically authorized to condemn property to carry out any of their powers or functions just as special districts are now authorized to condemn for all their functions. Specific restrictions on the power of cities and counties to condemn property for particular purposes¹¹ would not be affected by such authorization.

School districts. Section 1001 of the Civil Code and Section 1238 of the Code of Civil Procedure are the primary bases for the condemnation authority of school districts. Since these sections will not be continued, a provision should be added to the Education Code to preserve the authority of school districts to exercise the power of eminent domain to acquire property necessary for school purposes.

8. No new resort improvement districts can be formed after May 19, 1965.
See Pub. Res. Code § 13003.

9. For the amendments, additions, and repeals needed to conform the special district statutes to the Eminent Domain Law, see Tentative Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Special District Statutes (January 1974), to be reprinted in 12 Cal. L. Revision Comm'n Reports (1974).

10. For a listing, see Condemnation Practice in California, Appendix A: Table IC (Cal. Cont. Ed. Bar 1973). The one possible exception to this generalization is acquisition of property for open space purposes. Cf. Govt. Code §§ 6950-6954; compare Note, Property Taxation of Agricultural and Open Space Land, 8 Harv. J. Legis. 158 & n.1 (1970) (implying condemnation authorized) with Ops. Cal. Legis. Counsel (Oct. 24, 1969) (concluding condemnation not authorized). The Commission recommends that it be made clear that condemnation by cities and counties for open space purposes is authorized with appropriate limitations to prevent any abuse of the power.

11. E.g., Govt. Code §§ 37353 (existing golf course may not be condemned by city for golf course purposes), 26301 and 50701 (local agency may not condemn for golf course, marina, or small craft harbor under revenue bond acts), 54341 (local agency may not condemn publicly owned property under Revenue Bond Law of 1941 without consent of owner).

Public utilities. Sections 1001 of the Civil Code and various subdivisions of Section 1238 of the Code of Civil Procedure are also the primary source of the condemnation authority of privately owned public utilities. So that the repeal of these sections will not adversely affect the condemnation authority of public utilities, provisions should be added to the Public Utilities Code to preserve and clarify the authority of public utilities to exercise the power of eminent domain to acquire property necessary to carry out their regulated activities.

Quasi-public entities and private persons. The right to exercise the power of eminent domain in California is not limited to governmental entities and public utilities. Section 1001 of the Civil Code literally authorizes a private person to condemn property for any of the uses listed in Section 1238 of the Code of Civil Procedure. Other statutes have expressly granted the power of eminent domain to certain private entities which are engaged in quasi-public activities.

In Linggi v. Garovotti,¹² the California Supreme Court held that the owner of an apartment building could condemn a necessary easement for a sewer across his neighbor's property to connect the apartment building to the mains of an established sewer system. The extent to which private persons can condemn for other uses listed in Section 1238 is unclear. The Linggi case is an exceptional one; the courts generally have not permitted a private person to condemn property unless he is engaged in a quasi-public activity.¹³

Having considered the various uses listed in Section 1238 and the judicial decisions involving attempts by private persons to exercise the power of eminent domain, the Commission recommends that condemnation by private persons be abolished¹⁴ except in the following cases:

12. 45 Cal.2d 20, 286 P.2d 15 (1955).

13. Lorenz v. Jacob, 63 Cal. 73 (1883)(supplying mines with water); Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 P. 802 (1893)(supplying farming neighborhoods with water); People v. Elk River M. & L. Co., 107 Cal. 221, 40 P. 531 (1895)(floating logs on nonnavigable streams); General Petroleum Corp. v. Hobson, 23 F.2d 349 (S.D. Cal. 1927)(byroad to prospect for oil).

14. In addition to the repeal of Section 1001 of the Civil Code and Section 1238 of the Code of Civil Procedure, the Commission recommends the repeal of Streets and Highways Code Sections 1050-1054 (special private byroad statute) and Water Code Sections 7020-7026 (private ways for canals) and the amendment of Harbors and Navigation Code Section 4009 (private wharves, chutes, and piers). The Commission

(1) The condemnation authority of nonprofit educational institutions of collegeiate grade should be continued without change.¹⁵

(2) The existing condemnation authority of nonprofit hospitals¹⁶ should be liberalized to permit condemnation not only to expand existing hospitals but also to establish a newly organized and licensed hospital and to permit the acquisition of property whether or not "immediately adjacent" to existing holdings. At the same time, no acquisition should be permitted unless it has been reviewed and approved by appropriate local authorities and by the Director of Health and, if objection to the taking is made, by the court in the eminent domain proceeding. This would expand the condemnation power but, at the same time, would provide adequate limitations to prevent its abuse.

(3) The condemnation authority of certain nonprofit housing corporations which provide housing for low income families should be continued and clarified.¹⁷

recommends no change in Health and Safety Code Section 8715 (alteration, vacation, or replatting of public and private cemetery drives and parks an exercise of eminent domain).

In this connection, the last sentence of Section I of Article 14 of the California Constitution, which declares certain logging and lumbering railroads to be "public uses" and specifies that the takings of property for such purposes constitutes the taker a common carrier, should be deleted. Takings for this purpose are authorized by existing legislation, and the constitutional provision is obsolete since it applies only to "a railroad run by steam or electric power." Such railroads have been largely replaced for logging purposes by diesel powered locomotives and trucks. Moreover, the sentence adds little, if anything, to decisional law (some of which is based on the Constitution of the United States) relative to takings for such purposes or to the status and obligations of "common carriers."

15. The condemnation authority of these institutions, now found in subdivision 2 of Section 1238, should be continued by a provision added to the Education Code.
16. Code Civ. Proc. § 1238.3. Section 1238.3 should be repealed and provision made for condemnation by nonprofit hospitals in the Health and Safety Code.
17. See Health & Saf. Code §§ 34874-34878 (limited dividend housing corporations). Provisions comparable to the sections relating to the exercise of eminent domain by limited dividend housing corporations should be added to the statute relating to land chest corporations in the Health and Safety Code. Land chest corporations, if they now have condemnation authority, must base such authority on Section 1001 of the Civil Code and subdivision 21 of Section 1238 of the Code of Civil Procedure.

(4) The condemnation authority of mutual water companies should be continued without change.¹⁸

Joint Exercise of Power

Two or more public entities should be authorized to enter into an agreement under the Joint Powers Agreement Act¹⁹ for the joint exercise of their respective powers of eminent domain, whether or not possessed in common, for the acquisition of property as a single parcel. This authority already exists where a school district is a party to the joint powers agreement²⁰ and should be extended to permit exercise of such authority by public entities whether or not a school district is a party to the Joint Powers Agreement.

Property Subject to Condemnation

Property Interest That May Be Acquired

The grants of condemnation authority to various public entities differ widely in their description of the types of property and rights or interests therein that may be acquired by eminent domain. Some grants are restricted to "real property";¹ some grants broadly allow condemnation of "real or personal property"² or permit condemnation of "property" without limitation;³

18. The substance of subdivision 4 of Section 1238 of the Code of Civil Procedure should be continued by a provision added to the Public Utilities Code.

19. Govt. Code §§ 6500-6583.

20. Educ. Code § 15007.5.

1. State condemnation authority under the Property Acquisition Law is limited, for example, to any interest in real property. See Govt. Code § 15853. The Commission does not recommend that the Property Acquisition Law be broadened to cover acquisition of "personal property" since other statutes provide for state acquisition of personal property. See also, e.g., Health & Saf. Code § 34325 (housing authority).

2. E.g., Pub. Res. Code § 5006 (Department of Parks and Recreation), Pub. Util. Code § 30503 (Southern California Rapid Transit District).

3. E.g., Harb. & Nav. Code §§ 5900.4 (harbor improvement districts), 6076 (harbor districts), 6296 (port districts); Pub. Util. Code §§ 12703 (municipal utility districts), 16404 (public utility districts), 28903 (San Francisco Bay Area Rapid Transit District). The vast majority of condemnation grants authorize the taking of any necessary "property."

other grants contain an extensive listing of the various types of property and rights and interests in property that may be taken.⁴

A general provision should be enacted that, except to the extent otherwise limited by statute,⁵ will permit the condemnation of any type of property and any right, title, or interest therein necessary for the public use for which it is acquired. Further, the existing judicially developed rule that a grant of condemnation authority includes the authority to acquire any property necessary to carry out and make effective the principal purpose involved should be codified.⁶ Duplicating and inconsistent provisions should be repealed.⁷ The resolution of necessity should, as it generally is now,

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4. E.g., Alameda County Flood Control and Water Conservation District Act § 5 ("real and personal property of every kind, including lands, structures, buildings, rights-of-way, easements, and privileges" and "all lands and water and water rights and other property necessary or convenient for [district purposes]").
 5. The Commission recommends no change in the statutory provisions which exempt certain types of property from condemnation. See, e.g., Fish & Game Code § 1349 (farm lands exempt except by specific authorization of Legislature); Health & Saf. Code §§ 8134, 8560, 8560.5 (cemetery land not subject to condemnation for rights of way); Pub. Res. Code § 5006.2 (property within Aptos Forest not subject to eminent domain except by permission of Legislature); Pub. Util. Code § 21632 (Department of Aeronautics cannot take existing airport owned by local public entity without consent of entity). See also *Emery v. San Francisco Gas Co.*, 28 Cal. 345 (1865) (money not subject to eminent domain). The substance of Code of Civil Procedure Section 1240(2) (16th and 36th sections of certain public domain land not subject to condemnation) should be continued.
 6. Inherent in the power to condemn property for a particular purpose is the power to condemn additional property to effectuate that purpose. See, e.g., *City of Santa Barbara v. Cloer*, 216 Cal. App.2d 127, 30 Cal. Rptr. 743 (1963), and *Flood Control & Water Conservation Dist. v. Hughes*, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962).
 7. Numerous statutes, as well as a constitutional provision, provide a variety of tests to determine to what extent additional property may be acquired. See, e.g., Cal. Const., Art. I, § 14-1/2 (memorial grounds, streets, squares, parkways, reservations to 150 feet); Code Civ. Proc. § 1238(18) (trees along highways to 300 feet); Sts. & Hwys. Code § 104.3 (protect and preserve highways to 150 feet); Water Code § 256 (protect and preserve dams and water facilities to 500 feet). The Commission recommends that, in place of this multiplicity, there be substituted a uniform and comprehensive authorization to acquire all property necessary to carry out and make effective the principal purpose involved.

be conclusive on the issue of the necessity for acquiring any right or interest in property to be devoted to public use.⁸

Property Already Appropriated to Public Use

Existing law permits to a limited extent the acquisition by eminent domain of property already appropriated to public use.⁹ The Commission believes, however, that joint use of property appropriated to public use should be encouraged in the interest of fullest utilization of public land and least imposition on ownership of private property. To this end, the Commission recommends that any authorized condemnor be permitted to acquire for use in common property already devoted to public use if the joint uses are compatible or can be made compatible without substantial alteration of the preexisting public use.

Only where the two uses are not compatible and cannot be made compatible should a condemnor be permitted to take for its exclusive use property already appropriated to public use. In this case, the property may be taken only for a more necessary public use than the use to which the property is already appropriated.¹⁰

The resolution of necessity of a public entity should not be conclusive on the question whether a use is compatible with or more necessary than another public use.¹¹ It should be noted, however, that there is a statutory hierarchy of more necessary users--state,¹² local public entities,¹³ private persons--as well as specific statutory more necessary use presumptions such as those afforded certain park property and property kept in its natural condition.¹⁴ No change in this scheme is recommended. The Commission does,

8. See Taylor, The Right to Take--The Right to Take a Fee or Any Lesser Interest, 1 Pac. L.J. 555 (1970).

9. See Code Civ. Proc. §§ 1240(3), (4), (6), 1241(3) (acquisition of property devoted to public use for "consistent" and more necessary public uses).

10. This scheme should also apply where two or more persons seek to condemn the same property. The proceedings should be consolidated and condemnation allowed for joint use among the condemnors. Where the various uses are not compatible, condemnation should be allowed for the more necessary public use and the proceeding dismissed as to the others.

11. See discussion infra under "Public necessity."

12. Govt. Code § 15856.

13. Code Civ. Proc. §§ 1240(3) and 1241(3).

14. Code Civ. Proc. §§ 1241.7 and 1241.9.

however, solicit comments on whether the substance of Sections 1240(3) and 1241(3) of the Code of Civil Procedure (property appropriated to public use by certain local public entities may not be taken by another such entity) should be retained as proposed in Section 1240.660 of the Eminent Domain Law.

Extraterritorial Condemnation

Case law establishes that a local public entity--such as a city, county, or special district--may condemn only property within its territorial limits except where the power to condemn property outside its limits is expressly granted by statute or is necessarily implied as an incident to one of its other statutory powers.¹⁵ This rule should be codified. Unaffected by this codification would be statutes that expressly authorize extraterritorial condemnation¹⁶ and statutes--such as those authorizing the furnishing of sewage facilities or the supplying of water--under which the power of extraterritorial condemnation may be implied.¹⁷

Public Use and Necessity

Public Use

Constitutional requirement. Article I, Section 14, of the California Constitution prohibits the exercise of eminent domain except for a "public use."¹ Whether a particular purpose is a public use is an issue that is always justiciable in an eminent domain proceeding.² Ordinarily, however, a taking by a public entity or public utility does not present a public use issue. The property sought to be taken will be devoted to a purpose that is

15. See *City of No. Sacramento v. Citizens Util. Co.*, 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961)(implied authority); *City of Hawthorne v. Peebles*, 166 Cal. App.2d 758, 333 P.2d 442 (1959)(statutory authority); *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, 72 Cal. App.2d 638, 165 P.2d 741 (1946)(statutory authority).
16. E.g., Govt. Code § 61610; Harb. & Nav. Code § 7147; Health & Saf. Code §§ 6514, 13852(c); Pub. Res. Code § 5540. Such statutes are constitutional. *City of Hawthorne v. Peebles*, supra; *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, supra.
17. *City of Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604 (1891)(sewage)(dictum); *City of No. Sacramento v. Citizens Util. Co.*, supra (water). Cf. *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 718, 329 P.2d 289, ____ (1958). Compare *City of Carlsbad v. Wight*, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963).
1. *City & County of San Francisco v. Ross*, 44 Cal.2d 52, 279 P. 529 (1955).
2. *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959).

declared to be a public use by statute, and there is little likelihood that a court would declare the use not to be a public use. There are, however, some situations that may present a significant public use issue. These situations are discussed below.

Acquisition for future use. It is well established that statutory grants of general condemnation power carry with them the right to condemn property in anticipation of the condemnor's future needs, provided there is a reasonable probability of use of the property within a reasonable time.³ This standard should be codified. The question whether there is such a probability should always be justiciable; however, any use of property within seven years after the commencement of an eminent domain proceeding should be deemed "reasonable."⁴

Acquisition of physical and financial remnants. The acquisition of part of a larger parcel of property for public use will on occasion leave the remainder in such size, shape, or condition as to be of little market value. The elimination of such remnants may be of substantial benefit to the community at large as well as to the owners of such property. Generally speaking, California's condemnors with any substantial need therefor have been granted specific statutory authority to condemn the excess for the purpose of remnant elimination.⁵ Some of these statutes are so broadly drawn that they literally authorize exercise of the power of eminent domain to acquire remnants in circumstances not constitutionally permitted.⁶

The Commission has concluded that all public entities should be granted the authority to condemn excess property for the purpose of remnant elimination,⁷

3. See, e.g., *Central Pac. Ry. v. Feldman*, 152 Cal. 303, 92 P. 849 (1907); *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 P. 585 (1899); *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961).

4. Seven years is the time within which actual construction must commence under the Federal Aid Highway Act of 1968. 23 U.S.C. § 108.

5. E.g., Code Civ. Proc. § 1266 (city and county highway authorities); Sts. & Hwys. Code § 104.1 (Department of Public Works); Water Code §§ 254 (Department of Water Resources), 43533 (water districts). These statutes, however, vary from agency to agency, often with little or no apparent reason for the difference.

6. See *People v. Superior Court*, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

7. Nongovernmental condemnors have no statutory authority to acquire excess property. No change in this regard is recommended.

whether the remnant be physical or financial, provided it is of little market value. Such remnants should be subject to acquisition by both voluntary means and by condemnation but, to safeguard against the abuse of such authority, the property owner should always be able to contest whether the remainder will be of "little market value." The property owner should also be permitted to show that the condemnor has available a reasonable and economically feasible means to avoid leaving a remnant; if he is successful in demonstrating such a "physical solution," condemnation of the excess should not be allowed.

Acquisition for exchange purposes. A number of California condemnors are authorized to acquire property of a third party for the purpose of exchange with the owner of property that is necessary for public use.⁸ This power to acquire "substitute property" to be exchanged for the "necessary property" should be extended to all public entities; but, in order to safeguard the rights of the third party, it should be restricted to the following situations.

Where the necessary property already is devoted to public use and the owner of the necessary property could exercise the power of eminent domain to acquire substitute property for the same public use from a third party, the public entity should be permitted to acquire the substitute property by eminent domain. This authority will avoid the need for two condemnation proceedings. To protect against possible abuses, a substitute taking on these grounds should be allowed only where the owner of the necessary property has agreed to the exchange and it is clear that the substitute property will be devoted to the same public use as the necessary property.

In exceedingly rare cases, justice may require that the detriment to the owner of the necessary property be avoided in whole or in part by providing substitute facilities on land of a third person. The most frequently encountered situation of this sort is where the acquisition of the necessary property would leave other property in such condition as to be deprived of utility service or access to a public road. In such a case, substitute condemnation could provide a quite simple physical solution to what otherwise would constitute a case of severely damaged property. Accordingly, a public entity should be authorized to condemn such property as appears reasonably necessary and appropriate to supply utility service or access after taking

8. See, e.g., Govt. Code § 15858 (state); Sts. & Hwys. Code §§ 104(b), 104.2 (Department of Transportation); Water Code § 253(b) (Department of Water Resources).

into account any hardship to the owner of the substitute property. In cases other than utility or access cases, the public entity should be authorized to acquire substitute property for exchange purposes only if (a) the owner of the necessary property has agreed to the exchange, (b) the substitute property is in the same general vicinity as the necessary property, and (c) taking into account the relative hardship to both owners, the exchange would not be unjust to the owner of the substitute property.

The propriety of a taking for the purpose of exchange should always be subject to challenge, and the public entity should have the burden of proof that its taking of substitute property will satisfy these criteria.

Public Necessity

Statutory requirement. The necessity for taking must be established before property may be taken by eminent domain.⁹ The Commission believes that this statutory requirement is a sound one and recommends that no person be permitted to exercise the power of eminent domain unless:

(a) The public interest and necessity require the proposed project;
(b) 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

(c) The property and interest therein sought to be acquired are necessary for the proposed project.

Resolution of necessity. Some, but not all, public entities must adopt a resolution of necessity to acquire property by eminent domain before such a proceeding may be commenced.¹⁰ Among those public entities required to adopt a resolution of necessity, the vote requirement for most is a simple majority.¹¹ The Commission believes that the requirement of the adoption of the resolution of necessity is a salutary one: In addition to informing the property owner of the authority for the proposed acquisition, it helps to insure that the public entity makes a considered decision of both the need for the property as well as for the proposed project itself. Accordingly, the Commission recommends that all public entities be required to adopt a

9. See, e.g., Code Civ. Proc. §§ 1240(6), 1241(2), and 1242.

10. Compare, e.g., Code Civ. Proc. § 1241(a) (resolution not required) with Water Code § 8594 and Govt. Code § 15855 (resolution required).

11. See, e.g., Govt. Code § 15855 and Sts. & Hwys. Code § 102.

resolution of necessity for the acquisition of any property by eminent domain. The adoption should be by a majority vote of all the members of the governing body of the public entity¹² since a majority vote is normally required for the decision to undertake the proposed project itself.¹³ The resolution should describe the proposed project and refer to the statutory authority for the project; it should describe the property needed for the project and its use in the project; it should declare that the public entity has found and determined that the public interest and necessity require the proposed project, that the proposed project is planned or located in the manner that will be most compatible with the greatest public good and least private injury, and that the property sought to be taken is necessary for the proposed project.

In the great majority of cases, the resolution of necessity of a public entity establishes a conclusive presumption of public necessity.¹⁴ The Commission has weighed the need for court review of necessity questions against the economic and procedural burdens such review would entail and against the policy that entrusts to the legislative branch of government basic political and planning decisions concerning the need for and design and location of public projects. The Commission has concluded that the policy to provide conclusive effect to the resolution of necessity of a public entity is a sound one and should be continued. Where the condemnor is a public utility or other private entity, however, the issue of public necessity should always be subject to court determination.

There are certain situations where the propriety of the taking by a public entity should be subject to court review. The resolution of necessity should not have a conclusive effect for acquisitions outside the ter-

12. This rule should not apply to the Regents of the University of California. See Educ. Code § 23151 (two-thirds vote required for taking by Regents of the University of California).

13. Thus, the majority requirement should not apply to acquisition of property by a county for state highway purposes. See Sts. & Hwys. Code § 760 (four-fifths vote of supervisors required for project as well as for condemnation).

14. See, e.g., Govt. Code § 15855 (Public Works Board); Sts. & Hwys. Code § 103 (Department of Transportation); Water Code § 251 (Department of Water Resources); Code Civ. Proc. § 1241(2) (city, county, school district). The resolution is given conclusive effect even if its passage is obtained through fraud, bad faith, corruption, or gross abuse of discretion. *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959).

ritorial limits of the public entity.¹⁵ In addition, it should be made clear that the resolution of necessity has no effect on the justiciability of such "public use" issues as takings for exchange purposes, taking of remnants, and some takings for future use. These public use issues have previously been discussed.

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15. Judicial review of necessity in extraterritorial condemnation cases is desirable since the political process may operate to deny extraterritorial property owners an effective voice in the affairs and decision-making of the local public entity. Cf. *Scott v. City of Indian Wells*, 6 Cal.3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972). For this reason, when extraterritorial condemnation is undertaken, a local public entity is denied a conclusive presumption as to the public necessity of its acquisition. See, e.g., Code Civ. Proc. § 1241(2); *City of Los Angeles v. Keck*, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971). This rule is continued in the Eminent Domain Law.

COMPENSATION

Basic Compensation Scheme

Existing law provides that compensation shall be paid for property taken by eminent domain and, if the property is part of a larger parcel, for damage to the remainder caused by its severance from the part taken and by construction and use of the project for which it is taken.¹ If benefits are conferred by the project, the benefits may be offset against compensation for damage to the remainder but not against compensation for the part taken.²

Most states use the same general compensation scheme as California.³ Nevertheless, the Commission has considered the compensation approaches adopted in the remaining states. The most popular alternative is the "before and after" rule under which the value of the property before the taking and the value of the remainder after the taking are determined and the difference, if any, is awarded to the property owner. Despite the apparent fairness and simplicity of operation of the before and after rule, the Commission has determined not to recommend any change in the general California compensation scheme because there appears to be no general consensus in California among either condemning agencies or attorneys who ordinarily represent property owners in condemnation cases that adoption of a different scheme would be desirable.⁴

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1. The basic compensation scheme appears in Code of Civil Procedure Section 1248(1)-(3).
 2. The language of the first sentence of Section 14 of Article I of the California Constitution requires that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed by such corporation." The phrase applies only to "corporations other than municipal" and, oddly, only to takings for right of way or reservoir purposes. The language may be inoperative under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. See *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1083 (1902). In any event, the complex question of the offsetting of benefits in cases of partial takings should be left to the Legislature; hence, the Commission recommends that this language be deleted from the Constitution.
 3. See, e.g., 4A P. Nichols, *Eminent Domain* § 14.23 et seq. (rev. 3d ed. 1971).
 4. The Commission notes that the California scheme of valuing the part taken, computing damages to the remainder, and offsetting benefits against the damages has undergone a continuing process of judicial development. Court decisions have limited compensable items of damage, for example, to those that amount to more than "mere inconvenience" and that are peculiar to the particular property. See, e.g., *Eachus v. Los Angeles Consol. Elec. Ry.*, 103 Cal. 614, 37 P. 750 (1894), and *City of Berkeley*

Although the Commission has concluded that the basic method of measuring compensation in California should be retained, there are a number of defects or deficiencies that need correction, and there are some losses suffered by property owners that are not now compensated but should be. The revisions of existing law recommended by the Commission are outlined below.

Accrual of Right to Compensation

Code of Civil Procedure Section 1249 provides that, for the purpose of assessing compensation and damages, the right thereto accrues as of the date of issuance of summons. This date is an arbitrary one since summons may not be issued at the time the complaint is filed and, even if issued, may not be served immediately. The filing of the complaint commences the eminent domain proceeding and serves to vest the court with jurisdiction;⁵ hence, the date the complaint is filed is a more appropriate date for accrual of the right to compensation.

Date of Valuation

Since 1872, Code of Civil Procedure Section 1249 has required that the property taken be valued as of the date the summons is issued. In an attempt to improve the position of the property owner and to compel the condemnor to expedite the proceeding, a provision was added in 1911 specifying that, if a case is not brought to trial within one year and the delay is not caused by the defendant, the date of valuation is the date of trial. Neither the taking of possession nor the depositing of probable compensation has any bearing in determining the date of valuation. In cases in which the issue of compensation

v. Von Adelung, 214 Cal. App.2d 791, 29 Cal. Rptr. 802 (1963). Recent cases, however, indicate that particular items of damage may be compensable in any case where the property owner is required to bear more than his "fair share" of the burden of the public improvement. See, e.g., People v. Volunteers of America, 21 Cal. App.3d 111, 98 Cal. Rptr. 423 (1971). A similar development has taken place in the determination of what items of benefit may be offset against damages; traditionally only "special" benefits might be offset, but recent cases have found special benefits in areas not previously included. Compare Beveridge v. Lewis, 137 Cal. 619, 70 P. 1083 (1902), with People v. Giumarra Farms, Inc., 22 Cal. App.3d 98, 99 Cal. Rptr. 272 (1971).

In light of this continuing judicial development and improvement under the California scheme, the Commission recommends no codification of particular elements of damage and benefits.

5. See Code Civ. Proc. §§ 411.10 and 1243; Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924).

is once tried and a new trial is necessary, the Supreme Court of California has held that the date of valuation remains the same date used for that purpose in the original trial.⁶

The Commission has considered the oft-made proposal that the date of valuation be, in all cases, the date of trial. Much can be said in favor of that change. Unless the condemnor deposits probable compensation and takes possession of the property at that time, the date the proceedings are begun is not an entirely logical date of valuation. It would seem more appropriate to ascertain the level of the general market and the value of the particular property in that market at the time the exchange of the property for "just compensation" actually takes place. Also, in a rapidly rising market, property values may have increased so much that the property owner cannot purchase equivalent property when he eventually receives the award. In other states in which the power of eminent domain is exercised through judicial proceedings, the majority rule is to fix the date of trial as the date of valuation.⁷ Nonetheless, the existing California rules appear to have worked equitably in most cases. The alternative rule might provide an undesirable incentive to condemnees to delay the proceedings to obtain the latest possible date of valuation. And, as a matter of convenience, there is merit in fixing the date of valuation as of a date certain, rather than by reference to the uncertain date that the trial may begin.

The Commission therefore recommends retention of the existing rules with the following modifications:

Deposit to Establish Date

The condemnor should be permitted to establish an early date of valuation by depositing the probable amount of compensation for withdrawal by the property owner. In addition to providing a needed incentive to condemnors to deposit approximate compensation, the rule would accord with the view that the property should be valued as of the time payment is made. For convenience, the date of valuation should be the date the deposit is made unless an earlier date is made applicable by the existing rules. A date of valuation thus established should not be subject to change by any subsequent development in the proceeding.

6. See *People v. Murata*, 55 Cal.2d 1, 357 P.2d 833, 9 Cal. Rptr. 601 (1960).

7. See 3 P. Nichols, *Eminent Domain* § 8.5 (rev. 3d ed. 1965).

Date in Case of New Trial

In case of a new trial, the date of the new trial, rather than the date used in the original trial, should be the date of valuation unless the condemnor deposits the amount awarded in the original trial within a reasonably brief period after entry of judgment in the original trial. Unless such a deposit has been made, the date used in the original trial is of no practical or economic significance. To clarify existing law, a similar rule should be provided for a "retrial" following a mistrial except that the amount to be deposited should be determined in the same manner as a deposit made to obtain possession before judgment.

Date Based on Commencement of Proceeding

As a technical matter, provisions respecting the date of valuation should be changed to compute that date from the commencement of the proceeding (filing of the complaint) rather than from the issuance of summons since the date of commencement of the proceeding marks the inception of the court's jurisdiction over the property.

Enhancement and Blight

It is generally recognized that announcement of a public improvement may cause property values to fluctuate before eminent domain proceedings are begun. Existing California statutes do not deal with this problem.⁸ Case law establishes, however, that any increase in the value of the property before the time it becomes reasonably certain that the property will be taken for the project is to be included in arriving at the compensation to be made for the property; any increases thereafter attributable to the project itself are excluded.⁹

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8. Recently enacted Government Code Section 7267.2 requires condemnors to make an offer to acquire property in the amount of their determination of probable compensation. The section also provides that, for the purpose of this offer:

Any decrease or increase in the fair market value of real property to be acquired prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner or occupant, will be disregarded in determining the compensation for the property.

9. See, e.g., *Merced Irr. Dist. v. Woolstenhulme*, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971).

The law as to the treatment of any decrease in value is uncertain; demands by property owners that alleged decreases in value be excluded have frequently been denied. The reason commonly given is that any attempt to determine the existence or amount of such a decrease would be to engage in speculation. As recognized by recent cases, however, the injustice to the property owner is clear if general knowledge of the proposed improvement has actually depreciated the market value of the property prior to the date of valuation.¹⁰ Such influence can be shown by expert testimony and by direct evidence as to the general condition of the property and its surroundings as well where the value is depressed as where the value is enhanced.

Equitably, the amount awarded to the owner should be equivalent to what the market value of the property would have been on the date of valuation but for the proposed improvement's influence on the market. Accordingly, a uniform rule should be established by statute to provide that the value of the property taken on the date of valuation does not include any increase or decrease in such value resulting from (1) the project for which the property is taken, (2) the eminent domain proceeding itself, or (3) any preliminary actions on the part of the condemnor related to the taking or damaging of the property.¹¹ In the case of a partial taking, this rule should also apply in valuing the remainder in the "before" condition.

Divided Interests

At the time property acquired by eminent domain is taken, it is not always held by a single owner in fee simple; frequently, there are coowners, liens and encumbrances, deed restrictions, leases, and the like. The Commission has reviewed the statutory and case law relating to compensating and apportioning the award among divided interests and recommends the following changes in existing law.

Leaseholds

Under existing law, where property subject to a lease is partially taken, the lessee's obligation to pay rent under the terms of the lease for the property taken continues unabated, and the lessor's compensation for the property is given in part to the lessee to be paid back to the lessor as a

10. See, e.g., *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

11. The recommended rule is consistent with Government Code Section 7267.2.

part of the rental installments.¹² This rule, which in effect makes the lessee a trustee for the lessor's compensation, has been widely criticized.¹³ The lessor should be compensated immediately for the property taken, and the lessee should not be required to make payments on property no longer subject to the lease. Unless the lease otherwise provides, a partial taking of property subject to a leasehold should work a pro rata reduction of the rental obligation; and, if the taking is so great that it operates as a frustration of the whole lease, the court should, on motion of any party, terminate the lease.

Options

Existing law denies compensation to the holder of an unexercised option to acquire property.¹⁴ An option may be a valuable interest for which substantial consideration was given. An option holder should receive compensation for the fair market value of the option.¹⁵

Future Interests

When property subject to a life tenancy is taken by eminent domain, the life tenant's portion of the award may be inadequate for investment to provide the life tenant with the same income or comparable living conditions as the original life tenancy. In this situation, the court should have authority to defer distribution of the eminent domain award pending termination of the life tenancy and meanwhile to permit investment of the funds or their devotion to such purposes as would be equitable under the circumstances. Such authority would codify existing case law.¹⁶

Contingent future interests in property such as rights of reentry and possibilities of reverter are denied compensation under existing law.¹⁷ Such

12. *City of Pasadena v. Porter*, 201 Cal. 381, 257 P. 526 (1927).

13. See, e.g., *Horgan & Edgar, Leasehold Valuation Problem in Eminent Domain*, 4 U.S.F. L. Rev. 1 (1969).

14. See, e.g., *People v. Ocean Shore R.R.*, 90 Cal. App.2d 464, 203 P.2d 579 (1949).

15. This is consistent with the general rule that unexercised options to purchase or lease property are considered in determining the value of a lease. See, e.g., *People v. Gianni*, 29 Cal. App.3d 151, Cal. Rptr. (1973).

16. *Estate of Giacomelos*, 192 Cal. App.2d 244, 13 Cal. Rptr. 245 (1961).

17. See, e.g., *Romero v. Dep't of Public Works*, 17 Cal.2d 189, 109 P.2d 662 (1941).

future interests may have substantial market value, particularly where the reentry or reverter is imminent at the time of the taking. If the transformation of the future interest to a present interest was reasonably imminent at the time the eminent domain proceeding was commenced, the future interest should be compensated at its fair market value. Additionally, where the occurrence was not reasonably imminent but the future interest was appurtenant to some property that is damaged by the acquisition, the owner should be compensated for that damage.¹⁸ And, where the occurrence was not reasonably imminent but the future interest restricted the use of the property to charitable or public purposes, the award should be devoted to the same purposes subject to the continued future interest.

Improvements

A condemnor must take and pay for all improvements pertaining to the realty that it acquires by eminent domain.¹⁹ The application of this rule, however, has created several problem areas discussed below.

Business Equipment

Whether certain types of business equipment are improvements pertaining to the realty has been a continuing subject of litigation. In 1957, Code of Civil Procedure Section 1248b was enacted to provide that equipment designed for manufacturing or industrial purposes and installed for use in a fixed location is deemed a part of the realty regardless of the manner of installation. Nevertheless, this did not completely resolve the issue. It is sometimes difficult to determine whether particular equipment falls within the language of Section 1248b, and some types of business equipment--particularly equipment used in a commercial enterprise--are clearly not covered by the section but should be so that such equipment will be taken along with the realty and its special in-place value paid. The Commission recommends that improvements pertaining to the realty include all types of business equipment installed on the property to be taken or damaged except equipment that can be removed without a substantial loss in value.

18. See, e.g., *City of Santa Monica v. Jones*, 104 Cal. App.2d 463, 232 P.2d 55 (1951), for a situation in which the use restriction served to benefit appurtenant property.

19. See, e.g., Code Civ. Proc. §§ 1248 and 1249.1.

Removal of Improvements

While improvements pertaining to the realty must be taken and paid for by the condemnor, there may be situations where the condemnor does not require improvements that the owner desires to keep. In such situations, the owner should be expressly authorized to remove the improvements and to receive compensation for their removal and relocation cost, provided that such cost does not exceed the value of the improvements.

Where improvements pertaining to the realty are removed or destroyed before transfer of title or possession, the improvements are not taken into account in determining compensation.²⁰ Hence, where there is a dispute whether the improvements pertain to the realty, the owner of the improvements may wish to protect them from vandalism or destruction pending resolution of the issue. A procedure should be provided to enable the owner to remove and store the improvements, absent opposition from the condemnor. Thus, if the improvements are ultimately held to pertain to the realty, they will be returned to the condemnor; if they are held to be personalty, the owner will retain them in good condition.

Where the removal of improvements will damage property to which they are attached, a procedure should also be provided to enable the owner to remove the improvements without being charged with such damage, absent opposition from the condemnor.

Subsequent Improvements

As a general rule, improvements placed on the property after service of summons are not included in the determination of compensation.²¹ However, where the improvement is in the process of construction at the time of service of summons, this denial can cause the owner serious difficulties. For example, the partially completed improvement may present the risk of injury to the public or may be exposed to destruction by vandalism or by the elements. In such a situation, if the property owner continues with additional construction after service of summons with the written consent of the condemnor, compensation should be determined on the basis of the improvement with the additional

20. Code Civ. Proc. § 1249.1.

21. Code Civ. Proc. § 1249. This rule is subject to the judicially recognized exception that improvements required to be made by a public utility to its utility system following service of summons are compensable. *Citizen's Util. Co. v. Superior Court*, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963).

construction. Such consent may well be forthcoming if the condemnor anticipates a lengthy delay in the time of acquisition and wishes to avoid imposition of damages for such delay on inverse condemnation grounds.²²

Absent the condemnor's written consent, the property owner in the process of construction should, at least, be authorized to recover the cost of making additional improvements designed to protect the public from the risk of injury from the partially completed improvement whether or not the additional work adds to the value of the improvement. In addition, such an owner should be authorized to obtain a court order allowing compensation for the property taken to include value added by subsequent improvements upon a showing that the hardship to the condemnor of permitting the improvements is outweighed by the hardship to the property owner of leaving the improvement incomplete. No such order would be permitted after the condemnor has deposited the probable compensation with the court.

Harvesting and Marketing of Crops

Where a condemnor takes possession of property at a time that prevents the owner from harvesting and marketing crops growing on the property, the value of the crops is included in the compensation.²³ The value of growing crops is speculative, depending upon climatic and other natural conditions as well as upon economic conditions that may fluctuate rapidly. Rather than the imprecise standard of the value of the crops, the property owner should be awarded the reasonable value of material and labor reasonably expended in connection with the crops up to the time the condemnor is authorized to take possession of the property.

Compensation for Injury to Remainder

The Commission recommends no change in the basic rules relating to compensation for injury to the remainder in the case of a partial taking. However, features of these basic rules that require improvement include (1) the rule of People v. Symons²⁴ and (2) the computation of damages and benefits that will accrue in the future.

22. See, e.g., Klopping v. City of Whittier, 8 Cal.3d 39, 500 P.2d 1345, 31 Cal. Rptr. 316 (1972).

23. Code Civ. Proc. § 1249.2.

24. 54 Cal.2d 855, 357 P.2d 45, 9 Cal. Rptr. 363 (1960).

Rule of People v. Symons

The Symons case held that a property owner may not recover severance damages in eminent domain unless the portion of the project that caused the damage is located on property taken from the owner. Subsequent cases cast doubt on the continued vitality of the Symons rule,²⁵ and the present state of the law is not clear.

A property owner whose remaining property is injured by the project for which a portion of his property was taken may suffer substantial losses regardless whether the damage-causing portion of the project is located on or off the property taken. Accordingly, the rule of Symons should be abrogated by statute and should be replaced by the general rule that severance damages are awarded whether or not the damage is caused by a portion of the project located on the part taken.

By parity of reasoning, it should be made clear that benefits created by the project should be offset against severance damages whether or not the benefits are caused by a portion of the project located on the part taken. This would continue existing law.²⁶

Computation of Future Damages and Benefits

Existing law requires compensation for severance damage to be computed on the assumption that the project is completed as of the date compensation is assessed.²⁷ This requirement may work a hardship on the property owner where present damages are offset against benefits to be conferred by the project at some time in the future, thereby postponing compensation for the damage. To alleviate this problem, both damages and benefits should be assessed on the basis of the proposed schedule for completion of the improvement rather than on the assumption that the improvement is completed and in operation. Should the project not be completed according to schedule, damages would be recoverable by the property owner as at present.²⁸

25. See, e.g., People v. Ramos, 1 Cal.3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969).

26. See People v. Hurd, 205 Cal. App.2d 16, 23 Cal. Rptr. 67 (1962).

27. See, e.g., People v. Schultz Co., 123 Cal. App.2d 925, 268 P.2d 117 (1954).

28. Id.

Compensation for Loss of Goodwill

Eminent domain frequently works a severe hardship on owners of businesses affected by public projects. As a rule, business losses have not been compensated.²⁹ This rule of noncompensability has been widely criticized,³⁰ and the Commission believes that some step should be taken to compensate the owner of a business taken or damaged in an eminent domain proceeding for losses he suffers. But, in order to assure that the losses are certain and measurable for the purposes of compensation, recovery should be allowed only for the loss of goodwill³¹ and only to the extent that such loss is caused by the acquisition of the property or the injury to the remainder and cannot reasonably be prevented by a relocation of the business and by taking those steps and adopting those procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

Work to Reduce Compensation

There may be several practical ways by which the condemnor can reduce the damages to the property owner. For instance, if there are structures on the property that the owner desires to keep, it may be relatively inexpensive for the condemnor to relocate the structures for the owner while the project equipment is on the site. Likewise, the condemnor may be able to reduce severance damages substantially by constructing fences, sidewalks, driveways, retaining walls, drainage works, and the like on the owner's remaining property at the time work on the project is in progress. Public entities should be authorized to

29. See, e.g., *City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 P. 705 (1915). Government Code Section 7262, enacted Cal. Stats. 1971, Ch. 1574, provides for limited business losses in the form of relocation or in-lieu payments not to exceed \$10,000 where relocation is not possible without a substantial loss of patronage.

30. See, e.g., Kanner, When Is Property Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain, 6 Cal. West. L. Rev. 57 (1960); Note, The Unsoundness of California's Noncompensability Rule as Applied to Business Losses in Condemnation Cases, 20 Hastings L.J. 675 (1969); see also Aloï & Goldberg, A Re-examination of Value, Goodwill and Business Losses in Eminent Domain, 53 Cornell L. Rev. 604 (1968); Note, "Just Compensation" for the Small Businessman, 2 Colum. J.L. & Soc. Prob. 144 (1966); Comment, An Act to Provide Compensation for Loss of Goodwill Resulting From Eminent Domain Proceedings, 3 Harv. J. Legis. 445 (1966).

31. See Bus. & Prof. Code § 14100 (goodwill defined as expectation of continued public patronage).

enter into agreements with the property owner to perform such work when it will result in an overall savings.³²

Prohibition Against Double Recovery

There are situations where there may be an overlap of two statutes granting compensation for the same loss in an eminent domain proceeding. For example, the provisions recommended by the Commission for compensation for loss of goodwill of a business might in some situations duplicate to a limited extent the payment under Government Code Section 7262(d) to the business in lieu of a relocation allowance. To avoid the possibility of double recovery in this and other situations, the law should be clear that a person may recover only once for the same loss.

32. This concept is an expansion of existing authority in Streets and Highways Code Section 970 (certain types of work in connection with an acquisition for opening or widening a county road).

CONDEMNATION PROCEDURE

It has long been the California rule that eminent domain proceedings are governed by the same procedures as civil actions generally.¹ These procedures are supplemented where appropriate by provisions specially applicable to eminent domain proceedings, but such provisions are relatively few in number. Generally speaking, there has been little criticism of this procedural scheme, and the Commission recommends few major changes in it. However, the provisions relating to possession and deposits prior to judgment have been under continuing Commission study for a number of years,² and major changes in these provisions are recommended.

Pleadings

The special nature of an eminent domain proceeding has required special rules relating to pleadings; the Commission believes that such special treatment is necessary.

Contents of Pleadings

The complaint should include an adequate description of the property sought to be taken, as under existing law,³ and should include a map indicating generally the property described in the complaint and its relation to the project for which it is being taken. Presently, a map is required only where a right of way is sought.⁴

The existing requirements that the complaint indicate (1) the nature and extent of the interests of the defendants in the property and (2) whether the property sought to be taken is part of a "larger parcel" should be eliminated. The first issue is one that should be pleaded by the defendants; the second is one more appropriately raised and resolved at a later point in the proceedings.

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1. See, e.g., Code Civ. Proc. §§ 1256, 1257, 1262.
 2. The Commission previously published and distributed for comment a tentative recommendation and background study on this subject. See Tentative Recommendation and a Study Relating to Condemnation Law and Procedure: Number 1-- Possession Prior to Final Judgment and Related Problems, 8 Cal. L. Revision Comm'n Reports 1101 (1967). The comments received on that tentative recommendation have been taken into account in preparing this recommendation. See also note 17 infra.
 3. Code Civ. Proc. § 1244(5).
 4. Code Civ. Proc. § 1244(4).

Existing law also requires that the complaint contain "a statement of the right of the plaintiff" to take the property.⁵ To enable the defendant to better understand the ground for the proceeding and to more adequately prepare for the proceeding, the statement of the plaintiff's right should be more detailed. The complaint should include a description of the purpose for which the property is sought to be taken, an allegation of "public necessity" for the taking (including references where appropriate to the resolution of necessity), and references to the specific statutes authorizing the plaintiff to exercise the power of eminent domain for the purpose alleged. Failure to comply with these requirements should subject the complaint to attack by way of demurrer.

Existing law requires that the defendant set forth in his answer both a statement of his right, title, or interest in the property taken and the amount of compensation he claims for the taking.⁶ The second requirement should be eliminated; it serves little purpose at this stage of the proceeding and generally represents at best an ill-informed guess of what will be the compensation for the taking.

Verification

A public entity need never verify its pleadings but, where a public entity is the plaintiff, the defendant (except where it is also a public entity) must verify his answer.⁷ The Commission recommends a new scheme for eminent domain pleadings. In place of verification, the pleading of a party (including a public entity) who is represented by an attorney should be signed by his attorney. The signature of the attorney should constitute a certification that he has read the pleading, that to the best of his knowledge, information, and belief there is ground to support its contents, and that it is not interposed for delay. If the pleading is not signed or is signed with intent to defeat the purposes of the signature requirement, it should be subject to striking as sham. These provisions would be substantively the same as those of the Federal Rules of Civil Procedure.⁸

5. Code Civ. Proc. § 1244(3).

6. Code Civ. Proc. § 1246.

7. Code Civ. Proc. § 446.

8. See Fed. R. Civ. Proc. 11.

Under this scheme, verification will not be required where an attorney represents a party, but the requirement of signature and the sanctions for failure to sign properly will apply to both plaintiff and defendant.

Amendment

The liberal rules applicable generally to the amendment of pleadings⁹ are also desirable in an eminent domain proceeding. It should be made clear, however, that a court may, where justice so requires, impose such terms and conditions to an amendment as a change in the date of valuation or awarding costs and fees. Where an amendment would add property to the complaint of a public entity, adoption of a resolution of necessity for the additional property should be a prerequisite. And, where an amendment would delete property from the complaint, the plaintiff should follow the procedures and pay the price for a partial abandonment.¹⁰

Summons

Existing law requires that the summons duplicate such items contained in the complaint as the description of the property and the statement of the plaintiff's right to condemn.¹¹ This duplication should not be required in the ordinary case since the defendant may refer to the complaint for this information. However, where service of summons is by publication, the summons should describe the property to be taken in a manner reasonably calculated to give a person with an interest in the property notice of the proceeding.

Existing law requires that the summons be served in the same manner as in civil actions generally.¹² This requirement should be continued except that, where service is by publication, the plaintiff should also post copies of the summons on the property taken and record a notice of the pendency of the proceeding in the office of the county recorder of the county where the property is located.¹³ These additional requirements will

9. Code Civ. Proc. § 473.

10. See discussion infra under "Abandonment and Dismissal."

11. Code Civ. Proc. § 1245.

12. Id.

13. It should be noted that filing of a lis pendens at the commencement of a proceeding is required by Code of Civil Procedure Section 1243, but the plaintiff's failure to do so is not a jurisdictional defect. This requirement should be revised to make clear that such filing is not mandatory except in the case recommended by the Commission.

not be burdensome and will increase the likelihood that interested persons receive actual notice of the proceeding.

Where the state is a defendant, existing law requires service of summons on the Governor, Attorney General, Director of General Services, and State Lands Commission.¹⁴ The Commission recommends that only the Attorney General be served; he can notify the proper state agency of the proceeding. The Commission is advised that this would work no substantial change in present practice.

Possession Prior to Judgment

Extension of Right to Obtain Early Possession

Section 14 of Article I of the California Constitution authorizes the state and local public entities¹⁵ to take possession of the property to be condemned immediately upon commencement of an eminent domain proceeding, or at any time thereafter, if the condemnation is for any "right of way" or "lands to be used for reservoir purposes." Except to this limited extent, the condemnor may not obtain possession prior to entry of judgment unless the owner consents.¹⁶

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

14. Code Civ. Proc. §§ 1240(8) and 1245.4.

15. The authorization extends to "a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, levee reclamation or water conservation district, or similar public corporation." See also Code Civ. Proc. § 1243.4.

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

owner.¹⁷

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

From the property owner's point of view, if reasonable notice is given before dispossession and if prompt receipt of the probable compensation for the property is assured, possession prior to judgment frequently will be advantageous. Upon the commencement of the eminent domain proceeding, the landowner loses most of the valuable incidents of ownership. He is practically precluded from selling or financing the property and is legally deprived of any further increase in the value of the property. He is denied compensation for improvements made after service of the summons in the proceeding. As a practical matter, he usually must find and purchase other property prior to termination of the litigation. He must also defray the expenses of the litigation. It is possible that these difficulties will force

17. Certain improvements in these rules were made in 1957 and, in 1961, the Legislature enacted legislation recommended by the Commission that partially systematized the law on this subject. See Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports at B-1 (1961). See also Cal. Stats. 1961, Ch. 1613, amending or adding Code Civ. Proc. §§ 1243.4, 1243.5, 1243.6, 1243.7, 1249, 1249.1, 1253, 1254, 1255a, and 1255b.

him to settle for an amount less than he would eventually have received in the eminent domain proceeding. In contrast, the taking of possession and payment of approximate compensation prior to judgment permits the landowner to meet these problems and expenses while proceeding with the trial on the issue of compensation. Even if he has no urgent need for prompt payment, he may invest in other property the amount he receives as approximate compensation or he may leave it on deposit and receive interest at the legal rate of seven percent.

The necessity of determining the right of the condemnor to take the property before possession is taken does not preclude broadened provisions for exchanging probable compensation and possession prior to judgment. While the limiting doctrines of "public use" and "public necessity" once played important roles in condemnation cases, now the only substantial question to be determined in nearly all condemnation proceedings is the amount of compensation. And, because the question of the condemnor's right to take the property is decided by the court, rather than by the jury, procedures can be fashioned to permit expeditious determination of that question in the cases in which it arises.¹⁸

The existing constitutional authorization for immediate possession in takings for rights of way applies to most acquisitions for highway, freeway, and street purposes. As expansively interpreted, the authorization for such possession in takings of lands for reservoir purposes applies to most acquisitions of property needed to develop and conserve water resources. It has become apparent, however, that these two classes are neither entirely logical nor sufficiently inclusive. For example, a local government—but not a public utility serving the same needs—may obtain possession of the rights of way for an electric system; and neither may obtain possession of the site for the power plant.

The development of highways, and especially freeways, sometimes necessitates the taking of property outside the right of way. Even though the acquisition is by the state, no authorization exists for early possession of property outside the boundaries of the right of way. Similarly, many acquisitions in which possession prior to judgment would be appropriate are excluded both by the limitation as to entities and by the limitation as to the public purpose for which the property is being acquired. As an example, an assured date of possession is not available for the acquisition of a school site however great the need and whatever the size or responsibility of the school district.

18. See discussion infra under "Procedures for Determining Right to Take."

The Commission accordingly recommends that any person authorized to acquire property by eminent domain should also be authorized to obtain possession of that property prior to judgment.¹⁹ This recommendation would extend the right of prejudgment possession to public utilities which, at present, do not have the right.²⁰

Improvement of Prejudgment Possession Procedure

In order to protect the rights of owners and occupants of property of which possession prior to judgment is taken, the Commission recommends that the substance of the existing procedure for making and withdrawing deposits and for taking possession prior to judgment be modified in several important ways.

Amount of deposit. Under existing law, the court fixes the amount of the deposit on ex parte application of the condemnor.²¹ The amount fixed is almost always the amount suggested by the condemnor. Although existing law gives the property owner the right to have the court redetermine the amount of the deposit,²² experience has demonstrated that the court, having once made an order fixing the amount of the deposit, is reluctant to reconsider that decision even though the initial order was made on ex parte application.

Before making a deposit, the condemnor should be required to have an appraisal made by an expert appraiser. The amount deposited should be the amount determined by the appraiser to be the probable amount of compensation that will be awarded in the proceeding. The condemnor should be required to notify interested parties of the making of the deposit and to make available a statement of the valuation data upon which the amount of the deposit is based. The amount deposited should be subject to review and change by the court on motion of any interested party.

19. Section 14 of Article I of the California Constitution should be revised to permit the Legislature to specify the purposes for which and the persons by which possession may be taken prior to judgment. The revision should also provide explicitly that a property owner will be compensated concurrently with the transfer of possession.

20. A few quasi-public entities also would be authorized to take possession prior to judgment. See discussion supra under "Quasi-Public Entities and Private Persons." Under the Commission's recommendation, private persons would not have the right of prejudgment possession because they would no longer exercise the power of eminent domain.

21. Code Civ. Proc. § 1243.5(a).

22. Code Civ. Proc. § 1243.5(d).

The recommended procedure would simplify existing practice by eliminating the need for an ex parte application to the court in every case. It would, however, provide the interested parties with information as to the valuation data on which the amount of the deposit is based and, if any party is dissatisfied with the amount of the deposit, he will have a factual basis for applying to the court for an increase in the deposit.

Procedure for making deposits. Existing law provides for the depositing of approximate compensation only in connection with an order for possession.²³ However, any condemnor, whether or not it seeks possession prior to judgment, should be authorized to make a deposit of the probable amount of compensation that will be awarded in the proceeding. After a deposit is made, the condemnor should be entitled to an order for possession, effective 30 days after the making of the order, if the property owner either (a) expresses in writing his willingness to surrender possession of the property on or after a stated date or (b) withdraws the deposit.

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

Withdrawal of deposit. The existing system for withdrawing the deposit should be streamlined to eliminate obstacles and delays. Under existing practice, where a party makes application to withdraw a deposit, withdrawal is not permitted unless the plaintiff is able to personally serve notice of the application upon all parties.²⁴ Two changes in the withdrawal procedure are recommended:

(1) The existing absolute prohibition of withdrawal if personal service on all parties cannot be had should be eliminated.²⁵ Quite often, "defendants"

23. Code Civ. Proc. § 1243.5(a).

24. Code Civ. Proc. § 1243.7(e).

25. Id.

in eminent domain proceedings can easily be shown to have no compensable interest in the property. The courts can protect the rights of persons upon whom it is not possible to make service by requiring a bond or limiting the amount withdrawn in any case where it appears that the party not served actually has a compensable interest in the property.²⁶

(2) The plaintiff should be permitted to serve the notice of the application by mail on the other parties and their attorneys, if any, in all cases in which the other party has appeared or been served with the complaint and summons.

Cost of withdrawal bonds. Existing law requires the condemnor to reimburse the cost of bond premiums where the need for the bond arises from the defendant's efforts to withdraw an amount greater than that originally deposited.²⁷ Reimbursement is not required under existing law if the bond is required because of competing claims among defendants.²⁸ However, conflicting claims to a deposit usually result from the need to allocate the award among owners of separate interests in the property. In such a case, the need for the allocation--as well as for the bond--arises from the eminent domain proceeding rather than from any act or omission of the defendants. Accordingly, the condemnor should be required to reimburse the cost of the bond in all cases except where the need for the bond arises primarily from an issue as to title between the claimants.²⁹

Possession. The present 20 days' notice to the owners and occupants of property of the condemnor's right to possession³⁰ should be extended to 90 days in the case of property occupied by a dwelling, business, or farm and to 30 days in all other cases. The present 20 days' notice can result in serious hardship and inconvenience. The longer notice requirements will not only serve to reduce the possibility of hardship and inconvenience but will also make possible the actual disbursement to the property owner of the required deposit before he is obligated to relinquish possession.³¹

26. Code Civ. Proc. § 1243.7(f).

27. Code Civ. Proc. § 1243.7(b).

28. Code Civ. Proc. § 1243.7(f).

29. Cf. Code Civ. Proc. § 1246.1 (costs of determining issue as to title among defendants are borne by defendants).

30. Code Civ. Proc. § 1243.5(c).

31. The lengthened time periods are also in accord with Government Code Section 7267.3, requiring 90 days' written notice before possession of occupied property.

In addition to a lengthened period of notice, the owner or occupant of property should be able to obtain relief from the order for possession prior to judgment if the hardship to him will be substantial and the condemnor does not need possession or will suffer insignificant hardship by having possession delayed.

Once an order for possession has been made, however, the condemnor should be entitled to enforcement of the order as a matter of right.

Prejudgment Deposit on Demand of Property Owner

The Commission has considered statutes of other states that permit the property owner, in all cases, to demand deposit of approximate compensation at the beginning of the proceedings.³² Under these statutes, the condemnor usually is given the right to possession upon complying with the demand of the condemnee. Although these statutes have merit, integration of such a requirement into California condemnation procedure does not appear feasible at this time. Nonetheless, a greater incentive should be provided to the condemnor to deposit approximate compensation in certain classes of hardship cases.

One such class of cases is where a residence is being taken. The frequent need to purchase another home before he receives the final award places a particularly onerous burden upon the property owner. The property owner should have a right to demand that a deposit be made if the property being taken is residential property having not more than two dwelling units and the condemnee resides thereon. If the deposit is not made, interest at the legal rate of seven percent should be allowed on the amount of the eventual award from the date that the deposit should have been made.

Another class of "hardship case" is where rental property becomes subject to a high vacancy rate due to the condemnation proceeding. The owner of this type of property should be permitted to demand a prejudgment deposit and, absent compliance with the demand, be entitled to recover his rental losses caused by the eminent domain proceeding.³³

32. See, e.g., Pa. Stat. Ann., Tit. 26, § 1-407 (Supp. 1965).

33. This recommendation would supplement the recovery for lost rents occasioned by precondemnation publicity as provided in Klopping v. City of Whittier, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

Procedures for Determining Right to Take

Where objections to the right to take are raised, the practice has been to hear and determine such objections prior to the trial of compensation issues. This priority should be continued and reflected in statutory form.

Where the court determines that the plaintiff does not have the right to acquire by eminent domain any property described in the complaint, it should be authorized to order, in lieu of immediate dismissal, conditional dismissal as to that property unless such corrective action as the court may prescribe has been taken within the time prescribed. The court should impose such limitations and conditions as are just under the circumstances of the particular case including the requirement that the plaintiff pay to the defendant all or a 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.

Procedures for Determining Compensation

Pretrial Exchange of Valuation Data

The existing California scheme for pretrial exchange of valuation data among the parties to an eminent domain proceeding calls for a demand by a party no later than 50 days prior to trial and the opportunity to make a cross-demand no later than 40 days prior to trial, with the actual exchange of data occurring 20 days prior to trial.³⁴ While this scheme permits the exchange of basic valuation data, it does not permit sufficient time for follow-up discovery³⁵ and therefore is not as effective as it ought to be. To remedy this defect, the Commission recommends that the demand and exchange occur earlier in the proceeding³⁶ with an opportunity for the par-

34. Code Civ. Proc. § 1272.01.

35. See Cal. R. Ct. 222 (limiting discovery undertaken within 30 days of trial).

36. The demand should occur no later than 10 days following the date on which a trial date is selected. This will enable an earlier cutoff of demands while preserving adequate notice to the parties when the cutoff will occur. In this connection, the provision for a cross-demand should be eliminated. It is of marginal utility, the parties having ample opportunity to submit any necessary demands prior to the cutoff date. Elimination of the cross-demand will also serve to allay the misimpression that has arisen in some cases that a party who serves a demand need not exchange his own data unless a cross-demand has been served on him. The exchange of data should occur 40 days prior to trial unless the parties agree to another date.

ties thereafter to undertake subsequent discovery to within 20 days before trial. This recommendation would preserve the mutuality of the exchange scheme without imposing additional burdens on the parties.

Burden of Proof of Compensation

Existing law places the burden of proof (persuasion) on the issue of compensation on the defendant.³⁷ This burden is inappropriate in an eminent domain proceeding since the task of the trier of fact is to sift through the conflicting opinions of value and supporting data and fix a value based on the weight it gives to them. Neither party should be made to appear to bear a greater burden of persuasion than the other.

Valuation Evidence

Evidence of the value of property in an eminent domain proceeding must relate to the fair market value of the property.³⁸ Although fair market value is normally determined by reference to "open market" transactions,³⁹ there may be some types of property for which there is no open market.⁴⁰ To assure that the basic evidentiary standard of fair market value is applicable to such special purpose properties, the phrase "in the open market" should be deleted from the definition of fair market value.⁴¹ This change will have no effect on the valuation of other properties for which there is an open market.

The value of property may be shown only by opinion of expert witnesses and the property owner.⁴² Where the owner of the property is a corporation, however, a corporate representative may not testify unless he is otherwise

37. See, e.g., *City & County of San Francisco v. Tillman Estate Co.*, 205 Cal. 651, 272 P. 585 (1928).

38. See Evid. Code § 814.

39. *Id.*; see also *Sacramento etc. R.R. v. Heilbron*, 156 Cal. 408, 409, 104 P. 979, 980 (1909).

40. Examples of such special purpose properties are schools, churches, cemeteries, parks, and utilities.

41. Application of the fair market value standard to special purpose properties is consistent with other provisions dealing expressly with valuation of particular properties. See, e.g., Govt. Code § 51295 (valuation of property under contract under California Land Conservation Act of 1965) and Pub. Res. Code § 5407.2 (valuation of park land).

42. Evid. Code § 813.

qualified as an expert.⁴³ This rule should be changed. Where there is a corporate owner of property, an officer or employee designated by the corporation should be permitted to give an opinion of the value of the property if the designee is knowledgeable as to the character and use of the property. This will enable the small corporation to give adequate testimony as to the value of its property in cases where it might not be able to afford the cost of an expert.

Where an expert witness relies on comparable sales as a basis for his opinion of value,⁴⁴ the Commission recommends that he be permitted a wide discretion in his selection of the sales, for it is better to have all relevant evidence available to the trier of fact than to have insufficient evidence. Any errors of excess can be cured by motions to strike and proper instructions to the jury.

While it may be proper to rely on comparable sales, it is not proper to give an opinion as to the value of property other than that being valued.⁴⁵ To this end, it should be made clear by express provision that transactions involving the trade or exchange of any property are not a proper basis for an opinion as to the value of property.

Limitation on Valuation Experts

The number of valuation experts who may testify for a party in an eminent domain proceeding is limited to two, subject to a showing of good cause for additional witnesses.⁴⁶ This special provision is unnecessary and should be repealed. Its repeal would not affect the general authority of the court to control the number of expert witnesses.⁴⁷

Compensation of Court-Appointed Appraisers

The court may appoint appraisers, referees, commissioners, or other such persons to fix the value of property taken.⁴⁸ The fees fixed by the

43. See, e.g., *City of Pleasant Hill v. First Baptist Church*, 1 Cal. App.3d 384, 82 Cal. Rptr. 1 (1969).

44. See Evid. Code § 816.

45. Evid. Code § 822(d).

46. Code Civ. Proc. § 1267.

47. Code Civ. Proc. § 723.

48. Code Civ. Proc. § 1266.2.

court for such persons may not exceed "similar fees for similar services in the community where such services are rendered."⁴⁹ This restriction on the amount of compensation is unwarranted and may preclude effective use of court-appointed appraisers and the like in communities with comparatively low fee scales. The court, in fixing the fees for services, should be limited only by the requirement that they be reasonable in the circumstances of the case.

Possession After Judgment

The provisions for deposit, withdrawal, and possession of property following judgment but prior to the time the judgment becomes final are unnecessarily restrictive. Specific changes to improve the procedure are recommended below.

Deposit of Award

Under existing law, the defendant receives notice that a deposit has been made on the award only when he is served with an order for possession.⁵⁰ Since interest ceases to accrue when such a deposit is made⁵¹ and since the defendant may need the money for a short-notice move, he should receive notice of the deposit in all situations. Accordingly, the plaintiff at the time of making a postjudgment deposit should be required to serve a notice that the deposit has been made on all the parties who have appeared in the proceeding and who claim an interest in the property taken. This will parallel the prejudgment deposit requirement.

In case the judgment is reversed, vacated, or set aside, it should be made clear that there is no judgment for deposit and withdrawal purposes or for obtaining possession after judgment. Prejudgment procedures should be used, and any amounts deposited should be deemed prejudgment deposits for the purposes of these procedures.

Withdrawal of Award

Existing law provides the opportunity for defendants to withdraw deposits after entry of judgment without notice to the other parties.⁵² This

49. Id.

50. Code Civ. Proc. § 1254.

51. Code Civ. Proc. § 1255b(c).

52. Code Civ. Proc. § 1254(f).

provision creates a race to withdraw among parties laying claim to the award and may result in prejudice to the rights of a party entitled to the award. In order to protect all parties, a defendant seeking to withdraw any part of the award following judgment but prior to the time the award has been apportioned should serve a notice of application for withdrawal on all other parties who have appeared and are interested in the award. After the time the award has been apportioned, an applicant for withdrawal should be required to give notice only as the court may require.

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

Where there is a delay between entry of judgment and the time of apportionment of the award and the defendants are unable to agree to the withdrawal of an amount deposited for them, such amount should be deposited in an interest-bearing account for their benefit upon motion of any defendant having an interest in the award. This will assure that the defendants will not lose interest earned on the deposit pending resolution of their dispute.

Possession After Judgment

The 10-day notice period before which possession may be taken by the condemnor pursuant to an order for possession obtained after entry of judgment⁵³ is unduly short in the case of occupied property. This period should be extended to 30 days in cases where the property is occupied by a dwelling, business, or farm.

Satisfaction of Judgment

Under existing law, unnecessary confusion has arisen from the purely theoretical distinction between a payment into court to satisfy the judgment⁵⁴ and a deposit made pending appeal or motion for new trial.⁵⁵ One

53. See Code Civ. Proc. § 1254(c).

54. Code Civ. Proc. § 1252.

55. Code Civ. Proc. § 1254.

uniform procedure should be provided for paying the amount of the award into court after entry of judgment, and for withdrawing the amount so paid, whether or not either party plans to appeal or move for a new trial.

Existing law requires that the condemnor satisfy the judgment no later than 30 days after it becomes final except that, where the condemnor is the state or a public corporation, it may delay payment up to a year in order to market bonds to enable it to pay.⁵⁶ This delay provision should be eliminated; a property owner suffers many hardships in the course of the planning and execution of a public project without the added hardship of a year's delay before he receives payment for his property.

In the event that the 30-day period elapses without satisfaction of the judgment, existing law requires the property owner to seek execution before he is entitled to have the proceeding dismissed.⁵⁷ The property owner should be permitted to seek dismissal of the eminent domain proceeding upon non-payment without having to make an expensive, time-consuming, and futile attempt to execute. To protect the condemnor in such a case from dismissal for an inadvertent failure to pay, the property owner should give notice of intent to seek dismissal and should have a right to obtain the dismissal if the condemnor fails to pay within 20 days thereafter.

At present, it is not clear whether the final order of condemnation may be obtained after satisfaction of judgment alone or whether the judgment must first become final;⁵⁸ for the protection of all parties concerned, the law should be made clear that a final order of condemnation may be issued only after final judgment.

Costs

Code of Civil Procedure Section 1255 states 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." However, very early the California Supreme Court held that Section 1255 "must be limited by section 14 of article I of the constitution. . . . 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,

56. Code Civ. Proc. § 1251.

57. Code Civ. Proc. § 1252.

58. See Code Civ. Proc. § 1253; cf. *Arechiga v. Housing Authority*, 183 Cal. App.2d 835, 7 Cal. Rptr. 338 (1960).

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."⁵⁹ Thus, despite the language of Section 1255, the cases have generally allowed the defendant in an eminent domain proceeding his ordinary court costs⁶⁰ except that the costs of determining title as between two or more defendants is borne by the defendants.⁶¹ The statutes should be revised to conform with existing law on costs.

In case of an appeal by the plaintiff, the defendant has normally been allowed his costs on appeal whether or not he is the prevailing part.⁶² Where the defendant appeals and prevails, he is also allowed his costs.⁶³ However, the law is not clear whether the defendant who takes an appeal but does not prevail is entitled to costs.⁶⁴ A general rule should be provided that the defendant is entitled to his costs on appeal in all eminent domain cases except where the Judicial Council, by court rule, provides limitations specifically applicable to eminent domain.

If the defendant obtains a new trial and subsequently fails to obtain an increased award, the cost of the new trial is taxed against him.⁶⁵ This rule is unduly harsh and should be eliminated; a defendant should not be required to pay the cost of obtaining a proper and error-free trial.

59. *City & County of San Francisco v. Collins*, 98 Cal. 259, 262, 33 P. 56, (1893).

60. See, e.g., *Decoto School Dist. v. M. & S. Tile Co.*, 225 Cal. App.2d 310, 315, 37 Cal. Rptr. 225, 229 (1964).

61. Code Civ. Proc. § 1246.1.

62. See, e.g., *Sacramento & San Joaquin Drainage Dist. v. Reed*, 217 Cal. App.2d 611, 31 Cal. Rptr. 754 (1963).

63. See, e.g., *Regents of Univ. of Cal. v. Morris*, 12 Cal. App.3d 679, 90 Cal. Rptr. 816 (1970).

64. Compare, e.g., *City of Baldwin Park v. Stoskus*, 8 Cal.3d 563, 743a, 503 P.2d 1333, 1338, 105 Cal. Rptr. 325, 330 (1972), with *City of Oakland v. Pacific Coast Lumber & Mill Co.*, 172 Cal. 332, 156 P. 468 (1916).

65. Code Civ. Proc. § 1254(k). See, e.g., *Los Angeles, P. & G. Ry. v. Rumpp*, 104 Cal. 20, 37 P. 859 (1894).

Litigation Expenses

Entry for Examination

Where a condemnor enters upon property to determine the suitability of the property for public use, it must compensate the owner for any damages caused by the entry and by any tests made and must pay the owner for his court costs and reasonable attorney's fees expended in obtaining such compensation.⁶⁶ The provision for award of attorney's fees should not be automatically applied but should be limited to those cases where the interests of justice require such an award.

Abandonment and Dismissal

Litigation expenses, including reasonable attorney's fees, appraisal fees, and fees for the services of other experts, are awarded to the defendant where the plaintiff abandons the proceeding⁶⁷ or the defendant defeats a public entity plaintiff's right to take the property by eminent domain.⁶⁸ This rule should be expanded to allow litigation expenses against all plaintiffs in any case where the eminent domain proceeding is dismissed, including dismissal for failure to prosecute (a situation where litigation expenses are denied by the existing law).⁶⁹

Rights of Former Owner in Property Taken

The Law Revision Commission considered in depth the possibility of permitting the former owner of property taken by eminent domain to repurchase that property should it become surplus to the needs of the condemnor.⁷⁰ The Commission has concluded, however, that a general repurchase right would create practical problems of administration that far outweigh its potential social benefits and accordingly recommends against adoption of the repurchase right as a statutory requirement.⁷¹

66. Code Civ. Proc. § 1242.5(e).

67. Code Civ. Proc. § 1255a.

68. Code Civ. Proc. § 1246.4.

69. See, e.g., *City of Industry v. Gordon*, 29 Cal. App.3d 90, ____ Cal. Rptr. ____ (1972).

70. For a background study prepared for the Commission on this subject, see Sterling, Former Owner's Right to Repurchase Land Taken for Public Use, 4 Pac. L.J. 65 (1973).

71. For a similar conclusion, see Law Reform Commission of British Columbia, Report on Expropriation 118-121 (1971).