

Memorandum 2000-64**Withdrawal of Prejudgment Deposit in Eminent Domain
(Comments on Tentative Recommendation)**

The Commission last year approved a tentative recommendation relating to withdrawal of a prejudgment deposit in eminent domain proceedings. The Commission instructed the staff to hold the document until such a time as the Commission might be circulating other eminent domain proposals for comment, and then include it with the others.

We have received one letter commenting on the tentative recommendation. Richard B. Williams and Maxine F. Ferguson of the Caltrans Legal Division “strongly oppose” the proposal. Exhibit p. 1.

The tentative recommendation would make a condemnor liable to a property owner if all of the following events occur:

- The condemnor makes a prejudgment deposit for possession of the property.
- There is an overwithdrawal of the deposit by one of the interested parties.
- The overwithdrawing party fails to reimburse other parties who are ultimately determined to be entitled to a greater share of the award.
- No security was required for the withdrawal that would cover the deficit.

The staff notes that this proposal is somewhat nebulous about certain procedural details. For example, it is not clear what events trigger the condemnor’s liability — How long does the overwithdrawing party have to repay? Must the other parties first seek execution of judgment against the overwithdrawing party before approaching the condemnor to make up the difference? Etc.

The condemnor liability contemplated by this tentative recommendation will so rarely occur that the Commission did not deem it worthwhile to construct a complete or elaborate enforcement process for the statute. We are not aware of

the circumstances envisioned by the tentative recommendation ever having occurred, and if they ever do the court can devise an appropriate procedure.

The fact that the Commission received only one comment on this tentative recommendation is not surprising, considering the remote and theoretical nature of the problem addressed. Moreover, the staff concurs with the objections raised by the Caltrans Legal Division. Their letter notes:

- (1) Existing law provides a perfectly adequate procedure whereby interests of nonwithdrawing parties may be protected. The condemnor should not be penalized for the court's error in failing to apply the protective measures provided.
- (2) The condemnor has already deposited just compensation once in the case. To require a second payment of the same compensation is not fair to taxpayers, and violates the constitutional just compensation principle, which requires that the compensation awarded must be just to the public as well as to the property owner.
- (3) Making the condemnor an insurer of the funds deposited will encourage courts to allow risky withdrawals and will remove any incentive nonwithdrawing parties may have to protect their interests, since they can always make good their losses by looking to the condemnor as a guarantor.
- (4) So far as Caltrans Legal Division knows, this issue has not been a problem for property owners.

Does the Commission wish to proceed with this proposal? In the staff's opinion it is a classic "solution in search of a problem". It addresses a theoretical (not a practical) issue. The staff can envision a struggle over the proposal in the Legislature, with public entities concerned about potential liability in an unusual case.

A technical problem with existing law is that the statutory notice given to the parties does not comport with their potential exposure to loss. **Rather than conforming the rights of the parties to the statutory notice, the staff believes a better approach would conform the statutory notice to the rights of the parties:**

Code Civ. Proc. § 1255.230 (amended). Objections to withdrawal

1255.230. (a) No withdrawal may be ordered until 20 days after service on the plaintiff of a copy of the application or until the time for all objections has expired, whichever is later.

(b) Within the 20-day period, the plaintiff may file objections to withdrawal on any one or more of the following grounds:

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

(2) An undertaking should be filed by the applicant as provided in Section 1255.240 or 1255.250.

(3) The amount of an undertaking filed by the applicant under this chapter or the sureties thereon are insufficient.

(c) If an objection is filed on the ground that other parties are known or believed to have interests in the property, the plaintiff shall serve or attempt to serve on ~~such~~ the other parties a notice that they may appear within 10 days after ~~such~~ service and object to the withdrawal. The notice shall advise ~~such~~ the parties that ~~their failure to object will result in waiver of any rights they have no claim~~ against the plaintiff to the extent of the amount withdrawn. The notice shall be served in the manner provided in Section 1255.450 for service of an order for possession. The plaintiff shall file, and serve on the applicant, a report setting forth (1) the names of the parties upon whom the notice was served and the dates of service and (2) the names and last known addresses of the other parties who are known or believed to have interests in the property but who were not so served. The applicant may serve parties whom the plaintiff has been unable to serve. Parties served in the manner provided in Section 1255.450 shall have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants. The plaintiff shall remain liable to parties having an interest of record who are not so served but, if ~~such~~ the liability is enforced, the plaintiff shall be subrogated to the rights of ~~such~~ the parties under Section 1255.280.

(d) If any party objects to the withdrawal, or if the plaintiff so requests, the court shall determine, upon hearing, the amounts to be withdrawn, if any, and by whom.

Comment. Section 1255.230 is amended to conform the contents of the notice to the substantive rights of the parties.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

DEPARTMENT OF TRANSPORTATION

LEGAL - MS 57

1120 N STREET, SACRAMENTO, CA 95814

P.O. BOX 1438, SACRAMENTO, CA 95812-1438

PHONE (916) 654-2630

FAX (916) 654-6128

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September 14, 2000

File: _____

VIA FACSIMILE AND FIRST-CLASS MAIL

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

In re: Tentative Recommendation EmH-456, July 2000: Withdrawal of Prejudgment
Deposit in Eminent Domain

After consulting with the legal and right-of-way staff of the Department of Transportation, we offer the following comments regarding the Commission's Tentative Recommendation EmH-456:

This is the first opportunity we have had to review this proposed amendment to the Eminent Domain Law, and we strongly oppose the Commission's Tentative Recommendation. Existing law provides a process by which multiple condemnees have the opportunity to participate in a judicial hearing in which the court determines whether any portion of the deposit may be withdrawn by any particular condemnee and whether the withdrawing party must provide security for making an excessive withdrawal. As with other apportionment issues, the condemning agency plays a neutral role in this hearing.

The proposed amendments to Code of Civil Procedure section 1255.230 would result in the condemnor becoming an insurer and would transfer the condemnee's responsibility to the taxpayers on an issue which is clearly under the court's jurisdiction. The resulting double exposure of the taxpayers to the payment of compensation is inconsistent with the "fair market value" and "just compensation" principles which underlie the constitutional basis of condemnation law. The proposed amendments would not only encourage courts to allow risky withdrawals without security provisions, but would also discourage other condemnees from participating in the withdrawal process because they would be guaranteed payment regardless of any excessive withdrawal.

Nathaniel Sterling,
September 14, 2000
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Moreover, we are unaware that this issue has been a problem for condemnees. The current process provides more protection to the owners of various interests in condemnation proceedings than they would receive in other types of disputes. If a lessee goes broke, who pays the lessor? If a mortgagor skips town, who pays the mortgagee? The withdrawal hearing currently allows all condemnees to object to another's withdrawal and to present evidence in support of the objection to the court. If the judge turns out to be incorrect, the condemnee can seek a writ or possibly an expedited appeal. Taxpayers should not be required to pay double compensation simply because a condemnee fails to object to a withdrawal or the court fails to require an appropriate amount in the undertaking filed by the withdrawing party.

We wish to thank you for this opportunity to participate in the Commission's process and look forward to working with the Commission on any future proposals to revise the provisions of the Eminent Domain Law.

Very truly yours,



RICHARD B. WILLIAMS
Attorney



MAXINE F. FERGUSON
Attorney

cc: Michael R. Nave