

#36.65

8/19/70

Memorandum 70-89

Subject: Study 36.65 - Condemnation (Disposition of Existing Statutes--
Right to Enter, Survey, and Examine Property)

Attached are provisions drafted for incorporation into the Comprehensive Statute to supersede the provisions enacted upon Commission recommendation by the 1970 Legislature relating to entry for survey, examinations, and tests. The provisions retain the substance of the existing law as revised in 1970 with one exception. The staff recommended provisions would restrict the presently unrestricted right to recover reasonable attorney's fees. Compare subdivision (a) of proposed Section 506 with the following provision of Section 1242.5:

The owner is entitled to recover from the person who entered his property the amount necessary to compensate the owner for any damage which arises out of the entry and for his court costs, and reasonable attorney fees to be fixed by the court, in the proceeding under this section.

The Commission originally recommended that the provision for attorney's fees be eliminated entirely. This was not acceptable to the Legislature so the staff recommends that the provision be retained but be appropriately limited so that unmeritorious litigation will not be encouraged.

Respectfully submitted,

John H. DeMouly
Executive Secretary

EXHIBIT I

COMPREHENSIVE STATUTE § 500

Staff recommendation (Sept.1970)

The Right to Take

Chapter 10. Preliminary Location, Survey, and Tests

§ 500. Right to make examinations and tests

500. Subject to requirements of this chapter, a person having the power of eminent domain may enter upon property to make studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities reasonably related to the purpose for which the power may be exercised.

Comment. Section 500 continues without substantive change the provisions of subdivision (b) of former Code of Civil Procedure Section 1242.

The Right to Take

§ 501. Liability for damages

501. (a) The liability, if any, of a public entity for damages to property that arise from the entry and activities mentioned in Section 500 is determined by Section 816 of the Government Code.

(b) Any person that has the power of eminent domain, other than a public entity, is liable for damages to property that arise from the entry and activities mentioned in Section 500 to the same extent that a public entity is liable for such damages under Section 816 of the Government Code.

Comment. Section 501 continues without substantive change the provisions of subdivisions (c) and (d) of former Code of Civil Procedure Section 1242.

The Right to Take

§ 502. Consent or court order required in certain cases

502. In any case in which the entry and activities mentioned in Section 500 will subject the person having the power of eminent domain to liability under Section 816 of the Government Code, before making such entry and undertaking such activities, the person shall secure:

(a) The written consent of the owner to enter upon his property and to undertake such activities; or

(b) An order for entry from the superior court in accordance with Section 503.

Comment. Except as noted in the Comment to Section 506, Sections 502-506 continue without substantive change the provisions of former Code of Civil Procedure Section 1242.5.

The Right to Take

§ 503. Court order permitting entry; deposit of probable compensation

503. (a) The person seeking to enter upon the property may petition the court for an order permitting the entry and shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case.

(b) Upon such petition and after such notice has been given, the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use.

(c) After such determination, the court may issue its order permitting the entry. The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit the probable amount of compensation in the manner provided in Section [1243.6].

Comment. See the Comment to Section 502.

The Right to Take

§ 504. Modification of court order

504. At any time after an order has been made pursuant to Section 503, either party may, upon noticed motion, request the court to determine whether the nature and scope of the activities reasonably necessary to accomplish the purpose of the entry should be modified or whether the amount deposited is the probable amount of compensation that will be awarded. If the court determines that the nature and scope of the activities to be undertaken or the amount of the deposit should be modified, the court shall make its order prescribing the necessary changes.

Comment. See the Comment to Section 502.

COMPREHENSIVE STATUTE § 505

Staff recommendation (Sept. 1970)

The Right to Take

§ 505. Management of amount deposited

505. The court shall retain the amount deposited under this chapter for a period of six months following the termination of the entry. Such amount shall be held, invested, deposited, and disbursed in accordance with Section [1254].

Comment. See the Comment to Section 502.

The Right to Take

§ 506. Recovery of damages and expenses

506. (a) The owner is entitled to recover from the person who entered his property the amount necessary to compensate the owner for any damage which arises out of the entry and for his court costs in the proceeding under this chapter. If the court determines in the proceeding under this chapter that the position taken by the person who entered or sought to enter was arbitrary and without any reasonable justification, the court may award the owner, in addition to his court costs, reasonable attorney fees in an amount fixed by the court.

(b) Where a deposit has been made pursuant to this chapter, the owner may, upon noticed motion made within six months following the termination of the entry, request the court to determine the amount he is entitled to recover under this section. Thereupon, the court shall determine such amount and award it to the owner and the money on deposit shall be available for the payment of such amount.

(c) Nothing in this section affects the availability of any other remedy the owner may have for the damaging of his property.

COMPREHENSIVE STATUTE § 506

Staff recommendation (Sept. 1970)

Comment. Section 506 continues without substantive change the provisions of subdivision (e) of former Code of Civil Procedure Section 1242.5 except that Section 506 permits the award of reasonable attorney's fees only if the person who entered or sought to enter acted arbitrarily and without any reasonable justification, whereas former Section 1242.5 contained no such limitation on the award of reasonable attorney's fees.

Code of Civil Procedure § 1242 (repealed)

~~1242. -- (a) In all cases where land is required for public use, such use must be located in the manner which will be most compatible with the greatest public good and the least private injury.~~

~~(b) Subject to Section 1242.5, a person having the power of eminent domain may enter upon property to make studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities reasonably related to the purpose for which the power may be exercised.~~

~~(c) The liability, if any, of a public entity for damages to property that arise from the entry and activities mentioned in subdivision (b) is determined by Section 816 of the Government Code.~~

~~(d) Any person that has the power of eminent domain, other than a public entity, is liable for damages to property that arise from the entry and activities mentioned in subdivision (b) to the same extent that a public entity is liable for such damages under Section 816 of the Government Code.~~

~~(e) As used in this section, "public entity" means a public entity as defined in Section 811.2 of the Government Code.~~

CODE OF CIVIL PROCEDURE § 1242

Staff recommendation (Sept. 1970)

Comment. Section 1242 is superseded by provisions of the Eminent Domain Code. The disposition of the section is indicated below.

<u>Section 1242</u>	<u>Eminent Domain Code</u>
Subdivision (a) -----	[to be determined later]
Subdivision (b) -----	§ 500
Subdivisions (c), (d) -----	§ 501
Subdivision (e) -----	unnecessary, see § 108

Code of Civil Procedure § 1242.5 (repealed)

~~1242.5--(a)--In any case in which the entry and activities mentioned in subdivision (b) of Section 1242 will subject the person having the power of eminent domain to liability under Section 816 of the Government Code, before making such entry and undertaking such activities, the person shall secure:~~

~~(1)--The written consent of the owner to enter upon his property and to undertake such activities; or~~

~~(2)--An order for entry from the superior court in accordance with subdivision (b).~~

~~(b)--The person seeking to enter upon the property shall petition the court for an order permitting the entry and shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case. Upon such petition and after such notice has been given, the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use. After such determination, the court may issue~~

CODE OF CIVIL PROCEDURE § 1242.5
Staff recommendation (Sept. 1970)

~~its order permitting the entry.-- The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit the probable amount of compensation in the manner provided in Section 1243.6.~~

~~(c) At any time after an order has been made pursuant to subdivision (b), either party may, upon noticed motion, request the court to determine whether the nature and scope of the activities reasonably necessary to accomplish the purpose of the entry should be modified or whether the amount deposited is the probable amount of compensation that will be awarded.-- If the court determines that the nature and scope of the activities to be undertaken or the amount of the deposit should be modified, the court shall make its order prescribing the necessary changes.~~

~~(d) The court shall retain the amount deposited under this section for a period of six months following the termination of the entry.-- Such amount shall be held, invested, deposited, and disbursed in accordance with Section 1254.~~

~~(e) The owner is entitled to recover from the person who entered his property the amount necessary to compensate the~~

COURT OF CIVIL PROCEDURE § 1242.5

Staff recommendation (Sept. 1970)

~~owner for any damage which arises out of the entry and for his court costs, and reasonable attorney fees to be fixed by the court, in the proceeding under this section. -- Where a deposit has been made pursuant to this section, the owner may, upon noticed motion made within six months following the termination of the entry, request the court to determine the amount he is entitled to recover under this subdivision. -- Thereupon, the court shall determine such amount and award it to the owner and the money on deposit shall be available for the payment of such amount. -- Nothing in this subdivision affects the availability of any other remedy the owner may have for the damaging of his property.~~

Comment. Section 1242.5 is superseded by provisions of the Eminent Domain Code. The disposition of the section is indicated below.

<u>Section 1242.5</u>	<u>Eminent Domain Code</u>
Subdivision (a) -----	§ 502
Subdivision (b) -----	§ 503
Subdivision (c) -----	§ 504
Subdivision (d) -----	§ 505
Subdivision (e) -----	§ 506