

#36.95

12/15/69

First Supplement to Memorandum 69-138

Subject: Study 36.95 - Condemnation (Constitutional Revision)

The Committee on Article I of the Constitutional Revision Commission has approved the following language as its final recommendation on Section 14:

Private property may not be taken or damaged for public use without just compensation, ascertained by a jury unless waived, having first been paid to, or paid into court for, the owner. The legislature may provide for possession of the property by the condemnor following commencement of eminent domain proceedings upon deposit in court of money determined by the court to be the probable amount of just compensation. This money shall be available immediately to the owner.

It is apparent that the Committee, having considered various suggestions for clarification or modification of the jury trial provision, has determined to retain the existing language.

The staff has some concern with the last sentence. Under existing practice, the owner can withdraw the amount in excess of the original deposit only if he provides an undertaking to repay any withdrawal that exceeds the amount awarded him by the final judgment. (The condemnor may waive the requirement of an undertaking.) If the property owner can withdraw the entire deposit without providing an undertaking to repay any excess over the original deposit, the staff fears that courts may fix the deposits unreasonably low to be sure that public moneys are not lost. To deal with this problem, the following might be substituted for the last sentence in the revised Section 14:

The deposit shall be available for immediate withdrawal by the persons determined by the court to be entitled thereto. No unreasonable limitations may be placed upon withdrawal of the deposit.

This language is suggested to deal with the problem that arises where the owners (e.g., the fee owner and his lessee) and their entitlements to the amount deposited cannot be determined until after a court hearing to determine the probable just compensation for each owner. The deposit is not "available immediately" in such a case; it is available only after the shares of the persons entitled to share in the deposit have been determined. In addition, we are concerned that under the language of the final Committee recommendation on Section 14 that the public entity may no longer constitutionally have a right to an undertaking to assure repayment of the excess where it appears to the court that the amount withdrawn may exceed the amount of the final judgment. In other words, where the court must apportion between the lessor and the lessee the amount deposited, the court can never be sure that that apportionment is exactly equivalent to how the jury will apportion the amount of the just compensation. Possibly the condemnor could be required by statute to deposit a separate amount for each owner so that an amount would be "immediately available" to him.

Does the Commission wish to make any suggestions to the Constitutional Revision Commission concerning the revision of Section 14 of Article I?

Respectfully submitted,

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