

**CERTIFIED FOR PUBLICATION**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

MT. SAN JACINTO COMMUNITY  
COLLEGE DISTRICT,

Petitioner,

v.

THE SUPERIOR COURT OF THE  
COUNTY OF RIVERSIDE,

Respondent;

AZUSA PACIFIC UNIVERSITY,

Real Party in Interest.

E035868

(Super.Ct.No. RIC349900)

O P I N I O N

ORIGINAL PROCEEDINGS in mandate. Robert George Spitzer, Judge. Petition granted.

Redwine and Sherrill, Justin M. McCarthy, David F. Hubbard, Steven B. Abbott; Atkinson, Andelson, Rudd, Loya & Romo and John W. Dietrich for Petitioner.

No appearance by Respondent.

Manatt, Phelps & Phillips, George M. Soneff and Michael M. Berger for Real Party in Interest.

## INTRODUCTION

In a “quick take” eminent domain action, the “date of valuation” of the property is statutorily required to be *no later* than the date the condemner deposits “probable compensation” for the owner. (Code Civ. Proc., § 1263.110 et seq.)<sup>1</sup> But the owner’s right to receive “just compensation” for the property is a constitutional requirement which “cannot be made to depend on state statutory provisions.” (*Redevelopment Agency v. Gilmore* (1985) 38 Cal.3d 790, 797 (*Gilmore*); *Kirby Forest Industries, Inc. v. United States* (1984) 467 U.S 1, 17 [104 S.Ct. 2187, 81 L.Ed.2d 1].) Accordingly, courts have disregarded state and federal statutory provisions when necessary to ensure just compensation to the owner. (See, e.g., *Saratoga Fire Protection Dist. v. Hackett* (2002) 97 Cal.App.4th 895, 905-906 (*Saratoga Fire Protection Dist.*).

In this writ proceeding, we decide whether the date of valuation should be the date a deposit of probable compensation was made, as section 1263.110 requires, or whether the overriding, constitutional principle of just compensation requires that the date of valuation be the date of trial on the issue of just compensation. On December 15, 2000, the condemner, Mt. San Jacinto Community College District (Mt. San Jacinto) deposited

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

\$1.789 million as “probable compensation” (§ 1263.410) for the property owner, Azusa Pacific University (Azusa Pacific). However, trial on the just compensation issue is not expected to begin until 2005, and the parties agree that the fair market value of the property has substantially increased since December 15, 2000.

As trial on the compensation issue approached, the trial court ordered that the date of valuation would be the date of trial. Mt. San Jacinto then petitioned this court for a writ of mandate, directing the trial court to set the date of valuation on December 15, 2000, the date of the deposit. We hold that the date of valuation must be the date of deposit, as section 1263.110 requires, and that this will ensure that Azusa Pacific receives just compensation at the time of the taking. Accordingly, we grant the petition.

#### FACTS AND PROCEDURAL HISTORY

In October 2000, Mt. San Jacinto commenced an eminent domain action against Azusa Pacific, a private educational corporation, seeking to condemn approximately 30 acres of vacant land in the Menifee area of Riverside County. On December 15, 2000, Mt. San Jacinto deposited \$1.789 million as probable compensation for the property. (§ 1255.010 et seq.) Azusa Pacific has not withdrawn any portion of the deposited funds. (§ 1255.210 et seq.) In October 2001, Mt. San Jacinto applied for a prejudgment order

for possession. (§ 1255.410.) The trial court issued a prejudgment order for possession, effective upon Azusa Pacific's completion of improvements to the property.<sup>2</sup>

Mt. San Jacinto took possession of the property in January 2002, after the improvements were completed. Azusa Pacific did not move to stay the order for possession on hardship grounds (§ 1255.420) or pending the trial court's adjudication of Mt. San Jacinto's right to take the property (§ 1255.430). In February 2002, Azusa Pacific petitioned the trial court to increase the deposit of probable compensation from \$1.789 million to \$4.2 million, on the ground the property was worth \$4.2 million on December 15, 2000. (§ 1255.030.) The trial court denied the petition, and determined

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<sup>2</sup> Azusa Pacific began constructing the improvements (educational facilities) in May 2001, after summons was served in this eminent domain action. Section 1263.240 provides that improvements made subsequent to the date summons is served "shall not be taken into account in determining compensation" unless, e.g., the improvements are made with the plaintiff's written consent or are authorized by court order. (§ 1263.240, subds. (b) and (c).) Azusa Pacific did not obtain Mt. San Jacinto's written consent and did not seek advance court approval before constructing the improvements. (*Ibid.*) Accordingly, the trial court ruled that Azusa Pacific could not recover the value of the improvements. Azusa Pacific then filed an inverse condemnation action seeking the value of the improvements. In that action, we issued a writ directing the trial court to enter summary judgment in favor of Mt. San Jacinto on Azusa Pacific's complaint. (*Mt. San Jacinto Community College Dist. v. Superior Court* (2004) 117 Cal.App.4th 98, 110 (*Mt. San Jacinto Community College Dist.*)). We reasoned that Azusa Pacific could not recover the value of its postsummons improvements in the inverse condemnation action, because it failed to seek advance court approval for the improvements in this eminent domain action, as section 1263.240 required. (*Mt. San Jacinto Community College Dist., supra*, at pp. 106 & 110.) Azusa Pacific thus may not recover the value of its postsummons improvements in this eminent domain action.

that the value of the property on December 15, 2000, and the amount of Azusa Pacific's probable compensation, was \$1.789 million.

Following a bifurcated court trial addressing issues of law, the trial court ruled in June 2002 that Mt. San Jacinto had a right to take the property. As a jury trial on the issue of just compensation approached, the parties filed cross-motions in limine to establish the date of valuation. (§ 1260.040.) Mt. San Jacinto argued that the date of valuation should be December 15, 2000, as section 1263.110 required. Azusa Pacific argued that the date of valuation should be the date of trial on the compensation issue, because the property had substantially increased in value since December 15, 2000, and the trial on the compensation issue was not going to be held within one year of the commencement of the proceeding. (§ 1263.130.)

Initially, the trial court did not rule on the date of valuation issue, but indicated it was "a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." (§ 166.1.)<sup>3</sup> At the trial court's suggestion, Azusa Pacific petitioned this court

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<sup>3</sup> Section 166.1 provides: "Upon the written request of any party or his or her counsel, or at the judge's discretion, a judge may indicate in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation. Neither the denial of a request for, nor the objection of another party or counsel to, such a commentary in the interlocutory order, may be grounds for a writ or appeal."

for a writ of mandate requesting that we resolve the issue. In November 2003, we denied Azusa Pacific’s petition, without prejudice.<sup>4</sup>

Following remand, further briefing by the parties, and an evidentiary hearing, the trial court issued an order on April 23, 2004, setting the valuation date on December 6, 2004, the date of trial.<sup>5</sup> In making this ruling, the trial court considered a number of factors, including the factors listed in our November 2003 order. Mt. San Jacinto then petitioned this court for a writ of mandate, requesting that this court direct the trial court to vacate its April 23, 2004, order and enter a new order setting the valuation on December 15, 2000. We issued an alternative writ, and hereby grant Mt. San Jacinto’s petition.

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<sup>4</sup> We said: “To begin with, our reading of . . . section 166.1 does not indicate that it authorizes this court to issue an advance, or advisory opinion on an issue—merely that it provides a mechanism by which the trial court can encourage the appellate court to grant plenary *review* by writ of a *ruling* on a significant issue. Next, the record is not sufficiently developed to permit this court to issue a definitive ruling on the issue of valuation date. Whether the statutory rule established by . . . section 1263.110 should be disregarded in this case depends on facts which have not yet been established or determined by the trial court. Among these facts may be: 1) the value of the property on the date of deposit; 2) the value at the time of trial, and the relative and absolute amount of any appreciation; 3) the reasons for the delay in bringing the matter to trial; and 4) whether the deposit was made in good faith and whether Azusa Pacific’s decision not to withdraw it was similarly made in good faith. [¶] We cannot, and do not, attempt to predict, let alone establish, which facts and factors may eventually be critical in determining the issue which the trial court has attempted to place before us. We simply decide that we cannot decide it, and we must return the matter to the trial court. [¶] The petition for writ of mandate is DENIED without prejudice.”

<sup>5</sup> The December 6, 2004, trial date was vacated.

## DISCUSSION

Azusa Pacific maintains that the property should be valued on the date trial begins on the just compensation issue, notwithstanding Mt. San Jacinto's December 15, 2000, deposit of probable compensation. (§§ 1263.110, 1263.120 & 1263.130.) Azusa Pacific argues that the principle of just compensation requires that the property be valued on the date of trial, because the property has substantially increased in value since the date of the deposit. (*Saratoga Fire Protection Dist.*, *supra*, 97 Cal.App.4th at pp. 905-906.) It further argues that the deposit was not effectively tendered to it, because to withdraw the funds it was statutorily required to waive its right to further contest Mt. San Jacinto's right to take the property. (§ 1255.260.)

Upon further consideration of these issues, we conclude that the issues raised in Azusa Pacific's prior petition, and in Mt. San Jacinto's present petition, are questions of law which did not, as we previously stated, require further development of the record. We conclude that the overriding, constitutional principle of just compensation *does not* require that section 1263.110 be disregarded in this case. Valuing the property on the date of the deposit, as section 1263.110 requires in this case, will ensure that Azusa Pacific receives just compensation at the time of the taking, that is, the date of the deposit of probable compensation.

Further, the waiver rule of section 1255.260 does not deprive a condemnee of just compensation. The waiver rule reasonably requires a condemnee to waive its statutory

right to litigate the issue of the condemner's right to take, in the event the condemnee withdraws the deposited funds. Additionally, California's quick take statutory scheme affords due process to the condemnee who wishes to challenge the right to take, without affecting its right to receive just compensation at the time of the taking.

#### CALIFORNIA'S QUICK TAKE STATUTORY SCHEME

Article I, section 19 of the California Constitution provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation." (Cal. Const., art. I, § 19.)

Thus, our state Constitution guarantees an owner a jury trial on the issue of the just compensation. But it also allows a condemner to take possession of an owner's property, before trial on the compensation issue, upon deposit in court and prompt release to the owner of the probable amount of compensation the jury will award. The court, not the jury, determines the amount of the owner's probable compensation. (Cal. Const., art. I, § 19.)

Consistent with this state constitutional provision, the Eminent Domain Law (§ 1230.010 et seq.) permits a condemner to apply for a prejudgment order for possession



upon a deposit of probable compensation for the owner. (§§ 1255.010 et seq. & 1255.410.) This is California’s “quick take” or “early possession” law. (*Gilmore, supra*, 38 Cal.3d at pp. 794, 800.) The law affords the condemner a means of acquiring property in an orderly and efficient manner.<sup>6</sup> And it allows the owner to withdraw the deposited funds, even if the condemner does not subsequently seek or obtain prejudgment possession. (§ 1255.210 et seq.)

The quick take statutes contain procedural safeguards designed to ensure that the deposit of probable compensation will closely approximate the amount the owner will be ultimately awarded in a jury trial. The deposit must be supported by an appraisal and a summary statement of the appraisal. (§ 1255.010.) And after the deposit is made, the owner may petition the trial court to “determine or redetermine” whether the deposit equals the probable compensation the owner will be awarded. (§ 1255.030.) If the trial court determines that the amount of probable compensation exceeds the deposit and the

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<sup>6</sup> “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.” (Recommendation: Eminent Domain Law (Oct. 1974) 12 Cal. Law Revision Com. Rep. (1974) p. 1658.)

plaintiff fails to increase the deposit within the time it is allowed, the deposit is void and will not be deemed made for the purpose of determining the valuation date of the property. (§§ 1255.030, subd. (b) & 1255.010, subd. (b).) The condemner therefore has an incentive to make a good faith, accurate deposit of probable compensation.

### 1. The Valuation Rules

In a straight condemnation action, where no deposit of probable compensation is made and early possession is not sought, the property is valued on the date the proceedings commence, if trial on the compensation issue commences within one year. (§ 1263.120.) This rule reflects the view that a taking occurs on the date the proceedings commence. (*Leaf v. City of San Mateo* (1984) 150 Cal.App.3d 1184, 1190-1191, overruled on another ground in *Trope v. Katz* (1995) 11 Cal.4th 274, 292.) Indeed, on that date, the owner loses most of the incidents of ownership. In many cases, the owner will be unable to sell or refinance his property after the proceedings commence. (See Recommendation etc., 12 Cal. Law Revision Com. Rep., *supra*, at pp. 1658-1659.)

An alternative valuation date applies, however, if trial on the compensation issue does not commence within one year of the commencement of the proceedings through no fault of the owner. In this event, the property is valued on the date of trial. (§ 1263.130.) This rule protects both condemners and owners from fluctuations in the market value of the property after the date the proceeding commences. (*Redevelopment Agency v.*

*Maxwell* (1961) 193 Cal.App.2d 414, 418.) Concomitantly, the rule encourages both condemners and owners not to delay the trial.<sup>7</sup>

The rule of section 1263.130 reflects the view that a taking occurs when the owner is finally paid. (*Kirby Forest Industries, Inc. v. United States, supra*, 467 U.S at pp. 17-18.) Indeed, in straight condemnation proceedings, no amount of compensation must be paid to the owner until after trial and judgment. (§ 1268.010.) And, until that time, the owner remains in possession and retains title to its property. (§ 1268.030, subd. (c).) The owner also bears the risk of loss to the property, e.g., by fire. (*Redevelopment Agency v. Maxwell, supra*, 193 Cal.App.2d at pp. 417-418; *Redevelopment Agency v. Maynard*

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<sup>7</sup> As stated in the Recommendation etc., 12 Cal. Law Revision Com. Rep., *supra*, at pp. 1645-1646, “Since 1872, Code of Civil Procedure Section 1249 [the predecessor to section 1263.110 et seq.] 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 . . . . [¶] 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 . . . . 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.” (Italics added.)

(1966) 244 Cal.App.2d 260, 265; see Civ. Code, § 1662.) These factors further weigh in favor of valuing the property on the date trial commences on the compensation issue. (§ 1263.130.)

In a quick take proceeding, the property is valued *no later* than the date probable compensation is deposited for the owner. (§ 1263.110.)<sup>8</sup> Like section 1263.130, section 1263.110 reflects the view that a taking occurs at the time the owner is paid. (*Gilmore, supra*, 38 Cal.3d at p. 801 [taking occurs in quick take action when condemner deposits probable compensation and obtains prejudgment possession].) The owner may use the deposited funds to purchase other property or make other investments. Or, the owner may leave the funds on deposit and draw interest from the date the condemner takes possession. (§ 1268.310.) Additionally, the risk of loss to the property shifts to the condemner when the condemner takes possession. (*Redevelopment Agency v. Maynard, supra*, 244 Cal.App.2d at p. 265; see Civ. Code, § 1662, subd. (b).) Thus, in a quick take proceeding, it is reasonable to value the property no later than the date probable compensation is deposited. (*City of Los Angeles v. Tower* (1949) 90 Cal.App.2d 869, 874

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<sup>8</sup> In quick take proceedings, as in straight condemnation proceedings, the property is valued on the date the proceedings commence provided that trial on the compensation issue commences within one year of that date. (§ 1263.120.) Notably, however, in quick take proceedings the deposit will always be made *before* trial on the compensation issue. Thus, the property is *never* valued on the date trial commences on the compensation issue, regardless of when the trial commences. (Cf. § 1263.110 with §§ 1263.120 & 1263.130 [§ 1263.130 is expressly subject to § 1263.110].)

[Legislature may designate any stage of proceeding *prior to judgment* for purpose of assessing compensation].)

## 2. The Principle of Just Compensation

As applied here, section 1263.110 requires that Azusa Pacific's property be valued on December 15, 2000, the date Mt. San Jacinto deposited probable compensation. Nevertheless, Azusa Pacific argues that the principle of just compensation requires that its property be valued on the date trial on the compensation issue commences, which is expected to occur during 2005. We disagree.

It is well settled that "just compensation" is a constitutional requirement which "cannot be made to depend upon state [or federal] statutory provisions." (*Gilmore, supra*, 38 Cal.3d at p. 797, quoting *Seaboard Air Line Ry. v. U. S.* (1923) 261 U.S. 299 [43 S.Ct. 354, 67 L.Ed. 664].) "[A]ll condemnation law, procedure and practice[—] is but a means to the constitutional end of just compensation to the involuntary seller, the property owner.' [Citation.]" (*People ex rel. Dept. of Transportation v. Southern Cal. Edison Co.* (2000) 22 Cal.4th 791, 800.) "No one can gainsay that the amount to be paid for property taken by the government is, under the Constitution, a matter for the courts rather than the Legislature . . . . [Citations.]" (*County of Los Angeles v. Ortiz* (1971) 6 Cal.3d 141, 145.) Just compensation is the "overriding principle" that applies. (*Mt. San Jacinto Community College Dist., supra*, 117 Cal.App.4th at p. 108.)

Accordingly, courts have disregarded eminent domain statutes, when necessary to ensure just compensation to the property owner. (E.g., *Kirby Forest Industries, Inc. v. United States*, *supra*, 467 U.S. 1 [owner entitled to fair market value of property at time of taking, i.e., tender of payment, notwithstanding contrary practice]; *Citizens Utilities Co. v. Superior Court* (1963) 59 Cal.2d 805 [public utility entitled to compensation for legally required postsummons improvements; notwithstanding then-existing statute prohibiting compensation for any postsummons improvements]; *Gilmore*, *supra*, 38 Cal.3d 790 [higher market interest rate payable on difference between final compensation award and amount deposited and withdrawn, notwithstanding lower statutory interest rate]; *People ex rel. Dept. of Transportation v. Southern Cal. Edison Co.*, *supra*, 22 Cal.4th 791 [interest not payable on compensation award from time of plaintiff's prejudgment possession, notwithstanding § 1268.310].)

Azusa Pacific relies on *Saratoga Fire Protection Dist.*, *supra*, 97 Cal.App.4th 895. In that straight condemnation proceeding, section 1263.120 was held unconstitutional as applied. (*Id.* at pp. 905-906.) Trial on the compensation issue began 11 months after the date the proceeding commenced. Thus, section 1263.120 required that the property would be valued on the date the proceeding commenced. But during the 11 month period, the fair market value of the property substantially increased, from \$2 million to \$3.2 million. The owner argued that the principle of just compensation required the property to be valued on the date of trial, and the court agreed. (*Ibid.*)

The critical difference between *Saratoga Fire Protection Dist.* and the present case is that there was no deposit of probable compensation in *Saratoga Fire Protection Dist.*; it involved a straight condemnation proceeding, not a quick take proceeding. Thus, just compensation to the owner in *Saratoga Fire Protection Dist.* required valuing the property at the time of trial, or closer to the time payment would finally be made to the owner. (*Kirby Forest Industries, Inc. v. United States, supra*, 467 U.S. at pp. 16-17.) Here, however, Mt. San Jacinto deposited the probable amount of Azusa Pacific's just compensation on December 15, 2000, well before the date of trial. (§ 1255.010 et seq.)

Azusa Pacific's reliance on *Saratoga Fire Protection Dist.* is therefore misplaced. There, section 1263.120 had to be disregarded to ensure that the owner received just compensation at the time his property was taken, i.e., at or about the time payment was finally tendered. Here, however, there is no comparable, compelling reason to disregard section 1263.110. Valuing the property on the date of the deposit, December 15, 2000, will ensure that Azusa Pacific receives just compensation, because since that date Azusa Pacific has had the option of withdrawing the deposited funds. (§ 1255.210 et seq.)

### 3. The Waiver Rule of Section 1255.260

Section 1255.260 provides: "If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation." The waived claims and defenses

include the owner's right to contest the condemner's right to take the property. (*Clayton v. Superior Court* (1998) 67 Cal.App.4th 28, 33.)

Azusa Pacific argues that the waiver rule of section 1255.260 effectively rendered the deposit unavailable to it, because it cannot withdraw the deposit without waiving its right to fully and finally litigate Mt. San Jacinto's right to take the property. Thus, Azusa Pacific argues, there effectively is no deposit and the property should therefore be valued on the date of trial, not the date of the deposit. We disagree.

Substantially the same argument that Azusa Pacific advances here was rejected in *Pacific Gas & Electric Co. v. Superior Court* (1973) 33 Cal.App.3d 321 (*Pacific Gas*), which involved a deposit made following trial and judgment on the compensation issue. The condemnee appealed, and the condemner sought an order for possession pending the appeal. The condemnee argued that allowing the condemner to take possession pending the appeal would deprive it of just compensation, because it was unable to withdraw the deposited funds without having to waive its right to a final adjudication on appeal of the condemner's right to take the property. (*Id.* at pp. 324-329.)

The *Pacific Gas* court disagreed, reasoning that the deposit of funds satisfied the condemnee's right to just compensation at the time of the taking, that is, at the time the condemner had a right to take possession following judgment. (*Pacific Gas, supra*, 33 Cal.App.3d at p. 327.) The court also noted, "[t]he fact that statutory limitations or conditions are imposed upon a property owner's ability to withdraw [deposited] funds in



relation to his exercise of his solely *statutory right to appeal*, does not operate so as to constitute a denial of just compensation.” (*Ibid.*, italics added; accord, *Heilbron v. Superior Court* (1907) 151 Cal. 271, 273-275, 278-279.) The same reasoning applies where, as here, the condemner deposited probable compensation *before* judgment and had a right to early possession of the property. (Cal. Const., art. I, § 19.)<sup>9</sup>

The *Pacific Gas* court also rejected the condemnee’s related argument that it was being placed in a position which required it “to give up one constitutional right, the right to just compensation, in order to protect another, the right to take a meaningful appeal.” (*Pacific Gas, supra*, 33 Cal.App.3d at p. 328.) The court reasoned that there is no constitutional right to an appeal, only a statutory one. (*Id.* at pp. 328-329.) Indeed, the statutory right to an appeal may be made subject to reasonable conditions. (*Id.* at p. 329; *Redevelopment Agency v. Goodman* (1975) 53 Cal.App.3d 424, 431-432.)

In our view, having to leave funds on deposit is a reasonable condition to place on the condemnee’s statutory right to further litigate and/or pursue a final adjudication on

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<sup>9</sup> Azusa Pacific’s reliance on *Steinhart v. Superior Court* (1902) 137 Cal. 575 (*Steinhart*) is misplaced. There, the court held unconstitutional a statute authorizing the condemner to take prejudgment possession of the owner’s property upon deposit in court of the owner’s probable compensation. At that time, article I, section 14 of the California Constitution, the predecessor to current article I, section 19, afforded an owner a jury trial, unless waived, on the issue of just compensation. But the Constitution did not authorize a condemner to take prejudgment possession of property before the jury trial, or court trial, on the issue of just compensation. Article I, section 19 now authorizes the Legislature to provide for prejudgment possession by the condemner upon deposit in court and prompt release to the owner of its probable compensation.

appeal of the right to take issue. In enacting section 1255.260, the Legislature could have reasonably concluded that a condemnee who denies the condemner's right to take should not be able to withdraw the probable amount of its just compensation before judgment, or the amount of its just compensation following judgment. Indeed, it would be inconsistent for Azusa Pacific to insist on adjudicating Mt. San Jacinto's right to take its property, while at the same time enjoying the use and benefit of the probable amount of its just compensation. A condemnee who denies the condemner's right to take cannot have it both ways: he cannot withdraw the deposit *and* challenge the right to take. It is reasonable to require him to choose one or the other.

We further note that the Eminent Domain Law includes procedural safeguards that ensure a prompt, if not final, adjudication of the right to take issue *before* judgment is entered following trial on the compensation issue. The owner may request that the right to take issue be heard in a bifurcated proceeding, and the matter is entitled to priority on the civil trial calendar. (§§ 1260.010 & 1260.110.) Further, the trial court's ruling on the bifurcated right to take issue, although not appealable (§§ 598 & 904.1; *Plaza Tulare v. Tradewell Stores, Inc.* (1989) 207 Cal.App.3d 522, 523-524), may be challenged by extraordinary writ.<sup>10</sup>

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<sup>10</sup> In most cases, a deposit will be made shortly before the condemner seeks and obtains a prejudgment order for possession. (§ 1255.410.) In this instance, the owner may request that the trial court stay the order pending trial on the right to take issue, if the trial court finds there is a reasonable probability the owner will prevail on the issue. (§ 1255.430; *Israni v. Superior Court* (2001) 88 Cal.App.4th 621, 643-646.) The order

These procedural safeguards afford the owner procedural due process in litigating the right to take issue. They also mitigate the apparent Hobson's choice the owner faces between withdrawing the deposited funds and litigating the right to take issue: the right to take issue will be quickly, if not finally, adjudicated. Then, the owner may withdraw the deposited funds. Or, the owner may choose to further litigate the issue.<sup>11</sup> Whatever the owner chooses to do, in view of the procedural safeguards which ensure the prompt, if not final, adjudication of the right to take issue, the waiver rule of section 1255.260 in no way impairs the owner's constitutional right to a prompt release of the deposited funds. (Cal. Const., art. I, § 19; § 1255.210 et seq.)

“The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.” (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 715, quoting *Bauman v. Ross* (1896) 167 U.S. 548, 574 [17 S.Ct. 966, 976, 42 L.Ed. 270].)

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for possession is also not appealable, but may be challenged by extraordinary writ. (*City of Morgan Hill v. Alberti* (1989) 211 Cal.App.3d 1435.)

<sup>11</sup> We note that if the right to take issue is challenged by extraordinary writ, the appellate court's adjudication of the issue will be final if an alternative writ is issued. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894.)

Where, as here, a deposit of probable compensation is made, and the trial court determines that the deposit equals or exceeds the probable amount of the owner's just compensation, the property must be valued on the date of the deposit. The value of the property on the date of the deposit is all the owner should be awarded for the taking of its property. A greater award would be unjust to the condemner.

#### DISPOSITION

Let a peremptory writ of mandate issue directing the Superior Court of Riverside County to set aside its order setting the "date of valuation" on the date of trial, and to enter a new order setting the date of valuation on December 15, 2000, the date Mt. San Jacinto deposited probable compensation.

#### CERTIFIED FOR PUBLICATION

/s/ King  
J.

We concur:

/s/ McKinster  
Acting P.J.

/s/ Gaut  
J.