#36(2)

Commissioner Primarily Responsible: Uhler
9/11/68

Memorandum 68-89

Subject: Study 36(2) - Condemnation (Byroads)

The attached tentative recommendation incorporates the policy decisions made at the July meeting regarding condemnation for access roads, including byroads. (Also attached is the original background study distributed and discussed at the last meeting, and included here for reference.) The former references to byroads in Section 1238 of the Code of Civil Procedure have been deleted, and the term has been precisely defined and incorporated into the Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443). Thorough review revealed that this act was the one most readily adaptable for the opening of byroads, as it provides a complete and satisfactory procedure covering notice, legislative and judicial review, compensation and assessment. Finally, Section 1238.8 has been added to the Code of Civil Procedure to permit opening of access roads, both public and private, in connection with acquisitions of property for a public use that isolate other property.

Please read the attached recommendation prior to the meeting. We will go over it section by section at the meeting, after which we hope to be able to distribute it for comment.

Respectfully submitted,

Jack Horton
Junior Counsel

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

CONDEMNATION LAW AND PROCEDURE

The Right to Take (Byroads)

As enacted in 1872, Code of Civil Procedure Section 1238 authorized takings for "byroads" in subdivision (4) and for "byroads leading from highways to residences and farms" in subdivision (6). Subdivision (6) was expanded in 1895 to cover "byroads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes." In an appropriate case, Civil Code Section 1001 would appear to authorize a private person to maintain an action to acquire private property for the "byroad" described in subdivision (6).[1]

The need for resort to eminent domain to acquire property for byroads is partially alleviated by the common law doctrine of "ways of necessity." Nevertheless, situations exist where a landowner lacks adequate access to an established road and does not have a common law way of necessity. Use of the general authority of Civil Code Section 1001 to acquire property for byroads has not received judicial sanction and no explicit special statutory procedure now exists whereby either a public entity or an individual may condemn to provide byroads. The Commission therefore recommends that the provisions in

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1. For additional background information, see the research study prepared by the staff of the Law Revision Commission.

subdivisions (4) and (6) of Section 1238 relating to byroads be deleted and that more explicit statutory provisions relating to byroads be enacted. Specifically, the Commission recommends:

1. The Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443) should be amended to make it clear that a byroad may be opened in the manner therein provided. This act, if it does not already permit opening of byroads, is readily adaptable for this purpose and provides a complete statutory procedure covering notice, review, compensation, and assessment. To provide explicit recognition that the initiative for the opening of new roads, including byroads, will frequently come from private persons and to codify the present practice in at least some counties, a provision should be added to the Street Opening Act of 1903 to make it clear that private persons may present requests for specific improvements to be undertaken under the act.

These changes will make available an existing procedure whereby the cost of the improvement (including acquisition of land by condemnation) will be paid by the benefited property owner. Of course, the legislative body acting on the request to establish a byroad should have complete discretion to refuse to undertake the project and should be permitted, for example, to assess the benefited person not only for the cost of establishing the byroad but also for the cost of its maintenance. See, e.g., Streets and Highways Code Sections 969.5 and 1160-1197.

2. A public entity acquiring property for a public use should be permitted to acquire such additional property as is necessary to provide

access to property not taken. In certain situations, the acquisition of property for a public use may cut off access to property not taken. In such situations, it is fairly clear that the taking of additional property to provide access to the otherwise isolated parcel would be held to be a public use but in California no explicit statutory or decisional authority for such takings exists. A statutory provision recognizing that such authority exists is desirable for such takings often are the most satisfactory method of mitigating the adverse consequences when land is acquired for a public improvement and such authority would minimize the need for so-called "excess condemnation."[2]

3. The Commission has considered whether a private person should be permitted to initiate condemnation proceedings for a byroad and has concluded that the need for one person to take another's property for a byroad in any particular instance is one that should receive review by the appropriate legislative body before condemnation is instituted. Although the exercise of the right of eminent domain by an individual to acquire a sewer easement has been permitted by the California Supreme Court,[3] the Commission does not believe as strong a case can be made where property is sought to be condemned for a byroad. Accordingly, the Commission does not recommend that a private person be permitted to initiate condemnation proceedings to acquire access to isolated land.

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2. See People v. Superior Court, 68 Adv. Cal. ___, 65 Cal. Rptr. 342, 436 P.2d 342 (1968).

3 Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955).

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to amend Section 1238 of, and to add Section 1238.8 to, the Code of Civil Procedure, and to amend Section 4008, and to add Sections 4008.1 and 4120.1 to, the Streets and Highways Code, relating to roads.

The people of the State of California do enact as follows:

Section 1. Section 1238 of the Code of Civil Procedure is amended to read:

1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Fortifications, magazines, arsenals, Navy yards, Navy and Army stations, lighthouses, range and beacon lights, coast surveys, and all other public uses authorized by the Government of the United States.

2. Public buildings and grounds for use of a state, or any state institution, or any institution within the State of California which is exempt from taxation under the provisions of Section 1a of Article XIII of the Constitution of the State of California, and all other public uses authorized by the Legislature of the State of California.

3. Any public utility, and public buildings and grounds, for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district, ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other character of property necessary for conducting or storing or distributing water for the use of any county, incorporated city, or city and county, village or town or municipal water district, or the inhabitants thereof, or any state institution, or necessary for the proper development and control of such use of said water, either at the time of the taking of said property, or for the future proper development and control thereof, or for draining any county, incorporated city, or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels; roads, highways, boulevards, streets and alleys; public mooring places for watercraft; public parks, including parks and other places covered by water, and all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, warehouses, chutes, booms, ferries, bridges, toll roads, ~~byroads,~~ plank and turnpike roads; paths and roads either on the surface, elevated, or depressed, for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric, and horse railroads, canals, ditches, dams, poundings, flumes,

aqueducts and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable, and water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only, and lands with all wells and water therein adjacent to the lands of any municipality or of any corporation, or person supplying water to the public or to any neighborhood or community for domestic use or irrigation.

5. Roads, tunnels, ditches, flumes, pipes, aerial and surface tramways and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

~~6.--Byroads-leading-from-highways-to-residences,-farms,--mines, mills,-factories-and-buildings-for-operating-machinery,-or-necessary to-reach-any-property-used-for-public-purposes.~~

7. Telegraph, telephone, radio and wireless lines, systems and plants.

8. Sewerage of any incorporated city, city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than 10 families, or of any buildings, belonging to the State, or to any college or university, also the

connection of private residences and other buildings, through other property, with the mains of an established sewer system in any such city, city and county, town or village.

9. Roads for transportation by traction engines or road locomotives.

10. Oil pipelines.

11. Railroads, roads and flumes for quarrying, logging or lumbering purposes.

12. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages, towns, or irrigation districts; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations; together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

13. Electric power lines, electric heat lines, electric light lines, electric light, heat and power lines, and works or plants, lands, buildings or rights of any character in water, or any other character of property necessary for generation, transmission or

distribution of electricity for the purpose of furnishing or supplying electric light, heat or power to any county, city and county or incorporated city or town, or irrigation district, or the inhabitants thereof, or necessary for the proper development and control of such use of such electricity, either at the time of the taking of said property, or for the future proper development and control thereof.

14. Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof.

15. The plants, or any part thereof, or any record therein of all persons, firms or corporations heretofore, now or hereafter engaged in the business of searching public records, or publishing public records or insuring or guaranteeing titles to real property, including all copies of, and all abstracts or memoranda taken from, public records, which are owned by, or in the possession of, such persons, firms or corporations or which are used by them in their respective businesses; provided, however, that the right of eminent domain in behalf of the public uses mentioned in this subdivision may be exercised only for the purposes of restoring or replacing, in whole or in part, public records, or the substance of public records, of any city, city and county, county or other municipality, which records have been, or may hereafter be, lost or destroyed by conflagration or other public calamity; and provided further, that such right shall be exercised only by the city, city and county, county or municipality whose records, or part of whose records, have been, or may be, so lost or destroyed.

16. Expositions or fairs in aid of which the granting of public moneys or other things of value has been authorized by the Constitution.

17. Works or plants for supplying gas, heat, refrigeration or power to any county, city and county, or incorporated city or town, or irrigation district, or the inhabitants thereof, together with lands, buildings, and all other improvements in or upon which to erect, install, place, maintain, use or operate machinery, appliances, works and plants for the purpose of generating, transmitting and distributing the same and rights of any nature in water, or property of any character necessary for the purpose of generating, transmitting and distributing the same, or necessary for the proper development and control of such use of such gas, heat, refrigeration, or power, either at the time of the taking of said property, or for the future proper development and control thereof.

18. Standing trees and ground necessary for the support and maintenance thereof, along the course of any highway, within a maximum distance of 300 feet on each side of the center thereof; and ground for the culture and growth of trees along the course of any highway, within the maximum distance of 300 feet on each side of the center thereof.

19. Propagation, rearing, planting, distribution, protection or conservation of fish.

20. Airports for the landing and taking off of aircraft, and for the construction and maintenance of hangars, mooring masts, flying fields, signal lights and radio equipment.

21. Any work or undertaking of a city, county, or city and county, housing authority or commission, or other political subdivision or public body of the State: (a) to demolish, clear or remove buildings from any area which is detrimental to the safety, health and morals of the people by reason of the dilapidation, overcrowding, faulty arrangement or design, lack of ventilation or sanitary facilities of the dwellings predominating in such areas; or (b) to provide dwellings, apartments or other living accommodations for persons or families who lack the amount of income which is necessary (as determined by the body engaging in said work or undertaking) to enable them to live in decent, safe and sanitary dwellings without overcrowding.

22. Terminal facilities, lands, or structures for the receipt, transfer or delivery of passengers or property by any common carrier operating upon any public highway in this State between fixed termini or over a regular route, or for other terminal facilities of any such carrier.

Comment. Section 1238 is amended to delete subdivision (6) and to delete the reference to "byroads" from subdivision (4). These provisions are superseded by Code of Civil Procedure Section 1238.8 and revisions of the Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443). See Streets and Highways Code Sections 4008, 4008.1 and 4120.1 and the comments to those sections. The Street Opening Act of 1903 includes specific authority to exercise the right of eminent domain for byroads in Section 4090.

Sec. 2. Section 1238.8 is added to the Code of Civil Procedure, to read:

1238.8. In any case where a public entity acquires property for a public use and exercises or could have exercised the right of eminent domain to acquire such property for such use, the public entity may exercise the right of eminent domain to acquire such additional property as is reasonably necessary to provide access to an existing public road from any property which is not acquired for such public use but which is cut off from access to a public road as a result of the acquisition by the public entity.

Comment. Section 1238.8 provides explicit statutory recognition of the right of a public condemnor that acquires property for a public use to condemn such additional property as is necessary to provide access to property not taken which would otherwise lack access as a result of the acquisition. The access road need not be one that is open to the public. Although no explicit statutory or decisional authority for such a taking exists in California, the right to exercise the power of eminent domain for such purpose probably would be necessarily implied from the right to take property for the public improvement itself. Such a taking would be a taking for a public use. E.g., Department of Public Works v. Farina, 29 Ill.2d 474, 194 N.E.2d 209 (1963); Luke v. Mass. Turnpike Auth., 337 Mass. 304, 149 N.E.2d 225 (1958); May v. Chio Turnpike Comm., 172 Ohio St. 555, 178 N.E.2d 920 (1962); Tracy v. Preston, Director of Highways, 172 Ohio St. 567, 178 N.E.2d 923 (1962).

Sec. 3. Section 4008 of the Streets and Highways Code is amended to read:

4008. "Street" includes public street, avenues, roads, highways, byroads, squares, lanes, alleys, courts or places.

Comment. The addition of "byroads" to Section 4008 makes it clear that byroads--roads, open to public use, that furnish access to an existing public road from or primarily from otherwise isolated property--may be established under the Street Opening Act of 1903. See Section 4008.1 defining "byroad." This addition probably codifies existing law. Cf. City of Oakland v. Parker, 70 Cal. App. 295, 233 Pac. 68 (1924).

Sec. 4. Section 4008.1 is added to the Streets and Highways Code, to read:

4008.1. "Byroad" means a road, open to public use, that furnishes access to an existing public road from or primarily from otherwise isolated property.

Comment. The definition of "byroad" in Section 4008.1 is based on the discussion in Sherman v. Buick, 32 Cal. 242 (1867). It adopts substantially the definition formerly incorporated in Section 1238(6) of the Code of Civil Procedure; however, any restriction in utilization of the property served by the byroad is eliminated.

Sec. 5. Section 4120.1 is added to the Streets and Highways Code, to read:

4120.1. The owner of any property that may be benefited by a proposed improvement may file with the legislative body a request that the improvement be undertaken. Such request may, but need not, include the maps, plats, plans, profiles, specifications, and other information referred to in Sections 4120 and 4122.

Comment. Section 4120.1 is added to the Street Opening Act of 1903 to expressly authorize initiation of improvement proposals by individual property owners. Such procedures may already exist informally in many, if not most, counties. The section provides that the owner of property may file a request with the legislative body that a certain improvement be undertaken. The request may, and generally will, include the maps, plans, and other information that are a necessary prerequisite to the ordinance of intention. See Sections 4120 and 4123. The request and the necessary maps or plans will be considered for approval by the legislative body pursuant to Section 4120. The legislative body has broad discretion to approve or disapprove the request and to redefine the nature and location of the improvement and the boundaries of the assessment district. See Section 4166. The assessment district should encompass all property specially benefited by the improvement although it should be recognized that property, even though fronting on an improvement, may not be specially benefited and should not therefore be assessed. For example, a byroad traversing property already served by another public road may provide no additional benefits to that property though it provides substantial benefits to interior, landlocked property which has little or even no frontage on the improvement. See Section 4008.1.

## THE DECLARED PUBLIC USES

### "Byroads" and Ways of Necessity

As enacted in 1872, Code of Civil Procedure Section 1238 authorized takings for "byroads" in subdivision (4) and for "byroads leading from highways to residences and farms" in subdivision (6). Subdivision (6) was amended in 1895[1] to cover "byroads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes."[2]

The need for resort to eminent domain to provide byroads is partially alleviated by the common law doctrine of "ways of necessity." A way of necessity arises when a grantor conveys land shut off from access to a road by the grantor's remaining land or by his land and the land of a stranger or where a similar situation is created by a partition, either voluntary or involuntary.[3] Subdivision (6), however, is not merely a statutory substitute for the common law way of necessity.[4] When the facts that give rise to a common law way of necessity are established,[5] the right will be recognized; there is no need to institute eminent domain proceedings or to compensate the owner of the land over which the way of necessity is located.[6] Nevertheless, situations exist where a landowner lacks access to an established road and does not have common law way of necessity. The right to take property by eminent domain for a "byroad" may provide a solution to this problem where the owner's efforts to purchase a right of access across his neighbor's land fail.

In the leading California decision, Sherman v. Buick,[7] the taking of private property for a byroad was held proper where

the road was in fact to be a public road, open to all who desired to use it, even though the road was designed to provide access for the land of a private person and he bore the cost of establishing and maintaining the road. In Sherman, the court held constitutional an 1861 act that authorized the county board of supervisors to take private property to establish "public" and "private" roads. The court held that the term "private road" was used merely to designate a particular kind of public road,[9] and that, notwithstanding the somewhat inaccurate language,[10] the use was public:

> Roads, leading from the main road, which run through the county to the residences or farms of individuals, are of public concern and under the control of the Government. Taking private property for the purposes of such roads is not a taking for private use. They are open to everyone who may have occasion to use them, and are therefore public. Their character as public roads is unaffected by the circumstances, that in view of their situation, they are but little used, and are mainly convenient for the use of a few individuals, and such as may have occasion to visit them socially or on matters of business, nor by the circumstance that in view of such conditions the Legislature may deem it just to open and maintain them at the cost of those most immediately concerned instead of the public at large. The object for which they are established is none the less of a public character, and therefore within the supervision of the Government. To call them "private roads" is simply a legislative misnomer, which does not affect or change their real character. By-roads is a better name for them and one which is less calculated to mislead the uninitiated.

In drafting subdivision (6) of Section 1238, which superseded a part of the 1861 act referred to in the Sherman case, the 1872 Code Commissioners adopted the court's suggestion that roads used primarily for the convenience of a few individuals be described as "byroads."[11] The pertinent portion of the remainder of the 1861 act was compiled in Section 2711 of the 1872 Political Code, which read:

> Private or by-roads may be opened for the convenience of one or more residents of any road district in the same manner as public roads are opened, whenever the Board of Supervisors may for like cause order the same to be viewed and opened, the person for whose benefit the same is required paying the damages awarded to the landowners, and keeping the same in repair.

In 1883, Section 2711 was repealed and substantially re-enacted as Political Code Section 2692.[12] Section 2692 was amended in 1913[13] to include coverage for ways for "a canal" and in 1919[14] the words "irrigation, seepage, or drainage" were inserted before "canal." The section was repealed in 1943,[15] the portion relating to canals being compiled in Water Code Sections 7020-7026 and the portion relating to private or byroads not being continued. In 1949, Political Code Section 2692 was again repealed,[16] and Streets and Highways Code Sections 1128-1133 were enacted by the same act[17] to permit "private or by-roads" to be opened, laid out, or altered for "timber access purposes." A 1955 amendment[18] made these sections applicable to any private or byroad but the sections were repealed in 1961.[19] No special statutory procedure now exists[20] whereby an individual or public entity may condemn to provide the "byroads" described in subdivision (6).

In City of Los Angeles v. Leavis,[21] it was held that a city could condemn property for a public street relying solely on Civil Code Section 1001 and Section 1238. Hence, although no appellate decision on this question has been found, it seems fairly clear that subdivision (6) of Section 1238 is itself authority for a public entity to exercise the power of eminent domain to provide "byroads."[22] However, it seems unlikely that any

county or city would be willing to institute condemnation proceedings to provide a "byroad" even if the benefited person were willing to bear the cost of acquiring and maintaining the road.

Appellate courts in California have not decided whether a private person may maintain an action under Civil Code Section 1001 to acquire private property for the sort of byroad described in subdivision (6).[23] Nevertheless, a series of cases has established the proposition that such a byroad is a public use,[24] and the California Supreme Court held in Linggi v. Garovotti[25] that a private individual may maintain an eminent domain proceeding to provide a sewer connection for a single residence. Although land-locked property does not present the health hazard present in the Linggi case, it is likely that California would follow the holdings in numerous other states[26] and permit a private person to acquire a byroad in an appropriate case.

Private corporations have sought unsuccessfully in two cases to condemn access to land. In General Petroleum Corporation v. Hobson[27] the holder of an oil and gas prospecting permit granted by the State under a 1921 act[28] brought an eminent domain proceeding in the federal court to acquire an easement over private property from the highway to the place where it planned to prospect for oil. A demurrer to the corporation's complaint was sustained. The corporation contended that the taking was a public use authorized both under the 1921 act and under Code of Civil Procedure Section 1238. The 1921 act included a provision giving the right of eminent domain to permittees to acquire a right of way over

private property, but the court held this provision void as not embraced within the title of the act. An alternative ground for the holding was that the complaint did not show that the taking was for a public purpose:

> Nor can section 1238, subd. 5, C.C.P. of California, authorize the taking of private property for "roads * * * for working mines." Subdivision 6: "By-roads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes." The plaintiff has no working mines, nor any active industry, nor is it in any sense within any of the provisions of this section, nor is the property covered by the permit used or contemplated to be used for a public purpose, nor can the court assume a public use or purpose where none is claimed, or none can be reasonably deduced from conceded or established facts. Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577, is not elucidating, nor is Monterey County v. Cushing, 83 Cal. 507, 23 P. 700; nor was this issue before the court in County of Madera v. Raymond Granite Co., 139 Cal. 128, 72 P. 915. These cases are cited because particularly relied upon by the plaintiff. All cases cited have been examined, but have not [sic] application.
>
> Eminent domain can only be invoked because the interest of the public is greater than the interest of the private individual, and may not be invoked by a private person for private gain or advantage. The plaintiff's permit prospecting for oil enterprise by reason thereof is speculative and wholly private, and the private property may not be taken for a private purpose. Clearly the complaint does not state a cause of action; complainant does not show that it has legal capacity to maintain the action, nor that the taking is for a public purpose. [Emphasis in original.][29]

The meaning of this language is not entirely clear. It is clear, however, that the court concluded that the use for which the property was sought to be acquired--prospecting for oil--was not one within any of the provisions of Section 1238. The court may have overlooked the general authorization to condemn for "byroads" in subdivison (4). Some of the language indicates that the court also may have had in mind the well-established proposition that the mere fact that a particular use is listed in Section 1238 does not mean that the use is a public use under the facts of a particular case.[30] The court also seems to take the position that the

residence, farm, mine, mill, factory or buildings for operating machinery referred to in subdivision (6) must already be in existence at the time access is sought to be conedmned. This line of reasoning would not apply to subdivision (4) which authorizes exercise of the power of eminent domain for "byroads" without any limitation or description such as that found in subdivision (6), but the court did not refer to subdivision (4). The opinion does not appear absolutely to preclude a private person from taking private property for a byroad described in subdivision (6). At the same time, the holding in the case would permit no significant application of the "byroad" authorization in subdivision (4).

In City of Sierra Madre v. Superior Court,[31] a land developer sought to maintain a proceeding in the name of the city to acquire an access road to a planned subdivision in order to meet the requirements for subdivision approval. As the city had not authorized the proceeding, prohibition issued to prevent its prosecution. The opinion does not indicate whether the proceeding would have been permitted had the developer brought the suit in its own name.

In addition to establishing that the byroad would be a "public use" under the circumstances of the particular case, the condemnor would also have to show that the proposed taking is "necessary."[32] Reasoning from the common law way of necessity cases[33] and the Linggi decision,[34] it seems safe to predict that the courts would not allow condemnation if there were any other reasonable alternative to the taking.

This survey demonstrates the uncertainty that now exists as to whether property may be taken to provide an access road from an established highway to the land of a private person. This uncertainty

should be eliminated in any revision of the law of eminent domain. The following recommendations are made in this connection:

1. The provision in subdivision (4) of Section 1238 of the Code of Civil Procedure relating to "byroads" and subdivision (6) of the same section should also be eliminated. These provisions should be superseded by more explicit statutory provisions.

2. A statutory provision should be enacted to provide expressly that any public condemnor that acquires property for a public use may acquire by eminent domain such additional property as is necessary to provide access to property not taken which would otherwise become landlocked by the taking. It is fairly clear that the taking of property to provide access in this situation would be held to be a public use.[35] Although such a statute might be limited to takings for limited access highways, such a limitation is not recommended. Since it is the taking by the condemnor that creates the need for the access road, the condemnor should have authority to provide access where this would be the appropriate method of mitigating the adverse consequences of the taking. Any attempted abuse could be prevented by finding that the taking for the access road is not a public use under the facts of the particular case.[36] The California Supreme Court has recently taken a very liberal position toward "excess condemnation"[37] and a significant benefit of the recommended statutory provision would be elimination of the need for excess condemnation in some situations.

3. Consideration should be given to reenacting the substance of former Streets and Highways Code Sections 1128-1133. These sections were repealed in 1961. They permitted the county board

of supervisors to take property for a road, open to all who desired to use it, but required that the cost of acquisition, establishment, and maintaining the road be imposed on the person or persons primarily benefited. This procedure places the board of supervisors in the position of determining whether the access road should be established. On the other hand, it imposes the costs on the benefited persons. If this type of procedure were adopted, the statute probably should permit cities and other public entities concerned with road work to utilize the procedure.

4. As an alternative to the preceding recommendation, private persons might be authorized to condemn easements that would be dedicated to public use, be open to the public, and provide ingress and egress from private property to established roads. Such a taking should be permitted only upon a showing of strict necessity and not where the person has another method of access, even though the latter is inconvenient. The burden of maintaining the access road should be imposed on the person seeking access. Many of the other states authorize the use of the power of eminent domain to acquire property for such purposes. It is possible that this recommendation would merely restate existing California law.

Senate Bill No. 18, introduced at the 1968 session of the California Legislature, would have effectuated the substance of this recommendation.[38]

As maximum utilization of land is important, and as a strict showing of necessity would adequately protect the condemnee, this seems to be one of the few instances in which "private condemnation" would be justified.

THE DECLARED PUBLIC USES
BYROADS AND WAYS OF NECESSITY
FOOTNOTES

1. Cal. Stats. 1895, Ch. 98, §.1, p. 89.

2. It is interesting to trace the historical development of "byroads." In colonial times, statutes permitted individuals to condemn private property for access roads for their private use. As additional areas of the country were opened to settlement, similar statutes were enacted. It was generally assumed that these statutes were valid until the 1840's and 1850's when a narrowing of the concept of public use occurred; in all but a few states, the use of eminent domain to acquire land for private roads for the exclusive use of a few persons was held a private use. In California and some other states, the statutes were either construed or revised to permit the taking of lands for access roads only if the roads were open to public use. In a substantial number of states, constitutional provisions were adopted to permit the taking of private property by eminent domain for access roads. Ala. Const., Art. I, § 23 (1901); Ariz. Const., Art. II, § 17 (1910); Colo. Const., Art. II, § 14 (1876); Ga. Const., Art. I, § 2-301), para. 1 (1877); Ill. Const., Art. IV, § 30 (1870); Kan. Const., Art. 12, § 4 (1859); La. Const., Art. III, § 37 (1921); Miss. Const., Art. 4, § 110 (1890); Mo. Const. of 1945, Art. I, § 28 (1875); N.Y. Const., Art. I, § 7, subd. (c) (1846); Okla. Const., Art. II, § 23 (1907); Wash. Const., Art. I, § 16 (1889); Wyo. Const., Art. 1, § 32 (1889). See also Fla. Const., Art. XVI, § 29 (1885); Ore. Const., Art. I, § 18 (1857). The California Constitutional Convention did not consider such a provision; only a passing reference was made in the debates to this problem. II Debates and Proceedings of the Constitutional

Convention of the State of California 1028 (1881)[1878-1879] (Remarks of Mr. Shafter).

It has been recognized in California and elsewhere that the taking of property for use as a public road is a taking for a public use, even though the road is used primarily to provide access to the land of a single individual. E.g., Sherman v. Buick, 32 Cal. 241 (1867). 29A C.J.S. Eminent Domain § 34 (1965)("[T]he principle to be deduced from the cases bearing on the question seems to be that if the road, when laid out, is in fact a public road, open to all who may desire to use it, it is a public use, and valid, although the road is primarily designed for the benefit of an individual, and although the cost of laying out and maintaining such road is borne in whole or in part by the petitioners therefor." [footnotes omitted]). Compare 26 Am. Jur.2d Eminent Domain § 47 (1966).

The historical development is traced in Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 Boston U. L. Rev. 615 , 617-626 (1940). For an historical account in a particular state, see Notes, 11 Ala. L. Rev. 182 (1958)(Alabama); 33 Ky. L. J. 129 (1944)(Kentucky).

3. E.g., Mesmer v. Uharriet, 174 Cal. 110, 162 Pac. 104 (1916) (partition); Reese v. Borghi, 216 Cal. App.2d 324, 332-333, 30 Cal. Rptr. 868, 873 (1963); Tarr v. Watkins, 180 Cal. App.2d 362, 4 Cal. Rptr. 293 (1960). See also Daywalt v. Walker, 217 Cal. App.2d 669, 675, 31 Cal. Rptr. 899, 902 (1963). A way of necessity continues only so long as the necessity exists. See generally Martinelli v. Luis, 213 Cal. 183, 1 Pac. 980 (1931); Cassin v. Cole, 153 Cal. 677, 679, 96 Pac. 277, 278 (1908).

4. See Taylor v. Warnaky, 55 Cal. 350 (1880); Reese v. Borghi, 216 Cal. App.2d 324, 329, 30 Cal. Rptr. 868, 871 (1963).

5. The right exists only in case of extreme necessity and not where the landowner has another means of access, even though inconvenient. Marin County Hosp. Dist. v. Cicurel, 154 Cal. App.2d 294, 302, 316 P.2d 32, 37 (1957). See also Smith v. Shrbek, 71 Cal. App.2d 351, 360, 162 P.2d 674, 678 (1945).

6. Taylor v. Warnaky, 55 Cal. 350 (1880); Blum v. Weston, 102 Cal. 362, 369, 36 Pac. 778, 780 (1894); Reese v. Borghi, 216 Cal. App.2d 324, 30 Cal. Rptr. 868 (1963).

7. 32 Cal. 242 (1867).

8. Cal. Stats. 1861, Ch. 380, § 7, p. 392.

9. "[T]he legislature of this state . . . [i]n the plan devised by them . . . have for the purpose of classification divided roads into 'public and private,' and provided how they may be laid out and established and how maintained. The former are to be laid out and maintained at the expense of the county or road district at large, and are therefore called 'public.' The latter at the expense of such persons as are more especially and directly interested in them, and therefore called 'private.' But the latter are as much public as the former, for any one can travel them who has occasion--and no more can be said of the former." 32 Cal. at 253. See also 45 Ops. Cal. Atty. Gen. 98 (1965). Cf. Brick v. Keim, 208 Cal. App.2d 499, 503-504, 25 Cal. Rptr. 321, 323-324 (1962).

10. 32 Cal. at 255-256.

11. See Code Commissioners' Note to subdivision (6): "Subdivision 6 supersedes part of § 7 (Stats. 1861, p. 392), which prescribes

the mode for laying out private roads. This clause has been drawn to make it conformable to the decision in Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 597." The same word--"byroad"--was also used in subdivision (4) of Section 1238.

12. Cal. Stats. 1883, Ch. 10, p. 5. Section 2692 was held constitutional. Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700 (1890); Los Angeles County v. Reyes, 3 Cal. Unrep. 775, 32 Pac. 233 (1893); Lake County v. Allman, 102 Cal. 432, 36 Pac. 767 (1894); County of Madera v. Raymond G. Co., 139 Cal. 128, 72 Pac. 915 (1903).

13. Cal. Stats. 1913, Ch. 61, § 1, p. 62.

14. Cal. Stats. 1919, Ch. 73, § 1, p. 117.

15. Cal. Water Code § 150002, Cal. Stats. 1943, Ch. 368, p. 1895.

16. Cal. Stats. 1949, Ch. 883, § 6, p. 1652.

17. Cal. Stats. 1949, Ch. 883, §§ 1-5, p. 1652.

18. Cal. Stats. 1955, Ch. 1308, § 1, p. 2374.

19. Cal. Stats. 1961, Ch. 1354, § 1, p. 3133.

20. Streets and Highways Code Sections 969.5 and 1160-1197 provide a procedure for the improvement of a private easement or roadway not accepted or acceptable into the county highway system but upon which a permanent public easement is offered or a privately owned road where a right of way has been granted or leased to the county for its own use or for the use of the state or other public agency for public purposes, but these sections do not authorize condemnation. As to expenditure of public funds to maintain roads not accepted as county roads, see 45 Ops. Cal. Atty. Gen. 98 (1965).

21. 119 Cal. 164, 51 Pac. 34 (1897).

22. The mere fact that individuals have subscribed money or given a bond to a public entity to contribute toward the expense of establishing a public road would not make the taking one for "private" use. E.g., Santa Ana v. Harlin, 99 Cal. 538, 541, 34 Pac. 224, 226 (1893).

23. People v. Superior Court, 68 Cal.2d, 65 Cal. Rptr. 342, 436 P.2d 342 (1968), the leading California case on "excess condemnation," the Brief of Amicus Curiae in the Court of Appeal contended that the condemnor's rationale for the excess condemnation--that the remainder would be "landlocked"--was unsound:

> The condemnor's theory contains a fatal legal flaw. That flaw is the failure to recognize that in California, as a matter of law, there is no such thing as a "landlocked" parcel.
>
> Civil Code § 1001 provides that any person may exercise the power of eminent domain without further legislative action. C.C.P. § 1238 lists the various purposes for which such power may be used, including the acquisition of access to a highway.
>
> An application of the above principle may be found in Linggi v. Garovotti (1955) 45 Cal.2d 20 where a private individual was permitted to condemn a sewer easement across his neighbor's land. . . .
>
> It is, therefore, plain that just as Mr. Linggi did, the Rodonis [owners of remainder] can condemn an easement of access to Parcel 9 [the remainder], across neighboring land. The condemnor's "landlocked and therefore worthless" parcel theory therefore lacks merit. [Brief of Amicus Curiae in Court of Appeal at 7-8.]

The Department of Public Works did not dispute the possibility that the private owner could condemn a byroad, but pointed out that no "jury would be favorably inclined towards the condemnor were it to leave a property owner in such a predicament." [Reply of Petitioner to Memorandum in Opposition of Real Parties in Interest and Amicus Curiae Brief, Court of Appeal, at 4.]

24. See cases cited in note 12 supra.

25. 45 Cal.2d 20, 286 Pac. 15 (1955).

26. E.g., Komposh v. Powers, 75 Mont. 493, 244 Pac. 298 (1926), Derryberry v. Beck, 153 Tenn. 220, 280 S.W. 1014 (1926), State v. Superior Court, 145 Wash. 307, 260 Pac. 527 (1927). See also note 2 supra.

27. 23 F.2d 349 (1927).

28. Cal. Stats. 1921, Ch. 303, p. 404.

29. 23 F.2d at 350.

30. See discussion, supra, at p.____.

31. 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961).

32. See discussion supra, at p. ____.

33. See note 5, supra.

34. Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955).

35. Department of Public Works v. Farina, 29 Ill.2d 474, 194 N.E.2d 209 (1963); Luke v. Mass. Turnpike Auth., 337 Mass. 304, 149 N.E.2d 225 (1958); May v. Ohio Turnpike Comm., 172 Ohio St. 555, 178 N.E.2d 920 (1962); Tracy v. Preston, Director of Highways, 172 Ohio St. 567, 178 N.E.2d 923 (1962).

36. See People v. Superior Court, 68 Cal.2d ___, 65 Cal. Rptr. 342, 436 P.2d 342 (1968).

37. Id.

38. The bill would have added a new Section 1238.8 to the Code of Civil Procedure to read, in part, as follows:

> 1238.8. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:
> The acquisition of an easement by the owner of private property for which there is a strict necessity for an easement for access to a public road from such property. The easement which may be taken shall afford the most

reasonable access to the property for which the easement is taken consistent with other uses of the burdened land and the location of already established roads, and shall include the right to install or have installed utility facilities therein. The public shall be entitled, as of right, to use and enjoy the easement which is taken. The owner of the property for which the easement is taken shall maintain any such easement.

* * * * *

The bill was referred to interim study.

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# STUDY RELATING TO INVERSE CONDEMNATION

## EXPLORATORY SURVEYS AND INVESTIGATIONS

by

Arvo Van Alstyne*

* This study was prepared for the California Law Revision Commission by Professor Arvo Van Alstyne, College of Law, University of Utah. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

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Exploratory surveys and investigations. Many California statutes authorize public officers, in the performance of their duties, to enter private property for the purpose of inspection, examination, or survey.[359] The courts have long recognized that such entry and related activity, when limited to conduct reasonably related and incidental to the carrying out of validly authorized public duties, does not constitute a trespass or other basis for liability of the public employee, but is privileged.[360] On the other hand, if the officer conducting the survey engages in a tortious act, negligent or intentional, that constitutes an abuse of the privilege, the common law deemed him personally liable ab initio for the initial trespass as well as all resulting injuries sustained by the property owner.[361]

The applicable decisional law, in this regard, was modified by the California Tort Claims Act of 1963. Public entities and public employees are declared immune from tort liability for injuries arising out of an entry on private property which is expressly or impliedly authorized by law, but this immunity does not apply to injuries caused by the employee's "own negligent or wrongful act or omission".[362] As long as the employee remains within the scope of the authorization under which the entry was made, and acts with reasonable care and in good faith, neither he nor the employing entity are responsible in tort.

Freedom from tort liability, however, does not absolve the public entity from inverse condemnation liability. While it is clear that statutes authorizing privileged trespasses on private property in the furtherance of legitimate public business are generally valid,[363] their constitutionality

is predicated chiefly upon the judicial view that the alleged interference with private property rights is ordinarily slight in extent, temporary in duration, and de minimis in amount.[364] As the leading California case of Jacobsen v Superior Court[365] declares, a privilege of entry for official purposes will be construed to extend only to "such innocous entry and superficial examination . . . as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property"[366]. Minor and trivial injuries, in effect, are noncompensable; the public purpose to be served by the entry requires subordination of private property rights to this limited extent, at least.

The proposed entry before the court in Jacobsen, however, contemplated the occupation of parts of the owner's ranch for some two months by employees of a municipal water district, and their use of power machinery to make a number of test borings and excavations of the soil to determine the suitability of the premises for use as a possible water reservoir. Recognizing that the resulting damages would not be a basis of tort liability, absent negligence, wantonness, or malice, the Supreme Court nevertheless concluded that they would constitute an unconstitutional damaging of the owner's right to possession and enjoyment of his property. An order of the trial court enjoining the owner from interfering with the district's proposed entry and exploratory survey was annulled by writ of prohibition, since no condemnation proceedings had been commenced and compensation had not been "first made to or paid into court" for the owner, as required by section 14 of article 1 of the state constitution. The district's argument grounded on necessity was rejected;

the fact that extensive soil testing, to depths up to 150 feet, was deemed essential to an intelligent evaluation of the suitability of the site for reservoir purposes - a determination that necessarily must precede any decision to institute condemnation proceedings - was insufficient to justify the substantial interference with private property rights that was required.

The restrictive holding in the Jacobsen case has been obviated by a special statutory procedure, enacted in 1959, as Section 1242.5 of the Code of Civil Procedure. Public entities with power to condemn land for reservoir purposes are authorized to petition the superior court for an order permitting an exploratory survey of private lands to determine their suitability for reservoir use, when the owner's consent cannot be obtained by agreement. The order, however, must be conditioned upon the deposit with the court of cash security, in an amount fixed by the court, sufficient to compensate the owner for damage resulting from the entry, survey, and exploration, plus costs and attorneys fees incurred by the owner.

Section 1242.5 is a useful starting point for consideration of a more generalized legislative approach to the compensation of property owners who incur substantial damage from privileged official entries upon their property. It seems evident that reservoir site investigations are not the only type of privileged official entry that may cause significant private detriment.[367] As a model for remedial legislation, however, Section 1242.5 is somewhat defective in several respects. For example, even if its scope were expanded by amendment to include entries for purposes other than reservoir surveys, Section 1242.5 would probably be

unnecessarily broad. As the Supreme Court in the Jacobsen case
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recognized, there are many types of surveys that can readily be made without major interference with ownership rights or physical injury to the land other than incidental and superficial disturbance to grass, shrubs, or other vegetation; actual damages in such cases are usually purely nominal and, at best de minimis. To require the formality of a preliminary court order in all such cases would be unduly burdensome,
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time-consuming, and unrewarding, as well as constitutionally unnecessary.

What is required, it is suggested, are general statutory criteria limiting invocation of the Section 1242.5 procedure to those cases in which its safeguards are most urgently required, but dispensing with the procedure in other instances. The legislature, for instance, might make the procedure mandatory only when (as now) the owner's consent is not obtainable through negotiations, and the planned survey includes the digging of excavations, drilling of test holes or borings, extensive cutting of trees, clearing of land areas, moving of quantities of earth, use of explosives, or employment of vehicles or mechanized equipment.

Consideration should also be given to the development of inducements to private agreements that would avoid the necessity for invoking the formal statutory procedure. Public entities seeking authority to survey, for example, might be in a better position to obtain the owner's consent if the statute expressly required the entity at its sole expense to repair
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and restore the property, so far as possible, after the survey is concluded and, in addition, to compensate the owner for damages incurred by reason of its inability to fully restore the premises to their previous condition.

Contrary to the prevailing pattern of California laws (other than Section 1242.5), which limit liability in such cases to tortiously inflicted damages,[371] the statutes of other states, which authorize official entries upon private property for survey and investigational purposes, typically require the entity to reimburse the owner for "any actual damage" resulting therefrom.[372] Moreover, since the owner may fear that some injuries will occur despite the entity's assurances to the contrary, authority for the entity to pay the owner a reasonable amount as compensation for prospective apprehension and annoyance (in addition to assurance of payment of actual damages) may also usefully assist in promoting owner cooperation through negotiation.

Section 1242.5 has additional minor defects that should be corrected if it is to be employed more widely. It is not entirely clear whether the court proceedings preliminary to the order for the survey are ex parte or on notice to the owner;[373] assurance of a fully informed decision with respect to the amount of the security to be required strongly argues the need for a noticed hearing with opportunity for presentation of evidence by the owner. If in the course of the survey, the deposit becomes inadequate because of unforeseen injuries inflicted, the court should be authorized to require deposit of additional security and the statute should indicate the procedures open to the owner to obtain such an order. Furthermore, Section 1242.5 is silent on the scope of the court's authority to investigate the techniques of exploration and survey that are contemplated, and its power to impose limitations and restrictions upon their use in the interest of reducing the prospective damages or requiring utilization of the least

detrimental techniques where alternatives are technologically feasible. It also fails to provide for remedies available to the owner when a public entity fails to invoke the statutory procedure, whether inadvertently or by design. Finally, although Section 1242.5 expressly authorizes the landowner to recover, out of the deposited security, compensation for the damages caused by the survey, plus court costs and a reasonable attorney fee "incurred in the proceeding before the court", it is not clear what "proceeding" is referred to - the initial proceeding leading to the order permitting the survey, or the subsequent proceeding to obtain compensation for the damages incurred, or both. Ambiguities of this sort should be clarified in any new legislation based on Section 1242.5.

359. See, e.g., Cal. Code Civ. Proc. §1242 (surveys of land required for public use); Cal. Health & S. Code § 2270(f) (investigations and nuisance abatement work by mosquito abatement district); Cal. Water Code § 2229 (surveys for irrigation district purposes). For a comprehensive list of citations, see Van Alstyne, A Study Relating to Sovereign Immunity, in 5 Reports, Recommendations and Studies 1, 110-19 (Cal. Law Revision Comm'n ed. 1963).

360. Onick v. Long, 154 Cal. App. 2d 381, 316 P.2d 427 (1st Dist. 1957) (by implication); Giacona v. United States, 257 F.2d 450 (5th Cir. 1958); Johnson v. Steele County, 240 Minn. 154, 60 N.W.2d 32 (1953); Commonwealth v. Carr, 312 Ky. 393, 227 S.W.2d 904 (1950); Restatement, Torts § 211 (1934); 1 Harper & James, The Law of Torts §1.20, pp. 56-57 (1956).

361. Restatement, Torts § 214 (1934), apparently approved as the California rule in Reichhold v. Sommarstrom Inv. Co., 83 Cal. App. 2d 173, 256 Pac. 592 (1927) and Onick v. Long, supra note 360. See also, Heinze v. Murphy, 180 Md. 423, 24 A.2d 917 (1942); 1 Harper & James, The Law of Torts § 1.21, pp. 58-59 (1956).

362. Cal. Govt. Code § 821.8. See Van Alstyne, California Government Tort Liability § 5.62 (1964).

363. Irvine v. Citrus Pest Dist. No. 2 of San Bernardino County, 62 Cal. App. 2d 378, 144 P.2d 857 (4th Dist. 1944); County of Contra Costa v. Cowell Portland Cement Co., 126 Cal. App. 267, 14 P.2d

606 (1st Dist. 1932) (by implication). See Annot., 29 A.L.R. 1409 (1924).

364. Jacobsen v. Superior Court, 192 Cal. 319, 219 Pac. 986 (1923); Dancy v. Alabama Power Co., 198 Ala. 504, 73 So. 901 (1916). See also, Litchfield v. Bond, 186 N.Y. 66, 78 N.E. 719 (1906).

365. 192 Cal. 319, 219 Pac. 986 (1923).

366. Id. at , 219 Pac. at 991. Accord, Dancy v. Alabama Power Co., supra note 364.

367. The possibility that substantial injuries may result from official entries upon private property for purposes other than reservoir site investigations is well illustrated in reported cases. See, e.g., Onorato Bros. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142 N.E.2d 389 (1957) (highway route survey); Wood v. Mississippi Power Co., 245 Miss. 103, 146 So.2d 546 (1962) (utility line route survey); Rhyne v. Town of Mt. Holly, 251 N.C. 521, 112 S.E. 2d 40 (1960) (weed abatement work).

368. Jacobsen v. Superior Court, supra note 366.

369. See 2 P. Nichols, Eminent Domain § 6.11 (rev. 3d ed. 1963); Annot., 29 A.L.R. 1409 (1924). Disproportionate costs of administering a system for settlement of nominal inverse condemnation claims is a rational basis for withholding compensation for trivial injuries. See Michelman, Property, Utility, and

Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1214 (1967). Cf. Bacich v. Board of Control, 23 Cal. 2d 343, , 144 P.2d 818, 839 (1943) (Traynor, J., dissenting).

370. Precedent for imposition of a duty to restore the previous condition of the premises is found in numerous statutes providing, in connection with authorization for the construction of public improvements and facilities in or across streets, rivers, railroad lines, and the like, that the public entity "shall restore" the intersection, street, or other location to its former state. See, e.g., Cal. Health & S. Code § 6518 (sanitary districts); Cal. Pub. Util. Code § 16466 (public utility districts); Cal. Water Code § 71695 (municipal water districts). Statutory provisions to this effect are collected in Van Alstyne. A Study Relating to Sovereign Immunity, in 5 Reports, Recommendations and Studies 1, 91-96 (Cal. Law Rev. Comm'n ed. 1963).

371. Van Alstyne, California Government Tort Liability § 5.62 (1964).

372. See, e. g., Kans. Stat. Ann § 68-2005 (1964) (entry by turnpike authority to make "surveys, soundings, drillings and examinations" authorized; authority required to make reimbursement for "any actual damages"); Mass. Laws Ann. c. 81 § 7F (1964) (entry by highway department for "surveys, soundings, drillings or examinations" authorized; department required to restore lands to previous

condition, and to reimburse owner for "any injury or actual damage"); Ohio Rev. Code Ann. § 163.03 (Supp. 1966) (condemning public agencies authorized, prior to instituting eminent domain proceedings, to enter to make "surveys, soundings, drillings, appraisals, and examinations" after notice to owner; agency required to "make restitution or reimbursement for any actual damage resulting" to the premises or improvements and personal property located thereon); Okla. Stat. Ann. tit. 69 §§ 46.1, 46.2 (Supp. 1966) (entry by department of highways to make "surveys, soundings and drillings, and examinations" authorized; department required to make reimbursement for "any actual damages resulting" to premises); Pa. Stat. Ann. tit. 26 § 1-409 (Supp. 1966) (condemning agencies authorized to enter property, prior to filing declaration of taking, to make" studies, surveys, tests, soundings and appraisals"; agencies required to pay "any actual damages sustained" by owner).

The courts have experienced no difficulty in construing statutes of this type as limited to reimbursement for substantial physical damages only. See, e.g., Onorato Bros. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142 N.E.2d 389 (1957) (no recovery authorized for "trivial" damage caused by setting of surveyors' stakes, nor for temporary loss of marketability due to apprehension by prospective buyers that property being surveyed would be condemned in near future). Cf. Wood v. Mississippi Power Co., 245 Miss. 103, 146 So.2d 546 (1962).

373. In analogous situations, absent an express statutory requirement for notice and hearing, the courts have required only ex parte proceedings. See, e.g., People v. 2,624 Thirty-Pound Cans of Frozen Eggs, 224 Cal. App. 2d 134, 36 Cal. Rptr. 427 (2d Dist. 1964), construing Cal. Agric. Code § 1145b (court order for abatement of contaminated egg products). The interest in urgency and efficiency of administrative action to eradicate health menaces, however, has generally been deemed to justify dispensing with notice and hearing before abatement in such cases. North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908). Since no elements of emergency exist in cases of entries for survey and testing purposes, however, it is doubtful that ex parte proceedings would meet the requirements of procedural due process. Cf. People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932) (notice and hearing required before narcotics forfeiture of vehicle is effective); Thain v. City of Palo Alto, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515 (1st Dist. 1962) (notice and hearing required, absent emergency, before weed abatement action taken on private property). Compare City of Los Angeles v. Schweitzer, 200 Cal. App.2d 448, 19 Cal. Rptr. 429 (2d Dist. 1962)(on appeal from order for reservoir survey made under Cal. Code Civ. Proc. § 1242.5, report fails to indicate whether owner received notice and hearing; interlocutory order held nonappealable).

374. Compare City of Los Angeles v. Schweitzer, 200 Cal. App. 2d 448, 19 Cal. Rptr. 429 (2d Dist. 1962). By motion, the owner of

land subject to a reservoir-survey order granted under Cal. Code Civ. Proc. § 1242.5 sought modification of the order to increase the amount of the city's security deposit, and to impose specific limitations (e.g., time limits, maximum number of test holes and trenches authorized to be excavated) and other conditions (e.g., city to supply owner with geological, survey, and topographical data, to hold owner harmless from liability for any injuries to third persons resulting from city's activities during survey, and to restore premises to previous condition on termination of survey) upon the city's activities. The trial court ordered an increase in the security deposit, but denied the other requested modifications. The grounds of the denial are not stated in the appellate report, and the owner's appeal was dismissed for want of jurisdiction, the order being deemed interlocutory.