

#36.204

3/20/70

First Supplement to Memorandum 70-27

Subject: Study 36.204 - Condemnation (The Declared Public Uses--Condemnation for State Purposes)

The repeal of Section 1238 of the Code of Civil Procedure can be recommended only after adequate provision has been made in other statutes to retain the substance of the portions of that section that have current force and need to be retained.

Subdivision 2 of Section 1238 authorizes condemnation for public buildings and grounds for the use of a state, state institution, or non-profit college or university. Attached as Exhibit I is a Comment prepared by the staff indicating the effect of the repeal of subdivision 2. The attached background research study contains a full discussion of condemnation authority for general state purposes and of subdivision 2. We urge you to read the study since it will give you background information that will be helpful to you in our work on condemnation law and procedure.

Exhibit I, as revised by the Commission, should be tentatively approved at the April meeting. The background study also recommends that the Department of General Services be requested to assist in revising the statutes authorizing condemnation for state purposes so that the statutes will reflect the actual practice.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

CODE OF CIVIL PROCEDURE § 1238

Staff recommendation

Subdivision 2

~~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.~~

Comment. Insofar as subdivision 2 authorizes takings for state purposes, it is unnecessary because it has been superseded by the much broader condemnation powers conferred upon the Director of the Department of General Services and the State Public Works Board. See Govt. Code §§ 14660-14662. See also Govt. Code §§ 15853-15858. Insofar as the subdivision might authorize condemnation on behalf of a state other than California, it is not continued. Takings under the eminent domain power of one state for the benefit of another state raise serious problems under the public use doctrine. See 1 P. Nichols, Eminent Domain § 2.112 (3d ed. 1964). If property is to be condemned by or for another state for a particular purpose, the taking should be authorized by a specific statute dealing with the specific situation. E.g., Water Code § 5901, Art. VI, § A (Klamath River Basin Compact). The authorization in subdivision 2 for acquisitions for nonprofit colleges and universities ("institution . . . which is exempt from taxation under the provisions of Section 1a, of Article XIII of the

Constitution of the State of California") is continued in Section 30051 of the Education Code. The reference in subdivision 2 to "all other public uses authorized by the Legislature of the State of California" was superfluous and had no substantive effect.

THE DECLARED PUBLIC USES: CCP § 1238(2)--
PUBLIC BUILDINGS AND GROUNDS FOR
THE STATE, STATE INSTITUTIONS, AND NONPROFIT COLLEGES*

*This study was prepared for the California Law Revision Commission by the Commission's legal staff. 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.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

#36.204

THE DECLARED PUBLIC USES: CCP § 1238(2)--
PUBLIC BUILDINGS AND GROUNDS FOR
THE STATE, STATE INSTITUTIONS, AND NONPROFIT COLLEGES

The repeal of Section 1238 of the Code of Civil Procedure can be recommended only after adequate provision has been made in other statutes to retain the substance of the portions of that section that have current force and need to be retained. This study is concerned with subdivision 2 of Section 1238.

Background

As adopted in 1872, subdivision 2 of Code of Civil Procedure Section 1238 authorized condemnation for "public buildings and grounds for the use of the State, and all other public uses authorized by the Legislature of this State." The reference to "other public uses" was and remains superfluous, but under early acquisitive practices followed by the state, the reference to "public buildings and grounds" was a meaningful authorization to condemn.¹ The subdivision has been amended only once.² That amendment introduced several uncertainties into the subdivision by authorizing condemnation for:

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.

The apparent purpose of the amendment was merely to confer the power of eminent domain on private universities,³ but the change introduced two uncertainties (1) by changing the phrase "the State" to "a state" and (2) by adding the reference to "any state institution."

Other States

It seems incredible to ascribe to the Legislature the purpose of authorizing condemnation on behalf of any state other than California. Takings under the eminent domain power of one state for the benefit of another state or for the benefit of citizens of the other state raise serious problems under the public use doctrine.⁴ Whatever may have been the intention of changing "the State" to "a state," the Legislature should reserve the matter of taking property by or for another state for its own exercise in discrete and particular situations as they may arise.⁵

State Institutions

Addition of the reference to "any state institution" may, at one time, have provided a viable authorization to condemn. Although the phrase "state institution" is not one of art, there were entities aptly described as "state institutions" that managed their own property acquisition and were considered to have the power of condemnation.⁶ All of these institutions, however, appear to have been brought within the ambit of a state agency for which agency property is acquired by the Department of General Services and the State Public Works Board. For example, each of the many state hospitals is formed as a corporation⁷ and is authorized to acquire property "by gift, grant, devise, or bequest."⁸ Since 1937, Section 4104 of the Welfare and Institutions Code and its predecessors has provided that:

All lands necessary for the use of state hospitals except those acquired by gift, devise, or purchase, shall be acquired by condemnation as lands for other public uses are acquired.

Whatever this language may have meant in the past, it has no current force because the state hospitals have been brought under the "jurisdiction" of the Department of Mental Hygiene,⁹ and property acquisition for that

department is effected by the Department of General Services and the State
Public Works Board. There are two additional categories of state hospitals
--for the mentally disordered and the mentally retarded --to which all
of the foregoing applies.

The penal institutions, which are numerous and which were established
in various ways, have been brought under the jurisdiction of the Depart-
ment of Corrections. Similarly, institutions for juveniles have been
placed in the Department of the Youth Authority, and the veterans' insti-
tutions--specifically the Veterans' Home of California--in the Department
of Veterans Affairs. For all of these state agencies, of course, prop-
erty acquisition is conducted by the Department of General Services and
the State Public Works Board. Thus, in summary, it would appear that the
authorization to condemn for state institutions has been rendered obsolete
by the centralization of those institutions in departments and agencies
for which another scheme of property acquisition is provided.

The state educational institutions have been discussed in a separate
study, and recommendations were made in that study for the revisions made
necessary by the repeal of Section 1238.

Buildings and Grounds for Use of the State

Turning to the authorization respecting buildings and grounds for the
use of the state, it appears that the authorization has been totally
eclipsed by much more expansive condemnation powers conferred upon the
Director of the Department of General Services and the State Public Works
Board. Since 1965, the acquisition of property for the general purposes
of the state government has been centralized in the Department of General
Services. The director is authorized to acquire property in the name of

the state whenever such acquisition is "authorized or contemplated by law, if no other state agency is specifically authorized and directed to acquire it." ¹⁹ He is also authorized to bring condemnation proceedings to obtain "any land authorized by law to be obtained for any state agency, except land to be acquired . . . for highway purposes, if no other state agency is specifically authorized and directed to institute such proceedings." ²⁰ He is separately authorized to condemn "any easements or rights-of-way which he determines to be necessary for the proper utilization of real property owned or being acquired by the state." ²¹

The State Public Works Board, consisting of the Director of Finance, ²² the Director of Public Works, and the Director of General Services, is authorized to "select and acquire . . . suitable and adequate real property for such purposes as may be specified in the legislation making funds available for such acquisition." ²³ Interestingly, such acquisition is required to be by condemnation as to parcels costing more than \$5,000 unless the compensation is agreed to by the property owner and the board ²⁴ determines by unanimous vote that the price is "fair and reasonable." With respect to its condemnation proceedings, the board is given a set of prerogatives similar to those possessed by the Highway Commission and the Department of Water Resources including (1) the power to determine the particular interest that it shall acquire, ²⁵ (2) a conclusive effect to its resolution to condemn, ²⁶ (3) a declaration that the state's use of the property is "a more necessary public use" than any other public use to which the property may have been previously devoted, ²⁷ and (4) a power to take private property for the purpose of exchanging it for any public-use ²⁸ property that has been taken by the board.

Nonprofit Colleges and Universities

Subdivision 2 of Section 1238 also provides that the power of eminent domain may be exercised in behalf of "public buildings and grounds for use of . . . 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 . . ." Section 1a of Article XIII of the California Constitution provides that "any educational institution of collegiate grade, within the State of California, not conducted for profit, shall hold exempt from taxation its buildings and equipment, its grounds within which its buildings are located, its securities and income used exclusively for the purposes of education." These sections are construed to give a private college or university which is included within the constitutional provision²⁹ the power of eminent domain even though it is not specifically mentioned in the Education Code.³⁰ This³¹ authorization of the exercise of eminent domain should be retained.

Recommendation

The only current force of subdivision 2 is to authorize takings by and for private universities. The subdivision should therefore be deleted and the authorization respecting private universities should be appropriately codified in the Education Code. The Commission has already determined to do this. In addition, it is apparent that the statutes governing condemnation for state purposes need to be adjusted to reflect the actual practice, and it is recommended that the Department of General Services be requested to submit suggestions for clarification of these statutes.

THE DECLARED PUBLIC USES--CCP § 1238(2)

1. See, e.g., Kern County High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919)(condemnation of site for school district building).
2. Cal. Stats. 1929, Ch. 241, § 1, p. 478.
3. See the discussion of condemnation for nonprofit colleges and universities, infra.
4. For a full discussion, see 1 P. Nichols, Eminent Domain § 2.112 (3d ed. 1964).
5. Only rarely has the Legislature authorized condemnation for the benefit of another state or its citizens. For example, the Klamath River Basin Compact between Oregon and California, as ratified by California in 1959, provides:
 - A. Subject to approval of the commission, either state shall have the right (1) to acquire such property rights in the other state as are necessary for the diversion, storage, conveyance, measurement and use of water in conformity with this compact, by donation or purchase, or (2) to elect to have the other state acquire such property rights for it by purchase or through the exercise of the power of eminent domain. A state making the latter election shall make a written request therefor and the other state shall expeditiously acquire said property rights either by purchase at a price satisfactory to the requesting state, or, if such purchase cannot be made, then through the exercise of its power of eminent domain, and shall convey said property rights to the requesting state or its designee. All costs of such acquisition shall be paid by the requesting state. Neither state shall have any greater power to acquire property rights for the other state through the exercise of the power of eminent domain than it would have under its laws to acquire the same property rights for itself. [Water Code § 5901, Art. VI, § A.]
6. See, e.g., McNeil v. Kingsbury, 190 Cal. 406, 213 P. 50 (1923)(concerning Norwalk--now Metropolitan--State Hospital).
7. Welf. & Inst. Code § 4102.

8. Welf. & Inst. Code § 4103.
9. Welf. & Inst. Code § 4100.
10. See Govt. Code §§ 14660, 14661, 15850 et seq.
11. Welf. & Inst. Code § 7200.
12. Welf. & Inst. Code § 7500.
13. Cf. People v. Superior Court, 10 Cal.2d 288, 73 P.2d 1221 (1937).
14. Penal Code § 5003.
15. Welf. & Inst. Code § 1760.
16. Mil. & Vets. Code § 1011.
17. See Staff Study, The Right to Condemn for Educational Purposes (1/22/70).
18. Govt. Code § 14600.
19. Govt. Code § 14660.
20. Govt. Code § 14661.
21. Govt. Code § 14662.
22. Govt. Code § 15770 (two Senators and two Assemblymen are appointed to meet with and participate in the work of the board).
23. Govt. Code § 15853.
24. Govt. Code § 15854. The board, however, may stipulate to the amount of compensation in condemnation proceedings. See Govt. Code § 15857.
25. Govt. Code § 15853.

26. Govt. Code § 15855.
27. Govt. Code § 15856. For an application of this declaration, see State v. Los Angeles, 256 Cal. App.2d 930, 64 Cal. Rptr. 476 (1967).
28. Govt. Code § 15858.
29. Leland Stanford Junior University is provided for in Education Code Sections 30000-30031. Section 30031 provides that "the exemption from taxation of the Leland Stanford Junior University is as provided in Section 1a of Article XIII of the Constitution" Thus, Stanford University has the power of eminent domain.
30. University of So. Calif. v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934), cert. denied, 295 U.S. 738 ().
31. For further discussion, see Staff Study, The Right to Condemn for Educational Purposes (1/22/70).