

#36.20(1)

3/25/70

Memorandum 70-36

Subject: Study 36.20(1) - Condemnation (The Declared Public Uses--Disposition
of Section 1238(18)--Trees Along Highways)

Subdivision 18 of Section 1238 authorizes condemnation to provide for the culture and growth of trees along highways. The subdivision duplicates Streets and Highways Code Section 104(f) and should not be continued when Section 1238 is repealed.

Attached as Exhibit I is a Comment to subdivision 18. This should be tentatively approved.

Also attached is a staff background study on subdivision 18.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Memorandum 70-36

EXHIBIT I

CODE OF CIVIL PROCEDURE § 1238

Staff recommendation

Subdivision 18

~~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.~~

Comment. Subdivision 18 is not continued. This subdivision merely duplicated subdivision (f) of Section 104 of the Streets and Highways Code.

THE DECLARED PUBLIC USES

Trees Along Highways

Subdivision (18) was added to Section 1238 of the Code of Civil Procedure in 1915¹ to authorize condemnation to provide² for the culture and growth of trees along highways.

Although the subdivision does not identify the agencies or entities to which it is directed, it is clear from the context of its enactment that it authorizes condemnation only by the State Department of Public Works. The subdivision was added by Chapter 31 of the Statutes of 1915 and addition of the subdivision was the only change made by that chapter. However, Chapter 23 of the statutes of that year authorized the department of engineering (a predecessor of the State Department of Public Works) to acquire³ property for the identical purposes specified in the subdivision. Through a course of statutory evolution, this provision has become codified as subdivision (f) of Streets and Highways Code Section 104, which authorizes the taking of property by the Division of Highways.

Although this derivation clearly ~~indicates~~, the limited intention of the Legislature in adding subdivision (18), it is possible to argue that the subdivision authorizes condemnation by counties, cities, and various districts that might logically undertake the provision of amenities along "highways." The fact, however, that no case in which the subdivision has been involved has ever reached the appellate courts would indicate that the authorization has been seldom, if ever, used. Also, the word "highway" in the subdivision might be considered to be used in the technical sense of meaning only state and county highways rather⁴ than generically to refer to any public way. Cities and counties

does not appear to be expressly authorized to provide the amenity contemplated by subdivision (18),⁵ but it seems clear that the taking of property to provide trees along streets and highways could be accomplished under condemnation authorizations relating to parks, street and highway work, and improvements undertaken pursuant to the various improvement acts. Subdivision (18) also duplicates, at least in part, the "protective condemnation" authorized by Section 14-1/2 of Article I of the California⁶ Constitution.

Therefore, it would appear to be appropriate to simply delete subdivision (18) as being a superfluous duplication of Streets and Highways Code Section 104(f).

THE DECLARED PUBLIC USES
TREES ALONG HIGHWAYS
FOOTNOTES

1. Cal. Stats. 1915, Ch. 31, § 1, p. 38.

2. The subdivision authorizes condemnation for:

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.

3. That chapter reads as follows:

The department of engineering may acquire for and in the name of the people of the State of California, by purchase, donation, dedication or by proceedings in eminent domain, rights of way, land or trees and ground necessary for the culture and support thereof on or along the course of any state highway, within a maximum distance of three hundred feet on each side of the center thereof, in any case when the acquisition of such rights of way, land and trees will be for the benefit of a state highway in aiding in the maintenance and preservation of the roadbed of such highway or aid in the maintenance and preservation of the attractions and scenic beauty thereof.

4. See Criswell v. Pac. Elec. Ry. Co., 48 Cal.2d 120 P.2d 679 (1942).

5. Compare, however, the Tree Planting Act of 1931 (Sts. & Hwys. Code §§ 22000-22202) which makes elaborate provision for the planting and maintenance of trees within city streets. See Sts. & Hwys. Code § 22080.

6. See, infra, at page ____.