

#36.20(2)

4/17/70

Memorandum 70-44

Subject: Study 36.20(2) - Condemnation (The Right to Take--Statute)

Attached is the revised statute containing provisions tentatively approved and certain provisions recommended by the staff. This revised version reflects the actions at the April meeting.

In connection with condemnation for "byroads," Senate Bill 110 of the current session has been amended to conform in substance to our tentative recommendation. One change in the statutory language we recommended was made in drafting the amendments to Senate Bill 110 by the staff of the Commission working with the counsel to the Senate Judiciary Committee. We suggest that the attached statutory provision be conformed to this change.

Subdivision (b) of Proposed Section 345 of the Comprehensive Statute (attached green pages) should be revised to read:

(b) Where a public entity furnishes access to property cut off from access to a public road as a result of the acquisition of property for public use by the public entity, the fact that such access is furnished shall be taken into account in determining the damage to the property which is not acquired for public use.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

COMPREHENSIVE STATUTE § 1

Tentatively approved April 1970

DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

§ 1. Short title

1. This code shall be known as the Eminent Domain Code.

COMPREHENSIVE STATUTE § 3

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 3. Constitutionality

3. If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 4. Construction of code

4. Unless the provision or context otherwise requires, these preliminary provisions and rules of construction shall govern the construction of this code.

COMPREHENSIVE STATUTE § 5

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 5. Effect of headings

5. Division, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code.

COMPREHENSIVE STATUTE § 6

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 6. References to statutes

6. Whenever any reference is made to any portion of this code or to any other statute, such reference shall apply to all amendments and additions heretofore or hereafter made.

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 7. "Division," "chapter," "article," "section," "subdivision," and "paragraph"

7. Unless otherwise expressly stated:

(a) "Division" means a division of this code.

(b) "Chapter" means a chapter of the division in which that term occurs.

(c) "Article" means an article of the chapter in which that term occurs.

(d) "Section" means a section of this code.

(e) "Subdivision" means a subdivision of the section in which that term occurs.

(f) "Paragraph" means a paragraph of the subdivision in which that term occurs.

COMPREHENSIVE STATUTE § 8

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 8. Construction of tenses

8. The present tense includes the past and future tenses; and the future, the present.

COMPREHENSIVE STATUTE § 9

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 9. Construction of genders

9. The masculine gender includes the feminine and neuter.

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 10. Construction of singular and plural

10. The singular number includes the plural; and the plural, the singular.

COMPREHENSIVE STATUTE § 11

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 11. "Shall" and "may"

11. "Shall" is mandatory and "may" is permissive.

COMPREHENSIVE STATUTE § 100

Tentatively approved April 1970

DIVISION 2. WORDS AND PHRASES DEFINED

§ 100. Application of definitions

100. Unless the provision or context otherwise requires,
these definitions govern the construction of this code.

Words and Phrases Defined

§ 101. Property

101. "Property" includes real and personal property and any right or interest therein and, by way of illustration and not by way of limitation, includes rights of any nature in water, subsurface rights, airspace rights, flowage or flooding easements, aircraft noise or operation easements, rights to limit the use or development of property, public utility franchises, and franchises to collect tolls on a bridge or highway.

Comment. Section 101 is intended to provide the broadest possible definition of property and to include any type of interest in property that may be required for public use. It is expected that this definition will be improved as the Commission's work on condemnation law progresses.

Tentatively approved April 1970

Words and Phrases Defined

§ 102. Nonprofit college

102. "Nonprofit college" means an educational institution that is authorized to exercise the power of eminent domain under Section 30051 of the Education Code.

Comment. Section 30051 is a new section to be added to the Education Code in the legislation relating to the right to take.

COMPREHENSIVE STATUTE § 104

Tentatively approved April 1970

Words and Phrases Defined

§ 104. City

104. "City" includes city and county.

COMPREHENSIVE STATUTE § 105

Tentatively approved April 1970

Words and Phrases Defined

§ 105. County

105. "County" includes city and county.

COMPREHENSIVE STATUTE § 106

Tentatively approved April 1970

Words and Phrases Defined

§ 106. Local public entity

106. "Local public entity" means any public entity other than the state.

Words and Phrases Defined

§ 107. Person

107. "Person" includes any public entity, individual, firm, association, organization, partnership, trust, corporation, or company.

COMPREHENSIVE STATUTE § 108

Tentatively approved April 1970

Words and Phrases Defined

§ 108. Public entity

108. "Public entity" includes the state, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

Comment. The term "public corporation" is included subject to further review.

COMPREHENSIVE STATUTE § 109

Tentatively approved April 1970

Words and Phrases Defined

§ 109. State

109. "State" means the State of California and includes the Regents of the University of California.

COMPREHENSIVE STATUTE § 110

Tentatively approved April 1970

Words and Phrases Defined

§ 110. Statute

110. "Statute" means a constitutional provision or statute,
but does not include a charter provision or ordinance.

COMPREHENSIVE STATUTE § 200 et seq.

Staff recommendation

DIVISION 3. GENERAL PROVISIONS

Chapter 1. Right of eminent domain may be exercised only as provided in this code unless otherwise specifically provided by statute.

Staff recommendation

DIVISION 4. THE RIGHT TO TAKE

CHAPTER 1. The right to exercise the power of eminent domain

- Article 1. Statutory authorization required to exercise power
- Article 2. Property interest that may be acquired (including "protective condemnation")
- Article 3. Right to take property outside territorial limits of entity
- Article 4. Condemnation for future use
- Article 5. Substitute condemnation
- Article 6. Excess condemnation
- Article 7. Joint exercise of power
- Article 8. Preliminary location, survey, and tests
- Article 9. Failure to devote property to use for which taken

CHAPTER 2. Public necessity

CHAPTER 3. More necessary public use

CHAPTER 4. Property exempt from condemnation

COMPREHENSIVE STATUTE § 300

Tentatively approved April 1970

The Right to Take

§ 300. Eminent domain may be exercised only where authorized by statute

300. The power of eminent domain may be exercised to acquire property for a public use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use.

Tentatively approved April 1970

The Right to Take§ 310. Right to acquire a fee or any lesser interest

310. Except to the extent limited by statute, a public entity, public utility, or nonprofit college that is authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire the fee or such other right or interest in property that is necessary for that use.

Comment. Section 310 supersedes Section 1239 of the Code of Civil Procedure insofar as that section specified the type of interest--whether a fee or lesser interest--that might be acquired by eminent domain.

Section 310 generally codifies the former law that permitted a public entity to take whatever interest it determined to be necessary. See Code Civ. Proc. § 1239(4)(local public entities). However, under former law, most privately owned public utilities were permitted to acquire only an easement unless the taking was for "permanent buildings." See Code Civ. Proc. § 1239(1).

"Property" is broadly defined in Section 101 of the Comprehensive Statute to include the fee or any interest or right in property.

Note. Only the interest that is necessary for a particular use may be taken. The decision of what interest is necessary and the procedures for making such decision and the related decisions concerning the issues of "necessity" are a separate subject.

Tentatively approved April 1970

The Right to Take

§ 345. Condemnation to provide access to public road

345. (a) 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.

(b) Where a public entity furnishes or offers to furnish access pursuant to subdivision (a), the damage to the property which is not acquired for public use shall be determined as if such access were furnished, and the public entity shall furnish such access if the owner so requests.

Comment. Section 345 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

COMPREHENSIVE STATUTE § 345

Tentatively approved April 1970

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. 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).

Subdivision (b) of Section 345 is included to insure that, where a condemnor provides an access road to property to replace lost access or offers to make such provision, the provision or offer will receive proper consideration as a mitigating factor in determining compensation for the damage, if any, to the property not acquired.

Tentatively approved February 1970
Revised April 1970

The Right to Take

§ 360. Joint exercise of condemnation power

360. (a) As used in this section, "public agencies" includes all those agencies included within the definition of "public agency" in Section 6500 of the Government Code.

(b) Two or more public agencies may enter into an agreement for the joint exercise of their respective powers of eminent domain, whether or not possessed in common, for the acquisition of property as a single parcel. Such agreement shall be entered into and performed pursuant to the provisions of Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code.

Comment. Section 360 authorizes several public agencies to acquire a particular parcel under the Joint Powers Agreements Act, not only where the particular parcel is needed for a joint project but also where each of the agencies requires a portion of the parcel for its own purposes. The section is based on former Education Code Section 15007.5. Section 15007.5, however, applied only where a school district was a party to the joint powers agreement, and Section 360 is not so restricted.

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 5. JUST COMPENSATION AND MEASURE OF DAMAGES

CHAPTER 1. GENERAL PROVISIONS

Right to just compensation

Measure of damages

"Fair market value" defined

Effect of imminence of condemnation

Date of valuation

The larger parcel

Effect of condemnation use on after-market value

Machinery, equipment, and fixtures

Churches and other property devoted to unique or
special use

Harvesting and marketing of crops

CHAPTER 2. RELOCATION EXPENSES

CHAPTER 3. ADDITIONAL ITEMS OF COMPENSATION

Refinancing costs

Net rental loss

Expense of plans rendered unusable

CHAPTER 4. PRORATION OF TAXES

CHAPTER 5. DELAY COMPENSATION (INTEREST)

CHAPTER 6. LITIGATION EXPENSES

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 6. APPORTIONMENT AND ALLOCATION OF THE AWARD

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 7. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO
JUDGMENT; OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT

See California Law Revision Commission,
Tentative Recommendation and A Study
Relating to Condemnation Law and Proce-
dure: Number 1--Possession Prior to
Final Judgment and Related Problems, 1101,
1142-1166 (September 1967).

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 8. PROCEDURE

- CHAPTER 1. JURISDICTION AND VENUE
- CHAPTER 2. COMPLAINT
- CHAPTER 3. SUMMONS
- CHAPTER 4. PARTIES
- CHAPTER 5. ANSWER
- CHAPTER 6. TRIAL PRACTICE
- CHAPTER 7. JUDGMENT
- CHAPTER 8. PAYMENT OF JUDGMENT
- CHAPTER 9. ABANDONMENT
- CHAPTER 10. NEW TRIALS AND APPEALS

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 9. EXCHANGE OF VALUATION DATA

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 10. ARBITRATION OF COMPENSATION IN
ACQUISITIONS OF PROPERTY FOR PUBLIC USE

See Recommendation of California Law Revision
Commission Relating to Arbitration of Just Com-
pensation (September 1969)

CIVIL CODE § 1001

Tentatively approved April 1970

Sec. . Section 1001 of the Civil Code is repealed.

~~1001.--Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of Title 7, Part 3, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such Title is "an agent of the State," or a "person in charge of such use," within the meaning of these terms as used in such Title.--This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two.~~

Comment. Section 1001 is repealed because it and Section 1238 of the Code of Civil Procedure (also repealed) are superseded by Section 300 of the Eminent Domain Code and by specific statements of the condemnation authority of particular persons for particular public uses which are found in the various codes.

CODE OF CIVIL PROCEDURE § 1238

Tentatively approved April 1970

Sec. . Section 1238 of the Code of Civil Procedure is repealed.

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

Subdivision 1

~~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.~~

Comment. Subdivision 1, which was intended to authorize taking for federal purposes, is not continued since it no longer serves any useful purpose. The 1872 Code Commissioner's Note to subdivision 1 cites two California cases expressing doubt that the federal government had an independent right of eminent domain. It is now clear, however, that federal eminent domain power is not dependent on state authority and cannot be limited by the state. Kohl v. United States, 91 U.S. 367 (1875); C. M. Patten & Co. v. United States, 61 F.2d 970 (9th Cir. 1932).

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

CODE OF CIVIL PROCEDURE § 1238

Tentatively approved April 1970

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.

CODE OF CIVIL PROCEDURE § 1238.7

Tentatively approved March 1970

Sec. . Section 1238.7 of the Code of Civil Procedure is repealed.

~~1238.7.--Subject-to-the-provisions-of-this-title,-the-right of eminent domain may be exercised in behalf of the following public uses:~~

~~1.--Property-as-a-source-of-earth-fill-material-for-use-in-the development-of-a-school-site-by-a-school-district-which-is-situated wholly-or-partly-within-a-city-or-city-and-county-having-in-excess of-750,000-population-and-an-average-population-per-square-mile-of more-than-4,500-persons.~~

Comment. Section 1238.7 is repealed as unnecessary since Section 1047, which is added to the Education Code, permits condemnation of any property necessary to carry out the functions of the district and therefore would permit condemnation of an earth fill source. See also Section 350 of the comprehensive statute.

SCHOOL DISTRICTS

§ 1047. Power of eminent domain

Sec. . Section 1047 is added to the Education Code, to read:

1047. The governing board of any school district may condemn any property necessary to carry out any of the powers or functions of the district.

Comment. Section 1047 supersedes the grant of condemnation authority formerly contained in subdivision 3 of Section 1238 of the Code of Civil Procedure (condemnation authorized for "public buildings and grounds for the use . . . of any . . . school district"). It continues the prior authority of school districts to condemn for school purposes. E.g., Hayward Union High School Dist. v. Madrid, 234 Cal. App.2d 100, 121, 44 Cal. Rptr. 268, (1965)("The district had the right to condemn for any school purpose and on acquisition, to change to some other school purpose any time during its ownership of the property."). Kern County High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919). See also Anaheim Union High School Dist. v. Vieria, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966) (future use); Hayward Union High School Dist. v. Madrid, supra (temporary use for school purposes with resale to follow within several years); Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959)(school purposes may be a more necessary public use than private cemetery).

The section is, of course, subject to specific limitations that may be imposed on the exercise of the power of eminent domain. See Education Code Section 1048:

Section 1047 grants a school district (defined in Section 41) the power of eminent domain to acquire any property necessary to carry out any of the powers or functions of the district. Thus, for example, a school district may condemn property outside its boundaries, subject to such limitations as are provided by statute, even though the pertinent statute does not expressly grant the district the power of eminent domain. E.g., Education Code Section 15009. It should be recognized, however, that a school district is an agency of limited authority and may engage in only those functions authorized by statute. E.g., Yreka Union High School Dist. v. Siskiyou Union High School Dist., 227 Cal. App.2d 666, 39 Cal. Rptr. 112 (1964); Uhlmann v. Alhambra City High School Dist., 221 Cal. App.2d 228, 34 Cal. Rptr. 341 (1963).

In some cases, a particular statute may expressly grant school districts the powers of eminent domain for a particular purpose. E.g., Education Code Section 6726 (operation of a technical, agricultural, and natural resource conservation school). These specific grants of condemnation authority are not to be construed to limit the board grant of such authority under Section 1047.

Private schools which are not of the collegiate grade may not exercise the power of eminent domain. Yeshiva Torath Emeth Academy v. University of So. Calif., 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962). It is also not permissible for a private citizen to acquire property by eminent domain for the operation of a public school. People v. Oken, 159 Cal. App.2d 456, 324 P.2d 58 (1958).

EDUCATION CODE § 1048

Tentatively approved March 1970

§ 1048. Acquisition of property for utility purposes.

Sec. . Section 1048 is added to the Education Code, to read:

1048. The governing board of a school district may acquire property in an adjoining school district by lease, or purchase and dispose of such property in the same manner as property within the boundary of the district is purchased and disposed of, where the acquisition of such property is deemed necessary by the governing board for use as garages, warehouse, or other utility purposes.

The power of eminent domain shall not be applicable and such acquisitions by purchase shall be subject to the approval of the governing board of school district in which the property is located.

Comment. Section 1048 continues without change the provisions of former Education Code Section 16003.

EDUCATION CODE § 15007.5

Tentatively approved March 1970

Sec. . . Section 15007.5 of the Education Code is repealed.

~~15007.5.--The-governing-board-of-any-school-district-may-enter
into-an-agreement-with-the-governing-body-of-any-public-agency-for
the-joint-exercise-by-such-school-district-and-such-agency-of-their
respective-powers-of-eminent-domain,-whether-or-not-possessed-in
common,-for-the-acquisition-of-real-property-as-a-single-parcel.
Such-agreement-shall-be-entered-into-and-performed-pursuant-to-the
provisions-of-Chapter-5-(commencing-with-Section-6500)-of-Division-7
of-Title-1-of-the-Government-Code,-and-each-public-agency-therein
designated-is-authorized-to-enter-into-such-an-agreement-with-the
governing-board-of-any-school-district-for-such-purpose.~~

Comment. Section 15007.5 is superseded by Section 360 of the
Eminent Domain Code.

EDUCATION CODE § 16003

Tentatively approved March 1970

Sec. . Section 16003 of the Education Code is repealed.

~~16003.--The governing board of a school district may acquire property in an adjoining school district by lease, or purchase and dispose of such property in the same manner as property within the boundary of the district is purchased and disposed of, where the acquisition of such property is deemed necessary by the governing board for use as garages, warehouse, or other utility purposes.~~

~~The power of eminent domain shall not be applicable and such acquisitions by purchase shall be subject to the approval of the governing board of school district in which the property is located.~~

Comment. Section 16003 is superseded by Section 1048 of the Education Code.

Tentatively approved March 1970
Revised April 1970

UNIVERSITY OF CALIFORNIA

Sec. . Section 23151 of the Education Code is amended to read:

23151. The Regents of the University of California may condemn any property ~~or interest therein for the public buildings and grounds necessary to carry out any of the powers or functions of the University of California under the provisions of the Code of Civil Procedure relating to eminent domain~~ . The Regents of the University of California shall not commence any such proceeding in eminent domain unless it first adopts a resolution by a two-thirds vote declaring that the public interest and necessity require the acquisition, construction or completion by the Regents of the University of California of the public improvement for which the property ~~or interest therein~~ is required and that the property ~~or interest therein~~ described in such resolution is necessary for the public improvement.

Comment. Section 23151 is amended to make clear that the condemnation authority of the Regents of the University of California is broad enough to acquire any property or right or interest in property necessary to carry out the functions of the University of California even though the property is to be acquired for a project that does not clearly fall within the former language "public buildings and grounds of the University of California." See Section 310 of the comprehensive eminent domain statute.

STATE COLLEGE SYSTEM

Sec. . Section 23619 is added to the Education Code, to read:

23619. Subject to the Property Acquisition Law, Part 11 (commencing with Section 15850) of Division 3 of Title 2 of the Government Code, the trustees may condemn any property necessary to carry out any of the powers or functions of the state colleges.

Comment. Section 23619 supersedes subdivision 2 of Section 1238 of the Code of Civil Procedure ("public buildings and grounds for the use of a state, or any state institution") insofar as that subdivision may relate to the state college system. The phrasing of Section 23619 is based in part on subdivision (a) of Section 24503 of the Education Code, which grants the right of eminent domain to acquire property necessary for dormitories or other housing facilities, boarding facilities, student union or activity facilities, vehicle parking facilities, or any other auxiliary or supplemental facilities for individual or group accommodation for use by students, faculty members, or other employees of any one or more state colleges. Section 23619 covers not only the facilities covered by Section 24503 but also all other property necessary to the state college system.

NONPROFIT EDUCATIONAL INSTITUTIONS OF COLLEGIATE GRADE

Sec. . Chapter 3 (commencing with Section 30051) is added to Division 21 of the Education Code, to read:

Chapter 3. Eminent Domain

30051. Any educational institution of collegiate grade, within this state, not conducted for profit, may exercise the right of eminent domain to acquire any property necessary to carry out any of its powers or functions.

Comment. Section 30051 continues the grant of condemnation authority formerly found in subdivision 2 of Section 1238 of the Code of Civil Procedure ("Public buildings and grounds for the 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"). See University of So. Calif. v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934), cert. den., 295 U.S. 738 (1935); Redevelopment Agency v. Hayes, 122 Cal. App.2d 777, 266 P.2d 105 (1954). Private schools which are not of the collegiate grade may not exercise the power of eminent domain. Yeshiva Torath Emeth Academy v. University of So. Calif., 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962).

GOVERNMENT CODE § 184

Tentatively approved April 1970

Sec. . Section 184 of the Government Code is repealed.

~~184.--The-State-may-acquire-or-authorize-others-to-acquire
title-to-property-for-public-use-in-the-cases-and-in-the-mode
provided-by-law.~~

Comment. Section 184 is repealed as unnecessary.

GOVERNMENT CODE § 25350.5

Tentatively approved April 1970

COUNTIES

§ 25350.5. Power of eminent domain

Sec. . Section 25350.5 is added to the Government Code, to read:

25350.5. The board of supervisors of any county may condemn any property necessary to carry out any of the powers or functions of the county.

Comment. Section 25350.5 supersedes the grant of condemnation authority formerly contained in various subdivisions of Section 1238 of the Code of Civil Procedure and supplements the specific grants of such authority contained in this and other codes. E.g., Govt. Code § 26020 (airports); Sts. & Hwys. Code § 943 (highways). Its purpose is to give a county adequate authority to carry out its functions.

Specific limitations may, of course, be imposed on the exercise of the power of eminent domain. See Penal Code § 4106 (no industrial farm may be established on land outside county without consent of the affected county).

GOVERNMENT CODE § 37350.5

Tentatively approved April 1970

CITIES

§ 37350.5. Power of eminent domain

Sec. . Section 37350.5 is added to the Government Code, to read:

37350.5. The legislative body of any city may condemn any property necessary to carry out any of the powers or functions of the city.

Comment. Section 37350.5 supersedes the grant of condemnation authority formerly contained in various subdivisions of Section 1238 of the Code of Civil Procedure and supplements the specific grants of such authority contained in this and other codes. E.g., Govt. Code § 37501 (public assembly or convention halls); Sts. & Hwys. Code § 4090 (streets, walks, parking places). Its purpose is to give a city adequate authority to carry out its municipal functions.

Specific limitations may, of course, be imposed on the exercise of the power of eminent domain under some circumstances. See Govt. Code § 37353(c) (no existing golf course may be acquired by eminent domain).

Tentatively approved April 1970

PUBLIC CEMETERY DISTRICTS

§ 8961. Power to acquire property by condemnation or otherwise

Sec. . Section 8961 of the Health and Safety Code is amended to read:

8961. The district may maintain a cemetery or cemeteries, limited in use to burial in the ground of residents of the district or of members of the family of a resident who has heretofore purchased a burial plot , and for this purpose may take and hold title to property by grant, gift, devise, condemnation, lease, or any other method .

Comment. Section 8961 is amended to make clear the right of public cemetery districts to acquire and hold title to realty for cemetery purposes. See 14 Ops. Cal. Atty. Gen. 252 (noting the confusion engendered by the recodification of Sections 8961, 8962, and 8963). The term "condemnation" preserves the grant of condemnation authority formerly contained in subdivision 14 of Section 1238 of the Code of Civil Procedure (condemnation authorized for "cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof").

PUBLIC RESOURCES CODE § 13070.1

Tentatively approved April 1970

RESORT IMPROVEMENT DISTRICTS

§ 13070.1. Definition of "acquire"

Sec. . Section 13070.1 is added to the Public Resources Code, to read:

13070.1. As used in this chapter, "acquire" includes but is not restricted to taking by condemnation, purchase, or lease, and receiving by donation or dedication.

Comment. Section 13070.1 is added to give the term "acquire" used in Section 13070 its broadest possible meaning and to insure that the repeal of Code of Civil Procedure Section 1238 will not affect adversely the districts formed under the Resort Improvement District Law.

PUBLIC UTILITIES CODE §§ 610-627

Tentatively approved March 1970

PRIVATELY OWNED PUBLIC UTILITIES

ARTICLE 7. EMINENT DOMAIN

- § 610. Article applies to "public utilities" only
- § 611. Railroad corporations
- § 612. Electrical corporations
- § 613. Gas corporations
- § 614. Heat corporations
- § 615. Pipeline corporations
- § 616. Telephone corporations
- § 617. Telegraph corporations
- § 618. Water corporations
- § 619. Wharfingers
- § 620. Ferries
- § 621. Street railroad corporations
- § 622. Motor carriers
- § 623. Warehousemen
- § 625. Resolution of Public Utilities Commission
- § 626. Effect of resolution

PUBLIC UTILITIES CODE § 610

Tentatively approved March 1970

Sec. . Article 7 (commencing with Section 610) is added to Chapter 3 of Part 1 of Division 1 of the Public Utilities Code, to read:

Article 7. Eminent Domain

§ 610. Article applies to "public utilities" only

610. This article applies only to a corporation or person that is a public utility.

Comment. Section 610 is included to make clear that this article extends the right of eminent domain only to "public utilities" as defined in Section 216 ("service is performed for or the commodity delivered to the public or any portion thereof") and not to persons or corporations that are not subject to regulation and rate control. It has been held that the exercise of the right of eminent domain conclusively evidences an intention to devote the property so acquired to a public use, thereby rendering the condemnor a public utility. Producers Transp. Co. v. Railroad Comm'n, 176 Cal. 499, 505, 169 P. 59, (1917). Compare McCullagh v. Railroad Comm'n, 190 Cal. 13, 210 P. 264 (1922). This section is consistent with the holding in the Producers Transp. Co. case.

§ 611. Railroad corporations

611. A railroad corporation may condemn any property necessary for the construction and maintenance of its railroad.

Comment. Section 611 grants "railroad corporations" (defined in Section 230) the right of eminent domain to acquire property necessary for the construction and maintenance of its "railroad." "Railroad" is defined in Section 229 to mean in substance all railroad property devoted to public use in the transportation of persons or property. Thus, Section 611 authorizes condemnation of any property necessary to carry out the regulated activities of the railroad. It retains in substance the authority formerly found in subdivision (g) of Section 7526 of the Public Utilities Code and in Section 1238 of the Code of Civil Procedure. See, e.g., Southern Pac. Co. v. Los Angeles Mill Co., 177 Cal. 395, P. (1918)(spur tracks); Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238 (1915)(land for wharves for transfer of freight between railroad cars and boats where reasonably necessary for railroad corporation's future business); Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 92 P. 849 (1907)(land adjacent to station grounds required for a freight house); Southern Pacific R. R. Co. v. Raymond, 53 Cal. 223, P. () (workshop); Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 688, 87 P. 27 (1906)(spur tracks). Cf. City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916)(land for pole line for transmission of power to public railway). Section 611 would not, however, permit condemnation by a railroad corporation of land to be used, for example, as an industrial park.

PUBLIC UTILITIES CODE § 611

Tentatively approved March 1970

Section 611 supersedes provisions formerly contained in the Public Utilities Code and Code of Civil Procedure insofar as those provisions related to privately owned public utilities. See subdivision (g) of Section 7526 of the Public Utilities Code (right to condemn lands "to be used in the construction and maintenance of its roads, and all necessary appendages and adjuncts"); Section 1238 of the Code of Civil Procedure, subdivision 4 ("steam, electric and horse railroads"), subdivision 11 (railroads "for quarrying, logging or lumbering purposes"). See also Section 1238, subdivision 9 ("roads for transportation by traction engines or road locomotives").

Section 611 has no effect on various specific grants of the power to railroads to condemn private property. See Public Utilities Code Sections 7533 (additional tracks), 7535 (railroad intersections), 7536 (railroad crossings). See also Public Utilities Code Section 7508 (right of eminent domain in transferee of railroad corporation).

§ 612. Electrical corporations

612. An electrical corporation may condemn any property necessary for the construction and maintenance of its electric plant.

Comment. Section 612 grants "electrical corporations" (defined in Section 218) the right of eminent domain to acquire property necessary for the construction and maintenance of its "electric plant." "Electric plant" is defined in Section 217 to mean in substance all property devoted to public use in the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power. Thus, Section 612 authorizes condemnation of any property necessary to carry out the regulated activities of the electrical corporation. It retains and possibly broadens the authority formerly found in subdivisions 12 and 13 of Section 1238 of the Code of Civil Procedure and supersedes those subdivisions insofar as they apply to privately owned public utilities. See also the Comment to Section 613. Insofar as subdivision 13 permits acquisition of property for future use, it is anticipated that that authority will be given to privately owned public utilities by a general provision to be included in the comprehensive condemnation statute.

§ 613. Gas corporations

613. A gas corporation may condemn any property necessary for the construction and maintenance of its gas plant.

Comment. Section 613 grants "gas corporations" (defined in Section 222) the right of eminent domain to acquire property necessary for the construction and maintenance of its "gas plant." "Gas plant" is defined in Section 221 to include all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of gas, natural or manufactured, for light, heat, or power. Thus, Section 613 authorizes condemnation of any property necessary to carry out the regulated activities of the gas corporation.

Sections 612, 613, and 614 largely supersede subdivision 17 of Section 1238 of the Code of Civil Procedure. Insofar as subdivision 17 permits acquisition of property for future use, it is anticipated that that authority will be given privately owned public utilities by a general provision to be included in the comprehensive condemnation statute.

§ 614. Heat corporations

614. A heat corporation may condemn any property necessary for the construction and maintenance of its heating plant.

Comment. Section 614 grants "heat corporations" (defined in Section 224) the right of eminent domain to acquire property necessary for the construction and maintenance of its "heating plant." "Heating plant" is defined in Section 223 to include all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of heat for domestic, business, industrial, or public use. Thus, Section 614 authorizes condemnation of any property necessary to carry out the regulated activities of the heat corporations. See the Comment to Section 613.

§ 615. Pipeline corporations

615. A pipeline corporation may condemn any property necessary for the construction and maintenance of its pipeline.

Comment. Section 615 grants "pipeline corporations" (defined in Section 228) the right of eminent domain to acquire property necessary for the construction and maintenance of its "pipeline." "Pipeline" is defined in Section 227 to include all property used in connection with or to facilitate the transmission, storage, distribution, or delivery of crude oil or other fluid substances except water through pipelines.. Thus, Section 615 authorizes condemnation of any property necessary to carry out the regulated activities of the pipeline corporation.

Section 615 supersedes subdivision 10 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "oil pipelines") insofar as that subdivision relates to privately owned public utilities.

§ 616. Telephone corporations

616. A telephone corporation may condemn any property necessary for the construction and maintenance of its telephone line.

Comment. Section 616 grants "telephone corporations" (defined in Section 234) the right of eminent domain to acquire property necessary for the construction and maintenance of its "telephone line." "Telephone line" is defined in Section 233 to include all property used in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires. Thus, Section 616 authorizes condemnation of any property necessary to carry out the regulated activities of the telephone corporation.

Section 616 supersedes a portion of subdivision 7 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "telephone . . . lines, systems and plants") insofar as that subdivision relates to privately owned public utilities.

§ 617. Telegraph corporations

617. A telegraph corporation may condemn any property necessary for the construction and maintenance of its telegraph line.

Comment. Section 617 grants "telegraph corporations" (defined in Section 236) the right of eminent domain to acquire property necessary for the construction and maintenance of its "telegraph line." "Telegraph line" is defined in Section 235 to include all property used in connection with or to facilitate communication by telegraph, whether such communication is had with or without the use of transmission wires. Thus, Section 617 authorizes condemnation of any property necessary to carry out the regulated activities of the telegraph corporation.

Section 617 supersedes a portion of subdivision 7 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "telegraph . . . lines, systems and plants") insofar as that subdivision relates to privately owned public utilities.

§ 618. Water corporations

618. A water corporation may condemn any property necessary for the construction and maintenance of its water system.

Comment. Section 618 grants "water corporations" (as defined in Section 241) the right of eminent domain to acquire property necessary for the construction and maintenance of its "water system." "Water system" is defined in Section 240 to include all property used in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement of water for power, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use. Thus, Section 618 authorizes condemnation of any property necessary to carry out the regulated activities of the water corporation.

Section 618 supersedes portions of subdivisions 3 and 4 of Section 1238 of the Code of Civil Procedure insofar as those portions relate to condemnation by privately owned public utilities.

§ 619. Wharfingers

619. A wharfinger may condemn any property necessary for the construction and maintenance of facilities for the receipt or discharge of freight or passengers.

Comment. Section 619 grants a "wharfinger" the right of eminent domain to acquire property necessary for facilities for the receipt or discharge of freight or passengers. "Wharfinger" is defined in Section 242 to include "every corporation or person owning, controlling, operating, or managing any dock, wharf, or structure used by vessels in connection with or to facilitate the receipt or discharge of freight, other than bulk liquid commodities, or passengers for compensation within this State."

Section 619 supersedes portions of subdivisions 3 ("public mooring places for watercraft") and 4 ("wharves, docks, piers, . . . chutes, booms") of Section 123B of the Code of Civil Procedure insofar as those portions relate to privately owned public utilities.

PUBLIC UTILITIES CODE § 620

Tentatively approved March 1970
Revised April 1970

§ 620. Ferries

620. A common carrier, as defined in subdivision (b) of Section 211, may condemn any property necessary for the construction and maintenance of facilities for its transportation of persons or property.

Comment. Section 620 grants the power of eminent domain to acquire property necessary for ferry facilities. The reference to subdivision (b) of Section 211 incorporates a definition of those public utilities that transport persons or property for compensation by vessel upon inland waters or upon the high seas between points within this state. Section 620 supersedes the grant of condemnation for "ferries" in subdivision 4 of Section 1238 of the Code of Civil Procedure insofar as that subdivision relates to the privately owned public utilities. See Streets and Highways Code Sections 30802, 30866 (regulation of amount of ferry tolls).

PUBLIC UTILITIES CODE § 621

Tentatively approved March 1970

§ 621. Street railroad corporations

621. A street railroad corporation may condemn any property necessary for the construction and maintenance of terminal facilities for the receipt, transfer, or delivery of the passengers or property it carries.

Comment. Section 621 grants "street railroad corporations" (as defined in Section 232) the right of eminent domain to acquire property necessary for its terminal facilities. The section supersedes subdivision 22 of Section 1238 of the Code of Civil Procedure insofar as that subdivision applied to privately owned street railroad corporations.

§ 622. Motor carriers

622. (a) As used in this section, "motor carrier" means:

- (1) A highway common carrier as defined in Section 213.
- (2) A passenger stage corporation as defined in Section 226.

(b) A motor carrier may condemn any property necessary for the construction and maintenance of terminal facilities for the receipt, transfer, or delivery of the passengers or property it carries.

Comment. Section 622 grants certain motor carriers the right of eminent domain to acquire property necessary for terminal facilities. Sections 621 and 622 supersede subdivision 22 of Section 1238 of the Code of Civil Procedure which granted condemnation authority for "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."

§ 623. Warehousemen

623. A warehouseman may condemn any property necessary for the construction and maintenance of its facilities for storing property.

Comment. Section 623 grants a "warehouseman" (defined in Section 239) the right of eminent domain to acquire property necessary for storing property. Section 623 supersedes a portion of subdivision 4 of Section 1238 of the Code of Civil Procedure (granting authority to condemn for "warehouses") insofar as that portion relates to privately owned public utilities.

PUBLIC UTILITIES CODE § 625

Staff recommendation considered by
Commission March 1970--action deferred

§ 625. Resolution of Public Utilities Commission

625. No condemnation proceeding shall be commenced under the authority granted by this article unless the Public Utilities Commission first adopts a resolution declaring that the public interest and necessity require the acquisition, construction, or completion by the public utility of the project for which the property is required and that the fee or such interest in the property as is described in the resolution is necessary for the project.

Comment. Sections 625 and 626 impose a requirement not found in prior law. The sections, which are based on Streets and Highways Code Sections 102 and 103, make the question of necessity one for determination by the Public Utilities Commission rather than by the court as under former law.

PUBLIC UTILITIES CODE § 626

Staff recommendation considered by
Commission March 1970--action deferred

§ 626. Effect of resolution

626. The resolution of the commission is conclusive evidence:

(a) Of the public necessity of such proposed project.

(b) That such fee or interest in the property is necessary
therefor.

(c) That such proposed project is planned or located in a
manner which will be most compatible with the greatest public good
and the least private injury.

Comment. See the Comment to Section 625.

Tentatively approved March 1970

MUTUAL WATER COMPANIES

Sec. . Section 2729 is added to the Public Utilities Code, to read:

2729. A mutual water company may exercise the power of eminent domain for water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by such company.

Comment. Section 2729 specifies the condemnation authority of a mutual water company (defined in Section 2725). The section continues without substantive change the authority to condemn formerly conferred by Code of Civil Procedure Section 1238(4)(condemnation authorized for "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").

Mutual water companies are not generally subject to the jurisdiction of the Public Utilities Commission. See Pub. Util. Code § 2705. However, it is possible that exercise of the power of eminent domain by a mutual water company may demonstrate an intention to devote the property so acquired to public use and thereby render the company subject to regulation as a public utility. See Corona City Water Co. v. Public Utilities Comm'n, 54 Cal.2d 834, 357 P.2d 301, 9 Cal. Rptr. 245 (1960); Lamb v. California Water & Tel. Co., 21 Cal.2d 33, 129 P.2d 371 (1942).

STREETS & HIGHWAYS CODE § 4008

Tentatively approved April 1970

STREET OPENING ACT OF 1903

Sec. . 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 P. 68 (1924).

STREETS & HIGHWAYS CODE § 4008.1

Tentatively approved April 1970

STREET OPENING ACT OF 1903

Sec. . 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.

STREETS & HIGHWAYS CODE § 4120.1

Tentatively approved April 1970

STREET OPENING ACT OF 1903

Sec. . 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, and shall not be denied without a public hearing.

Comment. Section 4120.1 is added to the Street Opening Act of 1903 to expressly authorize initiation of improvement proposals by individual property owners. Similar procedures already exist in many counties and cities. In reviewing a property owner's request, the board of supervisors should consider the necessity for the improvement to provide access and the relative hardship to the party whose land is sought to be used for the improvement compared to the one seeking the improvement.