

#36.20(1)

11/24/70

Memorandum 70-121

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

Exhibit I (attached) contains the Comments to the repeals of subdivisions
6, 9, and 10 of Section 1238 of the Code of Civil Procedure. These repeals do
not appear to present any problem. References in the Comments are to provisions
of the Comprehensive Statute (including sections added to existing codes).

Respectfully submitted,

John H. DeMouly
Executive Secretary

Subdivision 6

~~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.~~

Comment. Subdivision 6 is superseded by Sections 4008, 4008.1, and 4120.1 of the Streets and Highways Code. These sections provide a procedure for the establishment of byroads--roads, open to public use, that furnish access to an existing public road from or primarily from otherwise isolated property--under the Street Opening Act of 1903. Private persons have no right to condemn property for byroads. The former law was unclear, there being no case precisely in point. See General Petroleum Corp. v. Hobson, 23 F.2d 349 (1927)(prospecting for oil not a use listed in Section 1238); City of Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961)(land developer not authorized to bring condemnation action in name of city). Cf., Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955) (private individual may condemn sewer easement over his adjoining property). See also Sherman v. Buick, 32 Cal. 241 (1867)("byroad" a public use for which county could acquire property).

Subdivision 9

~~9.--Roads-fer-transportation-by-traction-engines-or-road
locomotives.~~

Comment. Subdivision 9, which was enacted in 1891, is not continued because it is obsolete. Traction engines and road locomotives--essentially steam powered locomotives which ran on wheels rather than tracks--have long been considered collector's items. See Clymer, Album of Historical Steam Traction Engines (1949); J. Fisher, Road Locomotives, 31st Annual Rep. of the Amer. Inst. of the City of New York 1870-1871, at 877; Gilford, The Traction Engine 1842-1936 (1952).

CODE OF CIVIL PROCEDURE § 1238

Staff recommendation December 1970

Subdivision 10

~~10.--Oil-pipelines.~~

Comment. Subdivision 10 is superseded by Section 615 of the Public Utilities Code which grants the power of eminent domain to pipeline corporations. See the Comment to Section 615.