

#36.41

7/2/71

First Supplement to Memorandum 71-13

Subject: Study 36.41 - Condemnation (Protective Condemnation)

When a condemnor undertakes a public project, such as a building, it may need other property incidental to the project; for example, parking for and access to the building. These incidental uses are not clearly encompassed within the staff's proposed "protective" condemnation authority. Traditionally, these incidental uses have been considered to be inherently within the condemnor's authority to take property for a particular public use, absent any express statutory authorization.

However, it is desirable to include in the comprehensive statute express statutory authorization for condemnation for incidental uses, for two reasons:

(1) The existence of a clear statutory provision will remove any doubts and minimize the possibility of litigation over such an issue.

(2) The repeal of Code of Civil Procedure Section 1238 will involve repealing some specific sections that authorize a particular public use, along with the right to take property for parking and access purposes. See, e.g., Section 1238.4.

For these reasons, the staff recommends that proposed subdivision (a) of Section 304 of the comprehensive statute be approved in the following form:

304. (a) Except to the extent limited by statute, any person authorized to acquire property for a public work or improvement by eminent domain may exercise the power of eminent domain to acquire any property necessary for the public work or improvement, including any property necessary to protect or preserve the quality, attractiveness, safety, or usefulness of the public work or improvement and its environs.

The Comment should be amended to add the following paragraph at the beginning:

Comment. Section 304 codifies the rule that, absent any express limitation imposed by the Legislature, the power to condemn land for a particular purpose includes the power to condemn incidental property to carry out and make effective the principal purpose involved. See City of Santa Barbara v. Cloer, 216 Cal. App.2d 127, 30 Cal. Rptr. 743 (1963). See also University of So. Cal. v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934). Cf. Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962).

Respectfully submitted,

Nathaniel Sterling  
Legal Counsel