

#36.41

8/6/71

Memorandum 71-60

Subject: Study 36.41 - Condemnation (Protective Condemnation)

At the July 1971 meeting, the Commission approved the substance of a new Section 304 to be added to the Eminent Domain Code to deal with condemnation for incidental purposes, including protective purposes. The repeal of various protective condemnation statutes (Code Civ. Proc. § 1238(18), Govt. Code §§ 190-196, Sts. & Hwys. Code § 104.3, and Water Code § 256) also was approved.

Redrafted Section 304 is included in the Eminent Domain Code portion of the Comprehensive Statute that is sent to you in the blue binder. You should check the wording of the redrafted section and Comment thereto to determine if they are satisfactory. Also included in the blue binder are the repealed sections and the Comments thereto.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Directions for Updating Comprehensive Statute

You have previously been sent a copy of the comprehensive statute. Attached are additional or replacement pages.

| | <u>Remove Old Pages</u> | <u>Insert New Pages</u> |
|--|---|--|
| <u>Division 4 (White)--Right to Take</u> | i I-8 | i I-8 to I-11 |
| <u>Division 7 (Buff)--Immediate Possession</u> | i 12 17-22 | i 12 17-22.. |
| <u>Amendments and Repeals (White)</u> | i,ii iv -- -- 39 -- 67 81 82.1-84 -- | i,ii iv 7.4 14.1-14.3 39 45.5-45.6 67 81 83-84 91.5 |

C O M P R E H E N S I V E S T A T U T E

| | <u>Page</u> |
|--|-------------|
| DIVISION 4. THE RIGHT TO TAKE _____ | I-1 |
| CHAPTER 1. GENERAL PROVISIONS _____ | I-1 |
| § 300. Condemnation permitted only for a public use__ | I-1 |
| § 301. Condemnation permitted only where authorized by statute _____ | I-3 |
| § 302. Condemnation permitted only when necessity established _____ | I-4 |
| § 303. Right to acquire any necessary right or interest _____ | I-7 |
| § 304. Right to acquire property for incidental purposes _____ | I-8 |
| § 305. Joint exercise of condemnation power pursuant to Joint Powers Agreements Act _____ | I-11 |
| CHAPTER 2. LIMITATIONS ON TAKINGS BY LOCAL PUBLIC ENTITIES ____ | II-1 |
| Article 1. Resolution of Necessity _____ | II-1 |
| § 310. Resolution of necessity required _____ | II-1 |
| § 311. Contents of resolution _____ | II-2 |
| § 312. Adoption of resolution _____ | II-3 |
| § 313. Effect of resolution _____ | II-4 |
| CHAPTER 3. LIMITATIONS ON TAKINGS BY PUBLIC UTILITIES | |
| § 350 <u>et seq.</u> | |
| CHAPTER 4. LIMITATIONS ON TAKINGS BY OTHER CONDEMNORS | |
| § 380 <u>et seq.</u> | |
| CHAPTER 5. FUTURE USE _____ | V-1 |
| § 400. Authorization to acquire property for future use _____ | V-1 |
| § 401. Acquisitions for future use _____ | V-3 |
| CHAPTER 6. SUBSTITUTE CONDEMNATION _____ | VI-1 |
| § 410. Definitions _____ | VI-1 |
| § 411. Condemnation of substitute property where owner of necessary property has power to condemn property for use to which substi- tute property will be devoted _____ | VI-2 |

The Right to Take

§ 304. Right to acquire property for incidental purposes

304. (a) Except to the extent limited by statute, any person authorized to acquire property for a particular purpose by eminent domain may exercise the power of eminent domain to acquire incidental property necessary to carry out and make effective the principal purpose involved, including but not limited to incidental property to be used for the protection or preservation of the attractiveness, safety, and usefulness of the public work or improvement.

(b) Subject to any applicable procedures governing the disposition of property, a person that has acquired property under subdivision (a) may sell, lease, exchange, or otherwise dispose of such property or an interest therein subject to such reservations or restrictions as are necessary to protect or preserve the attractiveness, safety, and usefulness of the public work or improvement.

Comment. Subdivision (a) of Section 304 codifies the rule that, absent any express limitation imposed by the Legislature, the power to condemn property for a particular purpose includes the power to condemn incidental property necessary 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. 734 (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).

COMPREHENSIVE STATUTE § 304

Tentatively approved July 1971

Section 304 permits a condemnor to protect the attractiveness, safety, or usefulness of a public work or improvement from deleterious conditions or uses by condemning a fee or any lesser interest necessary for protective purposes. See Section 101 (defining "property" to include the fee or any lesser right or interest). A taking for this purpose is a "public use." E.g., People v. Iagiss, 223 Cal. App.2d 23, 35 Cal. Rptr. 554 (1963); Flood Control & Water Conservation Dist. v. Hughes, supra. See also United States v. Bowman, 367 F.2d 768, 770 (1966). See Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L.J. 571, 589-591 (1969).

Section 304 is an extremely flexible grant of condemnation authority. Where it is necessary to protect a public work or improvement from detrimental uses in adjoining property, the condemnor has the option either (1) to acquire an easement-like interest in the adjoining property which will preclude the detrimental use or (2) to acquire the fee or some other interest and then lease, sell, exchange, or otherwise dispose of it to some other public entity or a private person subject to carefully specified permitted uses.

If a condemnor has the power of eminent domain to condemn property for a particular improvement, Section 304 is sufficient authority to condemn such additional property as is necessary to preserve or protect the attractiveness, safety, and usefulness of the improvement. No additional statutory authority is required, and some of the former specific grants of protective condemnation authority have been repealed as unnecessary. E.g., former Code of Civil Procedure Section 1238(18) (trees along highways). Nevertheless, not all such

COMPREHENSIVE STATUTE § 304

Tentatively approved July 1971

specific authorizations have been repealed. E.g., Streets and Highways Code Section 104(f)(trees along highways), (g)(highway drainage), (h)(maintenance of unobstructed view along highway). Except to the extent that these specific authorizations contain restrictions on protective condemnation for particular types of projects (see Govt. Code §§ 7000-7001), they do not limit the general protective condemnation authority granted by Section 304.

In the case of a public entity, the resolution of necessity is conclusive on the necessity of taking the property or interest therein for protective purposes. See Section . However, the resolution does not preclude the condemnee from raising the question whether the condemnor actually intends to use the property for protective purposes. If the property is claimed to be needed for protective purposes but not actually going to be used for that purpose, the taking can be defeated on that ground. See Section and Comment thereto. See People v. Lagiss, 223 Cal. App.2d 23, 33-44, 35 Cal. Rptr. 554, (1963).

Section 304 is derived from and supersedes former Government Code Sections 190-196, Streets and Highways Code Section 104.3, and Water Code Section 256.

Tentatively approved February 1970
Revised April 1970
Revised May 1970
Renumbered September 1971

The Right to Take

§ 305. Joint exercise of condemnation power pursuant to Joint Powers

Agreements Act

305. (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 305 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 305 is not so restricted.

C O M P R E H E N S I V E S T A T U T E

| | <u>Page</u> |
|--|-------------|
| DIVISION 7. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT; OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT _ _ _ _ _ | 1 |
| CHAPTER 1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT _ _ _ _ _ | 1 |
| § 1268.01. Deposit of amount of appraised value of property _ _ _ _ _ | 2 |
| § 1268.02. Service of notice of deposit _ _ _ _ _ | 4 |
| § 1268.03. Increase or decrease in amount of deposit _ _ | 5 |
| § 1268.04. Withdrawal of deposit prior to judgment _ _ _ | 6 |
| § 1268.05. Procedure for withdrawal _ _ _ _ _ | 7 |
| § 1268.06. Security when amount in excess of original deposit is withdrawn _ _ _ _ _ | 9 |
| § 1268.07. Withdrawal of deposit after entry of judgment | 10 |
| § 1268.08. Withdrawal waives all defenses except claim to greater compensation _ _ _ _ _ | 12 |
| § 1268.09. Repayment of amount of excess withdrawal _ _ | 13 |
| § 1268.10. Limitation on use of evidence submitted in connection with deposit _ _ _ _ _ | 14 |
| § 1268.11. Deposit in State Treasury unless otherwise required _ _ _ _ _ | 15 |
| CHAPTER 2. POSSESSION PRIOR TO JUDGMENT _ _ _ _ _ | 16 |
| § 1269.01. Order for immediate possession _ _ _ _ _ | 17 |
| § 1269.02. Authority of court to stay or vacate order _ _ _ _ _ | 20 |
| § 1269.04. Service of order for possession _ _ _ _ _ | 22 |
| § 1269.05. Deposit for relocation purposes on motion of certain defendants _ _ _ _ _ | 23 |

Tentatively approved July 1971

Section 1268.08. Withdrawal waives all defenses except claim to greater compensation

1268.08. If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation. Any amount so paid to any party shall be credited upon the judgment in the eminent domain proceeding.

Code of Civil
Procedure

Comment. Section 1268.08 restates the substance of subdivision (g) of former Section 1243.7. In addition to the defendant's waiving claims and defenses other than the claim to greater compensation, withdrawal of the deposit may also entitle the plaintiff to an order for possession. See Section 1269.06. *Cf. People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

§ 1269.01. Order for immediate possession

1269.01. (a) If the plaintiff is a public entity or public utility, the plaintiff may apply ex parte to the court for an order for possession under this chapter at the time of filing the complaint or at any time after filing the complaint and prior to entry of judgment.

(b) The court shall make an order that authorizes the plaintiff to take possession of the property if the court determines all of the following:

(1) The plaintiff is entitled to take the property by eminent domain.

(2) The plaintiff needs possession of the property prior to judgment.

(3) The plaintiff has deposited the amount indicated by an appraisal to be the compensation for the taking of the property in accordance with Chapter 1 (commencing with Section 1268.01).

(c) The order for possession shall:

(1) Describe the property to be acquired, which description may be by reference to the complaint.

(2) State the date after which the plaintiff is authorized to take possession of the property, which date shall be not less than 90 days after the service of the order.

Comment. Section 1269.01 prescribes the procedures to be followed in order for the condemnor to obtain immediate possession of property. With respect to the relief available from an order for immediate possession, see Section 1269.02.

Subdivision (a). Subdivision (a), like former Code of Civil Procedure Section 1243.5(a), provides an ex parte procedure for obtaining an order for immediate possession. It further permits the condemnor, if a public entity or public utility, to make application for an order for possession prior to judgment in any condemnation case. Under former Code of Civil Procedure Section 1243.4, possession prior to judgment was allowed only if the taking was for right of way or reservoir purposes, and the right to immediate possession was limited to certain public entities; public utilities did not have the right to obtain immediate possession.

Subdivision (b). Subdivision (b) specifies the determinations a court must make before it may issue an order for immediate possession. The required determination that the plaintiff is entitled to take the property by eminent domain, and that it has deposited the amount of probable just compensation, is derived from former Code of Civil Procedure Section 1243.5(b). The requirement of a determination that the plaintiff is authorized to take immediate possession, formerly found in Code of Civil Procedure Section 1243.5(b), has been deleted since only authorized condemnors may apply to the court under subdivision (a) of Section 1269.01. The requirement that plaintiff show a need for immediate possession is new to California but is based upon comparable

provisions in other jurisdictions. See, e.g., Ill. Stat. Ann., Ch. 47, §§ 2.1-2.3 (Supp. 1966); Dep't of Pub. Works & Bldgs. v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958). See also Taylor, Possession Prior to Final Judgment in California Condemnation Procedure, 7 Santa Clara Lawyer 37, 81-86 (1966).

Subdivision (c). Subdivision (c) describes the contents of an order for possession. The contents are substantially the same as those of former Code of Civil Procedure Section 1243.5(b). However, the requirement that the order state the amount of the deposit has been eliminated since Section 1268.02 requires that a notice of the making of a deposit be served on interested parties. The requirement that the order state the purpose of the condemnation has been omitted since immediate possession is now authorized for any public use. And, the requirement that the order describe the "estate or interest" sought to be acquired has been omitted as unnecessary since the term "property" includes rights and interests therein. See Section 101 (defining "property").

Subdivision (c) incorporates the additional requirement of a 90-day period following the service of the order before possession can be physically assumed. Because the order is obtained on ex parte rather than noticed motion, the time period is computed from the date of service rather than the date of the order. See Section 1269.04(b). The 90-day period is a minimum period; it is in the court's discretion and is subject to extension under conditions specified in Section 1269.02. The period is also subject to decrease in cases of emergency. See NOTE to Section 1269.04.

§ 1269.02. Authority of court to stay or vacate order

1269.02. At any time after the court has made an order authorizing immediate possession and before the plaintiff has taken possession pursuant to such order, the court, upon motion of the owner of the property or an occupant of the property, and upon considering all relevant information, including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to such schedule or plan, may:

(a) Stay the order if the hardship to the moving party of having possession taken at the time specified in the order clearly outweighs the hardship to the plaintiff of a stay.

(b) Vacate the order if it determines that the plaintiff is not entitled to take the property by eminent domain, does not need possession of the property prior to judgment, or has not deposited the amount indicated to be the compensation for the taking of the property.

Comment. Section 1269.02 is new. It grants authority to the court to stay or vacate an order for immediate possession upon motion of the property owner or occupant. Of course, failure of a party to make a motion to stay or vacate an order is not an abandonment of any defense to the condemnation action or proceeding.

Subdivision (a). Subdivision (a) permits the court to stay an order for possession if hardship to the dispossessed clearly outweighs the hardship to the condemnor that would be caused by a stay.

Subdivision (b). Subdivision (b) permits the court to vacate an order if it finds that the requirements for immediate possession prescribed in Section 1269.01(b) have not been complied with.

Review of orders authorizing or denying possession. Under former statutes, judicial decisions held that an appeal may not be taken from an order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari were held to be the appropriate remedies. See Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950); Weiler v. Superior Court, 188 Cal. 729, 207 P. 247 (1922); State v. Superior Court, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962); City of Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961). However, an order for possession following entry of judgment has been held to be an appealable order. San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App.2d 668, 267 P.2d 349 (1954). No change is made in these rules as to orders made under Sections 1269.01 and 1269.02 or Chapter 3 (commencing with Section 1270.01).

Tentatively approved September 1970
Revised July 1971

Section 1269.04. Service of order for possession

1269.04. (a) As used in this section, "record owner" means both (1) the person in whom the legal title to the fee appears to be vested by duly recorded deeds or other instruments and (2) the person, if any, who has an interest in the property under a duly recorded lease or agreement of purchase.

(b) At least 90 days, prior to the time possession is taken pursuant to an order for possession made under Section 1269.01, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any.

or such longer time as the court prescribes,

(c) At least 30 days prior to the time possession is taken pursuant to an order for possession made under Section 1269.06, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any.

(d) Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or been served with summons in the proceeding. If the person has appeared or been served with the summons, service of the order for possession may be made by mail upon such person and his attorney of record, if any.

(e) If a person required to be personally served resides out of the state, or has departed from the state or cannot with due diligence be found within the state, the plaintiff may, in lieu of such personal service, send a copy of the order by registered or certified mail addressed to such person at his last known address.

(f) The court may, for good cause shown on ex parte application, authorize the plaintiff to take possession of the property without serving a copy of the order for possession upon a record owner not occupying the property.

(g) A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

Comment. Section 1269.04 is derived from former Section 1243.5(c). The requirement that an affidavit be filed concerning service by mail has been eliminated. Subdivision (d) is a clarification of a sentence in the first paragraph of Section 1243.5(c). The term "address" refers to a single residential unit or place of business, rather than to several such units or places that may happen to have the same street or post office "address." For example, each apartment is regarded as having a separate address although the entire apartment house may have a single street address.

former Code of Civil Procedure

Code of Civil Procedure

Note: The 90-day notice requirement does not, of course, apply to an emergency taking pursuant to the police powers, a matter that also is under study.

C O M P R E H E N S I V E S T A T U T E

EXISTING CODES--AMENDMENTS, ADDITIONS, REPEALS

Page

CIVIL CODE

§ 1001 (repealed) _____ 1

CODE OF CIVIL PROCEDURE

§ 1238 (repealed) _____ 2

§ 1238.1 (repealed) _____ 10

§ 1238.2 (repealed) _____ 12

§ 1238.3 (repealed) _____ 13

§ 1238.7 (repealed) _____ 14

§ 1239 (repealed) _____ 14.1

§ 1242 (repealed) _____ 15

§ 1242.5 (repealed) _____ 17

§ 1243.4 (repealed) _____ 20

§ 1243.5 (repealed) _____ 21

§ 1243.6 (repealed) _____ 23

§ 1243.7 (repealed) _____ 24

§ 1252 (amended) _____ 26

§ 1253 (amended) _____ 28

§ 1254 (repealed) _____ 29

§ 1266 (repealed) _____ 32

§ 1266.1 (repealed) _____ 33

§§ 1273.01-1273.06 (repealed) _____ 34

EDUCATION CODE

SCHOOL DISTRICTS

§ 1047. Power of eminent domain _____ 35

§ 1048. Acquisition of property for utility purposes _____ 38

| | <u>Page</u> |
|--|-------------|
| <u>EDUCATION CODE (cont.)</u> | |
| 15007.5 (repealed) _____ | 39 |
| § 16003 (repealed) _____ | 40 |
| UNIVERSITY OF CALIFORNIA | |
| § 23151 (amended) _____ | 41 |
| STATE COLLEGE SYSTEM | |
| § 23619 (added) _____ | 43 |
| NONPROFIT EDUCATIONAL INSTITUTIONS OF COLLEGIATE GRADE | |
| § 30051 (added) _____ | 44 |
| <u>GOVERNMENT CODE</u> | |
| § 184 (repealed) _____ | 45 |
| §§ 190-196 (repealed) _____ | 45.5 |
| § 14770. Restoration of state public records destroyed by public calamity _____ | 46 |
| § 15854 (conforming amendment) _____ | 48 |
| CONDEMNATION DEPOSITS FUND | |
| ARTICLE 9. CONDEMNATION DEPOSITS FUND _____ | 50 |
| § 16425. Condemnation Deposits Fund _____ | 51 |
| § 16426. Investment of fund _____ | 52 |
| § 16427. Apportionment and disbursement of fund _____ | 53 |
| COUNTIES | |
| § 25350.5. Power of eminent domain _____ | 54 |
| CITIES | |
| § 37350.5. Power of eminent domain _____ | 55 |
| § 53030. Restoration of local public records destroyed by public calamity _____ | 56 |
| <u>HEALTH AND SAFETY CODE</u> | |
| NONPROFIT HOSPITALS | |
| § 1427. Eminent domain power of nonprofit hospital _____ | 58 |

| | <u>Page</u> |
|---|-------------|
| <u>PUBLIC UTILITIES CODE (cont.)</u> | |
| § 619. Wharfingers _____ | 78 |
| § 620. Ferries _____ | 79 |
| § 621. Street railroad corporations _____ | 80 |
| § 622. Motor and water carriers _____ | 81 |
| § 623. Warehousemen _____ | 82 |
| § 624. Sewer system corporations _____ | 83-84 |
| | |
| <u>MUTUAL WATER COMPANIES</u> | |
| § 2729 (added) _____ | 85 |
| | |
| <u>STREETS AND HIGHWAYS CODE</u> | |
| § 104.1 (repealed) _____ | 86 |
| § 104.3 (repealed) _____ | 86.5 |
| § 943.1 (repealed) _____ | 87 |
| | |
| <u>STREET OPENING ACT OF 1903</u> | |
| § 4008 (amended) _____ | 88 |
| § 4008.1 (added) _____ | 89 |
| § 4120.1 (added) _____ | 90 |
| | |
| <u>WATER CODE</u> | |
| § 254 (repealed) _____ | 91 |
| § 256 (repealed) _____ | 91.5 |
| § 8590.1 (repealed) _____ | 92 |
| § 11575.2 (repealed) _____ | 93 |
| § 43533 (repealed) _____ | 94 |

Subdivision 18

~~18.---Standing-trees-and-ground-necessary-for-the-support-and-main-
tenance-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 unnecessary because Section 304 of the Compre-
hensive Statute provides general authority to condemn property necessary for
protective purposes, and this general authority permits condemnation to provide
for the culture and growth of trees along highways. See also Streets and High-
ways Code Section 104(f), which authorizes the taking of property by the
Department of Public Works.

Code of Civil Procedure § 1239

Sec. . Section 1239 of the Code of Civil Procedure is repealed.

~~1239.--The following is a classification of the estates and rights in lands subject to be taken for public use:~~

~~1.--A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, or for the protection of water bearing lands from drought therefrom of any character whatsoever from any adjacent lands.~~

~~2.--Except as provided in subsections 3 and 4, or specifically in any other statute, an easement, when taken for any other use, provided, however, that when the taking is by a municipal corporation, and is for the purpose of constructing, equipping, using, maintaining or operating any works, road, railroad, tramway, power plant, telephone line, or other necessary works or structures, for the preparation, manufacture, handling or transporting of any material or supplies required in the construction or completion by such municipal corporation of any public work, improvement, or utility, a fee simple may be taken if the legislative body of such municipal corporation shall, by resolution, determine the taking thereof to be necessary, and provided, further, that, when any land is taken for the use of a bypass, or drainage way, or overflow channel, or a levee, or an embankment, or a cut required by the plans of the California Debris Commission referred to in that certain act of the~~

Tentatively approved July 1971

Legislature, entitled "An act approving the report of the California Debris Commission transmitted to the Speaker of the House of Representatives by the Secretary of War on June 27, 1911, directing the approval of plans of reclamation along the Sacramento River or its tributaries or upon the swamp lands adjacent to said river, directing the State Engineer to procure data and make surveys and examinations for the purpose of perfecting the plans contained in said report of the California Debris Commission, and to make reports thereof, making an appropriation to pay the expenses of such examinations and surveys, and creating a Reclamation Board and defining its power," approved December 24, 1911, or any modifications or amendments that may be adopted to the same, either a fee simple or easement may be taken as a reclamation board shall by resolution determine may be necessary. -- Such resolution shall be conclusive evidence that a taking of the fee simple or easement, as the case may be, is necessary.

3. -- The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

4. -- When the property is taken by any mutual water system, county, city and county, or incorporated city or town, or a municipal water district, or other political subdivision, regardless of the use, a fee simple may be taken if the legislative or other governing body of such mutual water system, county, city and county, or incorporated city or town, or municipal water district, or other political subdivision, shall, by resolution, determine the taking thereof in fee to be necessary. -- Such

CODE OF CIVIL PROCEDURE § 1239

Tentatively approved July 1971

~~resolution shall be conclusive evidence of the necessity for the taking of the fee simple. -- Where the fee is taken, the decree of condemnation shall specifically provide for the taking of a fee simple estate.~~

~~The provisions of this subsection shall not be applicable where the property is taken under the authority conferred by subsection 1 hereof.~~

Comment. Section 1239 is superseded by Section 303 of the Eminent Domain Code. A background study, prepared for the Law Revision Commission, on Section 1239 is published as Taylor, The Right to Take--The Right to Take the Fee or Any Lesser Interest, 1 Pac. L.J. 555 (1970).

EDUCATION CODE § 15007.5

Tentatively approved March 1970

Education Code. § 15007.5 (repealed)

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 305 of the Eminent Domain Code.

Government Code §§ 190-196. Protective condemnation (repealed)

Sec. . Article 4.5 (commencing with Section 190) of Chapter 1 of Division 1 of Title 1 of the Government Code is repealed.

Comment. Sections 190-196 of the Government Code, relating to protective condemnation, are superseded by Section 304 of the Eminent Domain Code.

Note. The text of the repealed sections is set out below.

190. "Land" when used in this article includes any interest, easement, or reservation in land.

191. Whenever the State or any city or county may acquire land in excess of the land actually needed or used for public purposes in connection with the establishing, laying out, widening, enlarging, extending, or maintaining of memorial grounds, streets, squares, parkways, or reservations, the acquisition, maintenance, and use of such land and the sale, disposition, and conveyance and the establishment in connection therewith of any reservations concerning the future use and occupation of such land so as to protect the public works or improvements and their environs which it adjoins and to preserve the view, appearance, light, air, and usefulness of such public works shall be conducted and maintained pursuant to this article.

192. Every act of the State authorizing the State, any city or county to acquire land for the purposes of establishing, laying out, widening, enlarging, extending, or maintaining memorial grounds, streets, squares, parkways, or other public places, shall be construed as including among its purposes the acquisition of land in excess of the land actually needed or used for public purposes.

193. If the State, any city, or county acquires any land under Section 14-1/2 of Article I of the Constitution or this article, which land is in excess of the land actually needed or used for public purposes, the State, city, or county may sell such land or any interest therein and may reserve in the land any reservation, easement, interest, or right that public interest, necessity, or convenience requires to preserve the view, appearance, light, air, and usefulness of any public memorial grounds, streets, squares, parkways, places, or works.

Tentatively approved July 1971

194. No such sale shall be made by a city or county except by its legislative body, nor until after notice has been published in the jurisdiction of the legislative body pursuant to Section 6064. The notice shall:

- (a) Describe the land or lands to be sold.
- (b) Set forth in general terms the interests, easements, or reservations to be reserved by the public.
- (c) State the time and place of the sale.
- (d) Call for sealed bids in writing.

195. At the time and place set for the sale, the legislative body shall open any bids received in response to the notice and shall sell the land to the highest bidder, except that it may at that time or at any time to which the sale is continued receive any higher bids and may reject any bid failing to comply with the terms of purchase set forth in the notice.

196. Money derived from the sale of land pursuant to this article shall be immediately paid into the fund from which payment was made for the land. If the land was purchased with funds derived from the levy of any assessment or tax upon property benefited, the money derived from the sale of the land shall be distributed as refunds to the persons paying those assessments or taxes in proportion to the amounts levied or assessed against them or thereafter to be levied or assessed against them to meet any bonds as yet unpaid by them. Money to be refunded to any person pursuant to this article shall first be applied to any indebtedness of such person or his successor in interest on account of any tax or assessment levied or any bond issued to pay the cost of any improvement done or performed by the public body, all or part of the cost of which is levied or taxed against the land of that person.

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 and water carriers
- § 623. Warehousemen
- § 624. Sewer system corporations

§ 622. Motor and water 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) As used in this section, "water carrier" means a common carrier operating upon any waterway in this state between fixed termini or over a regular route.

(c) A motor carrier or water 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 and water 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 or waterway in this state between fixed termini or over a regular route, or for other terminal facilities of any such carrier."

§ 624. Sewer system corporations

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

Comment. Section 624 grants a "sewer system corporation" (defined in Section 230.6) the right of eminent domain to acquire property necessary for the construction and maintenance of its "sewer system." "Sewer system" is defined in Section 230.5 to include all property used in connection with or to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes. Thus, Section 624 authorizes condemnation of any property necessary to carry out the regulated activities of sewer system corporations. Section 624 does not, however, authorize condemnation for a sewer system which merely collects sewage on the property of a single individual (Section 230.5); nor does it authorize condemnation by anyone other than a public utility subject to the jurisdiction, control, and regulation of the Public Utilities Commission.

Section 624 supersedes portions of subdivisions 3, 4, and 8 of Section 1238 of the Code of Civil Procedure insofar as those portions relate to condemnation by privately owned public utilities.

STREETS & HIGHWAYS CODE § 104.3

Tentatively approved July 1971

Streets & Highways Code § 104.3. Protective condemnation (repealed)

Sec. . Section 104.3 of the Streets and Highways Code is repealed.

~~104.3. --The department may condemn real property or any interest therein for reservations in and about and along and leading to any state highway or other public work or improvement constructed or to be constructed by the department and may, after the establishment, laying out and completion of such improvement, convey out any such real property or interest therein thus acquired and not necessary for such improvement with reservations concerning the future use and occupation of such real property or interest therein, so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air and usefulness of such public work; provided, that land so condemned under authority of this section shall be limited to parcels lying wholly or in part within a distance of not to exceed 150 feet from the closest boundary of such public work or improvement; provided that when parcels which lie only partially within such limit of 150 feet are taken, only such portions may be condemned which do not exceed 200 feet from said closest boundary.~~

Comment. Section 104.3 of the Streets and Highways Code is superseded by Section 304 of the Eminent Domain Code.

Water Code § 256. Protective condemnation (repealed)

Sec. . Section 256 of the Water Code is repealed.

~~256.--The department may condemn real property or any interest therein for reservations in and about and along and leading to any state dam or water facility or other public work or improvement constructed or to be constructed by the department and may, after the establishment, laying out and completion of such improvement, convey out any such real property or interest therein thus acquired and not necessary for such improvement with reservations concerning the future use and occupation of such real property or interest therein, so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air and usefulness of such public work; provided, that land so condemned under authority of this section shall be limited to parcels lying wholly or in part within a distance of not to exceed 500 feet from the closest boundary of such public work or improvement; provided, that when parcels which lie only partially within such limit of 500 feet are taken, only such portions may be condemned which do not exceed 600 feet from said closest boundary.~~

Comment. Section 256 of the Water Code is superseded by Section 304 of the Eminent Domain Code.