

## First Supplement to Memorandum 71-67

Subject: Study 36 - Condemnation (Compatible Use)

Attached as Exhibit I is a letter from the Department of Public Works concerning the proposal discussed at the last meeting for condemnation for "compatible" purposes. This is covered by Sections 470 and 471 of the draft attached to Memorandum 71-67. The letter makes three basic points which are discussed below.

First. The state should be authorized to condemn property already appropriated to a public use without any obligation to take the property for a joint use. The letter states that the draft considered at the last meeting did not make this clear and was susceptible to the interpretation that the possibility of a compatible use might be a defense to a taking for a more necessary public use. The staff believes that this matter has been clarified in the draft attached to the basic memorandum. If the revision suggested at page 2 of the basic memorandum is adopted, the fact that condemnation for a more necessary public use and condemnation for compatible use are independent authorizations, and that property may be taken for a more necessary public use even though the uses are or could be made compatible, will be even more clear.

Second. The state presently is authorized to take for joint use, subject to the court's power to fix terms and conditions of the uses, and under the proposed draft, this power may be limited to cases where the proposed use, under the plan for the proposed project, will be compatible with the existing use. In other words, as we understand the objection, under present law, the court is required to indicate what revisions are needed in the plan to make it compatible. The staff agrees that the court should not be permitted to deny a taking for

a compatible use unless it has first determined that the proposed plan could not be modified to permit such a taking. Accordingly, we recommend that subdivision (b) of Section 471 (as set out in the revised draft attached to the basic memorandum) be revised to read:

(b) If the court determines that the use in the manner proposed by the condemnor would not meet the requirements of Section 470, the court shall further determine whether the requirements of Section 470 would be met by fixing terms and conditions upon which the property may be taken and the manner and extent of its use by each of the parties and, if the court determines that the requirements of Section 470 can be so met, the court shall permit the taking by the plaintiff upon such terms and conditions.

Third. Property appropriated to a public use by the state is not now subject to being taken for a compatible use, and the letter states that this rule should be continued. Moreover, according to the letter, the standard provided in the prior draft was not adequate to permit prediction of what uses would be held compatible. The standard has been clarified in the revised draft attached to the basic memorandum. Whether property appropriated to a public use by the state should be exempt from takings for compatible use (as it is from takings for "more necessary" public uses) is a policy question.

Respectfully submitted,

Nathaniel Sterling  
Legal Counsel

DEPARTMENT OF PUBLIC WORKS

LEGAL DIVISION

368 PINE STREET, SAN FRANCISCO 94104



September 29, 1971

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
School of Law, Stanford University  
Stanford, California 94365

Dear Mr. Demouilly:

Re: Study 36.24, Proposed Sections 452 and 453 -  
Appropriation For More Necessary Public Uses  
and Proposed Section 471 - Taking for Consistent  
Use

At the meeting on September 10, 1971, the Commission invited the Department to make comments on the above proposed statutes. Since that time, the Department has carefully examined the above proposed sections and the comments thereto as well as the previous law as set forth in Code of Civil Procedure Section 1240(3).

As recognized by the Staff, the above proposed sections present a marked departure from former law and an examination of Code of Civil Procedure Section 1240(3) would appear appropriate as a point of departure for the discussion of the new proposals. Code of Civil Procedure Section 1240(3) sets forth generally the following basic rules insofar as State appropriation and uses are concerned:

1) Where property is sought to be taken by the State for a public purpose, which property has previously been appropriated to a public use by any individual firm or private corporation, the State's purpose is deemed predominant and more necessary.

Predominance of State use over uses proposed by lesser public bodies to which the State has delegated condemnation powers is well established by case law.

State of California v. City of Los Angeles,  
256 Cal. App.2d 930, 933.

2) Where the State has previously devoted property to a public use and said property is sought to be taken the State's use is deemed to be more necessary.

3) Where property has already been appropriated to a public use by any person, firm or private corporation and is sought to be taken by the State for a "consistent" use by the State, the State's use is predominant but the Court may fix the terms and conditions upon which such property may be taken and the manner and extent of the use thereof to provide for common usage.

Insofar as the terms and conditions of Section 1240 are inconsistent with Federal Highway Law, Federal Highway Law will rule.

County of Marin v. Superior Court,  
53 Cal.2d. 633.

Proposed Section 471 and the comments thereto greatly expand the concept of taking for a "consistent" use over the provisions contained in Code of Civil Procedure Section 1240(3) as follows:

1) Section 1240(3) makes no provision for the acquisition of property previously devoted to public use by the State for a so-called "consistent" use. The proposed section would provide for this.

2) Assuming the State to be the condemnor of property previously devoted to public uses by a lesser Governmental body or a person, firm or private corporation, proposed Section 471 does not provide that the State's use will prevail subject to Court's power to fix terms and conditions, etc., but that the matter as to which use may be the "more necessary" is made justiciable.

A careful reading of the comments to the above proposed sections does not support the verbal assurances of the Staff at the September 10th meeting that a Court could not rule that the State must, in a particular case, be proceeding or be required to proceed under Section 471 and therefore, subject its proposed taking to defeat under the terms of proposed Chapter 9. As explained at the September 10th meeting of the Commission, such an exposure would, as a practical matter, preclude the Department from planning to make use of railway and other transportation corridors for highway construction as it currently may do with confidence under Code of Civil Procedure Section 1240. Indeed, the very necessity for the Department to structure its taking and construction so as not to unduly interfere with railroad operations (See P.U.C. Sections 1201, et seq. and consider

power of the Interstate Commerce Commission under superior Federal law) forces the Department in these cases into a factual situation of taking and construction which could well be deemed to be "consistent" with the public use usage to which the property has previously been appropriated.

The recommendations of the Commission as to this aspect of the problem would have either of two effects contrary to current planning policies encouraging more than one transportation use in a previously established (and perhaps partially obsolete) transportation corridor:

1) As stated above, since the availability of such corridor could not be assured prior to condemnation litigation, such corridor would be avoided in the planning process.

2) More property rights than actually "needed" might be sought by condemnors seeking to make use of such corridor in an effort to bring the case under the more necessary public use provisions of Chapter 8 rather than the so-called "consistent use" provisions of proposed Chapter 9. To the extent this tended to exclude the prior public use, this could be unfortunate in that it is desirable to encourage, in appropriate cases, two transportation uses within the same transportation corridor. In the case of railroads such uses can consist not only of trackage but of warehouses and freight forwarding buildings. Retention of these uses on the local tax roll is desirable to everyone involved.

Looking for a moment at the other side of the coin, as above observed, Section 1240 does not provide that property previously appropriated to public purposes by the State may be condemned for "consistent use" by lesser public bodies or by persons, firms, or private corporations. The Department feels that the change in this regard, proposed by Section 471, is entirely too sweeping, theoretical and generalized. No standards whatsoever are set forth to guide the Court in exercise of its discretion in this regard. Thus, a particular Superior Court judge, depending upon his proclivities, could rule that current wide-slope areas desirable for highway beautification and safety could consistently be used by a local city or county or private corporation, etc. for such uses as high tension electric transmission lines, jet fuel lines, natural gas pipelines, bicycle paths, hiking trails, drover's paths or hot-rod speedways. In the past, it has been the responsibility of the State Legislature to provide the power of condemnation to various departments of the State Government for various uses of overwhelming State-wide importance. In doing so, it explicitly has

established such matters of State-wide importance to be superior and a greater priority than public uses traditionally entrusted to lesser public bodies and persons, firms and private corporations. These legislative priorities should not lightly be cast in doubt by the enactment of a so-called procedural right to take statute which thrusts the determination of priorities upon the shoulders of a local Superior Court judge without statutory standards for guidance.

The Legislature's established priorities fit into a statutory scheme and provide a practical guide to entities in control of various public uses as situations may arise appropriate for joint public use of a corridor.

As applies to highways, the entities desiring to place utilities or other public uses in the right of way are usually allowed to do so under an Encroachment Permit which sets forth various terms and conditions to provide for future highway use and the safety and convenience of the travelling public. All unauthorized encroachments on highway rights of ways are actionable unless such an Encroachment Permit has been sought and received (see People v. Henderson, 85 Cal. App. 653; Streets and Highways Code Sections 660, 670).

Under the above scheme, the entity having the legislative priority as to public use controls any joint use of another entity desiring to make a lesser priority use of the property. If such priorities were subject to change at the whim of a particular local Superior Court judge, such agreement would be impossible and the current wide practice of standard agreements in these matters would be jeopardized.

Under the change in law proposed by the above referenced study, conceivably, if a particular utility was to run through the jurisdictions of three different Superior Court judges (even if not interrupted by one, the terms and conditions governing such joint use could be entirely divergent.) Such a proposed change would also cast in with great uncertainty current master agreements the Department has reached with major and minor utilities concerning relocation of facilities where the highway must be redesigned.

The Department is not aware of any shortcomings in the workability of the system under present law which have been pointed out to the Commission which would justify the sweeping changes proposed by the above referenced study.

In conclusion, the Department feels that the present priorities for State taking of property devoted to a prior public use are correctly provided for in Section 1240(3) and that immunity

Mr. John H. DeMouilly

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from condemnation of State property devoted to State-wide public use should likewise not be lightly abrogated by a "procedural" right to take statute as proposed in Chapter 9.

Very truly yours,



NORVAL FAIRMAN  
Assistant Chief Counsel