#36.440 9/25/72

Memorandum 72-61

Subject: Study 36.440 - Condemnation Law and Procedure (Approval of Portions of Comprehensive Statute for Printing)

Introduction

This memorandum is an attempt to complete the work on Chapter 4 of the Comprehensive Statute--the right to take in eminent domain. We hope to send this chapter, both statute sections and Comments, to the printer after the October meeting.

This memorandum presents Chapter 4 for tentative approval for printing. Various matters in connection with this chapter are presented for your consideration and action. Of the matters noted for future consideration following some of the right to take sections (Chapter 4 in blue binder), several are disposed of in this memorandum while others will be deferred until consideration of procedural aspects of eminent domain. Any other problems of a substantive nature relating to the right to take that anyone may have should be brought up at the meeting. Any drafting or technical revisions in the right to take sections or Comments should be given to the staff at the meeting so that they can be considered when the material is prepared for the printer following the meeting.

Technical revisions

Exhibit I (pink) is a list of changes, technical in nature, that the staff proposes to make in previously approved sections.

Numbering of Eminent Domain Law

Pursuant to the Commission's direction at the September 1972 meeting, the staff asked the Legislative Counsel for his views on placing the Eminent Domain

Law at the end of the Code of Civil Procedure as a new Part 5. The Legislative Counsel responded (Exhibit III--green) that to do so would be "illogical." He suggested that, if we wished to make a new Part, we place it immediately following Part 3 (Special Proceedings).

The staff believes that no useful purpose would be served by adopting the Legislative Counsel's compromise suggestion because there are no fresh numbers available following Part 3 and use of a decimal system would still be necessary. On balance, the staff recommends that the Eminent Domain Law be left in the existing eminent domain title of the Code of Civil Procedure.

§ 1240.040--Property that may be taken

Section 1240.040 needs to be revised to make clear that a grant of condemnation authority, unless the grant is itself limited, includes authority to condemn not only real property but also personal property necessary for the public use. Exhibit IV (gold) would revise Section 1240.040 accordingly. Numerous statutes authorize condemnation of "real or personal property" but some merely authorize condemnation of "property." Revision of Section 1240.040 to make clear that personal property can be condemned would not extend those condemnation grants that authorize acquisition of "real property" only.

The Commission has not previously considered the matter of property exempt from condemnation. There are numerous statutes that limit the right to condemn certain kinds of property. For example, some agencies may condemn property only with the consent of the Board of Supervisors of the county within which the property is located. Other provisions permit agencies to acquire property for certain purposes but prohibit the use of eminent domain. Other sections make particular property immune to taking by all persons. The staff believes that these are substantive decisions not necessarily within

the realm of the Commission's procedural statute and has determined not to tinker with these exemptions from condemnation. Section 1240.040 recognizes that specific statutory limitations such as those described above exist, and the Comment lists some of them.

Months ago, we wrote to the State Lands Commission asking whether Code of Civil Procedure Section 1240(2) (16th and 36th sections of public domain land included within the boundaries of a national reserve or land withdrawn from public entry not subject to condemnation) might be repealed but received no response. Exhibit V (blue) is a research study indicating that this provision probably has some current application; hence, the staff recommends that its substance be retained. See proposed Public Resources Code Section 8030.

§ 1240.070--Property that must be taken--improvements

The general rule is that, where a condemnor takes realty, it must also take structures and improvements affixed to the realty. There are a few statutory exceptions to this general rule, e.g.,the ability of certain local public entities to compel the relocation of railroad tracks under Code of Civil Procedure Section 1248a. The staff sees no reason to tamper with these rules; hence, Section 1240.070 (Exhibit VI--buff) represents a codification of former law. See Comment to Section 1240.070 for discussion.

Section 1240.070 also deals with two related matters not generally covered in existing law:

(1) The acquisition of structures does, on occasion, leave half a building which must be shored, sealed, and perhaps reoriented on the property. This can create substantial damages as well as safety problems. We have received a request from the City of Los Angeles that authority be provided to acquire the whole building in such a case. Subdivision (c) of Section 1240.070 is a draft of such authority; it is modeled after an existing special district provision.

(2) The problem whether equipment is to be classified as structures (and hence must be taken and paid for) or as personalty (and hence must be removed by the condemnee at his own expense) has engendered substantial litigation. The attached research study (Exhibit VII--white) indicates that the trend of both case and statutory law has been to classify equipment as part of the realty because there has been no adequate moving expense allowance. Since passage of the relocation assistance act last year, this situation has changed, and the pressure to classify equipment as part of the realty has diminished. Nonetheless, it may be inequitable to require a businessman to keep or resell equipment that is not affixed to the realty but that is designed especially for use on the property taken. Code of Civil Procedure Section 1248b provides that, if such equipment is designed for industrial or manufacturing purposes, it is deemed part of the realty. The staff believes that equipment designed for commercial purposes as well, and installed for use in a fixed location, should be deemed a part of the realty. Subdivision (a) of Section 1240.070 accomplishes this result.

§ 1240.080--General authorization to acquire property by purchase, and the like

The staff believes that it is sound policy to make clear that a public entity authorized to condemn property for any particular purpose also is authorized to negotiate a purchase of the property for the same purpose unless otherwise provided by statute. Section 1240.080 (Exhibit VIII--pink) is intended to assure that there are no cases where condemnation is authorized but the public entity has inadvertently been deprived of the right to acquire by other means. Section 1240.080 has several other useful functions:

(1) It permits the repeal of Code of Civil Procedure Section 1266.1 which provides that, where a city or county is authorized to condemn excess property, it may also acquire such property by gift or purchase.

(2) It permits deletion of portions of the special district sections that list, by way of illustration only, numerous types of property subject to acquisition by various means, including condemnation.

§ 1240.420--Excess condemnation

At the July 1972 meeting, the Commission revised the wording of Section 1240.420 and requested the staff to redraft the Comment in such a way as to indicate that it preserved existing case law. The revised statute and Comment appear in Exhibit IX (yellow). The material relating to challenging the right to take excess property has been eliminated since this matter will be dealt with in the uniform procedural provisions relating to pretrial disposition of right to take issues.

§§ 1240.530 and 1240.630--Indemnity in case of joint use

At the December 1971 meeting, the Commission approved the more necessary-compatible use scheme but requested that the staff draft an indemnity provision to protect the defendant whose property is taken for compatible use. In searching for a model provision, the only useful statute the staff has been able to find is a provision of the Franchise Act of 1937, providing that grantees of gas and electric franchises must indemnify the granting municipality:

Public Utility Code § 6296

> 6296. The grantee shall indemnify and hold harmless the municipality and its officers from all liability for damages proximately resulting from any operations under the franchise.

There appear to be no cases construing this section. Adapting this provision for use in our eminent domain statute, the compatible use indemnity provision would read:

§ 1240.530. Fixing terms and conditions of joint use

* * * * *

(d) Where property is taken under this article, the plaintiff shall indemnify and hold harmless the defendant from all liability for damages proximately resulting from the use of the property by the plaintiff.

Comment. . . .

* * * * *

The indemnity for the defendant in a taking for joint use provided by subdivision (d) is based upon a comparable provision in Public Utilities Code Section 6296 (indemnification of municipality by franchise grantee). See also Section 1240.630.

The more necessary use indemnity provision would read:

§ 1240.630. Right of prior user to joint use of property

* * * * *

(c) Where the court permits joint use under this section, the defendant shall indemnify and hold harmless the plaintiff from all liability for damages proximately resulting from the use of the property by the defendant.

Comment. . . .

* * * * *

The indemnity for the plaintiff where the defendant is permitted to enjoy common use of the property provided by subdivision (c) is based upon a comparable provision in Public Utilities Code Section 6296 (indemnification of municipality by franchise grantee). See also Section 1240.530.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

Memorandum 72-61

EXHIBIT I

This exhibit lists changes of a technical nature the staff tentatively intends to make in the right to take chapter before sending it to the printer. There probably will be further changes (for consistency or clarification) that result from Commission suggestions and from the process of preparation for printing.

Section 1240.010

Comment.

page 1, line 2: substitute "limitation" for "requirement"

page 2, line 12: add "County of Los Angeles v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308, cert. denied, 376 U.S. 963 (1964); Redevelopment Agency v. Hayes, 122 Cal. App.2d 777, 266 P.2d 105, cert. denied, 348 U.S. 897 (1954)."

Section 1240.020

Comment.

page 3, line 11: delete last paragraph; insert following:

If the property authorized to be taken is limited by statutory grant to property of a certain type--e.g., "natural, open" areas or "blighted" areas--an attempt to take property other than the type designated by statute is precluded by Section 1240.020. Cf. 7 P. Nichols, Eminent Domain App. 309 (3d ed. 1970).

Under former law, the right of eminent domain was delegated to any person seeking to acquire property for public use. See former Civil Code Section 1001; Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955). The Eminent Domain Law does not continue this broad delegation of condemnation authority. Specific statutes continue the condemnation authorization of all presently authorized

public entities. Separately enacted provisions also continue the right of some types of private persons to condemn for certain public uses. Privately owned public utilities may condemn for utility purposes. Pub. Util. Code §§ 610-624. Mutual water companies may condemn to irrigate lands that they service. Pub. Util. Code § 2729. Land chest corporations (Health & Saf. Code § 35167) and limited dividend housing corporations (Health & Saf. Code § 34874) may condemn property for their projects. Nonprofit hospitals may condemn property for their purposes. Health & Saf. Code § 1427. Nonprofit educational institutions of collegiate grade may condemn to carry out their functions. Educ. Code § 30051. Although private persons may no longer condemn for sewers or byroads, they may request the appropriate public authority to undertake such condemnation on their behalf. Health & Saf. Code § 4967 (sewers); Sts. & Hwys. Code § 4120.1 (byroads).

Section 1240.030

Comment.

page 4, line 3: substitute "Public entity plaintiffs" for "Condemnors that are public entities"

page 4, line 5: delete "s" from "Sections"; delete "and 1240.040"

page 4, line 6: add "r" to "govening"

page 5, line 2: delete "s" from "Sections"

page 5, line 3: delete "and 1240.040"

page 5, line 5: substitute "1260.000 and 1260.000" for "1260.340 and 1260.370"

page 5, line 9: delete "to have been adopted"

page 5, line 10: add the following: "Keith v. Volpe, ____ F. Supp. ____ (C.D. Cal. 1972), and Environmental Defense Fund, Inc. v. Coastside Water Dist., ____ Cal. App.3d ____, ____ Cal. Rptr. _____ (1972)."

page 6, line 17: substitute for last paragraph the following:

Subdivision (b) generalizes the plan or location requirement formerly found in Code of Civil Procedure Sections 1242(a) and 1240(6)(acquisition of land or rights of way).

page 7, line 3: substitute "includes" for "involves"

page 7, line 17: substitute for the parenthetical the following: "(right to take any necessary property or right or interest therein)."

page 7, line 22: substitute for last paragraph the following:

Subdivision (c) continues former Code of Civil Procedure Section 1241(2) to the extent that it required a showing of the necessity for taking the particular property or a particular interest therein.

Section 1240.040: See memorandum.

Section 1240.050

Caption. Substitute "Right to acquire property to make effective the principal use" for the existing caption.

Text.

page 9, line 2: substitute "use" for "purpose"

page 9, line 4: substitute "use" for "purpose"

Comment.

page 10, line 6: remove quotes from "public use"

page 11, line 16: substitute "1260.000" for "1260.330"

Section 1240.060: No change.

Section 1240.110

Comment.

page 16, line 18: substitute "1240.120" for "351"

Section 1240.120

Comment.

page 17, line 12: add the following paragraph:

It should be noted that failure to commence an eminent domain proceeding within six months after adoption of a resolution of necessity constitutes a cause of action for inverse condemnation. Section [CCP § 1243.1].

Section 1240.130: No change.

Section 1240.140: No change.

Section 1240.150

Text.

page 22, line 3: delete "s" from "Sections"

page 22, line 4: delete "and 1240.040"

page 22, line 8: delete "s" from "Sections"; delete "and"

page 22, line 9: delete "1240.040"; substitute "is" for "are"

Comment.

page 23, line 3: delete "s" from "Sections"; delete the following: "and 1240.040 and required by Section 1240.130 to be stated in the resolution as found and determined by the entity"

page 23, line 7: substitute "The conclusive effect of the resolution of necessity is constitutionally permissible." for "Giving the resolution this conclusive effect has been upheld against an assertion that the failure to give the property owner notice and a hearing on necessity and proper location in the condemnation proceeding makes the condemnation an unconstitutional taking without due process of law."

page 23, line 16: delete "s" from "Sections"; delete "and 1240.040"

page 23, line 19: delete "s" from "Sections"; delete "and 1240.040"

page 24, line 2: substitute "1260.000" for "1260.330"

page 24, line 4: substitute "defendant" for "condemnee"

page 25, line 8: insert "on the effect" following "limitation"

Section 1240.210: No change.

Section 1240.220: No change.

Section 1240.230

Comment.

page 31, line 6: substitute "1260.000" for "1260.310"

Section 1240.310: No change.

Section 1240.320

Text.

page 35, line 1: delete the introductory clause of subdivision (a) and insert the following:

(a) Any public entity authorized to exercise the power of eminent domain to acquire property for a particular use may exercise the power of eminent domain to acquire for that use substitute property if all of the following are established:

page 35, line 11: delete first sentence and insert the following:

(b) Where property is sought to be acquired pursuant to this section, the resolution of necessity and the complaint filed pursuant to such resolution shall specifically refer to this section and shall include a statement that the property is necessary for the purpose specified in this section.

Section 1240.330

Text.

page 38, line 1: delete introductory clause of subdivision (a) and insert the following:

(a) Any public entity authorized to exercise the power of eminent domain to acquire property for a particular use may exercise the power of eminent domain to acquire for that use substitute property if all of the following are established:

page 38, line 13: delete subdivision (b) and insert the following:

(b) Where property is sought to be acquired pursuant to this section, the resolution of necessity and the complaint filed pursuant to such resolution shall specifically refer to this section and shall include a statement that the property is necessary for the purpose specified in this section.

Section 1240.330

Comment.

page 41, line 10: substitute "1240.320" for "1240.330"

page 42, line 1: delete "See Section 1240.340."

page 42, line 4: substitute "1245.000" for "1245.610"

Section 1240.350

At the September 1972 meeting, the Commission decided to add utility service to this section. The new section with Comment adjusted is set out as Exhibit X (green).

Section 1240.360: No change.

Section 1240.410

Comment.

page 48, line 4: add the folliwing citation: "Cf. former Code Civ. Proc. § 1266.1 (cities and counties may acquire excess property by purchase or gift)."

page 49, line 1: substitute for the entire page the following language: market value or value to another owner). Compare Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956).

It should be noted that, where a partial taking would leave an "uneconomic remnant," the condemnor must offer to acquire the remnant. Govt. Code § 7267.7.

This section does not specify the procedure to be followed by the entity in disposing of the property so acquired. That matter is provided for by Section 1240.430.

Section 1240.420: See memorandum.

Section 1240.430: No change.

Section 1240.510

Text.

page 61, line 6: substitute "acquired pursuant to" for "taken under"

Comment.

page 64, line 19: substitute "1240.040" for "1240.___"

Section 1240.520

Comment.

page 65, line 6: substitute "1260.000" for "1260.310"

Section 1240.530

Text. See memorandum.

Comment.

page 68, line 15: add the following citation: "See also Note, Cost Allocation in Public Utility Relocation in California, 23 Hastings L.J. 898 (1972)."

Section 1240.610

Text.

page 69, line 5: substitute "acquired pursuant to" for "taken under"

Comment.

page 70, line 21: substitute "1240.040" for "1240.___"

Section 1240.620: No change.

Section 1240.630

Text. See memorandum.

page 72, line 9: substitute "Article 0 (commencing with Section 1260.000)" for "Article 4 (commencing with Section 1260.310)"

Comment.

page 73, line 9: substitute "1260.000" for "1260.310"

Section 1240.640: No change.

Section 1240.650: No change.

Section 1240.660: No change.

Sections 1240.670, 1240.680

Due to recent enactments, the staff now believes it is desirable to retain the whole of Code of Civil Procedure Sections 1241.7 and 1241.9 in the Eminent Domain Law rather than splitting them between the Eminent Domain Law and the Streets and Highways Code. The text of these provisions appears in Exhibit II (yellow).

Section 1240.710: Renumber as 1240.810.

Text.

page 84, line 1: substitute "acquire by eminent domain" for "condemn"

page 84, line 2: substitute "acquire by eminent domain" for "condemn"

Section 1240.810: Renumber as 1240.910.

Section 1240.820: Renumber as 1240.920.

Section 1240.830: Renumber as 1240.930.

Section 1240.840: Renumber as 1240.940.

Section 1240.850: Renumber as 1240.950.

Section 1240.860: Renumber as 1240.960.

Section 1240.870: Renumber as 1240.970.

Memorandum 72-61

EXHIBIT II

The Right to Take

EMINENT DOMAIN LAW § 1240.670

Tentatively approved September 1971
Renumbered October 1971
Renumbered December 1971
Staff revision September 1972

§ 1240.670. Presumption that property preserved in its natural condition by nonprofit organization appropriated to most necessary use

1240.670. (a) Except as provided in Section 1240.690, notwithstanding any other provision of law, property is presumed to have been appropriated for the best and most necessary public use if all of the following are established:

(1) The property is owned by a nonprofit organization contributions to which are deductible for state and federal income tax purposes under the laws of this state and of the United States and having the primary purpose of preserving areas in their natural condition.

(2) The property is open to the public subject to reasonable restrictions and is appropriated, and used exclusively, for the preservation of native plants or native animals, including but not limited to, mammals, birds, and marine life, or biotic communities, or geological or geographical formations of scientific or educational interest.

(3) The property is irrevocably dedicated to such uses so that upon liquidation, dissolution, or abandonment of or by the owner, such property will be distributed only to a fund, foundation, or corporation whose property is likewise irrevocably dedicated to such uses, or to a governmental agency holding land for such uses.

(b) The presumption established by this section is a presumption affecting the burden of proof.

Tentatively approved September 1971
Renumbered October 1971
Renumbered December 1971
Staff revision September 1972

Comment. Section 1240.670 continues without substantive change the provisions of subdivision (a) of former Section 1241.9 of the Code of Civil Procedure. For special procedural limitations where the property described is sought to be taken for state highway purposes, see Section 1240.690.

Tentatively approved September 1971
Renumbered October 1971
Renumbered December 1971
Staff revision September 1972

§ 1240.680. Presumption that park property appropriated to most necessary use

1240.680. (a) Except as provided in Sections 1240.690 and 1240.700, notwithstanding any other provision of law, property is presumed to have been appropriated for the best and most necessary public use if the property is appropriated to public use as any of the following:

(1) A state, regional, county, or city park or recreation area.

(2) A wildlife or waterfowl management area established by the Department of Fish and Game pursuant to Section 1525 of the Fish and Game Code.

(3) A historic site included in the National Register of Historic Places or state-registered landmarks.

(4) An ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code.

(b) The presumption established by this section is a presumption affecting the burden of proof.

Comment. Section 1240.680 continues without substantive change the provisions of subdivision (a) of former Section 1241.7 of the Code of Civil Procedure and subdivision (a) of former Section 5542.5 of the Public Resources Code. The portion of Section 5542.5(a) which described the property ("whether owned in fee or lesser title interest, leased, or operated under a license, management agreement, or otherwise") has been omitted in view of the broad definition of "property" in Section 1230.070. See also Section

1230.080 (defining "property appropriated to public use").

For special procedural limitations where the property described is sought to be taken for state highway purposes, see Section 1240.690. For special procedural limitations where the property described is sought to be taken for city or county road, street, or highway purposes, see Section 1240.700.

Tentatively approved September 1971
Revised December 1971
Renumbered; staff revision
September 1972

§ 1240.690. Declaratory relief where acquisition for state highway purposes

1240.690. (a) When property described in Section 1240.670 or Section 1240.680 is sought to be acquired for state highway purposes, and such property was dedicated or devoted to a use described in those sections prior to the initiation of highway route location studies, an action for declaratory relief may be brought by the public entity or nonprofit organization owning such property in the superior court to determine the question of which public use is the best and most necessary public use for such property.

(b) The action for declaratory relief shall be filed and served within 120 days after the California Highway Commission has published in a newspaper of general circulation pursuant to Section 6061 of the Government Code, and delivered to the public entity or nonprofit organization owning such property, a written notice that a proposed route or an adopted route includes such property. In the case of nonprofit organizations, the written notice need only be given to nonprofit organizations that are on file with the Registrar of Charitable Trusts of this state.

(c) In the declaratory relief action, the resolution of the California Highway Commission is not conclusive evidence of the matters set forth in Section 1240.030.

Tentatively approved September 1971
Revised December 1971
Renumbered; staff revision
September 1972

(d) With respect to property described in Section 1240.670 or Section 1240.680 which is sought to be acquired for state highway purposes:

(1) If an action for declaratory relief is not filed and served within the 120-day period established by subdivision (b), the right to bring such action is waived and the provisions of Sections 1240.670 and 1240.680 do not apply.

(2) When a declaratory relief action may not be brought pursuant to this section, the provisions of Sections 1240.670 and 1240.680 do not apply.

Comment. Section 1240.690 continues without substantive change the provisions of subdivision (b) of former Sections 1241.7 and 1241.9 of the Code of Civil Procedure except that the portion of subdivision (b) that related to trial preference is continued in Section 1240.710.

§ 1240.700. Declaratory relief where regional park to be acquired for city or county street purposes

1240.700. (a) Where property described in Section 1240.680 is sought to be acquired for city or county road, street, or highway purposes, and such property was dedicated or devoted to regional park or recreational purposes prior to the initiation of road, street, or highway route location studies, an action for declaratory relief may be brought in the superior court by the regional park district which operates the park or recreational area to determine the question of which public use is the best and most necessary public use for such property.

(b) The action for declaratory relief shall be filed and served within 120 days after the city or county, as the case may be, has published in a newspaper of general circulation pursuant to Section 6061 of the Government Code, and delivered to the regional park district, a written notice that a proposed route or site or an adopted route includes such property.

(c) With respect to property dedicated or devoted to regional park or recreational purposes which is sought to be acquired for city or county road, street, or highwyay purposes:

(1) If an action for declaratory relief is not filed and served within the 120-day period established by subdivision (b), the right to bring such action is waived and the provisions of Section 1240.680 do not apply.

(2) When a declaratory relief action may not be brought pursuant to this section, the provisions of Section 1240.680 do not apply.

Comment. Section 1240.700 continues without substantive change the provisions of subdivision (b) of former Section 5542.5 of the Public Resources Code except that the portion of Section 5542.5 relating to trial preference is continued in Section 1240.710.

Tentatively approved September 1971
Revised December 1971
Renumbered; staff revision
September 1972

§ 1240.710. Trial preference

1240.710. An action for declaratory relief under Section 1240.690 or 1240.700 shall have preference over all other civil actions in the matter of setting the action for hearing or trial to the end that any such action shall be quickly heard and determined.

Comment. Section 1240.710 continues without substantive change a portion of subdivision (b) of former Code of Civil Procedure Sections 1241.7 and 1241.9 and a portion of subdivision (b) of former Public Resources Code Section 5542.5.

Memo 72-61

EXHIBIT III

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GEORGE H. MURPHY

Sacramento, California
September 13, 1972

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law — Stanford University
Stanford, California 94305

Dear John:

You have asked my advice as to the placement in the Code of Civil Procedure of the law relating to eminent domain.

As you know, the Code of Civil Procedure was not compiled by the California Code Commission. Therefore, in the disposition of material therein, we are not concerned with any specific guidelines.

The law in the several titles of the Code appear to follow a logical sequence, as follows:

Title 1 - of Courts of Justice
Title 2 - of Civil Actions
Title 3 - of Special Proceedings of a Civil Nature
Title 4 - of Evidence

Since the law on eminent domain can be regarded as a special proceeding of a civil nature, it would appear that its inclusion in Title 3 is appropriate. And the inclusion of that law in Title 5 following the law on evidence would seem to be illogical.

On the other hand, I see no reason why the material should not be codified in a separate title. Therefore, I suggest for your consideration, that if it is desired to place the law in a separate title, it be numbered "Title 3.5" or it could be given the number "Title 4" and Title 4 could be renumbered.

As I indicated above, there is no established guideline to indicate the proper disposition of the eminent domain law and its disposition at any point will present no major problem. The only concern I would have is one of maintaining a logical sequence in presenting the subject matter.

Very truly yours,

George H. Murphy
Legislative Counsel

GHM:llb

Memorandum 72-61

EXHIBIT IV

§ 1240.040. Right to acquire any necessary right or interest in any type of property

1240.040. Except to the extent limited by statute, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire any right or interest in property of any type necessary for that use.

Comment. Section 1240.040 is both an authorization and a limitation on the power of condemnation. It provides that a person authorized to condemn may take any type of property and any right or interest in such property but limits this grant only to property that is necessary for the purpose for which the condemnation is authorized. See Sections 1230.070 ("property" includes any right or interest in property) and 1240.030 (necessity to acquire particular property must be established).

The authorization to take any right or interest is generally consistent with the former law that permitted a public entity to take a fee rather than merely an easement. See former Code Civ. Proc. § 1239(4)(local public entities). However, under former law, most privately owned public utilities and some local public entites were permitted to acquire only an easement except in certain circumstances. See former Code Civ. Proc. § 1239. Moreover, under former law, the distinction generally made was between taking a fee or an easement. See generally Taylor, The Right to Take--The Right to Take a Fee or Any Lesser Interest, 1 Pac. L.J. 555 (1970). Section 1240.040 permits taking of the fee or any other right or interest in property. See Section 1230.070 (defining "property").

The initial proviso recognizes that, if the interest in property authorized to be taken is limited by the statutory grant (as, for example, where the statute authorizes acquisition of only an easement), an attempt to take an interest in the property other than that permitted by the statute is precluded. Also, if the statutory grant to the particular entity is specifically limited to "real property," Section 1240.040 does not extend that grant to include personal property. On the other hand, if the statutory grant of condemnation authority is to acquire any "property" necessary for a particular use, Section 1240.040 makes clear this includes authority to condemn both real and personal property. See also Section 1240.070 (fixtures installed for use in fixed location).

The authorization to take property of any type necessary for a particular use supersedes former Code of Civil Procedure Section 1240 which attempted to list the various types of property that might be taken. The broad authorization in Section 1240.040 codifies cases holding that the right to condemn property has inherent the right to take all interests and all rights appurtenant. See, e.g., City of Los Angeles v. Hughes, 202 Cal. 731, 267 P. 737 (1927)(fixtures); People v. Superior Court, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962)(dredger tailings); Northern Light Etc. Co. v. Stacher, 13 Cal. App. 404, 109 P. 896 (1910)(water); County of Kern v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962)(oil, gas, mineral rights). It should be noted, however, that money is not subject to the power of eminent domain. Emery v. San Francisco Gas Co., 28 Cal. 345 (1865).

The initial proviso to Section 1240.040 also recognizes that other statutes may make certain property exempt from condemnation. For example, an existing golf course may not be acquired by a city for golf course purposes.

Govt. Code § 37353(c). Cemetery land may not be taken for rights of way. Health & Saf. Code §§ 8134, 8560, 8560.5; see Eden Memorial Park Ass'n v. Superior Court, 189 Cal. App.2d 421, 11 Cal. Rptr. 189 (1961). Property within the Aptos Forest is not subject to eminent domain except by specific permission of the Legislature. Pub. Res. Code § 5006.2. Certain land in the public domain may not be taken at all. Pub. Res. Code § 8030. An existing airport owned by a local entity cannot be taken by the Department of Aeronautics without consent. Pub. Util. Code § 21632. See generally Article 6 (commencing with Section 1240.510) and Article 7 (commencing with Section 1240.610) of Chapter 4 of the Eminent Domain law for limitations on the acquisition of property appropriated to public use.

Memorandum 72-61

EXHIBIT V

FEDERAL GRANTS OF THE 16TH AND 36TH SECTIONS OF SURVEYED LANDS TO THE STATES FOR SCHOOL PURPOSES

By Patty Radez

Background

It became customary when admitting states to the union for the federal government to make "in-place" grants of land to be used for school purposes. Originally, the grant was of the 16th section of all surveyed land but, with California and the states admitted after it, the grant was of the 16th and 36th sections. Most of these grants went to the western states. Accompanying the "in-place" grants of specific sections were quantity grants which were grants of blocks of land to be selected by the state from available public lands. This land was to be used for various institutional purposes. Related to the "in-place" grants were the indemnity or lieu-selection grants. These provided that, where the in-place lands were unavailable to the state because of prior public use or settlement, the state could select other land from the available public domain. There is no time limit on the lieu selection, and the state may opt to wait until federal or other use ceases and claim the original sections rather than selecting lieu sections. There has also been some contention lately that lieu selections may not be of land more valuable than the original land.

Federal grants to the state do not pass until the land is surveyed. Prior to survey, third-party rights may arise under other laws. This is one reason for the in-lieu grants. Early land scandals dealt with the sale of land that had not been officially surveyed and which was then resold after survey.

The California Land Grants

California was granted the 16th and 36th sections for all public lands, to be used for school purposes, on March 3, 1853. A federal act to "quiet land titles in California," passed July 23, 1866, granted the state the right to select other land in lieu of 16th and 36th sections which were unavailable to the state. Under these grants, California received 5,534,293 acres of land. Much of this land was immediately sold and a survey by the California Conservation Commission in 1912 estimated the state at that point owned approximately one million acres of school lands.

The original federal grants are now continued in 43 U.S.C. Sections 851, 856, 870, and 871. These sections have been amended as recently as 1966 and seem to have current vitality. Sections 852a and b allow the Secretary of the Interior to establish regulations for the application for unsurveyed lands and require that lands be surveyed before they may be transferred.

The federal statutes are matched in the California Public Resources Code. Section 6205 requires the State Lands Commission to keep records of all school lands belonging to the state. Sections 6206.5 and 6207 cover the application for unsurveyed land and the keeping of records of the types and amounts of land to which the state is entitled. Section 7301 gives the commission the power to sell the school lands and Section 7402 covers the selection of indemnity or in lieu lands.

The need for and application of these statutes is reflected in the current status of school lands in California. As of July 1968, California owned 617,000 acres of school lands. The revenue (rents and the like) from this land is approximately three million dollars per year. California also contains one of the largest areas of unsurveyed land in any of the western

states (much of it near Death Valley). In the years from 1958-1967, California received 101,153 acres of school lands from new surveys. There still remains approximately 310,000 acres of unsurveyed school land in California. Most of the land being granted now will result in indemnity or in-lieu grants. There is some evidence that much of the school lands owned by California are for sale.[1]

The grant of these lands originally limited their use to "school purposes." This was not held to prevent the state from selling the land. Alabama v. Schmitdt, 232 U.S. 168, 59 L.Ed 555, 34 S. Ct. 301 (1914). The title to the land vests absolutely in the state when surveyed. Hibberd v. Slack, 84 F. 571 (C.C. Cal. 1897). However, the funds from the sales usually went into a state education fund. Article IX, Section 4, of the California Constitution (passed 1849) provided that all revenue from school lands, both from sale and rent, should go into a state school fund. More recently, these funds have become less significant in financing education. The California fund was contributing less than 0.1 percent of the educational budget per year.[2] The California constitutional provision was repealed in 1964 and the fund was paid into the general fund. The school fund contained $32,983,017 at that time.[3] The legality of abolishing this fund is unclear. Michigan has also abolished its special fund and apparently has a history of using its funds for general purposes.[4] While the cases indicate that, once title has passed, the state may do with the land as it pleases, how the lack of a special fund will affect future grants of newly surveyed lands is unclear. However, California has

1. Public Land Law Review Commission, Background Studies, Vol. 7 at 157.
2. Ibid. at 72.
3. Ibid. at 41.
4. Ibid. at 15.

received new lands since 1964 and therefore the "school purposes" limitation at least does not seem to necessitate a special school fund.

Other limitations were put on the land conveyed. Until 1927, mineral lands were not subject to the grant, and, if they were the 16th or 36th section, the state could select in-lieu land. 43 U.S.C. Section 870 brought mineral lands under the grant in 1927 and gave the states the revenue from any mineral leases although it was not made retrospective. However, Section 870 still exempts any land specifically reserved for waterpower purposes. It also excludes all the lands in Alaska.

California Code of Civil Procedure Section 1240(2)

Section 1240(2) exempts school lands in parks and reserves from the exercise of eminent domain. This section was added to the code in 1915. It seems that school lands were receiving some attention at this time. The Report of the California Conservation Commission of 1912 showed that the state still owned over a million acres of land. The records apparently were somewhat scattered, and the Commission recommended a two-year moratorium on the sale of school lands until the records could be examined. A bill was passed withdrawing these lands from sale, and bills returning the lands to sale were passed in 1915 and 1919. The recommendation of the commission was "that the school lands be examined and determination be made as to what portions thereof should be sold and what portions retained by the state for transfer to the United States in lieu of lands in a compact body which the state might be able to exchange therefor to be used as a State Forest Reserve." p.75 Report. While I have not been able to find any follow-up on this report or any legislative history on Section 1240(2), it seems logical that they may be related.

The original subdivision (2) read: "Lands belonging to this State, or to any county, incorporated city or city and county, village or town, not appropriated to some public use" are subject to eminent domain. It was amended to read as the first part of the section now reads in 1901.

The 1915 amendment may have been in reaction to the case of State v. Deseret Water, Oil & Irr. Co., 167 Cal. 147, 138 P. 981 (1914). Here, it was held that school land which had been surveyed and passed to the state and which then had been included in a national forest reserve was not appropriated to a public use and was therefore subject to eminent domain. This case was reversed by the United States Supreme Court (243 U.S. 415, 61 L. Ed. 821, 37 S. Ct. 394 (1917)) which held that, when a forest reservation includes school lands which had already passed to the state, the state might waive its right to the section and select other lands in lieu. "This construction preserves the integrity of forest reservations, and permits the State to acquire other lands not surrounded by large tracts in such reservations which are withdrawn from settlement." (at 420)

In Pacific Power Co. v. State , 32 Cal. App. 175, 162 P. 643 (1916), app. dismissed 249 U.S. 581, 63 L. Ed. 786, 39 S. Ct. 258, "School lands situated within the boundaries of a federal forest reservation, which had been surveyed before they were included in the reservation, may be taken in eminent domain proceedings against the State." As the case arose before the 1915 amendment was passed, it was specifically decided without regard to the amendment.

The rationale expressed in Deseret seems to explain the addition of the amendment, and the dismissal of the appeal in Pacific Power argues for the necessity of the clause. There are no recent cases on this clause.

Sources:

California Conservation Commission Report (1912)

Public Land Law Review Commission:

Land Grants to States (Revised May 1970)

Background Studies, Volume 7 (page cites)

EXHIBIT VI

§ 1240.070. Acquisition of fixtures, buildings, structures, and other improvements

1240.070. (a) As used in this section, fixtures includes equipment designed for manufacturing, industrial, or commercial purposes and installed for use in a fixed location, regardless of the method of installation.

(b) Any person who acquires real property by eminent domain shall acquire at least an equal interest in all buildings, structures, fixtures, and other improvements located upon the real property unless their removal or relocation is required by statute, by order of the court or of the Public Utilities Commission, or by agreement of the parties.

(c) Any person who acquires part of a building by eminent domain may exercise the power of eminent domain to acquire the whole building along with an easement thereto for the purpose of removal or relocation if the severance of the part acquired from the remainder would cause substantial damage to the remainder.

Comment. Section 1240.070 requires that a condemnor taking the underlying fee to property shall also take structures located thereon. This rule largely continues prior law. See City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933)(fixtures on the property taken must be valued and paid for as part of the realty); former Code Civ. Proc. §§ 1248(1)(property value assessed along with "all improvements thereon pertaining to the realty") and 1249.1 ("all improvements pertaining to the realty" considered in assessing

compensation). See also 42 U.S.C. § 4655(1) (1971) (acquisition of interest in buildings, structures, and improvements required in federally-aided state takings). Cf. Sts. & Hwys. Code § 104.4 and Water Code § 11588 (acquisition of buildings or improvements by departments of Public Works and Water Resources upon termination of right of occupancy of national park and forest lands).

Improvements required to be taken by Section 1240.070 include all fixtures and structures affixed to or appurtenant to the land. See, e.g., Colusa County v. Hudson, 85 Cal. 633, 24 P. 791 (1890)(graded road); City of Los Angeles v. Hughes, 202 Cal. 731, 267 P. 737 (1927)(nursery stock); People v. Ganahl Lumber Co., 10 Cal.2d 501, 75 P.2d 1067 (1938)(planing mill, supply plant, and related fixtures affixed to the land); People v. Klopstock, 24 Cal.2d 897, 151 P.2d 641 (1944)(asphalt plant and appurtenant facilities).

In addition, Section 1240.070 requires the acquisition of certain equipment that is not necessarily affixed to the land. In this respect, the section continues former Code of Civil Procedure Section 1248b (equipment designed for manufacturing or industrial use in a fixed location) and expands the type of equipment that must be taken and compensated to include equipment designed for commercial use in a fixed location. See subdivision (a). Contrast People v. Church, 57 Cal. App.2d Supp. 1032, 136 P.2d 139 (1943)(gas station fixtures deemed personalty), and Los Angeles v. Siegel, 230 Cal. App.2d 982, 41 Cal. Rptr. 563 (1964)(restaurant equipment deemed personalty).

Although Section 1240.070 supplies the general rule that structures must be acquired in eminent domain proceedings, special statutes may permit or require relocation, or the parties may agree to relocate. See, e.g.,

Pub. Util. Code § 7557 (court-ordered relocation of railroad structures in certain cases) and 30503 (Public Utilities Commission consent to abandonment, removal, relocation, or use of railroad property by Southern California Rapid Transit District).

Subdivision (c) is derived from Los Angeles County Flood Control Act (Cal. Stats. 1915, Ch. 755), § 16-3/4 (added Cal. Stats. 1949, Ch. 449, § 7).

Matters noted for future consideration:

1. Method of valuation of fixtures and improvements.
2. Allocation of award between landlord and tenant.

#36 7/21/65

MACHINERY, EQUIPMENT, AND FIXTURES*

*This study was made for the California Law Revision Commission by the law firm of Hill, Farrer & Burrill, Los Angeles. This study is an extract from pages C-25--C-27 and C-35--C-36 of Recommendation and Study Relating to The Reimbursement of Moving Expenses When Property is Acquired for Public Use, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at C-1 (1961). No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

A STUDY

relating to

MACHINERY, EQUIPMENT, AND FIXTURES

Note: This study is an extract from pages C-25--C-27 and C-35--C-36 of Recommendation and Study Relating to The Reimbursement of Moving Expenses When Property is Acquired for Public Use, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at C-1 (1961).

Moving of Fixtures Severed From Realty

In light of the pattern and policy denying moving costs in condemnation cases, the courts often adopt a method to circumvent this restriction by declaring that the properties to be moved (*e.g.*, machinery, appliances and the like) constitute permanent fixtures and, therefore, are compensable.[65] Most courts have adopted a liberal definition of "fixtures" to remedy the denial of moving costs.[66] Only a minority of the courts refuse to reimburse owners for "fixtures" that can be removed.[67]

Presently, under California law, property affixed to the realty must be taken and paid for by the condemnor. Code of Civil Procedure Section 1248 provides that the court, jury or referee must ascertain and assess:

> 1. The value of the property sought to be condemned, *and all improvements thereon pertaining to the realty*. . . . [Emphasis added.]

and Civil Code Section 660 provides:

> A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods.

Perhaps the leading California case on this question is *City of Los Angeles* v. *Klinker*.[68] In that case the main building of the Los Angeles Times was especially designed and constructed to accommodate the permanent installation of the large presses and related machinery necessary to the publication of a daily newspaper. The California Supreme Court held that the large newspaper presses, a large autoplate machine, composing equipment (consisting of 40 linotype machines complete with electrical conduits and water and drainage systems), proof-presses, saw trimmers, imposing tables, steel cabinets and cases, engraving equipment and other items were, within the meaning of Section 1248, improvements pertaining to the realty. The court considered not only the doctrine of "fixtures," which depends upon the method of annexation to the realty, the intention of the person making the annexation and the purpose for which the property is used, but also the doctrine of "constructive annexation." In this connection the court said:

> Here we have not only the manner of annexation of the fixtures and the purpose for which the premises were used, but we have the acts and conduct of the owner in installing these fixtures and, when

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[65] Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 73 (1957).
[66] See Note, 22 TEXAS L. REV. 403 (1944). And see *In re* John C. Lodge Highway, 340 Mich. 364, 65 N.W.2d 339 (1954).
[67] See, *e.g.*, Futrovsky v. United States, 66 F.2d 215 (D.C. Cir. 1933).
[68] 219 Cal. 198, 25 P.2d 526 (1933).

> viewed as a whole, we are unable to escape the conclusion that so much of the fixtures as are denoted in the record by the term "processing equipment" are, actually or constructively, an improvement of the real property.[69]

Although the *Klinker* case involved only the property of an owner, the Supreme Court of California in *People* v. *Klopstock* [70] subsequently held that trade fixtures, regarded as personalty between the tenant and the landowner, may, as between the tenant and the condemning body, be regarded as part of the realty for the purpose of compensation.[71]

There is a similarity of reasoning between taxation and condemnation cases.[72] In *Southern Cal. Tel. Co.* v. *State Board*,[73] a taxation case, the California Supreme Court held that even such items as the telephone operators' head sets, breast sets and stools, although not physically attached to the realty, were under the doctrine of constructive annexation a part of the realty for the purposes of taxation. The court cited and relied upon *City of Los Angeles* v. *Klinker*.[74]

There is a considerable body of persuasive authority in California to the effect that trade fixtures, machinery and equipment are a part of the realty for purposes of condemnation. However, it is also true that each case turns on its specific facts, and consequently no uniform rule can be laid down. For example, in *People* v. *Church*,[75] a California case, the court held that gasoline pumps and an auto lubrication hoist were not real property. The court, although recognizing the doctrine of constructive annexation as set forth in the *Klinker* case, reasoned that here the controlling consideration was whether the property could have been removed without damage to the freehold or substantially impairing its value. This appears to be similar to the rationale of the court in *People ex rel. Dept. of P.W.* v. *Auman*,[76] discussed on page C-13 *supra*.

During the 1957 Session of the Legislature, Section 1248b of the Code of Civil Procedure was enacted. It provides:

> Equipment designed for manufacturing or industrial purposes and installed for use in a fixed location shall be deemed a part of the realty for the purposes of condemnation, regardless of the method of installation.

This section, although affording some relief from the uncertainties of case law, is not a complete answer. In the first place it is limited to equipment designed for manufacturing or industrial purposes. It does not cover commercial establishments such as restaurants, bars, motels or ordinary residential type property. In addition it is, by its terms, limited to equipment installed for use in a "fixed location" and thus does not consider the doctrine of constructive annexation.

The question of what constitutes a fixture or improvement pertaining to the realty is relevant to the question of whether the costs of removing and relocating personal property should be allowed in condemna-

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[69] *Id.* at 209-10, 25 P.2d at 831.
[70] 24 Cal.2d 897, 151 P.2d 841 (1944).
[71] And see City of Los Angeles v. Hughes, 203 Cal. 731, 265 Pac. 787 (1927).
[72] Trabue Pittman Corp. v. County of Los Angeles, 29 Cal.2d 385, 175 P.2d 513 (1946).
[73] 13 Cal.2d 127, 51 P.2d 422 (1935).
[74] 210 Cal. 193, 25 P.2d 825 (1933).
[75] 57 Cal. App.2d Supp. 1032, 136 P.2d 129 (1943).
[76] 160 Cal. App.2d 251, 255 P.2d 260 (1953).

tion cases. Under the existing California law the condemnor must take and pay for all improvements pertaining to the realty.[7] Because an owner or tenant is not entitled to any moving expenses, it is generally to his advantage to contend that all fixtures, trade fixtures, machinery and equipment are real property. Even though he may be able to use the fixtures or equipment in another location, if he cannot recover for the expense of moving and relocating them he suffers a pecuniary loss by the condemnation that can be avoided only by "selling" them to the condemnor. On the other hand, it is generally true that the condemning body has no need for the fixtures or equipment. However, if the court rules that the fixtures are a part of the realty, the condemning body must pay for them and salvage whatever it can by selling them to the highest bidder.

Code of Civil Procedure Section 1248b

An additional question to be considered is whether, in view of the possibility of the enactment of a moving costs statute, Section 1248b of the Code of Civil Procedure, either as it presently exists or as it might be revised, would be superfluous.

From a practical point of view, it would be more just to retain Section 1248b and amend it to provide that a condemnee may elect to treat fixtures either as personalty or realty. Thus the condemnee could elect to remove fixtures, trade fixtures, machinery and equipment and recover his actual cost of moving when fixtures or equipment upon the land condemned would continue to have value in a new location. If the owner were permitted to realize this value, it would be unnecessary for the condemnor to pay for the fixtures in the condemnation action. In those instances where the cost of moving is less than the fair market value of the fixtures, the condemnor would gain. In no event would the payment be more than the amount that would otherwise have been paid in the condemnation action, since recovery would be limited to the value of the equipment appraised as part of the realty.

While it may well be argued that the existence of Section 1248b as revised, particularly in light of a moving cost statute, would at times enable a condemnee to force the condemnor to purchase his business equipment at the market price and thus place himself in a position to purchase brand new equipment largely at public expense, the usual situation that justifies the revision would be otherwise. More often than not, the condemnee-owner of either manufacturing or industrial property finds that equipment located thereon is of greatly limited utility and value, if not altogether useless, in a new site.

An additional reason for granting a condemnee the election to treat the designated equipment either as realty (enabling him to be paid its value) or as personalty (enabling him to be reimbursed to a degree for removal costs under the proposed moving statute), is the limitation in the proposed moving costs statute. The moving costs statute, whether it contains a 25 per cent limitation or, in the alternative, whether it contains a monetary limitation upon the amount the condemnee may recover, will on a number of occasions fail to provide full compensation to the condemnee for his moving expenses. Consequently, if a condemnee is confronted with the fact that the compensation under the moving costs statute will pay only a small part of the actual cost of removing his equipment, he might prefer to have his equipment designated as a fixture belonging to the realty. By making the latter election, he would be more fully compensated for the loss he incurs. Thus, unless a moving costs statute affords the condemnee his *entire* costs of removal, he should be granted the opportunity to make the stated election.

Section 1248b should also be revised to reduce the uncertainty that now exists prior to the time of trial as to what constitutes a fixture. This uncertainty often results in expensive and time consuming delays to

[7] CAL. CODE CIV. PROC. § 1248.

obtain the court's ruling on the problem, and it requires alternative appraisals by both parties so that each can be prepared to proceed in the light of any anticipated ruling.

It may be asked whether the language of Section 1248b is too limited. Presently Section 1248b applies only to equipment and machinery designed for and used in manufacturing or industrial plants. It does not apply to commercial property.

If Section 1248b is not revised to apply to commercial property, the condemnee (under the revision to Section 1248b concerning election by the condemnee recommended above) can make an election only when the equipment involves manufacturing or industrial property. This does not appear to be a justifiable distinction. Commercial establishments often require many fixtures that are hardly different in nature from manufacturing equipment. A distinction in treatment, therefore, is not warranted. There is no distinction made between commercial and industrial property for the purpose of compensating the condemnee for loss of fixtures in any of the jurisdictions or authorities previously cited.[56] While the courts will undoubtedly have to decide what falls within the scope of "installed for use in a fixed location," no initial distinction should be made in this regard between manufacturing and commercial property.

[56] See notes 55-76 supra.

EXHIBIT VIII

§ 1240.080. Acquisition by gift, purchase, lease, or other means

1240.080. Except to the extent limited by statute, any public entity authorized to acquire property for a particular use by eminent domain may also acquire such property for such use by grant, purchase, lease, gift, devise, contract, or other means.

Comment. Section 1240.080 makes clear that a public entity is authorized to acquire property by negotiation or other means in any case in which it may condemn property. See also Govt. Code § 7267.1(a)(public entity shall make every reasonable effort to acquire real property by negotiation). This general authority is, of course, subject to any limitations that may be imposed by statute. See, e.g., Govt. Code § 15854 (acquisition under the Property Acquisition Law must be by condemnation except in certain circumstances).

Section 1240.080 makes unnecessary the detailed listing of various types of property that may be acquired under specific statutes authorizing acquisition by eminent domain and other means. See Sections 1230.070 ("property" defined) and 1240.040 (right to acquire any necessary property or right or interest therein). Section 1240.080 supersedes former Code of Civil Procedure Section 1266.1 (gift or purchase authorized for certain purposes).

Memorandum 72-61

EXHIBIT IX

The Right to Take

EMINENT DOMAIN LAW § 1240.420

Tentatively approved July 1970
Revised July 1972

§ 1240.420. Condemnation of physical or financial remnants

1240.420. (a) Whenever a part of a larger parcel of property is to be acquired by a public entity by eminent domain and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little market value, the public entity may exercise the power of eminent domain to acquire such remainder or portion thereof in accordance with this section.

(b) Where property is sought to be acquired pursuant to this section, the resolution of necessity and the complaint filed pursuant to such resolution shall specifically refer to this section. It shall be presumed from the adoption of the resolution that the taking of the remainder, or portion of the remainder, is authorized under this section. This presumption is a presumption affecting the burden of producing evidence.

(c) The court shall not permit a taking under this section if the defendant proves that the public entity has a reasonable, practicable, and economically sound means of avoiding or substantially reducing the damages that otherwise would cause the property sought to be taken under this section to be of little market value.

(d) Nothing in this section affects (1) the privilege of the public entity to abandon the proceeding or abandon the proceeding as to particular property or (2) the consequences of any such abandonment.

Comment. Section 1240.420 provides a uniform standard for determining when excess property may be taken to eliminate a physical or financial remnant that otherwise would remain after a partial taking. The section supersedes Section 1255 of the Code of Civil Procedure, Sections 100130.5 and 102241 of the Public Utilities Code, Section 104.1 and 943.1 of the Streets and Highways Code, Sections 254, 8590.1, 11575.2, and 43533 of the Water Code, and various provisions of uncodified special district acts.

Subdivision (a). Subdivision (a) states the rule to be used by the court in determining whether a physical remnant or financial remnant may be taken by eminent domain. With respect to physical remnants, see Kern County High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1915). As to the concept of "financial remnants," see Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

The test under subdivision (a) is essentially that stated in Dep't of Public Works v. Superior Court, supra, except that the confusing concept of "excessive" damages is not used. A remnant may be taken if it would be left in "such size, shape, or condition as to be of little market value." The "of little market value" concept is a flexible one; whether the remnant may be taken is to be determined in light of the circumstances of the particular case. Thus, the remnant may have relatively little market value, for example, if it is totally "landlocked" and no physical solution is practical, or is reduced beneath minimum zoning size and there is no reasonable probability of a zoning

change, or is of significant value to only one or few persons (such as adjoining landowners), or is landlocked and has primarily a speculative value dependent upon access being provided when adjacent land is developed and the time when the adjacent land will be developed is a matter of speculation. See, e.g., Dep't of Public Works v. Superior Court, supra; State v. Buck, 226 A.2d 840 (N.J. 1968). The test under subdivision (a) is the objective one of marketability and market value generally of the remainder. Compare Section 1240.410 (purchase of remnants).

On the other hand, a usable and generally salable piece of property is neither a physical nor financial remnant even though its "highest and best use" has been downgraded by its severance or a serious controversy exists as to its best use and value after severance. See, e.g., La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 762, 304 P.2d 803 (1956); State Highway Comm'n v. Chapman, 446 P.2d 709 (Mont. 1968). Likewise, Section 1240.420 does not authorize a taking of a remnant (1) to avoid the cost and inconvenience of litigating damages, (2) to preclude the payment of damages, including damages substantial in amount in appropriate cases, (3) to coerce the condemnee to accept whatever value the condemnor offers for the property actually needed for the public project, or (4) to afford the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public project. See Dep't of Public Works v. Superior Court, supra.

The phrase "portion of the remainder" is used to allow for the case in which a taking affecting a parcel leaves more than one remnant (e.g., the severance of a ranch by a highway so as to leave remnants on both sides of the highway). In certain cases, the taking of only one remnant (i.e., "a portion of the remainder") might be justified. The term does not mean or refer to artificially contrived "zones" of damage or benefit sometimes used in appraisers' analyses.

Subdivision (b). Subdivision (b) requires a specific reference in both the resolution and the complaint to Section 1240.420 as the statutory basis for the proposed taking; it does not require either the recitation or the pleading of the facts that may bring the case within the purview of the section. See People v. Jarvis, 274 Cal. App.2d 217, 79 Cal. Rptr. 175 (1969). A resolution that refers to this section gives rise to a presumption that the taking is authorized under this section. Thus, in the absence of a contest of that issue, the subdivision permits a finding and judgment that the remainder be taken. However, the presumption is specified to be one affecting the burden of producing evidence (see Evid. Code §§ 603, 604) rather than one affecting the burden of proof (see Evid. Code §§ 605, 606). Accordingly, the burden of proving the facts that bring the case within the section is left with the plaintiff (i.e., the condemnor). See People v. Van Garden, 226 Cal. App.2d 634, 38 Cal. Rptr. 265 (1964); People v. O'Connell Bros., 204 Cal. App. 34, 21 Cal. Rptr. 890 (1962). In this respect, the subdivision eliminates any

greater effect that might be attributed to the resolution (compare People v. Chevalier, 52 Cal.2d 299, 340 P.2d 603 (1959)) or that might be drawn from a legislative (see County of Los Angeles v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964)) or administrative (see County of San Mateo v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960)) determination or declaration as to "public use."

As to the time and manner of raising the issue whether a taking is authorized under this section, see Section 1260.000.

Subdivision (c). This subdivision permits the condemnee to contest a taking under this section upon the grounds that a "physical solution" could be provided by the condemnor as an alternative to either a total taking or a partial taking that would leave an unusable or unmarketable remainder. In at least a few cases, the condemnee may be able to demonstrate that, given construction of the public improvement in the manner proposed, the public entity is able to provide substitute access or take other steps that would be equitable under the circumstances of the particular case. If he can do so, subdivision (c) prevents acquisition of the remainder. Clearly, in almost every case, some physical solution would be possible. Subdivision (c), however, requires that the solution also be "reasonable, practicable, and economically sound." To be "economically sound," the proposed solution must, at a minimum, reduce the overall cost to the condemnor of the taking. Thus, the cost of the solution plus compensation paid for the part taken plus any remaining damages

must never exceed the amount that would be required to be paid if the entire parcel were taken. The court should, moreover, consider questions of maintenance, hardship to third persons, potential dangers, and so on in determining whether the solution is also "reasonable and practicable."

Subdivision (d). Subdivision (d) makes clear that the procedure provided by this section has no bearing upon the privilege to abandon or the consequences of abandonment. The subdivision makes no change in existing law. See former Section 1255a and People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967).

Memorandum 72-61

EXHIBIT X

The Right to Take

EMINENT DOMAIN LAW § 1240.350

Tentatively approved April 1970
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Revised September 1972

§ 1240.350. Condemnation to provide access to public road

1240.350. (a) Notwithstanding Section 1240.330, whenever a public entity acquires property for a public use and exercises or could have exercised the power of eminent domain to acquire such property for such use, the public entity may exercise the power of eminent domain to acquire such additional property, as appears reasonably necessary and appropriate after taking into account any hardship to the owner of the additional property, to provide utility service to or access to a public road from any property that is not acquired for such public use but which is cut off from utility service or access to a public road as a result of the acquisition by the public entity.

(b) Where a public entity has furnished or committed itself to furnish, according to a specific plan, utility service or access to property cut off from utility service or access to a public road as a result of the acquisition of property for public use by the public entity, such fact shall be taken into account in determining the damage to the property which is not acquired for public use.

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Comment. Section 1240.350 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 utility service or access to property not taken that would otherwise lack utility service or access as a result of the acquisition. The utility service or access road need not be open or available to the general public. Under former law, the right to exercise the power of eminent domain for such purposes probably would have been 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); Pitznogle v. Western Md. R.R., 119 Md. 637, 87 A. 917 (1913); Luke v. Mass. Turnpike Auth., 337 Mass. 304, 149 N.E.2d 225 (1958); North Carolina State Highway Comm'n v. Asheville School, Inc., ___ N.C. ___, 173 S.E.2d 909 (1970); May v. Ohio Turnpike Comm'n, 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).

Section 1240.350 is related to Section 1240.330 but is intended to resolve somewhat different problems and is accordingly quite different in content. Frequently, where property is acquired for a major engineering-oriented project, such as a freeway or irrigation canal, parcels not acquired will be deprived of utility service or access to a public road. To restore

these parcels to a useful life and, in doing so, to avoid claims of substantial severance damage, a condemnor is authorized to provide substitute utility service or access in connection with the improvement itself. Although the agreement of the owner of the landlocked parcel will generally be obtained, this is not a prerequisite here. Contrast Section 1240.330(a)(1). The owner is not being compensated for property taken; the condemnor is simply minimizing the damage to property retained by the owner. The substitute utility service or access will by necessity be located in the general vicinity of the improvement and it is unnecessary to provide such a requirement here. Compare Section 1240.330(a)(2). Subdivision (a) of Section 1240.350 requires the condemnor to consider and to minimize the hardship to the owner of both the landlocked parcel and the substitute property; however, in contrast with Section 1240.340, no special procedural safeguards are set forth here, and the condemnor's resolution of necessity will generally be conclusive as to issues of necessity. See Section 1240.150 and Comment thereto (effect of resolution of necessity).

Subdivision (b) of Section 1240.350 is included to insure that, where a condemnor provides utility service or an access road to property to replace lost utility service or access or commits itself to making 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. Obviously, where the work has not been completed, there must be a specific plan which indicates not only what utility service or access will be substituted but equally important when such utility service or access will be provided. In the latter situation, in determining any damages to be awarded, proper consideration must be given to the fact that utility service or access will not be immediately provided.

Section 1240.350 provides discretionary authority for the condemnor to provide utility service or access. Where the condemnor does not choose to avail itself of this authority, an owner of property has no right to force such a physical solution upon it but is limited to the recovery of damages except as provided in Section 1240.420. It should be noted, however, that, in the case of lost access, the owner may at any time seek separate relief under the Street Opening Act of 1903. See Sts. & Hwys. Code §§ 4008, 4008.1, 4120.1.

CHAPTER 4. THE RIGHT TO TAKE

Article 1. General Provisions

§ 1240.010. Condemnation permitted only for a public use

1240.010. The power of eminent domain may be exercised only to acquire property for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is a declaration by the Legislature that such use, purpose, object, or function is a public use.

Comment. The first sentence of Section 1240.010 reiterates the basic constitutional requirement that property may be acquired by eminent domain only for "public use." Cal. Const., Art. I, § 14; U.S. Const., Amend. XIV.

The second sentence is included in Section 1240.010 to avoid the need to state in each condemnation authorization statute that the taking by eminent domain under that statute is a taking for a public use. For example, Section 104 of the Streets and Highways Code authorizes the acquisition of property by eminent domain for state highway purposes. Section 1240.010 provides that such legislative action is also deemed to be a legislative declaration that use for state highway purposes constitute a public use.

Section 1240.010 supersedes former Section 1238 of the Code of Civil Procedure, which purported to declare the public uses for which property could be taken by eminent domain.

The fact that Section 1240.010 declares that a particular use for which the power of eminent domain may be exercised is a public use does not preclude judicial review to determine whether the proposed use in the particular case is actually a public use. E.g., City & County of San Francisco v. Ross, 44 Cal.2d 52, 279 P.2d 529 (1955). Nevertheless, the Legislature's declaration that the particular use is a public use will be accepted as controlling unless clearly errorneous and without reasonable foundation. E.g., People v. Superior Court, 68 Cal.2d 206, 210 (1968); Housing Authority v. Dockweiler, 14 Cal.2d 437, 449-450, 94 P.2d 794, 801 (1939). Doubts are resolved in favor of the legislative declaration. University of So. Cal. v. Robbins, 1 Cal. App.2d 523, 525-526, 37 P.2d 163, 164 (1934). A legislatively authorized taking will be upheld if the taking is for a "use which concerns the whole community, or promotes the general interest of such community in its relation to any legitimate [governmental objective]." Bauer v. Ventura County, 45 Cal.2d 276, 284, 289 P.2d 1, 6 (1955). For further discussion, see Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L.J. 571, 574-576 (1969); Note, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599 (1949).

§ 1240.020. Condemnation permitted only where authorized by statute

1240.020. The power of eminent domain may be exercised to acquire property for a particular use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use.

Comment. Section 1240.020 codifies the prior law that no person may condemn property for a particular public use unless the Legislature has delegated the power to that person to condemn property for that use. E.g., City and County of San Francisco v. Ross, 44 Cal.2d 52, 55, 279 P.2d 529, 531 (1955); People v. Superior Court, 10 Cal.2d 288, 295-296, 73 P.2d 1221, 1225 (1937); Yeshiva Torath Emeth Academy v. University of So. Cal., 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962); Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 590, 12 Cal. Rptr. 836, 838 (1961); Eden Memorial Park Ass'n v. Superior Court, 189 Cal. App.2d 421, 425, 11 Cal. Rptr. 189, 192 (1961); City of Menlo Park v. Artino, 151 Cal. App.2d 261, 266, 311 P.2d 135, 139 (1957).

If the property authorized to be taken is limited by the statutory grant--as, for example, where the statute authorizes acquisition of only an easement--an attempt to take an interest in the property other than that permitted by the statute or to take property other than of the type permitted by the statute is precluded by Section 1240.020. Cf. 7 P. Nichols, Eminent Domain App. 309 (3d ed. 1970).

Matters for Future Consideration:

1. Property exempt from condemnation.

§ 1240.030. Condemnation permitted only when necessity established

1240.030. The power of eminent domain may be exercised to take property for a particular use only if all of the following are established:

(a) The public interest and necessity require the proposed project.

(b) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(c) The property sought to be acquired is necessary for the proposed project.

Comment. Section 1240.030 requires that the necessity for the taking be established before property may be taken by eminent domain.

Condemnors that are public entities must adopt a resolution of necessity before condemning property. Section 1240.120. This resolution conclusively establishes the matters listed in Sections 1240.030 and 1240.040 if it is adopted by a vote of a majority of all the members of the govening body of the public entity. Section 1240.150(a). See Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923); aff'g County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 200 P. 27 (1921). If property sought to be taken by a local public entity is not located entirely within the boundaries of the local public

entity, the resolution of necessity creates a presumption affecting the burden of producing evidence that the matters listed in Sections 1240.030 and 1240.040 are true. Section 1240.150(b). Condemnors other than public entities have the burden of proof on the issue of necessity. See Sections 1260.340 and 1260.370.

It should be noted that the prerequisites to condemnation specified in Section 1240.030 may not be the only prerequisites for public projects. Environmental statements and hearings may be required by statute, relocation plans may be required to have been adopted, or consent of various public agencies may be required. See, e.g., Lathan v. Volpe, ___ F.2d ___ (9th Cir. 1971) proper relocation program and environmental statement prerequisite to interstate highway acquisition). The public necessity elements of Section 1240.030 supplement but do not replace any other prerequisites to condemnation imposed by any other law.

Subdivision (a). Subdivision (a) prevents the taking of property by eminent domain unless the public interest and necessity require the project. "Public interest and necessity" includes all aspects of the public good, including by not limited to social, economic, environmental, and esthetic considerations. Under prior law, the necessity of the proposed improvement was not subject to judicial review; the decision of the condemnor on the need for the improvement was conclusive. E.g., City of Pasadena v. Stimson, 91 Cal. 238, 253, 27 P. 604, ___ (1891).

Subdivision (b). Subdivision (b) prevents the taking of property by eminent domain unless the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. Subdivision (b), which involves essentially a comparison between two or more sites, has also been described as "the necessity for adopting a particular plan" for a given public improvement. State v. Chevalier, 52 Cal.2d 299, , 240 P.2d 598, 603 (1959). See also City of Pasadena v. Stimson, supra; Eel R. & E. R.R. v. Field, 67 Cal. 429, 7 P. 814 (1885).

Proper location is based on two factors--public good and private injury. Accordingly, the condemnor's choice is correct or proper unless another site would involve an equal or greater public good and a lesser private injury. A lesser public good can never be counterbalanced by a lesser private injury to equal a more proper location. Montebello etc. School Dist. v. Keay, 55 Cal. App.2d 839, 131 P.2d 384 (1942). Nor can equal public good and equal private injury combine to make the condemnor's choice an improper location. California Cent. Ry. v. Hooper, 76 Cal. 404, 412-413, 18 P. 599, 603 (1888).

Subdivision (b) continues the requirement of prior law under former Code of Civil Procedure Sections 1242(a) and 1240(6) but, unlike subdivision (b), these sections were limited to cases where land or rights of way were to be condemned. Subdivision (b) applies without regard to the property or property interest sought to be condemned.

Subdivision (c). Subdivision (c) prevents the taking of property by eminent domain unless the property or interest therein sought to be acquired is necessary for the proposed project. This aspect of necessity involves the suitability and usefulness of the property for the public use. See City of Hawthorne v. Peebles, 166 Cal. App.2d 758, 763, 333 P.2d 442, 445 (1959) ("necessity does not signify impossibility of constructing the improvement . . . without taking the land in question, but merely requires that the land be reasonably suitable and useful for the improvement"). Accord, Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 P. 484 (1894). Thus, evidence on the aspect of necessity covered by subdivision (c) is limited to evidence showing whether the particular property will be suitable and desirable for the construction and use of the proposed public project.

Subdivision (c) also requires a showing of the necessity for taking a particular interest in the property. See Section 1235.070 (defining "property" to include any right or interest therein). Cf. City of Los Angeles v. Keck, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971). See also Section 1240.040 (right to take any necessary right or interest).

Subdivision (c) continues the portion of former Code of Civil Procedure Section 1241(2) that required a showing of necessity to the extent that that portion required a showing of the necessity for taking the particular property or a particular interest therein.

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§ 1240.040. Right to acquire any necessary right or interest

1240.040. Except to the extent limited by statute, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire any right or interest in property necessary for that use.

Comment. Section 1240.040 permits any condemnor to take whatever interest is required for a particular use subject, of course, to a showing that such interest is necessary for such use. See Section 1240.030. Section 1240.040 is generally consistent with the former law that permitted a public entity to take a fee rather than merely an easement. See former Code Civ. Proc. § 1239(4)(local public entities). However, under former law, most privately owned public utilities and some local public entities were permitted to acquire only an easement except in certain circumstances. See former Code Civ. Proc. § 1239. Moreover, under former law, the distinction generally made was between taking a fee or an easement. See generally Taylor, The Right to Take--The Right to Take a Fee or Any Lesser Interest, 1 Pac. L.J. 555 (1970). Section 1240.040 permits taking of the fee or any other right or interest. See Section 1230.070 (defining "property").

The resolution of necessity has the same effect on the necessity for taking the fee or a particular interest in property as it has on whether there is any need to take any property at all. See Section 1240.150 and the discussion in the Comment to Section 1240.030.

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§ 1240.050. Right to acquire property for related or protective purposes

1240.050. (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 property necessary to carry out and make effective the principal purpose involved, including but not limited to 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 may acquire property under subdivision (a) with the intent to 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 1240.050 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 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).

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Section 1240.050 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 1235.070 (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. Lagiss, 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).

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 that will preclude the detrimental use or (2) to acquire the fee or some other interest and then--if the condemnor desires--lease, sell, exchange, or otherwise dispose of the property 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 1240.050 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 unecessary. E.g., former Code Civ. Proc. § 1238(18)(trees along highways). Not all such specific authorizations have been repealed. E.g., Sts. & Hwys. Code § 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 1240.050.

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 1240.150. 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 is not actually to be used for that purpose, the taking can be defeated on that ground. See Section 1260.330 and Comment thereto. See People v. Lagiss, 223 Cal. App.2d 23, 33-44, 35 Cal. Rptr. 554, (1963).

Section 1240.050 is derived from and supersedes former Government Code Sections 190-196, Streets and Highways Code Section 104.3, and Water Code Section 256.

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Renumbered September 1971

§ 1240.060. Joint exercise of condemnation power pursuant to Joint Powers Agreements Act

1240.060. (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 1240.060 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 1240.060 is not so restricted.

Article 2. Resolution of Necessity

§ 1240.110. "Governing body" defined

1240.110. As used in this article, "governing body" means:

(a) In the case of a taking by a local public entity, the governing body of the local public entity.

(b) In the case of a taking by the Sacramento and San Joaquin Drainage District, the State Reclamation Board.

(c) In the case of a taking by the State Public Works Board pursuant to the Property Acquisition Law, Part 11 (commencing with Section 15850) of Division 3 of Title 2 of the Government Code, the State Public Works Board.

(d) In the case of a taking by the Department of Public Works (other than a taking pursuant to Section 30100 of the Streets and Highways Code), the California Highway Commission.

(e) In the case of a taking by the Department of Public Works pursuant to Section 30100 of the Streets and Highways Code, the California Toll Bridge Authority.

(f) In the case of a taking by the Department of Water Resources, the California Water Commission.

(g) In the case of a taking for the University of California, the Regents of the University of California.

Comment. Section 1240.110 gives content to the term "governing body" as used in Section 1240.120 (resolution of necessity by governing body of public entity prerequisite to condemnation).

Subdivision (a). A local public entity is any public entity other than the state. Section 1230.040. The governing bodies of such entities are specified by statute. E.g., Govt. Code §§ 23005 (board of supervisors governs county) and 34000 (legislative body of municipal corporation is board of trustees, city council, or other governing body).

Subdivision (b). The San Joaquin Drainage District, while by definition a local public entity (Section 1230.040), is comparable in some ways to an agency of the state. Its work is in the interest of the entire state. See San Joaquin Drainage Dist. v. Riley, 199 Cal. 668, 251 P. 207 (1926). It is partially funded by the state. See Water Code § 8527. Its management and control are vested in a state agency--the Reclamation Board--which is its governing body. See Water Code § 8502.

Subdivision (c). Takings for all general state purposes (other than state highways, toll bridges, state water projects, and the University of California) are made by the State Public Works Board under the Property

Acquisition Law (Govt. Code § 15850 et seq.). Under former law, there may have been cases where the Department of General Services or other state agencies could condemn on behalf of the state under authority formerly found in Government Code Section 14661 or other provisions (basically where an appropriation was made not subject to the Property Acquisition Law), but this authority is not continued. See Govt. Code § 15855 and Comment thereto. It should be noted that the Public Works Board may condemn property only with the approval of the agency concerned. Govt. Code § 15853.

Subdivision (d). Takings for state highway purposes are accomplished on behalf of and in the name of the state by the Department of Public Works. Sts. & Hwys. Code § 102. The governing body for the Department of Public Works in such takings is the California Highway Commission. This continues a provision formerly found in Streets and Highways Code Section 102.

Subdivision (e). Takings for toll bridges and other transportation facilities designated by Streets and Highways Code Section 30100 are accomplished on behalf and in the name of the state by the Department of Public Works. Sts. & Hwys. Code § 30400. The governing body for the Department of Public Works in such takings is the California Toll Bridge Authority. Sts. & Hwys. Code § 30400. See also former Section 30404.

Subdivision (f). Takings for state water and dam purposes and for the Central Valley Project are accomplished on behalf and in the name of the state by the Department of Water Resources. Water Code §§ 250 and 11575. The governing body of the Department of Water Resources is the California Water Commission. This supersedes provisions formerly found in Sections 250 and 11581 of the Water Code that required a declaration of necessity by the Director of Water Resources with the concurrence of the Water Commission.

Subdivision (g). The Regents of the University of California, while comparable to an agency of the state, is a separate corporation administering the public trust known as the University of California. The Regents is authorized to condemn property for the university in its own name and is, therefore, the governing body of the university for purposes of Section 351. See Cal. Const., Art. IX, § 9 and Educ. Code § 23151. Cf. Educ. Code §§ 23201 and 23204.

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Revised December 1971

§ 1240.120. Resolution of necessity required

1240.120. A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article.

Comment. Before a public entity begins condemnation proceedings, its governing body must adopt a resolution of necessity that meets the requirements of Sections 1240.130 and 1240.140. If the public entity fails to adopt such a resolution, or adopts a defective resolution, it may not condemn property. See California Condemnation Practice § 8.44 (Cal. Cont. Ed. Bar 1960); California Condemnation Law § 3.20 (Cal. Cont. Ed. Bar, 1971 draft).

Section 1240.120 generalizes the provision, previously applicable to some but not all public entities, that a resolution of necessity is a condition precedent to condemnation. Compare, e.g., former Code Civ. Proc. § 1241(2)(resolution not required) with former Water Code § 8594 and former Govt. Code § 15855 (resolution required).

Matters Noted for Future Consideration:

1. Problems with amending the resolution of necessity when complaint is amended.

2. Availability of declaratory relief and its effect on the requirement of a resolution of necessity.

3. Acquisition of interests in inverse condemnation proceeding.

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§ 1240.130. Contents of resolution

1240.130. The resolution of necessity shall contain all of the following:

(a) A general description of the proposed project with a reference to the specific statute or statutes authorizing the public entity to acquire property for such project.

(b) A description of the property to be acquired for the proposed project and its use in the proposed project.

(c) A declaration that the governing body of the public entity has found and determined each of the following:

(1) The public interest and necessity require the proposed project.

(2) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(3) The property described in the resolution is necessary for the proposed project.

Comment. Section 1240.130 prescribes the contents of the resolution of necessity by a public entity. The resolution is an administrative determination that the statutory prerequisites for taking particular property have been met. Section 1240.130 supersedes various provisions that required a resolution of necessity by different public entities.

Subdivision (a). The resolution of necessity must contain a general description of the proposed project. A statement, for example, that the project is an "elementary school and grounds" or "right of way for a freeway" would satisfy this requirement.

The resolution also must make reference to the specific statute or statutes authorizing the exercise of the power of eminent domain for the project. Only persons authorized by statute to condemn for a particular public use can condemn for that use. Section 1240.020. Such authorizing statutes may be of several types. The state, the University of California, cities, counties, and school districts, for example, may condemn any property necessary to carry out any of their powers or functions. See, e.g., Educ. Code §§ 1047 (school districts), 23151 (Regents of the University of California); Govt. Code §§ 15853 (Public Works Board), 25350.5 (counties), 37350.5 (cities). Many special districts have similar broad authority, but some may condemn only for limited or special purposes. Additionally, if the condemnor is acquiring property under authority of certain general public uses, it must specify that authority. E.g., Sections 1240.220 (future use), 1240.320 and 1240.330 (substitute), 1240.420 (excess), 1240.510 (compatible use), 1240.610 (more necessary use). The purpose of this subdivision is to enable a defendant better to determine whether the taking of his property is authorized.

Subdivision (b). The resolution of necessity must contain a description of the property, right, or interest to be taken. See Section 1235.070 ("property" defined). The description must be sufficiently precise to enable the owner to determine the physical extent and the interests sought. The resolution must also indicate in what way the property will be used for the proposed project.

Subdivision (c). The resolution of necessity must contain a declaration that the governing body of the public entity has found and determined the existence of each of the three elements of public necessity required by Section 1240.030 to be established for a taking. See Section 1240.030 and Comment thereto. This provision is modeled after similar provisions formerly applicable to various condemnors. See, e.g., former Code Civ. Proc. § 1241(2), former Water Code § 8595, former Sts. & Hwys. Code § 25052.

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§ 1240.140. Adoption of resolution

1240.140. Except as otherwise provided by statute, the resolution must be adopted by a vote of a majority of members of the governing body of the public entity.

Comment. Section 1240.140 states the general rule that, to be valid, the resolution of necessity must be adopted by a majority of all of the members of the governing body of the entity, not merely a majority of those present at the time of adoption. In the past, it was not clear whether a majority of those present could authorize condemnation. Cf. 52 Ops. Cal. Atty. Gen. 56 (1969)(majority of those present needed for city ordinance).

Section 1240.140 continues the majority vote requirement for takings by the state. See, e.g., former Govt. Code § 15855 and Sts. & Hwys. Code § 102. Section 1240.140 also continues the majority vote requirement formerly applicable to most takings by local public entities under numerous specific provisions superseded by Section 1240.140. Section 1240.140 supersedes the provision of former Code of Civil Procedure Section 1241(2) that made the resolutions of certain local public entities conclusive on necessity if the resolution was adopted by a two-thirds vote.

The introductory proviso of Section 1240.140 recognizes that differing vote requirements may be imposed by special statute. See, e.g., Educ. Code § 23151 (two-thirds vote required for taking by Regents of the University of California).

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§ 1240.150. Effect of resolution

1240.150. (a) Except as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity conclusively establishes the matters referred to in Sections 1240.030 and 1240.040.

(b) If the taking is by a local public entity and the property described in the resolution is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a presumption that the matters referred to in Sections 1240.030 and 1240.040 are true. This presumption is a presumption affecting the burden of producing evidence.

(c) For the purposes of subdivision (b), a taking by the State Reclamation Board for the Sacramento and San Joaquin Drainage District is not a taking by a local public entity.

Comment. Section 1240.150 provides a uniform rule governing the effect to be given to a resolution of necessity. It continues the conclusive effect given to the resolution in state takings. See, e.g., former Govt. Code § 15855. It supersedes numerous sections of various codes that afforded disparate treatment of the resolution of necessity of various types of local public entities and generalizes the conclusive effect given the resolution of certain local public entities by former Code of Civil Procedure Section 1241(2).

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Subdivision (a). Under Section 1240.150, a valid resolution of necessity conclusively establishes the matters of public necessity specified in Sections 1240.030 and 1240.040 and required by Section 1240.130 to be stated in the resolution as found and determined by the entity (1) in all takings by local public entities where the property taken is entirely within the boundaries of the condemning entity and (2) in all takings by state entities, regardless of the location of the property taken. Giving the resolution this conclusive effect has been upheld against an assertion that the failure to give the property owner notice and a hearing on necessity and proper location before the condemnor, or a hearing on necessity and proper location in the condemnation proceeding, makes the condemnation an unconstitutional taking without due process of law. Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923), aff'g County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 200 P. 27 (1921); City of Oakland v. Parker, 70 Cal. App. 295, 233 P. 68 (1924).

A valid resolution precludes judicial review of the matters specified in Sections 1240.030 and 1240.040 even where it is alleged such matters were determined by "fraud, bad faith, or abuse of discretion." See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959). However, the resolution is conclusive only on the matters specified in Sections 1240.030 and 1240.040; it does not affect in any way the right of a condemnee to challenge a taking on the ground that the project is not an authorized public use or on the ground

that the condemnor does not intend to put the property to its declared public purpose. See Sections 1240.010 and 1260.330. Nor does the conclusive presumption granted the resolution on matters of necessity affect the right of a condemnee to contest the right to take his property on specific statutory grounds provided in the Eminent Domain Law. See Sections 1240.220 (future use), 1240.330 (substitute), 1240.420 (excess), 1240.510 (compatible), and 1240.610 (more necessary). Likewise, the condemnor must demonstrate its compliance with any other requirements and regulations governing the institution of public projects. Cf. Comment to Section 1240.030.

The initial proviso of Section 1240.150 recognizes that there may be exceptions to the uniform conclusive effect given the resolution of necessity. One important exception is in subdivision (b)(extraterritorial acquisitions by local public entity). As to the effect of the resolution of necessity where the taking is by a city or county for open space, see Government Code Section 6953.

Subdivision (b). Subdivision (b) provides that a resolution of necessity of a local public entity creates a presumption affecting the burden of producing evidence with regard to public necessity if the resolution is not entirely within the boundaries of the local public entity. See Evid. Code § 604.

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Subdivision (b) continues the portion of former Code of Civil Procedure Section 1241(2) that denied conclusive effect of a resolution to property lying outside the territorial limits of certain local public entities. Under that provision, necessity and proper location were justiciable questions in the condemnation proceeding. See City of Hawthorne v. Peebles, 166 Cal. App.2d 758, 333 P.2d 442 (1959); City of Carlsbad v. Wight, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963); City of Los Angeles v. Keck, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971). Subdivision (b) extends this limitation of the resolution of necessity to all local public entities condemning property outside their territorial jurisdiction and also makes the question whether the proposed project is necessary a justiciable question in such a condemnation proceeding.

Subdivision (c). The limitation contained in subdivision (b) is not applicable to acquisitions for the Sacramento and San Joaquin Drainage District. Acquisitions for this district are undertaken by the State Reclamation Board. See Water Code § 8590 and Section 1240.110 and Comment thereto. The conclusive effect given resolutions of the board by former Water Code Section 8595 is continued under subdivisions (a) and (c).

Article 3. Future Use

§ 1240.210. "Date of use" defined

1240.210. For the purposes of this article, the "date of use" of property taken for public use is the date when the property is devoted to that use or when construction is started on the project for which the property is taken with the intent to complete the project within a reasonable time. In determining the "date of use," periods of delay caused by extraordinary litigation or by failure to obtain from any public entity any agreement or permit necessary for construction shall not be included.

Comment. See the Comment to Section 1240.220.

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§ 1240.220. Acquisitions for future use

1240.220. (a) Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire property to be used in the future for that use, but property may be taken for future use only if there is a reasonable probability that its date of use will be within seven years from the date the complaint is filed or within such longer period as is reasonable.

(b) Unless the plaintiff plans that the date of use of property taken will be within seven years from the date the complaint is filed, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section and shall state the estimated date of use.

Comment. Section 1240.220 continues prior case law and makes clear that statutory grants of condemnation power carry with them the power to condemn property in anticipation of the condemnor's future needs. See, e.g., Central Pac. Ry. v. Feldman, 152 Cal. 303, 309, 92 P. 849, 852 (1907); City of Los Angeles v. Pomeroy, 124 Cal. 597, 616, 57 P. 585, 591 (1899); San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 480-481, 14 Cal. Rptr. 899, 904-905 (1961). Despite the existence of the implied power,

condemnation for future use was formerly specifically authorized by statute for a few condemnors for particular purposes. See, e.g., Cal. Stats. 1968, Ch. 354, § 1, at 736 (former Cal. Sts. & Hwys. Code § 104.6)(Department of Public Works authorized to acquire real property for future highway needs); Cal. Stats. 1957, Ch. 2104, § 1, at 3729 (former Cal. Water Code § 258) (Department of Water Resources authorized to acquire real property for future state dam and water purposes). Section 1240.220 obviates the need for these additional statutory statements.

The basic substantive test that determines when condemnation for future needs is permitted is stated in subdivision (a). If the date of use of property will be within seven years from the date the complaint is filed, the taking is permitted. (The date of use is that date when property is actually devoted to the use for which taken or when construction on the project is commenced in good faith. See Section 1240.210.) If the date of use will not be within the seven-year period, the taking is permitted only if there is a reasonable probability that the date of use will be within a "reasonable time." What constitutes a reasonable time depends upon all the circumstances of the particular case--e.g., is there a reasonable probability that funds for the construction of the project will become available, have plans been drawn and adopted, is the project a logical extension of existing improvements, is future growth likely, and should the condemnor anticipate and provide for that growth? However, it should be noted that periods of delay caused by litigation other than the normal resolution of valuation issues or by difficulty in obtaining an agreement or permit necessary for construction from a public entity--e.g., freeway route agreements from local public entities--are not to be included in determining date of use. See Section 1240.210.

Subdivision (b) specifies an additional requirement for the complaint and, if the plaintiff is a public entity, for the resolution of necessity.

If the plaintiff does not plan to use the property for the public use within seven years from the date the complaint is filed, it must so state in the complaint and resolution. The required information in the complaint will put the defendant on notice that there is a potential issue whether the plaintiff is authorized to take the property under this section.

§ 1240.230. Burden of proof where objection to taking for future use

1240.230. (a) If the defendant objects to a taking for future use, the burden of proof is as prescribed in this section.

(b) Unless the complaint states an estimated date of use that is not within seven years from the date the complaint is filed, the defendant has the burden of proof that there is no reasonable probability that the date of use will be within seven years from the date the complaint is filed.

(c) If the defendant proves that there is no reasonable probability that the date of use will be within seven years from the date the complaint is filed, or if the complaint states an estimated date of use that is not within seven years from the date the complaint is filed, the plaintiff has the burden of proof that a taking for future use satisfies the requirements of this article.

Comment. Section 1240.230 states the rules governing the burden of proof where the defendant objects to a taking for future use. A defendant who desires to contest the taking of his property on the ground that the taking is for a future use and is not authorized under Section 1240.220 must raise this defense by objection. Failure to raise the defense in the manner provided in Section 1260.310 constitutes a waiver of the defense even though the complaint states that the condemnor does not plan to use the

property within the seven-year period. See Section 1260.310 and the Comment thereto.

If the defendant does contest the taking, the court must first find that there is no reasonable probability that date of use will be within the seven-year period. Unless the court so finds, the taking cannot be defeated on the ground that it is not authorized under 1240.220. Except where the complaint indicates that the date of use will not be within the seven-year period, the defendant has the burden of proof to establish that there is no reasonable probability that his property will be used for the public use within that period. When the plaintiff estimates that the date of use will not be within the seven-year period or when it is established by proof that there is no reasonable probability that the property will be used for the designated use within such period, the burden shifts to the plaintiff to prove that there is a reasonable probability that the property will actually be devoted to the public use within a "reasonable time." See discussion in Comment to Section 1240.220.

Section 1240.230 makes a significant change in former practice. Under prior law, as under Section 1240.230, condemnation for future use was permitted only if there was a reasonable probability that the property would be devoted to the public use within a reasonable time. See, e.g., San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 480-481, 14 Cal. Rptr. 899, 904-905 (1961). See also East Bay Mun. Util. Dist. v. City of Lodi, 120 Cal. App. 720, 750-755, 8 P.2d 532, 536-538 (1932). However, under prior

law, this issue--whether there was a reasonable probability of use within a reasonable time--was ordinarily nonjusticiable. The issue was regarded as an issue of necessity. The resolution of necessity was conclusive on issues of necessity in the great majority of takings; hence, the issue could be raised only in those few cases where the resolution was not conclusive. Compare Anaheim Union High School Dist. v. Vieira, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966)(resolution conclusive) and County of San Mateo v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960)(resolution conclusive) with San Diego Gas & Elec. Co. v. Lux Land Co., supra (justiciable issue). This aspect of the prior law has not been continued. The resolution of necessity is not conclusive on the issue of whether a taking is authorized under this article.

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Article 4. Substitute Condemnation

§ 1240.310. Definitions

1240.310. As used in this article:

(a) "Necessary property" means property to be used for a public use for which the public entity is authorized to acquire property by eminent domain.

(b) "Substitute property" means property to be exchanged for necessary property.

Comment. Section 1240.310 provides definitions useful in applying the "substitute condemnation" provisions contained in this chapter. Briefly stated, "substitute condemnation" involves the following type of situation: The potential condemnor determines that it needs certain real property (the "necessary property") for its use. It agrees to compensate the owner of the necessary property in whole or in part by other real property or an interest in real property (the "substitute property") rather than money. It then condemns the "substitute property" and exchanges it for the "necessary property." See generally Note, Substitute Condemnation, 54 Cal. L. Rev. 1097 (1966).

§ 1240.320. Condemnation of substitute property where owner of necessary property has power to condemn property for use to which substitute property will be devoted

1240.320. (a) A public entity may acquire by eminent domain substitute property if all of the following are established:

(1) The owner of the necessary property has agreed in writing to the exchange.

(2) The necessary property is devoted to or held for some public use and the substitute property will be devoted to or held for the same public use by the owner of the necessary property.

(3) The owner of the necessary property is authorized to exercise the power of eminent domain to acquire the substitute property for such use.

(b) The resolution authorizing the taking of property under this section and the complaint filed pursuant to such authorization shall specifically refer to this section and shall include a statement that the property is necessary for the purpose specified in this section. The determination in the resolution that the taking of the substitute property is necessary has the effect prescribed in Section 1240.150.

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Comment. Section 1240.320 authorizes a public entity to condemn property to be exchanged only where the person with whom the property is to be exchanged has agreed in writing to such exchange, and such person could himself have condemned the property to be exchanged. In this situation, the same end can be reached no matter which party to the exchange exercises the power of condemnation, so that the authority provided here is simply a shortcut to an identical result. Subdivision (a) extends the advantages of this procedure to public entities generally. Under former law, only certain entities were explicitly authorized to condemn for exchange purposes. See, e.g., former Govt. Code § 15858; Sts. & Hwys. Code §§ 104(b), 104.2; People v. Garden Grove Farms, 231 Cal. App.2d 666, 42 Cal.Rptr. 118 (1965)(state may condemn property to be conveyed to school district in exchange for property necessary for highway right of way). See generally Langenau Mfg. Co. v. City of Cleveland, 159 Ohio St. 525, 112 N.E.2d 658 (1953)(relocation of railroad by municipality); Tiller v. Norfolk & W. Ry., 201 Va. 222, 110 S.E.2d 209 (1959)(relocation of state highway by railroad); Note, Substitute Condemnation, 54 Cal. L. Rev. 1097, 1099-1100 (1966).

Where the owner of the necessary property does not have the power to condemn the substitute property for the use contemplated, the public entity must rely upon the authority granted by Section 1240.330.

Subdivision (b) makes clear that the determination in the resolution authorizing the taking that the property to be taken is necessary for exchange purposes is conclusive unless a local public entity is acquiring property outside its territorial limits. See People v. Garden Grove Farms, supra. See also Section 1240.150 and Comment thereto (effect of resolution of necessity).

Matters noted for future consideration:

1. Should section be applicable to all condemnors?

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§ 1240.330. Condemnation of substitute property where owner of necessary property lacks power to condemn property for use to which substitute property will be devoted

1240.330. (a) A public entity may acquire by eminent domain substitute property if all of the following are established:

(1) The owner of the necessary property has agreed in writing to the exchange and, under the circumstances of the particular case, justice requires that he be compensated in whole or in part by substitute property rather than by money.

(2) The substitute property is in the vicinity of the public improvement for which the necessary property is taken.

(3) Taking into account the relative hardship to both owners, it is not unjust to the owner of the substitute property that his property be taken so that the owner of the necessary property may be compensated by such property rather than by money.

(b) The resolution authorizing the taking of property under this section and the complaint filed pursuant to such authorization shall specifically refer to this section and shall include a statement that the property is necessary for the purpose specified in this section.

Comment. Section 1240.330 authorizes substitute condemnation where the requirements of Section 1240.320 cannot be satisfied but, under the circumstances, justice demands that the owner of the necessary property be compensated in land rather than money. Under former law, only certain condemnors were explicitly authorized to condemn for exchange purposes generally. See, e.g., Sts. & Hwys. Code § 104(b)(Department of Public Works); Water Code § 253(b)(Department of Water Resources). However, the right to exercise the power of eminent domain for exchange purposes probably would have been implied from the right to take property for the improvement itself in the circumstances contemplated. See Brown v. United States, 263 U.S. 78 (1923)(property acquired to relocate town displaced by reservoir); Pitznogle v. Western Md. R.R., 119 Md. 637, 87 A. 917 (1913)(property needed to relocate private road). One of the more common examples of such substitute condemnation is a taking to provide access to a public road from property cut off from access by the condemnor's original acquisition. This situation is provided for specifically by Section 1240.350. See Section 1240.350 and the Comment thereto. Similar situations may arise where private activities--such as a nonpublic utility, railroad serving a mining, quarrying, or logging operation or belt conveyors, or canals and ditches--are displaced by a public improvement. However, the authority granted by Section 1240.330 is

reserved for only these and similarly extraordinary situations. Paragraph (3) of subdivision (a) requires the court to consider the relative hardship to both owners and to permit condemnation only where both owners can be treated fairly.

Matters Noted for Future Consideration:

1. Should this section apply to all condemnors, not just public entities?

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§ 1240.340. Burden of proof where objection to taking for substitute purposes; joinder of parties

1240.340. If the defendant objects to a taking under Section 1240.330, the court in its discretion, upon motion of the owner of the substitute property, the owner of the necessary property, or the plaintiff, may order that the owner of the necessary property be joined as a party plaintiff. At the hearing of the objection, the plaintiff has the burden of proof as to the facts that justify the taking of the property.

Comment. Sections 1240.330 and 1240.340 contain special procedural provisions to help insure complete fairness for the owner of the substitute property. The defendant will receive notice that the condemnor is relying on the authority conferred by Section 1240.330 because that section requires that the condemnation complaint specifically refer to the section. In contrast to the procedure under Section 1240.320, the resolution authorizing the taking under Section 1240.330 is never conclusive, the necessity for the taking is justiciable, and the condemnor has the burden of proof of showing that the facts justify the taking of the substitute property. Compare Section 1240.340 with Section 1240.330. The court is provided the power to join the person who is to receive the substitute property as a party to the action, thereby securing complete representation

of all positions. See Section 1240.340. Finally, the owner of the substitute property may recover litigation expenses connected with the taking of the property to be exchanged where the condemnor is unable to justify such taking. See Section 1245.610. The risk of incurring this additional burden should aid in limiting the exercise of this power to those situations where its exercise is appropriate.

EMINENT DOMAIN LAW § 1240.350

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§ 1240.350. Condemnation to provide access to public road

1240.350. (a) Notwithstanding Section 1240.330, whenever 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 appears reasonably necessary and appropriate after taking into account any hardship to the owner of the additional property, to provide access to a 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 has furnished or committed itself to furnish, according to a specific plan, 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, such fact shall be taken into account in determining the damage to the property which is not acquired for public use.

Comment. Section 1240.350 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 general public. Under former law, the right to exercise the power of eminent domain for such purpose probably would have been 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); Pitznogle v. Western Md. R.R., 119 Md. 637, 87 A. 917 (1913); Luke v. Mass. Turnpike Auth., 337 Mass. 304, 149 N.E.2d 225 (1958); North Carolina State Highway Commission v. Asheville School, Inc., ___ N.C. ___, 173 S.E.2d 909 (1970); 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).

Section 1240.350 is related to Section 1240.330 but is intended to resolve somewhat different problems and is accordingly quite different in content. As indicated above, Section 1240.350 authorizes condemnation to provide substitute access to a public road. Frequently, where property is acquired for a major engineering-oriented project, such as a freeway or irrigation canal, parcels not acquired will be deprived of access to a public road. To restore these parcels to a useful life and, in doing so, to avoid claims of substantial severance damage, a condemnor is authorized to provide

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substitute access in connection with the improvement itself. Although the agreement of the owner of the landlocked parcel will generally be obtained, this is not a prerequisite here. Contrast Section 1240.330(a)(1). The owner is not being compensated for property taken; the condemnor is simply minimizing the damage to property retained by the owner. The substitute access will by necessity be located in the general vicinity of the improvement and it is unnecessary to provide such a requirement here. Compare Section 1240.330(a)(2). Subdivision (a) of Section 1240.350 requires the condemnor to consider and to minimize the hardship to the owner of both the landlocked parcel and the substitute property; however, in contrast with Section 1240.340, no special procedural safeguards are set forth here, and the condemnor's resolution of necessity will generally be conclusive as to issues of necessity. See Section 1240.150 and Comment thereto (effect of resolution of necessity).

Subdivision (b) of Section 1240.350 is included to insure that, where a condemnor provides an access road to property to replace lost access or commits itself to making 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. Obviously,

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where the work has not been completed, there must be a specific plan which indicates not only what access will be substituted but equally important, when such access will be provided. In the latter situation, in determining any damages to be awarded, proper consideration must be given to the fact that access will not be immediately provided.

Section 1240.350 provides discretionary authority for the condemnor to provide access. Where the condemnor does not choose to avail itself of this authority, an owner of property has no right to force such a physical solution upon it, but is limited to the recovery of damages. The owner may, however, at any time seek separate relief under the Street Opening Act of 1903. See Sts. & Hwys. Code §§ 4008, 4008.1, 4120.1.

Matters Noted for Future Consideration:

1. Should this section apply to all condemnors?
2. Extend the doctrine of "physical solutions" to types of damage other than loss of access.

§ 1240.360. Special statutes not affected

1240.360. This article does not limit any authority a public entity may have under any other provision of law to acquire property for exchange purposes nor does it limit any authority a public entity may have to acquire, other than by eminent domain, property for exchange purposes.

Note: It is intended to repeal many of the existing substitute condemnation provisions so that Article 4 (substitute condemnation) will eventually be the primary statutory authority for substitute condemnation. It is possible, however, that some special substitute condemnation provisions will be retained, and Section 1240.360 will protect these special provisions from being impliedly repealed.

Article 5. Excess Condemnation

§ 1240.410. Voluntary acquisition of physical or financial remnants

1240.410. Whenever a part of a larger parcel of property is to be acquired by a public entity for public use and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little value to its owner or to give rise to a claim for severance or other damages, the public entity may acquire the remainder, or portion of the remainder, by any means expressly consented to by the owner.

Comment. Section 1240.410 provides a broad authorization for public entities to acquire physical or "financial" remnants of property by voluntary transactions, including condemnation proceedings initiated with the consent of the owner. Compare Section 1240.420 and the Comment to that section relating to the condemnation of remnants. The language of this section is similar to that contained in former Sections 104.1 and 943.1 of the Streets and Highways Code and Sections 254, 8590.1, 11575.2, and 43533 of the Water Code. Inasmuch as exercise of the authority conferred by this section depends upon the consent and concurrence of the property owner, the language of the section is broadly drawn to authorize acquisition whenever the remnant would have little value to its owner (rather than little

market value or value to another owner) or would give rise to a "claim" for "damages" (rather than raise a "substantial risk" that the entity will be required to pay an amount substantially equivalent to the amount that would be required to be paid for the entire parcel). Compare Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956). This section does not specify the procedure to be followed by the entity in disposing of the property so acquired. That matter is provided for by Section 1240.430. See Section 1240.430 and Comment thereto.

Matters Noted for Future Consideration:

1. Generalize the application of this section to all condemnors?

§ 1240.420. Condemnation of physical or financial remnants

1240.420. (a) Whenever a part of a larger parcel of property is to be taken by a public entity through condemnation proceedings and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little market value or to give rise to a substantial risk that the entity will be required to pay in compensation an amount substantially equivalent to the amount that would be required to be paid for the entire parcel, the entity may take such remainder, or portion of the remainder, in accordance with this section.

(b) The resolution, ordinance, or declaration authorizing the taking of a remainder, or a portion of a remainder, under this section and the complaint filed pursuant to such authority shall specifically refer to this section. It shall be presumed from the adoption of the resolution, ordinance, or declaration that the taking of the remainder, or portion of the remainder, is justified under this section. This presumption is a presumption affecting the burden of producing evidence.

(c) If the defendant desires to contest the taking under this section, he shall specifically raise the issue in the manner provided in Article 4 (commencing with Section 1260.310) of Chapter 8. Upon motion of either the condemnor or the condemnee, made not later than 20 days prior to the day set for trial of the issue of compensation, the court shall determine whether the remainder, or portion of the remainder, may be taken under this section. If the condemnee does not specifically raise the issue in his answer, or if a motion to have this issue heard is not timely made, the right to contest the taking under this section shall be deemed waived.

(d) The determination whether the remainder, or portion of the remainder, may be taken under this section shall be made before trial of the issue of compensation. If the court's determination is in favor of the defendant, the taking of the remainder, or portion of the remainder, shall be deleted from the proceeding, and upon trial of the issue of compensation no reference shall be made to the fact that the public entity previously sought to invoke this section to acquire the remainder or portion of the remainder.

(e) The court shall not permit a taking under this section if the defendant proves that the public entity has a reasonable, practicable, and economically sound means of avoiding or substantially reducing the damages that might cause the taking of the remainder, or portion of the remainder, to be justified under subdivision (a).

(f) Nothing in this section affects (1) the privilege of the entity to abandon the proceeding or abandon the proceeding as to particular property or (2) the consequence of any such abandonment.

Comment. Section 1240.420 provides a uniform standard and a uniform procedure for determining whether property may be taken to eliminate physical and financial "remnants." With respect to physical remnants, see Kern County High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1915). As to the concept of "financial remnants," see Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); People v. Jarvis, 274 Cal. App.2d 217, 79 Cal. Rptr. 175 (1969); People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956). See generally 2 P. Nichols, Eminent Domain § 7.5122 (3d ed. 1963); Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L.J. 571 (1969); Matheson, Excess Condemnation in California: Proposals for Statutory and Constitutional Change, 42 So. Cal. L. Rev. 421 (1969). This section supersedes Section 1266 of the Code of Civil Procedure, Sections 104.1 and 943.1 of the Streets and Highways Code, Sections 254, 8590.1, 11575.2, and 43533 of the Water Code, and various sections of special district laws.

Subdivision (a). It should be noted preliminarily that the terms "larger parcel" and "entire parcel" are not synonymous. "Larger parcel" refers to the original, contiguous, unified parcel held by the condemnee. See former Code Civ. Proc. § 1248(2); People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967). "Entire parcel" refers to the entire parcel sought to be acquired by the condemnor; this includes the part taken for the improvement itself and the remainder, or portion of the remainder, sought to be acquired under this section. The term "portion of the remainder" is used in various subdivisions of this section to allow for the case in which a taking affecting a parcel leaves more than one remnant (e.g., the complete severance of a ranch by a highway). In certain cases, the taking of only one remnant (i.e., "a portion of the remainder") might be justified. The term does not mean or refer to artificially contrived "zones" of damage or benefit sometimes used in appraisers' analyses.

Subdivision (a) undertakes to provide a common sense rule to be applied by the court in determining whether physical remnants (those of "little market value") or financial remnants (those raising a "substantial risk" that assessed damages will be "substantially equivalent" to value) may be taken. The test is essentially that stated as a matter of constitutional law in Dep't of Public Works v. Superior Court, supra, except that the confusing concept of "excessive" damages is not used and "sound economy" alone,

or an estimate as to "sound economy" on the part of the condemnor, is not made a basis for total parcel takings. As the Supreme Court made clear in that decision, such takings are not justified (1) to avoid the cost and inconvenience of litigating damages, (2) to preclude the payment of damages, including damages substantial in amount in appropriate cases, (3) to coerce the condemnee to accept whatever value the condemnor offers for the property actually needed for the project, or (4) to afford the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public work or improvement. In general, a usable and generally salable piece of property is neither a physical nor financial remnant even though its "highest and best use" has been downgraded by its severance or a serious controversy exists as to its best use or value after severance. See, e.g., La Mesa v. Tweed & Gambrell Planing Mill, supra; State Highway Commission v. Chapman, 446 P.2d 709 (Mont. 1968). However, if it is totally "landlocked" and no physical solution is practical, or reduced beneath minimum zoning size and there is no reasonable probability of a zoning change, or rendered unusable for any of its plausible applications, or made to be of significant value to only one or a few persons (e.g., adjoining landowners), it is a "remnant" irrespective of its size. See, e.g., Dep't of Public Works v. Superior Court, supra; State v. Buck, 226 A.2d 840 (N.J. 1968). The test provided by

subdivision (a) is the objective one of marketability and market value generally of the remainder rather than "value to its owner" as specified in Section 1240.410 (which authorizes the purchase of remnants) and certain superseded provisions such as former Section 104.1 of the Streets and Highways Code. See State Highway Commission v. Chapman, supra. The term "substantial risk" and the concept of "substantial" equivalence of damages and value are taken directly from Dep't of Public Works v. Superior Court, supra. Obviously, those general terms are only guides to the exercise of judgment on the part of the court. They are intended to serve as such rather than to indicate with precision the requisite range of probability or the closeness of arithmetical amounts.

Subdivision (b). Although this subdivision requires a specific reference in both the resolution and the complaint to Section 1240.420 as the statutory basis for the proposed taking, it does not require either the recitation or the pleading of the facts that may bring the case within the purview of the section. See People v. Jarvis, supra. The resolution (or ordinance or declaration) is given the effect of raising a presumption that the taking is justified under this section. Thus, in the absence of a contest of that issue, the subdivision permits a finding and judgment that the remainder be taken. However, the presumption is specified to be one affecting the burden of producing evidence (see Evid. Code §§ 603, 604) rather

than one affecting the burden of proof (see Evid. Code §§ 605, 606). Accordingly, the burden of proving the facts that bring the case within the section is left with the plaintiff (i.e., the condemnor). See People v. Van Garden, 226 Cal. App.2d 634, 38 Cal. Rptr. 265 (1964); People v. O'Connell Bros., 204 Cal. App. 34, 21 Cal. Rptr. 890 (1962). In this respect, the subdivision eliminates any greater effect that might be attributed to the resolution (compare People v. Chevalier, 52 Cal.2d 299, 340 P.2d 603 (1959)) or that might be drawn from a legislative (see Los Angeles County v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964)) or administrative (see San Mateo County v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960)) determination or declaration as to "public use."

Subdivisions (c) and (d). Remnant elimination condemnation inevitably raises the problem of requiring both condemnor and condemnee to assume one position as to the right to take issue and an opposing position in the valuation trial. Thus, to defeat the taking, the property owner logically contends that the remainder is usable and valuable but, to obtain maximum severance damages, his contention is the converse. To sustain the taking, the condemnor emphasizes the severity of the damage to the remainder but, if the right to take issue is lost, its position in the partial taking valuation trial is reversed. Under decisional law, the right to take issue as to remnants has been disposed of at various stages. See, e.g., Dep't of Public Works v.

Superior Court, supra (mandamus as to preliminary adverse decision by trial court); People v. Nyrin, supra (appeal from condemnation judgment as to trial motion to delete remnant); People v. Jarvis, supra (appeal from condemnation judgment as to motion prior to pretrial to add remnant); La Mesa v. Tweed & Gambrell Planing Mill, supra (appeal from condemnation judgment following posttrial attempt to amend complaint to add remnant). To obviate this procedural confusion and jousting, subdivision (c) makes clear that either party is entitled to demand a determination by the trial court of the right to take issue before the valuation trial. Moreover, failure to make such demand is a waiver of this issue. Subdivisions (c) and (d) make no change in existing law as to the appellate remedies (appeal from final judgment of condemnation, prohibition, mandamus) that may be available as to the trial court's determination. However, these subdivisions do not contemplate that results of the valuation trial as to values, damages, or benefits may be invoked either in postverdict proceedings in the trial court or on appeal to disparage a determination of the right to take issue made before the valuation trial. Such a determination is necessarily based on matters made to appear at the time it is made and it should be judged accordingly.

The preliminary hearing will be concluded and a determination reached prior to the trial of issue of compensation. Where the court's determination

is in favor of the condemnee, the taking of the remainder, or portion of the remainder, should be completely removed from the proceeding. Moreover, subdivision (d) specifically forbids reference in the valuation trial to the fact that the condemnor sought to take under this section. Whether specific evidence introduced at the preliminary hearing may be used for impeachment or other purposes at the valuation trial should be determined under the usual rules of evidence (see below). However, subdivision (d) makes clear that it is improper to refer directly or indirectly to the resolution, pleadings, or other papers on file to show that the condemnor previously sought to invoke this section to take the entire parcel. For a somewhat analogous provision, see former Code of Civil Procedure Section 1243.5(e)(amount deposited or withdrawn in immediate possession cases).

Subdivision (e). This subdivision permits the condemnee to contest a taking under this section upon the grounds that a "physical solution" could be provided by the condemnor as an alternative to either a total taking or a partial taking that would leave an unusable or unmarketable remainder. In at least a few cases, the condemnee may be able to demonstrate that, given construction of the public improvement in the manner proposed, the public entity is able to provide substitute access or take other steps that would be equitable under the circumstances of the particular case. If he can do so, subdivision (e) prevents acquisition of the remainder. Clearly, in

almost every case, some physical solution would be possible. Subdivision (e), however, requires that the solution also be "reasonable, practicable, and economically sound." To be "economically sound," the proposed solution must, at a minimum, reduce the overall cost to the condemnor of the taking. Thus, the cost of the solution plus compensation paid for the part taken plus any remaining damages must never exceed the amount that would be required to be paid if the entire parcel were taken. The court should, moreover, consider questions of maintenance, hardship to third persons, potential dangers, and so on in determining whether the solution is also "reasonable and practicable."

Subdivision (f). Subdivision (f) makes clear that the procedure provided by this section has no bearing upon the privilege to abandon or the consequences of abandonment. The subdivision makes no change in existing law. See former Section 1255a and People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967).

Matters Noted for Future Consideration:

1. Generalize to apply to all condemnors?
2. Conform to general provisions relating to contesting right to take.
3. Define "larger parcel"?

§ 1240.430. Disposal of acquired physical or financial remnants

1240.430. A public entity may sell, lease, exchange, or otherwise dispose of property taken under this article and may credit the proceeds to the fund or funds available for acquisition of the property being acquired for the public work or improvement. Nothing in this section relieves a public entity from complying with any applicable statutory procedures governing the disposition of property.

Comment. Section 1240.430 authorizes the entity to dispose of property acquired under Sections 1240.410 and 1240.420.

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Article 6. Condemnation for Compatible Use

§ 1240.510. Property appropriated to public use may be taken for compatible public use

1240.510. Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future. Where property is sought to be taken under this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.

Comment. Section 1240.510 makes clear that the authority to condemn property includes the general authority to condemn for compatible joint use property already devoted to public use. See Section 1230.080 ("property appropriated to public use" defined). Section 1240.510 does not contemplate displacement of the existing use by the second use; rather it authorizes common enjoyment of the property where the second use does not unreasonably interfere with the existing use.

The authority granted by Section 1240.510 is independent of the authority contained in Article 7 ("more necessary public use") and is not limited in any

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way by the rules set forth therein. Likewise, condemnation of property appropriated to a public use may be accomplished under Article 7 independent of any authority stated in Article 6. It should be noted, however, that, where property is taken under more necessary use authority, the defendant may be entitled to continue joint use of the property. See Section 1240.630.

The requirement that the proposed use be compatible with the existing use continues prior law that permitted condemnation for consistent uses. See former Code Civ. Proc. § 1240(3), (4), (6). The term "consistent" was necessarily imprecise because of the variety of circumstances it embraced. See, e.g., City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 287 P. 496 (1930), cert. denied 282 U.S. 863 (1930)(abundant water for use of both parties) (alternate holding); Reclamation Dist. No. 551 v. Superior Court, 151 Cal. 263, 90 P. 545 (1907)(railroad right of way sought on top of reclamation district levee); City of Pasadena v. Stimson, 91 Cal. 238, 255, 27 P. 604, ___ (1891)(sewer line in highway right of way); City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916)(railway company's electric transmission lines and subway on property taken for city park).

Section 1240.510 continues the basic principle of consistency by requiring that the proposed use not unreasonably interfere with or impair the continuance of the existing use or such future use as may reasonably be anticipated for the purpose for which the property is already appropriated.

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Tentatively approved December 1971

See San Bernardino County Flood Control Dist. v. Superior Court, 269 Cal. App.2d 514, 75 Cal. Rptr. 24 (1969); Reclamation Dist. No. 551 v. Superior Court, supra. See generally 1 P. Nichols, Eminent Domain § 2.2[8], at 235-238 (3d ed. 1964). Section 1240.510 does not grant authority to displace or interfere substantially with a prior use; the power to displace an existing use is dealt with in Article 7 (commencing with Section 1240.610).

Section 1240.510 authorizes any condemnor able to satisfy the requirement that its proposed use will be compatible with the existing one to condemn the property of any person. Under former law, this point was not clear. See San Bernardino County Flood Control Dist. v. Superior Court, 269 Cal. App.2d 514, 523-524 n.10, 75 Cal. Rptr. 24, (1969). Subdivision (3) of former Code of Civil Procedure Section 1240 referred only to property "appropriated to a public use or purpose, by any person, firm or private corporation," thereby implying that property appropriated to public use by a public entity could not be subjected to imposition of a consistent use. Subdivision (4) of former Section 1240 also dealt with joint use, but the subdivision was limited to property appropriated to public use by an irrigation district. However, subdivision (6) of former Section 1240 authorized the imposition of "rights of way" on property appropriated to public use with no limitation as to the person who had appropriated the property to public use. In view of the limited nature of the authority granted and the

desirability of encouraging common use, Section 1240.510 adopts the latter approach and is applicable to all condemnors and all condemnees.

It should be noted that Section 1240.510 has no effect on the respective rights of the owner of the underlying fee and any easement holders to compensation for the additional burdens imposed by a condemnor exercising the authority granted by this section. Such a situation may call for intervention by the owners or a separate inverse action. Cf. Section 1260. (owner as party to condemnation proceeding) and People v. Schultz Co., 123 Cal. App.2d 925, 268 P.2d 117 (1954)(possibility of subsequent action).

Section 1240.510 requires the plaintiff to refer specifically to this section in its complaint where it seeks to exercise the authority granted here. If the plaintiff is a public entity, it also must refer to this section in its resolution of necessity.

In certain situations, a plaintiff may be uncertain of its authority to condemn under Article 7 and may, therefore, proceed under both that article and Section 1240.510. Such inconsistent allegations are proper. See Section 1260. and Comment thereto.

The authority granted by Section 1240.510 does not permit condemnation of property made exempt from condemnation by statute. See Section 1240.___.

§ 1240.520. Burden of proof where objection to taking for compatible use

1240.520. If the defendant objects to a taking under Section 1240.510, the defendant has the burden of proof that his property is appropriated to public use. If it is established that the property is appropriated to public use, the plaintiff has the burden of proof that its proposed use satisfies the requirements of Section 1240.510.

Comment. Section 1240.520 states the rules governing the burden of proof where the defendant objects to a taking for compatible use. A defendant desiring to contest the taking on the ground that the proposed use will be incompatible with the public use to which the property is appropriated must raise this defense by objection to the right to take. See Section 1260.310 et seq. If the taking is contested, the court must first determine whether the property is in fact already appropriated to a public use, and the defendant bears the burden of proof on this issue. Cf. City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916). Where this fact is established, the plaintiff must then show that the taking is authorized under this article.

§ 1240.530. Fixing terms and conditions of joint use

1240.530. (a) Except as otherwise provided by statute, where property is taken under Section 1240.510, the court shall fix the terms and conditions upon which the property is taken and the manner and extent of its use by each of the parties.

(b) If the court determines that the use in the manner proposed by the plaintiff would not satisfy the requirements of Section 1240.510, the court shall further determine whether the requirements of Section 1240.510 could be satisfied by fixing terms and conditions upon which the property may be taken. If the court determines that the requirements of Section 1240.510 could be so satisfied, the court shall permit the plaintiff to take the property upon such terms and conditions and shall prescribe the manner and extent of its use by each of the parties.

(c) Where property is taken under this article, the court may order any necessary removal or relocation of structures or improvements if such removal or relocation would not require any significant alteration of the use to which the property is appropriated. Unless otherwise provided by statute, all costs and damages that result from the relocation or removal shall be paid by the plaintiff.

Comment. Subdivision (a) of Section 1240.530 requires that, in granting the plaintiff the right to use property appropriated to public use, the court may regulate the manner in which the proposed and prior uses will be enjoyed. This continues the substance of portions of former Code of Civil Procedure Sections 1240(3), 1247(1), 1247a.

The introductory clause of subdivision (a) recognizes that exceptions to its provisions may be found in other statutes. E.g., the Public Utilities Commission has exclusive jurisdiction to determine and regulate crossings involving railroads (Pub. Util. Code §§ 1201 and 1202), and issues involving street and highway crossings may not be subject to judicial review. (Cf. Section 1240.150; Sts. & Hwys. Code § 100.2.)

Subdivision (b) requires that, before a court refuses to allow a taking for joint use because the taking does not satisfy the requirements of Section 1240.510, the court must determine whether terms and conditions could be imposed on the proposed taking so that it would satisfy the requirements of Section 1240.510. If the court refuses to approve the joint use as proposed because of a particular feature of the joint use, the court must specify in what respect the joint use as proposed fails to satisfy the requirements of Section 1240.510 and, where possible, specify the modifications in the use as proposed that are necessary in order to satisfy the requirements of Section 1240.510. Under prior law, decisions could be found which implied that

the court could not review the proposed joint use or indicate what changes would be required in the proposed joint use so that the taking would be permitted. E.g., San Bernardino County Flood Control Dist. v. Superior Court, 269 Cal. App.2d 514, 75 Cal. Rptr. 24 (1969).

Under subdivision (c), the court may require any necessary removal or relocation of structures or improvements if such removal or relocation would not require any significant alteration of the existing use. A similar provision was found in former Code of Civil Procedure Sections 1240(3) and 1247a. See Marin County v. Superior Court, 53 Cal.2d 633, 349 P.2d 526, 2 Cal. Rptr. 758 (1960). Subdivision (c) provides that the plaintiff will normally bear the cost of such relocation although, in some cases, specific statutory provisions may allocate all or part of such cost otherwise. For a listing and discussion of statutes dealing with the cost of relocation of facilities of franchise holders, see 5 Cal. L. Revision Comm'n Reports 186-190 (1963); 10 Cal. L. Revision Comm'n Reports 353-358 (1971).

Matters Noted for Future Consideration:

1. Incorporate an indemnity provision for the defendant.

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Article 7. Condemnation for More Necessary Public Use

§ 1240.610. Property appropriated to public use may be taken for more necessary public use

1240.610. Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated. Where property is sought to be taken under this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.

Comment. Section 1240.610 permits a plaintiff to exercise the power of eminent domain to displace an existing public use. (For the definition of "property appropriated to public use," see Section 1230.080.) The plaintiff may do so only if the proposed use is "more necessary" than the existing use. It should be noted, however, that the defendant may be permitted to continue joint use of the property under authority granted in Section 1240.630.

The authority to take property appropriated to public use for a more necessary use continues prior law. See former Code of Civil Procedure Sections 1240(3) and 1241(3) and numerous repetitions of the rule in other provisions. The authority to take property for a "more necessary" public use

makes unnecessary the authority formerly granted to a number of condemnors to take property "whether the property is already devoted to the same use or otherwise." See, e.g., Harb. & Nav. Code § 6296; Pub. Res. Code § 5542; Pub. Util. Code § 16404; Sts. & Hwys. Code § 27166; Water Code § 71693. The meaning of "more necessary public use" is given greater specificity in the succeeding sections in this article as well as numerous provisions in other codes. See, e.g., Sts. & Hwys. Code § 30402 (use by Toll Bridge Authority a more necessary use than any other use except railroad uses); Sts. & Hwys. Code § 31001 (use by Folsom Lake Bridge Authority a more necessary use than any other use); Sts. & Hwys. Code § 31201 (use by El Dorado County Toll Tunnel Authority a more necessary use than any other use).

Prior law apparently required a plaintiff seeking to condemn property already appropriated to a public use to allege facts showing that its proposed use was a more necessary public use than that to which the property was already appropriated. See Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959). Section 1240.610 eliminates this pleading requirement, but Section 1240.620 continues the rule that the condemnor has the burden of proving that the proposed use is a more necessary public use.

The authority granted by Section 1240.610 does not permit condemnation of property made exempt from condemnation by statute. See Section 1240.___.

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§ 1240.620. Procedure for raising and resolving more necessary use issue

1240.620. If the defendant objects to a taking under Section 1240.610, the defendant has the burden of proof that his property is appropriated to public use. If it is established that the property is appropriated to public use, the plaintiff has the burden of proof that its use satisfies the requirements of Section 1240.610.

Comment. Section 1240.620 states the rules governing the burden of proof where the defendant objects to a taking for a more necessary public use. A defendant desiring to contest the taking on the ground that the proposed use is not more necessary than the public use to which the property is appropriated must raise this defense by objection to the right to take. See Section 1260.310 et seq. If the taking is contested, the court must first determine whether the property is in fact already appropriated to public use, the defendant bearing the burden of proof on this issue. Cf. City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916). Where this fact is proved or otherwise established, the plaintiff must then show that its use is a more necessary public use than the existing use.

§ 1240.630. Right of prior user to joint use of property

1240.630. (a) Where property is sought to be taken under Section 1240.610, the defendant is entitled to continue the public use to which the property is appropriated if the continuance of such use will not unreasonably interfere with or impair, or require a significant alteration of, the more necessary public use as it is then planned or exists or may reasonably be expected to exist in the future.

(b) Upon motion of the defendant, made within the time permitted to object to a taking under Article 4 (commencing with Section 1260.310) of Chapter 8, the court shall determine whether the defendant is entitled under subdivision (a) to continue the use to which the property is appropriated; and, if the court determines that the defendant is so entitled, the court shall fix the terms and conditions upon which the defendant may continue the public use to which the property is appropriated, the terms and conditions upon which the property taken by the plaintiff is acquired, and the manner and extent of the use of the property by each of the parties.

Comment. Section 1240.630 provides a right new to California law; where property appropriated to public use is taken for a more necessary public use, the prior user may continue his use jointly with the more necessary

use if the continuance will not unreasonably interfere with or impair, or require a significant alteration of, the more necessary use.

Subdivision (a). The test for whether the defendant may continue to jointly use the property is comparable to that defining compatible uses. Cf. Sections 1240.510 and 1240.530.

Subdivision (b). In order to have a determination of the right to joint use under subdivision (a), the defendant must raise the issue by timely motion. The motion may be made alone within the time specified in the provisions for challenging the right to take (Section 1260.310 et seq.) or may be made in connection with an objection to the right to take.

If the defendant makes the proper motion, the court must determine whether he is entitled to continue use of the property and must consider possible alterations that would enable joint use and, at the same time, not require significant alteration of the more necessary use or unreasonably impair or interfere with it.

Matters Noted for Future Consideration:

1. Incorporate an indemnity provision for the more necessary user.

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§ 1240.640. Use by state more necessary than other uses

1240.640. (a) Where property has been appropriated to public use by any person other than the state, the use thereof by the state for the same use or any other public use is a more necessary use than the use to which such property has already been appropriated.

(b) Where property has been appropriated to public use by the state, the use thereof by the state is a more necessary use than any use to which such property might be put by any other person.

Comment. Section 1240.640 broadens somewhat the general rule stated under former Code of Civil Procedure Section 1240 and former Government Code Section 15856 (Property Acquisition Law). Section 1240 provided a state priority over private ownership and Section 15856 provided an absolute priority for all acquisitions under that statute. See, e.g., State v. City of Los Angeles, 256 Cal. App.2d 930, 64 Cal. Rptr. 476 (1967). Section 1240.640 not only embraces state acquisitions under the Property Acquisition Law but also under any other authority, most notably by the Department of Water Resources and the Department of Public Works. See also Water Code § 252 (authority of Department of Water Resources to take park lands). Specific exemptions or qualifications to the rule of state supremacy may be stated elsewhere. E.g., Section 1240.680 (park use presumed

"more necessary" than highway use); Sts. & Hwys. Code § 155 (Department of Public Works may not take for memorials without county consent); Sts. & Hwys. Code §§ 103.5, 210.1 (Department of Public Works may condemn parks but shall avoid doing so wherever possible). Also, property appropriated to public use by the state may be taken for common use where compatible pursuant to Section 1240.510 et seq. and the prior user may, under appropriate circumstances, be permitted under Section 1240.630 to continue his use jointly with the more necessary state use.

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§ 1240.650. Use by public entity more necessary than use by other persons

1240.650. (a) Where property has been appropriated to public use by any person other than a public entity, the use thereof by a public entity for the same use or any other public use is a more necessary use than the use to which such property has already been appropriated.

(b) Where property has been appropriated to public use by a public entity, the use thereof by the public entity is a more necessary use than any use to which such property might be put by any person other than a public entity.

Comment. Section 1240.650 is similar in substance to former Code of Civil Procedure Section 1240(3) except that Section 1240.650 embraces all public entities. Thus, for example, Section 1240.650 includes school districts which formerly were not included.

The preference under Section 1240.650 is not merely one of public ownership over private ownership for the same use but includes any use. Thus, for example, a public entity may condemn the easement of a privately owned public utility not merely to perpetuate the utility use in public ownership but also to provide some separate and distinct use. Specific exceptions to the rule of public supremacy may be legislatively declared

elsewhere. Perhaps the most notable of these exceptions are contained in Section 1240.660. Under the latter section, property appropriated by any person to the use of certain public entities is protected from subsequent appropriation by certain other public entities. See Section 1240.660 and Comment thereto. See also Mono Power Co. v. City of Los Angeles, 284 Fed. 784 (9th Cir. 1922)(city precluded by former Code of Civil Procedure Sections 1240(3) and 1241(3)--now Section 1240.660--from condemning property appropriated to use of other governmental entities by private corporation).

Property appropriated to public use by a public entity may always be taken for common use by any other person where compatible pursuant to Section 1240.510 et seq.

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§ 1240.660. Property appropriated to a public use by cities, counties, or certain special districts

1240.660. Property appropriated to the public use of any city, county, municipal water district, irrigation district, transit district, rapid transit district, public utility district, or water district may not be taken under this article by any other city, county, municipal water district, irrigation district, transit district, rapid transit district, public utility district, or water district while such property is so appropriated to such use.

Comment. Section 1240.660 codifies prior law under former Sections 1240(3) and 1241(3) of the Code of Civil Procedure. Section 1240.660, like its predecessors, protects property appropriated to a public use by or to the use of one of a group of public entities from displacement by any other entity in the group. The list of entities in Section 1240.660 conforms to that contained in former Section 1241(3). Former Section 1241(3) listed a greater number of entities than former Section 1240(3); however, the discrepancy appears to have been unintentional, and the sections were apparently regarded as interchangeable. See City of Beaumont v. Beaumont Irr. Dist., 63 Cal.2d 291, 405 P.2d 377, 46 Cal. Rptr. 465 (1965); County of Marin v. Superior Court, 53 Cal.2d 633, 349 P.2d 526, 2 Cal. Rptr. 758 (1960). The term "appropriated to public use" is defined by Section 1230.080. See

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Section 1230.080 and Comment thereto. Former Sections 1240(3) and 1241(3) prohibited takings "while such property is so appropriated and used for the public purposes for which it has been appropriated." (Emphasis added.) This language implied that the property must not only be appropriated but also actually used for a public purpose. However, the cases did not so construe the section. See East Bay Mun. Util. Dist. v. Lodi, 120 Cal. App. 740, 750, 8 P.2d 532, (1932)("'used' does not mean actual physical use . . . but . . . property reasonably necessary for use" which will be used within a reasonable time). The term "used" has accordingly been eliminated from Section 1240.660 to conform with the actual construction. Similarly, both sections referred to takings of "private" property appropriated to the use of the respective entities. It was clear, however, that the sections were not limited to private property devoted to public use but included property owned by public entities as well as by private individuals or corporations. See City of Beaumont v. Beaumont Irr. Dist., supra (city may not condemn property appropriated to use by irrigation district); County of Marin v. Superior Court, supra (county road may not be condemned by municipal water district); Mono Power Co. v. City of Los Angeles, 284 Fed. 784 (9th Cir. 1922)(city may not condemn property appropriated to use of other governmental entities by private corporation). The modifying word "private" has, therefore, been omitted.

EMINENT DOMAIN LAW § 1240.660

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Section 1240.660, like its predecessors, protects property appropriated to a public use by the specific defendants listed from displacement only by the plaintiffs listed. Thus, for example, a city may not take from a rapid transit district--but a school district--because it is not listed, may both take from those listed and have its property taken by those listed without regard to these provisions (although the general rule stated in Section 1240.610 would still apply).

It should be noted that Section 1240.660 places a limitation only on displacement of one user by another. Any entity listed in Section 1240.660 may take property of any other entity listed for common uses where compatible under Section 1240.510. See, e.g., City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 287 P. 496 (1930), and Turlock Irr. Dist. v. Sierra Etc. P. Co., 69 Cal. App. 150, 230 P. 671 (1924).

Note: The Commission solicits comments on whether the provisions of existing law reflected in Section 1240.660 are presently causing difficulty, whether Section 1240.660 is needed, and whether it should be retained, repealed, or modified.

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§ 1240.670. Preservation of certain property in its natural condition; presumption as to best public use

1240.670. Except as provided in Section 103.5 of the Streets and Highways Code, notwithstanding any other provision of law, the fact that property is owned by a nonprofit organization contributions to which are deductible for state and federal income tax purposes under the laws of this state and of the United States and having the primary purpose of preserving areas in their natural condition, and that such property is open to the public subject to reasonable restrictions and is appropriated and used exclusively for the preservation of native plants or native animals, including but not limited to, mammals, birds, and marine life, or biotic communities, or geological or geographical formations of scientific or educational interest, and further that such property is irrevocably dedicated to such uses so that upon liquidation, dissolution, or abandonment of or by the owner, such property will be distributed only to a fund, foundation, or corporation whose property is likewise irrevocably dedicated to such uses, or to a governmental agency holding land for such uses, establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

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Comment. Section 1240.670 continues without substantive change the provisions of subdivision (a) of former Section 1241.9 of the Code of Civil Procedure. For special procedural limitations where the property described is sought to be taken for state highway purposes, see Section 103.5 of the Streets and Highways Code.

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§ 1240.680. Park property; presumption as to best public use

1240.680. Except as provided in Section 103.5 of the Streets and Highways Code, notwithstanding any other provision of law, the fact that property is appropriated to public use as a state, regional, county, or city park or recreation area, or historic site included in the National Register of Historic Places or state-registered landmarks, or state wildlife or waterfowl management area, or state ecological preserve, establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

Comment. Section 1240.680 continues without substantive change the provisions of subdivision (a) of former Section 1241.7 of the Code of Civil Procedure. The term "wildlife or waterfowl management area" refers to an area as provided for in Article 2 (commencing with Section 1525) of Chapter 5 of Division 2 of the Fish and Game Code. The term "ecological preserve" refers to an area as provided for in Article 4 (commencing with Section 1580) of that same chapter of the Fish and Game Code. For special procedural limitations where the property described is sought to be taken for state highway purposes, see Section 103.5 of the Streets and Highways Code.

Article 8. Extraterritorial Condemnation

§ 1240.710. Condemnation outside territorial limits of local public entity

1240.710. A local public entity may condemn only property within its territorial limits except where the power to condemn property outside its limits is expressly granted by statute or necessarily implied as an incident of one of its other statutory powers.

Comment. Section 1240.710 codifies prior law. Although express statutory authority generally is required, extraterritorial condemnation also is permitted where this power is necessarily implied as an incident to the existence of other powers expressly granted. See City of No. Sacramento v. Citizens Util. Co., 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961)(implied authority); City of Hawthorne v. Peebles, 166 Cal. App.2d 758, 333 P.2d 442 (1959)(statutory authority); Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co., 72 Cal. App.2d 638, 165 P.2d 741 (1946)(statutory authority). See also Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955); City of Carlsbad v. Wight, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963). Cf. Mulville v. City of San Diego, 183 Cal. 734, 737, 192 P. 702, (1920); McBean v. City of Fresno, 112 Cal. 159, 44 P. 358 (1896). Furnishing sewage facilities and supplying water are services for which the power of extraterritorial condemnation may be implied. City of Pasadena v. Stimson,

91 Cal. 238, 27 P. 604 (1891)(sewage)(dictum); City of No. Sacramento v. Citizens Util. Co., supra (water). Cf. Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 718, 329 P.2d 289, (1958). Compare City of Carlsbad v. Wight, supra.

There are a number of statutes that expressly authorize extraterritorial condemnation. E.g., Govt. Code § 61610; Harb. & Nav. Code § 7147; Health & Saf. Code §§ 6514, 13852(c); Pub. Res. Code § 5540. Such statutes are constitutional. City of Hawthorne v. Peebles, supra; Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co., supra.

A significant limitation on the exercise of extraterritorial condemnation is that the resolution of necessity of a local public entity is not conclusive where the property to be taken is outside its boundaries. Section 1240.150(b). See City of Hawthorne v. Peebles, supra; Orange County Water Dist. v. Bennett, 156 Cal. App.2d 745, 750, 320 P.2d 536, (1958); Los Angeles County Flood Control Dist. v. Jan, 154 Cal. App.2d 389, 394, 316 P.2d 25, (1957); City of Los Angeles v. Keck, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971). The "necessity" required to justify extraterritorial condemnation is only a reasonable necessity under all the circumstances of the case and not an absolute or imperative necessity. City of Hawthorne v. Peebles, supra. While economic considerations alone may not

be sufficient to justify extraterritorial condemnation, considerations of economy may be taken into account in determining necessity. Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co., supra. Compare City of Carlsbad v. Wight, supra.

Article 9. Preliminary Location, Survey, and Tests

§ 1240.810. Right to make examinations and tests

1240.810. Subject to requirements of this article, any person authorized to acquire property for a particular use by eminent domain may enter upon property to make studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.

Comment. Section 1240.810 continues without substantive change the provisions of subdivision (b) of former Code of Civil Procedure Section 1242.

§ 1240.820. Liability for damages

1240.820. (a) The liability, if any, of a public entity for damages to property that arise from the entry and activities mentioned in Section 1240.810 is determined by Section 816 of the Government Code.

(b) Any person authorized to acquire property for a particular use by eminent domain, other than a public entity, is liable for damages to property that arise from the entry and activities mentioned in Section 1240.810 to the same extent that a public entity is liable for such damages under Section 816 of the Government Code.

Comment. Section 1240.820 continues without substantive change the provisions of subdivisions (c) and (d) of former Code of Civil Procedure Section 1242.

§ 1240.830. Consent or court order required in certain cases

1240.830. In any case in which the entry and activities mentioned in Section 1240.810 will subject the person having the power of eminent domain to liability under Section 1240.820, before making such entry and undertaking such activities, the person shall secure:

(a) The written consent of the owner to enter upon his property and to undertake such activities; or

(b) An order for entry from the superior court in accordance with Section 1240.840.

Comment. Except as noted in the Comment to Section 1240.870, Sections 1240.830-1240.870 continue without substantive change the provisions of former Code of Civil Procedure Section 1242.5.

§ 1240.840. Court order permitting entry; deposit of probable compensation

1240.840. (a) The person seeking to enter upon the property may petition the court for an order permitting the entry and shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case.

(b) Upon such petition and after such notice has been given, the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use.

(c) After such determination, the court may issue its order permitting the entry. The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit the probable amount of compensation in the manner provided in Section 1255.110.

Comment. See the Comment to Section 1240.830.

§ 1240.850. Modification of court order

1240.850. At any time after an order has been made pursuant to Section 1240.840, either party may, upon noticed motion, request the court to determine whether the nature and scope of the activities reasonably necessary to accomplish the purpose of the entry should be modified or whether the amount deposited is the probable amount of compensation that will be awarded. If the court determines that the nature and scope of the activities to be undertaken or the amount of the deposit should be modified, the court shall make its order prescribing the necessary changes.

Comment. See the Comment to Section 1240.830.

§ 1240.860. Management of amount deposited

1240.860. The court shall retain the amount deposited under this article for a period of six months following the termination of the entry. Such amount shall be deposited in the Condemnation Deposits Fund in the State Treasury and shall be held, invested, deposited, and disbursed in accordance with Article 10 (commencing with Section 16429.1) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code.

Comment. See the Comment to Section 1240.830.

§ 1240.870. Recovery of damages and expenses

1240.870. (a) The owner is entitled to recover from the person who entered his property the amount necessary to compensate the owner for any damage which arises out of the entry and for his court costs in the proceeding under this article. In the interests of justice, the court may award the owner, in addition to his court costs, reasonable attorney's fees in an amount fixed by the court.

(b) Where a deposit has been made pursuant to this article, the owner may, upon noticed motion made within six months following the termination of the entry, request the court to determine the amount he is entitled to recover under this section. Thereupon, the court shall determine such amount and award it to the owner and the money on deposit shall be available for the payment of such amount.

(c) Nothing in this section affects the availability of any other remedy the owner may have for the damaging of his property.

Comment. Section 1240.870 continues without substantive change the provisions of subdivision (e) of former Code of Civil Procedure Section 1242.5 except that Section 1240.870 permits the award of reasonable attorney's fees only in the interests of justice--e.g., where the person who entered or sought to enter acted arbitrarily and without any reasonable justification--whereas former Section 1242.5 contained no such limitation on the award of reasonable attorney's fees.