

#36.65

10/12/72

Memorandum 72-65

Subject: Study 36.65 - Condemnation (Disposition of Existing Statutes--Code of Civil Procedure Sections 1247, 1247a, 1248(5), 1248a, 1251, 1257)

One task in preparing a comprehensive eminent domain statute is to dispose of the provisions of the existing title on eminent domain that deal specifically with public utilities. A background research study on this matter has previously been distributed. The Commission has considered this problem previously and deferred decision pending a review of the jurisdiction of the Public Utilities Commission over relocation matters in eminent domain proceedings. See Memorandum 72-64.

The existing eminent domain title, partly because it is based on earlier statutes dealing with condemnation by railroads, contains some special provisions concerning public utilities. These provisions should not be continued in the new Eminent Domain Law. Most of them can be omitted as unnecessary because the same area is covered either by a comprehensive provision of the new law (such as joint use) or by an existing provision of the Public Utilities Code. Where this is not the case, the substance of the provision should be recodified either as a comprehensive provision of the new law or as a provision of the Public Utilities Code.

The sections to be repealed are Code of Civil Procedure Sections 1247, 1247a, 1248(5), 1248a, 1251, and 1257. The text of these sections appears in the printed text of the eminent domain title of the Code of Civil Procedure previously distributed. See Appendix in your binder containing the Comprehensive Statute. The Comments to these sections appear in Exhibit I attached. Conforming changes are attached as Exhibit II.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

EXHIBIT I

CODE OF CIVIL PROCEDURE § 1247

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Code of Civil Procedure § 1247 (repealed)

[See page 55 of Appendix for text.]

Comment. Section 1247 of the Code of Civil Procedure is repealed. The disposition of its provisions is indicated below.

Subdivision 1. The broad jurisdictional grant to the court to regulate and determine the place and manner of making connections and crossings of rights of way (see former Code Civ. Proc. § 1240(6)) is not continued. The Public Utilities Commission has jurisdiction to determine and regulate connections and crossings of rights of way of certain public utilities. See, e.g., Pub. Util. Code §§ 764 and 765 (railroad connections), 1201 and 1202 (railroad crossings). See Breidert v. Southern Pac. Co., 272 Cal. App.2d 398, 77 Cal. Rptr. 262 (1969). See also City of Union City v. Southern Pac. Co., 261 Cal. App.2d 777, 67 Cal. Rptr. 816 (1968). See also Pub. Util. Code §§ 766 (connection of telephone and telegraph lines of different companies), 767 (order by Public Utilities Commission for joint use of utility facilities). Cf. Code Civ. Proc. § 1260.000 (jurisdiction of Public Utilities Commission preserved). The manner and place of street and highway connections and crossings are normally within the exclusive control of entities concerned. Cf. Sts. & Hwys. Code § 100.2; Code Civ. Proc. § 1240.150 (conclusive effect of resolution of necessity); City of Los Angeles v. Central Trust Co., 173 Cal. 323, 159 P. 1169

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(1969); People v. Reed, 139 Cal. App. 258, 33 P.2d 879 (1934).

In other cases, the court has jurisdiction to determine whether the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. Code Civ. Proc. § 1240.030. This jurisdiction extends to crossings and intersections of rights of way since crossings and intersections of rights of way are familiar examples of common uses. San Bernardino County Flood etc. Dist. v. Superior Court, 269 Cal. App.2d 515, 75 Cal. Rptr. 24 (1969). The power of the court to regulate and determine the place and manner of enjoying common use of rights of way is continued in Article 6 (commencing with Section 1240.510) of Chapter 4 of Title 7 of the Code of Civil Procedure.

Subdivision 2. [Not yet drafted.]

Subdivision 3. The power of the court to determine the respective rights of different parties seeking condemnation of the same property is continued in Code of Civil Procedure Section 1260.000.

Code of Civil Procedure § 1247a (repealed)

[See page 56 of Appendix for text.]

Comment. Section 1247a of the Code of Civil Procedure is repealed, and the power granted the court by this section to regulate and determine the place and manner of enjoying common use of property already appropriated to public use (see former Code Civ. Proc. § 1240(3)) and of removing or relocating structures or improvements in connection with such enjoyment is continued in Article 6 (commencing with Section 1240.510) of Chapter 4 of Title 7 of the Code of Civil Procedure. See the Comment to former Section 1247 (discussion of subdivision 1). Cf. San Bernardino County Flood etc. Dist. v. Superior Court, 269 Cal. App.2d 515, 521-522, 75 Cal. Rptr. 24, (1969). To the extent the Public Utilities Commission has jurisdiction over the manner of relocation and removal of structures and improvements of a public utility, such jurisdiction is continued. See Section 1260.000 and Comment thereto.

Code of Civil Procedure § 1248 (repealed)

[See pages 56-58 of Appendix for text.]

Comment. Code of Civil Procedure Section 1248 is repealed. The disposition of its provisions or the reason why such provisions are not continued is indicated below.

Subdivision 5. Subdivision 5, specifying that, in case of condemnation for a railroad, the cost of providing fences and crossings must be ascertained and assessed, is omitted as unnecessary.

The duty of a railroad corporation to construct and maintain good and sufficient fences on both sides of its track and property is continued in Public Utilities Code Section 7626 et seq. Where any project, whether or not a railroad, would require the owner of the remainder to construct and maintain fencing to service the highest and best use of the remainder, the cost of such construction and maintenance is part of the damage caused by the project and is assessed accordingly. See, e.g., Butte County v. Boydston, 64 Cal. 110, 29 P. 511 (1883); California So. R.R. v. Southern Pac. R.R., 67 Cal. 59, 7 P. 153 (1885).

The duty of a railroad corporation to construct and maintain private or farm crossings over its tracks is continued in Public Utilities Code Section 7537, subject to the control of the Public Utilities Commission. Where any project, whether or not a railroad, would limit the access of the owner of

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the remainder so as to impair the service of the remainder for its highest and best use, the loss of access is part of the damage caused by the project and is assessed accordingly. See, e.g., People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

Code of Civil Procedure § 1248a (repealed)

[See page 59 of Appendix for text.]

Comment. Section 1248a of the Code of Civil Procedure is repealed. The substance of the portion of the section authorizing the plaintiff to seek relocation or removal of railway tracks in certain cases is continued in Section 7557 of the Public Utilities Code. See also Code Civ. Proc. § 1240.610 (condemnation for more necessary public use). The portion stating the pleading requirements is continued in Section 1260. of the Code of Civil Procedure. The substance of the portion that required compensation for such relocation and removal to be ascertained and assessed as in other cases is continued in Code of Civil Procedure Section [Code Civ. Proc. § 1248(6)].

Code of Civil Procedure § 1251 (repealed)

[See pages 60-61 of Appendix for text.]

Comment. Section 1251 of the Code of Civil Procedure is repealed. The disposition of its provisions or the reason why such provisions are not continued is indicated below.

Second paragraph. The second paragraph of Section 1251 is not continued. The cost of fences, cattle-guards, and crossings is no longer assessed in an eminent domain proceeding as a separate item of damages. See former Code Civ. Proc. § 1248(5) and Comment thereto.

A railroad corporation has an affirmative duty to fence its tracks and to provide crossings as determined by the Public Utilities Commission. See Pub. Util. Code §§ 7626 and 7537. The railroad is partially absolved from liability for a failure to fence if damages for the lack of a fence were awarded to the owner of adjoining property as part of compensation in an eminent domain proceeding. See Pub. Util. Code § 7627.

CODE OF CIVIL PROCEDURE § 1257

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Code of Civil Procedure § 1257 (repealed)

[See pages 67-68 of Appendix for text.]

Comment. The first portion of Section 1257, which incorporated the general provisions of the Code of Civil Procedure relating to new trials and appeals, is superseded by Section 1260.000. The elaborate proviso relating to possession pending appeal or new trial has been deleted because possession pending appeal or new trial is now provided for by Article 3 (commencing with Section 1255.310) of Chapter 7 of Title 7 of the Code of Civil Procedure.

EXHIBIT II

EMINENT DOMAIN LAW § 1260.000

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Eminent Domain Law § 1260.000

1260.000. The complaint shall contain all of the following:

* * * * *

(e) Where the removal or relocation of structures or improvements is sought, a prayer therefore, a reference to the statute granting the plaintiff the right to compel such removal or relocation, and a description and map of the location and proposed location of such structures or improvements.

Comment. Where the plaintiff is authorized by statute, it may seek the removal or relocation of structures or improvements. See, e.g., Pub. Util. Code § 7557 (removal or relocation of railroad tracks in certain cases). In order to accomplish removal or relocation under such authority, the plaintiff must make specific allegations in the complaint, including a prayer for removal or relocation, an indication of its authority, and appropriate descriptions and maps. This requirement is adapted from former Section 1248a of the Code of Civil Procedure.

PUBLIC UTILITIES CODE § 7526

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Public Utilities Code § 7526 (amended)

Sec. . Section 7526 of the Public Utilities Code is amended
to read:

7526. Every railroad corporation has all of the following powers:

(a) To make such examination and surveys as are necessary to the selection of the most advantageous route for the railroad. The officers, agents, and employees of the corporation may enter upon the lands or waters of any person, for this purpose, subject to liability for all damages which they do thereto.

(b) To receive, hold, take, and convey, by deed or otherwise, as a natural person, such voluntary grants and donations of real estate and other property as are made to it to aid and encourage the construction, maintenance, and accommodation of the railroad.

(c) To purchase, or by voluntary grants or donations to receive, enter, take possession of, hold, and use all such real estate and other property as is necessary for the construction and maintenance of such railroad, and for all stations, depots, and other purposes necessary to successfully work and conduct the business of the road.

(d) To lay out its road, not exceeding 10 rods wide, and to construct and maintain it, with one or more tracks, and with such appendages and adjuncts as are necessary for the convenient use of the road.

(e) To construct its roads across, along, or upon any stream of water, watercourse, roadstead, bay, navigable stream, street, avenue, or highway, or across any railway, canal, ditch, or flume which the

PUBLIC UTILITIES CODE § 7526

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route of its road intersects, crosses, or runs along, in such manner as to afford security for life and property. The corporation shall restore the stream or watercourse, road, street, avenue, highway, railroad, canal, ditch, or flume thus intersected to its former state of usefulness as near as may be, or so that the railroad does not necessarily impair its usefulness or injure its franchise.

(f) To cross, intersect, join, or unite its railroad with any other railroad, either before or after construction, at any point upon its route, and upon the grounds of the other railroad corporation, with the necessary turnouts, sidings, and switches, and other conveniences in furtherance of the objects of its connections. Every corporation whose railroad is intersected by any new railroad shall unite with the owners of the new railroad in forming the intersections and connections, and grant facilities therefor. If the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of the crossings, intersections, and connections, such matters shall be ascertained and determined as is provided in Title 7, Part 3 of the Code of Civil Procedure - Part 1 (commencing with Section 201) of Division 1.

(g) To ~~purchase~~ acquire lands, timber, stone, gravel, or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, ~~or acquire them in the~~

PUBLIC UTILITIES CODE § 7526

Tentatively approved September 1971
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~~manner-provided-in-Title-7,-Part-3-of-the-Code-of-Civil-Procedure,-for
the-condemnation-of-lands .~~

(h) To change the line of its road, in whole or in part, whenever a majority of the directors so determine, as provided in Section 7531, but the change shall not vary the general route of the road, as contemplated in its articles of incorporation.

Comment. Subdivision (f) of Section 7526 is amended to substitute a reference to provisions of the Public Utilities Code for the former reference to the eminent domain title of the Code of Civil Procedure. The determination and regulation of the place and manner of railroad connections and crossings is in the exclusive jurisdiction of the Public Utilities Commission. See the Public Utilities Act (Part 1 of Division 1), particularly Sections 764 and 765 (connections), 1201 and 1202 (crossings). Cf. former Code Civ. Proc. § 1247(1) and Comment thereto. The Public Utilities Act also provides for determination and allocation of compensation in such cases. See Pub. Util. Code §§ 764, 765, 1201-1205; see also Pub. Util. Code §§ 1206-1218 (commission determination of just compensation in connection with grade separations; commission jurisdiction here is not exclusive, see Section 1217).

The authority to condemn for lands, timber, stone, gravel, or other materials used in the construction or maintenance of a railroad is deleted from subdivision (g) of Section 7526 because it duplicates and is more restrictive than the general power of railroad corporations to condemn any property necessary for the construction and maintenance of its railroad provided by Section 611.

Public Utilities Code § 7557 (added)

Sec. . Section 7557 is added to the Public Utilities Code, to read:

7557. Where any railroad or street railroad tracks are located on property that a public entity is authorized to acquire by eminent domain for road, highway, boulevard, street, or alley purposes or on property that a city, county, or municipal water district is authorized to acquire by eminent domain for the right of way of a public utility that it will construct, complete, and maintain, the plaintiff may require the relocation or removal of such tracks by exercise of the power of eminent domain.

Comment. Section 7557 is an exception to the general rule that in eminent domain proceedings the plaintiff must acquire all structures and improvements upon the property it is taking. See Code Civ. Proc. § 1240.000. It continues the substance of former Code of Civil Procedure Section 1248a. For the required allegations in a complaint seeking to compel the removal or relocation of tracks, see Section 1260.000 of the Code of Civil Procedure. Section 7557 does not affect any jurisdiction that the Public Utilities Commission may have over the relocation or removal of tracks in an eminent domain proceeding. See Section 1260.000 of the Code of Civil Procedure and Comment thereto.