

5/12/73

Memorandum 73-87

Subject: Study 36.500 - Condemnation (~~Comprehensive Statute--~~Amendments, Additions, and Repeals)

Attached is a draft of the amendments, additions, and repeals that would be included in the pamphlet containing the Eminent Domain Law. This material is presented for approval for printing. We expect to find additional sections that will require technical revisions and request authority to include these in the printed tentative recommendation. (It should be noted that most of the conforming revisions of codified and uncodified law will be made in the pamphlets containing other tentative recommendations: (1) Conforming Changes in the Special District Statutes, (2) Conforming Changes in the Improvement Acts, and (3) State Condemnation Authorizations.)

Most of the attached draft either has previously been tentatively approved or consists of merely technical changes that involve no policy decisions. Nevertheless, the staff is hopeful that you will read the entire attached draft and bring up for discussion at the Commission meeting any of the suggested provisions that cause you concern. The following matters are noted for your special attention:

Cross-complaints (pages 6-9 of attached draft). The provisions contained in the attached draft were tentatively approved at the July 1973 meeting. However, our consultant, Mr. Kanner, takes the view that the defendant in an eminent domain proceeding should not be required to assert in a cross-complaint a cause of action for damages arising from prelitigation activities; he recommends a provision that the defendant's answer in the eminent domain proceeding seeking just compensation be deemed to include a claim for prelitigation damages even though such cause of action is not pleaded. See his letter attached as Exhibit I. The staff believes that the defendant should be

required to plead any cause of action for damages that are in addition to those recoverable as compensation under the Eminent Domain Law. And a cross-complaint is the appropriate pleading by which the defendant may assert such cause of action. What action does the Commission wish to take on Mr. Kanner's suggested provision which is set out in Exhibit I?

Referees (page 12 of attached draft). The staff proposes to delete the special provisions relating to eminent domain from the section relating to qualifications of referees. We see no need to treat eminent domain proceedings any different than other types of proceedings in this respect.

Open space (pages 38-46 of attached draft). The provisions of the attached draft relating to open space were tentatively approved in September 1971 after months of discussion by the Commission. We suggest no changes in these provisions, but we note for your information that Assembly Bill 921 which was similar to--but not the same as--the attached draft passed the Legislature at the 1973 session and was vetoed by the Governor. See Exhibit II attached. We do not believe that it would be profitable to devote much time to the discussion of this problem at the October meeting, the problem having been fully discussed on a number of previous occasions. Instead, we suggest that the Commission wait until it gets the comments from interested persons and organizations on the attached provisions and then again discuss the problem of open space acquisition in light of the comments received.

Nonprofit hospitals (pages 66-69 of attached draft). The provisions relating to nonprofit hospitals have been tentatively approved by the Commission; the staff revisions are purely technical. However, it should be noted that Assembly Bill 851, which would have imposed somewhat similar limitations on the condemnation authority of nonprofit hospitals, passed the 1973 Legislature

but was vetoed by the Governor. See Exhibit II attached. We do not believe it would be profitable to reconsider these provisions at this time; we suggest instead that consideration of the provisions await the receipt of comments on the printed tentative recommendation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Memo 73-87

EXHIBIT I

JERROLD A. FADEM
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July 9, 1973

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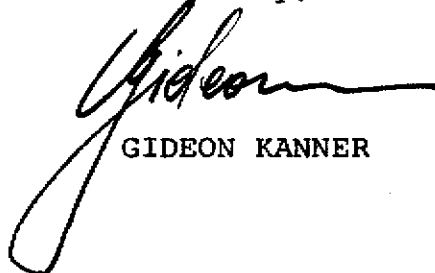
Dear John:

Pursuant to the Commission's request, I suggest the following statute, as a means of raising Klopping-type damages in a direct condemnation action:

"Whenever a defendant in an action brought under this title files an answer seeking just compensation, such answer shall be deemed to contain a claim for each and every element of just compensation to which the defendant may be entitled, regardless of whether such element of just compensation arises out of the taking or from plaintiff's pre-litigation activities which are claimed to have injuriously affected defendant's property sought to be taken or the remainder in partial taking cases."

My rationale is that "just compensation" is an all-inclusive term that covers all constitutionally compensable damages payable in a condemnation action. This approach will simplify condemnation pleadings, and is therefore pragmatically preferable to the cross-complaint method articulated in the First Supplement to Memorandum 73-56.

Sincerely,



GIDEON KANNER

GK:cl

AB 851 - Briggs

Provides that property which may be taken by eminent domain for nonprofit hospital is property immediately adjacent to, and necessary for, the expansion of hospital facilities and services of rather than for the expansion or operation of, a nonprofit hospital engaged in scientific research or educational activity. The bill requires as a condition of the exercise of eminent domain that the proposed expansion has received a favorable decision from such agencies as are by law required for the certification of health facilities.

REASON FOR VETO:

"While there is agreement that the areawide health planning agencies have an interest in proposed hospital expansion, the bill would create a system which varies from the process under existing state and federal law and regulations. The processing of applications for expansion of hospitals must be uniform. Variations within the process can only create excessive administrative burdens upon the hospital and aggravate an already complex review and approval system. The present process of issuance of a certificate of necessity is subject to judicial review when questioned. I find no compelling reason to support a change in the existing process.

"Accordingly, I am returning the bill unsigned."

AB 921 - Dunlap

Makes provision for any city or county to exercise the power of eminent domain, subject to a specified limitation, for the acquisition of any right or interest in any privately owned land designated as open space in an adopted open-space element.

REASON FOR VETO:

"Current law provides for a series of methods to maintain land in open space. I do not feel that eminent domain should be utilized when other methods are available for preserving open space. The Williamson Act, zoning law and similar devices should be examined in order to determine their effectiveness. We should look toward incentive systems for the preservation of open space rather than the extension of governmental authority to condemn land.

"Accordingly, I am returning the bill unsigned."

DELEGATION OF CONDEMNATION AUTHORITY

Civil Code § 1001 (repealed)

Sec. . Section 1001 of the Civil Code is repealed.

~~1001. Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of Title VII, Part III, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such Title is "an agent of the State," or a "person in charge of such use," within the meaning of those terms as used in such Title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two.~~

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Comment. Section 1001 is repealed because it and Section 1238 of the Code of Civil Procedure (also repealed) are superseded by Code of Civil Procedure Sections 1240.010 (public use limitation) and 1240.020 (statutory delegation of condemnation authority required) and by specific statements of the condemnation authority of particular persons for particular public uses which are found in the various codes. See Comment to Code Civ. Proc. § 1240.020 and the Comment to former Code Civ. Proc. § 1238.

DISQUALIFICATION OF JUDGES

Code of Civil Procedure § 170 (amended)

Sec. . Section 170 of the Code of Civil Procedure is amended to read:

170. No justice or judge shall sit or act as such in any action or proceeding:

1. To which he is a party; or in which he is interested other than as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation;

2. In which he is interested as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation;

3. When he is related to either party, or to an officer of a corporation, which is a party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity within the third degree computed according to the rules of law, or when he is indebted, through money borrowed as a loan, to either party, or to an attorney, counsel or partner of either party, or when he is so indebted to an officer of a corporation or unincorporated association which is a party; provided, however, that if the parties appearing in the action and not then in default, or the petitioner in any probate proceeding, or the executor, or administrator of the estate, or the guardian of the minor or incompetent person, or the commissioner, or the referee, or the attorney for any of the above named, or the party or his attorney in all other or special proceedings, shall sign and file in the action or matter, a stipulation in writing waiving the disqualification mentioned in this subdivision or in subdivision 2 or 4 hereof, the judge or court may proceed with the trial or hearing and the performance of all other duties connected therewith with the same legal effect as if no such disqualification existed;

4. When, in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for any party; or when he has given advice to any party upon any matter involved in the action or proceeding; or when he has been retained or employed as attorney or counsel for any party within two years prior to the commencement of the action or proceeding;

5. When it is made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had before him.

Staff draft October 1973

Whenever a judge or justice shall have knowledge of any fact or facts, which, under the provisions of this section, disqualify him to sit or act as such in any action or proceeding pending before him, it shall be his duty to declare the same in open court and cause a memorandum thereof to be entered in the minutes or docket. It shall thereupon be the duty of the clerk, or the judge if there be no clerk, to transmit forthwith a copy of such memorandum to each party, or his attorney, who shall have appeared in such action or proceeding, except such party or parties as shall be present in person or by attorney when the declaration shall be made.

In justice courts when, before the trial, either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before the judge before which the action is pending, by reason of the interest, prejudice or bias of the judge, the court may order the transfer of the action, and the provisions of Section 398 shall apply to such transfer.

Whenever a judge of a court of record who shall be disqualified under the provisions of this section, to sit or act as such in any action or proceeding pending before him, neglects or fails to declare his disqualification in the manner hereinbefore provided, any party to such action or proceeding who has appeared therein may present to the court and file with the clerk a written statement objecting to the hearing of such matter or the trial of any issue of fact or law in such action or proceeding before such judge, and setting forth the fact or facts constituting the ground of the disqualification of such judge. Copies of such written statement shall forthwith be served by the presenting party on each party, or his attorney, who has appeared in the action or proceeding and on the judge alleged in such statement to be disqualified.

Within 10 days after the filing of any such statement, or 10 days after the service of such statement as above provided, whichever is later in time, the judge alleged therein to be disqualified may file with the clerk his consent in writing that the action or proceeding be tried before another judge, or may file with the clerk his written answer admitting or denying any or all of the allegations contained in such statement and setting forth any additional fact or facts material or relevant to the question of his disqualifications. The clerk shall forthwith transmit a copy of the judge's consent or answer to each party or his attorney who shall have appeared in such action or proceeding. Every such statement and every such answer shall be verified by oath in the manner prescribed by Section 446 for the verification of pleadings. The statement of a party objecting to the judge on the ground of his disqualification, shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge.

Staff draft October 1973

No judge of a court of record, who shall deny his disqualification, shall hear or pass upon the question of his own disqualification; but in every such case, the question of the judge's disqualification shall be heard and determined by some other judge agreed upon by the parties who shall have appeared in the action or proceeding, or, in the event of their failing to agree, by a judge assigned to act by the Chairman of the Judicial Council, and, if the parties fail to agree upon a judge to determine the question of the disqualification, within five days after the expiration of the time allowed herein for the judge to answer, it shall be the duty of the clerk then to notify the Chairman of the Judicial Council of that fact; and it shall be the duty of the Chairman of the Judicial Council forthwith, upon receipt of notice from the clerk, to assign some other judge, not disqualified, to hear and determine the question.

If such judge admits his disqualification, or files his written consent that the action or proceeding be tried before another judge, or fails to file his answer within the 10 days herein allowed, or if it shall be determined after hearing that he is disqualified, the action or proceeding shall be heard and determined by another judge or justice not disqualified, who shall be agreed upon by the parties, or, in the event of their failing to agree, assigned by the Chairman of the Judicial Council; provided, however, that when there are two or more judges of the same court, one of whom is disqualified, the action or proceeding may be transferred to a judge who is not disqualified.

A judge who is disqualified may, notwithstanding his disqualification, request another judge, who has been agreed upon by the parties, to sit and act in his place.

6. In an action or proceeding brought in any court by or against the Reclamation Board of the State of California, or any irrigation, reclamation, levee, swampland or drainage district, or trustee, officer or employee thereof, affecting or relating to any real property, or an easement or right-of-way, levee, embankment, canal, or any work provided for or approved by the Reclamation Board of the State of California, a judge of the superior court of the county, or a judge of the municipal court or justice court of the judicial district, in which such real property, or any part thereof, or such easement or right-of-way, levee, embankment, canal or work, or any part thereof is situated shall be disqualified to sit or act, and such action shall be heard and tried by some other judge assigned to sit therein by the Chairman of the Judicial Council, unless the parties to the action shall sign and file in the action or proceeding a stipulation in writing, waiving the disqualification in this subdivision of this section provided, in which case such judge may proceed with the trial or hearing with the same

CODE OF CIVIL PROCEDURE § 170

Staff draft October 1973

legal effect as if no such legal disqualification existed. If, however, the parties to the action shall sign and file a stipulation, agreeing upon some other judge to sit or act in place of the judge disqualified under the provisions of this subdivision, the judge agreed upon shall be called by the judge so disqualified to hear and try such action or proceeding; provided, that nothing herein contained shall be construed as preventing the judge of the superior court of such county, or of the municipal court of such judicial district, from issuing a temporary injunction or restraining order, which shall, if granted, remain in force until vacated or modified by the judge designated as herein provided.

7. When, as a judge of a court of record, by reason of permanent or temporary physical impairment, he is unable to properly perceive the evidence or properly conduct the proceedings.

8. Notwithstanding anything contained in subdivision 6 of this section, a judge of the superior court or a judge of the municipal court or justice court of the judicial district, in which any real property is located, shall not be disqualified to hear or determine any matter in which the opposing party shall have failed to appear within the time allowed by law, or as to such of the opposing parties who shall have failed to appear within the time allowed by law, and as to which matter or parties the same shall constitute purely a default hearing; provided, that nothing in this section contained shall be construed as preventing the judge of the superior court of such county, ~~or of the municipal court of such judicial district,~~ from issuing an order for ~~immediate possession,~~ in proceedings in eminent domain.

prior to judgment

Nothing in this section contained shall affect a party's right to a change of the place of trial in the cases provided for in Title 4 (commencing with Section 392) of Part 2 of this code.

Comment. Section 170 is amended to conform to the language used in the Eminent Domain Law. See Article 3 (commencing with Section 1255.410) of Chapter 6 of Title 7 of Part 3 of the Code of Civil Procedure. The reference to the judge of the municipal court is deleted because eminent domain proceedings may be brought only in the superior court. See Code Civ. Proc. § 1250.010.

Tentatively approved July 1973

CROSS-COMPLAINTS

Code of Civil Procedure § 426.70 (added)

Sec. . Section 426.70 is added to the Code of Civil Procedure, to read:

426.70. (a) Notwithstanding subdivision (a) of Section 426.60, this article applies to eminent domain proceedings.

(b) The related cause of action may be asserted by cross-complaint in an eminent domain proceeding whether or not the party asserting such cause of action has presented a claim in compliance with Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code to the plaintiff in the original eminent domain proceeding.

Comment. Subdivision (a) of Section 426.70--by making this article applicable to eminent domain proceedings--codifies the principle that a related cause of action must be asserted against the plaintiff in an eminent domain action or it is barred. Klopping v. City of Whittier, 8 Cal.3d 39, ___, ___ P.2d ___, ___, ___ Cal. Rptr. ___, ___ (1972)(damages caused by precondemnation announcements must be raised in eminent domain proceeding). The related cause must be asserted as a cross-complaint. See Section 426.30.

Subdivision (b) of Section 426.70 dispenses with the requirement that a claim be presented to a public entity as a condition to bringing a compulsory cross-complaint against the public entity in an eminent domain proceeding. Compare Govt. Code §§ 905, 905.2; County of San Luis Obispo v. Ranchita Cattle Co., 16 Cal. App.3d 383, 94 Cal. Rptr. 73 (1971). Accordingly, the cause of

CODE OF CIVIL PROCEDURE § 426.70

Tentatively approved July 1973

action is not barred by mere failure to present the claim within the time specified in the public entity claims statute, and the cause may be asserted by cross-complaint in the eminent domain action whether or not a claim has been presented to the public entity. However, subdivision (b) eliminates the requirement only as against the plaintiff. Actions against third parties are not affected.

Tentatively approved July 1973

Code of Civil Procedure § 428.10 (amended)

Sec. . Section 428.10 of the Code of Civil Procedure is amended to read:

428.10. A party against whom a cause of action has been asserted in a complaint or cross-complaint may file a cross-complaint setting forth either or both of the following:

(a) Any cause of action he has against any of the parties who filed the complaint or cross-complaint against him. Nothing in this subdivision authorizes the filing of a cross-complaint against the plaintiff in an action commenced under Title 7 (commencing with Section ~~4227~~) of Part 3.

1230.010

(b) Any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against him.

Comment. Section 428.10 is amended to substitute a correct reference to the Eminent Domain Law. It should be noted that only subdivision (a) is inapplicable to an eminent domain proceeding. Subdivision (b) authorizes a defendant in such a proceeding to assert by cross-complaint against the plaintiff any cause of action having any relationship to the property involved or arising out of the actions of the condemnor in connection with the acquisition of the property. See Comment to 1971 Amendment to Section 378. This authorization permitting joinder of related causes is intended to be given a liberal construction. See Klopping v. City of Whittier, 8 Cal.3d 39, ___ P.2d ___, ___ Cal. Rptr. ___ (1972)(damages caused by precondemnation announcements must be raised in condemnation proceedings). Compare People v. Clausen, 248 Cal. App.2d 770, 781 n.6, 57 Cal. Rptr. 227, _____ (1967)(construing "transaction"

Tentatively approved July 1973

to permit assertion by cross-complaint of cause of action for alleged trespass occurring in connection with condemnation activities), with People v. Buellton Dev. Co., 58 Cal. App.2d 178, 183, 136 P.2d 793, ___ (1943)(narrowly construing "transaction"). This same liberal construction will also permit joinder of third parties against whom claims are asserted involving the same property; pre-1971 cases may not be authoritative in this regard. See El Monte School Dist. v. Wilkens, 177 Cal. App.2d 47, 1 Cal. Rptr. 715 (1960)(independent regulatory activities by public entity other than the condemnor held not a basis for cross-complaint).

It also should be noted that the test for compulsory cross-complaints under Section 426.70 in eminent domain proceedings is narrower than the test for a permissive cross-complaint under subdivision (b) of Section 428.10. Compare Section 426.10 (defining "related cause of action") with Section 428.10(b).

Staff draft October 1973

ACTION TO ENJOIN DIVERSION OF WATER

Code of Civil Procedure § 534 (amended)

Sec. . Section 534 of the Code of Civil Procedure is amended to read:

534. In any action brought by a riparian owner to enjoin the diversion of water appropriated or proposed to be appropriated, or the use thereof, against any person or persons appropriating or proposing to appropriate such waters, the defendant may set up in his answer that the water diverted or proposed to be diverted is for the irrigation of land or other public use, and, in such case, he shall also in such answer set forth the quantity of water desired to be taken and necessary to such irrigation of land or the public use, the nature of such use, the place where the same is used or proposed to be used, the duration and extent of the diversion or the proposed diversion, including the stages of the flow of the stream at and during the time in which the water is to be diverted, and that the same may be diverted without interfering with the actual and necessary beneficial uses of the plaintiff, and that such defendant so answering desires that the court shall ascertain and fix the damages, if any, that will result to the plaintiff or to his riparian lands from the appropriation of the water so appropriated or intended to be appropriated by defendant.

The plaintiff may serve and file a reply to the defendant's answer stating plaintiff's rights to the water and the damage plaintiff will suffer by the defendant's taking of the water, and plaintiff may implead as parties to the action all persons necessary to a full determination of the rights of plaintiff to the water and the damages plaintiff will suffer by the proposed taking by defendant, and the court shall have jurisdiction to hear and determine all the rights to water of the plaintiff and other parties to the action, and said parties shall have a right to state and prove their rights, and shall be bound by the judgment rendered the same as though made parties plaintiff at the commencement of the action.

Upon the trial of the case the court shall receive and hear evidence on behalf of the respective parties, and if the court finds that the allegations of such answer are true as to the aforesaid matters, and that the appropriation and diversion of such waters is for irrigation of land or other public use and that, after allowing sufficient water for the actual and necessary beneficial uses of the plaintiff and other parties, there is water available to be beneficially appropriated by such defendant so answering, the court shall fix the time and manner and extent of such appropriation and the actual damages, if any, resulting to the plaintiff or other parties on account of the same, and in fixing such damages the court shall

be guided by ~~paragraph four of section one thousand two hundred forty-eight of this code~~ and if, upon the ascertainment and fixing of such damages the defendant, within the time allowed in ~~section one thousand two hundred fifty-one of this code~~ for the payment of damages in proceedings in eminent domain, shall pay into court the amount of damages fixed and the costs adjudged to be paid by such defendant, or give a good and sufficient bond to pay the same upon the final settlement of the case, the injunction prayed for by the plaintiff shall be denied to the extent of the amount the defendant is permitted to appropriate, as aforesaid, and the temporary injunction, if any has been granted, shall be vacated to the extent aforesaid; *provided*, that any of the parties may appeal from such judgment as in other cases; *and provided, further*, that if such judgment is in favor of the defendant and if he upon and pending such appeal shall keep on deposit with the clerk of said court the amount of such damages and costs, or the bond, if it be given, so awarded to be paid to the plaintiff or other parties in the event such judgment shall be affirmed, no injunction against the appropriation of the amount the defendant is permitted to appropriate as aforesaid shall be granted or enforced pending such appeal, and, upon the acceptance by the plaintiff or other parties of such amount so awarded or upon the affirmation of such decision on appeal so that such judgment shall become final, the defendant shall have the right to divert and appropriate from such stream, against such plaintiff or other parties and his successors in interest, the quantity of water therein adjudged and allowed. Upon the filing of such answer as is herein provided for, the parties plaintiff or other parties and defendant shall be entitled to a jury trial upon the issues as to damages so raised, as provided in ~~title seven, part three of this code~~, applying to actions in eminent domain.

Section
1268.010

Article 5 (commencing
with Section 1263.410)
of Chapter 9 of Title
7 of Part 3 ,

Title 7 (commencing with
Section
1230.010) of
Part 3 ,

proceedings

Comment. The amendment of Section 534 merely replaces the references to former Sections 1248 and 1251 with references to the statutory provisions that supersede those sections.

REFEREES

Code of Civil Procedure § 640 (amended)

Sec. . Section 640 of the Code of Civil Procedure is amended to read:

640. A reference may be ordered to the person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection, or the reference may be made to a court commissioner of the county where the cause is pending, ~~provided, that in any action brought under Title 7 of Part 3 of this code, if the plaintiff is the State, a county, city and county, or any incorporated city or town, or a municipal water district, the referees are not required to be residents of the county in which the action or proceeding is triable. Nothing herein contained shall be construed as repealing any law of this State giving jurisdiction to the State Railroad Commission to ascertain the just compensation which must be paid in eminent domain proceedings.~~

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Comment. Section 640 is amended to delete the special provisions relating to eminent domain. See Cal. Const., Art. I, § 14 (trial by jury unless waived).

GARNISHMENT OF DEBT OWNED BY PUBLIC ENTITY

Code of Civil Procedure § 710 (amended)

Sec. . Section 710 of the Code of Civil Procedure is amended to read:

710. (a) Whenever a judgment for the payment of money is rendered by any court of this state against a defendant to whom money is owing and unpaid by this state or by any county, city and county, city or municipality, quasi-municipality, district or public corporation, the judgment creditor may file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

1. If such money, wages or salary is owing and unpaid by this state to such judgment debtor, said judgment creditor shall file said abstract or transcript and affidavit with the state department, board, office or commission owing such money, wages or salary to said judgment debtor prior to the time such state department, board, office or commission presents the claim of such judgment debtor therefor to the State Controller. Said state department, board, office or commission in presenting such claim of such judgment debtor to said State Controller shall note thereunder the fact of the filing of such abstract or transcript and affidavit and state the amount unpaid on said judgment as shown by said affidavit and shall also note any amounts advanced to the judgment debtor by, or which the judgment debtor owes to, the State of California by reason of advances for expenses or for any other purpose. Thereupon the State Controller, to discharge such claim of such judgment debtor, shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due such judgment debtor on such claim, after deducting from such claim an amount sufficient to reimburse the state department, board, office or commission for any amounts advanced to said judgment debtor or by him owed to the State of California, and after deducting therefrom an amount equal to one-half or such greater portion as is allowed by statute of the United States, of the earnings owing to the judgment debtor for his personal services to the state rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof; if any, to the judgment debtor.

2. If such money, wages or salary is owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi-municipality, district or public corporation, said judgment creditor shall file said abstract or

transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality, district or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to discharge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, less an amount equal to one-half or such greater portion as is allowed by statute of the United States, of the earnings of the debtor owing by the county, city and county, city, municipality, quasi-municipality, district or public corporation to the judgment debtor for his personal services to such public body rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

(b) The judgment creditor upon filing such abstract or transcript and affidavit shall pay a fee of two dollars and fifty cents (\$2.50) to the person or agency with whom the same is filed.

(c) Whenever a court receives any money hereunder, it shall pay as much thereof as is not exempt from execution under this code to the judgment creditor and the balance thereof, if any, to the judgment debtor. The procedure for determining the claim of exemption shall be governed by the procedure set forth in Section 690.50 of this code, and the court rendering the judgment shall be considered the levying officer for the purpose of that section.

(d) In the event the moneys owing to a judgment debtor by any governmental agency mentioned in this section are owing by reason of an award made in a condemnation proceeding brought by the governmental agency, such governmental agency may pay the amount of the award to the clerk of the court in which such condemnation proceeding was tried, and shall file therewith the abstract or transcript of judgment and the affidavit filed with it by the judgment creditor. Such payment into court shall constitute payment of the condemnation award within the meaning of Section 1251 of this code. Upon such payment into court and the filing with the county clerk of such abstract or transcript of judgment and affidavit, the county clerk shall notify by mail, through their attorneys, if any, all parties interested in said award of the time and place at which the court which tried the condemnation proceeding will determine the conflicting claims to said award. At said time and place the

1268.010 .

CODE OF CIVIL PROCEDURE § 710

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court shall make such determination and order the distribution of the money held by the county clerk in accordance therewith.

(e) The judgment creditor may state in the affidavit any fact or facts tending to establish the identity of the judgment debtor. No public officer or employee shall be liable for failure to perform any duty imposed by this section unless sufficient information is furnished by the abstract or transcript together with the affidavit to enable him in the exercise of reasonable diligence to ascertain such identity therefrom and from the papers and records on file in the office in which he works. The word "office" as used herein does not include any branch or subordinate office located in a different city.

(f) Nothing in this section shall authorize the filing of any abstract or transcript and affidavit against: (1) any wages, or salary owing to the Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, and Attorney General, or (2) any overpayment of tax, penalty or interest, or interest allowable with respect to such overpayment, under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code.

(g) Any fees received by a state agency under this section shall be deposited to the credit of the fund from which payments were, or would be, made on account of a garnishment under this section. For the purpose of this paragraph, payments from the State Pay Roll Revolving Fund shall be deemed payments made from the fund out of which moneys to meet such payments were transferred to said revolving fund.

(h) (1) In the event the moneys owing to a judgment debtor by any governmental agency mentioned in this section are for wages or salary, the judgment creditor shall mail under a separate cover at the time of filing the affidavit with the governmental agency, in an envelope marked "Personal and Confidential", a copy of the affidavit and a Notice to Judgment Debtor as provided in paragraph (2) of this subdivision, addressed to the judgment debtor at his place of employment.

(2) The Notice to Judgment Debtor shall be in 10-point bold type, and in substantially the following form:

You may be entitled to file a claim exempting your salary or wages from execution. You may seek the advice of any attorney or may, within 10 days from the date your salary or wages were levied upon, deliver an affidavit to the court rendering the judgment to exempt such salary or wages, as provided in Section 690.50 of the Code of Civil Procedure.

Comment. Section 710 is amended to substitute in subdivision (d) a reference to the statutory provision that replaced former Section 1251.

CODE OF CIVIL PROCEDURE § 1036

Staff draft October 1973

LITIGATION EXPENSES IN INVERSE CONDEMNATION PROCEEDINGS

Code of Civil Procedure § 1036 (added)

Sec. . Section 1036 is added to the Code of Civil Procedure, to read:

1036. In any inverse condemnation proceeding brought for the taking of any interest in real property, the court rendering judgment for the plaintiff by awarding compensation for such taking, or the attorney representing the public entity who effects a settlement of such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or such attorney, reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

Comment. Section 1036 is the same as former Code of Civil Procedure Section 1246.3.

CODE OF CIVIL PROCEDURE §§ 1237-1273.06

Tentatively approved--various dates

GENERAL CONDEMNATION STATUTE

Code of Civil Procedure §§ 1237-1273.06 (repealed)

Sec. . Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure is repealed.

Note. The text of each section in Title 7 is set out in the Appendix. The disposition of the provisions of these sections is indicated in the Comments that follow the text of each section in the Appendix.

SCHOOL DISTRICTS

Education Code § 1047.5 (added)

Sec. . Section 1047.5 is added to the Education Code, to read:

1047.5. The governing board of any school district may acquire by eminent domain any property necessary to carry out any of the powers or functions of the district.

Comment. Section 1047.5 grants a school district (defined in Section 41) the power of eminent domain to acquire any property necessary to carry out any of the powers or functions of the district. The section supersedes the grant of condemnation authority formerly contained in subdivision 3 of Section 1238 of the Code of Civil Procedure (condemnation authorized.. for "public buildings and grounds for the use . . . of any . . . school district"). It continues the prior authority of school districts to condemn for school purposes.

E.g., Hayward Union High School Dist. v. Madrid, 234 Cal. App.2d 100, 121, 44 Cal. Rptr. 268, (1965)("The district had the right to condemn for any school purpose and on acquisition, to change to some other school purpose any time during its ownership of the property."). Kern County High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919). See also Anaheim Union High School Dist. v. Vieira, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966) (future use); Hayward Union High School Dist. v. Madrid, supra (temporary use for school purposes with resale to follow within several years); Woodland

EDUCATION CODE § 1047.5

Tentatively approved March 1970

Revised April 1970

Renumbered October 1973

School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959)(school purposes may be a more necessary public use than private cemetery).

The authority granted by Section 1047.5 is, of course, subject to specific limitations that may be imposed on the exercise of the power of eminent domain. See Educ. Code § 1048.

In some cases, a particular statute may expressly grant school districts the power of eminent domain for a particular purpose. E.g., Educ. Code § 6726 (operation of a technical, agricultural, and natural resource conservation school). These specific grants of condemnation authority are not to be construed to limit the broad grant of such authority under Section 1047.5.

Private schools which are not of the collegiate grade may not exercise the power of eminent domain. Yeshiva Torath Emeth Academy v. University of So. Cal., 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962). It is also not permissible for a private citizen to acquire property by eminent domain for the operation of a public school. People v. Oken, 159 Cal. App.2d 456, 324 P.2d 58 (1958).

EDUCATION CODE § 1048

Tentatively approved March 1970

Education Code § 1048 (added)

Sec. . Section 1048 is added to the Education Code,
to read:

1048. The governing board of a school district may acquire property in an adjoining school district by lease, or purchase and dispose of such property in the same manner as property within the boundary of the district is purchased and disposed of, where the acquisition of such property is deemed necessary by the governing board for use as garages, warehouse, or other utility purposes.

The power of eminent domain shall not be applicable and such acquisitions by purchase shall be subject to the approval of the governing board of school district in which the property is located.

Comment. Section 1048 continues without change the provisions of former Education Code Section 16003.

Education Code § 15007.5 (repealed)

Sec. . Section 15007.5 of the Education Code is repealed.

~~15007.5. The governing board of any school district may enter into an agreement with the governing body of any public agency for the joint exercise by such school district and such agency of their respective powers of eminent domain, whether or not possessed in common, for the acquisition of real property as a single parcel. Such agreement shall be entered into and performed pursuant to the provisions of Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code, and each public agency therein designated is authorized to enter into such an agreement with the governing board of any school district for such purpose.~~

ALL IN
STRIKEOUT

Comment. Section 15007.5 is superseded by Section 1240.140 of the Code of Civil Procedure.

EDUCATION CODE § 15009

Staff draft October 1973

Education Code § 15009 (amended)

Sec. . Section 15009 of the Education Code is amended to read:

15009. The governing board of a school district may acquire a site for a school building contiguous to the boundaries of the district and upon the acquisition of such site it shall become a part of the district. The site shall not be acquired until the county committee on school district organization of the county or of each of the counties concerned has received the proposal for acquisition of the site and reported its recommendations thereon to the governing boards of the districts concerned and to each county superintendent of schools concerned. The report of the county committee shall be made within 60 days from the time the proposal for acquisition of the site was submitted to it. The power of eminent domain may be

used for the purposes of this section.

A school site is contiguous for the purpose of this section although separated from the boundaries of the district by a road, street, stream, or other natural or artificial barrier or right-of-way.

Comment. Section 15009 is amended to make clear that the power of eminent domain may be used to acquire a school site on property contiguous to the district. See Code Civ. Proc. § 1240.050 (extraterritorial condemnation). Cf. Educ. Code § 1048 (power of eminent domain may not be used to acquire property outside district for use as garage, warehouse, or other utility purpose).

EDUCATION CODE § 16003

Tentatively approved March 1970

Education Code § 16003 (repealed)

Sec. . Section 16003 of the Education Code is repealed.

~~16003. The governing board of a school district may acquire property in an adjoining school district by lease, or purchase and dispose of such property in the same manner as property within the boundary of the district is purchased and disposed of, where the acquisition of such property is deemed necessary by the governing board for use as garages, warehouse, or other utility purposes.~~

The power of eminent domain shall not be applicable and such acquisitions by purchase shall be subject to the approval ~~of the governing board of school district in which the property is located.~~

ALL IN
STRIKEOUT

Comment. Section 16003 is superseded by Section 1048 of the Education Code.

NONPROFIT EDUCATIONAL INSTITUTIONS OF COLLEGIATE GRADE

Education Code § 30051 (added)

Sec. . Chapter 3 (commencing with Section 30051) is added to Division 21 of the Education Code, to read:

Chapter 3. Eminent Domain

30051. Any educational institution of collegiate grade, within this state, not conducted for profit, may acquire by eminent domain any property necessary to carry out any of its powers or functions.

Comment. Section 30051 continues the grant of condemnation authority formerly found in subdivision 2 of Section 1238 of the Code of Civil Procedure ("Public buildings and grounds for the use of . . . any institution within the State of California which is exempt from taxation under the provisions of Section 1a, of Article XIII of the Constitution of the State of California"). See University of So. Cal. v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934), cert. denied, 295 U.S. 738 (1935); Redevelopment Agency v. Hayes, 122 Cal. App.2d 777, 266 P.2d 105 (1954). Private schools which are not of the collegiate grade may not exercise the power of eminent domain. Yeshiva Torath Emeth Academy v. University of So. Cal., 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962).

Tentatively approved September 1973

EVIDENCEEvidence Code § 811 (amended)

Sec. . Section 811 of the Evidence Code is amended to read:

811. As used in this article, "value of property" means the amount of "just compensation" to be ascertained under Section 14 of Article I of the State Constitution and the amount of value, damage, and benefits to be ascertained under subdivisions 1, 2, 3, and 4 of Section 1248 Articles 4 (commencing with Section 1263.310) and 5 (commencing with Section 1263.410) of Chapter 9 of Title 7 of Part 3 of the Code of Civil Procedure.

Comment. Section 811 is amended to conform with the new numbering of the Eminent Domain Law.

Section 811 makes clear that this article as applied to eminent domain proceedings governs only evidence relating to the determination of property value and damages and benefits to the remainder. This article does not govern evidence relating to the determination of loss of goodwill (Code Civ. Proc. § 1263.510). The evidence admissible to prove loss of goodwill is governed by the general provisions of the Evidence Code. Hence, nothing in this article should be deemed a limitation on the admissibility of evidence to prove loss of goodwill if such evidence is otherwise admissible.

Evidence Code § 812 (amended)

Sec. . Section 812 of the Evidence Code is amended to read:

812. This article is not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting "just compensation" as used in Section 14 of Article I of the State Constitution or the terms "fair market value," "damage," or "~~benefits~~" "benefit" as used in Section-1248 Articles 4 (commencing with Section 1263.310) and 5 (commencing with Section 1263.410) or Chapter 9 of Title 7 of Part 3 of the Code of Civil Procedure.

Comment. Section 812 is amended to conform with the new numbering and terminology of the Eminent Domain Law.

Evidence Code § 813 (amended)

Sec. . Section 813 of the Evidence Code is amended to read:

813. (a) The value of property may be shown only by opinion of:

(1) Witnesses qualified to express such opinions; and

(2) The owner of any right, title, or interest in the property
~~or property-interest~~ being valued ; and

(3) An officer or employee designated by a corporation claiming
any right, title, or interest in the property being valued if such person is
knowledgeable as to the character and use of the property .

(b) Nothing in this section prohibits a view of the property being valued or the admission of any other admissible evidence (including but not limited to evidence as to the nature and condition of the property and, in an eminent domain proceeding, the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony given under subdivision (a); and such evidence, except evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding, is subject to impeachment and rebuttal.

Comment. Section 813(a)(2) is amended to make clear that not only the fee owner of the property, but any person having a compensable interest in the property, may testify as to the value of the property or his interest therein. Cf. Code Civ. Proc. §§ 1235.170 ("property" defined) and 1263.010 (right to compensation).

Paragraph (3) is added to Section 813(a) to make clear that, where a corporation owns property being valued, a designated officer or employee who is knowledgeable as to the character and use of the property may testify to his opinion of its value as an owner, notwithstanding any contrary implications in City of Pleasant Hill v. First Baptist Church, 1 Cal. App.3d 384, 82 Cal. Rptr. 1 (1969).

Evidence Code § 814 (amended)

Sec. . Section 814 of the Evidence Code is amended to read:

814. The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the fair market value of the property ~~and which a willing purchaser and a willing seller, dealing with each other in the open market and with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, would take into consideration in determining the price at which to purchase and sell the property or property interest being valued~~, including but not limited to the matters listed in Sections 815 to 821, unless a witness is precluded by law from using such matter as a basis for his opinion.

Comment. Section 814 is amended to substitute a general reference to fair market value for the listing of particular matters constituting fair market value that an expert may rely on in forming an opinion as to the value of property. See Code Civ. Proc. § 1263.320 (fair market value). No substantive change is made by this amendment.

It should be noted that the definition of fair market value contained in Section 1263.320 omits the phrase "in the open market" since there may be no open market for some types of special purpose properties such as schools, churches, cemeteries, parks, utilities, and similar properties. All properties, special as well as general, are valued at their fair market value. Within the limits of this article, fair market value may be determined by reference to (1) the market data (or comparable sales) approach, (2) the income (or capitalization) method, and (3) the cost analysis (or production less depreciation) formula.

Evidence Code § 816 (amended)

Sec. . Section 816 of the Evidence Code is amended to read:

816. (a) When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation.

(b) In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may be fairly considered as shedding light on the value of the property being valued.

(c) The provisions of this section shall be liberally construed to the end that an expert witness is permitted a wide discretion in his selection of comparable sales. Nothing in this section affects the right of the court in its discretion to limit the number of sales used by a witness.

Comment. Subdivision (c) is added to Section 816 to incorporate a policy of liberal admissibility of sales on the theory that an error of exclusion is more likely to be prejudicial than an error of admission. This policy applies only to expert witnesses. It is not intended to limit the court's discretion in placing a reasonable limitation upon the number of sales that may be admissible for any appraisal purpose so as to avoid the cumulative effect of such testimony.

Evidence Code § 816

Tentatively approved September 1973

It should be noted that existence of project enhancement or blight on comparable sales is one aspect of their relevance under this section. See Code Civ. Proc. § 1263.330 (changes in property value due to imminence of project).

Evidence Code § 817 (amended)

Sec. . Section 817 of the Evidence Code is amended to read:

817. (a) When Subject to subdivision (b), when relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the date of valuation.

(b) A witness may take into account a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property only for the purpose of arriving at his opinion as to the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest.

Comment. Section 817 is amended to make clear that subdivision (b) is a limitation on subdivision (a). It should be noted that Section 817 applies only to the determination of the value of property and not to such matters as loss of goodwill. See Section 811 and Comment thereto and Code of Civil Procedure Section 1263.510 and Comment thereto.

Evidence Code § 822 (amended)

Sec. . Section 822 of the Evidence Code is amended to read:

822. Notwithstanding the provisions of Sections 814 to 821, the following matter is inadmissible as evidence and is not a proper basis for an opinion as to the value of property:

(a) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain.

(b) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which such property was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding; but nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 813.

(c) The value of any property or property interest as assessed for taxation purposes, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.

(d) An opinion as to the value of any property or property interest other than that being valued.

(e) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury.

(f) The capitalized value of the income or rental from any property or property interest other than that being valued.

Tentatively approved September 1973

(g) A transaction involving the trade or exchange of any property including the property being valued.

Comment. Subdivision (b) of Section 822, precluding admission of the price of an option to show the value of property, does not preclude admission of the price of the option to show the value of the option under Code of Civil Procedure Section 1265.310 (unexercised options).

Subdivision (g) is added to Section 822 to make clear that transactions involving a trade or exchange of property are not a proper basis for an opinion since use of such transactions requires valuation of property other than the property being valued. See subdivision (d). Cf. People v. Reardon, 4 Cal.3d 507, 483 P.2d 20, 93 Cal. Rptr. 852 (1971). It should be noted, however, that subdivision (d) does not prohibit a witness from testifying to adjustments made in sales of comparable property used as a basis for his opinion. Cf. Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971).

Section 822 does not prohibit cross-examination of a witness on any matter precluded from admission as evidence if such cross-examination is for the limited purpose of determining whether a witness based his opinion in whole or in part on matter that is not a proper basis for an opinion; such cross-examination may not, however, serve as a means of placing improper matters before the jury. Cf. Evid. Code §§ 721, 802, 803.

GOVERNMENT CODE § 184

Tentatively approved April 1970

GENERAL CONDEMNATION AUTHORIZATION

Government Code § 184 (repealed)

Sec. . Section 184 of the Government Code is repealed.

~~184. The State may acquire or authorize others to acquire title to property for public use in the cases and in the mode provided by law.~~

Comment. Section 184 is superseded by Sections 1240.010 (public use limitation), 1240.020 (statutory delegation of condemnation authority required) of the Code of Civil Procedure.

PROTECTIVE CONDEMNATION

Government Code §§ 190-196 (repealed)

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

Comment. Sections 190-196 of the Government Code, relating to protective condemnation, are superseded by Section 1240.120 of the Code of Civil Procedure. Restrictions on the disposition of surplus property are continued in other provisions and in local ordinances and charters. See, e.g., Charter of the City and County of San Francisco § 7.401 (1971).

LIABILITY OF PUBLIC ENTITIES

Government Code § 816 (amended)

Sec. . Section 816 of the Government Code is amended to read:

816. Notwithstanding Section 821.8, a public entity is liable for actual damage to property or for substantial interference with the possession or use of property where such damage or interference arises from an entry pursuant to ~~Section 1242 or 1242.5~~ of the Code of Civil Procedure upon the property by the public entity to make studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities.

Article 1 (commencing
with Section 1245.010)
of Chapter 4 of Title
7 of Part 3

Comment. Section 816 is amended to substitute a reference to the provisions that supersede former Sections 1242 and 1242.5 of the Code of Civil Procedure.

Section 816 was added in 1970 to clarify the application of Division 3.6 (Sections 810-996.6) to claims for damages that may arise from privileged entries upon private property to conduct surveys, examinations, explorations, and similar activities. In general, this section codifies the decisional law that gives content, as to these entries and activities, to the assurance of Section 14 of Article I of the California Constitution that compensation will be made for the "taking" or "damaging" of property. See *Jacobsen v. Superior Court*, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399 (1923).

This section does not *authorize* any entry upon property or the conducting of investigatory activities. Rather, the section provides a "rule of reason" to govern the liability of the public entity where such entries and activities are authorized by other statutory provisions. As to entries upon private property to determine its suitability for acquisition by eminent domain proceedings, see Sections 1245.010-1245.070 of the Code of Civil Procedure.

In cases where a condemnation proceeding eventually is filed to take the property, or a portion of it, the damages mentioned in this

section may be recovered only by cross-complaint in the condemnation proceeding. See Code Civ. Proc. § 426.70 and

Comment thereto.

Staff draft October 1973

In imposing liability for "actual" damage to property and for "substantial" interference with possession and use of the property, this section provides only a general standard that must be applied with common sense to the facts of the particular case. The term "actual damage" is commonly used in similar statutory provisions in other states. See, e.g., KAN. STAT. ANN. § 68-2005 (1964); MASS. LAWS ANN., Ch. 81, § 7F (1964); OHIO REV. CODE ANN. § 163.03 (Page 1969); OKLA. STAT. ANN., Tit. 69, §§ 702, 703 (1969); PA. STAT. ANN., Tit. 26, § 1-409 (Supp. 1969). Judicial decisions from other states have also given sensible applications to the phrase. See, e.g., *Onorato Bros. v. Massachusetts Turnpike Authority*, 336 Mass. 54, 142 N.E.2d 389 (1957); *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So.2d 546 (1962). A specific consequence of the use of the term "actual" is to preclude recovery of the purely "nominal" or "constructive" damages that are presumed in tort law to flow from any intentional tort.

Use of the phrase "substantial interference" recognizes that any entry upon private property causes at least a minimal "interference" with the owner's use, possession, and enjoyment of that property. The very presence upon property of uninvited "guests" would be deemed by some property owners to be an interference with their property rights. The term "substantial," however, is intended to exclude liability for entries and activities that, to quote the leading California decision (*Jacobsen v. Superior Court, supra*), "would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property." See *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801, 811 (1969).

GOVERNMENT CODE § 6950

Tentatively approved September 1971

ACQUISITION OF PROPERTY BY COUNTY OR CITY

FOR OPEN SPACE

Government Code--heading for Chapter 12 (commencing with Section 6950)(amended)

Sec. . The heading for Chapter 12 (commencing with Section 6950) of Division 7 of Title 1 of the Government Code is amended to read:

CHAPTER 12. PURCHASE-OF-INTERESTS-AND-RIGHTS-IN-REAL

PROPERTY ACQUISITION OF PROPERTY FOR OPEN SPACE

Government Code § 6950 (amended)

Sec. . Section 6950 of the Government Code is amended to read:

6950. It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.

, condemnation

Comment. See Comment to Section 6953.

GOVERNMENT CODE § 6952

Tentatively approved September 1971

Government Code § 6952 (amended)

Sec. . Section 6952 of the Government Code is amended to read:

6952. The Legislature hereby declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this State for any county or city to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions.

condemnation

Comment. See Comment to Section 6953.

Tentatively approved September 1971

Government Code § 6953 (amended)

Sec. . Section 6953 of the Government Code is amended

to read:

(a) 6953. The Legislature further declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended or advanced, ~~and that any~~ county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter. Notwithstanding Section 1245.250 of the Code of Civil Procedure, where property is sought to be acquired under this section by condemnation, the resolution of necessity adopted pursuant to Section 1245.220 of the Code of Civil Procedure is not conclusive on the matters referred to in Section 1240.030 of the Code of Civil Procedure.

(b) Any
condemnation

(c) Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter.

Comment. Section 6953 is amended to make clear that a city or county may exercise the power of eminent domain to acquire property for open space

Tentatively approved September 1971

use under this chapter. The former law was unclear, but condemnation for open space probably was not authorized. Compare Note, Property Taxation of Agricultural and Open Space Land, 8 Harv. J. Legis. 158 text at n:1 (1970) (implying that condemnation was authorized) with Ops. Cal. Legis. Counsel (Oct. 24, 1969)(concluding that condemnation was not authorized). Cities are authorized to acquire "urban open space lands" (Govt. Code § 38002) by condemnation (Govt. Code § 38010) under the Parks and Playground Act of 1909. See Cal. Stats. 1970, Ch. 645. Cf. Govt. Code §§ 51058 (last paragraph), 51065. Compare, e.g., Pub. Res. Code §§ 5540, 5541 (authorizing condemnation by regional park district for "natural areas" and "ecological and open space preserves"); Cal. Stats. 1970, Ch. 268 (Orange County Flood Control Act § 2.4--authorizing condemnation for "natural areas" and "ecological and open space preserves"); Cal. Stats. 1971, Ch. 760 (Marin County Flood Control and Water Conservation District Act (Cal. Stats. 1953, Ch. 666) § 5(13), (15)--authorizing condemnation "to acquire, preserve, and enhance lands or interests in lands within the County of Marin contiguous to its properties, for the protection and preservation of the scenic beauty and natural environment for such properties or such lands"); Cal. Stats. 1971, Ch. 803 (Los Angeles County Flood Control Act § 2(6)(15)--authorizing condemnation "to acquire, preserve, and enhance lands or interests in lands contiguous to its properties for the protection and preservation of the scenic beauty and natural environment for such properties or such lands."). Where

GOVERNMENT CODE § 6953

Tentatively approved September 1971

property is acquired by condemnation under this chapter, the resolution of necessity is not conclusive on the issues of public interest and necessity.

The power of eminent domain provided in Section 6953 will facilitate compliance with Section 65564 (requiring local open space plans to incorporate an "action program" consisting of specific programs the city or county intends to pursue in implementing its open space plan). See also Govt. Code §§ 25350.5 and 37350.5 (power of cities and counties to condemn to carry out city and county functions). The power of eminent domain will also provide a means to compel open space preservation where zoning fails. See Govt. Code § 65912 (open space zoning may not be used to take or damage property for public use without payment of just compensation). Cf. Govt. Code §§ 50575-50628 (open space maintenance districts).

For limitations on the right to acquire property under this chapter, see Section 6955.

Government Code § 6955 (added)

Sec. . Section 6955 is added to the Government Code, to read:

6955. Property may be acquired under this chapter only if its acquisition is consistent with the local open space plan adopted by the city or county pursuant to Section 65563.

Comment. Section 6955 makes clear that cities and counties may acquire open space or open area only if such acquisition is consistent with the local open space plan adopted pursuant to Section 65563 (requiring every city and county to prepare and adopt a local open space plan for the comprehensive and long-range preservation and conservation of open space land within its jurisdiction). Section 6955 is thus merely a specific application of Section 65566 (requiring all acquisitions of open space land to be consistent with the local open space plan). See also Section 65567 (prohibiting issuance of building permits, approval of subdivision maps, or adoption of open space zoning ordinances unless consistent with the local open space plan) and Section 65302 (general plan must contain land use element designating open space use).

Section 6955 parallels Section 65910 (requiring cities and counties to adopt open space zoning ordinances consistent with the local open space plan). By providing that the acquisition of open space--by purchase, condemnation, or otherwise--must be consistent with the local open space plan, Section 6955 recognizes that acquisition of property is an alternative to open space zoning.

Tentatively approved September 1971

Government Code § 6956 (added)

Sec. . Section 6956 is added to the Government Code, to read:

6956. (a) A city or county may divert property from use as open space or open area only after it has obtained replacement property for the property to be diverted. Any replacement property, whether substituted or received in exchange, shall be substantially equivalent in usefulness and location for permanent open space or open area as the property it replaces and must be held subject to all the provisions of this chapter. Money received for property diverted from use as open space or open area shall be used to acquire the replacement property or shall be held in a trust fund to be used only to acquire other open space or open area subject to the provisions of this chapter.

(b) This section applies only to property acquired under this chapter after June 30, 1976.

(c) This section does not apply where property or a right or interest therein is conveyed or otherwise subjected to uses that are compatible with its character as open space or open area and that do not significantly adversely affect such character.

Comment. Before open space or open area may be diverted to other use, Section 6956 requires that substantially equivalent property be acquired for open space or open area. The equivalent property may be acquired, for example, in exchange for the diverted property, by purchase with funds available for open space acquisition, or (if the city or county uses the open space or open area for its own public project) by public funds available for the project.

Tentatively approved September 1971

It should be noted that the restriction contained in Section 6956 is not the only restriction upon disposal of open space property by cities and counties. Section 65566 requires that acquisition, disposition, restriction, or regulation of open space property be in accordance with the local open space plan. This requirement applies to property acquired for open space under this chapter or under any other provision of law.

Subdivision (a). Subdivision (a) of Section 6956, which requires substitution of equivalent property, adopts the substance of the limitation found in 42 U.S.C. § 1500c (limitation on conversion of open space to another use if federal assistance used to acquire the open space). See also the 1970 Cumulative State Legislative Program (1969) of the Advisory Commission on Intergovernmental Relations, containing suggested state legislation including a similar limitation. For a somewhat comparable provision, see Pub. Res. Code § 5096.27 (property acquired by local entity with state grant under Cameron-Unruh Beach, Park, Recreational, and Historical Facilities Bond Act of 1964 to be used only for purpose for which state grant funds requested unless otherwise permitted by specific act of the Legislature). Compare Pub. Res. Code § 5540 (authorization by voters or by act of Legislature required for conveyance of property used for park purposes by regional park district).

Subdivision (b). The requirements of subdivision (a) apply only to open space property acquired after the time cities and counties have been granted the power of eminent domain to acquire open space. Nonetheless, the requirements apply not only to open space acquired by eminent domain but also to such property acquired by any other method.

Tentatively approved September 1971

Subdivision (c). The requirements of subdivision (a) do not affect the right of cities and counties to convey or lease open space property, or a right or interest therein, under such covenants or other contractual arrangements as will limit its future use in accordance with the provisions of this chapter. See Section 6953. Subdivision (c) permits improvements in the open space area that do not significantly adversely affect its usefulness as open space. If, however, the improvement significantly adversely affects the usefulness of the open space area as open space, subdivision (a) is applicable.

GOVERNMENT CODE § 7275

Staff draft October 1973

ACQUISITION PRICE PUBLIC INFORMATION

Government Code § 7275 (added)

Sec. . Section 7275 is added to the Government Code, to read:

7275. Whenever any public entity acquires real property by eminent domain, purchase, or exchange, the purchase price or other consideration paid by such entity shall be public information made available upon request from the entity concerned.

Comment. Section 7275 is the same in substance as former Code of Civil Procedure Section 1265.

RESTORATION OF DESTROYED STATE RECORDS

Government Code § 14770 (added)

Sec. . Article 7 (commencing with Section 14770) is added to Chapter 5 of Part 5.5 of Division 3 of Title 2 of the Government Code, to read:

Article 7. Restoration of Records Destroyed by
Public Calamity

14770. (a) As used in this section:

(1) "Acquire" includes acquisition by gift, purchase, lease, eminent domain, or otherwise.

(2) "Public record plant" means the plant, or any part thereof, or any record therein, of any person engaged in the business of searching or publishing public records or insuring or guaranteeing titles to real property, including copies of public records and abstracts or memoranda taken from public records, which is owned by or in the possession of such person or which is used by him in his business.

(b) If public records of any state agency have been lost or destroyed by conflagration or other public calamity, the director may acquire the right to reproduce such portion of a public record plant as is necessary for the purpose of restoring or replacing the records or their substance.

Comment. Section 14770 is new but reflects the same policy as subdivision 15 of former Code of Civil Procedure Section 1238 which applied only to certain local public entities.

GOVERNMENT CODE § 14770

Tentatively approved June 1970

The broad authority to acquire the "right to reproduce" lost or destroyed records permits the reproduction of records by such means as making copies, obtaining a computer printout or other visual representation of records preserved in data processing equipment, or duplicating magnetic tapes or other means for preserving such records in data processing equipment.

For comparable authority for local public entities, see Government Code Section 53030.

GOVERNMENT CODE § 16429.1 et seq.

Tentatively approved September 1970

CONDEMNATION DEPOSITS FUND

Government Code §§ 16429.1-16429.3 (added)

Sec. . Article 10 (commencing with Section 16429.1) is added to Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, to read:

Article 10. Condemnation Deposits Fund

Government Code § 16429.1 (added)

16429.1. The Condemnation Deposits Fund in the State Treasury is continued in existence. The fund consists of all money deposited in the State Treasury under Section 1255.070 or 1268.150 of the Code of Civil Procedure and all interest earned or other increment derived from its investment. The State Treasurer shall receive all such moneys, duly receipt for, and safely keep the same in the fund, and for such duty he is liable upon his official bond.

Comment. Sections 16429.1-16429.3 restate the substance of a portion of subdivision (h) and all of subdivisions (i) and (j) of former Code of Civil Procedure Section 1254.

Government Code § 16429.2 (added)

16429.2. (a) Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Section 16430 or deposited in banks as provided in Chapter 4 (commencing with Section 16500).

(b) The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the State Treasurer shall invest or make deposits in bank accounts in accordance with the designations. For the purposes of this subdivision, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

Comment. See the Comment to Section 16429.1.

Government Code § 16429.3 (added)

16429.3. Interest earned and other increment derived from investments or deposits made pursuant to this article, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the State Treasurer in taking and making delivery of bonds or other securities under this article, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

Comment. See Comment to Section 16429.1.

GOVERNMENT CODE § 25350.5

Tentatively approved April 1970

COUNTIES

Government Code § 25350.5 (added)

Sec. . Section 25350.5 is added to the Government Code, to read:

25350.5. The board of supervisors of any county may acquire by eminent domain any property necessary to carry out any of the powers or functions of the county.

Comment. Section 25350.5 supersedes the grant of condemnation authority formerly contained in various subdivisions of Section 1238 of the Code of Civil Procedure and supplements the specific grants of such authority contained in this and other codes. E.g., Govt. Code § 26020 (airports); Sts. & Hwys. Code § 943 (highways). Its purpose is to give a county adequate authority to carry out its functions.

Specific limitations may, of course, be imposed on the exercise of the power of eminent domain. See Penal Code § 4106 (no industrial farm may be established on land outside county without consent of the affected county). On the other hand, where a statute authorizes the acquisition of property by means not specifically including eminent domain, such authorization does not preclude the use of eminent domain under this section. See, e.g., Pub. Res. Code § 5157 (county may acquire land for public park).

MOBILIZATION, TRAINING, AND SUPPLY STATIONS

Government Code § 25431 (amended)

Sec. . Section 25431 of the Government Code is amended to read:

25431. ~~The acquisition of land for the establishment of a permanent mobilization, training, and supply station for any military purposes authorized by any law of the United States is a public use, and the right of eminent domain is granted and extended to every county availing itself of the provisions of this article for every purpose of condemnation, appropriation, or disposition intended by this article and any county may condemn and appropriate all lands and rights whatsoever~~ **ALL IN STRIKEOUT**
exercise the right of eminent domain to acquire any property **(Any)**
necessary or convenient for carrying out the provisions of this article. ~~The right of eminent domain may be exercised on behalf of such public use in accordance with the provisions of Title 7, Part 3 of the Code of Civil Procedure.~~

Comment. Section 25431 is amended to delete unnecessary portions.

Code of Civil Procedure Section 1240.010 makes the portion declaring that the acquisition is for a public use unnecessary. Code of Civil Procedure Section 1230.020 makes the last sentence unnecessary.

CITIES

Government Code § 37350.5 (added)

Sec. . Section 37350.5 is added to the Government Code, to read:

37350.5. A city may acquire by eminent domain any property necessary to carry out any of its powers or functions.

Comment. Section 37350.5 supersedes the grant of condemnation authority formerly contained in various subdivisions of Section 1238 of the Code of Civil Procedure and supplements the specific grants of such authority contained in this and other codes. E.g., Govt. Code § 37501 (public assembly or convention halls); Sts. & Hwys. Code § 4090 (streets, walks, parking places). Its purpose is to give a city adequate authority to carry out its municipal functions.

Specific limitations may, of course, be imposed on the exercise of the power of eminent domain under some circumstances. See Govt. Code § 37353(c) (no existing golf course may be acquired by eminent domain). On the other hand, where a statute authorizes the acquisition of property by means not specifically including eminent domain, such authorization does not preclude the use of eminent domain under this section. See Comment to Section 25350.5 (authority of county to condemn for county functions).

CITY REVOLVING FUND

Government Code § 43424 (amended)

Sec. . Section 43424 of the Government Code is amended to read:

as a

43424. It may advance money from the revolving fund
~~deposit it in court as security upon commencing~~ pursuant
to Section 1255.010 or 1268.110 of the Code
of Civil Procedure in any emi-
nent domain proceeding to acquire ~~lands, rights of way or other~~
property necessary in establishing, laying out, opening, widen-
ing, extending, or straightening any street or other public way.

any

Comment. Section 43424 is amended to conform to the provisions of the Eminent Domain Law. The reference to "lands, rights of way, or other property" is deleted as unnecessary. See Code Civ. Proc. §§ 1235.070 ("property" defined) and 1240.110 (right to acquire any necessary right or interest in any type of property).

GOVERNMENT CODE § 50366

Staff draft October 1973

PROPERTY TO BE USED FOR FEDERAL PURPOSES

Government Code § 50366 (amended)

Sec. . Section 50366 of the Government Code is amended to read:

50366. ~~The acquisition of land for use by the United States pursuant to this article is a public use, and the right of eminent domain is granted to a local agency availing itself of this article to condemn and appropriate lands and rights necessary or convenient to carry out this article.~~

may exercise the right
of eminent domain to
acquire any property

Comment. Section 50366 is amended to delete the portion made unnecessary by Code of Civil Procedure Section 1240.010.

Tentatively approved October 1971

AIRPORT HAZARDS

Government Code § 50485.2 (amended)

Sec. . Section 50485.2 of the Government Code is amended to read:

50485.2. It is hereby found that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of the aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein. Accordingly, it is hereby declared: (a) that the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question; (b) that it is therefore necessary in the interest of the public health, public safety, and general welfare that the creation or establishment of airport hazards be prevented; and (c) that this should be accomplished, to the extent legally possible, by exercise of the police power by appropriate exercise of the police power or the authority conferred by Article 2.6 (commencing with Section 21652) of Part 1 of Division 9 of the Public Utilities Code .

and

It is further declared that both the prevention of the creation or establishment of airport hazards and the elimination, removal, alteration, mitigation, or marking and lighting of existing airport hazards are public purposes for which a city or county may raise and expend public funds and acquire land or property interests therein.

Comment. Section 50485.2 is amended to preserve the broad discretion of local governments in selecting the means employed in acquiring airport approach protection. See former Section 50485.13 and Public Utilities Code Sections 21652 and 21653 (acquisitions for airport approach protection).

GOVERNMENT CODE § 50485.13

Tentatively approved September 1971

Government Code § 50485.13 (repealed)

Sec. . Section 50485.13 of the Government Code is repealed.

~~50485.13. In any case in which: (a) it is desired to remove, lower, or otherwise terminate a nonconforming structure or use; or (b) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this article; or (c) it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations, the city or county within which the property or nonconforming use is located or the city or county owning the airport or served by it may acquire, by purchase, grant, or condemnation in the manner provided by the law under which a city or county is authorized to acquire real property for public purposes, such as air right, air navigation easement, or other estate or interest in the property or nonconforming structure or use in question as may be necessary to effectuate the purposes of this article. In the case of the purchase or grant of any property or any easement or estate or interest therein or the acquisition of the same by the power of eminent domain by a city or county making such purchase or exercising such power, there shall be included in the damages for the taking, injury or destruction of property the cost of the removal and relocation of any structure or public utility which is required to be moved to a new location.~~

ALL

IN

STRIKEOUT

GOVERNMENT CODE § 50485.13

Tentatively approved September 1971

Comment. Section 50485.13, granting cities and counties the power of eminent domain to eliminate airport hazards, is superseded by other sections.

The power to condemn for the elimination of airport hazards is continued in Public Utilities Code Section 21652. To the extent that entities were limited in their exercise of eminent domain under Section 50485.13 to situations in which zoning would have been inadvisable or unconstitutional, the limitation is not continued. Any entity authorized to condemn for airports may condemn to eliminate airport hazards without limitation under Public Utilities Code Section 21652. It should be noted that cities and counties may achieve this end by appropriate use of its police or eminent domain power. Govt. Code § 50485.2.

The requirement that cities and counties pay the cost of relocation of structures when acquiring property to eliminate airport hazards is continued in Public Utilities Code Section 21653.

The authority of cities and counties to condemn property outside their boundaries for airport purposes is retained in Government Code Section 50470.

Tentatively approved June 1970

RESTORATION OF DESTROYED LOCAL PUBLIC RECORDS

Government Code § 53030 (added)

Sec. . Article 2.5 (commencing with Section 53030) is added to Chapter 1 of Part 1 of Division 2 of Title 5 of the Government Code, to read:

Article 2.5. Restoration of Records Destroyed by
Public Calamity.

53030. (a) As used in this section:

(1) "Acquire" includes acquisition by gift, purchase, lease, eminent domain, or otherwise.

(2) "Local public entity" means any public entity other than the state.

(3) "Public record plant" means the plant, or any part thereof, or any record therein, of any person engaged in the business of searching or publishing public records or insuring or guaranteeing titles to real property, including copies of public records and abstracts or memoranda taken from public records, which is owned by or in the possession of such person or which is used by him in his business.

(b) If public records of a local public entity have been lost or destroyed by conflagration or other public calamity, the local public entity may acquire the right to reproduce such portion of a public record plant as is necessary for the purpose of restoring or replacing the records or their substance.

GOVERNMENT CODE § 53030

Tentatively approved June 1970

Comment. Section 53030 is derived from and reflects the same policy as subdivision 15 of former Code of Civil Procedure Section 1238. However, the provision is broadened to cover all local public entities and is limited to acquiring the "right to reproduce" such records and does not permit permanent acquisition of the public records plant itself.

The broad authority to acquire the "right to reproduce" lost or destroyed records permits the reproduction of records by such means as making copies, obtaining a computer printout or other visual representation of records preserved in data processing equipment, or duplicating magnetic tapes or other means for preserving such records in data processing equipment.

For comparable authority for state agencies, see Government Code Section 14770.

INTEREST ON DEPOSITS

Government Code § 53844 (amended)

Sec. . Section 53844 of the Government Code is amended to read:

53844. In any county which qualifies as set forth in Section 53840 to use the foregoing procedure for short-term financing, all interest payments on the loans may, in the discretion of the board of supervisors, be charged to the general fund of any district or fund for which loans have been made. All interest earned on funds in the county treasury shall be credited to said general fund of the county, excepting therefrom the interest on deposits of school districts which shall accrue to the general funds of the respective school districts, the interest earned on specific investments of a local agency as authorized by Section 53601 of this code or by Section 5007 of the Education Code, and moneys on deposit in court in eminent domain actions pursuant to ~~order of court to secure immediate possession~~ Section 1255.010 or 1268.150 of the Code of Civil Procedure .

Comment. Section 53844 is amended to conform to the language used in the Eminent Domain Law. See Article 3 (commencing with Section 1255.410) of Chapter 6 of Title 7 of Part 3 of the Code of Civil Procedure.

JOINT SANITATION PROJECTS

Government Code § 55003 (amended)

Sec. . Section 55003 of the Government Code is amended
to read:

55003. When it is necessary to ~~take or damage private~~
property in the construction of any outfall sewer or conduit
pursuant to this chapter, the property may be ~~taken by eminent~~
domain ~~pursuant to the Code of Civil Procedure.~~

acquire

acquired

Comment. The amendment of Section 55003 merely conforms
the wording of the section to the language used in the Eminent
Domain Law, Title 7 (commencing with Section 1230.010) of Part 3
of the Code of Civil Procedure, and makes no substantive change.

Staff draft October 1973

WHARVES, CHUTES, AND PIERS

Harbors & Navigation Code § 4009 (amended)

Sec. . Section 4009 of the Harbors and Navigation Code is amended
to read:

4009. After authority to construct a wharf or chute has
been granted, the grantee ~~may procure from the owner the~~ has procured
right of way and other necessary incidental uses of any of
his lands for the wharf or chute, ~~by condemnation proceed-~~
~~ings had under Part III of Title VII, of the Code of Civil~~
~~Procedure. Until the use of the lands held adversely is~~
~~obtained by agreement, or by the proceedings herein men-~~
~~tioned, there is no authority to construct a wharf or chute or~~
to take tolls thereon.

Comment. Section 4009 is amended to delete the grant of the right to
exercise the power of eminent domain. The right of a wharfinger to condemn
property is continued by Public Utilities Code Section 619 to the extent
that the wharfinger is a public utility. Insofar as Section 4009 might
have been construed to authorize private persons to exercise the
power of eminent domain, such authority is not continued.

NONPROFIT HOSPITALS

Health & Safety Code § 438.4 (amended)

Sec. . Section 438.4 of the Health and Safety Code is amended to read:

438.4. The voluntary area health planning agency, acting upon an application originally or reviewing a recommendation of a voluntary local health planning agency or the consumer members of a voluntary area health planning agency acting as an appeals body, and the Advisory Health Council shall make one of the following decisions:

- (a) Approve the application in its entirety;
- (b) Deny the application in its entirety;
- (c) Approve the application subject to modification by the applicant, as recommended by the body involved.

A decision shall become final when all rights to appeal have been exhausted. Approval shall terminate 12 months after the date of such approval unless the applicant has commenced construction² or conversion to a different license category , or an action to

condemn property pursuant to Section 1427,

and is diligently pursuing the same to completion as determined by the voluntary area health planning agency; or unless the approval is extended by the voluntary area health planning agency for an additional period of up to 12 months upon the showing of good cause for the extension. If the Advisory Health Council finds that the voluntary area health planning agency has dissolved, it may grant such extension upon a showing by the applicant of good cause for the extension.

Comment. Section 1427 requires that health planning agency approval be secured before a nonprofit hospital may condemn property for hospital facilities. The amendment to Section 438.4 recognizes that condemnation may require more than a year and provides that approval automatically is extended at the end of 12 months if condemnation has been commenced and is diligently pursued.

HEALTH & SAFETY CODE § 1427

Tentatively approved September 1971
Staff revision October 1973

Health & Safety Code § 1427 (added)

Sec. . Section 1427 is added to the Health and Safety Code, to read:

1427. (a) As used in this section, "nonprofit hospital" means any institution, place, building, or agency currently licensed under this chapter to provide 24-hour inpatient services for the diagnosis, care, and treatment of various physical or mental illnesses or ailments of humans, in multiple departments having an organized medical or medical-dental staff, and which is owned and operated by a fund, foundation, or corporation, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual. "Nonprofit hospital" does not include institutions the primary purpose of which is to provide convalescent, rehabilitative, nursing, or resident care.

(b) Any nonprofit hospital may exercise the right of eminent domain to acquire property necessary for the establishment, operation, or expansion of the hospital ~~if~~ both the following requirements are met:

(1) A final and favorable decision concerning the project for which the property is sought to be condemned has been made pursuant to Part 1.5 (commencing with Section 437) of Division 1 of the Health and Safety Code by such agencies and with such procedures as are required for the certification of health facilities pursuant to the provisions of the Health and Safety Code.

(2) The Director of the State Department of Health has certified that (i) the acquisition of the property sought to be condemned is necessary for

HEALTH & SAFETY CODE § 1427

Tentatively approved September 1971
Staff revision October 1973

the establishment, operation, or expansion of the hospital, (ii) the public interest and necessity require the proposed project, and (iii) 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 certificate of the Director of the State Department of Health pursuant to subdivision (b) establishes a presumption that the matters referred to in Section 1240.030 of the Code of Civil Procedure are true. This presumption is a presumption affecting the burden of proof.

Comment. Section 1427 supersedes former Code of Civil Procedure Section 1238.3.

Subdivision (a). The term "nonprofit" has the same meaning under subdivision (a) as under former Code of Civil Procedure Section 1238.3. However, the definition of "hospital" in subdivision (a) has been narrowed to include only those institutions that are licensed to provide diversified, professional, short-term services and to exclude institutions that provide only long-term or specialized services. The definition is in keeping with the Administrative Code definitions of "hospital" and "general hospital." See 9 Cal. Admin. Code § 515; 17 Cal. Admin. Code, Ch. 1, § 230.

Subdivision (b). Subdivision (b) grants broader authority to condemn than was provided by Code of Civil Procedure Section 1238.3, for it permits acquisition of property to establish a newly-organized and licensed hospital, dispenses with the requirement that the property be "immediately adjacent" to existing

HEALTH & SAFETY CODE § 1427

Tentatively approved September 1971
Staff revision October 1973

holdings, and no longer requires that the hospital condemnor be engaged in "scientific research or an educational activity." The limitation to property immediately adjacent unduly restricted the ability of existing hospitals to acquire one parcel in a large tract needed for expansion. The limitation to hospitals engaged in scientific research or education was both narrow and ineffective and no longer serves a limiting function since nearly all medical institutions conduct some research or education. Also, the limitation to expansion of existing hospitals was undesirable in view of the equal or greater need of new hospitals for the right of eminent domain. The new scheme is intended to aid expansion to meet public needs as determined by authorized agencies.

In place of the restrictions contained in former Section 1238.3, paragraph (1) of subdivision (b) requires that a project be approved by the appropriate agencies before condemnation will be permitted. Paragraph (2) continues the requirement of former Code of Civil Procedure Section 1238.3 that the Director of the Department of Health certify that the acquisition is necessary. In addition, paragraph (2) requires the certificate to indicate the public interest and necessity for the acquisition. Cf. Code Civ. Proc. § 1240.030.

Subdivision (c). Subdivision (c) establishes and classifies the presumption of necessity afforded the certificate of the Director of the Department of Health for the purposes of Section 1240.030 of the Code of Civil Procedure.

SEWER CONSTRUCTION

Health & Safety Code § 4967 (added)

Sec. . Section 4967 is added to the Health and Safety Code, to read:

4967. The owner of property that may be benefited by the acquisition, construction, extension, or operation of the works referred to in this chapter may file with the district a request that a particular work be undertaken. The request may, but need not, include the descriptions and estimates referred to in Section 4966 and shall not be denied without a public hearing.

Comment. Section 4967 is added to the Health and Safety Code to expressly authorize initiation of sewerage construction and extension proposals by individual property owners. The request may be made of any city, county, city and county, or any municipal or public corporation or district which is authorized to acquire, construct, own, or operate a sewer system. See Section 4951. In reviewing a property owner's request, the district should consider both the necessity for the requested action and its relative hardship on any party whose land is sought to be used compared with the benefit to the requester.

Tentatively approved April 1971

Under prior law, private individuals under certain circumstances were authorized to condemn property for a sewer easement. Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955). Private individuals no longer have a right to condemn property for this purpose. See the Comment to subdivision 8 of former Code of Civil Procedure Section 1238. Instead, Section 4967 provides a procedure whereby the property owner can initiate proceedings to have the public entity acquire a sewer easement or any other necessary property. The public entity is authorized to acquire the necessary property by gift, purchase, condemnation, or otherwise. See Sections 5000, 5001.

Staff draft October 1973

RENEWAL AREA AGENCY

Health & Safety Code § 33720 (amended)

Sec. . . . Section 33720 of the Health and Safety Code is amended to read:

33720. The power of eminent domain shall not be exercised by the renewal area agency ~~without the specific authority of the legislative body~~, unless by a majority vote of its members, has adopted a resolution of necessity .

Comment. Sections 33720, 33721, and 33723 are amended to conform to the Eminent Domain Law. See Code Civ. Proc. §§ 1240.040 and 1245.210 et seq.

Health & Safety Code § 33721 (amended)

Sec. . Section 33721 of the Health and Safety Code is amended

to read:

~~33721. The authorization shall be contained in a certificate of the legislative body specifying that after public hearing, it has determined that the acquisition of the property by eminent domain and the construction of the housing on the property is in the public interest and necessary for the public use.~~

resolution of necessity may be adopted only

(a)

by the legislative body and 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 renewal area agency 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 legislative body 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. See the Comment to Section 33720.

HEALTH & SAFETY CODE § 33723

Staff draft October 1973

Health & Safety Code § 33723 (amended)

Sec. . Section 33723 of the Health and Safety Code is

amended to read:

The resolution
of necessity

33723. ~~A duly certified copy of the certificate of the legis-~~
~~lative body~~ is conclusive evidence of the matters certified in it

referred to in Section 1240.030

of the Code of Civil Procedure

in any proceeding in eminent domain to acquire property or
any part of it set forth in the ~~certificate~~ resolution .

Comment. See the Comment to Section 33720.

Staff draft October 1973

HOUSING AUTHORITY

Health & Safety Code § 34325 (amended)

Sec. . . . Section 34325 of the Health and Safety Code is

amended to read:

34325. ~~Puruant to the Code of Civil Procedure an author-~~ An
ity may acquire by eminent domain any real property which it is
deems necessary for its purposes under this chapter ~~after the~~
~~adoption by it of a resolution declaring that the acquisition of~~
~~the real property described in it is necessary for such purposes.~~
~~Property already devoted to a public use may be acquired by~~
Real ~~eminent domain, but real~~ property belonging to the city, the
county, the State, or any of its political subdivisions shall not
be acquired without its consent.

Comment. The deleted portions of Section 34325 are unnecessary. See
Code Civ. Proc. §§ 1230.020 (law governing exercise of eminent domain power),
1245.210 et seq. (resolution of necessity), 1240.510 (compatible use),
1240.610 (more necessary public use).

Staff draft October 1973

LIMITED DIVIDEND HOUSING CORPORATIONS

Health & Safety Code § 34875 (amended)

Sec. . . . Section 34875 of the Health and Safety Code is amended to read:

34875. The power of eminent domain shall not be exercised by a corporation ~~except with the specific authorization of~~ the commission, by a majority vote of its members, has adopted a resolution of necessity . unless

Comment. Sections 34875, 34876, and 34878 are amended to conform to the Eminent Domain Law. See Code Civ. Proc. §§ 1240.040 and 1245.210 et seq.

Health & Safety Code § 34876 (amended)

Sec. . Section 34876 of the Health and Safety Code is amended

to read:

resolution of
necessity may
be adopted only

~~34876. The authorization shall be contained in a certificate of the commission specifying that, after public hearing, the commission has determined that the acquisition of the property by eminent domain and the construction of the housing on the property is in the public interest and necessary for the public use.~~ and shall contain all of the following:

a

by

(a) A general description of the proposed project with a reference to the specific statute or statutes authorizing the corporation 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 commission 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. See the Comment to Section 34875.

Staff draft October 1973

Health & Safety Code § 34878 (amended)

Sec. . . Section 34878 of the Health and Safety Code is

amended to read:

The resolution
of necessity

34878. ~~A duly certified copy of the certificate of the commission is conclusive evidence of the matters certified in it~~

referred to in Section 1240.030

of the Code of Civil Procedure in

any proceeding in eminent domain to acquire property or any part of it set forth in the ~~certificate~~ resolution.

Comment. See the Comment to Section 34875.

HEALTH & SAFETY CODE § 35167

Tentatively approved June 1970

LAND CHEST CORPORATIONS

Health & Safety Code § 35167 (added)

Sec. . Section 35167 is added to the Health and Safety Code, to read:

35167. When the commissioner has approved a housing project, the corporation may acquire the property necessary for the project by gift, bequest, purchase, or eminent domain.

Comment. Sections 35167-35171 retain the substance of subdivision 21 of former Code of Civil Procedure Section 1238 insofar as that subdivision may have applied to land chest corporations (nonprofit corporations formed for the purpose of providing "housing in rural and suburban areas for families of low income"). Sections 35167-35171 use the same language as Sections 34874-34878 relating to limited dividend housing corporations (corporations formed for the purpose of providing housing for families of low income or reconstructing slum areas).

HEALTH & SAFETY CODE § 35168

Tentatively approved June 1970
Staff revision October 1973

Health & Safety Code § 35168 (added)

Sec. . Section 35168 is added to the Health and Safety Code, to read:

35168. The power of eminent domain shall not be exercised by a corporation unless the commissioner has adopted a resolution of necessity.

Comment. See the Comment to Section 35167.

Health & Safety Code § 35169 (added)

Sec. . Section 35169 is added to the Health and Safety Code, to read:

35169. The resolution of necessity may be adopted only after a public hearing by the commissioner and 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 corporation 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 commissioner 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. See the Comment to Section 35167.

HEALTH & SAFETY CODE § 35170

Tentatively approved June 1970

Health & Safety Code § 35170 (added)

Sec. . Section 35170 is added to the Health and Safety Code, to read:

35170. The hearing shall be held at a time and place designated by the commissioner. At least 10 days prior to the hearing, the corporation shall give notice of the hearing by publication in a newspaper designated by the commissioner and published or circulated in the city or county where the property is located.

Comment. See the Comment to Section 35167.

HEALTH & SAFETY CODE § 35171

Tentatively approved June 1970
Staff revision October 1973

Health & Safety Code § 35171 (added)

Sec. . Section 35171 is added to the Health and Safety Code, to read:

35171. The resolution of necessity is conclusive evidence of the matters referred to in Section 1240.030 of the Code of Civil Procedure in any proceeding in eminent domain to acquire the property or any part of it set forth in the resolution.

Comment. See the Comment to Section 35167.

Staff draft October 1973

HOUSING AUTHORITY

Health & Safety Code § 36059 (amended)

Sec. . Section 36059 of the Health and Safety Code is amended to read:

36059. Within its area of operation, and with reference to farm labor centers, a housing authority may:

- (a) Own, hold, and improve real or personal property.
- (b) Purchase, lease, obtain options upon, acquire by gift, bequest, devise, or otherwise, any real or personal property or any interest therein.
- (c) Accept grants from any person or agency, public or private.
- (d) Borrow money and pledge any property, real or personal, as security.
- (e) Contract with any person or agency, public or private, with regard to operation of the farm labor centers.
- (f) Sell, lease, exchange, transfer, assign, purchase, or dispose of any real or personal property or interest therein.
- (g) Insure or provide for the insurance of any real or personal property or operations of any farm labor centers against any risks or hazards.
- (h) Employ such officers and employees, permanent and temporary, as may be required, determine their qualifications, duties and compensation, and delegate to one or more of them such powers or duties as may be necessary for the acquisition of any farm labor center.
- (i) Acquire any real property by eminent domain ~~after adopting a resolution declaring that the acquisition of the real property is necessary for the purposes of the housing authority:~~
- (j) Lease or rent any dwellings, accommodations, lands, buildings, structures, or facilities embraced in any farm labor center, and, subject to the requirements for occupancy contained in this part, establish the rents and charges therefor.

Comment. The language deleted from Section 36059 is unnecessary.

See Code Civ. Proc. § 1240.040.

Staff draft October 1973

PREVENTION OF SUBSIDENCE IN OIL OR
GAS PRODUCTION AREA

Public Resources Code § 3320.1 (amended)

Sec. . Section 3320.1 of the Public Resources Code is

amended to read:

3320.1. (a) An agreement for the management, development and operation of two or more tracts in a pool or pools, or portions thereof, in a field as a unit without regard to separate ownerships for the production of oil and gas, including repressuring operations therein, and for the allocation of benefits and costs on a basis set forth in such agreement, shall be valid and binding upon those who consent thereto and may be filed with the supervisor for approval.

Any agreement for the co-operative management, development and operation of two or more tracts in a pool or pools, or portions thereof, in a field for the production of oil or gas, including repressuring operations therein, shall be valid and binding upon those who consent thereto and may be filed with the supervisor for approval.

If in the judgment of the supervisor a unit agreement or co-operative agreement filed for approval is not detrimental to the intent and purposes of this article to arrest or ameliorate subsidence, or otherwise unlawful, the supervisor may approve the same. No such agreement approved by the supervisor hereunder or heretofore approved pursuant to applicable law prior to the enactment of this article shall be held to violate any of the statutes of this State prohibiting monopolies or acts, arrangements, agreements, contracts, combinations or conspiracies in restraint of trade or commerce.

(b) In the event that at the time of the approval by the supervisor of a unit or co-operative agreement under subdivision (a) of this section, the supervisor makes written findings that:

1. A primary purpose of the unit or co-operative agreement is the initiation and conduct of repressuring operations in the area covered thereby for the purpose of arresting or ameliorating subsidence; and

2. The initiation and conduct of repressuring operations in the area covered by the unit or co-operative agreement are feasible and compatible with the purposes of this article; and

Staff draft October 1973

3. The persons who are entitled to 75 percent of the proceeds of production of oil and gas within the area covered by the unit or co-operative agreement (measured by the production of oil and gas therein in the last calendar year preceding the date of such approval) have become parties to such agreement by signing or ratifying it; and

4. It is necessary, in order to initiate and conduct such repressuring operations, that the properties of nonconsenting persons who own working interests or royalty interests in lands within the area covered by the unit or co-operative agreement become subject to such agreement; and

5. The agreement is fair and reasonable, and contains appropriate provisions to protect and safeguard the rights of all persons having an interest in oil and gas production in the area covered thereby; then the supervisor shall make and enter an order which shall provide that unless such nonconsenting persons shall, within 30 days after service upon such persons of the order in the manner specified by the supervisor, become parties to the agreement by signing or ratifying the same, the right of eminent domain may be exercised as ~~hereinafter~~ provided in subdivision (c) ~~hereof~~ for the purpose of acquiring the properties of such nonconsenting persons which are found by the supervisor to be necessary for the initiation and conduct of such repressuring operations.

In the event the supervisor shall make findings in accordance with the foregoing, such findings shall be prima facie evidence (1) of the public necessity of the development and operation of the said properties in accordance with the unit or co-operative agreement and of the repressuring operations to be initiated and conducted pursuant to such agreement; and (2) that the acquisition of the properties of the nonconsenting persons which are designated by the supervisor is necessary therefor; and (3) that the repressuring and other operations to be initiated and conducted pursuant to such agreement, and the improvements to be made in connection therewith are planned or located in the manner which will be most compatible with the greatest public good and the least private injury.

The acquisition and use of land, including oil and gas rights therein, and personal property used in the production of oil and gas within a subsidence area for the purposes and by the persons mentioned in this section under the circumstances herein specified, are public uses on behalf of which the right of eminent domain may be exercised.

PUBLIC RESOURCES CODE § 3320.1

Staff draft October 1973

(c) Subject to the provisions of subdivision (b) ~~hereof~~, the right of eminent domain for the purposes therein mentioned may be exercised by any city, county, or city and county, which has agreed to commit the properties to be acquired to such unit or co-operative agreement, or which has agreed to convey all or a portion of said properties upon acquisition, for a price not less than the cost of acquiring the same, to working interest owners who are parties to such unit or co-operative agreement and who have agreed to commit such properties to said agreement.

Except as otherwise provided in subdivisions (b) and (c) ~~hereof~~, any condemnation action brought hereunder shall be governed by the provisions of Title 7 (commencing at Section ~~1227~~) of Part 3 of the Code of Civil Procedure.

1230.010

If a condemnation action or actions to acquire the properties of the nonconsenting persons are promptly commenced and diligently prosecuted to final judgment by which such properties are acquired, no compulsory unit order affecting the area covered by such agreement shall be made by the supervisor under Section 3321 of this article with respect to such area.

Comment. The amendment of Section 3320.1 corrects a section reference.

Staff draft October 1973

Public Resources Code § 3341 (amended)

Sec. . Section 3341 of the Public Resources Code is amended to read:

3341. At the termination of oil and gas production from a unit area established or approved pursuant to this article and the abandonment of attempts to obtain production therefrom, any interested municipal corporation or other public agency may acquire by eminent domain, in the manner provided by law for the condemnation of property for public use by the State, municipal corporation or other public agency, such oil production properties or facilities within the unit area as such municipal corporation or other public agency may deem necessary or essential to the maintenance of such pressures as will continue to arrest or ameliorate subsidence. ~~Such municipal corporation or other public agency shall proceed in its name, under the provisions of Title 7 (commencing at Section 1237) of Part 3 of the Code of Civil Procedure, which provisions are hereby made applicable for that purpose, and the use of the property which may be condemned, taken or appropriated under the provisions of this section is a public use.~~

ALL IN
STRIKEOUT

Comment. The last sentence of Section 3341 is deleted as unnecessary. See Code Civ. Proc. §§ 1230.020 (law governing exercise of eminent domain power), 1240.010 (public use limitation).

PUBLIC RESOURCES CODE § 8030

Tentatively approved September 1971

LANDS EXEMPT FROM CONDEMNATION

Public Resources Code § 8030 (added)

Sec. . Article 11 (commencing with Section 8030) is added to Chapter 4 of Part 3 of Division 6 of the Public Resources Code, to read:

Article 11. Exemption From Condemnation

8030. Notwithstanding any other provision of law, all 16th and 36th sections, both surveyed and unsurveyed, owned by the state or the United States, which are now or may hereafter be included within the exterior boundaries of a national reservation, a reserve, or lands withdrawn from public entry, are exempt from taking by eminent domain.

Comment. Section 8030 continues without substantive change the limitation upon condemnation of the lands described in subdivision 2 of former Code of Civil Procedure Section 1240.

PRIVATELY OWNED PUBLIC UTILITIES

Public Utilities Code §§ 610-624 (added)

Sec. . Article 7 (commencing with Section 610) is added to Chapter 3 of Part 1 of Division 1 of the Public Utilities Code, to read:

Article 7. Eminent Domain

Public Utilities Code § 610 (added)

610. This article applies only to a corporation or person that is a public utility.

Comment. Section 610 is included to make clear that this article extends the right of eminent domain only to "public utilities" as defined in Section 216 ("service is performed for or the commodity delivered to the public or any portion thereof") and not to persons or corporations that are not subject to regulation and rate control. It has been held that the exercise of the right of eminent domain conclusively evidences an intention to devote the property so acquired to a public use, thereby rendering the condemnor a public utility. Producers Transp. Co. v. Railroad Comm'n, 176 Cal. 499, 505, 169 P. 59, __ (1917). Compare McCullagh v. Railroad Comm'n, 190 Cal. 13, 210 P. 264 (1922). This section is consistent with the holding in the Producers Transp. Co. case.

PUBLIC UTILITIES CODE § 611

Tentatively approved March 1970

Public Utilities Code § 611 (added)

611. A railroad corporation may condemn any property necessary for the construction and maintenance of its railroad.

Comment. Section 611 grants a "railroad corporation" (defined in Section 230) the right of eminent domain to acquire property necessary for the construction and maintenance of its "railroad." "Railroad" is defined in Section 229 to mean in substance all railroad property devoted to public use in the transportation of persons or property. Thus, Section 611 authorizes condemnation of any property necessary to carry out the regulated activities of the railroad. It retains in substance the authority formerly found in subdivision (g) of Section 7526 of the Public Utilities Code and in Section 1238 of the Code of Civil Procedure. See, e.g., Southern Pac. Co. v. Los Angeles Mill Co., 177 Cal. 395, 170 P. 829 (1918)(spur tracks); Vallejo & N. R.R. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238 (1915) (land for wharves for transfer of freight between railroad cars and boats where reasonably necessary for railroad corporation's future business); Central Pacific Ry. v. Feldman, 152 Cal. 303, 92 P. 849 (1907)(land adjacent to station grounds required for a freight house); Southern Pac. R.R. v. Raymond, 53 Cal. 223 (1878)(workshop); Madera Ry. v. Raymond Granite Co., 3 Cal. App. 668, 87 P. 27 (1906)(spur tracks). Cf. City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992

PUBLIC UTILITIES CODE § 611

Tentatively approved March 1970

(1916)(land for pole line for transmission of power to public railway). Section 611 would not, however, permit condemnation by a railroad corporation of land to be used, for example, as an industrial park.

Section 611 supersedes provisions formerly contained in the Public Utilities Code and Code of Civil Procedure insofar as those provisions related to privately owned public utilities. See subdivision (g) of Section 7526 of the Public Utilities Code (right to condemn lands "to be used in the construction and maintenance of its roads, and all necessary appendages and adjuncts"); Section 1238 of the Code of Civil Procedure, subdivision 4 ("steam, electric and horse railroads"), subdivision 11 (railroads "for quarrying, logging or lumbering purposes"). See also Section 1238, subdivision 9 ("roads for transportation by traction engines or road locomotives").

Section 611 has no effect on various specific grants of the power to railroads to condemn private property. See Pub. Util. Code §§ 7533 (additional tracks), 7535 (railroad intersections), 7536 (railroad crossings). See also Pub. Util. Code § 7508 (right of eminent domain in transferee of railroad corporation).

PUBLIC UTILITIES CODE § 612

Tentatively approved March 1970

Public Utilities Code § 612 (added)

§ 612. An electrical corporation may condemn any property necessary for the construction and maintenance of its electric plant.

Comment. Section 612 grants an "electrical corporation" (defined in Section 218) the right of eminent domain to acquire property necessary for the construction and maintenance of its "electric plant." "Electric plant" is defined in Section 217 to mean in substance all property devoted to public use in the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power. Thus, Section 612 authorizes condemnation of any property necessary to carry out the regulated activities of the electrical corporation. It retains and possibly broadens the authority formerly found in subdivisions 12 and 13 of Section 1238 of the Code of Civil Procedure and supersedes those subdivisions insofar as they applied to privately owned public utilities. See also the Comment to Section 613. Insofar as subdivision 13 permitted acquisition of property for future use, this authority is continued in Section 1240.220 of the Code of Civil Procedure.

PUBLIC UTILITIES CODE § 613

Tentatively approved March 1970

Public Utilities Code § 613 (added)

613. A gas corporation may condemn any property necessary for the construction and maintenance of its gas plant.

Comment. Section 613 grants a "gas corporation" (defined in Section 222) the right of eminent domain to acquire property necessary for the construction and maintenance of its "gas plant." "Gas plant" is defined in Section 221 to include all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of gas, natural or manufactured, for light, heat, or power. Thus, Section 613 authorizes condemnation of any property necessary to carry out the regulated activities of the gas corporation.

Sections 612, 613, and 614 largely supersede subdivision 17 of Section 1238 of the Code of Civil Procedure. Insofar as subdivision 17 permitted acquisition of property for future use, this authority is continued in Section 1240.220 of the Code of Civil Procedure.

PUBLIC UTILITIES CODE § 614

Tentatively approved March 1970

Public Utilities Code § 614 (added)

614. A heat corporation may condemn any property necessary for the construction and maintenance of its heating plant.

Comment. Section 614 grants a "heat corporation" (defined in Section 224) the right of eminent domain to acquire property necessary for the construction and maintenance of its "heating plant." "Heating plant" is defined in Section 223 to include all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of heat for domestic, business, industrial, or public use. Thus, Section 614 authorizes condemnation of any property necessary to carry out the regulated activities of the heat corporations. See the Comment to Section 613.

PUBLIC UTILITIES CODE § 615

Tentatively approved March 1970

Public Utilities Code § 615 (added)

615. A pipeline corporation may condemn any property necessary for the construction and maintenance of its pipeline.

Comment. Section 615 grants a "pipeline corporation" (defined in Section 228) the right of eminent domain to acquire property necessary for the construction and maintenance of its "pipeline." "Pipeline" is defined in Section 227 to include all property used in connection with or to facilitate the transmission, storage, distribution, or delivery of crude oil or other fluid substances except water through pipelines. Thus, Section 615 authorizes condemnation of any property necessary to carry out the regulated activities of the pipeline corporation.

Section 615 supersedes subdivision 10 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "oil pipelines") insofar as that subdivision related to privately owned public utilities.

PUBLIC UTILITIES CODE § 616

Tentatively approved March 1970

Public Utilities Code § 616 (added)

616. A telephone corporation may condemn any property necessary for the construction and maintenance of its telephone line.

Comment. Section 616 grants a "telephone corporation" (defined in Section 234) the right of eminent domain to acquire property necessary for the construction and maintenance of its "telephone line." "Telephone line" is defined in Section 233 to include all property used in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires. Thus, Section 616 authorizes condemnation of any property necessary to carry out the regulated activities of the telephone corporation.

Section 616 supersedes a portion of subdivision 7 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "telephone . . . lines, systems and plants") insofar as that subdivision related to privately owned public utilities.

PUBLIC UTILITIES CODE § 617

Tentatively approved March 1970

Public Utilities Code § 617 (added)

617. A telegraph corporation may condemn any property necessary for the construction and maintenance of its telegraph line.

Comment. Section 617 grants a "telegraph corporation" (defined in Section 236) the right of eminent domain to acquire property necessary for the construction and maintenance of its "telegraph line." "Telegraph line" is defined in Section 235 to include all property used in connection with or to facilitate communication by telegraph, whether such communication is had with or without the use of transmission wires. Thus, Section 617 authorizes condemnation of any property necessary to carry out the regulated activities of the telegraph corporation.

Section 617 supersedes a portion of subdivision 7 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "telegraph . . . lines, systems and plants") insofar as that subdivision related to privately owned public utilities.

PUBLIC UTILITIES CODE § 618

Tentatively approved March 1970

Public Utilities Code § 618 (added)

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

Comment. Section 618 grants a "water corporation" (as defined in Section 241) the right of eminent domain to acquire property necessary for the construction and maintenance of its "water system." "Water system" is defined in Section 240 to include all property used in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement of water for power, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use. Thus, Section 618 authorizes condemnation of any property necessary to carry out the regulated activities of the water corporation.

Section 618 supersedes portions of subdivisions 3 and 4 of Section 1238 of the Code of Civil Procedure insofar as those portions related to condemnation by privately owned public utilities.

PUBLIC UTILITIES CODE § 619

Tentatively approved March 1970

Public Utilities Code § 619 (added)

619. A wharfinger may condemn any property necessary for the construction and maintenance of facilities for the receipt or discharge of freight or passengers.

Comment. Section 619 grants a "wharfinger" the right of eminent domain to acquire property necessary for facilities for the receipt or discharge of freight or passengers. "Wharfinger" is defined in Section 242 to include "every corporation or person owning, controlling, operating, or managing any dock, wharf, or structure used by vessels in connection with or to facilitate the receipt or discharge of freight, other than bulk liquid commodities, or passengers for compensation within this State."

Section 619 supersedes portions of subdivisions 3 ("public mooring places for watercraft") and 4 ("wharves, docks, piers, . . . chutes, booms") of Section 1238 of the Code of Civil Procedure insofar as those portions related to privately owned public utilities.

PUBLIC UTILITIES CODE § 620

Tentatively approved March 1970
Revised April 1970

Public Utilities Code § 620 (added)

620. A common carrier, as defined in subdivision (b) of Section 211, may condemn any property necessary for the construction and maintenance of facilities for its transportation of persons or property.

Comment. Section 620 grants the power of eminent domain to acquire property necessary for ferry facilities. The reference to subdivision (b) of Section 211 incorporates a definition of those public utilities that transport persons or property for compensation by vessel upon inland waters or upon the high seas between points within this state. Section 620 supersedes the grant of condemnation for "ferries" in subdivision 4 of Section 1238 of the Code of Civil Procedure insofar as that subdivision related to the privately owned public utilities. See Sts. & Hwys. Code §§ 30802, 30866 (regulation of amount of ferry tolls).

PUBLIC UTILITIES CODE § 621

Tentatively approved March 1970

Revised May 1970

Public Utilities Code § 621 (added)

621. A street railroad corporation may condemn any property necessary for the construction and maintenance of its street railroad.

Comment. Section 621 grants a "street railroad corporation" (defined in Section 232) the right of eminent domain to acquire property necessary for the construction and maintenance of its "street railroad" (defined in Section 231). It replaces in substance the authority formerly found in subdivision (g) of Section 7526 and incorporated by reference by Section 7801 and in Section 1238 of the Code of Civil Procedure. See the Comment to Section 611.

PUBLIC UTILITIES CODE § 622

Tentatively approved March 1970

Revised February 1971

Public Utilities Code § 622 (added)

622. (a) As used in this section, "motor carrier" means:

- (1) A highway common carrier as defined in Section 213.
- (2) A passenger stage corporation as defined in Section 226.

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

(c) A motor carrier or water carrier may condemn any property necessary for the construction and maintenance of terminal facilities for the receipt, transfer, or delivery of the passengers or property it carries.

Comment. Section 622 grants certain motor carriers and water carriers the right of eminent domain to acquire property necessary for terminal facilities. Sections 621 and 622 supersede subdivision 22 of Section 1238 of the Code of Civil Procedure which granted condemnation authority for "terminal facilities, lands or structures for the receipt, transfer or delivery of passengers or property by any common carrier operating upon any public highway or waterway in this state between fixed termini or over a regular route, or for other terminal facilities of any such carrier."

PUBLIC UTILITIES CODE § 623

Tentatively approved March 1970

Public Utilities Code § 623 (added)

623. A warehouseman may condemn any property necessary for the construction and maintenance of its facilities for storing property.

Comment. Section 623 grants a "warehouseman" (defined in Section 239) the right of eminent domain to acquire property necessary for storing property. Section 623 supersedes a portion of subdivision 4 of Section 1238 of the Code of Civil Procedure (granting authority to condemn for "warehouses") insofar as that portion related to privately owned public utilities.

PUBLIC UTILITIES CODE § 624

Tentatively approved February 1971

Public Utilities Code § 624 (added)

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

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

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

PUBLIC UTILITIES CODE § 861

Tentatively approved December 1972

CONTROVERSIES CONCERNING RELOCATION OF UTILITY IMPROVEMENTS

Public Utilities Code § 861 (added)

Sec. . Article 7 (commencing with Section 861) is added to Chapter 4 of Part 1 of Division 1 of the Public Utilities Code, to read:

Article 7. Controversies Concerning Relocation
of Utility Improvements

861. (a) As used in this section, "special law water district" means the Santa Clara Valley Water District and the Yuba-Bear River Basin Authority and, if created by an uncodified special law, any of the following: a county flood control district, a county flood control and water district, a county flood control and water conservation district, a county water conservation and flood control district, or a county water agency.

(b) Whenever by court order or judgment in an eminent domain proceeding or by agreement a special law water district is required to relocate any improvements of a public utility, if the special law water district and the public utility fail to agree as to the character or location of the new improvements to be relocated by the special law water district, the character and location of such new improvements and any other controversy relating thereto shall be submitted to and determined by the Public Utilities Commission in the manner prescribed in Chapter 6 (commencing with Section 1201).

PUBLIC UTILITIES CODE § 861

Tentatively approved December 1972

Comment. Section 861 is derived from and supersedes numerous provisions formerly found in the uncodified statutes relating to special water districts. See, e.g., Alameda County Flood Control and Water Conservation District Act, § 28 (Cal. Stats. 1949, Ch. 1275); Alpine County Water Agency Act, § 19 (Cal. Stats. 1961, Ch. 1896); Amador County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 2137); Contra Costa County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1951, Ch. 1617); El Dorado County Water Agency Act, § 20 (Cal. Stats. 1959, Ch. 2139); Kern County Water Agency Act, § 4.9 (Cal. Stats. 1961, Ch. 1003); Lake County Flood Control and Water Conservation District Act (Cal. Stats. 1951, Ch. 1544), § 33 (added Cal. Stats. 1944, 1st Ex. Sess., Ch. 62, § 48); Marin County Flood Control and Water Conservation District Act, § 28 (Cal. Stats. 1953, Ch. 666); Mariposa County Water Agency Act, § 4.9 (Cal. Stats. 1959), Ch. 2036); Monterey County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1947, Ch. 699); Napa County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1951, Ch. 1449); Nevada County Water Agency Act, § 19 (Cal. Stats. 1959, Ch. 2122); Placer County Water Agency Act, § 4.9 (Cal. Stats. 1957, Ch. 1234); San Benito County Water Conservation and Flood Control District Act, § 33 (Cal. Stats. 1953, Ch. 1598); San Diego Flood Control District Act, § 39 (Cal. Stats. 1966, 1st Ex. Sess., Ch. 55); San Joaquin County Flood Control and Water Conservation District Act, § 33 (Cal. Stats. 1956, 1st Ex. Sess., Ch. 46); San Luis Obispo County Flood Control and

PUBLIC UTILITIES CODE § 861

Tentatively approved December 1972

Water Conservation District Act, § 29 (Cal. Stats. 1945, Ch. 1294); Santa Barbara County Flood Control and Water Conservation District Act, § 30 (Cal. Stats. 1955, Ch. 1057); Santa Clara Valley Water District Act, § 29 (Cal. Stats. 1951, Ch. 1405); Sutter County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 2088); Tulare County Flood Control District Act, § 32 (Cal. Stats. 1969, Ch. 1149); Tuolumne County Water Agency Act, § 20 (Cal. Stats. 1969, Ch. 1236); Yuba-Bear River Basin Authority Act, § 19 (Cal. Stats. 1959, Ch. 2131); Yuba County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 788). The substance of these superseded provisions is continued in Section 861 and is extended to all special law water districts of the same type.

Staff draft October 1973

EXTENSION OF SERVICE INTO AREA SERVED BY
PRIVATE UTILITY

Public Utilities Code § 1503 (amended)

Sec. . Section 1503 of the Public Utilities Code is

amended to read:

1503. The Legislature finds and declares that whenever a political subdivision constructs facilities to provide or extend water service, or provides or extends such service, to any service area of a private utility with the same type of service, such an act constitutes a taking of the property of the private utility for a public purpose to the extent that the private utility is injured by reason of any of its property employed in providing the water service being made inoperative, reduced in value or rendered useless to the private utility for the purpose of providing water service to the service area, ~~and such taking shall be compensable under Section 11 of Article I of the Constitution of California.~~ (2)

Comment. The last clause of Section 1503 is deleted as unnecessary.

See the last sentence of Section 1504.

MUTUAL WATER COMPANIES

Public Utilities Code § 2729 (added)

Sec. . Section 2729 is added to the Public Utilities Code,
to read:

2729. A mutual water company may exercise the power of eminent domain for water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by such company.

Comment. Section 2729 specifies the condemnation authority of a mutual water company (defined in Section 2725). The section continues without substantive change the authority to condemn formerly conferred by Code of Civil Procedure Section 1238(4)(condemnation authorized for "water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only").

Mutual water companies are not generally subject to the jurisdiction of the Public Utilities Commission. See Pub. Util. Code § 2705. However, it is possible that exercise of the power of eminent domain by a mutual water company may demonstrate an intention to devote the property so acquired to public use and thereby render the company subject to regulation as a public utility. See Corona City Water Co. v. Public Utilities Comm'n, 54 Cal.2d 834, 357 P.2d 301, 9 Cal. Rptr. 245 (1960); Lamb v. California Water & Tel. Co., 21 Cal.2d 33, 129 P.2d 371 (1942). Nevertheless, the authority granted by this section is not dependent upon whether a company is or is not held to be a public utility by exercising such authority.

RAILROADS

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 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 unnecessarily 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

PUBLIC UTILITIES CODE § 7526

Tentatively approved September 1971
Revised April 1973

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,~~

acquire

(g) To ~~purchase~~ 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 manner provided in Title 7, Part 3 of the Code of Civil Procedure, for the condemnation of lands.~~

Part 1 (commencing
with Section 201)
of Division 1.

(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. In such case, the complaint shall contain a description and map of the location and proposed location of such tracks.

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. § 1263.210. It continues the substance of former Code of Civil Procedure Section 1248a. 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 1230.060 of the Code of Civil Procedure and Comment thereto.

AIRPORT HAZARDS

Public Utilities Code § 21634 (repealed)

Sec. . Section 21634 of the Public Utilities Code is
repealed.

~~21634. The department may contract or otherwise provide, by condemnation if necessary, for the removal or relocation of any airport hazard or the removal or the relocation of all private structures, railways, highways, mains, pipes, conduits, wires, cables, poles, and all other facilities and equipment which may interfere with the location, expansion, development, or improvement of the airports and other air navigation facilities or with the safe approach thereto or takeoff therefrom by aircraft, and may pay the cost of the removal or relocation. When exercising its power of removal or relocation, the department shall pay the cost of removal and relocation of any private structures, railways, mains, pipes, conduits, wires, cables, poles, or any other structure or equipment required to be moved to a new location.~~

ALL IN
STRIKEOUT

Comment. The substance of Section 21634 is continued in
Section 21653.

AIRCRAFT HAZARD OR DISTURBANCE ELIMINATION

Public Utilities Code §§ 21652-21653 (added)

Sec. . Article 2.6 (commencing with Section 21652) is added to Chapter 4 of Part 1 of Division 9 of the Public Utilities Code, to read:

Article 2.6. Hazard Elimination; Flight Disturbance

Public Utilities Code § 21652 (added)

21652. (a) Any person authorized to exercise the power of eminent domain for airport purposes may acquire by purchase, gift, devise, lease, condemnation, or otherwise:

(1) Any property necessary to permit the safe and efficient operation of the airport, or to permit the removal, elimination, obstruction-marking, or obstruction-lighting of airport hazards, or to prevent the establishment of airport hazards.

(2) Airspace or an easement in such airspace above the surface of property where necessary to permit imposition upon such property of excessive noise, vibration, discomfort, inconvenience, interference with use and enjoyment, and any consequent reduction in market value, due to the operation of aircraft to and from the airport.

(3) Remainder property underlying property taken pursuant to paragraph (2), where permitted by Section 1240.410 of the Code of Civil Procedure.

Tentatively approved September 1971

(b) As used in this section, "property" includes real and personal property and any right or interest therein, whether within, beyond, adjacent to, or in the vicinity of, the boundaries of an airport or airport site, and, by way of illustration and not by way of limitation, includes air rights, airspace, air easements, and easements in airport hazards.

Comment. Section 21652 continues the authority of the state (formerly found in Section 21633), of cities, of counties, and of airport districts (formerly found in Code Civ. Proc. §§ 1239.2 and 1239.4 and Govt. Code § 50485.13) to condemn or otherwise acquire property for the elimination and prevention of airport hazards. See Pub. Util. Code § 21017 ("airport hazard" defined). In addition, it extends this authority to entities previously not covered by a specific grant, e.g., San Diego Unified Port District. See Harb. & Nav. Code App. 1, §§ 4, 5, 27 (West Supp. 1967). For statutes granting the power of eminent domain for airport purposes, see Govt. Code §§ 26020 (counties), 50470 (cities, counties); Pub. Util. Code §§ 21633 (state), 22553 (port districts); Harb. & Nav. Code App. 1, §§ 4, 5, 27 (West Supp. 1967)(San Diego Unified Port District).

Section 21652 also continues and expands the authority (formerly found in Code Civ. Proc. § 1239.3) of cities, counties, airport districts, and the San Diego Unified Port District to condemn to provide areas where flight disturbance will result in damage that might otherwise be the subject of actions for property damage. Cf. Pub. Util. Code § 21688. Section 21652

PUBLIC UTILITIES CODE § 21652

Tentatively approved September 1971

extends this authority to the state and to any other airport condemnors previously not covered by specific grant.

Subdivision (a). Paragraph (1) of subdivision (a) is based on language formerly found in Public Utilities Code Section 21633 (authority of Department of Aeronautics). As a specific authorization of condemnation for airport protective purposes, it duplicates the more general authority found in Section 1240.120 of the Code of Civil Procedure, but this duplication has been retained because it provides useful detail.

Paragraph (2) of subdivision (a) retains the substance of former Code of Civil Procedure Section 1239.3 that airspace or airspace rights may be taken in any area to which flight disturbance will penetrate.

Paragraph (3) of subdivision (a) permits airport condemnors to take-- in addition to airspace interests--land and other property for the purpose of providing areas of flight disturbance where a taking pursuant to paragraph (2) would leave a physical or financial remnant. The procedures and standards applicable to such takings are those set forth in Section 1240.410 of the Code of Civil Procedure. The right to take pursuant to Section 1240.410 entails the right to dispose of property thus acquired pursuant to Section 1240.430 of the Code of Civil Procedure.

Subdivision (b). Subdivision (b) makes clear that property of any character or degree may be condemned for airport protective or flight disturbance

PUBLIC UTILITIES CODE § 21652

Tentatively approved September 1971

purposes. As such, it supersedes the restrictive language of former Code of Civil Procedure Sections 1239.2 and 1239.3, and it is consistent with the more general definition of property found in Code of Civil Procedure Section 1235.170.

The provision formerly found in Code of Civil Procedure Section 1239.4, authorizing acquisition of land, reserving an "irrevocable free license" in the former owner to use and occupy such land has not been continued since subdivision (b) defines "property" so broadly that a condemnor may take land subject to such an interest where necessary.

PUBLIC UTILITIES CODE § 21653

Tentatively approved September 1971

Public Utilities Code § 21653 (added)

21653. Any person authorized to exercise the power of eminent domain for airport purposes may provide, by purchase, gift, devise, lease, condemnation, or otherwise, for the removal or relocation of any airport hazard or the removal or relocation of all facilities, structures, and equipment that may interfere with the location, expansion, development, or improvement of the airport and other air navigation facilities or with the safe approach thereto and takeoff therefrom by aircraft. Any person acting under authority of this section shall pay the cost of such removal or relocation.

Comment. Section 21653 continues the authority of the state (formerly found in Pub. Util. Code § 21634) and of cities and of counties (formerly found in Govt. Code § 50485.13) to require the removal or relocation of airport hazards. See Pub. Util. Code § 21017 ("airport hazard" defined). In addition, it extends this authority to entities previously not covered by a specific grant, e.g., airport districts. See Pub. Util. Code § 22553.

Section 21653 also continues the authority of the state to require the removal and relocation of structures, facilities, and equipment that might interfere with the location, expansion, development, or improvement of the airport and its facilities and extends this authority to other public entities. In addition, it requires payment for relocation or removal of airport hazards generally.

PUBLIC UTILITIES CODE § 21653

Tentatively approved September 1971

While Section 21653 is phrased as a separate grant of authority to require removal or relocation, such authority can be exercised in connection with an eminent domain proceeding brought under Section 21652.

It should be noted that the removal or relocation of property held for or devoted to a public use may be required only after the court in which proceedings are pending finds that the relocation for airport purposes is of greater public necessity than the public use for which the property was previously held or used. See Code Civ. Proc. § 1240.610 et seq.; see Comment to former Pub. Util. Code § 21635.

COUNTY HIGHWAYS

Streets & Highways Code § 943 (amended)

Sec. . Section 943 of the Streets and Highways Code is amended to read:

943. Such board may:

(a) Acquire any ~~real property or interest therein~~ for the uses and purposes of county highways, ~~including real property adjacent to property being condemned for the purpose of exchanging the same for other real property to be used for widening county highways.~~ When eminent domain proceedings are necessary, the board shall require the district attorney to institute such proceedings. The expense of and award in such proceedings may be paid from the road fund or the general fund of the county, or the road fund of any district benefited.

necessary

(b) Lay out, construct, improve, and maintain county highways.

(c) Incur a bonded indebtedness for any of such purposes, subject to the provisions of Section 944.

(d) Construct and maintain stock trails approximately paralleling any county highway, retain and maintain for stock trails the right-of-way of any county highway which is superseded by relocation. Such stock trails shall not be included in the term "maintained mileage of county roads" as that term is used in Chapter 3 of Division 3 of this code.

(commencing with Section 2100)

Comment. Section 943 is amended to delete portions superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1240.110 (right to acquire any necessary right or interest in any type of property), 1240.120 (right to acquire property to make effective the principal use), 1240.310 et seq. (condemnation of property to be used for exchange purposes). See also Code Civ. Proc. § 1240.130 (acquisition by gift, purchase, lease, or other means).

Tentatively approved July 1970

COUNTY--HIGHWAYS

Streets & Highways Code § 943.1 (repealed)

Sec. . Section 943.1 of the Streets and Highways Code is repealed.

~~943.1. Whenever a part of a parcel of land is to be taken for county highway purposes and the remainder of such parcel is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damages, the county may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for county highway purposes.~~

ALL
IN
STRIKEOUT

Comment. Section 943.1 is superseded by Section 1240.410 et seq. of the Code of Civil Procedure.

Staff draft October 1973

COUNTY ROADS

Streets & Highways Code § 943.2 (repealed)

Sec. . . . Section 943.2 of the Streets and Highways Code is repealed.

~~943.2. Whenever property which is devoted to or held for some other public use for which the power of eminent domain might be exercised is to be taken for county highway purposes, the county may, with the consent of the person or agency in charge of such other public use, condemn, in the name of the people of the county, real property to be exchanged with such person or agency for the real property so to be taken for county highway purposes. This section does not limit the authorization to the county to acquire other than by condemnation property for such purposes.~~

ALL
IN
STRIKEOUT

Comment. Section 943.2 is superseded by Code of Civil Procedure Section 1240.310 et seq. See also Code Civ. Proc. § 1230.030 (exercise of eminent domain power discretionary).

Staff draft October 1973

Streets & Highways Code § 943.4 (repealed)

Sec. . Section 943.4 of the Streets and Highways Code is repealed.

~~943.4. Whenever real property is sought to be taken for the purpose of county highway widening which is devoted to or held for some other public use by a person or public agency that has the power of eminent domain, the county may, with the consent of the person or public agency, condemn in the name of the county the real property to be exchanged with such person or public agency for the real property so to be taken for county highway purposes. This section does not limit the authorization of the county to acquire, other than by condemnation, property for such purposes.~~

ALL
IN
STRIKEOUT

Comment. Section 943.4 is superseded by Code of Civil Procedure Section 1240.320. See also Code Civ. Proc. § 1230.030 (exercise of eminent domain power discretionary).

WORK TO REDUCE COMPENSATION

Streets & Highways Code § 970 (repealed)

Sec. . Section 970 of the Streets and Highways Code is repealed.

~~970. In connection with the acquisition of land for the opening or widening of a county highway the county may agree with the owner of the property to construct, reconstruct or install immediately adjacent to the right-of-way, fences, driveways, sidewalks, retaining walls, and drainage or utility connections, if the performance of such work will reduce the amount of damages which would otherwise be payable to the property owner as compensation for the diminution in value of that portion of said owner's property not being acquired for the opening or widening of the county highway.~~

The cost of the work so performed shall not exceed the estimated amount of the damages otherwise payable to the property owner and shall be deemed work incident to the improvement of the county highway and a proper charge against the funds of the county.

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STRIKEOUT

Comment. Section 970 is superseded by the more general authority provided by Section 1263.610 of the Code of Civil Procedure.

STREETS & HIGHWAYS CODE §§ 1050-1054

Tentatively approved April 1973

PRIVATE BYROADS

Streets & Highways Code §§ 1050-1054 (repealed)

Sec. . Chapter 3.5 (commencing with Section 1050) of Division 2 of the Streets and Highways Code is repealed.

Comment. Chapter 3.5 (commencing with Section 1050), relating to private byroads, is repealed because it is special legislation that should not be preserved in the codes.

IMPROVEMENT ACT OF 1911

Streets & Highways Code § 5100 (amended)

Sec. . Section 5100 of the Streets and Highways Code is amended to read:

5100. All streets, places, public ways, or property, or rights-of-way, or tidelands, or submerged lands owned by any city, open or dedicated to public use, and any property for ~~the immediate possession and use of which, as rights-of-way required for public use, an order, has been obtained in compliance with the provisions of Section 14 of Article I of the State Constitution~~, and all tidelands or submerged lands to which all the right, title and interest of the state have been granted to any city, and all tidelands or submerged lands which have been leased by the state to any city for the construction of improvements authorized by subdivision (g) of Section 5101, are open public streets, places, public ways, or property or rights-of-way owned by the city, for the purposes of this division, and the legislative body of the city may establish and change the grades of the respective ways, properties, and rights-of-way hereinbefore enumerated and fix the width thereof and is hereby invested with jurisdiction to order to be done therein, over or thereon, either singly or in any combination thereof, any of the work mentioned in this division under the proceedings described in this part.

for possession
prior to judgment

Comment. Section 5100 is amended to conform to the language used in the Eminent Domain Law. See Article 3 (commencing with Section 1255.410) of Chapter 6 of Title 7 of Part 3 of the Code of Civil Procedure.

Staff draft October 1973

Streets & Highways Code § 5101 (amended)

Sec. . Section 5101 of the Streets and Highways Code is amended to read:

5101. Whenever in the opinion of the legislative body the public interest or convenience may require, it may order the whole or any portion, either in length or in width, of any one or more of the streets, places, public ways, or property, easements, or rights-of-way, or tidelands, or submerged lands owned by any city, or tidelands or submerged lands leased by the state to any city for the construction of improvements authorized by subdivision (g), open or dedicated to public use, and any property for the ~~immediate possession and use of which as rights-of-way required for public use,~~ an order, ~~has been obtained in compliance with the provisions of Section 14 of Article I of the State Constitution,~~ to be improved by or have constructed therein, over or thereon, either singly or in any combination thereof, any of the following:

which

for possession
prior to judgment

(a) The grading or regrading, the paving or repaving, the planking or replanking, the macadamizing or remacadamizing, the graveling or regrading, the oiling or reoiling thereof.

(b) The construction or reconstruction of sidewalks, crosswalks, steps, safety zones, platforms, seats, statuary, fountains, parks and parkways, recreation areas, including all structures, buildings, and other facilities necessary to make parks and parkways and recreation areas useful for the purposes for which intended, culverts, bridges, curbs, gutters, tunnels, subways or viaducts.

(c) Sanitary sewers or instrumentalities of sanitation, together with the necessary outlets, cesspools, manholes, catch basins, flush tanks, septic tanks, disposal plants, connecting sewers, ditches, drains, conduits, tunnels, channels or other appurtenances.

(d) Drains, tunnels, sewers, conduits, culverts and channels for drainage purposes; with necessary outlets, cesspools, manholes, catch basins, flush tanks, septic tanks, disposal plants, connecting sewers, ditches, drains, conduits, channels and appurtenances.

(e) Poles, posts, wires, pipes, conduits, tunnels, lamps and other suitable or necessary appliances for the purpose of lighting said streets, places or public ways of any such city or property or rights-of-way owned by any such city, or for the purpose of furnishing electricity and electric service or telephone service to property within a city.

(f) Pipes, hydrants and appliances for fire protection.

(g) Breakwaters, levees, bulkheads, groins, and walls of rock or other material to protect the streets, places, public ways and other property in any such city, from overflow by water, or to prevent beach erosion or to promote accretion to beaches.

STREETS & HIGHWAYS CODE § 5101

Staff draft October 1973

(h) Wells, pumps, dams, reservoirs, storage tanks, channels, tunnels, conduits, pipes, hydrants, meters or other appurtenances for supplying or distributing a domestic water supply.

(i) Mains, services, pipes, fittings, valves, regulators, governors, meters, drips, drains, tanks, ditches, tunnels, conduits, channels, or other appurtenances for supplying or distributing a domestic or industrial gas supply.

(j) The construction or maintenance of bomb shelters or fallout shelters which are primarily designed to protect and shelter the population from conventional or nuclear bomb or missile warhead explosions, shellfire, radiation, and fallout in the event of an enemy attack.

(k) Retaining walls, embankments, buildings and any other structures or facilities necessary or suitable in connection with any of the work mentioned in this section.

(l) The planting of trees, shrubs or other ornamental vegetation.

(m) The construction, repairing, or improving of public mooring places for watercraft, the building, repairing and improving of wharves, piers, docks, slips, quays, moles, or other utilities, structures, and appliances necessary or convenient for the promotion or accommodation of commerce, navigation and the protection of lands within said city, and for aiding and securing access to the waters of said lands to the people of the State of California, in the exercise of their rights to fish, or for the extension of public streets or places.

(n) Compaction of land, change of grade or contours, construction of caissons, retaining walls, drains and other structures suitable for the purpose of stabilizing land.

(o) All other work which may be deemed necessary to improve the whole or any portion of such streets, places, public ways, property, easements or rights-of-way owned by such city.

(p) All other work auxiliary to any of the above, which may be required to carry out the same.

Comment. Section 5101 is amended to conform to the language used in the Eminent Domain Law. See Article 3 (commencing with Section 1255.410) of Chapter 6 of Title 7 of Part 3 of the Code of Civil Procedure (possession prior to judgment).

STREETS & HIGHWAYS CODE § 5661

Staff draft October 1973

Streets & Highways Code § 5661 (amended)

Sec. . Section 5661 of the Streets and Highways Code is amended to read:

5661. No proceedings taken or had under this division shall ever be held to be invalid on the ground that the street, right of way, public property or any portion thereof, upon which the work or any part thereof is or was done has not been lawfully dedicated or acquired; provided, the same is lawfully dedicated or acquired, or an order of immediate possession, and use thereof has been obtained, at any time before judgment is entered in the action involving such proceeding .

for

prior to judgment

Comment. Section 5661 is amended to conform to the language used in the Eminent Domain Law. See Article 3 (commencing with Section 1255.410) of Chapter 6 of Title 7 of Part 3 of the Code of Civil Procedure (possession prior to judgment).

WATER CODE §§ 7020-7026

Tentatively approved April 1973

PRIVATE WAYS FOR CANALS

Water Code §§ 7020-7026 (repealed)

Sec. . Chapter 2 (commencing with Section 7020) of Division 4 of the Water Code is repealed.

Comment. Chapter 2 (commencing with Section 7020), relating to private ways for canals, is repealed because it is obsolete, its functions presently being served by special districts and other local agencies.