

36.300

3/25/75

Memorandum 75-3

Subject: Study 36.300 - Eminent Domain (AB 11 and Related Bills)

The Commission at the March 1975 meeting made some changes in the Eminent Domain Law and conforming amendments, and asked the staff for additional information concerning other areas. This Memorandum presents drafts of the changes, along with the additional information requested by the Commission. Also attached as Exhibit I is a letter we have received from the County Supervisors Association of California objecting to the "anti-public agency" approach of the Eminent Domain Law.

§ 1240.250. Acquisition for future use under Federal Aid Highway Act of 1973

The Commission determined to extend to 10 years the future use period in the case of takings under the Federal Aid Highway Act of 1973. Exhibit II (yellow) is a draft of a section to accomplish this. There is a conforming change required in Section 1250.360 (see below).

§ 1245.250. Effect of resolution of necessity

The Commission asked the staff to draft narrowly a provision that removes the conclusive effect of a resolution of necessity procured by criminal conduct of a particularly egregious nature. The staff has reviewed the penal laws of the State of California and has concluded that there are two fairly broad areas affecting adoption of the resolution that should be considered: (1) conflict of interest and (2) bribery.

The Political Reform Act of 1974, as the Commission well knows, makes it a misdemeanor for any public official at any level of state or local government to make, participate in making, or in any way attempt to use his

official position to influence a governmental decision in which he knows or has reason to know that he has a financial interest. Govt. Code §§ 87100, 91000. Where a citizen suspects a violation of the conflict of interest statute, he may bring an action to set aside the tainted governmental action (Govt. Code § 91003(b)):

Upon a preliminary showing in an action brought by a person residing in the jurisdiction that a violation of Article 1 of Chapter 7 of this title [general prohibition of conflicts of interest] or of a disqualification provision of a Conflict of Interest Code [adopted by individual agencies] has occurred, the court may restrain the execution of any official action in relation to which such a violation occurred, pending final adjudication. If it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void. The official actions covered by this subsection include but are not limited to orders, permits, resolutions and contracts, but do not include the enactment of any state legislation. In considering the granting of preliminary or permanent relief under this subsection, the court shall accord due weight to any injury that may be suffered by innocent persons relying on the official action.

The staff believes that this provision is adequate to take care of the problem of the resolution of necessity tainted by a conflict of interest. The property owner may bring a collateral action and, if he is able to make a preliminary showing of impropriety, have the eminent domain proceeding stayed. Upon proof of the violation and a showing of injury to the property owner, the court may set the condemnation aside as void. With this effective remedy, the staff sees no need to enact a provision relating to the effect of a resolution of necessity where a conflict of interest is alleged.

The staff is not aware of any comparable provisions relating to setting aside governmental action influenced by bribery. There was a bill introduced in the 1972 Legislature to require public entities to reopen for consideration any of their actions which involve bribery and to allow them to reaffirm their action or have the Attorney General bring a civil proceeding to void the action. The bill was not enacted.

The word "bribe" is defined in the Penal Code to signify "anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion, in any public or official capacity." Penal Code § 7(6). Acceptance of a bribe by a public officer is a felony. See, e.g., Penal Code §§ 68 (asking or receiving bribes by public officers or employees), 165 (bribing councilmen, supervisors, etc.). Acceptance of any "emolument, gratuity, or reward" is a misdemeanor. Penal Code § 70 (solicitation or acceptance of gratuities by public officers or employees). In addition, as Witkin points out:

Our state has a bewildering number of bribery statutes, in the Penal Code and elsewhere. This variety is a result of classification of persons who may be involved in bribery transactions; e.g., executive and ministerial officers, judicial officers, legislative officers, jurors, witnesses, and some others. [2 B. Witkin, California Crimes § 808 (1963).]

The first question to be faced in drafting a statute that creates an exception to the conclusive effect of a resolution of necessity for bribery is whether there must be conviction of a crime before the issue can be raised. If conviction is required, the cases where the issue can be raised will be very few indeed, for bribery is an extremely difficult offense to prove. Witkin says:

The secrecy surrounding an attempt to bribe makes it almost impossible to apprehend and convict the wrongdoer unless the person approached informs the authorities and works with them, e.g., using marked money, or bringing others into the transaction to witness the criminal acts. [2 B. Witkin, California Crimes § 809 (1963).]

Moreover, the decision to prosecute is discretionary with the district attorney, and, in many cases, a real case of bribery may never result in conviction because it has been plea-bargained out. On the other hand, to allow the defendant to raise the issue where there have been no criminal

charges is to provide the defendant with an opportunity to harass and abuse the public officials, and will in effect inject into the eminent domain proceeding a criminal trial.

The staff believes that the better resolution is to require conviction of bribery. This will both eliminate the defendant's ability to abuse the privilege of raising the bribery issue, and greatly simplify matters. If the defendant believes he can make a legitimate bribery case even though there has been no prosecution, he may take his case to the district attorney and have charges brought. This will place a neutral intermediary between the parties. Exhibit III (white) is a draft of such a provision.

This draft entails the following policy questions:

(1) What degree of causation must exist between the bribery and the adoption of the resolution? The draft takes the middle ground that the bribery "might" have been the proximately causal factor in the adoption of the resolution; this is the approach of the conflict of interest statute. Other possible approaches are to require absolute causation, or simply to allow the taint to affect the resolution without any showing of causation.

(2) Suppose the bribe was accepted, but the public official shows he was planning to vote yes regardless? The draft does not require the defendant to show subjective motivations; simple acceptance of the bribe is sufficient.

(3) What should occur where there is a pending criminal proceeding? The draft gives the court discretion to stay the eminent domain proceeding or take other appropriate action.

(4) Should the public entity be permitted to rescind the resolution and promulgate an untainted one (assuming there are sufficient votes to do

so)? The draft permits this subject to the court's discretion to award reasonable expenses to the defendant in dealing with the tainted resolution.

Exhibit IV (buff) is an alternative draft, which the staff does not recommend, to allow the defendant to raise the bribery issue even where there has been no prior conviction. In addition to the foregoing policy questions, this draft also raises these issues:

(1) Since criminal charges are not necessarily involved, must there be present the elements of any particular criminal statute? The draft takes the approach of referring to the generic definition of bribery without trying to tie it down to any particular crime or crimes.

(2) What must be the defendant's burden of proof? The draft rejects the "guilt beyond a reasonable doubt" standard for a simple "preponderance of the evidence" standard.

(3) Where there has been a prior criminal case that has resulted in conviction, should the defendant be required to prove bribery regardless? The draft says no.

(4) Where there has been a prior criminal case that has resulted in acquittal, or has been dismissed for some other reason, should the defendant be precluded from raising the issue in the eminent domain proceeding? The draft takes the position that one judicial hearing on the issue is enough.

Of course, all of these issues can be avoided by taking the approach of the Uniform Eminent Domain Code (AB 486)--simply provide that the resolution "has no effect to the extent that its adoption or contents were influenced or affected by bribery," and leave it to the courts to work out the problems. See Section 1232.11(c) of AB 486.

Regardless which approach the Commission adopts, there will be necessary conforming changes in the Comments to related sections.

§ 1250.150. Lis pendens

Section 1250.150 (Exhibit V (blue) is revised to substitute "shall" for "may" in accordance with the Commission's instructions at the March 1975 meeting and to make necessary conforming changes.

§ 1250.360. Grounds for objection to right to take where resolution
conclusive

The change in the future use date for takings under the Federal Aid Highway Act of 1973 (see Section 1240.250 above) necessitates a conforming change in this section. See Exhibit VI (gold).

§ 1255.410. Order for possession prior to judgment

At the March 1975 meeting the Commission requested the staff to give more specific content to the term "unoccupied" as it is used in subdivision (c) of Section 1255.410. A review of the statutes and cases involving other areas of the law in which occupancy is an issue, such as adverse possession and forcible detainer, indicates that "actual possession" is the phrase most frequently used and which has the greatest judicial gloss. Accordingly, the staff has redrafted subdivision (c) to make use of this phrase and to make clear that a person in actual possession may not be displaced on short notice. See Exhibit VII (pink).

§ 1263.240. Improvements made after service of summons

This section has been amended to delete the reference to prejudgment deposits from subdivision (c) and to add a provision enabling the court to limit the extent to which a court-ordered improvement will be taken into account in determining compensation. Exhibit VIII (green).

§§ 1263.310-1263.320. Fair market value

The Commission at the March 1975 meeting asked the staff for additional information concerning various aspects of the definition of "fair market value." Each aspect is discussed below.

"Just" Compensation

The State Bar Committee has suggested that the first sentence of Section 1263.310 be rephrased to read: "Just compensation shall be awarded for the property taken." Actually, this suggestion is misplaced, since compensation for the property taken is only one element of "just compensation," along with severance damage and any other compensable additional losses. Thus, if the term "just" is to be added to the statute, it should be added to Section 1263.010--"The owner of property acquired by eminent domain is entitled to just compensation as provided in this chapter."

The Commission's initial draft of Section 1263.010 included the word "just." That word was removed on advice of the Commission's consultant, Professor Kanner, if the staff recollects correctly, for the reason that the Legislature cannot purport to usurp the prerogative of the Supreme Court to determine what amounts to just compensation within the meaning of the Constitution; hence, use of that phrase would be unconstitutional. The Commission agreed with this argument, noting that the Eminent Domain Law purports to give more than the Constitution presently requires in some areas, whereas it does not purport to restrict compensation in other areas where the Supreme Court might rule that compensation greater than that allowed by statute is required. A change in wording at this point will require fairly extensive conforming amendments throughout the Eminent Domain Law.

"Highest" Price

Sacramento etc. R.R. v. Heilbron, 156 Cal. 408, 409, 104 P. 979, 980 (1909)

defines fair market value as follows:

The highest price estimated in terms of money which the land would bring if exposed to sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable.

The Commission determined not to codify the "highest price" language upon hearing the argument of the Department of Transportation and upon reading the discussion in the 1960 CEB book, California Condemnation Practice (at 42-43) to the effect that the property should be appraised at the price that can reasonably be considered as the fair market value of the property. The Commission also wished to avoid the false implication that the jury must select the highest value given by an appraiser at trial.

As a concurrent change, the Commission in Section 1260.210(b) eliminated the defendant's burden of proof on compensation; since the jury will no longer be instructed that market value is the "highest" price, it is no longer appropriate to place a burden on the defendant. The jury will simply hear all the testimony and determine what it believes to be the reasonable market value of the property.

The staff assumes that if the Commission determines to reinsert the term "highest" in the fair market value definition, it will also wish to reconsider the burden of proof issue. Actually, the staff believes that this is not a bad idea, since the burden of proof change is strongly opposed by the public entities.

"Special Purpose" Properties

Attached as Exhibit IX (yellow) is a copy of a short (3-page) memorandum which the Commission considered about 1-1/2 years ago concerning the problem

of valuing special purpose properties. The memorandum summarizes a Highway Research Board Study which is fairly lengthy and which we shall not reproduce here. The gist of the memorandum is that what is needed in valuing special purpose properties is flexibility, and that the California Evidence Code contains sufficient flexibility in enabling the use of three basic approaches to valuation--(1) the market data approach, (2) the income method, and (3) the cost analysis formula.

To make clear that the definition of fair market value does not preclude use of any or all three approaches to valuation where relevant, the Commission removed the phrase "in the open market" from the definition (which implies a comparable sales approach), and added language to the Comment clarifying the right to use any relevant means of valuation within the limits of the Evidence Code.

The Commission has now received comments that removal of the "open market" language and expansion of the language in the Comment is not sufficient; there is still confusion.

The State Bar Committee would clarify this matter by providing that the measure of compensation for property taken is "normally" the fair market value of the property. The staff believes better language can be adapted from Section 1239.04 of AB 486 (Uniform Eminent Domain Code) by adding a new subdivision to the definition of fair market value in AB 11:

(b) The fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

The Uniform Code provision also includes special rules for properties owned by public entities and nonprofit organizations. These special rules are not essential to the basic fair market value scheme set out above, but the Commission may wish to consider including them in the statute.

Should the Commission make changes in the fair market value definition, there may have to be slight adjustments in the Comment.

§ 1265.310. Unexercised options

In response to the recent California Supreme Court case of County of San Diego v. Miller (attached to Memorandum 75-23 as Exhibit IV (buff), the Comment to Section 1265.310 should be adjusted as set out in Exhibit X (white).

Civil Code § 1002. Condemnation by private persons

The staff has prepared a provision for condemnation by private persons as a separate bill Exhibit XI (buff) since it presents a controversial substantive issue which should not be permitted to burden the passage of the conforming changes bill (AB 278). We have made the enactment of the bill dependent on the enactment of the conforming changes bill (which contains Civil Code Section 1001).

The text of the bill to provide condemnation by private persons is drawn nearly verbatim from a bill which was introduced in the Legislature by Senator Carrell at every session from 1967 to 1970 and which was defeated at every session.

The only change from the text of the Carrell bill is one to make it applicable to utility service as well as to byroads. The Carrell bill applied only to byroads, but did provide that the byroad easement "shall include the right to install or have installed utility facilities therein."

One of the points of contention over the Carrell bill was the requirement of "strict necessity" for the easement. Should the Commission desire to adopt a looser standard, it might use the standard of proposed Section 1240.350 (substitute condemnation to provide utility service or access to public road), a section which authorizes public entities to take additional property to make connections where their projects would otherwise have the effect of

landlocking property. The standard proposed by the Commission under this section is "such additional property as appears reasonably necessary and appropriate (after taking into account any hardship to the owner of the additional property)."

There are Comments in other sections that will require adjustment if this bill passes.

Health & Safety Code § 8501. Condemnation by private cemeteries

The staff has revised this section in accordance with the Commission's direction at the March meeting to include corporations sole. Exhibit XII (blue).

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

COUNTY SUPERVISORS
ASSOCIATION

EXHIBIT I



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March 21, 1975

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Honorable Alister McAlister
Assemblyman, State of California
Room 3112, State Capitol
Sacramento, Ca 95814

Subject: Assembly Bill 11 and Companion Bills

Dear Assemblyman McAlister:

This is to inform you that the County Supervisors Association of California has serious objections to your Assembly Bill 11 and companion bills, which would implement the recommendations of the California Law Revision Commission on eminent domain.

The features of this proposed legislation which most disturb us are those which require compensation to landowners in excess of the fair market value of the land, such as the provisions relating to loss of goodwill, and those which encourage new or extended litigation, such as the provisions concerning settlement offers (encompassed in your AB 3925 last year).

There appears to be an underlying assumption in certain of the Commission's recommendations that public agencies in California have been arbitrary and overbearing in condemnation actions, and that rather extreme counter-measures are necessary. We do not believe that there is factual basis for such an assumption. To the extent that it is carried into law, we foresee heavy increases in costs of local projects, at a time when local government finances are already over-strained by inflation, tax rate limits and unreimbursed mandates.

We are hopeful, therefore, that we may work with you on this legislation, with the objective of achieving a better balance between public and private interests in the contemplated revisions to eminent domain law.

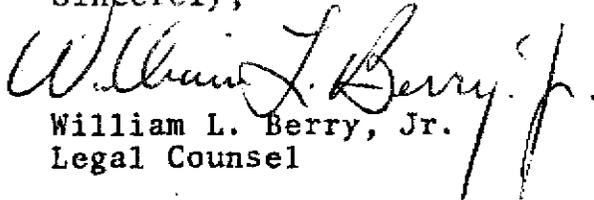
Executive Director
RICHARD E. WATSON

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AB 11 is now under study by a special task force of the County Counsels Association. We should be in position to offer detailed recommendations on this bill and companion legislation in early April.

In the meantime, we thank you for your consideration of these preliminary and very general comments.

Sincerely,

A handwritten signature in cursive script that reads "William L. Berry, Jr." with a stylized flourish at the end.

William L. Berry, Jr.
Legal Counsel

WLB/jn

cc: All members, Assembly Judiciary Committee
Mr. Thomas Carroll, Consultant, Assembly Judiciary
Committee

§ 1240.250. Acquisition for future use under Federal Aid Highway Act of 1973

1240.250. Notwithstanding any other provision of this article, where property is taken pursuant to the Federal Aid Highway Act of 1973:

(a) A date of use within 10 years from the date the complaint is filed shall be deemed reasonable.

(b) The resolution of necessity and the complaint shall indicate that the taking is pursuant to the Federal Aid Highway Act of 1973 and shall state the estimated date of use.

(c) If the defendant objects to the taking, the defendant has the burden of proof that there is no reasonable probability that the date of use will be within 10 years from the date the complaint is filed. If the defendant proves that there is no reasonable probability that the date of use will be within 10 years from the date the complaint is filed, the plaintiff has the burden of proof that the taking satisfies the requirements of this article.

Comment. Section 1240.250 provides a special rule for acquisitions for future use under the Federal Aid Highway Act of 1973 (P.L. 93-87), which provides a 10-year period for advance acquisition of rights of way. See 23 U.S.C.A. § 108(a)(P.L. 93-87, § 113(a)). Subdivision (a) provides that, in such an acquisition, a 10-year period will be deemed reasonable notwithstanding the seven-year period provided in Section 1240.220(a). Subdivision (b) prescribes the contents of the resolution of necessity and the complaint in such a case notwithstanding the general requirements of Section 1240.220(b). Subdivision (c) allocates the burden of proof in such a taking in a manner consistent with the general provisions of Section 1240.230.

§ 1245.270. Adoption of resolution affected by bribery

1245.270. (a) A resolution of necessity adopted by the governing body of a public entity pursuant to this article does not have the effect prescribed in Section 1245.250 if the defendant establishes by a preponderance of the evidence both of the following:

(1) A member of the governing body who voted in favor of the resolution was convicted of a violation of Section 68, 70, or 175 of the Penal Code or of any other criminal statute that prohibits receiving or agreeing to receive a bribe (as that term is defined in subdivision 6 of Section 7 of the Penal Code) involving adoption of the resolution.

(2) But for the conduct for which the member of the governing body was convicted, the resolution might not otherwise have been adopted.

(b) Where there is a pending criminal prosecution for violation of any statute described in subdivision (a)(1), the court may take such action as it deems appropriate under the circumstances of the case.

(c) Nothing in this section precludes a public entity from rescinding a resolution of necessity and adopting a new resolution as to the same property, subject to the same consequences as a conditional dismissal of the proceeding under Section 1260.120.

Comment. Section 1245.270 is new. It does not affect the holding of People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959), that a valid resolution precludes judicial review even where it is alleged that the resolution was influenced by fraud, bad faith, or abuse of discretion. It provides a limited exception to the conclusiveness of the resolution where a member of the governing body that adopted the resolution has been convicted of bribery involved in its adoption. It should be noted that, where a resolution was influenced by a conflict of interest, the resolution may be subject to direct attack under Government Code Section 91003(b) (Political Reform Act of 1974).

The conviction under this section must be final. Where there is a pending criminal proceeding, subdivision (l) allows the court to use its discretion to take such actions as (1) staying the eminent domain proceeding until the criminal case is resolved, (2) permitting the eminent domain proceeding to continue while reserving the issue of necessity, or (3) permitting the issue of necessity to be litigated even though bribery has not yet been established.

§ 1245.270. Adoption of resolution affected by bribery

1245.270. (a) A resolution of necessity adopted by the governing body of a public entity pursuant to this article does not have the effect prescribed in Section 1245.250 if the defendant establishes by a preponderance of the evidence both of the following:

(1) A member of the governing body who voted in favor of the resolution received or agreed to receive a bribe (as that term is defined in subdivision 6 of Section 7 of the Penal Code) involving adoption of the resolution.

(2) But for the conduct described in paragraph (1), the resolution might not otherwise have been adopted.

(b) Where there has been a prior criminal prosecution for conduct of a type described in subdivision (a)(1), proof of conviction shall be conclusive evidence that the conditions of subdivision (a)(1) are satisfied, and proof of acquittal or other dismissal of the prosecution shall be conclusive evidence that the conditions of subdivision (a)(1) are not satisfied. Where there is a pending criminal prosecution for conduct of a type described in subdivision (a)(1), the court may take such action as it deems appropriate under the circumstances of the case.

(c) Nothing in this section precludes a public entity from rescinding a resolution of necessity and adopting a new resolution as to the same property, subject to the same consequences as a conditional dismissal of the proceeding under Section 1260.120.

Comment. Section 1245.270 is new. It does not affect the holding of People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959), that a valid resolution precludes judicial review even where it is alleged that the resolution was influenced by "fraud, bad faith, or abuse of discretion."

It provides a limited exception to the conclusiveness of the resolution where the defendant is able to demonstrate actual bribery of a criminal character. It should be noted that, where a resolution was influenced by a conflict of interest, the resolution may be subject to direct attack under Government Code Section 91003(b) (Political Reform Act of 1974).

The introductory portion of subdivision (a) makes clear that the defendant need not demonstrate the bribery to the same degree required for a criminal conviction. However, where there has been a prior criminal conviction, the defendant may satisfy his burden of proof by showing the prior conviction. On the other hand, a prior criminal proceeding that ended in acquittal or dismissal for any other reason will preclude the defendant from raising the issue again in the eminent domain proceeding. Subdivision (b). Where there is a pending criminal proceeding, the court may use its discretion to take such actions as staying the eminent domain proceeding until the criminal case is resolved, permitting the eminent domain proceeding to continue while reserving the issue of necessity, permitting the defendant to make his case on bribery notwithstanding the concurrent criminal action, or simply opening the issue of necessity without any final determination as to bribery involved in the resolution.

§ 1250.150. Lis pendens

1250.150. The plaintiff, at the time of the commencement of the proceeding, ~~or at any time thereafter, may~~ record a notice of the pendency of the proceeding in the office of the county recorder of any county in which property described in the complaint is located.

shall

Comment. Section 1250.150 ~~makes clear that the plaintiff in an eminent domain proceeding may file a lis pendens after the proceeding is commenced. This provision~~ supersedes a portion of former Section 1243 that required the plaintiff to file a lis pendens after service of summons. ~~Compare Section 1250.130 (lis pendens required where service is by publication).~~ Where a lis pendens is recorded prior to a transfer, the judgment in the proceeding will be binding upon the transferee from a defendant named by his real name who is properly made a party to the proceeding. *Drinkhouse v. Spring Valley Water Works*, 87 Cal. 253, 25 P. 420 (1890).

See also

Failure to file such a notice of pendency of the eminent domain proceeding does not deprive the court of subject matter jurisdiction. See *Housing Authority v. Forbes*, 51 Cal. App.2d 1, 124 P.2d 194 (1942). However, where a lis pendens is not recorded prior to a recorded transfer, the transferee will not be bound by the judgment in the proceeding unless he is properly made a party to the proceeding. See *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, 319 (1859). See also Section 1250.220 (naming defendants).

Section 1250.150 is analogous to Section 409 (obligation to file lis pendens and consequences of failure to do so). See also *Roach v. Riverside Water Co.*, 74 Cal. 263, 15 P. 776 (1887) (Section 409 applicable to condemnation proceedings prior to adoption of former Section 1243).

EXHIBIT VI

§ 1250.360. Grounds for objection to right to take where resolution conclusive

1250.360. Grounds for objection to the right to take, regardless of whether the plaintiff has adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4, include:

(a) The plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint.

(b) The stated purpose is not a public use.

(c) The plaintiff does not intend to devote the property described in the complaint to the stated purpose.

(d) There is no reasonable probability that the plaintiff will devote the described property to the stated purpose within seven years or, where the property is taken pursuant to the Federal Aid Highway Act of 1973, 10 years, or such longer period as is reasonable.

(e) The described property is not subject to acquisition by the power of eminent domain for the stated purpose.

(f) The described property is sought to be acquired pursuant to Section 1240.340 (substitute condemnation), 1240.410 (excess condemnation), 1240.510 (condemnation for compatible use), or 1240.610 (condemnation for more necessary public use), but the acquisition does not satisfy the requirements of those provisions.

(g) The described property is sought to be acquired pursuant to Section 1240.610 (condemnation for more necessary public use), but the defendant has the right under Section 1240.630 to continue the public use to which the property is appropriated as a joint use.

(h) Any other ground provided by law.

Comment. Section 1250.360 prescribes the grounds for objection to the right to take that may be raised in any eminent domain proceeding regardless of whether the plaintiff has adopted a resolution of necessity that is given conclusive effect on other issues. See Section 1250.370 for a listing of grounds for objection that may be raised only where there is no conclusive resolution of necessity.

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

Subdivision (b). The power of eminent domain may be exercised only to acquire property for a public use. Section 1240.010. CAL. CONST., Art I, § 19. U.S. CONST., Amend. XIV.

Subdivision (c). This subdivision codifies the classic test for lack of public use: whether the plaintiff *intends* to apply the property to the proposed use. See *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959). Once the acquisition has been found initially proper, the plaintiff may thereafter devote the property to any other use, public or private. See *Arechiga v. Housing Authority*, 159 Cal. App.2d 657, 324 P.2d 973 (1958). See generally Sterling, *Return Right for Former Owners of Land Taken by Eminent Domain*, 4 PAC. L.J. 65 (1973).

Subdivision (d). This subdivision adds a test for public use new to California law. If the defendant is able to demonstrate that there is no reasonable probability that the plaintiff will apply the property to the proposed use within seven years or, where the taking is pursuant to the Federal Aid Highway Act of 1973, 10 years, or within a reasonable period of time, the plaintiff may not take the property. Cf. ~~Section~~ Sections 1240.220 (future use) and 1240.250 (future use under Federal Aid Highway Act of 1973).

Subdivision (e). Condemnation for certain specified purposes is not available in the case of some land. For example, a city may not acquire by eminent domain an existing golf course for golf course purposes. GOVT. CODE § 37353(c). Property appropriated to a public use may not be taken except for more necessary or compatible uses. Sections 1240.510 and 1240.610. Cemetery land may not be taken for rights of way. HEALTH & SAF. CODE §§ 8134, 8560, 8560.5. Certain land in the public domain may not be taken at all. PUB. RES. CODE § 8030. See also Section 1240.010 and Comment thereto (eminent domain only for purposes authorized by statute); cf. subdivision (f) *infra* (more necessary public use).

Subdivision (f). Section 1240.340 permits property to be taken for substitute purposes only if: (1) the owner of the property needed for the public use has agreed in writing to the exchange and, under the circumstances of the particular case, justice requires that he be compensated in whole or in part by substitute property rather than by money; (2) the property to be exchanged is in the vicinity of the public improvement for which the property needed is taken; and (3) taking into account the relative hardship to the owners, it is not unjust to the owner of the property to be exchanged that his property be taken so that the owner of the needed property may be compensated by such property rather than by money.

Section 1240.410 permits property excess to the needs of the proposed project to be taken only if it would be left as a remainder in such size, shape, or condition as to be of little market value.

Property appropriated to a public use may be taken by eminent domain only if the proposed use is compatible with or more necessary than the existing use. See Sections 1240.510 (compatible use), 1240.610 (more necessary use).

Subdivision (g). Section 1240.630 gives the prior user a right to continue a public use as a joint use under certain circumstances where the plaintiff seeks to displace the prior use by a more necessary use.

Subdivision (h). While the provisions of Section 1250.360 catalog the objections to the right to take available under the Eminent Domain Law where the resolution is conclusive, there may be other grounds for objection not included in the Eminent Domain Law, *e.g.*, where there exist federal or constitutional grounds for objection or where prerequisites to condemnation are located in other codes. See, for example, Section 1427 of the Health and Safety Code, which imposes certain requirements that must be satisfied before a nonprofit hospital may exercise the right of eminent domain. See also various special district laws that require consent of the board of supervisors of the affected county before extraterritorial condemnation authority may be exercised. *E.g.*, HEALTH & SAF. CODE §§ 4741 (county sanitation district), 6514 (sanitary district), 13852(c) (fire protection district); PUB. UTIL. CODE § 98213 (Santa Cruz Metropolitan Transit District); WATER CODE §§ 43532.5 (California water storage district), 60230(8) (water replenishment district), 71694 (municipal water district); Alameda County Flood Control and Water Conservation District Act, § 5(13) (Cal. Stats. 1949, Ch. 1275); Alameda County Water District Act, § 4(d) (Cal. Stats. 1961, Ch. 1942); Alpine County Water Agency Act, § 7 (Cal. Stats. 1961, Ch. 1896); Amador County Water Agency Act, § 3.4 (Cal. Stats. 1959, Ch. 2137); Antelope Valley-East Kern Water Agency Law, § 61(7) (Cal. Stats. 1959, Ch. 2146); Bethel Island Municipal Improvement District Act, § 81 (Cal. Stats. 1960, 1st Ex. Sess., Ch. 22); Castaic Lake Water Agency Act, § 15(7) (Cal. Stats. 1962, 1st Ex. Sess., Ch. 28); Crestline-Lake Arrowhead Water Agency Act, § 11(9) (Cal. Stats. 1962, 1st Ex. Sess., Ch. 40); Embarcadero Municipal Improvement District Act, § 82 (Cal. Stats. 1960, 1st Ex. Sess., Ch. 81); Estero Municipal Improvement District Act, § 82 (Cal. Stats. 1960, 1st Ex. Sess., Ch. 82); Fresno Metropolitan Transit District Act, § 6.3 (Cal. Stats. 1961, Ch. 1932); Guadalupe Valley Municipal Improvement District Act, § 80.5 (Cal. Stats. 1959, Ch. 2037); Kern County Water Agency Act, § 3.4 (Cal. Stats. 1961, Ch. 1003); Lake County Flood Control and Water Conservation District Act, § 5(12) (Cal. Stats. 1951, Ch. 1544); Monterey County Flood Control and Water Conservation District Act, § 4 (Cal. Stats. 1947, Ch. 699); Mountain View Shoreline Regional Park Community Act, § 51 (Cal. Stats. 1969, Ch. 1109); Nevada County Water Agency Act, § 7 (Cal. Stats. 1959, Ch. 2122); North Lake Tahoe-Truckee River Sanitation Agency Act, § 146 (Cal. Stats. 1967, Ch. 1503); Placer County Water Agency Act, § 3.4 (Cal. Stats. 1957, Ch. 1234); Plumas County Flood Control and Water Conservation District Act, § 3(f) (Cal. Stats. 1959, Ch. 2114); Sacramento County Water Agency Act, § 3.4 (Cal. Stats. 1952, 1st Ex. Sess., Ch. 10); San Geronio Pass Water Agency Law, § 15(9) (Cal. Stats. 1961, Ch. 1435); Santa Barbara County Flood Control and Water Conservation District Act, § 5.3 (Cal. Stats. 1955, Ch. 1057); Shasta County Water Agency Act, § 65 (Cal. Stats. 1957, Ch. 1512); Sierra County Flood Control and Water Conservation District Act, § 3(f) (Cal. Stats. 1959, Ch. 2123); Yolo County Flood Control and Water Conservation District Act, § 3(f) (Cal. Stats. 1951, Ch. 1657); Yuba-Bear River Basin Authority Act, § 8 (Cal. Stats. 1959, Ch. 2131); Yuba County Water Agency Act, § 3.4 (Cal. Stats. 1959, Ch. 788).

EXHIBIT VII

Article 3. Possession Prior to Judgment

§ 1255.410. Order for possession prior to judgment

1255.410. (a) At the time of filing the complaint or at any time after filing the complaint and prior to entry of judgment, the plaintiff may apply ex parte to the court for an order for possession under this article, and the court shall make an order authorizing the plaintiff to take possession of the property if the plaintiff is entitled to take the property by eminent domain and has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article.

(b) The order for possession shall describe the property of which the plaintiff is authorized to take possession, which description may be by reference to the complaint, and shall state the date after which the plaintiff is authorized to take possession of the property.

(c) Where the plaintiff has shown its urgent need for possession of ~~unoccupied~~ property, the court may, ~~notwithstanding Section 1255.450,~~

if it finds that possession will not displace any person in actual and lawful possession of the property,

make an order for possession of such property on such notice as it deems appropriate under the circumstances of the

case , notwithstanding Section 1255.450 .

Comment. Section 1255.410 states the requirements for an order for possession of property prior to judgment and describes the content of the order. With respect to the relief available from an order for possession prior to judgment, see Sections 1255.420-1255.440.

Subdivision (a). Subdivision (a), like subdivision (a) of former Section 1243.5, provides an ex parte procedure for obtaining an order for possession prior to judgment.

Subdivision (a) states two prerequisites to issuance of an order for possession:

(1) The plaintiff must be entitled to take the property by eminent domain. This requirement is derived from subdivision (b) of former Section 1243.5. However, under former Section 1243.4, possession prior to judgment was permitted only if the taking was for right of way or reservoir purposes. This limitation is not continued. Likewise, the requirement found in subdivision (b) of former Section 1243.5 that the plaintiff was authorized to take possession prior to judgment is no longer continued since any person authorized to exercise the power of eminent domain may now take possession prior to judgment in any case in which he is entitled to take by eminent domain. Contrast former

Section 1243.4 (right to early possession limited to certain public entities).

(2) The plaintiff must have made the deposit required by Article 1. This requirement is derived from subdivision (b) of former Section 1243.5.

The issue of the plaintiff's need for possession prior to judgment is a matter that is incorporated in the provisions of Section 1255.420. Section 1255.410 does not affect any other prerequisite that may exist for taking possession of property. *Cf. 815 Mission Corp. v. Superior Court*, 22 Cal. App.3d 604, 99 Cal. Rptr. 538 (1971) (provision of relocation assistance is not necessarily prerequisite to an order for possession).

It should be noted that the determination of the plaintiff's right to take the property by eminent domain is preliminary only. The granting of an order for possession does not prejudice the defendant's right to demur to the complaint or to contest the taking. Conversely, the denial of an order for possession does not require a dismissal of the proceeding and does not prejudice the plaintiff's right to fully litigate the issue if raised by the defendant.

Under former statutes, judicial decisions held that an appeal may not be taken from an order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari was held to be the appropriate remedy. See *Central Contra Costa Sanitary Dist. v. Superior Court*, 34 Cal.2d 845, 215 P.2d 462 (1950); *Weiler v. Superior Court*, 188 Cal. 729, 207 P. 247 (1922); *State v. Superior Court*, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962); *City of Sierra Madre v. Superior Court*, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961). However, an order for possession following entry of judgment has been held to be an appealable order. *San Francisco Unified School Dist. v. Hong Mow*, 123 Cal. App.2d 668, 267 P.2d 349 (1954). No change is made in these rules as to orders made under Section 1255.410 or Article 3 (commencing with Section 1268.210) of Chapter 11.

Subdivision (b). Subdivision (b) describes the contents of an order for possession. The contents are substantially the same as those of subdivision (b) of former Section 1243.5. However, the requirement that the order state the amount of the deposit has been eliminated since Section 1255.020 requires that a notice of the making of a deposit be served on interested parties. The requirement that the order state the purpose of the condemnation has been omitted since possession prior to judgment is now authorized for any public use by an authorized condemnor. And, the requirement that the order describe the "estate or interest" sought to be acquired has been omitted as unnecessary since the term "property" includes interests therein. See Sections 1235.170 (defining "property") and 1235.125 (defining "interest" in property).

Subdivision (b) is limited by the requirement of a 30-day or 90-day period following service of the order before possession can

be physically assumed. See Section 1255.450. Subdivision (c), however, permits possession of property that is unoccupied on lesser notice in cases where the plaintiff is able to make an adequate showing of need.

It should be noted that, under both subdivisions (b) and (c), the court may authorize possession of all, or any portion or interest, of the property sought to be taken by eminent domain.

For example, the court may order possession under subdivision (c) of a portion of a farm or residential property if the occupant will not be displaced from the property.

EXHIBIT VIII

§ 1263.240. Improvements made after service of summons

1263.240. Improvements pertaining to the realty made subsequent to the date of service of summons shall not be taken into account in determining compensation unless one of the following is established:

(a) The improvement is one required to be made by a public utility to its utility system.

(b) The improvement is one made with the written consent of the plaintiff.

(c) The improvement is one authorized to be made by a court order issued after a noticed hearing and upon a finding by the court that the hardship to the defendant of not permitting the improvement outweighs the hardship to the plaintiff of permitting the improvement. ~~No order may be issued under this subdivision after the plaintiff has deposited the amount of probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6. A deposit of probable compensation subsequent to issuance of an order under this subdivision shall operate neither to preclude the defendant from completing the authorized improvement nor to deny compensation based thereon.~~

The court may, at the time it makes the order under this subdivision authorizing the improvement to be made, limit the extent to which the improvement shall be taken into account in determining compensation.

Comment. Section 1263.240 in no way limits the right of the property owner to make improvements on his property following service of summons; it simply states the general rule that the subsequent improvements will not be taken into account in valuing the property and specifies those instances in which subsequent improvements will be considered in valuing the property. It should be noted that, although subsequent improvements may be precluded from consideration in valuing the property under this section, if the improvements were necessary to protect the public from risk of injury or to protect partially installed machinery or equipment from damage, their cost may

be recoverable as a separate item of compensation under Section 1263.620.

The introductory portion of Section 1263.240, which adopts the substance of the last sentence of former Section 1249, requires that, as a general rule, subsequent improvements be uncompensated regardless of whether they are made in good faith or bad. See *City of Santa Barbara v. Petras*, 21 Cal. App.3d

506, 98 Cal. Rptr. 635 (1971). For exceptions to this rule, see subdivisions (a)-(c) and Section 1263.250 (harvesting and marketing of crops).

Subdivision (a) codifies a judicially recognized exception to the general rule. *Citizen's Util. Co. v. Superior Court*, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963).

Subdivision (b), allowing compensation for subsequent improvements made with the consent of the plaintiff, is new. It permits the parties to work out a reasonable solution rather than forcing them into court and makes clear that the condemnor has authority to make an agreement that will deal with the problem under the circumstances of the particular case.

Subdivision (c) is intended to provide the defendant with the opportunity to make improvements that are demonstrably in good faith and not made to enhance the amount of compensation payable. The subsequent improvements might be compensable under the balancing of hardships test, for example, where an improvement is near completion, the date of public use of the property is distant, and the additional work will permit profitable use of the property during the period prior to the time it is actually taken for public use.

The making of a pre-judgment deposit by the condemnor affects neither the right of the defendant to complete a court-ordered improvement nor the authority of the court subsequently to authorize an improvement. The court may, however, limit the extent to which an improvement that it authorizes will be taken into consideration in determining compensation.

EXHIBIT IX

#36.500

First Supplement to Memorandum 73-73

9/7/73

Subject: Study 36.500 - Comprehensive Condemnation Statute (Conforming Changes and Revisions--Special Purpose Properties)

Summary

The attached research study published by the Highway Research Board, Valuation and Condemnation of Special Purpose Properties (1970), is a good and easy-to-follow treatment of the complex problems involved where the property taken by eminent domain has no readily available market for which data exists for valuation purposes. This memorandum recapitulates highlights of the study, and the staff suggests a method to implement the study's recommendations.

Analysis

The study indicates that cemeteries, churches, parks, schools, and similar properties are difficult to value in a trial to determine compensation because they are rarely sold. Therefore, appraisal methods other than the market data approach are allowed and the rules of evidence are relaxed to permit additional proof to secure to the owner constitutional indemnification for his loss.

Such properties are referred to as "specialities" or "special purpose properties." In some courts, before such property will be accorded special treatment, proof must be shown that there is an absence of market data, that the property and its improvements are unique, that its utility is peculiar to the owner, and that it would have to be replaced.

The usual method of measuring just compensation is market value. Because special purpose properties are rarely sold, some courts refuse to apply the market value measure to such properties. Value is then expressed in terms of intrinsic value, value for special uses or purposes, value to the owner, or similar terms, all of which reflect value that the owner, as distinguished from others, may see in the property. Whether the market value measure is applied, rules of allowable proof will be relaxed to permit the use of approaches to valuation other than the market data approach and the use of evidence not usually allowed in condemnation actions.

Three usual appraisal approaches are the market data, reproduction cost, and income approaches. Because of the lack of other proof, the cost approach is often used in valuing special purpose properties. The approach has been

much criticized as starting with a cost that may have no relation to value, and then deducting depreciation, which must usually be estimated without sufficient factual data.

Although usually excluded, the income approach, or evidence of income, may be permitted in valuing special purpose properties. Its use may be prohibited on the grounds that the business is not being taken and such proof will lead to collateral inquiry. Where the business is recognized as being taken or damaged, as in utility cases, proof of income will be allowed.

Substitution, or the substitute property doctrine, is a means of securing compensation to public owners where it is necessary to replace facilities taken. Compensation is measured by the cost of the necessary substitution of land and improvements, without depreciation, having the same utility as that taken. Application may result in no compensation. The traditional approach is to take no depreciation on improvements, but some recent cases do allow depreciation. Although some cases have permitted its use in dealing with private property, its application is usually restricted to public property.

Unimproved cemetery lands are appraised by two approaches:

1. An income approach that uses net income from sales of tracts discounted to present value.

2. The market data approach, which usually disregards special value for cemetery purposes. It is impossible to tell which method will be held proper.

Churches are usually valued in terms of market value by the cost approach.

The market data approach is generally used in valuing parks if improvements are measured by the cost approach. Substitution has been applied to publicly owned parks.

Schools are usually valued by substitution. If the school is old, it will be valued by the cost or market data approach.

No single method is applicable to all special properties or even all special properties of a particular type. Each case varies with its own facts. To render just compensation in such cases more likely, the study recommends that consideration be given to the following:

1. Extending the limits of admissible proof, including use of the replacement costs approach and the substitute property doctrine with a proper allowance for depreciation. The methods should not be treated as exclusive or as the only means of arriving at value.

2. Recognition of special value arising out of special uses or character

of the property. This may be done by departing from market value or by permitting consideration of such special value in arriving at market value.

3. Incidental to the more extensive allowance of proof, expecting and receiving more extensive investigation and exercise of ingenuity by appraisers in considering factors that affect the value of special purpose properties.

Conclusion

The study strongly suggests that legislation in this area can achieve little since no single method of valuation can be applied consistently to all special properties. Approaches to the solution of what is basically an appraisal problem are generally limited to matters of evidence, and even here legislation tends to be overly restrictive.

The thrust of the research study is that legislation should be used to liberate rather than restrict the admissibility of evidence. The more factors that an appraiser can consider and the more reasons that he can use in arriving at his opinion, the more reasonable is his opinion. Opinions of value should be less extreme in either direction and fair compensation more likely.

This basic approach appears sound to the staff. The Commission has previously approved deletion of the phrase "in the open market" from the definition of fair market value. This deletion will make the willing buyer-willing seller test applicable to all properties, special purpose as well as general purpose. The staff suggests that, in order to make clear that all three basic appraisal techniques may be applied to special purpose property in order to determine market value, the following language be added to the Comment to Section 1263.320 (fair market value):

The phrase "in the open market" has been deleted from the definition of fair market value because 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 Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code, 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 reproduction less depreciation) formula.

A similar Comment should be added to Evidence Code Section 814 (matter upon which opinion must be based).

Respectfully submitted,
Nathaniel Sterling
Staff Counsel

Article 4. Options

§ 1265.310. Unexercised options

1265.310. Unless the option expressly provides otherwise, an unexercised option to acquire an interest in property taken by eminent domain is terminated as to that property, and the option holder is entitled to compensation for its value, if any, as of the time of the filing of the complaint in the eminent domain proceeding.

Comment. Section 1265.310 ~~reverses~~ prior case law that the holder of an unexercised option to purchase property ~~has no right to~~ share in the award when that property has been condemned. See *East Bay Mun. Util. Dist. v. Kieffer*, 99 Cal. App. 240, 278 P. 476 (1929). See also *People v. Ocean Shore R.R.*, 90 Cal. App. 2d 464, 203 P.2d 579 (1949).

Continues

may

County of San Diego v. Miller, ___ Cal. 3d ___, ___ P.2d ___, ___ Cal. Rptr. ___ (1975).

The measure of compensation for the loss of the option is the fair market value of the option. See Section 1263.310. Since the value of the fee owner's interest in the property is diminished to the extent of the value of the option holder's interest, the award for the value of the property must be so apportioned. See Section 1260.220 (procedure where there are divided interests). Section 1265.310 applies to options other than options in a lease; options in a lease are considered in determining the value of the lease. Such options may not be compensated both under this section and as part of a lease. See Section 1263.010(b) (no double recovery).

It should be noted that, while the price at which the option may be exercised is admissible to show the value of the option, it may not be admissible to show the value of the property to which it relates. See EVID. CODE § 822(b) (option price inadmissible to show value of property except as an admission of a party).

An act to add Section 1002 to the Civil Code, relating to eminent domain.

The people of the State of California do enact as follows:

SECTION 1. Section 1002 is added to the Civil Code, to read:

1002. (a) The owner of private property may exercise the right of eminent domain to acquire an easement for which there is a strict necessity to provide utility service to, or access to a public road from, such property. The easement that may be taken shall afford the most reasonable service or access to the property for which the easement is taken consistent with other uses of the burdened land and the location of already established utility service and roads. The public shall be entitled, as of right, to use and enjoy the easement which is taken. The owner of the property for which the easement is taken shall maintain any such easement.

(b) This section does not apply to lands of the state park system as to which Section 5003.5 of the Public Resources Code applies.

(c) This section shall not be utilized for the acquisition of a private or farm crossing over a railroad track, the exclusive remedy of an owner of a landlocked parcel to acquire a private or farm crossing over such track being that provided in Section 7537 of the Public Utilities Code.

Comment. Section 1002 extends the right of eminent domain to private persons for the limited purposes of establishing byroads and making utility connections. Compare Code Civ. Proc. § 1240.350 (substitute condemnation by public entities to provide utility service or

access to public road). The exercise of eminent domain authority under Section 1002 is subject to the provisions of the Eminent Domain Law. See Code Civ. Proc. § 1230.020 (law governing exercise of eminent domain power). Under the Eminent Domain Law, there must be "public necessity" for the acquisition (Code Civ. Proc. § 1240.030), and any necessary interest in property may be acquired (Code Civ. Proc. § 1240.110); under Section 1002, however, there must be "strict necessity" for the acquisition and only an easement may be acquired. See also Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955) (condemnation by private person for sewer connection a public use, but a "stronger showing" of necessity required than if plaintiff were a public or quasi-public entity). It should be noted that public utilities within the meaning of Section 1002 include sewers. See Pub. Util. Code §§ 230.5 (sewer system), 230.6 (sewer system corporation).

968-700

SEC. 2. The Legislature hereby declares its policy to eliminate landlocked parcels of property and to restore to useful life property cut off from utility service in order to facilitate public safety and to enable the beneficial use of all land in this state.

SEC. 3. This act shall become operative only if Assembly Bill No. 278 is chaptered and becomes effective January 1, 1977, and, in such case, shall become operative at the same time as Assembly Bill No. 278.

Memorandum 75-3

968-701

EXHIBIT XII

Health & Safety Code § 8501 (added)

SEC. ____ . Section 8501 is added to the Health and Safety Code, to read:

8501. Any cemetery authority described in Section 23701c of the Revenue and Taxation Code and any corporation sole may acquire by eminent domain any property necessary to enlarge and add to an existing cemetery for the burial of the dead and the grounds thereof.

Comment. Section 8501 is new. It continues the grant of condemnation authority formerly found in subdivision 14 of Section 1238 of the Code of Civil Procedure ("Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof."). Section 8501 limits the condemnation authority to cemeteries not operated for profit (see Rev. & Tax. Code § 23701c) and solely for the purpose of expansion of an existing cemetery. Cemetery authority is defined in Section 7018 ("Cemetery authority' includes cemetery association, corporation sole, or other person owning or controlling cemetery lands or property."). It should be noted that Section 8501 applies to all cemetery authorities notwithstanding the limitations of Section 8250 (application of Part 3).