

#36.25

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Memorandum 75-45

Subject: Study 36.25 - Condemnation (Byroad and Utility Easements)

Attached to this memorandum are two copies of a tentative recommendation relating to private condemnation for byroads and utility easements. Please mark your editorial revisions on one copy to return to the staff at the June 1975 meeting. We hope to distribute the tentative recommendation for comment immediately after the meeting.

Respectfully submitted,

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TENTATIVE  
RECOMMENDATION AND A STUDY  
relating to  
CONDEMNATION FOR BYROADS AND UTILITY EASEMENTS

Existing law permits the condemnation of property for public use by private persons.<sup>1</sup> The California Law Revision Commission in December 1974 recommended that private condemnation authority be abolished except for condemnation by four types of quasi-public entities--nonprofit hospitals, nonprofit educational institutions of collegiate grade, certain nonprofit housing corporations, and mutual water companies;<sup>2</sup> the legislation introduced to effectuate this recommendation was amended on Commission recommendation to permit condemnation by nonprofit cemeteries.<sup>3</sup> This recommendation is concerned with private condemnation to provide appurtenant easements to property of the condemnor that are necessary for access or utility service to the property.

Existing law permits private persons to condemn appurtenant easements for access and utility service purposes.<sup>4</sup> This authority serves

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1. Civil Code Section 1001 provides:

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.

2. Recommendation Proposing the Eminent Domain Law 1635-1636 (1974), reprinted in 12 Cal. L. Revision Comm'n Reports 1635-1636 (1974).
3. Assembly Bill 278 (1975-76 Reg. Sess.).
4. For the law relating to byroad condemnation, see the attached background study, "The Use of the Power of Eminent Domain to Acquire Byroads." Condemnation for utility connections is authorized by Civil Code Section 1001 and Code of Civil Procedure Section 1238, subdivisions 3-4 (water), 8 (sewerage), 12-13 (electricity), 17 (gas). See Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955) (apartment owner may condemn appurtenant sewerage easement under authority of Civil Code Section 1001 and Code of Civil Procedure Section 1238(8)).

the dual function of opening what would otherwise be landlocked property and enabling the most beneficial use of remote property. As a practical matter, land that is cut off from access to public roads and land to which utility service cannot be extended cannot be developed.<sup>5</sup>

The need for private condemnation for byroad and utility easements is unrelieved by the ability of public entities to condemn for such easements on behalf of private persons. Many local public entities and public utilities are reluctant or unwilling to institute such proceedings even though the benefited person offers and is willing to bear the cost of acquiring and maintaining the easement. This may be due in part to lack of time and staffing, fear of potential liability, or simply unwillingness to become involved in the controversy.

For these reasons, the Law Revision Commission recommends that private persons be authorized to condemn appurtenant easements for byroads and utility service, subject to the following limitations designed to prevent abuse of the condemnation power:

(1) The governing body of the city or county must first adopt a condemnation authorization. The condemnation authorization should be adopted by a two-thirds vote of all the members of the governing body, following a hearing of which the person whose property is to be taken has 15-days mailed notice. The condemnation authorization should be adopted only upon a finding by the governing body that there is a great necessity for the taking, that the easement taken is located in such a manner as to cause the least reasonable damage, and that the hardship to the property owner of having the easement across his land is outweighed by the hardship to the condemnor if the taking is denied.

(2) The adoption of a condemnation authorization should not be given a conclusive effect in the eminent domain proceeding. The private condemnor should be required to prove that the acquisition is proper if the taking is challenged in court. Existing law places the burden of proof of public necessity on the private condemnor.<sup>6</sup>

(3) Existing law limits the interest in property that a private condemnor may take to an easement;<sup>7</sup> this limitation should be continued.

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5. The common law doctrine of "way of necessity" affords only limited relief to the landlocked property owner. See background study, p. 1.

6. Code Civ. Proc § 1241.

7. Code Civ. Proc. § 1239.

(4) The taking should be permitted only if there is a "great necessity" for the taking. This standard is consistent with the holding of Linggi v. Garovotti<sup>8</sup> requiring a stronger showing of necessity for condemnation by a private person than if the condemnor were a public or quasi-public entity.

(5) The easement condemned should be located in such a manner as to afford the most reasonable service or access to the property of the condemnor consistent with the least damage to the property to be taken. This requirement is comparable to that imposed on public entities that the location of their projects be compatible with the greatest public good and the least private injury.<sup>9</sup>

(6) The easement taken should be subject to the use and enjoyment of the public. This requirement would implement the constitutional public use limitation.<sup>10</sup>

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The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Section 1001 of, and 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 1001 of the Civil Code is amended to read:

1001. (a) Any person owner of real property may, without further legislative action subject to the requirements of Section 1002, acquire private property by eminent domain 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

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8. 45 Cal.2d 20, 286 P.2d 15 (1955).

9. Code Civ. Proc. § 1241(2).

10. Cal. Const., Art. I, § 19; see Sherman v. Buick, 32 Cal. 242 (1867).

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 an appurtenant easement for which there is a great 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 to which it is appurtenant consistent with the least damage to the property to be taken . The public shall be entitled, as of right, to use and enjoy the easement which is taken.

(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 1001 is amended to provide 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 1001 is subject to approval by the appropriate public entity under Section 1002. See Section 1002 and Comment thereto.

Condemnation under this section must comply with 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 1001, however, there must be "great 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 1001 include sewers. See Pub. Util. Code §§ 230.5 (sewer system), 230.6 (sewer system corporation).

The provisions of Section 1001 prior to this amendment, and former Code of Civil Procedure Section 1238 to which it referred, 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.

SEC. 2. Section 1002 is added to the Civil Code, to read:

1002. (a) A person authorized to acquire property by eminent domain under Section 1001 may not do so unless the legislative body of the city (if the property is located entirely within the boundaries of a city) or of the county (if the property is not located entirely within the boundaries of a city) has by a two-thirds vote of all its members adopted a resolution that authorizes the taking and that contains all of the following:

(1) A statement of the purpose for which the property is to be taken and a reference to Section 1001.

(2) A description of (i) the location of the property to be taken, (ii) the extent of the easement thereon, and (iii) the location of the property to which the easement is appurtenant.

(3) A declaration that the legislative body has found and determined that (i) there is a great necessity for the taking, (ii) the location of

the easement affords the most reasonable service or access to the property to which it is appurtenant consistent with the least damage to the property to be taken, and (iii) the hardship to the owner of the property to be taken is outweighed by the hardship to the person authorized to acquire the property by eminent domain if the taking is not permitted.

(b) The legislative body may adopt the resolution required by this section only after holding a hearing at which the person whose property is to be taken has had a reasonable opportunity to appear and be heard after notice stating the time, place, and subject of the hearing has been sent by first-class mail at least 15 days prior to the date of the hearing to the address of such person as it appears on the last equalized county assessment roll (including the roll of state-assessed property).

(c) The legislative body may require that the person authorized to acquire the property by eminent domain pay all of the costs reasonably incurred by the legislative body under this section and may require payment before it takes any action under this section.

(d) The requirement of this section is in addition to any other requirements imposed by law. Nothing in this section relieves the person authorized to acquire the property by eminent domain from satisfying the requirements of Civil Code Section 1001 or any other requirements imposed by law.

(e) The adoption of a resolution under this section does not make the city or county liable for any damages caused by the acquisition of the property or by the easement for which it is acquired.

Comment. Section 1002 is new. It supplements, but does not replace, the requirements of Section 1001 and of the Eminent Domain Law. See subdivision (d). Thus the adoption of a resolution by the legislative body under this section declaring that there is a great necessity for

the taking does not preclude the defendant from raising the issue and obtaining an independent court determination during the proceeding. The resolution does not have the effect afforded a resolution of necessity of a public entity. Compare Article 2 (commencing with Section 1245.210) of Chapter 4 of the Eminent Domain Law (Code of Civil Procedure Section 1230.010 et seq.).

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.