

Memorandum 76-12

Subject: Study 36.25 - Condemnation (Byroads)

The Commission in October 1975 gave final approval to the text of its recommendation relating to condemnation by private persons for byroads and utility easements. The recommendation is now in the process of printing and introduction in the Legislature.

The Commission has received several new comments on the recommendation. Exhibit I (blue) is a letter from a private attorney supporting the recommendation. The City of Los Angeles (see Memorandum 76-14, Exhibit I (blue)) also supports the recommendation.

The Metropolitan Water District of Southern California (Exhibit II--yellow) raises an issue the Commission has not previously focused on--whether property of a public entity should be subject to condemnation for byroads and utility easements; the water district recommends that public entity property be exempt. The staff recommends the opposite: Under the Eminent Domain Law, the use of property by a public entity is more necessary than use by a private person (Section 1240.650), hence, a private person may take the property only for a compatible use (Section 1240.510). The staff believes that joint use of property, wherever possible, should be encouraged. The staff would amend proposed Civil Code Section 1001(b) to read:

(b) Any owner of real property may acquire by eminent domain an appurtenant easement over private property for which there is a great necessity to provide utility service to, or access to a public road from, the owner's property. . . .

The State Office of Planning and Research (see Memorandum 76-14, Exhibit II--yellow) questions whether there is a need for byroad condemnation authority in light of the common law doctrine of way of necessity. The Commission has previously studied the way of necessity doctrine and determined it was not

really adequate for the following reasons: (1) it arises only in the limited situation where there has been a severance of two parcels by grant or partition, cutting off access to one of the parcels; (2) it requires a showing of "strict necessity"; (3) the person whose property is taken receives no compensation.

The Office of Planning and Research also suggests that, if condemnation power is granted, the reviewing legislative body that consents to the acquisition should be required to make a finding that consolidation of neighboring access roads or utility services is not feasible. The staff believes there is merit to the concept of making the fullest practical use of existing neighboring easements. The staff does not believe that this concept requires codification, however, since the statute does require that the easement which is taken shall afford the most reasonable service or access to the property consistent with the least damage to burdened property. The staff suggests the following language be added to the Comment to Section 1001:

Because subdivision (b) requires that the easement that may be taken shall afford the most reasonable access consistent with the least damage to property, an easement acquired under this section must be so located as to make the maximum feasible use of neighboring existing easements in supplying access or utility service to the property.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Memorandum 76-12

EXHIBIT I

JOHN B. MILLIKEN
RALPH KOHLMEIER
FRANK W. CLARK, JR.
WALTER R. MILNER, JR.
JOHN F. O'HARA
STANLEY L. BAUER
LAVERNE M. SAGMASTER
W. DICKENSON MILLIKEN
MARK TOWNSEND
N. MATTHEW GROSSMAN
KARL N. SAMUELIAN
ANTHONY T. OLIVER, JR.
FLOYD M. LEWIS
RICHARD L. FRANCK
EVERETT F. HEINERS
RICHARD A. CLARK
FRANKLIN TOM
FRANK ALSING
R. KENT WARNER
HOWLAND C. HONG
PAUL J. LIVADARY
J. TERENCE LYONS
JEFFREY L. GLASSMAN
WILLIAM H. ENER
ROGER M. LUSTBERG
HOWARD W. FOSS
THOMAS P. LAFFEY
DONALD M. ROBERTS
CARLO SIMA
RONALD S. BENEANI
M. YANKE HIRSCH
KENNETH J. FLORENCE

PARKER, MILLIKEN, KOHLMEIER, CLARK & O'HARA
ATTORNEYS AT LAW
TWENTY-FOURTH FLOOR
606 SOUTH OLIVE STREET
LOS ANGELES, CALIFORNIA 90014
TELEPHONE (213) 624-1451

CLAUDE J. PARKER
1971-1982

TELEX: 97-4517
CODE: "PARKERMILL LBA"

December 10, 1975

California Law Revision Committee
Stanford Law School
Stanford, California 94305

Re: Recommendations Relating to (a) Condemnation
for Byroads and Utility Easements (b) Relocation
Assistance by Private Condemnors

Gentlemen:

The above two recommendations for legislation have
been reviewed and my comments are as follows:

(a) The proposal to restore Section 1001 to the
Civil Code and to add Section 1245.325 to the Code of
Civil Procedure is a necessary step to restore to the law
a portion of private condemnation rights which was eliminated
by the repeal of Section 1001. As I recall, at that time the
State Bar Committee on Condemnation was overwhelmingly in
favor of retaining Section 1001 and it is my impression that
most attorneys in the condemnation field today are in agreement.

(b) The addition of Section 7276 to the Government
Code relating to relocation assistance by private condemnors
will remedy a serious omission in the law and should be
supported through the Legislature.

Cordially yours,


RICHARD L. FRANCK

RLF:ml



EXHIBIT II

The Metropolitan Water District of Southern California

Office of General Counsel

December 5, 1975

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Attention: John H. DeMouilly, Executive Secretary

Dear Mr. DeMouilly:

It is recommended that proposed Section 1001 of the Civil Code as set forth in the Commission's "Recommendation Relating to Condemnation for By-Roads and Utility Easements", October, 1975, be amended to read:

"... (b) Any owner of real property may acquire by eminent domain an appurtenant easement over private property, excepting that owned by a public entity as defined in Section 1235.90 of the Code of Civil Procedure, to provide utility service to, or across, or access to a public road from, the owner's 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 burdened by the easement. ..."

For the purpose of exercising the power of eminent domain "private property" includes property owned by a public entity. Marin County Water Company v Marin County, 145 Cal. 586 (1904), Reclamation District v Superior Court, 151 Cal. 263, (1907), Borough of Ford City Pa. v U.S. Dist. Pa. 213 F Supp. 248, Coyle v Gray, Del. 30 A 728.

"Real" is stricken because "real" property is included within the definition of "property" in Section 1235.70 of Calif. Stats. 1975, Ch. 1275.



December 5, 1975

"Private" is stricken because although present CCP 1240 and old CC 1001 refer to the condemnation of "private" property, Chapter 1275 refers only to the condemnation of "property", and it would seem to be in the interest of clarity to eliminate the adjective "private", which adds nothing and could be misleading if it were interpreted to mean only property owned by private parties, the contention made in Marin County Water Company v Marin County.

Very truly yours,



Robert P. Will
General Counsel

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

**Condemnation for Byroads and
Utility Easements**

October 1975

**CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305**

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94304
(415) 497-1771

MARC SANDSTROM, *Chairman*
JOHN H. McLAURIN, *Vice Chairman*
SENATOR ROBERT S. STEVENS
ASSEMBLYMAN JUSTICE McALISTER
JOHN J. SALLUP
HOMER E. GREGORY
JOHN G. HULSE
THOMAS E. STANTON, JR.
HOWARD R. WILLIAMS
GEORGE H. MURPHY, *Clerk*

October 11, 1975

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study and make recommendations relating to condemnation law and procedure. The Commission has previously submitted recommendations concerning various aspects of condemnation law and procedure, including the recently enacted Eminent Domain Law (Cal. Stats. 1975, Ch. 1275). The Commission submits herewith a recommendation dealing with another aspect of its study--condemnation for byroads and utility easements.

Respectfully submitted,
MARC SANDSTROM
Chairman

RECOMMENDATION

relating to

CONDEMNATION FOR BYROADS AND UTILITY EASEMENTS

The 1975 Legislature, on recommendation of the California Law Revision Commission,¹ abolished private condemnation authority² except for condemnation by public utilities³ and five types of quasi-public entities-- nonprofit hospitals,⁴ nonprofit educational institutions of collegiate grade,⁵ nonprofit cemeteries,⁶ certain nonprofit housing corporations,⁷ and mutual water companies.⁸

This recommendation is concerned with private condemnation to provide appurtenant easements necessary for access or utility service to property of the condemnor. Prior to 1975, the law permitted private

-
1. Recommendation Proposing the Eminent Domain Law 1635-1636 (1974), reprinted in 12 Cal. L. Revision Comm'n Reports 1635-1636 (1974).
 2. Former Civil Code Section 1001, which authorized condemnation by private persons, was repealed by Cal. Stats. 1975, Ch. 1240, § 1. It provided:

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.

3. Pub. Util. Code §§ 610-624 (Cal. Stats. 1975, Ch. 1240, § 65).
4. Health & Saf. Code § 1260 (Cal. Stats. 1975, Ch. 1240, § 43).
5. Educ. Code § 30051 (Cal. Stats. 1975, Ch. 1240, § 14).
6. Health & Saf. Code § 3501 (Cal. Stats. 1975, Ch. 1240, § 45).
7. Health & Saf. Code §§ 34874, 35167 (Cal. Stats. 1975, Ch. 1240, § 55).
8. Pub. Util. Code § 2729 (Cal. Stats. 1975, Ch. 1240, § 66).

persons to condemn appurtenant easements for access and utility service purposes.⁹ This authority served the function of opening what would otherwise be landlocked property to enable its most beneficial use. As a practical matter, land to which utility service cannot be extended or that is cut off from access to public roads cannot be developed.¹⁰

The need for private condemnation for byroads 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.

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 law prior to 1975 limited the interest in property that a private condemnor could take to an easement;¹¹ this limitation should be perpetuated.

(2) The private condemnor should be required to show a "great necessity" for the taking of the easement by eminent domain. This standard is consistent with the holding of Linggi v. Garovotti,¹² requiring a stronger showing of necessity for condemnation by a private person than if the condemnor were a public or quasi-public entity.

9. Condemnation for byroads was authorized by Civil Code Section 1001 and Code of Civil Procedure Section 1238(4), (6). See also Sherman v. Buick, 32 Cal. 241 (1867) (taking for byroad proper where road was open to public). Condemnation for utility connections was authorized by Civil Code Section 1001 and Code of Civil Procedure Section 1238, subdivisions 3-4 (water and drainage), 7 (telephone), 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 authorizing statutes were repealed in 1975. Cal. Stats. 1975, Ch. 1240, § 1; Cal. Stats. 1975, Ch. 1275, § 1.

10. The common law doctrine of "way of necessity" affords only limited relief to the landlocked property owner. See 3 B. Witkin, Summary of California Law, Real Property § 363 (8th ed. 1973).

11. Former Code Civ. Proc. § 1239.

12. 45 Cal.2d 20, 286 P.2d 15 (1955).

(3) There should be a requirement that the easement 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 burdened by the easement. This requirement is comparable to that imposed on public and quasi-public entities that the location of their projects be compatible with the greatest public good and the least private injury.¹³

(4) The condemnation right should be subject to consent of the governing bodies of affected cities and counties in the same manner and to the same extent as condemnation by quasi-public condemnors.¹⁴

(5) The consent of the local public entities should not have a conclusive effect in the eminent domain proceeding. The private condemnor should be required to prove the propriety of the acquisition if the taking is challenged in court. This continues existing law which places the burden of proof of necessity on the private condemnor.¹⁵

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

An act to add Section 1001 to the Civil Code and to add Section 1245.325 to the Code of Civil Procedure, relating to eminent domain.

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

Civil Code Section 1001 (added)

SECTION 1. Section 1001 is added to the Civil Code, to read:

-
13. Code Civ. Proc. § 1240.030(b).
 14. Code Civ. Proc. §§ 1245.310-1245.390.
 15. Code Civ. Proc. §§ 1240,030 (burden of proof on condemnor) and 1245.250 (resolution of public entity conclusive on issues of necessity).

1001. (a) As used in this section, "utility service" means water, gas, electric, drainage, sewer, or telephone service.

(b) Any owner of real property may acquire by eminent domain an appurtenant easement over private property for which there is a great necessity to provide utility service to, or access to a public road from, the owner's 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 burdened by the easement.

(c) This section shall not be utilized for the acquisition of a private or farm crossing over a railroad track. The exclusive method of acquiring such a private or farm crossing is that provided in Section 7537 of the Public Utilities Code.

Comment. Section 1001 is added 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). This restores authority found under former Section 1001 (repealed Cal. Stats. 1975, Ch. 1240, § 1). See also Sherman v. Buick, 32 Cal. 241 (1867) (condemnation for byroad proper where road open to public use of persons who may have occasion to travel it). The exercise of eminent domain authority under Section 1001 is subject to consent of the appropriate local public entities under Code of Civil Procedure Sections 1245.310-1245.390 to the same extent as quasi-public condemners. See Code Civ. Proc. § 1245.325.

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 the condemnor must pay compensation for the easement taken and for damage to the property from which it is taken. See Code Civ. Proc. §§ 1263.010-1263.620.

Code of Civil Procedure Section 1245.325 (added)

SEC. 2. Section 1245.325 is added to the Code of Civil Procedure, to read:

1245.325. Where an owner of real property seeks to acquire by eminent domain an appurtenant easement over private property pursuant to Section 1001 of the Civil Code:

(a) The person seeking to exercise the power of eminent domain shall be deemed to be a "quasi-public entity" for the purposes of this article.

(b) Notwithstanding subdivision (c) of Section 1245.340, the resolution required by this article shall contain a declaration that the legislative body has found and determined each of the following:

(1) There is a great necessity for the taking.

(2) 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 burdened property.

(3) The hardship to the owner of the appurtenant property, if the taking is not permitted, outweighs any hardship to the owner of the burdened property.

Comment. Subdivision (a) of Section 1245.325 makes clear that acquisitions pursuant to Civil Code Section 1001 are subject to the requirements of this article. Subdivision (b) replaces the findings required in Section 1245.340(c) with findings necessitated by the special provisions of Civil Code Section 1001(b).