#36(L) 7/12/65

Memorandum 65-44

Subject: Study No. 36(L) - Condemnation Law and Procedure (The Right to Take)

This is the first of a series of memoranda that will be prepared to present various aspects of the problems in condemnation law and procedure. These memoranda are prepared with the view of developing a series of tentative recommendations that can be distributed in mimeographed form for comments to the State Bar Committee and other interested persons. These comments will be considered when a tentative recommendation is prepared for publication in printed form (with the related research studies). After the comments on the series of printed tentative recommendations have been considered, the recommendation proposing the comprehensive statute can be prepared.

In preparing this memorandum, it became apparent that the research studies do not cover all the problems that will need to be considered in drafting the tentative recommendations and the comprehensive statute. Nevertheless, we plan to present and draft tentative recommendations on as many aspects of the problems as we can on the basis of the studies we have and a limited amount of staff research. We do not want to defer preparation of these tentative recommendations pending completion of additional research the staff plans to undertake in a systematic manner. (For example, we plan to search out and discover all California statutes, both general and special, that relate to eminent domain. We plan to examine all bills relating to eminent domain that were introduced at recent sessions of the California Legislature. We plan to examine the statutes of other states and have already started to acquire copies of those statutes in their latest amended form.) This additional research will no doubt result in revisions and additions to

the tentative recommendations we develop on the basis of the research studies provided by our consultants.

Although we plan to conduct this additional research, we also plan to do whatever research is necessary to draft sound tentative recommendations. In some cases, however, the tentative recommendations will not cover all aspects of the subject of the tentative recommendation.

The procedure we suggest is basically the same procedure we used on the study of evidence. We do not plan, however, to defer consideration of existing general and special statutes until we have drafted the general comprehensive statute. We hope to consider all statutes relating to a particular aspect of the subject before we publish a printed tentative recommendation on that aspect of the subject.

If the procedure outlined above meets the approval of the Commission, we are ready to turn to consideration of the subject of this memorandum--the right to take. The right to take involves primarily two questions: (1) public use and (2) necessity. The attached research study and this memorandum discuss these questions. Other closely related questions considered in this memorandum include: (3) excess condemnation, (4) devoting property to a use other than that for which taken, (5) condemnation by private persons, and (6) the estates in land and types of property that may be condemned. To a considerable extent, the material in this memorandum is taken from California Condemnation Practice (Continuing Education of the Bar, 1960).

At this time, we do not plan to consider the problem of whether the proposed general statute should require public hearings and similar proceedings in advance of condemnation proceedings, but we suggest that the Department of Public Works and the State Bar Committee be requested to submit suggested provisions on this aspect of the problem for our consideration. The research

study mentions the problem but does not provide any analysis of the practical problems involved nor does it contain any recommendations.

We plan to make available in a convenient form many of the statute sections that are pertinent to the questions considered in this memorandum

PUBLIC USE

In general. As the research study points out, there is only one constitutional limitation--assuming just compensation-- to the exercise of the power of eminent domain and that limitation is "public use." The Legislature may and has imposed additional general and specific limitations on the exercise of the power. Lindsay I. Co. v. Mehrtens, 97 Cal. 676, 678, 32 Pac. 802 (1893) (right of condemnation may be exercised "only in behalf of those public uses which the Legislature has authorized, and in the mode and with the limitations prescribed in the statute which confers the authority").

One of the limitations the Legislature has imposed is that the use for which the property is to be taken must have been declared a public use by the Legislature. See, however, constitutional provisions providing for the exercise of the right of condemnation:

> Art. I, § 14 1/2 (authorized the state, a county, or city to condemn a strip up to 200 feet wide about or along a park or street, and thereafter to sell the land with restrictions preserving the view, light, and air)
>
> Art. XV, § 1 (authorizes the state to condemn all frontages on navigable waters)
>
> Art. IX, § 9 (empowers the Regents of the University of California to "take . . . either by purchase or by donation, or gift, . . . or in any other manner, without restriction, all real and personal property for the benefit of the University or incidentally to its conduct").

The Legislature has declared that numerous uses are public uses. The principal uses so declared are in C.C.P. §§ 1238, 1238.1-1238.7, but there are other

declared public uses throughout the various codes. These legislative declarations, if not unreasonable, are binding upon the courts. This does not, however, preclude a person whose land is being condemned from showing at trial that, as a matter of fact, the actual use of the land will be for private rather than public purposes. Thus, the courts take a broad view of what will benefit the public; and, unless the public benefit is only incidental to the private benefit, the proposed use will be held a public use.

The research consultant suggests that Section 1238 and Sections 1238.1-1238.7 are superflucus and add little if anything to the interpretation of the public use concept. The consultant argues:

> If the condemner is given the right to condemn, then, there seems little justification for attempting to define in detail the scope of that right, particularly when such authority is contained in various and sundry enabling statutes. Moreover, if the condemner takes property for a purpose unduly divorced from a purpose for which it is concerned, a court may strike down such an usurpation of power on the grounds of lack of necessity, if it is a private condemner or a condemner presently not enjoying the conclusive presumption regarding necessity that attaches to most public condemners. As to other condemners, it is doubtful that they would take property that is not reasonably related to a purpose connected with their inherent powers or granted by enabling acts.

For further discussion, see pages 10-12 of the research study.

One difficulty we see with this suggestion is the fact that in some cases the courts have stated that the determination of the Legislature that a particular use is a public use, if not unreasonable, is binding on the courts. Perhaps if the suggestion is adopted, the statute could impose the burden on the person objecting to the taking to show that it was not a public use if the condemner is a public entity. If the condemner is not a public entity, such condemner could be given the burden (as now) of showing that the use is a public use. Under existing law, for example, a resolution of the Highway Commission that property is needed "is prima facie evidence that the property is to be acquired for a public purpose. The burden is on the defendant to show it is not for a public purpose." People v. Garden Grove Farms, 231 A.C.A. 713 (1965). As an alternative, we would require that any objection to the

taking other than the amount of compensation must be raised in the answer and separately tried by the court and if not so raised the objection is waived. Several states follow this practice.

Deleting Section 1238 and Sections 1238.1-1238.7 from the code would make unnecessary the numerous bills presented each session to make clear that a particular use is a public use or to clarify a particular provision of the statutes specifying a particular use as a public use. On the other hand, it would remove from the Legislature the power it presently has--and may wish to retain--to prevent the use of eminent domain for a use which would otherwise be recognized as a public use under the Constitution.

The staff suggests that a tentative recommendation be prepared that will repeal Section 1238 and Sections 1238.1-1238.7 and will authorize the use of the power of eminent domain for any public use, together with an allocation of the burden of proof on this issue as suggested above. (Other statutes specifying particular uses as public uses would not be affected for the time being, but will be examined at a later time.) The tentative recommendation could then be distributed for comment and the matter reconsidered in light of the comments received. We believe that the proposed provisions on burden of proof, together with the requirement of "necessity" (discussed below), provide sufficient protection in cases where some restriction should be imposed on the exercise of the power of eminent domain.

If the consultant's suggestion is not accepted, we assume that the next step will be to examine each provision specifying a particular use as a public use to determine whether it should be retained, revised, or omitted as unnecessary.

Claim that condemner does not intend to apply some or all of the property to the proposed public use. In addition to challenging the proposed use as a public use, the property owner may object to the taking of his property on the ground that the condemner does not intend to apply some or all of the property to the proposed public use. This defense raises an issue of public use and not,

as frequently but mistakenly assumed, one of necessity. State v. Chevalier, 52 Cal.2d 299, 305, 340 P.2d 598, 601-602 (1959). This distinction is important because public use is always a justiciable question, whereas--as is indicated later in this memorandum--necessity may not be.

This defense requires affirmative allegations indicating "fraud, bad faith, or abuse of discretion in the sense that the condemnor does not actually intend to use the property as it resolved to use it." State v. Chevalier, supra.

No express statutory provision is required to retain the existing law, but we suggest that a comment to the pertinent section on public use indicate that the proposed legislation will make no change in the existing law with respect to this defense.

Excess condemnation. Several California statutes authorize the condemner to acquire an entire parcel even though only a portion of the property is to be used for a public purpose. These statutes authorize what is ordinarily referred to as "excess condemnation."

We are concerned here only with cases where a taking is with intent later to sell the excess to private persons, with or without restricting the right of use in their hands. To be distinguished are cases where more land than will be occupied by the public improvement is taken with the intention of using it for public improvement at some future time. Also to be distinguished are cases where land that was taken for a public improvement is to be sold because it is determined it is no longer needed. These cases are discussed later in this memorandum. It is the intention to resell at the time of the taking that identifies a case of excess condemnation in the sense used here.

Some of the statutes that authorize or may authorize excess condemnation are listed below.

California Constitution, Article I, Section 14 1/2 (authorizes excess condemnation where property is acquired for establishing or enlarging memorial grounds, streets, squares, parkways, or reservations connected therewith)

Government Code Sections 190-196 (implements Constitutional provision--Section 192 provides that every statute authorizing the State or any city or county to acquire land for establishing or enlarging of certain improvements is to be construed as including among its purposes the acquisition of land in excess of that actually needed or used for such public purposes)

Code of Civil Procedure Section 1266 (provides that if the taking of a part would require the condemner to pay an amount "equal to the fair and reasonable value of the whole," upon adoption of a resolution providing for the taking of the whole, the taking shall be deemed necessary for the public use)

Streets and Highways Code Section 104(b) (land may be condemned for purpose of exchanging it for other real property to be used for rights of way)

Streets and Highways Code Section 104.1 (authorizes the Department of Public Works to take an entire parcel for highway purposes if the unneeded portion would be left in such condition as to be of little value to the owner or give rise to claims involving severance or other damage) See also Streets and Highways Code Sections 104.2 and 104.3.

Water Code Section 8590.1 (gives Reclamation Board the same power)

Streets and Highways Code Sections 30405, 30410 (similar provision for acquisition of property to be used for purposes of the California Toll Bridge Authority Act)

These and similar California statutes appear to be constitutional. See People v. Garden Grove Farms, 231 A.C.A. 713 (1965).

We believe that the excess condemnation statutes represent a sound policy and recommend that they be retained in substance. They permit the use of the power of excess condemnation to merge small remainders, often of odd sizes, that may be completely unsuited to building purposes. Often the cost of the whole parcel will be less than the price paid for a part (which includes the value of the part taken and the damage to the remainder). Even after this larger sum is paid, the ownership of the remainder remains in the hands of one who cannot erect a suitable structure upon it. Often it cuts off an adjacent owner from fronting on the improvement. If these remainders can be

condemned and sold to adjacent owners better buildings fronting on the improvement can be erected. This will further the purpose of the improvement and increase the taxable value of the abutting land.

The use of excess condemnation to protect a public improvement is also recognized by the various provisions listed above. City planners may desire to restrict the use of the adjacent property in the hands of private owners in order that such use will be in accord with the beauty and utility of the improvement projected. Leaving the use of the property uncontrolled permits shortsighted selfish interests to thwart the plan designed for the benefit of the community. See Comment, 18 CAL. L. REV. 284 (1930).

Whether changes are needed in the existing statutes is a question that should depend on whether any interested person or organization can make a case sufficient to convince the Commission that a change is needed. The research studies prepared by our consultant do not discuss this problem and the staff has merely presented the matter so that it could be recognized and considered in connection with the problems arising in connection with the right to take. We recommend, therefore, that in the tentative recommendation on right to take the Commission indicate its approval of Code of Civil Procedure Section 1266 (and Section 1267 which authorizes the acquisition by purchase for the purposes enumerated in Section 1266) and the Commission's intention to retain the substance of these sections unless the need for their revision can be shown. (Sections in other codes will be considered at a later time.)

Future public use. A condemnor may take property only if it has the intention of devoting the property to the public use within a reasonable period of time. See Kern Co. High School Dist. v. McDonald, 180 Cal. 7, 14, 179 Pac. 180, 184 (1919). The ordinary case where this requirement would be in

issue is where a condemnor, anticipating unknown future requirements, seeks to condemn property in areas expected to rise markedly in value. This condemnation forces the property owner to sell at the current market value and, thus, deprives him of the additional compensation he would receive had the condemnation been delayed until the property was actually needed by t e condemner.

The concept of reasonable immediacy of public use appears to be implicit in the constitutional and statutory requirement that the taking be for a public use, rather than an issue of necessity for the taking. Thus, no express statutory provision appears to be required, although we suggest that the Comment to the pertinent section indicate that no change is being made in the existing law in this respect.

The Highway Commission is expressly authorized to acquire real property for future needs. STS. & HWYS. CODE § 104.6. No reported case has been found in which the validity of this section has been questioned.

Although this problem is not discussed in the research studies, the staff recommends that Section 104.6 and like sections be retained. We do not recommend that any additional legislation be enacted unless a need for such legislation is shown by some interested person or organization. See, for example, 1965 Assembly Bill 2462 (San Francisco Bay Area Rapid Transit District--acquisition of property for future needs).

Devoting property to another use. Under existing law, property acquired by a public body in fee simple for one purpose can, within the scope of the broad discretionary powers granted to public bodies, be put to some other use. Thus, the general rule is that property acquired in fee simple does not revert to its former owner when it ceases to be used for the purpose for which it was condemned. If no longer needed, the property may be sold.

Lavine v. Jessup, 161 Cal. App.2d 59, 326 P.2d 238 (1958)(property acquired in fee simple for a courthouse site could be leased out for use as a parking lot operated for profit when courthouse was built on another site)

Newport v. City of Los Angeles, 184 Cal. App.2d 229, 7 Cal. Rptr. 497 (1960)(hearing denied)(property acquired for railroad and harbor purposes; majority of land was never used for such purposes, but was later leased for the production of oil and gas)

Arechiga v. Housing Authority, 159 Cal. App.2d 657, 660, 34 P.2d 973, 975 (1958)(hearing denied)(housing authority condemned property for low cost housing project in 1953, abandoned project about three months later, and later conveyed property to City of Los Angeles)

Rio Vista Gas Ass'n v. State, 188 Cal. App.2d 555, 10 Cal. Rptr. 559 (1961)(State acquired land for dumping debris excavated by dredging and later leased to various oil companies for the extraction of gas).

The justification for this rule is that it enables public bodies to meet changing conditions.

In connection with the Arechiga case, a provision of the 1964 Pennsylvania Eminent Domain Code is of interest:

> Section 410. Abandonment of Project. If a condemnor has condemned a fee and thereafter abandons the purpose for which the property has been condemned, the condemnor may dispose of it by sale or otherwise: Provided, however, that if the property has not been substantially improved; it may not be disposed of within three years after condemnation without first being offered to the condemnee at the same price paid to the condemnee by the condemnor. The condemnee shall be served with notice of the offer in the same manner as prescribed for the service of notices in subsection (b) of section 405 of this act, and shall have ninety days after receipt of such notice to make written acceptance thereof.

The research studies do not discuss this problem, but the problem apparently is a matter that has caused concern in California. At least two bills--Assembly Bill 2882 and Assembly Bill 3317--were introduced in 1965 to impose a requirement somewhat similar to Section 410 of the Pennsylvania code. These bills are set out on pages 13 and 14.

The problem under discussion here often arises because property is taken for future use and then never used for that purpose. An interesting possibility for consideration in connection with the problem results from the combination of the substance of Assembly Bill 2462 and Assembly Bill 3317 (both set out on pages 12 and 14).

> The authority of a local public entity to exercise the right of eminent domain includes authority to take property for future needs. No property may be taken for future needs, however, unless the governing body of the public entity has adopted by ordinance plans pursuant to which the property will be put in use, for the purposes of the public entity, within five years of the date of the proposed taking. [Based on Assembly Bill 2462]
>
> Whenever a local public entity acquires property by the exercise of eminent domain, the property shall be utilized for the purpose for which it was taken within five years of the date of judgment in the condemnation proceeding. If not so utilized, it shall be transferred back to the person from whom it was taken for a price equal to the amount of the condemnation award, if such a person requests such a transfer. [Based on Assembly Bill 3317]

An analysis of these provisions would reveal many problems that would arise. However, if the Commission believes that the provisions represent sound policy, we will prepare such an analysis.

Although we do not recommend the provisions set out above, we do recommend that the Commission seriously consider adding a general provision similar to Assembly Bill 2882 (set out on following pages) to the proposed general statute.

CALIFORNIA LEGISLATURE—1965 REGULAR (GENERAL) SESSION

ASSEMBLY BILL No. 2462

Introduced by Assemblymen Meyers and Foran

April 14, 1965

REFERRED TO COMMITTEE ON TRANSPORTATION AND COMMERCE

An act to add Section 28953.5 to the Public Utilities Code, relating to San Francisco Bay Area Rapid Transit District.

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

SECTION 1. Section 28953.5 is added to the Public Utilities Code, to read:

28953.5. The authority conferred by Section 28953 to exercise the right of eminent domain includes authority to take property for future needs. No property shall be taken for future needs, however, unless the board has adopted by ordinance plans pursuant to which the property will be put to use, for the purposes of the district, within five years of the date of the proposed taking.

LEGISLATIVE COUNSEL'S DIGEST

AB 2462, as introduced, Meyers (Trans. & C.). Eminent domain: future needs.

Adds Sec. 28953.5, P.U.C.

Provides that the authority of the San Francisco Bay Area Rapid Transit District to exercise the power of eminent domain includes the authority to take property for future needs. Provides, however, that no property shall be taken for future needs, unless the district's board of directors adopts by ordinance plans pursuant to which the property will be put to use, for the purposes of the district, within five years of the proposed taking.

CALIFORNIA LEGISLATURE—1965 REGULAR (GENERAL) SESSION

ASSEMBLY BILL No. 2882

Introduced by Assemblyman Meyers

April 21, 1965

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Section 118.5 to the Streets and Highways Code, relating to sale of land by the Department of Public Works.

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

SECTION 1. Section 118.5 is added to the Streets and Highways Code, to read:

118.5. No parcel of property acquired by eminent domain for the purposes specified in Section 104 of this code which in its entirety is found to be no longer necessary for such purposes shall be subject to public sale within five years of the date of its acquisition if it is in the same condition as it was at the time of acquisition, unless it has been offered in advance to the former owner from whom it was acquired at a price equal to the price paid to such owner by the state plus an amount equal to the taxes which would have been paid by such owner had the property not been acquired by the state. Upon completion of such sale to the former owner the department shall transmit to the county auditor of the county in which the property is located that portion of the price which represents taxes which would have been paid had the property remained in private ownership.

When such land is sold to a person other than the former owner, a recital in the deed to the effect that the provisions of this section have been complied with shall be deemed prima facie evidence that such is the case, and conclusive evidence thereof in favor of a bona fide purchaser or encumbrancer for value.

LEGISLATIVE COUNSEL'S DIGEST

AB 2882, as introduced, Meyers (Jud.). Sale of land.

Adds Sec. 118.5, S. & H.C.

Prohibits the Department of Public Works from offering for public sale any parcel of property acquired by eminent domain for highway or other purposes which in its entirety is found to be no longer necessary for such purposes within five years of the date of its acquisition unless it has been offered to its former owner at a prescribed price.

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CALIFORNIA LEGISLATURE—1965 REGULAR (GENERAL) SESSION

ASSEMBLY BILL No. 3317

Introduced by Assemblyman Meyers

April 23, 1965

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Section 1241.5 to the Code of Civil Procedure, relating to eminent domain.

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

SECTION 1. Section 1241.5 is added to the Code of Civil Procedure, to read:

1241.5. Whenever any local government agency acquires property by exercise of the power of eminent domain, the property shall be utilized for the purpose for which it was taken within five years of the date of judgment in the condemnation proceeding. If not so utilized, it shall be transferred back to the person from whom it was taken for a price equal to the amount of the condemnation award, if such a person requests such a transfer.

LEGISLATIVE COUNSEL'S DIGEST

AB 3317, as introduced, Meyers (Jud.). Eminent domain.

Adds Sec. 1241.5, C.C.P.

Requires local government agencies which acquire property by eminent domain to use the property for the purpose for which it was taken within five years, or make the property available to the owner for the same amount for which it was taken.

Condemnation for a more necessary public use. As a general rule, property already appropriated to a public use may be taken only for a more necessary public use. CCP §§ 1240(3), 1241(3). The term "property" for the purposes of Code of Civil Procedure Sections 1240(3) and 1241(3) includes land belonging to the state, a county, or city.

Appropriation to a public use is not synonymous with ownership by a public entity. Thus, the Code of Civil Procedure sections expressly contemplate that property may be appropriated to a public use even though it is owned by a private individual or corporation. Conversely, ownership of property by a public entity does not necessarily mean that it is appropriated to a public use. "Appropriation" is synonymous with "devoted to" so that "appropration to" a public use means "devoted to" such use. But appropriation to or devotion to a public use does not necessarily mean that the property must actually be in use for a public purpose. Property acquired by a condemner for a public use and "held in reasonable anticipation of its future needs, with a bona fide intention of using it for such purpose within a reasonable time" is appropriated to a public use.

For more detail, see California Condemnation Practice, pp. 142-148. The above material is taken from this source.

The consultant does not discuss this problem in any detail, but he recommends (see attached study at page 21) that no change be made in the existing law concerning condemnation for a more necessary public use. If this recommendation is accepted, we will include the substance of the pertinent provisions from the title on eminent domain in the tentative recommendation and bring to your attention any deficiencies we discover upon a careful examination of these provisions. We plan to examine the pertinent provisions found in other codes at a later time.

NECESSITY

Necessity is not a constitutional limitation on the exercise of the right of eminent domain. The Legislature has, however, limited the exercise of the right of condemnation by restricting the taking of property in cases where the property "is necessary to such ['authorized by law'] use" (CCP § 1241(2)), and the taking of land or rights of way to cases where the proposed public use is located in a manner which will be "most compatible with the greatest public good and least private injury" (CCP § 1242 on land and § 1240(6) on rights of way). If the property to be taken is not land or rights of way, the Legislature has not limited the right of condemnation by requiring a proper location of the proposed public use.

Necessity has three aspects: (1) the necessity for making the proposed public improvement, (2) the necessity for taking particular property or a particular interest in property (CCP § 1241(2)), and (3) the proper location of the public improvement (CCP §§ 1242, 1240(6)). See State v. Chevalier, 52 Cal.2d 299, 307, 340 P.2d 598, 603 (1959).

The first aspect of necessity--the condemnor's wisdom in deciding to make the particular public improvement as a necessary public improvement--is a political or legislative question and is not open to judicial review.

The meaning and applicability of the second aspect--the necessity for taking particular property or a particular interest--is unclear because on one side the issue merges into the issue of public use and on the other side into the issue of proper location. See California Condemnation Practice, pp. 151-153.

The third aspect of necessity--proper location of the proposed public improvement--involves proper location and the necessity for taking particular property and these "are frequently termed the question of necessity." State

v. Chevalier, 52 Cal.2d 299, 304, 340 P.2d 598, 601 (1959).

This issue is essentially a comparison between two or more sites in which the condemner has chosen the property owner's site, the property owner wants the condemner to choose another site, and each claims that his proposed site is most compatible with the greatest public good and the least private injury.

Since the Constitution does not require that the proposed public improvement be necessary, or that the property be necessary to that proposed public improvement, or that the public improvement be properly located, these questions are not constitutional limitations upon the exercise of the power of eminent domain. Therefore, unless the Legislature imposes these limitations by statute, these three questions are within the Legislature's absolute and unlimited control over the exercise of the right of condemnation and, as such, are questions of a political or legislative nature not subject to judicial review. State v. Chevalier, 52 Cal.2d 299, 304-306, 340 P.2d 598, 601-602 (1959).

In 1872, the Legislature limited the exercise of the right of condemnation by enacting CCP §§ 1241(2), 1242, and 1240(6). These statutes make "necessary to such ['authorized by law'] use" a judicial question in the taking of all property and location "in a manner . . . most compatible with the greatest public good and least private injury" a judicial question in the taking of land or rights of way. The 1872 statutes did not make the necessity of the proposed public improvement a judicial question. Therefore, as previously indicated, this question remains a legislative question not subject to judicial review.

The Legislature has, however, returned necessity and proper location to non-justiciable questions in many cases by express statutory provisions, some of which are indicated below.

General provisions.

Code of Civil Procedure Section 1241(2) (when the legislative body of a county, city, sanitary district, irrigation district, transit district, rapid transit district, public utility district, county sanitation district, school district, or water district, by resolution or ordinance adopted by vote of two-thirds of all its members, finds and determines that the "public interest and necessity require" the proposed public improvement and that the particular property "is necessary therefore, such resolution or ordinance shall be conclusive evidence" of (1) the necessity of the proposed improvement, (2) the necessity of the particular property to the proposed improvement, and (3) the proper location of the proposed improvement if the taking of property is within the legislative body's territorial limits)

Code of Civil Procedure Section 1239(2) (the resolution of a reclamation board finding that the taking of either a fee simple or an easement is necessary for its purposes is conclusive evidence that a taking of the fee simple or easement is necessary)

Code of Civil Procedure Section 1239(3) (the resolutions of a county, city, mutual water system, municipal water district "or other political subdivisions, regardless of the use," determining that the taking of a fee simple is necessary, are conclusive evidence of the necessity for the taking of the fee simple.

Special provisions applicable to particular agencies.

California Condemnation Practice, pp. 157-160, indicates that the declarations, ordinances or resolutions of necessity of the following public agencies are conclusive evidence of (1) necessity of the proposed public improvement, (2) necessity of the particular property to the proposed public improvement, and (3) proper location of the proposed public improvement:

Central Valley Project

Highway Commission

Housing Commission (appears to be conclusive evidence only of (1) and (2))

Joint Highway District

L. A. Metropolitan Authority

Park and Playground Act of 1909 (appears to be conclusive evidence only of (1))

Parking District

Reclamation Board

Recreational Harbor District

Regents of University of California

San Mateo County Flood Control District

State Public Works Board

Street Improvement Act of 1911 (conclusive evidence only of "necessity")

Street Opening Act of 1903 (appears to be conclusive evidence of only (1) and (3))

Toll Bridge Authority

In the enabling acts of many public agencies, the Legislature has granted to their boards the same powers and rights with respect to the taking of property for public use as are conferred by general law on the legislative body of a county or a city. Since resolutions of necessity by the legislative bodies of counties and cities are conclusive evidence of all three aspects of necessity under the proviso to Code of Civil Procedure Section 1241(2), it appears that the resolutions of these public agencies will be conclusive evidence of all three aspects of necessity in the same manner and to the same extent under the proviso to Section 1241(2). The following agencies are listed in California Condemnation Practice as being in this class:

Water Conservation and Flood Control Agencies and Districts:

American River
Antelope Valley etc.
Iassen-Modoc County
Mendocino County
Morrison Creek
Plumas County

County Water Authority Act

Harbor Improvement District

Joint Municipal Sewage Disposition District

Municipal Utilities District

Port District

Regional Park District

Vallejo

"Prima facie evidence" provisions.

There are also a number of public agencies whose resolutions are declared to be prima facie evidence of the necessity for taking the particular interest in the property. Those listed in California Condemnation Practice are:

Adjutant General (armory purposes)

State Park Commission

Sacramento County Water Agency

Special Water, Flood Control, and Water Conservation Districts and Agencies:

Alameda County
Amador County
Contra Costa County (three districts)
Del Norte County
El Dorado County
Humboldt County
Lake County
Los Angeles County
Marin County
Mariposa County
Mojave County
Napa County
Placer County
Riverside County
Sacramento County
San Benito County
San Joaquin County
San Luis Obispo County
San Mateo County
Santa Barbara County (2 districts)
Santa Clara County
Shasta County
Solano County
Sutter County
Ventura County
Yuba-Bear R. Basin
Yuba County

It is thus apparent that a great many condemners have the benefit of the conclusive presumption regarding necessity. However, certain public condemners have only a prima facie presumption or none at all. The consultant recommends that the conclusive presumption of necessity be extended to all public condemners. He notes that the majority position throughout the country is that necessity is not open to judicial review. It is essentially a legislative question that is more appropriately determined by the responsible public officials than by the courts. Moreover, making necessity a judicial question opens the door to endless litigation, and perhaps conflicting determinations on the question of "necessity" in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement. On the other hand, the Legislature now has--and may desire to retain--the right to determine when the determination of necessity should be subject to court review. See, for example, 1965 Assembly Bill 1440 (Highway Commission resolutions as creating rebuttable rather than conclusive presumptions).

The staff would, however, place one limitation--consistent with the existing statutes--on the conclusive presumption of necessity: The conclusive presumption would apply only if the property to be taken is within the limits of the public entity taking the property. This is a sound limitation because only in this case can the persons whose property is being taken have recourse to their own legislative body--the governing board of the public entity--to protest the taking or to remove those public officers who abuse their power to take property by eminent domain. Thus, as now, there would be no presumption where the property is located outside the limits of the condemning entity and, in such case, the entity would have to establish (a) that such property or property interest is necessary for the public improvement and (b) that the public improvement is planned or located in the manner which will be most compatible with the greatest public good and the least private injury. (Note

that there is no requirement of showing the public necessity of such proposed public improvement.) In the case of state agencies this limitation would not apply.

While it is recommended that this advantage be extended to all public condemners, the "right" should not be extended to private condemners or privately owned public utilities as there is, it would seem, less of a check and balance regarding their actions and, therefore, less protection afforded to the public. As to private condemners and privately owned public utilities, it is therefore recommended that they have the burden of showing not only public use but also (1) the public necessity of such proposed public utility or public improvement, (2) that such property or property interest is necessary therefor, and (3) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good and the least private injury. These three requirements apparently apply when a private person condemns property under existing law. Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955).

CONDEMNATION BY PRIVATE INDIVIDUAL AND PRIVATE CORPORATIONS

Government Code Section 184 provides that the State may "authorize others to acquire title to property for public use. . . ." The "others" who have been so authorized are designated by Civil Code Section 1001. Under Section 1001, "any person" may acquire private property for the uses specified in Code of Civil Procedure Section 1238. He is deemed "an agent of the state" or a "person in charge of such use," and may be a private citizen (Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955); Note, 44 CALIF. L. REV. 785 (1956)) or a corporation, public or private, domestic or foreign (City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604 (1891)).

A private party must allege and prove that he is authorized to devote the property to the use in question. Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083 (1902). For example, the court will take judicial notice of the fact that a private citizen is not authorized by law to acquire private property for a school district. State v. Cken, 159 Cal. App.2d 456, 324 P.2d 58 (1958).

A private party must, moreover, prove his right and justification for the proposed condemnation with a stronger showing than is necessary if the condemner is a public or quasi-public entity. He must, as previously indicated, establish the three aspects of necessity.

This problem is not discussed in any detail in the research studies, but the staff recommends that the existing law be retained: A private person or corporation should be permitted to condemn property for a public use upon a showing of the public necessity of such proposed public improvement, that the property or property interest is necessary therefore and that such public improvement is planned or located in the manner which will be most compatible with the greatest public good and the least private injury.

ESTATES IN LAND SUBJECT TO CONDEMNATION

An elaborate set of rules is contained in Code of Civil Procedure Section 1239, purporting to be "a classification of the estates and rights of land subject to be taken for public use." Except as otherwise provided by statute, Section 1239 provides that an easement only rather than a fee simple may be taken. Highland Realty Co. v. City of San Rafael, 46 Cal.2d 669, 298 P.2d 15 (1956). The statutory exceptions are so extensive, however, that they come close to abrogating the general rule. The major exceptions are:

> Code of Civil Procedure 1239(1)(authorizes a condemnor to take a fee simple for the following uses: public buildings or grounds, permanent buildings, reservoirs, dams, depositories for mine tailings, and protection of water-bearing land from drought)

Code of Civil Procedure 1239(2), (4)(upon adoption of a resolution finding that the taking of a fee is necessary a municipal corporation is authorized to take a fee for road, railroad, or utility purposes; a reclamation board is authorized to take a fee for its purposes; and a county, city, mutual water system, municipal water district "or other political subdivision, regardless of the use" is authorized to take a fee simple)

Streets and Highways Code Section 104 (Highway Commission is authorized to take a fee that it considers necessary for highway and related purposes)

The question is presented as to whether the limitation of public use is not sufficient limitation on the estates in land subject to condemnation. In other words, should not the limitation of Section 1239 be repealed and any property or interest in property (including a right of entry on and occupation of lands and the right to take therefrom such earth, gravel, stores, trees, and timber as may be necessary for a public use--CCP § 1239 (3)) be subject to condemnation for a public use. This problem is not discussed in the research studies, but the staff believes that the requirement of necessity will be a sufficient limitation on the taking of more of an interest than is necessary where the taking is by a private person or corporation or by a public entity that is taking outside of its territorial limits.

TYPES OF PROPERTY THAT MAY BE CONDEMNED

Code of Civil Procedure Section 1240 specifies generally what kinds of public and private property may be taken under eminent domain. The kinds of property specified in Section 1240 are:

(1) Real Property belonging to any person. CCP 1240(1)

(2) All classes of private property not enumerated when such taking is authorized by law. 1240(7)

(3) State property. 1240(2), (8)

(4) County and municipal property. 1240(2), (3)

(5) Property already appropriated to public use. 1240(3)-(5)

(6) Irrigation district property for limited use in common. 1240(4) See also 1241(3).

(7) Rights of way for purposes mentioned in Section 1238. 1240(6) See also 1247a and 1240(3).

(8) Corporate property and public utility franchises. 1240(5)

(9) Public Utility property appropriated to use of county or municipality. 1240(3)

With regard to certain types of property, judicial decisions determine that they may be condemned. E.g., Northern Light and Power Co. v. Stacher, 13 Cal. App. 404, 109 Pac. 896 (1910)(water flowing over land is real property and may be condemned for any public use specified in CCP § 1238).

Certain code provisions, including Section 1240, limit the exercise of the power of eminent domain with respect to certain types of property. E.g., Welfare and Institutions Code Section 6503 (no public street or road for railway or other purposes, except hospital use, shall be opened through the lands of any state hospital unless the Legislature consents by special enactment).

We recommend that the proposed statute contain a specification of the types of property that may be taken under eminent domain along the lines set out in Sections 1240 and 1241. We believe that it is desirable to indicate the extent to which property of public entities, whether or not appropriated to public use, can be taken and to retain the provisions dealing with corporate property, public utility franchises, and the like. Since this problem is not discussed in our research studies, the only decision to be made now is that the Commission will tentatively take this approach. If this approach is taken, it will be necessary to examine in more detail each provision of Section 1240 and other statutes that specify what kinds of public and private property may be taken under eminent domain and to determine what changes if any should be made in the existing law.

OTHER LIMITATIONS ON THE RIGHT TO TAKE

There are a number of other existing statutes that limit the right to take property. For example, Article 3 (commencing with Section 11590) of Chapter 6 of Part 3 of Division 6 of the Water Code provides that the Water Project Authority for the Central Valley Project may not:

> take or destroy the whole or any part of the line or plant of any common carrier railroad, other public utility, or State agency, or the appurtenances thereof, unless and until the authority has provided and substituted for the facilities to be taken or destroyed new facilities of like character and at least equal in usefulness with suitable adjustments for any increase or decrease in the cost of operating and maintenance thereof, or unless and until the taking or destruction has been permitted by agreement executed between the authority and the common carrier, public utility, or state agency.

There have been a number of attempts to revise this procedure but, because of the complex nature of the problems involved and the lack of an adequate study, the Legislature has not solved the problem. The most recent attempt at revision was made in 1965 and may be studied in the interim. See 1965 Assembly Bill 513 for an example of an attempted revision.

There are other suggested changes in the right to take that have been considered in California or are found in the laws of other states. For example, 1965 Assembly Bill 3012 would have added a new Section 1240.5 to the Code of Civil Procedure to read:

> 1240.5. In any case in which condemnation of a portion of a parcel of land on which a business is being operated would render the remainder unusable by the condemnee for the business purpose for which he has been using such land, the entire parcel must be condemned, and the condemnee must be compensated for the taking of such entire parcel.

The 1959 Wisconsin statute has an interesting limitation on the right to take: The condemner is required to make a "jurisdictional offer" to the condemnee and the condemnee is allowed a specified time within which to

consider the offer before the condemnation proceeding may be commenced. The condemnee is permitted to examine the appraisal report that is the basis of the offer. Statutory costs are awarded to the condemnee if he recovers more than the amount offered and to the condemnor if the amount recovered is less than the amount offered.

We merely mention these examples here to demonstrate that there are other sections of existing statutes that bear on the problem of the right to take and that there are additional provisions that might be added to qualify this right. Since these problems are not discussed in the research studies prepared by our consultant, we plan to examine the California statutes to identify the pertinent existing provisions and to examine recent legislative proposals in California and the existing statutes of other states. We will then present recommendations as to what, if any, changes or additions should be made in our law that have not been previously identified in this memorandum

Respectfully submitted,

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Executive Secretary