

## Memorandum 70-8

Subject: Study 36.20(1) - Condemnation (The Right to Take--The Legislatively Declared "Public Uses")

THE LEGISLATIVELY DECLARED "PUBLIC USES"--CODE OF CIVIL PROCEDURE SECTION 1238

## BACKGROUND

Under the California statutory scheme, the power of eminent domain may be exercised only for the public uses which the Legislature has specified. Section 184 of the Government Code provides that the state may "acquire or authorize others to acquire title to property for public use in the cases and in the mode provided by law." The basic authorizing statutes are Civil Code Section 1001 and Code of Civil Procedure Section 1238.

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 7, Part 3, 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.

Section 1238 of the Code of Civil Procedure lists, in 22 subdivisions, a great number of public uses. The section provides:

1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Fortifications, magazines, arsenals, Navy yards, Navy and Army stations, lighthouses, range and beacon lights, coast surveys, and all other public uses authorized by the Government of the United States.

2. Public buildings and grounds for use of a State, or any state institution, or any institution within the State of California which is exempt from taxation under the provisions of Section 1a, of Article XIII of the Constitution of the State of California, and all other public uses authorized by the Legislature of the State of California.

3. Any public utility, and public buildings and grounds, for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district, ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other character of property necessary for conducting or storing or distributing water for the use of any county, incorporated city, or city and county, village or town or municipal water district, or the inhabitants thereof, or any state institution, or necessary for the proper development and control of such use of said water, either at the time of the taking of said property, or for the future proper development and control thereof, or for draining any county, incorporated city, or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels; roads, highways, boulevards, streets and alleys; public mooring places for watercraft; public parks, including parks and other places covered by water, and all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, warehouses, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads; paths and roads either on the surface, elevated, or depressed, for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric, and horse railroads, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable, and water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only, and lands with all wells and water therein adjacent to the lands of any municipality or of any corporation, or person supplying water to the public or to any neighborhood or community for domestic use or irrigation.

5. Roads, tunnels, ditches, flumes, pipes, aerial and surface tramways and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

6. Byroads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes.

7. Telegraph, telephone, radio and wireless lines, systems and plants.

8. Sewerage of any incorporated city, city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than 10 families, or of any buildings belonging to the State, or to any college or university, also the connection of private residences and other buildings, through other property, with the mains of an established sewer system in any such city, city and county, town or village.

9. Roads for transportation by traction engines or road locomotives.

10. Oil pipelines.

11. Railroads, roads and flumes for quarrying, logging or lumbering purposes.

12. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages, towns, or irrigation districts; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations; together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

13. Electric power lines, electric heat lines, electric light lines, electric light, heat and power lines, and works or plants, lands, buildings or rights of any character in water, or any other character of property necessary for generation, transmission or distribution of electricity for the purpose of furnishing or supplying electric light, heat or power to any county, city and county or incorporated city or town, or irrigation district, or the inhabitants thereof, or necessary for the proper development and control of such use of such electricity, either at the time of the taking of said property, or for the future proper development and control thereof.

14. Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof.

15. The plants, or any part thereof, or any record therein of all persons, firms or corporations heretofore, now or hereafter engaged in the business of searching public records, or publishing public records or insuring or guaranteeing titles to real property, including all copies of, and all abstracts or memoranda taken from public records, which are owned by, or in the possession of, such persons, firms or corporations or which are used by them in their respective businesses; provided, however, that the right of eminent domain in behalf of the public uses mentioned in this subdivision may be exercised only for the purposes of restoring or replacing, in whole or in part, public records, or the substance of public records, of any city, city and county, county or other municipality, which records have been, or may hereafter be, lost or destroyed by conflagration or other public calamity; and provided further, that such right shall be exercised only by the city, city and county, county or municipality whose records, or part of whose records, have been, or may be, so lost or destroyed.

16. Expositions or fairs in aid of which the granting of public moneys or other things of value has been authorized by the Constitution.

17. Works or plants for supplying gas, heat, refrigeration or power to any county, city and county, or incorporated city or town, or irrigation district, or the inhabitants thereof, together with lands, buildings, and all other improvements in or upon which to erect, install, place, maintain, use or operate machinery, appliances, works and plants for the purpose of generating, transmitting and distributing the same and rights of any nature in water, or property of any character necessary for the purpose of generating, transmitting and distributing the same, or necessary for the proper development and control of such use of such gas, heat, refrigeration, or power, either at the time of the taking of said property, or for the future proper development and control thereof.

18. Standing trees and ground necessary for the support and maintenance thereof, along the course of any highway, within a maximum distance of 300 feet on each side of the center thereof; and ground for the culture and growth of trees along the course of any highway, within the maximum distance of 300 feet on each side of the center thereof.

19. Propagation, rearing, planting, distribution, protection or conservation of fish.

20. Airports for the landing and taking off of aircraft, and for the construction and maintenance of hangars, mooring masts, flying fields, signal lights and radio equipment.

21. Any work or undertaking of a city, county, or city and county, housing authority or commission, or other political subdivision or public body of the State: (a) to demolish, clear or remove buildings from any area which is detrimental to the safety, health and morals of the people by reason of the dilapidation, overcrowding, faulty arrangement or design, lack of ventilation or sanitary facilities of the dwellings predominating in such areas; or (b) to provide dwellings, apartments

or other living accommodations for persons or families who lack the amount of income which is necessary (as determined by the body engaging in said work or undertaking) to enable them to live in decent, safe and sanitary dwellings without overcrowding.

22. Terminal facilities, lands, or structures for the receipt, transfer or delivery of passengers or property by any common carrier operating upon any public highway in this State between fixed termini or over a regular route, or for other terminal facilities of any such carrier.

The very broad grant of condemnation authority under Sections 1001 and 1238 is subject to limitations. First, notwithstanding that the generic use is listed in Section 1238, the question whether, under the circumstances of the particular case, the use will be "public" is open to review by the courts. However, while a declaration of public use by the Legislature is not conclusive upon the courts, it is entitled to great weight; and the courts will not interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation. Secnd, primarily in cases where the condemnor is a privately owned public utility, a public entity seeking to take property outside its territorial limits, or a private individual, the "necessity" for the taking is a judicial question. Thus, in these cases, the judge determines whether the condemnor has established the necessity for making the particular improvement, for adopting the particular plan therefor, and for taking the particular property (rather than other property). Ordinarily, however, in the case of a public entity, the resolution authorizing the taking is conclusive (or "prima facie" evidence) on the issue of necessity. In cases involving private persons, the "public use" and "necessity" limitations have for all practical purposes so limited the use of condemnation that the section has rarely been invoked. But see Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955)(taking by private individual of sewer easement).

When Section 1238 was enacted in 1872, the drafters listed in that section all the uses for which property could then be taken by eminent domain. The section consisted of six subdivisions. Generally speaking, subdivision 1 authorized takings for federal purposes; subdivision 2, takings for state purposes; subdivision 3, takings for city, county, and school district purposes; subdivision 4, takings for public utility purposes; subdivision 5, takings for mining purposes; and subdivision 6, takings for byroads leading from highways for residences and farms. Subdivisions 5 and 6 appear to have been intended to apply primarily, if not exclusively, to private individuals, partnerships, and corporations. Section 1238 has been amended 24 times and now has 22 subdivisions. The proper construction and effect of the original provisions and the various phrases inserted by amendment is often difficult, if not impossible, to determine.

The statutory approach taken in Civil Code Section 1001 and Code of Civil Procedure Section 1238 is anomalous in several respects:

1. Section 1238 is no longer a complete designation of the public uses for which property may be acquired by eminent domain. Although Civil Code Section 1001 refers only to Section 1238, the Legislature has lost sight of the 1872 scheme and has added a series of public use sections (e.g., Sections 1238.1-1238.7) to the eminent domain title and has enacted hundreds of sections--not included in the eminent domain title--that authorize the exercise of the power of eminent domain. Often these provisions overlap, duplicate, or are inconsistent with the provisions of Section 1238. For example, as the functions of cities and counties

have expanded, their authority to condemn property for particular purposes has been specified in numerous statutes outside the Code of Civil Procedure. Moreover, as enacted in 1872, Section 1238 granted the power of eminent domain only to school districts--the single type of special district in existence at that time. Since then a great number of special or single purpose districts have been created and, in almost every case, the district's condemnation power is found in the statute authorizing its creation. Accordingly, it has become clear that the attempt to state the various public uses in Section 1238 has failed. It would be neither feasible nor desirable to attempt to collect in a comprehensive eminent domain statute all the designated public uses found in the various codes.

2. Section 1238 is unclear in many instances as to the entities or persons that are entitled to exercise the power of eminent domain for a designated public use. Frequently, amendments to Section 1238 have specified uses or purposes without indicating the persons entitled to take property for that use or purpose. For example, to which persons or entities does subdivision 19--added by amendment in 1935--apply. Subdivision 19 provides that one of the public uses in behalf of which the power of eminent domain may be exercised is:

19. Propagation, rearing, planting, distribution, protection or conservation of fish.

Public entities rarely need to rely upon Section 1238 because adequate condemnation authority will almost always be found in other statutes. However, except for railroads, Section 1238 is the sole declaration of public use upon which public utilities can rely. In addition, the extent to which private individuals may exercise the power of eminent domain is determined

by Section 1001 and Section 1238, and, as a result, the law is unclear. Several cases have interpreted Section 1001 to require not only that the person seeking to take the property propose to devote it to one of the public uses provided in Section 1238 but also that he be authorized to devote it to such use or be authorized to administer or have "charge of such use." E.g., Beveridge v. Lewis, 137 Cal. 619, 70 P. 1083 (1902)(property cannot be condemned for railroad right of way by private individual who is not engaged in and does not plan to build the railway but merely seeks to acquire the property to transfer it to a railway company engaged in building a railway). In a later case, however, this purported limitation did not preclude a private individual from condemning an easement over his neighbor's land for a sewer connection to an apartment building. Noting that subdivision 8 of Section 1238 declares as a public use the taking for "the connection of private residences and other buildings, through other property, with the mains of an established sewer system," the court authorized the taking, subject to a showing of "strict necessity," without discussing whether the plaintiff was "a person in charge of such use." Linggi v. Carovotti, 45 Cal.2d 20, 286 P.2d 15 (1955).

The failure of Section 1238 to make clear the persons entitled to take property for particular uses has understandably led the Legislature to enact independent, more specific statutes. As a result, Sections 1001 and 1238 have little practical application to public entities and do little to clarify the condemnation authority of privately owned public utilities and private individuals, partnerships, and corporations.

3. The meaning of Section 1238 has become difficult, if not impossible, to determine because many of the amendments have listed types of property that may be taken instead of the public uses for which property may be taken. As one writer has pointed out:

This section, as originally enacted, specified, as declared by its title and its opening paragraph, only the uses or purposes for which, or the objects for the construction of which the right might be exercised. It did not purport to specify the nature or character of the property which might be taken, that being specified in section 1240. But since its original enactment it has been repeatedly amended by the insertion of many phrases with the apparent purpose of attempting to specify the character of property which may be taken. These amendments have been ineptly made, through a failure to appreciate that the section refers only to uses. They should have been added to section 1240, if in fact it was necessary to add to that section to give the right to condemn such property. In its present form this section in parts is difficult, if not impossible to construe, as witness the following:

". . . the right of eminent domain may be exercised on behalf of the following public uses: . . .

"13. . . lands, buildings or rights of any character in water or any other character of property necessary for generation, transmission or distribution of electricity."

It is apparent that lands, water rights and property are neither uses nor purposes, nor objects for the construction of which the right of eminent domain may be invoked. They are intended to be descriptive of the things, which may be taken by the exercise of that right. [Note, 16 Cal. L. Rev. 105, 106 ( ).]

The character of the property that may be taken by eminent domain is a complex problem that will be considered separately in the course of the Commission's study of the right to take. It is sufficient to note here that Section 1238 serves to confuse, rather than clarify, the law in this respect.

4. Portions of Section 1238 have been substantially limited in application by judicial decisions but the section does not reflect these limitations.

For example, subdivision (5) was apparently intended to permit private mine owners to condemn for roads, tunnels, ditches, flumes, pipes, aerial and surface tramways, and dumping places for working mines, as well as for outlets, natural or otherwise, for the flow, deposit or conduct or tailings or refuse from mines. Although some other Western states have held that similar provisions grant private individuals the right to condemn property for these purposes, the California courts have taken the contrary view.

5. Some portions of Section 1238 are unnecessary or obsolete. For example, subdivision (1) deals with takings by the federal government and has become unnecessary since the federal government now takes under authority of federal law. Other provisions, such as those referring to "horse railroads," "roads for transportation by traction engines or road locomotives," are obsolete.

Although California originally purported to state all the public uses in the general eminent domain statute, it is apparent that this is no longer the California statutory scheme. Sections 1001 and 1238 are, for all practical purposes, significant only where the taking is by a privately owned public utility or private individual or association. Only rarely are these sections of use to public entities and, in these rare cases, there is some question as whether it is desirable to permit the public entity to use the sections.

It appears that 10 states originally adopted the California statute on eminent domain, including the specification of public uses. These states, like California, apparently have failed to keep current the specification of public uses. The other states never took the California approach; rather, they have delineated the condemnation power in statutes dealing with

particular entities or public functions. This, too, is the actual statutory scheme in California at the present time. The states that have recently enacted comprehensive eminent domain statutes make no attempt in the comprehensive statute to state the public uses for which property may be taken. With the exception of Wisconsin, they merely provide the procedure for taking property and for determining just compensation in cases where the person seeking to acquire the property has separate statutory authorization to condemn. Generally speaking, the Wisconsin statute (Wis. Stat. § 32.02) permits local entities, including districts, to condemn "for any lawful purpose" but provides in some detail the uses for which privately owned public utilities may condemn property. In addition, the statute lists one instance where taking by a private person apparently is permitted: "Any person operating a plant which creates waste material which, if released without treatment would cause stream pollution, for the location of treatment facilities."

#### RECOMMENDATIONS

A significant improvement that can be achieved in drafting a comprehensive eminent domain statute is the elimination of the existing uncertainty as to who can exercise the power of eminent domain and for what purposes. The disposition of Section 1238 of the Code of Civil Procedure presents a substantial problem to the Commission because the meaning of this Section is unclear and it would be unthinkable to retain the section in any comprehensive revision of the California eminent domain law.

The staff makes the following recommendations as to the tentative approach that should be taken in dealing with the "declared public uses" problem. Each of these matters will be covered in more detail in later memoranda. The

purpose of outlining the suggested approach at this time is to give you a bird's-eye view of what the staff believes we should attempt to accomplish in our work on this aspect of eminent domain law.

Specific recommendations

1. Government Code Section 184, which provides that the state may "acquire or authorize others to acquire title to property for public use in the cases and in the mode provided by law," should be repealed. This section serves no purpose.

2. Civil Code Section 1001 and Code of Civil Procedure Section 1238 should be repealed and replaced by a series of clear statements of the condemnation authority in appropriate places in the various codes. This will require that Section 1238 be examined in detail and that appropriate dispositions of its provisions be made. This would not be as substantial an undertaking as one might expect merely from referring to Section 1238 and noting the many different public uses listed in that section and the failure of the section to indicate which entities and persons can take for such uses.

The principal reason that it is feasible to "distribute" the taking power conferred by Section 1238 appropriately is that it is readily possible to identify every type of public entity in California that has a capacity to acquire or hold property. In this connection, for example, the proliferation of "district laws" presents a problem that is more apparent than real. Concededly, a great number of different types of special purpose districts have been created pursuant to codified and uncodified laws. However, very few, if any, of these districts depend on Section 1238 for their condemnation authority. Over 140 general or special district laws provide for condemnation powers that are equivalent to authorizations to "take any property necessary to carry out any of the objects or purposes of the district." Other districts

with condemnation powers containing specific purposes are phrased so broadly as to be, in effect, authorizations to condemn for any purpose of the district. Other acts grant unrestricted condemnation power in terms such as "acquire by . . . condemnation . . . any interest in real or personal property." A relatively few district acts grant condemnation powers by specifying certain purposes; these acts will need to be examined to determine whether these districts have adequate condemnation authority in view of the repeal of Section 1238. There are a relatively few district acts that grant the authority to "purchase or otherwise acquire" property but do not expressly grant the power of condemnation. These acts will need to be examined and revised to make clear whether these districts have condemnation authority. Finally, there are some district acts that expressly provide that the district does not have the power of eminent domain or that do not appear to authorize condemnation by the district. These acts should be revised to make any necessary clarifying changes.

School districts present no significant problem. Although these districts have no statute other than Section 1238 granting them condemnation authority, Section 1238 grants them unlimited condemnation authority, and this authority can be codified in an appropriate provision to be added to the Education Code.

With respect to the state itself, it does not appear necessary to provide any additional condemnation authority if Section 1238 is repealed. It is almost assuredly the case that no state agency, officer, commission, or board derives any taking authority from the generalities of Section 1238.

Cities and counties will present a problem if Section 1238 is repealed. Much of the condemnation authority contained in Section 1238 apparently was intended to authorize condemnation by cities, counties, or both. It is true that the condemnation authority given cities and counties by other statutes

is substantially broader and overlaps and duplicates the authority in Section 1238. Nevertheless, there are provisions in Section 1238 that have been and can be used at the present time by cities and counties. The easy solution to the problem, and the one tentatively recommended by the staff, is to grant cities and counties a general condemnation authority similar to the great majority of other governmental entities--that is, authority to acquire property by eminent domain that is necessary to carry out any of the objects, functions, or purposes of the city or county. This is not to say that a particular taking could be justified by a recital that the property is necessary for the general, but unspecified, purposes of the city or county. The requirement of existing law that a particular improvement or project be pleaded and proved would be retained. Moreover, any such grant of authority should be made subject to any limitations on the condemnation authority imposed by special statutes dealing with particular types of takings. This would preserve, for example, the requirement that a hearing be held in certain types of cases (especially those arising under the "improvement acts") before the resolution to take is adopted. We will prepare a memorandum to indicate--to the extent we can determine--whether the enactment of such a provision would change existing law. If this approach is taken, it will be relatively easy to dispose of Section 1238. On the other hand, we could attempt to ascertain what provisions of Section 1238 apply to cities and counties and codify them in a series of provisions in various codes.

3. The other provisions in the title on eminent domain that declare particular uses to be public uses (i.e., Sections 1238.1-1238.7 and other provisions) should be repealed and (where appropriate) codified in the appropriate codes.

4. A clear statement of the extent of the right of a private individual to exercise the power of eminent domain will also be necessary if Section 1238 is to be repealed.

5. A clear statement of the right of the various privately owned public utilities to exercise the right of eminent domain will be necessary if Section 1238 is to be repealed.

6. The provision of subdivision (4) relating to mutual water companies is the condemnation authority of these companies and should be recodified in an appropriate place.

7. Any provisions of Section 1238 and related sections that clarify the law in doubtful areas should be recodified in appropriate codes.

8. The general policy to follow in carrying out the above recommendations should be to codify existing law. Changes in existing law should be made only to the extent they can clearly be justified. It should be recognized, however, that the existing law is difficult, if not impossible, to determine in many instances.

Respectfully submitted,

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Executive Secretary

Memorandum 70-8

EXHIBIT I

COMPREHENSIVE STATUTE - § 300  
Staff recommendation

The Right to Take

§ 300. Eminent domain may be exercised only where authorized by statute

300. 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.