

#36.23

3/25/70

Memorandum 70-39

Subject: Study 36.23 - Condemnation (The Right to Take--Extraterritorial
Condemnation)

One aspect of the right to take is the power of a local public entity, such as a city, to take property located outside the boundaries of the entity. The attached research study summarizes the law.

The staff recommends that no attempt be made to examine the various condemnation authorization statutes to determine whether they should be revised to make clear the extent to which the power to take property outside the condemnor's territory exists. Such an undertaking would require a substantial effort and the law in this area is not in such shape that such an effort is required. Instead, the staff recommends that the case law be codified in the comprehensive statute. Attached as Exhibit I is a section and Comment recommended by the staff.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

The Right to Take

§ 320. Condemnation outside territorial limits of local public entity

320. A local public entity may condemn only property within its territorial limits except where the power to condemn property outside its limits is expressly granted by statute or necessarily implied as an incident to one of its other statutory powers.

Comment. Section 320 codifies prior law. Although express statutory authority generally is required, extraterritorial condemnation also is permitted where this power is necessarily implied as an incident to the existence of other powers expressly granted. See City of No. Sacramento v. Citizens Util. Co., 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961)(implied authority); City of Hawthorne v. Peebles, 166 Cal. App.2d 758, 333 P.2d 442 (1959) (statutory authority); Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co., 72 Cal. App.2d 638, 165 P.2d 741 (1946)(statutory authority). See also Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955); City of Carlsbad v. Wight, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963). Cf. Mulville v. City of San Diego, 183 Cal. 734, 737, 192 P. 702, (1920); McBean v. City of Fresno, 112 Cal. 159, 44 P. 358 (1896). Furnishing sewage facilities and supplying water are services for which the power of extraterritorial condemnation may be implied. City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891)(sewage)(dictum); City of No. Sacramento v. Citizens Util. Co., supra (water). Cf. Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 718, 329 P.2d 289, (1958). Compare City of Carlsbad v. Wight, supra.

COMPREHENSIVE STATUTE § 320

Staff recommendation

There are a number of statutes that expressly authorize extraterritorial condemnation. E.g., Govt. Code § 61610; Harb. & Nav. Code § 7147; Health & Saf. Code §§ 6514, 13852(c); Pub. Res. Code § 5540. Such statutes are constitutional. City of Hawthorne v. Peebles, supra; Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co., supra.

A significant limitation on the exercise of extraterritorial condemnation is that the conclusive presumption of necessity provided by Section [1241(2) of the Code of Civil Procedure] does not apply where the property to be taken is outside the boundaries of the condemnor. See City of Hawthorne v. Peebles, supra. The "necessity" required to justify extraterritorial condemnation is only a reasonable necessity under all the circumstances of the case and not an absolute or imperative necessity. City of Hawthorne v. Peebles, supra. While economic considerations alone may not be sufficient to justify extraterritorial condemnation, considerations of economy may be taken into account in determining necessity. Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co., supra. Compare City of Carlsbad v. Wight, supra.

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RIGHT TO TAKE--EXTRATERRITORIAL CONDEMNATION*

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The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

RIGHT TO TAKE--EXTRATERRITORIAL CONDEMNATION

Local public entities--such as cities, counties, and special districts-- have a specific area within which they can exercise the powers conferred upon them. However, a local public entity sometimes needs real property outside its territorial limits in order to carry out one of its other powers. In the United States, extraterritorial condemnation often is expressly authorized for water, sewage, electricity, gas, communication, parks, airports, transportation, and public ways.¹

There is no constitutional objection to a statute granting the power to condemn property situated outside the condemnor's boundaries.² Although express statutory authority generally is required,³ extraterritorial condemnation also is permitted where this power is necessarily implied as an incident to the existence of other powers expressly granted.⁴ Furnishing

1. See generally Maddox, *Extraterritorial Powers of Municipalities in the United States* (1955).

2. *City of Hawthorne v. Peebles*, 166 Cal. App.2d 758, 333 P.2d 442 (1959); *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, 72 Cal. App.2d 638, 165 P.2d 741 (1946).

3. See *City of Carlsbad v. Wight*, 221 Cal. App.2d 756, 34 Cal. Rptr 820 (1963); *City of Hawthorne v. Peebles*, 166 Cal. App.2d 758, 333 P.2d 442 (1959); *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, 72 Cal. App.2d 638, 165 P.2d 741 (1946); 1 P. Nichols, *Eminent Domain* § 2.24 (3d ed. 1964).

4. E.g., *City of No. Sacramento v. Citizens Util. Co.*, 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961). See also 1 P. Nichols, *Eminent Domain* § 2.24 (3d ed. 1964); *Annots.*, 49 A.L.R. 1239 (1927), 98 A.L.R. 1001 (1935).

sewage facilities⁵ and supplying water⁶ are services for which the power of extraterritorial condemnation will be implied.

In California, a number of statutes expressly authorize extraterritorial condemnation.⁷ Many of the special district laws provide for condemnation outside the district's boundaries for municipal or public services.⁸ A significant limitation on the exercise of extraterritorial condemnation is that the conclusive presumption of necessity provided by

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5. City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891)(dictum). Cf. Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 718, 329 P.2d 289, (1958). Compare City of Carlsbad v. Wight, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963).
 6. City of No. Sacramento v. Citizens Util. Co., 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961).
 7. See, e.g., Govt. Code § 61610; Harb. & Nav. Code § 7147; Health & Saf. Code §§ 6514, 13852(c); Pub. Res. Code § 5540.

In the absence of an express statutory authorization, Section 1241(2) of the Code of Civil Procedure could be interpreted to authorize extraterritorial condemnation by negative implication. The section provides in part:

provided, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, or school district, or irrigation, public utility, or water district, of property located outside the territorial limits thereof.

In Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955), the court apparently rejected this interpretation, and no case has suggested that the proviso in Section 1241(2) by itself is sufficient to authorize extraterritorial condemnation.

8. For example, Sections 61600 and 61610 of the Community Services District Law authorize extraterritorial condemnation for the following purposes: (a) water for any purpose, (b) garbage disposal, (c) sewage, (d) storm water control, (e) fire protection, (f) parks, (g) streets and street lighting, (h) mosquito abatement.

Section 1241(2) of the Code of Civil Procedure does not apply where the property to be taken is outside the boundaries of the condemnor.⁹ Thus, the condemnor must prove the necessity for the taking in each case.

Although the weight of authority requires only practical or reasonable necessity,¹⁰ one recent case held that practical necessity is not sufficient.¹¹ Economic considerations alone do not show necessity.¹²

Various other types of limitations upon the exercise of extraterritorial condemnation are found in the California statutes. The consent of the local governing body may be required¹³ or geographical limitations may be imposed.¹⁴ Also, the general tax exemption for public property does not apply to property outside the entity's territory.¹⁵

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9. See *City of Hawthorne v. Peebles*, 166 Cal. App.2d 758, 333 P.2d 442 (1959).
 10. *City of Hawthorne v. Peebles*, 166 Cal. App.2d 758, 333 P.2d 444 (1959); *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, 72 Cal. App.2d 638, 165 P.2d 741 (1946).
 11. *City of Carlsbad v. Wight*, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963). It should be noted that this case is subject to several analytical interpretations.
 12. *City of Carlsbad v. Wight*, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963); *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, 72 Cal. App.2d 638, 165 P.2d 741 (1946).
 13. See, e.g., Harb. & Nav. Code § 7147; Health & Saf. Code §§ 6514, 13852(c); Water Code § 35628.
 14. See, e.g., Desert Water Agency Law, Cal. Stats. 1961, Ch. 1069, § 15(a), Water Code App. § 100-15(9)(West Supp. 1970). See also *City of Hawthorne v. Peebles*, 166 Cal. App.2d 758, 333 P.2d 442 (1959)(discussing Sections 5301 and 5302 of the Public Resources Code, which permit a city to condemn land "conveniently adjacent" to the city for park purposes). See generally Maddox, supra note 1.
 15. Cal. Const., Art. XIII, § 1.