

#36.22

5/22/70

Memorandum 70-52

Subject: Study 36.22 - Condemnation (The Right to Take--Public Necessity)

At the May 1970 meeting, the Commission began consideration of the issues of "public necessity" discussed in Memorandum 70-38. Time did not permit the Commission to complete its consideration of that memorandum and the materials attached thereto. However, a number of the statutory provisions proposed by the staff dealing with the necessity problem were considered and tentatively approved, subject in some instances to certain modifications. Attached as Exhibit I (pink) are the provisions, as modified at the May meeting, relating to necessity. Some are tentatively approved; others have not yet been considered by the Commission.

At the June 1970 meeting, we plan to review the sections that have been tentatively approved and also those that have not yet been considered as set out in Exhibit I attached. For the convenience of the members of the Commission, we attach a copy of Memorandum 70-38 (previously distributed) which contains valuable background information on necessity. You should read the memorandum and background material if you have not already done so.

With respect to the provisions already tentatively approved, the staff suggests that Section 311 be reconsidered. You will recall that the scheme recommended by the staff requires that a public hearing be held before a resolution of necessity be adopted. In determining the content of the resolution of necessity (Section 311), it should be kept in mind that the scheme recommended by the staff assumes that there will be a "notice of hearing" (Section 315) and also that certain information (to be determined later) will be required in the complaint in the eminent domain proceeding.

We recommend that Section 311 be revised to read:

311. The resolution of necessity shall state the general nature of the proposed project and expressly declare that the legislative body of the local public entity has found and determined all of the following:

(a) The public interest and necessity require the proposed project.

(b) The proposed project is planned and located in the manner which will be most compatible with the greatest public good and least private injury.

(c) The parcel or parcels of property described in the resolution are necessary for the project.

The significance of the resolution of necessity is that it is conclusive on the issue of necessity in the condemnation action. It has no other purpose. We believe that a description of the proposed project (now required by subdivision (a) of Section 311) should be included in the notice of hearing--that is the time the information is needed by interested persons. We believe that the specific authorizing statute (now required by subdivision (f) of Section 311) should be included in the complaint and, perhaps, in the notice of hearing. Also, it is important that the description of the proposed project be in the complaint in a partial taking case because the property owner may have an inverse condemnation action if the project is not constructed as planned and hence causes damages that would not have occurred had the project been constructed as planned. We do not believe that it is desirable to require information in the resolution unless it serves some useful purpose. Certainly such information should not duplicate information contained in the complaint unless it is essential to the conclusive determination of necessity.

Respectfully submitted,

John H. DeMouly
Executive Secretary

The Right to Take

DIVISION 4. THE RIGHT TO TAKE

Chapter 1. General Provisions

§ 300. Condemnation permitted only for a public use

300. The ~~power of eminent domain~~ may be exercised only to acquire property for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is a declaration by the Legislature that such use, purpose, object, or function is a public use.

Note: Notwithstanding the second sentence of Section 300, whether any specific use, purpose, and the like is in fact a "public use" remains a justiciable issue.

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§ 301. Condemnation permitted only where authorized by statute

301. 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.

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§ 302. Condemnation permitted only when necessity established

302. Before property may be taken by eminent domain, all of the following must be established:

- (a) The proposed project is a necessary project.
- (b) The proposed project is planned or located in the manner which will be most compatible with the greatest public good and the least private injury.
- (c) The property sought to be acquired is necessary for the proposed project.

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Chapter 2. Limitations on Takings by Local Public Entities

Article 1. Resolution of Necessity

§ 310. Resolution of necessity required

310. An eminent domain proceeding may not be commenced by a local public entity until after its governing body has adopted a resolution of necessity that meets the requirements of this chapter.

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§ 311. Contents of resolution

311. The resolution of necessity shall expressly set forth all of the following:

- (a) A description of the proposed project.
- (b) A description of the property to be acquired for the proposed project. Such description shall identify each parcel of property to be acquired which is held in separate ownership.
- (c) A declaration that the legislative body of the local public entity has found and determined that the public interest and necessity require the proposed project.
- (d) A declaration that the legislative body of the local public entity has found and determined that the proposed project is planned or located in the manner which will be most compatible with the greatest public good and the least private injury.
- (e) A declaration that the legislative body of the local public entity has found and determined that the property described in the resolution is necessary for the project.
- (f) The specific statute authorizing the local public entity to exercise the power of eminent domain to acquire such property for such use.

COMPREHENSIVE STATUTE § 312

Tentatively approved May 1970

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§ 312. Adoption of resolution

312. The resolution of necessity must be adopted by a vote of not less than two-thirds of all of the members of the governing body of the local public entity.

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§ 313. Effect of resolution

313. (a) If the property described in the resolution is located entirely within the boundaries of the local public entity, the resolution of necessity conclusively establishes the matters referred to in Section 302.

(b) If the property described in the resolution is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a presumption that the matters referred to in Section 302 are true. This presumption is a presumption affecting the burden of producing evidence.

Note: Tentative approval of this section does not foreclose further review or changes providing broader justiciability of the matters covered herein. Nor does it affect in any way the justiciability of such issues as "excess condemnation," "substitute condemnation," "protective condemnation," "future use," and the like. The issue whether the resolution may be attacked by a showing of actual fraud has been expressly reserved.

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§ 314. Public hearing

314. A resolution of necessity may be adopted only after the governing body of the local public entity has held a public hearing at which interested persons are provided a reasonable opportunity to express their views on the matters to be determined by the resolution. The determination by the governing body of the local public entity as to what constitutes a reasonable opportunity to present views is conclusive.

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§ 315. Notice of hearing

315. (a) Notice of the public hearing shall be given as provided in this section.

(b) The notice of the hearing shall include all of the following information:

(1) A statement that the governing body of the local public entity is holding a public hearing to determine whether the right of eminent domain should be exercised to acquire property.

(2) The general nature of the project for which the property is to be acquired.

(3) The general location or situs of the parcel or parcels of property to be considered at the hearing.

(4) The time and place of the hearing.

(c) The notice of hearing shall be published as provided in Section 6061 of the Government Code at least 15 days before the date set for the hearing.

(d) A copy of the notice shall be mailed by first class mail to each person whose interest in property is to be acquired by eminent domain if the name and address of such person appears

on the last equalized county assessment roll (including the roll of state-assessed property) or is known to the clerk or secretary of the local public entity. The notice shall be mailed at least 15 days before the date set for the hearing.

(e) Certificates or affidavits shall be filed with the clerk or secretary setting forth the time and manner of compliance with the requirements of subdivisions (c) and (d).

(f) A defect, error, or omission in the notice, the certificate or affidavit of the clerk or secretary, the publication or mailing of notices, or failure of the person having an interest in the property to receive notice, does not invalidate any eminent domain proceeding or affect the right to commence or maintain any eminent domain proceeding.