

Memorandum 70-67

Subject: Study 36.20(2) - Condemnation (The Right to Take--Tentative Statute)

Attached is a revised version of the tentative statute relating to condemnation. This version incorporates the decisions made at the last meeting.

In the future, we do not plan to reproduce those divisions of the statute that are not changed. After each meeting, we will reproduce only those divisions that have changes as a result of the meeting. Accordingly, you must retain and update the attached version of the tentative statute after each meeting. This should not be a difficult task since we plan to replace entire divisions, not pages, after each meeting.

The following sections or Comments to sections were tentatively approved at the June meeting:

Division 4 - The Right to Take

- § 300 (see the revised Comment, not previously considered by the Commission)
- § 303 (Comment revised)
- § 311 (section redrafted; not previously considered in exactly this form by Commission although redraft reflects Commission policy decisions)
- § 320
- § 400
- § 401 (see Memorandum 70-73)
- § 410
- § 411
- § 412 (The staff suggests that "and is adjacent to or in the immediate vicinity of such improvement or for property which is a portion of a right of way" be deleted from paragraph (2) of subdivision (a). The only effect this limitation could have is to make it impossible to have substitute condemnation in some cases where it would be appropriate under the standards set out in paragraph (1) ("reasonable" solution) and paragraph (2) ("not unjust to owner" of property to be exchanged for necessary property). Note that, under subdivision (b), the court determines whether a taking is justified under Section 412, and the standards set out in paragraphs (1) and (3) of subdivision (a) are believed to provide adequate protection.)

Existing Codes (white pages at end of statute)

The following pages are new or revised as a result of decisions at the June meeting: 7, 8, 15, 19, 20, 23, 24, 26-30, 50, and 53.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

COMPREHENSIVE STATUTE

- DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION - PINK
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- DIVISION 3. GENERAL PROVISIONS - GREEN
- DIVISION 4. THE RIGHT TO TAKE - WHITE
- DIVISION 5. JUST COMPENSATION AND MEASURE OF DAMAGES - GOLD
- DIVISION 6. APPORTIONMENT AND ALLOCATION OF THE AWARD - BLUE
- DIVISION 7. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT;
OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT - BUFF
- DIVISION 8. PROCEDURE - PINK
- DIVISION 9. EXCHANGE OF VALUATION DATA - YELLOW
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COMPREHENSIVE STATUTE

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COMPREHENSIVE STATUTE § 1

Tentatively approved April 1970

DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

§ 1. Short title

1. This code shall be known as the Eminent Domain Code.

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 3. Constitutionality

3. If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 4. Construction of code

4. Unless the provision or context otherwise requires, these preliminary provisions and rules of construction shall govern the construction of this code.

Preliminary Provisions and Construction

§ 5. Effect of headings

5. Division, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code.

COMPREHENSIVE STATUTE § 6

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 6. References to statutes

6. Whenever any reference is made to any portion of this code or to any other statute, such reference shall apply to all amendments and additions heretofore or hereafter made.

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 7. "Division," "chapter," "article," "section," "subdivision," and "paragraph"

7. Unless otherwise expressly stated:

(a) "Division" means a division of this code.

(b) "Chapter" means a chapter of the division in which that term occurs.

(c) "Article" means an article of the chapter in which that term occurs.

(d) "Section" means a section of this code.

(e) "Subdivision" means a subdivision of the section in which that term occurs.

(f) "Paragraph" means a paragraph of the subdivision in which that term occurs.

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 8. Construction of tenses

8. The present tense includes the past and future tenses; and the future, the present.

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 9. Construction of genders

9. The masculine gender includes the feminine and neuter.

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 10. Construction of singular and plural

10. The singular number includes the plural; and the plural, the singular.

Preliminary Provisions and Construction

§ 11. "Shall" and "may"

11. "Shall" is mandatory and "may" is permissive.

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COMPREHENSIVE STATUTE § 100

Tentatively approved April 1970

DIVISION 2. WORDS AND PHRASES DEFINED

§ 100. Application of definitions

100. Unless the provision or context otherwise requires,
these definitions govern the construction of this code.

Words and Phrases Defined

§ 101. Property

101. "Property" includes real and personal property and any right or interest therein and, by way of illustration and not by way of limitation, includes rights of any nature in water, subsurface rights, airspace rights, flowage or flooding easements, aircraft noise or operation easements, rights to limit the use or development of property, public utility franchises, and franchises to collect tolls on a bridge or highway.

Comment. Section 101 is intended to provide the broadest possible definition of property and to include any type of interest in property that may be required for public use. It is expected that this definition will be improved as the Commission's work on condemnation law progresses.

Tentatively approved April 1970

Words and Phrases Defined

§ 102. Nonprofit college

102. "Nonprofit college" means an educational institution that is authorized to exercise the power of eminent domain under Section 30051 of the Education Code.

Comment. Section 30051 is a new section to be added to the Education Code in the legislation relating to the right to take.

COMPREHENSIVE STATUTE § 104

Tentatively approved April 1970

Words and Phrases Defined

§ 104. City

104. "City" includes city and county.

COMPREHENSIVE STATUTE § 105

Tentatively approved April 1970

Words and Phrases Defined

§ 105. County

105. "County" includes city and county.

COMPREHENSIVE STATUTE § 106

Tentatively approved April 1970

Words and Phrases Defined

§ 106. Local public entity

106. "Local public entity" means any public entity other than the state.

COMPREHENSIVE STATUTE § 107

Tentatively approved April 1970

Revised May 1970

Words and Phrases Defined

§ 107. Person

107. "Person" includes any public entity, individual, association, organization, partnership, trust, or corporation.

Words and Phrases Defined

§ 108. Public entity

108. "Public entity" includes the state, a county, city, district, public authority, public agency, and any other political subdivision in the state.

Comment. Subject to further review, the Commission has determined that, if "public corporations" are granted the power of eminent domain, the term "public corporation" will be defined and a section included which provides that, "unless otherwise provided by statute, a public corporation shall have the same rights, powers, and duties as a local public entity."

1
COMPREHENSIVE STATUTE § 109

Tentatively approved April 1970

Words and Phrases Defined

§ 109. State

109. "State" means the State of California and includes the Regents of the University of California.

COMPREHENSIVE STATUTE § 110

Tentatively approved April 1970

Words and Phrases Defined

§ 110. Statute

110. "Statute" means a constitutional provision or statute,
but does not include a charter provision or ordinance.

COMPREHENSIVE STATUTE § 200 et seq.

Staff recommendation

DIVISION 3. GENERAL PROVISIONS

Chapter 1. Right of eminent domain may be exercised only as provided in this code unless otherwise specifically provided by statute.

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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.

Comment. The first sentence of Section 300 reiterates the basic constitutional requirement that property may be acquired by eminent domain only for a "public use." Cal. Const., Art. I, § 14; U.S. Const., Amend. XIV.

The second sentence is included in Section 300 to avoid the need to state in each condemnation authorization statute that the taking by eminent domain under that statute is a taking for a public use. For example, Section 104 of the Streets and Highways Code authorizes the acquisition of property by eminent domain for state highway purposes. Section 300 provides that such legislative action is also deemed to be a legislative declaration that state highway purposes constitute a public use. Section 300 supersedes former Section 1238 of the Code of Civil Procedure, which purported to declare the public uses for which property could be taken by eminent domain.

COMPREHENSIVE STATUTE § 300

Tentatively approved June 1970

The fact that Section 300 declares that a particular use for which the power of eminent domain may be exercised is a public use does not preclude judicial review to determine whether the proposed use in the particular case is actually a public use. E.g., City & County of San Francisco v. Ross, 44 Cal.2d 52, 279 P.2d 529 (1955). Nevertheless, the Legislature's declaration that a particular use is a public use will be recognized by the courts unless clearly erroneous and without reasonable foundation. E.g., People v. Superior Court, 68 Adv. Cal. 206, 210 (1968); Housing Authority v. Dockweiler, 14 Cal.2d 437, 449-450, 94 P.2d 794, 801 (1939). Doubts are resolved in favor of the legislative declaration. University of So. Calif. v. Robbins, 1 Cal. App.2d 523, 525-526, 37 P.2d 163, 164 (1934).

The Right to Take

§ 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.

The Right to Take

§ 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.

The Right to Take

§ 303. Right to acquire any necessary right or interest

303. Except to the extent limited by statute, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire any right or interest in property necessary for that use.

Comment. Section 303 supersedes former Section 1239 of the Code of Civil Procedure insofar as that section specified the type of interest--whether a fee or lesser interest--that might be acquired by eminent domain.

Section 303 permits any condemnor to take whatever interest is required for a particular use subject, of course, to a showing that such interest is necessary for such use. See Section 302 of the Comprehensive Statute. Section 303 is generally consistent with the former law that permitted a public entity to take a fee rather than merely an easement. See former Code Civ. Proc. § 1239(4)(local public entities). However, under former law, most privately owned public utilities and some local public entities were permitted to acquire only an easement except in certain circumstances. See former Code Civ. Proc. § 1239. Moreover, under former law, the distinction generally made was between taking a fee or an easement, and Section 303 permits taking of the fee or any other right or interest. See Section 101 of the Comprehensive Statute (defining "property").

Tentatively approved February 1970
Revised April 1970
Revised May 1970

The Right to Take

§ 304. Joint exercise of condemnation power pursuant to Joint Powers
Agreements Act

304. (a) As used in this section, "public agencies" includes all those agencies included within the definition of "public agency" in Section 6500 of the Government Code.

(b) Two or more public agencies may enter into an agreement for the joint exercise of their respective powers of eminent domain, whether or not possessed in common, for the acquisition of property as a single parcel. Such agreement shall be entered into and performed pursuant to the provisions of Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code.

Comment. Section 304 authorizes several public agencies to acquire a particular parcel under the Joint Powers Agreements Act, not only where the particular parcel is needed for a joint project but also where each of the agencies requires a portion of the parcel for its own purposes. The section is based on former Education Code Section 15007.5. Section 15007.5, however, applied only where a school district was a party to the joint powers agreement, and Section 304 is not so restricted.

The Right to Take

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.

The Right to Take

§ 311. Contents of resolution

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

(a) A general description of the proposed project and a reference to the specific statute authorizing the local public entity to exercise the power of eminent domain to acquire property for such project.

(b) A description of the parcel or parcels of property to be acquired for the proposed project and the relationship of each such parcel to the proposed project.

(c) A declaration that the legislative body of the local public entity has found and determined each of the following:

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

(2) 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.

(3) The property described in the resolution is necessary for the project.

COMPREHENSIVE STATUTE § 312

Tentatively approved May 1970

The Right to Take

§ 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.

The Right to Take

§ 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.

Tentatively approved June 1970

Article 2. Extraterritorial condemnation

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

Tentatively approved June 1970

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 resolution of necessity is not conclusive where the property to be taken is outside the boundaries of the condemnor. Comprehensive Statute Section 313(b). 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.

Chapter 5. Future Use

§ 400. Authorization to acquire property for future use

400. The authority to acquire property by eminent domain for a public use includes authority to exercise the power of eminent domain to acquire property to be used in the future for that public use.

Comment. Section 400 continues prior case law and makes clear that statutory grants of condemnation power carry with them the power to condemn property in anticipation of the condemnor's future needs. See, e.g., Central Pac. Ry. v. Feldman, 152 Cal. 303, 309, 92 P. 849, 852 (1907); City of Los Angeles v. Pomeroy, 124 Cal. 597, 616, 57 P. 585, 591 (1899); San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 480-481, 14 Cal. Rptr. 899, 904-905 (1961). Despite the existence of the implied power, condemnation for future use was formerly specifically authorized by statute for a few condemnors for particular purposes. See, e.g., Cal. Stats. 1968, Ch. 354, § 1, p. (former Cal. Sts. & Hwys. Code § 104.6) (Department of Public Works authorized to acquire real property for future highway needs); Cal. Stats. 1957, Ch. 2104, § 1, p. 3729 (former Cal. Water Code § 258) (Department of Water Resources authorized to acquire real property for future state dam

COMPREHENSIVE STATUTE § 400

Tentatively approved June 1970

and water purposes). Section 400 obviates the need for these additional statutory statements which have accordingly been repealed. [n.b. the staff has not attempted to locate all of these provisions. This task has been postponed so that it may be performed together with other "clean-up tasks," such as designating the property interest that may be acquired, and so on.]

Note. Sections 400 and 401 as tentatively approved contain a general grant of authority to condemn for future use as well as general substantive limits upon such authority. Statutory provisions providing a procedure for handling this and similar issues have not yet been drafted.

§ 401. Limitations on acquisitions for future use

401. (a) Property may be taken pursuant to Section 400 for future use only if there is a reasonable probability that it will be used for the public use for which it is taken within a reasonable time.

(b) Where the resolution of a public entity authorizing the taking of property declares that the property taken will be devoted to the use for which it is taken within seven years, it shall be conclusively presumed that there is a reasonable probability that it will be used for such use within a reasonable time.

(c) Where subdivision (b) is not applicable, the court shall determine whether, under all the circumstances of the particular case, the condemnor has established that the requirement of subdivision (a) is satisfied.

Comment. Subdivision (a) of Section 401 restates the judicially established substantive limit applied to acquisitions for future needs under prior law. See, e.g., San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 480-481, 14 Cal. Rptr. 899, 904-905 (1961). See also East Bay Mun. Util. Dist. v. City of Lodi, 120 Cal. App. 740, 750-755, 8 P.2d 532, 536-538 (1932). The test is necessarily imprecise; the limitless diversity of engineering and financing problems involved preclude any more definite general rule.

However, to provide some certainty and forestall frivolous objections, subdivision (b) gives conclusive effect to the resolution of necessity of a public entity where the resolution declares that property taken will be put to actual use in not more than seven years. (The condemnee may, of course, always contest the taking by showing that the condemnor is seeking to take land that it does not intend to put to a public use. See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959).) Where the issue is properly presented, the court under subdivision (c) should consider all the circumstances of the case--e.g., is there a reasonable probability that funds for the project will be available for construction, have plans been drawn and adopted, is the project a logical extension of existing improvements, is future growth likely and must the condemnor provide for such growth--to determine whether the requirement of subdivision (a) is satisfied.

The Right to Take

Chapter 6. Substitute Condemnation

§ 410. Definitions

410. As used in this chapter:

(a) "Necessary property" means property to be used for a public use for which the public entity is authorized to acquire property by eminent domain.

(b) "Property to be exchanged" means property to be exchanged for necessary property.

Comment. Section 410 provides definitions useful in applying the "substitute condemnation" provisions contained in this chapter. Briefly stated, "substitute condemnation" involves the following type of situation: A decides to condemn B's real property (the "necessary property"). A and B agree that B shall be compensated in whole or in part by other real property (the "property to be exchanged") rather than money. A condemns C's real property (the "property to be exchanged") to compensate B. See generally Note, Substitute Condemnation, 54 Cal. L. Rev. 1097 (1966). The A, B, C model will be used throughout this chapter. See Sections 411 and 412 and Comments thereto.

The Right to Take

§ 411. Condemnation of property to be exchanged for property already devoted to public use

411. (a) A public entity may acquire by eminent domain property to be exchanged if all of the following are established:

(1) The person with whom the property is to be exchanged has agreed in writing to such exchange.

(2) The necessary property is devoted to or held for some public use and the property to be exchanged will be devoted to or held for the same public use.

(3) The person with whom the property is to be exchanged is authorized to exercise the power of eminent domain to acquire such property for such use.

(b) The resolution, ordinance, or declaration authorizing the taking of property under this section shall specifically refer to this section and shall recite a determination by the officer or body adopting the resolution, ordinance, or declaration that the property is necessary for the purpose specified in this section. The determination in the resolution, ordinance, or declaration that the taking of the property to be exchanged is necessary is conclusive.

Tentatively approved June 1970

Comment. Section 411 authorizes A to condemn C's property (and convey it to B) where B has agreed in writing to such exchange, and B could itself have condemned the property to be exchanged. In short, B has the right of eminent domain to accomplish the same end so that the authority provided here is simply a shortcut to an identical result. See, e.g., Langenau Mfg. Co. v. City of Cleveland, 159 Ohio St. 525, 112 N.E.2d 658 (1953) (relocation of railroad by municipality); Tiller v. Norfolk & W. Ry., 201 Va. 222, 110 S.E.2d 209 (1959) (relocation of state highway by railroad). See generally Note, Substitute Condemnation, 54 Cal. L. Rev. 1097, 1099-1100 (1966).

Where B does not have the power to condemn C's property for the use contemplated, A must rely upon the authority granted under Section 412.

The Right to Take

§ 412. Condemnation of property to be exchanged for property not already devoted to public use

412. (a) A public entity may acquire by eminent domain property to be exchanged if:

(1) The owner of the necessary property has agreed in writing to the exchange and, under the circumstances of the particular case, it is reasonable that he be compensated in whole or in part by the property to be exchanged rather than by money;

(2) The property to be exchanged is to be exchanged for property needed for a public improvement and is adjacent to or in the immediate vicinity of such improvement or for property which is a portion of a right-of-way; and

(3) Taking into account the relative hardship to both owners, it is not unjust to the owner of the property to be exchanged that his property be taken so that the owner of the necessary property may be compensated by the property to be exchanged rather than by money.

(b) The resolution, ordinance, or declaration authorizing the taking of property under this section shall specifically refer to this section and shall recite a determination by the officer or body adopting the resolution, ordinance, or declaration

Tentatively approved June 1970

that the property is necessary for the purpose specified in this section. The public entity has the burden of proof as to the facts that justify the taking of the property. However, the resolution, ordinance, or declaration creates a presumption that the taking of the property to be exchanged is justified under this section. This presumption is a presumption affecting the burden of producing evidence.

Comment. Section 412 authorizes substitute condemnation where the requirements of Section 411 cannot be established a public use but under the circumstances it is reasonable that B be compensated in land rather than money. One of the more common examples of such substitute condemnation is a taking to provide access to a public road from property cut off from access by A's original acquisition. This situation is provided for specifically by Section 415. See Section 415 and the Comment thereto. However, similar situations may arise where private activities--such as a nonpublic utility, railroad serving a mining, quarrying, or logging operation or belt conveyors, or canals and ditches--are displaced by a public improvement. In the latter situation, Section 412 authorizes condemnation of C's property for exchange for B's property where, taking into account the relative hardship to B and C, such action is fair and equitable. In contrast to the procedure under Section 411, the resolution authorizing the taking under this section is not conclusive, the necessity for the taking is justiciable, and A has the burden of proof of showing that the facts justify the taking of C's property. Compare Section 412(b) with Section 411(b).

Tentatively approve June 1970

The Right to Take

§ 413. Special statutes not affected

413. This chapter does not limit any authority a public entity may have under any other provision of law to acquire property for exchange purposes nor does it limit any authority a public entity may have to acquire, other than by eminent domain, property for exchange purposes.

Note: It is intended to repeal many of the existing substitute condemnation provisions so that Chapter 6 (Substitute Condemnation) will eventually be the primary statutory authority for substitute condemnation. It is possible, however, that some special substitute condemnation provisions will be retained, and Section 413 will protect these special provisions from being impliedly repealed.

The Right to Take

§ 415. Condemnation to provide access to public road

415. (a) Where a public entity acquires property for a public use and exercises or could have exercised the right of eminent domain to acquire such property for such use, the public entity may exercise the right of eminent domain to acquire such additional property as is reasonably necessary to provide access to an existing public road from any property which is not acquired for such public use but which is cut off from access to a public road as a result of the acquisition by the public entity.

(b) Where a public entity has furnished, offers to furnish, or will furnish, according to a specific plan, access to property cut off from access to a public road as a result of the acquisition of property for public use by the public entity, such fact shall be taken into account in determining the damage to the property which is not acquired for public use.

Comment. Section 415 provides explicit statutory recognition of the right of a public condemnor that acquires property for a public use to condemn such additional property as is necessary to provide access to property not taken which would otherwise lack access as a result of the acquisition. The access road need not be one that is open to the public. Although no explicit statutory or decisional authority for such a taking

COMPREHENSIVE STATUTE § 415

Tentatively approved April 1970

Revised May 1970

Revised June 1970

exists in California, the right to exercise the power of eminent domain for such purpose probably would be necessarily implied from the right to take property for the public improvement itself. Such a taking would be a taking for a public use. E.g., Department of Public Works v. Farina, 29 Ill.2d 474, 194 N.E.2d 209 (1963); Luke v. Mass. Turnpike Auth., 337 Mass. 304, 149 N.E.2d 225 (1958); May v. Ohio Turnpike Comm., 172 Ohio St. 555, 178 N.E.2d 920 (1962); Tracy v. Preston, Director of Highways, 172 Ohio St. 567, 178 N.E.2d 923 (1962).

Subdivision (b) of Section 415 is included to insure that, where a condemnor provides an access road to property to replace lost access or offers to make such provision, the provision or offer will receive proper consideration as a mitigating factor in determining compensation for the damage, if any, to the property not acquired. Obviously, where the work has not been completed, there must be a specific plan which indicates not only what access will be substituted but equally important, when such access will be provided.

Note: The basic public use issue raised by this section, i.e., whether the taking or property to provide private access to private property constitutes a public use, is subject to further review by the Commission.

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 5. JUST COMPENSATION AND MEASURE OF DAMAGES

CHAPTER 1. GENERAL PROVISIONS

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Effect of imminence of condemnation

Date of valuation

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Effect of condemnation use on after-market value

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Refinancing costs

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COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 6. APPORTIONMENT AND ALLOCATION OF THE AWARD

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Staff recommendation

DIVISION 7. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO
JUDGMENT; OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT

See California Law Revision Commission,
Tentative Recommendation and A Study
Relating to Condemnation Law and Proce-
dure: Number 1--Possession Prior to
Final Judgment and Related Problems, 1101,
1142-1166 (September 1967).

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Staff recommendation

DIVISION 8. PROCEDURE

- CHAPTER 1. JURISDICTION AND VENUE
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- CHAPTER 6. TRIAL PRACTICE
- CHAPTER 7. JUDGMENT
- CHAPTER 8. PAYMENT OF JUDGMENT
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COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 9. EXCHANGE OF VALUATION DATA

COMPREHENSIVE STATUTES

Staff recommendation

DIVISION 10. ARBITRATION OF COMPENSATION IN
ACQUISITIONS OF PROPERTY FOR PUBLIC USE

See Recommendation of California Law Revision
Commission Relating to Arbitration of Just Com-
pensation (September 1969)

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CIVIL CODE § 1001

Tentatively approved April 1970

Civil Code § 1001 (repealed)

Sec. . Section 1001 of the Civil Code is repealed.

~~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 these 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.~~

Comment. Section 1001 is repealed because it and Section 1238 of the Code of Civil Procedure (also repealed) are superseded by Section 300 of the Eminent Domain Code and by specific statements of the condemnation authority of particular persons for particular public uses which are found in the various codes.

Tentatively approved April 1970

Code of Civil Procedure § 1238 (repealed)

Sec. . Section 1238 of the Code of Civil Procedure is repealed.

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

Subdivision 1

~~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.~~

Comment. Subdivision 1, which was intended to authorize taking for federal purposes, is not continued since it no longer serves any useful purpose. The 1872 Code Commissioner's Note to subdivision 1 cites two California cases expressing doubt that the federal government had an independent right of eminent domain. It is now clear, however, that federal eminent domain power is not dependent on state authority and cannot be limited by the state. Kohl v. United States, 91 U.S. 367 (1875); C. M. Patten & Co. v. United States, 61 F.2d 970 (9th Cir. 1932).

Subdivision 2

~~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.~~

Comment. Insofar as subdivision 2 authorizes takings for state purposes, it is unnecessary because it has been superseded by the much broader condemnation powers conferred upon the Director of the Department of General Services and the State Public Works Board. See Govt. Code §§ 14660-14662. See also Govt. Code §§ 15853-15858. Insofar as the subdivision might authorize condemnation on behalf of a state other than California, it is not continued. Takings under the eminent domain power of one state for the benefit of another state raise serious problems under the public use doctrine. See 1 P. Nichols, Eminent Domain § 2.112 (3d ed. 1964). If property is to be condemned by or for another state for a particular purpose, the taking should be authorized by a specific statute dealing with the specific situation. E.g., Water Code § 5901, Art. VI, § A (Klamath River Basin Compact). The authorization in subdivision 2 for acquisitions for nonprofit colleges and universities ("institution . . . which is exempt from taxation under the provisions of Section 1a, of Article XIII of the

Constitution of the State of California") is continued in Section 30051 of the Education Code. The reference in subdivision 2 to "all other public uses authorized by the Legislature of the State of California" was superfluous and had no substantive effect.

Subdivision 5

~~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.~~

Comment. Subdivision 5 is not continued. It is clear from the language of the subdivision itself, and from the statute that it superseded (Cal. Stats. 1870, Ch. CCCCIV, p. 569), that the Legislature intended to authorize takings by individual mine owners to facilitate the working of their mines. However, the California courts have refused to give the subdivision its intended application or any effect whatsoever. Sutter County v. Nichols, 152 Cal. 688, 93 P. 872 (1908); Amador Queen Min. Co. v. Dewitt, 73 Cal. 482, 15 P. 74 (1887); Lorenz v. Jacob, 63 Cal. 73 (1883); Consolidated Channel Co. v. Central Pac. R. Co., 51 Cal. 269 (1876). Although the courts have not held the subdivision unconstitutional, they have invoked the constitutional doctrine of public use to prevent any takings under the subdivision. The only possible application of the subdivision might have been under the former Placer Mining District Act (Pub. Res. Code §§ 2401-2512, repealed Cal. Stats. 1953, Ch. 1365, § 1, p. 2935). See Black Rock Placer Mining Dist. v. Summit

Water & Irrigation Co., 56 Cal. App.2d 513, 133 P.2d 58 (1943). Although the repeal of that act did not affect the existence or powers of any district previously organized pursuant to the repealed act, there are no such districts presently reporting financial transactions to the State Controller. See Financial Transactions Concerning Special Districts in California (Cal. State Controller 1965-66). The repeal of subdivision 5 does not, of course, affect in any way the power of the appropriate public entity to provide a byroad where necessary or desirable under the Street Opening Act of 1903. See Sts. & Hwys. Code §§ 4008, 4008.1, 4090.

Tentatively approved June 1970

Subdivision 15

~~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.~~

Comment. Subdivision 15 is superseded by Sections 14770 and 53030 of the Government Code.

Tentatively approved June 1970

Subdivision 21

~~21.--Any-work-or-undertaking-of-a-city,-county,-or-city-and
 county,-housing-authority-or-commission,-or-other-political-sub-
 division-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,-over-
 crowding,-faulty-arrangement-or-design,-lack-of-ventilation-or-sani-
 tary-facilities-of-the-dwellings-predominating-in-such-areas;-or
 (b)-to-provide-dwellings,-apartments-or-other-living-accomodations
 for-persens-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.~~

Comment. Subdivision 21 is unnecessary because it merely duplicates express grants of the power of eminent domain given the agencies engaged in slum clearance and low rent housing by other statutes. Thus, housing authorities, which may be activated within any city or county, may condemn property for slum clearance, construction of low-cost housing, or construction of farm labor camps. Health & Saf. Code §§ 34240, 34325, 36059(i). See also Health & Saf. Code §§ 34874, 34875, 34879 (limited dividend housing corporations). The addition of Sections 35167-35171 to the Health and Safety Code to grant condemnation authority to community land chest corporations (nonprofit corporations formed under Health and Safety Code Sections 35100-35237 to provide "housing in rural and suburban areas for families of low income") provides all of the agencies covered by subdivision 21 with adequate condemnation authority.

Tentatively approved March 1970

Code of Civil Procedure § 1238.7 (repealed)

Sec. . Section 1238.7 of the Code of Civil Procedure is repealed.

~~1238.7.--Subject-to-the-provisions-of-this-title,-the-right of-eminant-domain-may-be-exercised-in-behalf-of-the-following public-uses:~~

~~1.--Property-as-a-source-of-earth-fill-material-for-use-in-the development-of-a-school-site-by-a-school-district-which-is-situated wholly-or-partly-within-a-city-or-city-and-county-having-in-excess of-750,000-population-and-an-average-population-per-square-mile-of more-than-4,500-persons.~~

Comment. Section 1238.7 is repealed as unnecessary since Section 1047, which is added to the Education Code, permits condemnation of any property necessary to carry out the functions of the district and therefore would permit condemnation of an earth fill source. See also Section 350 of the comprehensive statute.

SCHOOL DISTRICTS

§ 1047. Power of eminent domain

Sec. . Section 1047 is added to the Education Code, to read:

1047. The governing board of any school district may condemn any property necessary to carry out any of the powers or functions of the district.

Comment. Section 1047 supersedes the grant of condemnation authority formerly contained in subdivision 3 of Section 1238 of the Code of Civil Procedure (condemnation authorized for "public buildings and grounds for the use . . . of any . . . school district"). It continues the prior authority of school districts to condemn for school purposes. E.g., Hayward Union High School Dist. v. Madrid, 234 Cal. App.2d 100, 121, 44 Cal. Rptr. 268, (1965)("The district had the right to condemn for any school purpose and on acquisition, to change to some other school purpose any time during its ownership of the property."). Kern County High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919). See also Anaheim Union High School Dist. v. Vieria, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966) (future use); Hayward Union High School Dist. v. Madrid, supra (temporary use for school purposes with resale to follow within several years); Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959)(school purposes may be a more necessary public use than private cemetery).

The section is, of course, subject to specific limitations that may be imposed on the exercise of the power of eminent domain. See Education Code Section 1048.

EDUCATION CODE § 1047 (cont.)

Tentatively approved March 1970
Revised April 1970

Section 1047 grants a school district (defined in Section 41) the power of eminent domain to acquire any property necessary to carry out any of the powers or functions of the district. Thus, for example, a school district may condemn property outside its boundaries, subject to such limitations as are provided by statute, even though the pertinent statute does not expressly grant the district the power of eminent domain. E.g., Education Code Section 15009. It should be recognized, however, that a school district is an agency of limited authority and may engage in only those functions authorized by statute. E.g., Yreka Union High School Dist. v. Siskiyou Union High School Dist., 227 Cal. App.2d 666, 39 Cal. Rptr. 112 (1964); Uhlmann v. Alhambra City High School Dist., 221 Cal. App.2d 228, 34 Cal. Rptr. 341 (1963).

In some cases, a particular statute may expressly grant school districts the powers of eminent domain for a particular purpose. E.g., Education Code Section 6726 (operation of a technical, agricultural, and natural resource conservation school). These specific grants of condemnation authority are not to be construed to limit the broad grant of such authority under Section 1047.

Private schools which are not of the collegiate grade may not exercise the power of eminent domain. Yeshiva Torath Emeth Academy v. University of So. Calif., 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962). It is also not permissible for a private citizen to acquire property by eminent domain for the operation of a public school. People v. Oken, 159 Cal. App.2d 456, 324 P.2d 58 (1958).

EDUCATION CODE § 1048

Tentatively approved March 1970

§ 1048. Acquisition of property for utility purposes

Sec. . Section 1048 is added to the Education Code, to read:

1048. The governing board of a school district may acquire property in an adjoining school district by lease, or purchase and dispose of such property in the same manner as property within the boundary of the district is purchased and disposed of, where the acquisition of such property is deemed necessary by the governing board for use as garages, warehouse, or other utility purposes.

The power of eminent domain shall not be applicable and such acquisitions by purchase shall be subject to the approval of the governing board of school district in which the property is located.

Comment. Section 1048 continues without change the provisions of former Education Code Section 16003.

Tentatively approved March 1970

Education Code § 15007.5 (repealed)

Sec. . Section 15007.5 of the Education Code is repealed.

~~15007.5.--The-governing-board-of-any-school-district-may-enter
into-an-agreement-with-the-governing-body-of-any-public-agency-for
the-joint-exercise-by-such-school-district-and-such-agency-of-their
respective-powers-of-eminent-domain,-whether-or-not-possessed-in
common,-for-the-acquisition-of-real-property-as-a-single-parcel.
Such-agreement-shall-be-entered-into-and-performed-pursuant-to-the
provisions-of-Chapter-5-(commencing-with-Section-6500)-of-Division-7
of-Title-1-of-the-Government-Code,-and-each-public-agency-therein
designated-is-authorized-to-enter-into-such-an-agreement-with-the
governing-board-of-any-school-district-for-such-purpose.~~

Comment. Section 15007.5 is superseded by Section 360 of the
Eminent Domain Code.

Tentatively approved March 1970

Education Code § 16003 (repealed)

Sec. . Section 16003 of the Education Code is repealed.

~~16003.--The-governing-board-of-a-school-district-may-acquire property-in-an-adjoining-school-district-by-lease,-or-purchase-and dispose-of-such-property-in-the-same-manner-as-property-within-the boundary-of-the-district-is-purchased-and-disposed-of,-where-the acquisition-of-such-property-is-deemed-necessary-by-the-governing board-for-use-as-garages,-warehouse,-or-other-utility-purposes-~~

~~The-power-of-eminent-domain-shall-not-be-applicable-and-such acquisitions-by-purchase-shall-be-subject-to-the-approval-of-the governing-board-of-school-district-in-which-the-property-is-located.~~

Comment. Section 16003 is superseded by Section 1048 of the Education Code.

Tentatively approved March 1970
Revised April 1970
Revised June 1970

UNIVERSITY OF CALIFORNIA

Education Code § 23151 (amended)

Sec. . Section 23151 of the Education Code is amended to read:

23151. The Regents of the University of California may condemn any property ~~or interest therein for the public buildings and grounds necessary to carry out any of the powers or functions of the University of California under the provisions of the Code of Civil Procedure relating to eminent domain~~ . The Regents of the University of California shall not commence any such proceeding in eminent domain unless it first adopts a ~~resolution~~ by a two-thirds vote ~~declaring that the public interest and necessity require the acquisition, construction or completion by the Regents of the University of California of the public improvement for which the property or interest therein is required and that the property or interest therein described in such resolution is necessary for the public improvement~~ a resolution that meets the requirements of Section 311 of the Comprehensive Statute .

Comment. Section 23151 is amended to make clear that the condemnation authority of the Regents of the University of California is broad enough to acquire any property or right or interest in property necessary to carry out the functions of the University of California even though the property is to be acquired for a project that does not clearly fall within the former language "public buildings and grounds of the University of California." See Section 310 of the comprehensive eminent domain statute.

STATE COLLEGE SYSTEM

Education Code § 23619 (added)

Sec. . Section 23619 is added to the Education Code, to read:

23619. Subject to the Property Acquisition Law, Part 11 (commencing with Section 15850) of Division 3 of Title 2 of the Government Code, the trustees may condemn any property necessary to carry out any of the powers or functions of the state colleges.

Comment. Section 23619 supersedes subdivision 2 of Section 1238 of the Code of Civil Procedure ("public buildings and grounds for the use of a state, or any state institution") insofar as that subdivision may relate to the state college system. The phrasing of Section 23619 is based in part on subdivision (a) of Section 24503 of the Education Code, which grants the right of eminent domain to acquire property necessary for dormitories or other housing facilities, boarding facilities, student union or activity facilities, vehicle parking facilities, or any other auxiliary or supplemental facilities for individual or group accommodation for use by students, faculty members, or other employees of any one or more state colleges. Section 23619 covers not only the facilities covered by Section 24503 but also all other property necessary to the state college system.

Tentatively approved March 1970

NONPROFIT EDUCATIONAL INSTITUTIONS OF COLLEGIATE GRADE

Education Code § 30051 (added)

Sec. . Chapter 3 (commencing with Section 30051) is added to Division 21 of the Education Code, to read:

Chapter 3. Eminent Domain

30051. Any educational institution of collegiate grade, within this state, not conducted for profit, may exercise the right of eminent domain to acquire any property necessary to carry out any of its powers or functions.

Comment. Section 30051 continues the grant of condemnation authority formerly found in subdivision 2 of Section 1238 of the Code of Civil Procedure ("Public buildings and grounds for the use of . . . 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"). See University of So. Calif. v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934), cert. den., 295 U.S. 738 (1935); Redevelopment Agency v. Hayes, 122 Cal. App.2d 777, 266 P.2d 105 (1954). Private schools which are not of the collegiate grade may not exercise the power of eminent domain. Yeshiva Torath Emeth Academy v. University of So. Calif., 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962).

GOVERNMENT CODE § 184

Tentatively approved April 1970

Government Code § 184 (repealed)

Sec. . Section 184 of the Government Code is repealed.

~~184.--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.~~

Comment. Section 184 is repealed as unnecessary.

§ 14770. Restoration of state public records destroyed by public calamity

Sec. . Article 7 (commencing with Section 14770) is added to Chapter 5 of Part 5.5 of Division 3 of Title 2 of the Government Code, to read:

Article 7. Restoration of Records Destroyed by
Public Calamity

14770. (a) As used in this section:

(1) "Acquire" includes acquisition by gift, purchase, lease, eminent domain, or otherwise.

(2) "Public record plant" means the plant, or any part thereof, or any record therein, of any person engaged in the business of searching or publishing public records or insuring or guaranteeing titles to real property, including copies of public records and abstracts or memoranda taken from public records, which is owned by or in the possession of such person or which is used by him in his business.

(b) If public records of any state agency have been lost or destroyed by conflagration or other public calamity, the director may acquire the right to reproduce such portion of a public record plant as is necessary for the purpose of restoring or replacing the records or their substance.

Comment. Section 14770 is new but reflects the same policy as subdivision 15 of former Code of Civil Procedure Section 1238 which applied only to certain local public entities.

The broad authority to acquire the "right to reproduce" lost or destroyed records permits the reproduction of records by such means as making copies, obtaining a computer print-out or other visual representation of records preserved in data processing equipment, or duplicating magnetic tapes or other means for preserving such records in data processing equipment.

Cross Reference:

Similar authority for local public entities, Govt. Code § 53030.

GOVERNMENT CODE § 25350.5

Tentatively approved April 1970

COUNTIES

§ 25350.5. Power of eminent domain

Sec. . Section 25350.5 is added to the Government Code, to read:

25350.5. The board of supervisors of any county may condemn any property necessary to carry out any of the powers or functions of the county.

Comment. Section 25350.5 supersedes the grant of condemnation authority formerly contained in various subdivisions of Section 1238 of the Code of Civil Procedure and supplements the specific grants of such authority contained in this and other codes. E.g., Govt. Code § 26020 (airports); Sts. & Hwys. Code § 943 (highways). Its purpose is to give a county adequate authority to carry out its functions.

Specific limitations may, of course, be imposed on the exercise of the power of eminent domain. See Penal Code § 4106 (no industrial farm may be established on land outside county without consent of the affected county).

GOVERNMENT CODE § 37350.5

Tentatively approved April 1970

CITIES

§ 37350.5. Power of eminent domain

Sec. . Section 37350.5 is added to the Government Code, to read:

37350.5. The legislative body of any city may condemn any property necessary to carry out any of the powers or functions of the city.

Comment. Section 37350.5 supersedes the grant of condemnation authority formerly contained in various subdivisions of Section 1238 of the Code of Civil Procedure and supplements the specific grants of such authority contained in this and other codes. E.g., Govt. Code § 37501 (public assembly or convention halls); Sts. & Hwys. Code § 4090 (streets, walks, parking places). Its purpose is to give a city adequate authority to carry out its municipal functions.

Specific limitations may, of course, be imposed on the exercise of the power of eminent domain under some circumstances. See Govt. Code § 37353(c) (no existing golf course may be acquired by eminent domain).

§ 53030. Restoration of local public records destroyed by public calamity

Sec. . Article 2.5 (commencing with Section 53030) is added to Chapter 1 of Part 1 of Division 2 of Title 5 of the Government Code, to read:

Article 2.5. Restoration of Records Destroyed by
Public Calamity

53030. (a) As used in this section:

(1) "Acquire" includes acquisition by gift, purchase, lease, eminent domain, or otherwise.

(2) "Local public entity" means any public entity other than the state.

(3) "Public record plant" means the plant, or any part thereof, or any record therein, of any person engaged in the business of searching or publishing public records or insuring or guaranteeing titles to real property, including copies of public records and abstracts or memoranda taken from public records, which is owned by or in the possession of such person or which is used by him in his business.

(b) If public records of a local public entity have been lost or destroyed by conflagration or other public calamity, the local public entity may acquire the right to reproduce such portion of a public record plant as is necessary for the purpose of restoring or replacing the records or their substance.

Comment. Section 53030 is derived from and reflects the same policy as subdivision 15 of former Code of Civil Procedure Section 1238. However, the provision is broadened to cover all local public entities and is limited to acquiring the "right to reproduce" such records and does not permit permanent acquisition of the public records plant itself.

The broad authority to acquire the "right to reproduce" lost or destroyed records permits the reproduction of records by such means as making copies, obtaining a computer print-out or other visual representation of records preserved in data processing equipment, or duplicating magnetic tapes or other means for preserving such records in data processing equipment.

Cross Reference:

Similar authority for state agencies, Govt. Code § 14770.

PUBLIC CEMETERY DISTRICTS

§ 8961. Power to acquire property by condemnation or otherwise

Sec. . Section 8961 of the Health and Safety Code is amended to read:

8961. The district may maintain a cemetery or cemeteries, limited in use to burial in the ground of residents of the district or of members of the family of a resident who has heretofore purchased a burial plot , and for this purpose may take and hold title to property by grant, gift, devise, condemnation, lease, or any other method .

Comment. Section 8961 is amended to make clear the right of public cemetery districts to acquire and hold title to realty for cemetery purposes. See 14 Ops. Cal. Atty. Gen. 252 (noting the confusion engendered by the recodification of Sections 8961, 8962, and 8963). The term "condemnation" preserves the grant of condemnation authority formerly contained in subdivision 14 of Section 1238 of the Code of Civil Procedure (condemnation authorized for "cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof").

LAND CHEST CORPORATIONS

§ 35167. Acquisition of property

Sec. . Section 35167 is added to the Health and Safety Code, to read:

35167. When the commissioner has approved a housing project, the corporation may acquire the property necessary for the project by gift, bequest, purchase, or eminent domain.

Comment. Sections 35167-35171 retain the substance of subdivision 21 of former Code of Civil Procedure Section 1238 insofar as that subdivision may have applied to land chest corporations (nonprofit corporations formed for the purpose of providing "housing in rural and suburban areas for families of low income"). Sections 35167-35171 use the same language as Sections 34874-34878 relating to limited dividend housing corporations (corporations formed for the purpose of providing housing for families of low income or reconstructing slum areas).

HEALTH & SAFETY CODE § 35168
Tentatively approved June 1970

LAND CHEST CORPORATIONS

§ 35168. Eminent domain; authorization by commissioner

Sec. . Section 35168 is added to the Health and Safety Code,
to read:

35168. The power of eminent domain shall not be exercised by
a corporation except with the specific authorization of the commis-
sioner.

Comment. See the Comment to Section 35167.

HEALTH & SAFETY CODE § 35169

Tentatively approved June 1970

LAND CHEST CORPORATIONS

§ 35169. Certificate of authorization

Sec. . Section 35169 is added to the Health and Safety Code, to read:

35169. The authorization shall be contained in a certificate of the commissioner specifying that after public hearing the commissioner has determined that the acquisition of the property by eminent domain and the construction of the housing on the property is in the public interest and necessary for the public use.

Comment. See the Comment to Section 35167.

HEALTH & SAFETY CODE § 35170

Tentatively approved June 1970

LAND CHEST CORPORATIONS

§ 35170. Public hearing

Sec. . Section 35170 is added to the Health and Safety Code, to read:

35170. The hearing shall be held at a time and place designated by the commissioner. At least 10 days prior to the hearing the corporation shall give notice of the hearing by publication in a newspaper designated by the commissioner and published or circulated in the city or county where the property is located.

Comment. See the Comment to Section 35167.

HEALTH & SAFETY CODE § 35171

Tentatively approved June 1970

LAND CHEST CORPORATIONS

§ 35171. Effect of certificate

Sec. . Section 35171 is added to the Health and Safety Code, to read:

35171. A certified copy of the certificate of the commissioner is conclusive evidence of the matters certified in it in any proceeding in eminent domain to acquire the property or any part of it set forth in the certificate.

Comment. See the Comment to Section 35167.

RESORT IMPROVEMENT DISTRICTS

§ 13070.1. Definition of "acquire"

Sec. . Section 13070.1 is added to the Public Resources Code, to read:

13070.1. As used in this chapter, "acquire" includes but is not restricted to taking by condemnation, purchase, or lease, and receiving by donation or dedication.

Comment. Section 13070.1 is added to give the term "acquire" used in Section 13070 its broadest possible meaning and to insure that the repeal of Code of Civil Procedure Section 1238 will not affect adversely the districts formed under the Resort Improvement District Law.

PRIVATELY OWNED PUBLIC UTILITIES

ARTICLE 7. EMINENT DOMAIN

- § 610. Article applies to "public utilities" only
- § 611. Railroad corporations
- § 612. Electrical corporations
- § 613. Gas corporations
- § 614. Heat corporations
- § 615. Pipeline corporations
- § 616. Telephone corporations
- § 617. Telegraph corporations
- § 618. Water corporations
- § 619. Wharfingers
- § 620. Ferries
- § 621. Street railroad corporations
- § 622. Motor carriers
- § 623. Warehousemen
- § 625. Resolution of Public Utilities Commission
- § 626. Effect of resolution

PUBLIC UTILITIES CODE § 610

Tentatively approved March 1970

Sec. . Article 7 (commencing with Section 610) is added to Chapter 3 of Part 1 of Division 1 of the Public Utilities Code, to read:

Article 7. Eminent Domain

§ 610. Article applies to "public utilities" only

610. This article applies only to a corporation or person that is a public utility.

Comment. Section 610 is included to make clear that this article extends the right of eminent domain only to "public utilities" as defined in Section 216 ("service is performed for or the commodity delivered to the public or any portion thereof") and not to persons or corporations that are not subject to regulation and rate control. It has been held that the exercise of the right of eminent domain conclusively evidences an intention to devote the property so acquired to a public use, thereby rendering the condemnor a public utility. Producers Transp. Co. v. Railroad Comm'n, 176 Cal. 499, 505, 169 P. 59, (1917). Compare McCullagh v. Railroad Comm'n, 190 Cal. 13, 210 P. 264 (1922). This section is consistent with the holding in the Producers Transp. Co. case.

§ 611. Railroad corporations

611. A railroad corporation may condemn any property necessary for the construction and maintenance of its railroad.

Comment. Section 611 grants "railroad corporations" (defined in Section 230) the right of eminent domain to acquire property necessary for the construction and maintenance of its "railroad." "Railroad" is defined in Section 229 to mean in substance all railroad property devoted to public use in the transportation of persons or property. Thus, Section 611 authorizes condemnation of any property necessary to carry out the regulated activities of the railroad. It retains in substance the authority formerly found in subdivision (g) of Section 7526 of the Public Utilities Code and in Section 1238 of the Code of Civil Procedure. See, e.g., Southern Pac. Co. v. Los Angeles Mill Co., 177 Cal. 395, P. (1918)(spur tracks); Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238 (1915)(land for wharves for transfer of freight between railroad cars and boats where reasonably necessary for railroad corporation's future business); Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 92 P. 849 (1907)(land adjacent to station grounds required for a freight house); Southern Pacific R. R. Co. v. Raymond, 53 Cal. 223, P. () (workshop); Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 688, 87 P. 27 (1906)(spur tracks). Cf. City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916)(land for pole line for transmission of power to public railway). Section 611 would not, however, permit condemnation by a railroad corporation of land to be used, for example, as an industrial park.

PUBLIC UTILITIES CODE § 611

Tentatively approved March 1970

Section 611 supersedes provisions formerly contained in the Public Utilities Code and Code of Civil Procedure insofar as those provisions related to privately owned public utilities. See subdivision (g) of Section 7526 of the Public Utilities Code (right to condemn lands "to be used in the construction and maintenance of its roads, and all necessary appendages and adjuncts"); Section 1238 of the Code of Civil Procedure, subdivision 4 ("steam, electric and horse railroads"), subdivision 11 (railroads "for quarrying, logging or lumbering purposes"). See also Section 1238, subdivision 9 ("roads for transportation by traction engines or road locomotives").

Section 611 has no effect on various specific grants of the power to railroads to condemn private property. See Public Utilities Code Sections 7533 (additional tracks), 7535 (railroad intersections), 7536 (railroad crossings). See also Public Utilities Code Section 7508 (right of eminent domain in transferee of railroad corporation).

§ 612. Electrical corporations

612. An electrical corporation may condemn any property necessary for the construction and maintenance of its electric plant.

Comment. Section 612 grants "electrical corporations" (defined in Section 218) the right of eminent domain to acquire property necessary for the construction and maintenance of its "electric plant." "Electric plant" is defined in Section 217 to mean in substance all property devoted to public use in the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power. Thus, Section 612 authorizes condemnation of any property necessary to carry out the regulated activities of the electrical corporation. It retains and possibly broadens the authority formerly found in subdivisions 12 and 13 of Section 1238 of the Code of Civil Procedure and supersedes those subdivisions insofar as they apply to privately owned public utilities. See also the Comment to Section 613. Insofar as subdivision 13 permits acquisition of property for future use, it is anticipated that that authority will be given to privately owned public utilities by a general provision to be included in the comprehensive condemnation statute.

§ 613. Gas corporations

613. A gas corporation may condemn any property necessary for the construction and maintenance of its gas plant.

Comment. Section 613 grants "gas corporations" (defined in Section 222) the right of eminent domain to acquire property necessary for the construction and maintenance of its "gas plant." "Gas plant" is defined in Section 221 to include all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of gas, natural or manufactured, for light, heat, or power. Thus, Section 613 authorizes condemnation of any property necessary to carry out the regulated activities of the gas corporation.

Sections 612, 613, and 614 largely supersede subdivision 17 of Section 1238 of the Code of Civil Procedure. Insofar as subdivision 17 permits acquisition of property for future use, it is anticipated that that authority will be given privately owned public utilities by a general provision to be included in the comprehensive condemnation statute.

§ 614. Heat corporations

614. A heat corporation may condemn any property necessary for the construction and maintenance of its heating plant.

Comment. Section 614 grants "heat corporations" (defined in Section 224) the right of eminent domain to acquire property necessary for the construction and maintenance of its "heating plant." "Heating plant" is defined in Section 223 to include all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of heat for domestic, business, industrial, or public use. Thus, Section 614 authorizes condemnation of any property necessary to carry out the regulated activities of the heat corporations. See the Comment to Section 613.

§ 615. Pipeline corporations

615. A pipeline corporation may condemn any property necessary for the construction and maintenance of its pipeline.

Comment. Section 615 grants "pipeline corporations" (defined in Section 228) the right of eminent domain to acquire property necessary for the construction and maintenance of its "pipeline." "Pipeline" is defined in Section 227 to include all property used in connection with or to facilitate the transmission, storage, distribution, or delivery of crude oil or other fluid substances except water through pipelines.. Thus, Section 615 authorizes condemnation of any property necessary to carry out the regulated activities of the pipeline corporation.

Section 615 supersedes subdivision 10 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "oil pipelines") insofar as that subdivision relates to privately owned public utilities.

§ 616. Telephone corporations

616. A telephone corporation may condemn any property necessary for the construction and maintenance of its telephone line.

Comment. Section 616 grants "telephone corporations" (defined in Section 234) the right of eminent domain to acquire property necessary for the construction and maintenance of its "telephone line." "Telephone line" is defined in Section 233 to include all property used in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires. Thus, Section 616 authorizes condemnation of any property necessary to carry out the regulated activities of the telephone corporation.

Section 616 supersedes a portion of subdivision 7 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "telephone . . . lines, systems and plants") insofar as that subdivision relates to privately owned public utilities.

§ 617. Telegraph corporations

617. A telegraph corporation may condemn any property necessary for the construction and maintenance of its telegraph line.

Comment. Section 617 grants "telegraph corporations" (defined in Section 236) the right of eminent domain to acquire property necessary for the construction and maintenance of its "telegraph line." "Telegraph line" is defined in Section 235 to include all property used in connection with or to facilitate communication by telegraph, whether such communication is had with or without the use of transmission wires. Thus, Section 617 authorizes condemnation of any property necessary to carry out the regulated activities of the telegraph corporation.

Section 617 supersedes a portion of subdivision 7 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "telegraph . . . lines, systems and plants") insofar as that subdivision relates to privately owned public utilities.

§ 618. Water corporations

618. A water corporation may condemn any property necessary for the construction and maintenance of its water system.

Comment. Section 618 grants "water corporations" (as defined in Section 241) the right of eminent domain to acquire property necessary for the construction and maintenance of its "water system." "Water system" is defined in Section 240 to include all property used in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement of water for power, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use. Thus, Section 618 authorizes condemnation of any property necessary to carry out the regulated activities of the water corporation.

Section 618 supersedes portions of subdivisions 3 and 4 of Section 1238 of the Code of Civil Procedure insofar as those portions relate to condemnation by privately owned public utilities.

§ 619. Wharfingers

619. A wharfinger may condemn any property necessary for the construction and maintenance of facilities for the receipt or discharge of freight or passengers.

Comment. Section 619 grants a "wharfinger" the right of eminent domain to acquire property necessary for facilities for the receipt or discharge of freight or passengers. "Wharfinger" is defined in Section 242 to include "every corporation or person owning, controlling, operating, or managing any dock, wharf, or structure used by vessels in connection with or to facilitate the receipt or discharge of freight, other than bulk liquid commodities, or passengers for compensation within this State."

Section 619 supersedes portions of subdivisions 3 ("public mooring places for watercraft") and 4 ("wharves, docks, piers, . . . chutes, booms") of Section 1238 of the Code of Civil Procedure insofar as those portions relate to privately owned public utilities.

PUBLIC UTILITIES CODE § 620

Tentatively approved March 1970
Revised April 1970

§ 620. Ferries

620. A common carrier, as defined in subdivision (b) of Section 211, may condemn any property necessary for the construction and maintenance of facilities for its transportation of persons or property.

Comment. Section 620 grants the power of eminent domain to acquire property necessary for ferry facilities. The reference to subdivision (b) of Section 211 incorporates a definition of those public utilities that transport persons or property for compensation by vessel upon inland waters or upon the high seas between points within this state. Section 620 supersedes the grant of condemnation for "ferries" in subdivision 4 of Section 1238 of the Code of Civil Procedure insofar as that subdivision relates to the privately owned public utilities. See Streets and Highways Code Sections 30802, 30866 (regulation of amount of ferry tolls).

PUBLIC UTILITIES CODE § 621

Tentatively approved March 1970
Revised May 1970

§ 621. Street railroad corporations

621. A street railroad corporation may condemn any property necessary for the construction and maintenance of its street railroad.

Comment. Section 621 grants "street railroad corporations" (defined in Section 232) the right of eminent domain to acquire property necessary for the construction and maintenance of its "street railroad" (defined in Section 231). It replaces in substance the authority formerly found in subdivision (g) of Section 7526 and incorporated by reference by Section 7801 and in Section 1238 of the Code of Civil Procedure. See the Comment to Section 611.

§ 622. Motor carriers

622. (a) As used in this section, "motor carrier" means:

- (1) A highway common carrier as defined in Section 213.
- (2) A passenger stage corporation as defined in Section 226.

(b) A motor carrier may condemn any property necessary for the construction and maintenance of terminal facilities for the receipt, transfer, or delivery of the passengers or property it carries.

Comment. Section 622 grants certain motor carriers the right of eminent domain to acquire property necessary for terminal facilities. Sections 621 and 622 supersede subdivision 22 of Section 1238 of the Code of Civil Procedure which granted condemnation authority for "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."

§ 623. Warehousemen

623. A warehouseman may condemn any property necessary for the construction and maintenance of its facilities for storing property.

Comment. Section 623 grants a "warehouseman" (defined in Section 239) the right of eminent domain to acquire property necessary for storing property. Section 623 supersedes a portion of subdivision 4 of Section 1238 of the Code of Civil Procedure (granting authority to condemn for "warehouses") insofar as that portion relates to privately owned public utilities.

PUBLIC UTILITIES CODE § 625

Staff recommendation considered by
Commission March 1970--action deferred

§ 625. Resolution of Public Utilities Commission

625. No condemnation proceeding shall be commenced under the authority granted by this article unless the Public Utilities Commission first adopts a resolution declaring that the public interest and necessity require the acquisition, construction, or completion by the public utility of the project for which the property is required and that the fee or such interest in the property as is described in the resolution is necessary for the project.

Comment. Sections 625 and 626 impose a requirement not found in prior law. The sections, which are based on Streets and Highways Code Sections 102 and 103, make the question of necessity one for determination by the Public Utilities Commission rather than by the court as under former law.

PUBLIC UTILITIES CODE § 626

Staff recommendation considered by
Commission March 1970--action deferred

§ 626. Effect of resolution

626. The resolution of the commission is conclusive evidence:

(a) Of the public necessity of such proposed project.

(b) That such fee or interest in the property is necessary
therefor.

(c) That such proposed project is planned or located in a
manner which will be most compatible with the greatest public good
and the least private injury.

Comment. See the Comment to Section 625.

MUTUAL WATER COMPANIES

Public Utilities Code § 2729 (added)

Sec. . Section 2729 is added to the Public Utilities Code,
to read:

2729. A mutual water company may exercise the power of eminent domain for water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by such company.

Comment. Section 2729 specifies the condemnation authority of a mutual water company (defined in Section 2725). The section continues without substantive change the authority to condemn formerly conferred by Code of Civil Procedure Section 1238(4) (condemnation authorized for "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").

Mutual water companies are not generally subject to the jurisdiction of the Public Utilities Commission. See Pub. Util. Code § 2705. However, it is possible that exercise of the power of eminent domain by a mutual water company may demonstrate an intention to devote the property so acquired to public use and thereby render the company subject to regulation as a public utility. See Corona City Water Co. v. Public Utilities Comm'n, 54 Cal.2d 834, 357 P.2d 301, 9 Cal. Rptr. 245 (1960); Iamb v. California Water & Tel. Co., 21 Cal.2d 33, 129 P.2d 371 (1942). Nevertheless, the authority granted by this section is not dependent upon whether a company is or is not held to be a public utility by exercising such authority.

STREETS & HIGHWAYS CODE § 4008

Tentatively approved April 1970

STREET OPENING ACT OF 1903

Streets & Highways Code § 4008 (amended)

Sec. . Section 4008 of the Streets and Highways Code is amended to read:

4008. "Street" includes public street, avenues, roads, highways, byroads, squares, lanes, alleys, courts or places.

Comment. The addition of "byroads" to Section 4008 makes it clear that byroads--roads, open to public use, that furnish access to an existing public road from or primarily from otherwise isolated property--may be established under the Street Opening Act of 1903. See Section 4008.1 defining "byroad." This addition probably codifies existing law. Cf. City of Oakland v. Parker, 70 Cal. App. 295, 233 P. 68 (1924).

STREETS & HIGHWAYS CODE § 4008.1

Tentatively approved April 1970

STREET OPENING ACT OF 1903

Streets & Highways Code § 4008.1 (added).

Sec. . Section 4008.1 is added to the Streets and Highways Code, to read:

4008.1. "Byroad" means a road, open to public use, that furnishes access to an existing public road from or primarily from otherwise isolated property.

Comment. The definition of "byroad" in Section 4008.1 is based on the discussion in Sherman v. Buick, 32 Cal. 242 (1867). It adopts substantially the definition formerly incorporated in Section 1238(6) of the Code of Civil Procedure; however, any restriction in utilization of the property served by the byroad is eliminated.

STREETS & HIGHWAYS CODE § 4120.1

Tentatively approved April 1970
Revised June 1970

STREET OPENING ACT OF 1903

Streets & Highways Code § 4120.1 (added)

Sec. . Section 4120.1 is added to the Streets and Highways Code, to read:

4120.1. The owner of any property that may be benefited by a proposed improvement may file with the legislative body a request that the improvement be undertaken. Such request may, but need not include the maps, plats, plans, profiles, specifications, and other information referred to in Sections 4120 and 4122, and shall not be denied without a public hearing.

Comment. Section 4120.1 is added to the Street Opening Act of 1903 to expressly authorize initiation of improvement proposals by individual property owners. Similar procedures already exist in many counties and cities. In reviewing a property owner's request, the board of supervisors should consider the necessity for the improvement and the relative hardship to the party whose land is sought to be used for the improvement compared to the one seeking the improvement.