

Memorandum 71-13

Subject: Study 36.41 - Condemnation (Protective Condemnation)

Summary

This memorandum discusses so-called protective condemnation--condemnation of property for the purpose of protecting or preserving the safety, appearance, or usefulness of a public work or improvement. Authority to condemn property for this use is presently found in Article I, Section 14-1/2 of the California Constitution and in various statutory provisions. Absent an express statute, such authority will be implied from the grant of authority to condemn property for a particular public work or improvement. A brief background study is attached.

The policy questions presented are:

- (1) Is express statutory authority for protective condemnation needed or desirable and, if so, how should the grant of authority be phrased?
- (2) Should the existing provisions, many of which limit the authority to condemn property for protective purposes to property within a specified distance from the public work or improvement, be retained or repealed?
- (3) What, if any, limitations should be imposed on the right to acquire property for protective purposes and to then sell or lease the property subject to appropriate limitations on use? What rights, if any, should the former owner have to get first chance at the property when it is sold or leased?

Background

"Excess condemnation" distinguished. Protective condemnation does not involve true "excess condemnation." Excess condemnation involves acquisition

of an entire parcel where only a portion is to be used for the public work or improvement. The Commission has determined that excess condemnation should be permitted only where there is a substantial probability that the cost of acquiring the entire parcel will be substantially equivalent to the cost of acquiring the part needed for the public work or improvement. In protective condemnation, the property acquired is to be used for the public work or improvement.

Site-oriented improvements. Where the property taken is not to be resold subject to restrictions, the question as to the amount of property needed for the improvement would rarely, if ever, be presented where the public project is a site-oriented improvement, such as a school or public building, since the improvement ordinarily will be planned and designed to occupy the entire parcel sought to be taken. For example, a public building will be designed to occupy the entire parcel if the condemnor determines that it wants the entire parcel. The grounds surrounding the building may be larger or smaller, depending on the size of the parcel selected for the project. It would be undesirable to provide for a court hearing on "necessity" to determine in such a case, for example, that the planned set-back for the building, or the grounds surrounding the building, are in excess of what is "necessary" for the building, or that the space allotted to a school playground is more than is needed. Accordingly, in the case of a site-oriented improvement, a court review of necessity would serve no useful purpose and could, in fact, be exceedingly undesirable. No court hearing is now available in cases where the resolution of necessity is conclusive.

Engineering-oriented improvements. In an engineering-oriented improvement, such as a freeway or water distribution canal, the question whether more property

is taken than is needed for protective purposes is more likely to arise because the boundaries of the public improvement are determined by engineering considerations. People v. Lagiss, 223 Cal. App.2d 23, 35 Cal. Rptr. 554 (1963), illustrates a case of what may be considered protective condemnation for highway purposes. (See Exhibit I for the pertinent portions of the opinion in this case.) Here, there could be a court review of necessity because the boundaries of the improvement are established by engineering considerations, but it does not appear desirable to permit such a review any more than in any other case where property is being acquired for a public use. The condemnor constructing the freeway may determine that an entire parcel of property is needed to provide for better appearance, better slope, increase in sight distance, and improved drainage conditions even though the proposed freeway could be constructed without a portion of the parcel. This is the Lagiss case. If, in fact, the entire parcel is to be devoted to freeway use, the only question is whether the entire parcel is necessary for that use. The necessity question ordinarily has not been, and (we believe) should not be, justiciable. The taking ordinarily cannot now be defeated on the ground of lack of necessity since the resolution of necessity ordinarily is conclusive on that issue. We do not believe that a court determination that the property taken in the Lagiss case was not necessary--and, hence, could not be condemned--would have given a desirable result in that case.

Right to contest taking on ground not to be used for public use. It is important to note that the fact that the condemnee cannot contest a taking on the ground of lack of necessity does not mean that he cannot defeat the taking on the ground that the condemnor is not going to put the property to the public use for which it is purportedly taken. This defense was not available in Lagiss,

since the court found that the condemnor at the time of trial was actually using the property for the public purpose for which it was taken. See Exhibit I for a discussion of the presently applicable law.

Acquisition of fee and sale or lease subject to restrictions. Where property is needed for protective purposes, there are two means whereby the condemnor can achieve its objective. The condemnor may condemn only the interest needed to secure the needed protection, leaving the property owner with the remaining interests. This may result in a saving since the condemnor needs only to pay for the interest it takes. At the same time, the owner of the property may or may not be happy with this type of taking. If he is a farmer, he may be happy because he can, perhaps, continue to use the land as before. But, if he is a land developer, he may be unhappy because he now has his money invested in a tract he cannot develop. Moreover, taking a limited interest may create practical problems for the condemnor. As pointed out in Taylor's article on taking the fee or a lesser interest, it may be difficult to describe the exact type of "easement" or interest to be acquired where less than a fee is to be acquired. Subsequent condemnation actions may be needed to enlarge on the interest originally taken as future events change the situation that existed at the time of the original taking. Control over permitted uses is more difficult when only a described interest is taken because all interests not taken remain with the owner. The better method, according to various groups that have studied this problem, may be to acquire the fee and then sell off or lease out an interest that permits only specified uses. E.g., Monterey County Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 213 (1962)(court notes that "the taking of a flowage easement only as to lands above the minimum pool would present many problems and difficulties as to access, sanitation and control and that any possible savings would be more than

offset by the numerous operational problems presented."). (A possessory interest of this type is, of course, subject to property taxation.) Some of the existing protective condemnation statutes expressly authorize sale subject to protective restrictions.

Rights of former owner. One question presented when the fee is acquired and some interest is to be sold or leased is whether the former owner should have some type of preferential interest in acquiring the interest to be sold off or to be leased. None of the existing protective condemnation statutes give the former owner any preferential rights.

In cases of negotiated purchases, we can assume that, in the usual case, the acquirer will want to work out a mutually beneficial arrangement with the former owner where he will have the right to use the land for the permitted uses if he wishes to have such right. This type of arrangement often would facilitate a negotiated purchase. Cf. Code Civ. Proc. § 1239.4 (acquisition of right to prevent hazardous uses of land adjacent to airport authorized, former owner having an "irrevocable free license to use and occupy such land for all purposes except the erection or maintenance of structures or the growth or maintenance of vegetable life above a certain prescribed height"). Note, however, that Section 1239.4 was amended in 1961 to permit the condemnation of a fee in lieu of leaving the owner with the irrevocable free license, probably a reflection of the problems of controlling uses that may result when less than the fee is acquired.

The rights of the former owner are considered in a separate study. There are many complications in granting any rights to the former owner. In many cases, the former owner will be the one who will bid the highest for the permitted uses, for he will be the one who can most easily put the property to

the permitted uses. In cases where this is not true, presumably the former owner will be fairly compensated by the "just compensation" paid for the taking of the fee (and severance damage where not all the parcel is taken). The staff believes that the benefits to the former owner of a preferential right are outweighed by the procedural and practical problems that would result if such a right were given him.

When necessity might be subject to court review. Although not recommended by the staff, the Commission should consider whether a taking for protective purposes where the condemnor intends to resell the property subject to restrictions to protect the safety, utility, and beauty of improvements should be subject to a court review on necessity. The draft statute proposed by the staff does not include this feature; but, if the Commission decides that a review on necessity would be desirable in this situation, a draft of an appropriate provision could be prepared for consideration at a future meeting.

Constitutional provision. Article I, Section 14-1/2 of the California Constitution authorizes protective condemnation for certain specified purposes and subject to specified footage limitations. At the time this section was enacted, the law on what constituted a public use was in a development stage, and the section was thought to be necessary to make clear that protective condemnation is a permitted public use. The California courts have, for some time, held that protective condemnation is permitted absent express authority in the Constitution. See attached research study.

The Constitution Revision Commission has recommended that Section 14-1/2 be repealed. See Exhibit II attached. This is a sound recommendation. The section serves no useful purpose.

Existing protective condemnation statutes. The existing protective condemnation statutes are discussed infra under "Recommendations." By way of

background, it should be pointed out that some of these statutes merely implement Article I, Section 14-1/2; others authorize condemnation without footage restrictions or with footage restrictions in excess of those prescribed in Section 14-1/2; some provide expressly for resale subject to restrictions; others do not mention resale. The existing protective condemnation statutes are set out in Exhibit III. We have not searched the various uncodified special district statutes for protective condemnation statutes; we plan to make a search of those statutes when we conform them to our general comprehensive statute.

Coercion of waiver of severance damages. The power of protective condemnation does give the condemnor some leverage against the condemnee in partial takings. For example, in the Lagiss case (Exhibit I), the condemnor indicated a willingness to design the improvement so as to avoid the need to take all the land eventually taken if the owner would waive severance damages. When the condemnee declined to waive severance damages, the condemnor went ahead with its plan to take the entire parcel. This possibility exists in some cases. For example, the condemnor may agree to a slight revision in the alignment of the project to convenience a property owner in return for a settlement. Or the condemnor may agree to install an underpass in return for a settlement. The extra cost of the changes is offset by the savings in damages and the savings realized from not having to try the eminent domain action.

The staff does not believe that the potential for coercion that exists is great enough to justify the problems and procedural difficulties that would be created if necessity were made justiciable, assuming that it would be possible to describe in statutory language the kinds of cases where the issue of necessity would be reviewable. The Lagiss case does not disturb us enough to cause us

to recommend that necessity be made justiciable. As the court points out in its opinion:

The nub of the inquiry is whether defendant has affirmatively established bad faith or abuse of discretion in the sense that the condemnor does not actually intend to use the property as it resolved to use it. Stated another way, it was proper for defendant to introduce relevant evidence tending to show the "real purpose" of the condemnation proceedings, i.e., whether it was plaintiff's "real purpose" to take part of defendant's property, not for highway purposes, but for private purposes or for a public purpose not related to the highway project. Our attention, then, is directed to ascertaining whether there is any substantial evidence in the record which will support a finding that plaintiff does not intend to use the disputed portion for highway purposes.

Reviewing the evidence, the court found:

The fact that plaintiff was utilizing more land for sight distance than was needed for highway purposes does not militate against its public use so long as it was in fact used for sight distance purposes. The evidence is also clear that the subject highway had been completed at the time of trial, and that the disputed portion was then being utilized for sight distance, thus contributing to highway safety, and that it was useful to the highway from the standpoint of drainage, slope and appearance. These factors of utility are related to the highway project and are, therefore, consistent with public use.

We think that the test used by the court provides the condemnee with sufficient protection. We would be concerned if a rule were adopted that permitted a court to determine how much sight distance, slope, drainage, and appearance is to be permitted when a highway is designed. Accordingly, we believe that codification of the existing law as stated in various cases, including the Lagiss case, is the best course of action.

Recommendations

Repeal of Section 14-1/2 of Article I of Constitution. The Constitution Revision Commission has recommended that Section 14-1/2 be repealed. See Exhibit II. This is a sound recommendation; the section serves no useful purpose and is a potential source of confusion in the law. The Law Revision Commission should join in the recommendation that this section be repealed.

General provision for comprehensive statute. The right to take property for protective purposes will be implied in the absence of a specific statute where such right is necessary to protect or preserve a public work or improvement. See, e.g., Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962) ("taking incidental property to carry out and make effective the principal uses" permitted). Nevertheless, to avoid any doubt, an express statutory provision should be included in the comprehensive statute to deal with this problem.

The staff suggests a provision modeled after Government Code Sections 190-193, Streets and Highways Code Section 104.3, and Water Code Section 256. See Exhibit IV for a draft of a statute section and Comment. We believe that the language used to describe the purpose of protective condemnation ("to protect or preserve the quality, attractiveness, safety, or usefulness of the public work or improvement and its environs") is superior to the language used in the various sections upon which the new provision is based.

In connection with the proposed section, the following questions should be considered:

(1) What does the phrase "and its environs" add to the section? This phrase is included in the superseded provisions. Does it mean that protective condemnation is available to protect adjacent land from the adverse effects of the improvement as, for example, to protect adjacent land from flooding or from noise? Can the condemnor acquire land that would be adversely affected by the improvement and resell it subject to restrictions that assure that the land will be used for purposes compatible with the public improvement? For example, does the section authorize acquisition of residences adjacent to a proposed airport with a view to the assembly of a large tract to be resold for commercial purposes that will be compatible with the airport use? Should this be authorized by the section?

(2) The section does not contain any footage limitations. Such limitations operate in an arbitrary way. If limitations are desired, they should be written with a view to the particular uses. Although it is proposed infra to repeal some of the specific grants of protective condemnation authority that contain footage restrictions, the footage restrictions in these specific grants could be retained if desired. The general provision would be restricted by the specific statutes in cases where the specific statutes are applicable.

(3) The section does not provide for court review on necessity. The court can, however, prevent a taking where the purpose is not to use the property for protective purposes but instead the acquisition is for recoupment purposes. If it can be shown, for example, that the acquisition is for recoupment purposes and that the property is not going to be used for protective purposes, the court can prevent the acquisition on that ground. It would be possible to provide for a court review on necessity only in cases where the condemnor intends to resell the property subject to restrictions needed for protective purposes. The staff does not recommend this, and no such review is permitted under existing law.

Disposition of existing protective condemnation statutes. The staff suggests the following disposition be made of the protective condemnation statutes set out in Exhibit III (special district statutes--if any exist--will be considered later):

(1) Code of Civil Procedure Section 1238(18)(trees along highways)--repeal. This section is clearly superseded not only by the general protective condemnation authority but also by other statutory provisions.

(2) Code of Civil Procedure Section 1239.4 (air space or air easement) --defer consideration until condemnation for airport purposes is considered.

(3) Government Code Sections 190-196 (protective condemnation by the state, cities and counties for certain purposes)--repeal. The portion of this statute that authorizes protective condemnation is superseded by the general section to be included in the comprehensive statute. A statute could be drafted to govern disposition of property acquired for protective purposes (a matter that is covered in Government Code Sections 193-196 which will be repealed) and such statute could also apply to dispositions of property taken under true excess condemnation. The decision made when we considered true excess condemnation was that the disposition procedure should be governed by whatever procedure applies to the particular public entity when it is disposing of surplus property. The staff believes that the same policy should be adopted here.

(4) Government Code Sections 7000-7001 (protective condemnation in connection with specific projects)--retain. This statute has limitations on financing which should be retained. Retention of the statute will do no harm. Ultimately, when the particular project has been completed, the sections can be repealed.

(5) Streets and Highways Code Section 104.3 (protective condemnation for projects of Department of Public Works)--repeal. This authority overlaps that provided in the comprehensive statute provision. If the footage limitations are to be retained, the section could be revised to retain those limitations. The section appears to apply only when it is intended to convey out the property acquired subject to use restrictions. Other provisions authorize protective condemnation without footage limitations where there is no intent to convey out the property acquired subject to use restrictions. E.g., Streets and Highways Code Section 104(f)(trees along highways), (g)(highway drainage), (h)(maintenance of unobstructed view along highway). See also Streets and

Highways Code Section 965 (Exhibit III) relating to certain protective condemnations for county highway purposes, a section that should be retained.

(6) Water Code Section 256 (protective condemnation for Department of Water Resources projects)--repeal. This section also appears to apply only when it is intended to convey out the property acquired subject to use restrictions. Other sections authorize protective condemnation by the Department of Water Resources without footage restrictions. E.g., Water Code Section 253(e)(parks adjoining dams and water facilities), (f)(trees), (g)(drainage). Cf. Monterey County Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962)("excess" land could be condemned where its acquisition would benefit a dam and reservoir project by being of value for flood control purposes, permitting more effective supervision by avoiding policing and sanitation problems by precluding use adjacent land by private persons, avoiding "numerous operational problems" as to control of access, sanitation, and the like, and where the land could be used for recreational purposes, and the like).

If it is desired to retain the footage limitations, the section could be revised to retain those limitations.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

BACKGROUND STUDY -- PROTECTIVE CONDEMNATION

EXTRACT

Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L. J. 571, 588-591 (1969)

2. Protective Acquisitions

California adopted the protective theory of excess condemnation when section 14½ was added to article I of the state constitution. This provision authorizes excess acquisitions of property lying within 200 feet of the closest boundary of memorial grounds, streets, squares or parkways. The section further authorizes the condemnor to convey such parcels to private persons after restrictions are imposed to protect the project and preserve "the view, appearance, light, air and usefulness of such public works."⁸⁴

Section 14½ was adopted in the belief that absent such express authority excess condemnations for protective purposes would not constitute a "public use" within the meaning of article I section 14 of the constitution.⁸⁵ Decisions in other states at that time had declared protective takings unconstitutional either because the state followed the physical "public usage" test of determining public use, or because the courts were of the opinion that the resale to private persons constituted a private use.⁸⁶ Since 1928, however, the federal and state courts have rejected the physical "public usage" test⁸⁷ and have upheld acquisitions of land which the condemnor planned to retain merely to protect public improvements not located on the parcels acquired.⁸⁸ Further, federal and state decisions have sustained takings of private property where the condemnor proposed to resell the property after imposing restrictions on it to prohibit detrimental uses on the parcels acquired.⁸⁹ Thus, the constitutional arguments for invalidating protective takings have generally been rejected.⁹⁰

But while the validity of protective acquisitions is thus assured under the stringent provisions of section 14½, it is fairly clear that the general "public use" limitation of section 14 would now support such excess takings. The ironic result is that the distance limitations

⁸⁴ CAL. CONST. art. I, § 14½.

⁸⁵ *Argument for Proposed Senate Constitutional Amendment No. 16, 1928 BALLOT PAMPHLET*, cited in *People ex rel. Department of Pub. Works v. Superior Court*, 68 A.C. 206, 212, 436 P.2d 342, 346, 65 Cal. Rptr. 342, 346 (1968); see Note, *The Constitutionality of Excess Condemnation*, 46 COLUM. L. REV. 106, 111-12 (1946); Note, *The Problem of Excess Condemnation*, 27 WASH. U.L.Q. 466, 472-73 (1942).

⁸⁶ E.g., *Opinion of the Justices to the Senate*, 204 Mass. 616, 91 N.E. 578 (1910); *Pennsylvania Mut. Life Ins. Co. v. Philadelphia*, 242 Pa. 47, 88 A. 904 (1913); see Comment, *Eminent Domain--The Meaning of the Term "Public Use"--Its Effect on Excess Condemnation*, 13 MERCER L. REV. 274 (1966); Note, *An Expanded Use of Excess Condemnation*, 21 U. PITT. L. REV. 60, 63 (1959).

⁸⁷ *Bauer v. Ventura County*, 45 Cal. 2d 276, 284, 289 P.2d 1, 6 (1955); *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 789-90, 266 P.2d 105, 114, cert. denied, 348 U.S. 897 (1954).

⁸⁸ E.g., *United States v. Bowman*, 337 F.2d 768, 770 (7th Cir. 1966); *United States v. 91.69 Acres of Land*, 334 F.2d 229 (4th Cir. 1964); *United States v. Agee*, 322 F.2d 139 (6th Cir. 1963); *Monterey County Flood Control & Water Conser. Dist. v. Hughes*, 201 Cal. App. 2d 197, 20 Cal. Rptr. 252 (1962).

⁸⁹ *United States v. Bowman*, 337 F.2d 768, 770 (7th Cir. 1966).

⁹⁰ *People ex rel. Department of Pub. Works v. Lagiss*, 223 Cal. App. 2d 23, 35 Cal. Rptr. 554 (1962) (commenting favorably on section 104.3 of the *Streets and Highways Code*).

contained in section 14½ may be more restrictive than would have obtained had the section not been adopted. California courts, therefore, have limited section 14½ to protective acquisitions, refusing to extend the distance limitations to remnant, exchange, or other acquisitions.⁹¹

It is also difficult to support an argument that section 14½ voids statutes that authorize protective acquisitions other than those described in section 14½. The section could have this result only if it were the sole authority for excess condemnations for protective purposes. Section 14½ however, must be regarded as only a constitutional declaration of specific public uses within the general "public use" limitation of article I, section 14. Otherwise, section 14½ would purport to authorize condemnations for non-public purposes and would thus violate the fourteenth amendment of the federal Constitution.

Furthermore, it is difficult to interpret section 14½ as an exclusive particularization of uses for which protective acquisitions can be made, for the section was adopted not to limit but to expand the public use concept.⁹² As a result, several decisions have indicated that the distance limitations of section 14½ apply only to the uses specified in that section.⁹³ Moreover, the legislature has since enacted several protective acquisition statutes which exceed the distance limitations contained in section 14½. For example, Water Code section 256 authorizes protective acquisitions of property within 600 feet of improvements constructed by the Department of Water Resources. Streets and Highways Code section 104.3 contains distance limitations substantially the same as those of section 14½, but authorizes protective acquisitions for improvements other than those described in section 14½.⁹⁴ While Streets and Highways Code section 104.3 has received favorable judicial comment,⁹⁵ no reported decision has de-

⁹¹ *People ex rel. Department of Pub. Works v. Superior Court*, 68 A.C. 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); *People ex rel. Department of Pub. Works v. Garden Grove Farms*, 231 Cal. App. 2d 666, 42 Cal. Rptr. 118 (1965); *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 266 P.2d 105 (1954).

⁹² See note 85 *supra*.

⁹³ *People ex rel. Department of Pub. Works v. Garden Grove Farms*, 231 Cal. App. 2d 666, 671-72, 42 Cal. Rptr. 118, 121-22 (1965); *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 810, 266 P.2d 105, 126 (1954); see *People ex rel. Department of Pub. Works v. Superior Court*, 68 A.C. 206, 212, 436 P.2d 342, 346, 65 Cal. Rptr. 342, 346 (1968) (holding that section 14½ does not limit condemnation for other than protective purposes).

⁹⁴ Protective acquisitions for "any state highway or other public work or improvement constructed or to be constructed by the department . . ." are authorized by CAL. STREETS & HIGHWAYS CODE § 104.3.

⁹⁵ *People ex rel. Department of Pub. Works v. Lagiss*, 223 Cal. App. 2d 23, 35 Cal. Rptr. 554 (1963).

terminated whether this statute is unconstitutional to the extent it exceeds the limitations of section 14½. It appears, however, that statutes authorizing protective condemnations in connection with public projects other than those described in section 14½ are valid even if they contain more liberal distance limitations than found in section 14½ provided the true purpose of the condemnation is protective. If the purpose of a particular acquisition is not protective, the validity of the acquisition depends on whether the true purpose is a constitutional one.

In reviewing public use, the court can determine whether the purpose sought to be served by the acquisition is a public one. If the condemnor proposes to impose no restrictions, the purpose could hardly be protective. If it is shown that the acquisition is for recoupment purposes, the court can determine the validity of that acquisition on the basis of whether recoupment constitutes a public use.

Dec. 1963] PEOPLE EX REL. DEPT. PUB. WKS. v. LAGISS 29
 (223 C.A.2d 23; 35 Cal.Rptr. 354)

Action to condemn real property for highway purposes. Judgment condemning part of property involved, quieting title to part refused condemnation and awarding compensation for part taken, reversed with directions.

Holloway Jones, Jack M. Howard, Joseph F. DeMartini, Harry C. Miller, Robert E. Reed and Harry S. Fenton for Plaintiff and Appellant.

Harlow P. Rothert, Cushing, Cullinan, Hancock & Rothert, Tinning & DeLap and Robert Eshleman for Defendant and Appellant.

MOLINARI, J.—This is an appeal by both parties to this litigation from specified portions of the judgment in an eminent domain proceeding.¹

The Record

The present appeal grows out of an earlier appeal in the instant case decided by this court.² In order to properly place the appeal now before us in its proper focus it will be necessary to set out a summary of the facts set forth in the previous appeal. These facts give us the background of the case as follows:

After adoption by the California Highway Commission of the resolution of public interest and necessity required by Streets and Highways Code section 102, this action was brought to condemn, for highway purposes, a parcel of land in Contra Costa County belonging to defendant.³ Defendant answered, denying that the whole of the parcel was needed by plaintiff for highway or any public purpose. Defendant

¹Plaintiff below, the People of the State of California, acting by and through the Department of Public Works, will herein be referred to by the designation, "plaintiff." Defendant, Anthony G. Lagiss, will also be referred to by his designation below, namely, "defendant." The portions of the judgment from which each party appeals will be hereinafter particularly set out.

²*People v. Lagiss*, 160 Cal.App.2d 28 [324 P.2d 926], hereinafter referred to as "*People v. Lagiss*." (Decided May 1958. Petition for hearing denied June 1958.)

³Under the Streets and Highways Code the Department of Public Works, hereinafter sometimes referred to as "the Department," cannot commence proceedings in eminent domain unless the California Highway Commission, hereinafter referred to as "the Commission," first adopts a resolution declaring that public interest and necessity require the acquisition, construction or completion by the state, acting through the Department, of the improvement for which the real property is required.

further alleged in his answer, as amended, that the Commission in passing its resolution acted in bad faith and abused its discretion in that it knew or should have known that only a portion of the parcel was needed for any public purpose; that it is apparent from the face of the complaint that only the portion between the highway lines shown on the map was necessary and that there are no plans for or possible use of the remainder of said parcel; that the Commission and the Department had no independent knowledge of the public necessity in acquiring all of said parcel and that its acquisition was for the sole purpose of depriving defendant of compensation justly due him, also to harass him, as plaintiff well knew defendant wished to retain that portion of the parcel not needed for public improvement, and to coerce defendant into accepting a sum for the taking substantially less than the fair market value of the land actually needed for the improvement; and that plaintiff determined to take the property for the purpose of harassing defendant in that plaintiff submitted to defendant a stipulation in which plaintiff would acquire only the portion which defendant claimed was needed for the highway provided defendant would waive any rights to severance damage from the taking of only a portion of the larger parcel. These affirmative allegations of the answer were stricken by the court on motion. The cause thereupon proceeded to trial by jury, and on the first day of the trial leave was granted to defendant to file a third amended answer. This answer contains no allegations of fraud, abuse of discretion or bad faith or that the entire parcel was not needed, other than a denial of the allegations of the complaint. The jury returned a verdict for plaintiff wherein it assessed the damages for the taking at \$10,000 for the whole of the parcel sought to be condemned. On an appeal from the judgment entered pursuant to said verdict, this court, in *People v. Lagiss*, reversed the judgment on the basis that defendant should have been permitted to present the defense of fraud, bad faith, abuse of discretion and lack of public purpose. The reviewing court also held that in filing the third amended answer containing no allegations of fraud, abuse of discretion or bad faith defendant did not waive his

(§ 102.) The Department, plaintiff herein, is the condemning body for state highway purposes. (§ 102.) The Commission is a part of and an adjunct to the Department (§ 70), and is the quasi-judicial body which determines the matters required to be declared in said resolution. (*People v. Olson*, 109 Cal.App. 528, 530 [293 P. 645].)

right to present these defenses in view of the trial court's previous rulings rejecting these defenses.⁴

On June 16, 1959, the Supreme Court in *People v. Chevalier*, 52 Cal.2d 299 [340 P.2d 598], held that the question of "necessity" is not justiciable and disapproved any language in *People v. Lagiss* and other cases implying a contrary rule. (Pp. 305, 307.)⁵ On June 22, 1959, a pretrial conference was had in the instant action. The pretrial order recites that the issues of public use and necessity having been raised, these issues would be heard by the court sitting without a jury at some time prior to the hearing on the issue of valuation wherein a jury trial was requested. It does not appear from the record whether *Chevalier* was then called to the attention of the court. When the cause came on for retrial on January 19, 1960, the trial court indicated that the questions before it were those of necessity and public use, and while it appears that counsel for both sides acknowledge that these issues were before the court, it also appears that the counsel for plaintiff did, in its opening statement, call the attention of the court to the holding in *Chevalier* to the effect that the question of necessity is not justiciable and that the sole issue before the court was that of public use. It appears, also, that the trial court at that time agreed with plaintiff's statement in this respect. Moreover, in "Findings of Fact and Conclusions of Law"⁶ which the court made and signed on August 2, 1960, the trial court recited therein that the matter came on for trial "as to the issue of public use." The record discloses, however, that evidence was taken on the

⁴The order of reversal as contained in the opinion reads "The judgment is reversed." (P. 37.)

⁵*Chevalier* held that the condemning body's findings of necessity are not reviewable and cannot be affected by allegations that such findings were made as the result of fraud, bad faith or abuse of discretion. (P. 307.) This holding is predicated upon the provisions of Code of Civil Procedure section 1241 and Streets and Highways Code section 103 wherein it is provided that the condemning body's determination of necessity "shall be conclusive evidence" thereof. *Chevalier* did recognize and hold, however, that fraud, bad faith and abuse of discretion may be shown on the question of "public use." The rationale of *Chevalier* is based upon a recognition of the distinction between the question of public use and the question of necessity. (P. 308.)

The rule announced by *Chevalier* has been followed in *County of San Mateo v. Bartole*, 184 Cal. App.2d 422 [7 Cal.Rptr. 569], and *County of Los Angeles v. Bartlett*, 203 Cal.App.2d 523 [21 Cal.Rptr. 776].

⁶These "Findings of Fact and Conclusions of Law" were superseded by the "Findings of Fact and Conclusions of Law" made and signed on April 13, 1961.

issue of necessity as well as the issue of public use, and that the trial court made findings of fact on both of these issues. The trial court found: that plaintiff was guilty of bad faith and abuse of discretion in submitting to and having the Commission pass a resolution reciting a need for the whole of the said parcel when it knew that only a portion of said parcel was needed for a public purpose; that plaintiff included the whole parcel knowing that defendant wanted to use said unneeded part; that plaintiff did so to coerce and harass defendant into taking less than the fair market value of the property despite plaintiff's knowing that defendant at all times wanted to use a portion of said property and attached substantial value to it, and despite plaintiff's knowing that no public use was intended to be made of said disputed portion, for highway or drainage or other public purpose whatever; and that no public use is being made or was intended to be made of the contested portion. The court, from said findings, concluded: that no public use attached to the contested portion of defendant's property, and directed that the cause proceed to trial for the determination of the remaining issues; and that at the conclusion thereof defendant was entitled to a judgment quieting title to the said disputed portion together with just compensation for all loss sustained.

Thereafter, plaintiff filed a document entitled "Waiver," in the court below, reciting that plaintiff was desirous of obviating the expense incident to the retrial of the issue of compensation and that it was therefore waiving its right to claim any value for that portion of defendant's property not to be condemned, and that it was conceding, for purposes of the waiver, that the said remaining property be considered to have suffered total damage. The said "Waiver" was conditioned upon the issue of compensation being removed by entry of judgment upon the verdict reached by the jury in the first trial. Plaintiff thereupon moved for entry of judgment in accordance with the tenor of said "Waiver," which motion was granted after a hearing thereon. The trial court thereupon on April 13, 1961, made and filed its "Findings of Fact and Conclusions of Law,"³ incorporating by reference

³These findings constitute the actual decision of the court (Code Civ. Proc., § 882), the court having the power to amend or change its findings of fact and conclusions of law at any time prior to the entry of judgment. (*Brownell v. Superior Court*, 157 Cal. 703, 708 [109 P. 91]; *Phillips v. Phillips*, 41 Cal.2d 866, 874 [264 P.2d 926]; *Wilson v. Los Angeles County Employees Assn.*, 127 Cal.App.2d 285, 289 [278 P.2d 824].)

its previous "Findings of Fact and Conclusions of Law" and finding further as follows: that no public use is being made or was intended to be made of other than a portion of the said parcel, which portion it therein particularly described; that only the portion of said parcel thereafter particularly described "is needed" for State highway purposes; that the taking in condemnation of the said portion is and was necessary for a public use; that pursuant to the verdict of the jury therein the value of the whole of the parcel described in plaintiff's complaint is the sum of \$10,000; and that in view of plaintiff's waiver on file conceding that the portion not to be condemned may be considered to have suffered total damage, the court took judicial notice of and found that the portion condemned, being a part of the whole parcel found by the jury to be of the value of \$10,000, together with maximum severance damages, cannot exceed the value of the whole of said parcel. The trial court thereupon concluded: that the portion decreed to be taken be condemned in fee absolute for highway purposes; that defendant have judgment in the sum of \$10,000 for the property taken and for severance damages as to the portion not taken; that no public use attached to other than the portion of the parcel condemned; and that defendant's title to the portion not condemned be quieted. Judgment pursuant to said "Findings of Fact and Conclusions of Law" was thereupon entered. Each of the parties has appealed from a portion of the judgment: plaintiff, from that portion which fails to adjudge condemnation of the whole of the parcel and that portion which quiets title to the portion refused condemnation; defendant, from the portion thereof awarding compensation.

The Issue of Public Necessity

[1] As we have hereinbefore indicated, *People v. Cavalier*, *supra*, 52 Cal.2d 299, unequivocally holds that the issue of necessity is not justiciable. The Supreme Court there noted that the only limitations placed upon the right of eminent domain by the California Constitution (art. I, § 14), and the United States Constitution (Fourteenth Amendment) are that the taking be for "a 'public use'" and that "just compensation" be paid for such taking. (P. 304.) "Each of these limitations," said the Supreme Court, "creates a justiciable issue in eminent domain proceedings. But 'all other questions involved in the taking of private property are of a legislative nature.'" (P. 304; citing *Uni-*

iversity of So. California v. Robbins, 1 Cal.App.2d 523, 525 [37 P.2d 163].) The reviewing court, in *Chevalier*, directed attention to the provisions of Code of Civil Procedure section 1241 and Streets and Highways Code section 103 declaring that the resolution of the condemning body finding public necessity is conclusive evidence thereof, and cited *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 [43 S.Ct. 689, 67 L.Ed. 1186], upholding the constitutionality of this conclusive presumption. In *Rindge Co.*, the United States Supreme Court said: "That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. . . . The question is purely political, does not require a hearing, and is not the subject of judicial inquiry." (P. 709 [67 L.Ed. p. 1193].) It was error, therefore, for the trial court in the present case to have received evidence and to make findings thereon on the issue of public necessity.⁸ *Chevalier* points out that the question of public use is often confused with the question of necessity, particularly in those instances, in which the property owner contends that the condemning body is seeking to take more land than it intends to put to a public use. The crux of the question in the instant case, however, is whether the taking is for a public use and whether the condemnor is guilty of fraud, bad faith or abuse of discretion in the sense that it does not actually intend to use the property as it resolved to use it. Before turning to this question we must first dispose of defendant's contention that *People v. Lagiss* is the "law of the case."

[2] As stated by *Within*: "The doctrine of 'law of the case' deals with the effect of the first appellate decision on the subsequent retrial or appeal: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent

⁸There is ample evidence to sustain a finding that the disputed portion of the parcel sought to be condemned was not "needed" for the use resolved were such issue justiciable. We need not reiterate such evidence here. Suffice it to say, there was substantial evidence that several of plaintiff's agents, acting within the scope of their authority, made representations to defendant, prior to the adoption of the resolution declaring that it was necessary to take the whole parcel, that such disputed portion was not necessary for highway purposes and that if defendant would waive severance damages to the portion not condemned the condemning body would not include such portion in its said resolution.

retrial or appeal in the same case." (3 Witkin, Cal. Procedure, § 210, p. 2419; citing *Tally v. Ganahl*, 151 Cal. 418, 421 [90 P. 1049], and other cases.) [3] It appears from the late California decisions that this doctrine is one of policy only and that it will be disregarded when compelling circumstances call for a redetermination of the determination of the point of law on a prior appeal. (*England v. Hospital of Good Samaritan*, 14 Cal.2d 791, 795 [97 P.2d 813]; *Vangel v. Vangel*, 45 Cal.2d 804, 810 [291 P.2d 25, 55 A.L.R.2d 1385]; *Wicktor v. County of Los Angeles*, 177 Cal.App.2d 390, 396 [2 Cal.Rptr. 352]; see 3 Witkin, Cal. Procedure, § 211, pp. 2421-2422.) This is particularly true where an intervening or contemporaneous change in the law has occurred by the overruling of former decisions or the establishment of new precedent by controlling authority. (*Standard Oil Co. v. Johnson*, 56 Cal.App.2d 411, 415-416 [132 P.2d 910]; *England v. Hospital of Good Samaritan*, *supra*, p. 795; *Gore v. Bingaman*, 20 Cal.2d 118, 122-123 [124 P.2d 17]; *Subsequent Injuries Fund v. Industrial Acc. Com.*, 53 Cal.2d 392, 395 [1 Cal.Rptr. 833, 348 P.2d 193]; see *Wicktor v. County of Los Angeles*, *supra*, at pp.397-404; and see 3 Witkin, Cal. Procedure, §217, p. 2430.) In the present case the trial court applied the law declared in *People v. Lagiss* to the effect that the condemning body's findings of necessity are reviewable in condemnation actions when facts establishing fraud, bad faith or abuse of discretion are affirmatively pleaded, although *Chevalier* had intervened as a precedent declaring that such finding was not justiciable even though fraud, bad faith or abuse of discretion may be alleged in connection with the condemning body's determination of such necessity. The clarification of the principles stated in *Chevalier* on the issue of public necessity made after our decision in *People v. Lagiss*, impels us to depart from the doctrine of "the law of the case" because adherence thereto would amount to the use of the doctrine, as an instrument of injustice upon plaintiff. Accordingly, we do not hesitate to reconsider our prior determination in the light of the controlling rule stated in the *Chevalier* case.

The Issue of Public Use

[4a] The complaint in the present case sets forth in *hæc verba* the resolution of the Commission stating public interest and necessity with respect to the acquisition of the parcel in question "for State highway purposes..." (Italics added.) [5] The taking of property for use as a public highway is

a purpose authorized by Code of Civil Procedure section 1238, subdivision 3, and is clearly for an established public use. (See *People v. Chevalier*, *supra*, at p. 304; *County of San Mateo v. Coburn*, 130 Cal. 531, 635 [63 P. 78, 621].) This resolution was offered in evidence by plaintiff at the commencement of the trial and was admitted in evidence without objection. [4b] Such a resolution is prima facie evidence that the taking is in fact for a public purpose (*County of San Mateo v. Bartole*, 184 Cal.App.2d 422, 432 [7 Cal.Rptr. 569]); and the determination therein that the taking is for a public purpose, declared proper for eminent domain proceedings by the state, may not be disputed in the absence of fraud, bad faith, or abuse of discretion on the part of the condemning body. (*People v. Chevalier*, *supra*, at p. 304; *County of San Mateo v. Bartole*, *supra*, p. 433; *People v. Milton*, 35 Cal.App.2d 549, 552 [96 P.2d 159]; *People v. Olsen*, 109 Cal.App. 523, 531 [293 P. 645]; and *Rindge Co. v. County of Los Angeles*, *supra*, 262 U.S. 700.) [6] The issues of fraud, bad faith or abuse of discretion must, however, be affirmatively framed or raised by appropriate and adequate pleadings. (*People v. Chevalier*, *supra*; *County of San Mateo v. Bartole*, *supra*; *People v. Milton*, *supra*; *People v. Olsen*, *supra*; *County of Los Angeles v. Bartlett*, 203 Cal. App.2d 523, 531 [21 Cal.Rptr. 776]; *People v. Lagiss*, *supra*, at p. 33; *People ex rel. Dept. Public Works v. Schultz Co.*, 123 Cal.App.2d 925, 941 [268 P.2d 117]; *People v. Thomas*, 108 Cal.App.2d 832, 836 [239 P.2d 914].) Accordingly, it has been held that a general denial in the answer to the allegations contained in the plaintiff's complaint does not constitute a denial that the land was intended to be used for a public purpose. (*People v. Milton*, *supra*; *People v. Olsen*, *supra*, (cited with approval by *People v. Chevalier*, *supra*, at p. 306).) It is established by the above cases, therefore, that unless the issues of fraud, bad faith or abuse of discretion are affirmatively alleged, the resolution of the Commission is conclusive of the finding that the taking is for the public purpose therein specified. We thus have the conclusiveness as to public necessity afforded by the statutes, and a conclusiveness as to public use declared by judicial decisions. [7] Where such issues are appropriately and affirmatively pleaded, however, the determination as to public use is not conclusive, but merely prima facie evidence that the taking is in fact for a public purpose. (*People v. Bartole*, *supra*, at p. 432, citing Code Civ. Proc., § 1963, subd. 15; and *Lovins v.*

Jessup, 161 Cal.App.2d 59, 67 [326 P.2d 238], to the effect that the actions of public bodies, acting within the powers vested in them, are presumed to be proper.)

[8] In the case at bench defendant did not plead the defense of fraud, bad faith or abuse of discretion in his third amended answer. This answer was merely a general denial of the allegations of the complaint and therefore would not, under the authorities above alluded to, raise these defenses. As we have indicated above, however, it was held in *People v. Lagiss* that these defenses had not been waived in view of the repeated attempts made by defendant to plead them. It appears, moreover, that although no attempt was made to amend the answer to plead such defenses prior to the retrial of the instant case, it is clear that counsel for the respective parties and the trial court considered the holding in *People v. Lagiss* to be the "law of the case." Accordingly, the cause was tried upon the theory that the affirmative defenses of bad faith and abuse of discretion were before the court.* [9] It was proper for the trial court, furthermore, to consider these defenses relative to the issue of public use pursuant to the time-honored rule that where the parties and the court proceed throughout the trial upon a theory that a certain issue is presented for adjudication, the doctrine of estoppel precludes either party from thereafter asserting that no such issue was in controversy, even though it was not actually raised by the pleadings. (*Miller v. Peters*, 37 Cal.2d 89, 99 [230 P.2d 803]; *People v. Nahabedian*, 171 Cal.App.2d 302, 306 [340 P.2d 1053]; *People v. Lucas*, 155 Cal.App.2d 1, 5 [317 P.2d 104].)

[10] In the case at bench we thus have a prima facie case established by plaintiff that the taking of the entire parcel in question was for a public use. It was therefore incumbent upon defendant to overcome this prima facie showing by establishing either or both of his affirmative defenses of bad faith and abuse of discretion by a preponderance of the evidence, the burden of proof as to such defenses being upon him. (Code Civ. Proc., §§ 1869, 1981; Witkin, Cal. Evidence,

*The answers containing defendant's said affirmative defenses which were stricken and rejected by the trial court prior to the first trial were not included in the clerk's transcript on appeal. These defenses are, however, set out in *People v. Lagiss*. They do not include fraud, but they do include bad faith and abuse of discretion. The facts alleged to constitute bad faith and abuse of discretion have been hereinabove set out in the narrative of the record in the present case.

§ 56, pp. 72-73.) In attempting to establish his claim of bad faith and abuse of discretion defendant directed most of the evidence adduced by him towards proof of the fact that plaintiff did not need the disputed portion for highway purposes. It is defendant's claim that plaintiff was guilty of bad faith and abuse of discretion in its attempt to secure from him a waiver of severance damages in exchange for an agreement on the part of plaintiff not to take the disputed portion. Such conduct, contends defendant, amounts to a coercion to compel a settlement on plaintiff's terms. Accordingly, it is defendant's theory that because plaintiff does not need the entire parcel for highway purposes the use of the portion not needed is not for a public purpose. In support of this thesis the contention is made that if bad faith or abuse of discretion is shown with respect to the Commission's determination of necessity such showing inheres in the finding of public use.

[11] This argument is not tenable because, as determined by *Chevalier*, the questions of necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity of taking particular property for the purposes of accomplishing such public improvement, cannot be made justiciable issues even though bad faith or abuse of discretion might be shown with respect to the condemning body's determination of such necessity. (See *People v. Chevalier*, *supra*, at p. 307.) As pointed out, in *Chevalier*, the motives or reasons for declaring that it is necessary to take land are no concern of the owner of land sought to be condemned by the state for a use declared by law to be a public use. (P. 307; citing *County of Los Angeles v. Rindge Co.*, 53 Cal.App. 166, 174 [200 P. 27]; see *County of Los Angeles v. Bartlett*, *supra*, 203 Cal.App.2d 523, 533.)

The trial court permitted both parties the widest latitude in offering evidence for the purpose of showing whether the disputed portion was necessary for highway purposes. Accordingly, most of defendant's evidence was directed towards the proof that plaintiff was seeking to acquire land in excess of that necessary for the designated purpose. It appears, therefore, that to a considerable degree the trial court and respective counsel confused "necessity" with "public use." [12] The character of the use, and not its extent, determines the question of public use. (*Stratford Irr. Dist. v. Empire Water Co.*, 44 Cal.App.2d 61, 67 [111 P.2d 957].) It is necessary, therefore, to distinguish between the amount of land and the necessity for its condemnation, as contrasted

with the proposed purpose for which it is to be used. [13] The necessity for the construction of a highway at the place designated and in the manner determined by the Commission, together with the amount of land required therefor, are matters which were conclusively established by the adoption of the resolution. The question as to whether the land was to be devoted to a public use, however, as distinguished from private purposes or to accomplish some purpose which is not public in character, became a proper issue for the judicial determination of the court. (*People v. Nahabedian, supra*, 171 Cal.App.2d 302, 308; *County of San Mateo v. Coburn, supra*, 130 Cal. 631, 634.)

The nub of the inquiry is whether defendant has affirmatively established bad faith or abuse of discretion in the sense that the condemnor does not actually intend to use the property as it resolved to use it. [14] Stated another way, it was proper for defendant to introduce relevant evidence tending to show the "real purpose" of the condemnation proceedings, i.e., whether it was plaintiff's "real purpose" to take part of defendant's property, not for highway purposes, but for private purposes or a public purpose not related to the highway project. Our attention, then, is directed to ascertaining whether there is any substantial evidence in the record which will support a finding that plaintiff does not intend to use the disputed portion for highway purposes.

[15] The evidence in the present case pertaining to the events leading up to the adoption of the resolution discloses the following: plaintiff originally intended to take the entire parcel for highway purposes; during the course of negotiations for purchase of the parcel defendant evinced a desire to retain a portion of the parcel; this portion was not to be used for the highway itself but had utility related to the highway in that it made for a better appearance, increased the sight distance, and improved drainage conditions; plaintiff's engineers concluded that they could construct the proposed highway without the portion which defendant desired to retain; plaintiff prepared a written stipulation to the effect that it would not take said portion if defendant would waive severance damages; defendant refused to sign the stipulation; plaintiff thereupon recommended to the Commission that it determine to take the whole parcel; that if defendant had agreed to waive severance damages the recommendation would have been made by plaintiff to the Commission to exclude the dis-

puted portion from the condemnation proceedings.¹⁰ This evidence in and of itself would not support a finding that the disputed portion was not taken for a public use. At best it establishes that plaintiff was taking more land than it needed for a public purpose. Such necessity is not justiciable, even if the motive of plaintiff was to take more land than it needed in order to avoid severance damages.

The record discloses, further, that the Commission adopted the resolution upon the recommendation made by the plaintiff Department that the entire parcel was needed for a public use. Considerable evidence was also adduced as to whether the disputed portion was needed for sight distance. Here again the parties were litigating necessity. [16] The fact that plaintiff was utilizing more land for sight distance than was needed for highway purposes does not militate against its public use as long as it was in fact used for sight distance purposes. [17] The evidence is also clear that the subject highway had been completed at the time of trial, and that the disputed portion was then being utilized for sight distance, thus contributing to highway safety, and that it was useful to the highway from the standpoint of drainage, slope and appearance. These factors of utility are related to the highway project and are, therefore, consistent with public use.

Defendant asserts that there is significant testimony in the record from which the trial court was entitled to infer that plaintiff did not, and does not, intend to use the disputed portion for the highway purposes resolved by the Commission. The basis of defendant's assertion is that plaintiff did not intend to devote the disputed portion to highway purposes when it made its recommendation to the Commission, but that it intended to turn it over to the County of Contra Costa for whatever use it might wish to put it, or that it intended to sell it to the cemetery for a private use. [18] It

¹⁰It appears that during the negotiations for acquisition certain of plaintiff's agents and employees characterized the acquirement as one involving considerations applicable to Streets and Highways Code section 104.1. This section provides: "Wherever a part of a parcel of land is to be taken for State highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for State highway purposes." Plaintiff does not assert or contend that the property involved in the instant action was acquired pursuant to the provisions of this section.

is, of course, a fundamental principle of eminent domain law that the taking for a private purpose is without authority in law as violative of the California and federal Constitutions which prohibit the taking of the property of a citizen for private use. (U.S. Const., Fifth and Fourteenth Amendments.; Cal. Const., art. I, § 14; *People v. Chevalier, supra*, 52 Cal.2d 299, 304; *People v. Nahabedian, supra*, 171 Cal. App.2d 302, 303.) [19a] The testimony relied upon is that of plaintiff's Metropolitan District Right of Way Agent, Daniels, who, while under cross-examination by defendant's counsel, was asked the following question: "... And the intention is to treat this remainder as excess property when the litigation is settled or determined, as indicated in Defendant's Exhibit 8 in evidence?"¹¹ His answer was: "The intent was here that he should take no action until after this litigation was settled. After that time, we'd have the decision to make as to whether to turn it over to the county or sell it perhaps to the cemetery people with restrictions against placing improvements on it."

There is ample evidence in the record to indicate that the disputed portion was considered excess property by plaintiff and that the same was acquired in order to avoid severance damages. However, as we have pointed out above, the condemning body may acquire land in excess of that necessary for the designated purpose. The inquiry before us, however, is not whether plaintiff acquired excess property, but whether such property was acquired by the condemnor with the intent of not putting it to a public use. There is nothing in the record to indicate that at the time the resolution for the acquisition of the subject property was adopted the Commission harbored or entertained an intention to put such excess property to a purpose other than one related to the highway project. Daniels testified specifically with reference to the memorandum from Gibbons to Moore, an interoffice communication which was made subsequent to the first trial herein and prior to the commencement of the proceedings herein under review. This memorandum is clearly a reminder to

¹¹Defendant's Exhibit 8 is a Division of Highways interoffice memorandum from Fred O. Gibbons, Senior Right of Way Agent, to Thomas Moore (identified as "head" of excess land division) which reads as follows: "The trial of the subject action was appealed by the defendant, and it has been sent back to the lower court. Therefore, the remainder of the subject property should not be considered as excess until the legal issues involved have been finally settled. It is anticipated that this will require a period of several months at least."

Moore that because of the pending litigation the disputed portion should not be considered excess until such litigation was finally settled. It should be here noted that plaintiff is empowered and authorized to sell or exchange any property, or interest therein, acquired for highway purposes when such property is *no longer necessary for such purposes* upon terms and conditions *approved* by the Commission. (Sts. & Hy. Code, § 118.) Daniels' interpretation of the subject communication was that Moore should take no action until the litigation was settled, and that "After that time, *we'd* have the decision to make as to whether to turn it over to the county ⁽¹²⁾ or sell it *perhaps* to the cemetery people *with restrictions against placing improvements on it.*" (Italics added.) This statement was, at best, speculative on the witness' part and, clearly, had reference to action that might or could be taken in the future. The record is void of any evidence that the disputed property was declared excess by the Commission pursuant to section 118 of the Streets and Highways Code, or that such property was in fact relinquished to the county by resolution as provided in section 73 of said code. [20] It should be further noted, moreover, that when property is relinquished under section 73 it is not relinquished for a private purpose, but only for a public use, i.e., as a county road. Furthermore, the record is barren of any evidence that the suggestion made by Daniels concerning a sale to the cemetery is in the contemplation of the Commission or that such sale has been authorized by the express resolution of such body.

[19b] Assuming, *arguendo*, that Daniels' said testimony and the memorandum in question are susceptible of the inference that plaintiff and the Commission, or either of them, did not, at the time of the acquisition of the disputed property or of the adoption of the resolution therefor, intend to use the disputed portion for the highway purposes resolved

¹²§ 73 of the Sts. & Hy. Code provides, in pertinent part, as follows: "Whenever the department and the county . . . concerned have entered into an agreement providing therefor, or the legislative body of such county . . . has adopted a resolution consenting thereto, the commission may relinquish, to any such county . . . , any frontage or service road or outer highway, within the territorial limits of such county . . . , which has a right-of-way of at least forty (40) feet in width and which has been constructed as a part of a state highway or freeway project, but does not constitute a part of the main traveled roadway thereof. . . . Relinquishment shall be by resolution . . . and such highway or portion thereof shall thereupon constitute a county road. . . ."

by the Commission, but to put it to a private use, such inference is of no avail to defendant because it will not serve to establish bad faith or abuse of discretion on the part of plaintiff or the Commission. Under the facts of the instant case any such intent, if it did in fact exist, was proper and legal within the meaning and applicability of section 104.3 of the Streets and Highways Code. This section provides that "[t]he department may condemn real property . . . for reservations in and about and along and leading to any State highway or other public work or improvement constructed or to be constructed by the department and may, after the establishment, laying out and completion of such improvement, convey out [sic] any such real property . . . thus acquired and not necessary for such improvement with reservations concerning the future use and occupation of such real property . . . , so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air and usefulness of such public work; provided, that land so condemned . . . shall be limited to parcels lying wholly or in part within a distance of not to exceed one hundred fifty feet from the closest boundary of such public work or improvement; provided that when parcels which lie only partially within such limit of one hundred fifty feet are taken, only such portions may be condemned which do not exceed two hundred feet from said closest boundary." [21] As we interpret this section, it permits the Department to condemn more land than is necessary for a public use within the limitations therein specified, and upon completion of the highway or public improvement, authorized the Department to convey the excess land not necessary for such highway or improvement with reservations concerning the use of such land, so conveyed, so as to protect the highway or improvement, and to preserve its view, appearance, light, air and usefulness. In the case at bench, the record discloses that the disputed or "excess" portion lies wholly within 150 feet of the closest boundary of the highway project for which defendant's entire parcel was condemned. It is obvious, moreover, that when Daniels made reference to a conveyance of the disputed portion to the cemetery "with restrictions against placing improvements on it," he was speaking in terms of the conveyance and reservations provided for in section 104.3. We conclude, accordingly, that the propriety of acquiring land in excess of that actually needed for the public purpose resolved by the Commission with the intent to

dispose of the land not actually needed or used for such purpose, after the completion of the improvement, finds sanction in section 104.3, provided that such excess land is within the distance therein prescribed, and, provided further, that any such conveyance is made with reservations concerning the future use and occupation of such land so as to protect the public improvement as in said section provided. (Cf. *Baker v. City of Palo Alto*, 190 Cal.App.2d 744, 754 [12 Cal.Rptr. 425].)

ARTICLE I DELETED PROVISIONS

The following deleted provisions are deemed unsuitable for consideration as statutes.

Particular words and phrases deleted from revised provisions are not included here. Reasons for those

deletions are treated in the comments following each revised Section.

Numerical designations and descriptive headings refer to the existing Constitution.

Section 14½—~~Excess~~ Condemnation

Sec. 14½. The State, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvements; provided, that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from said closest boundary, and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works.

The Legislature may, by statute, prescribe procedure.

Comment: Section 14½ provides for "excess condemnation" in specified cases. This phrase refers to a taking of more property than is actually physically necessary for the construction of a public work. At the time it was enacted, courts were very restrictive in the amount of land which could be taken for a public use through eminent domain. The Commission recommends deletion of this Section for two reasons. The first is that since adoption of this Section, courts have adopted an interpretation of the concept of "public use" which permits additional lands to be taken to provide median and surrounding areas.

A more compelling reason is that the California Supreme Court has refused to construe Section 14½ as a limitation on the power of the Legislature to provide for excess condemnation free from constitutional restraints. The case of *People v. Superior Court of Merced*, 65 Cal. Rptr. 342 so held and effectively emasculated the apparent limitations of Section 14½. The Commission does not feel that this Section serves a discernible purpose.

EXHIBIT III

PROTECTIVE CONDEMNATION STATUTES

Code of Civil Procedure § 1238(18)

18. Trees along highways.

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

Code of Civil Procedure § 1239.4

§ 1239.4 Air space or air easement; uses reserved to property owner; acquisition in fee

Where necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such a height or character as to interfere with or be hazardous to the use of such airport, land adjacent to, or in the vicinity of, such airport may be acquired under this title by a county, city or airport district reserving to the former owner thereof an irrevocable free license to use and occupy such land for all purposes except the erection or maintenance of structures or the growth or maintenance of vegetable life above a certain prescribed height or may be acquired by a county, city or airport district in fee. (As amended Stats.1961, c. 965, p. 2608, § 1.)

Government Code §§ 190-196

§ 190. Land, definition. "Land" when used in this article includes any interest, easement, or reservation in land. (Added Stats. 1953, c. 170, p. 1084, § 2.)

§ 191. Application of chapter. Whenever the State or any city or county may acquire land in excess of the land actually needed or used for public purposes in connection with the establishing, laying out, widening, enlarging, extending, or maintaining of memorial grounds, streets, squares, parkways, or reservations, the acquisition, maintenance, and use of such land and the sale, disposition, and conveyance and the establishment in connection therewith of any reservations concerning the future use and occupation of such land so as to protect the public works or improvements and their environs which it adjoins and to preserve the view, appearance, light, air, and usefulness of such public works shall be conducted and maintained pursuant to this article. (Added Stats.1953, c. 170, p. 1084, § 2.)

§ 192. Construction of acts. Every act of the State authorizing the State, any city or county to acquire land for the purposes of establishing, laying out, widening, enlarging, extending, or maintaining memorial grounds, streets, squares, parkways, or other public places, shall be construed as including among its purposes the acquisition of land in excess of the land actually needed or used for public purposes. (Added Stats.1953, c. 170, p. 1084, § 2.)

§ 193. Authority to sell; reservation of easement, interest, or right. If the State, any city, or county acquires any land under Section 14½ of Article I of the Constitution or this article, which land is in excess of the land actually needed or used for public purposes, the State, city, or county may sell such land or any interest therein and may reserve in the land any reservation, easement, interest, or right that public interest, necessity, or convenience requires to preserve the view, appearance, light, air, and usefulness of any public memorial grounds, streets, squares, parkways, places, or works. (Added Stats. 1953, c. 170, p. 1084, § 2.)

§ 194. Prohibition against sale except by legislative body; notice of sale. No such sale shall be made by a city or county except by its legislative body, nor until after notice has been published in the jurisdiction of the legislative body pursuant to Section 6064. The notice shall:

- (a) Describe the land or lands to be sold.
- (b) Set forth in general terms the interests, easements, or reservations to be reserved by the public.
- (c) State the time and place of the sale.
- (d) Call for sealed bids in writing. (Added Stats.1953, c. 170, p. 1084, § 2, as amended Stats.1957, c. 357, p. 1020, § 42.)

§ 195. Opening of bids, sale to highest bidder, rejection of bids. At the time and place set for the sale, the legislative body shall open any bids received in response to the notice and shall sell the land to the highest bidder, except that it may at that time or at any time to which the sale is continued receive any higher bids and may reject any bid failing to comply with the terms of purchase set forth in the notice. (Added Stats.1953, c. 170, p. 1085, § 2.)

§ 196. Disposition of proceeds of sale, refunds. Money derived from the sale of land pursuant to this article shall be immediately paid into the fund from which payment was made for the land. If the land was purchased with funds derived from the levy of any assessment or tax upon property benefited, the money derived from the sale of the land shall be distributed as refunds to the persons paying those assessments or taxes in proportion to the amounts levied or assessed against them or thereafter to be levied or assessed against them to meet any bonds as yet unpaid by them. Money to be refunded to any person pursuant to this article shall first be applied to any indebtedness of such person or his successor in interest on account of any tax or assessment levied or any bond issued to pay the cost of any improvement done or performed by the public body, all or part of the cost of which is levied or taxed against the land of that person. (Added Stats.1953, c. 170, p. 1085, § 2.)

§ 7000. Legislative intent; easements. It is the intent of the Legislature in enacting this chapter to provide a means whereby the Department of Water Resources, Parks and Recreation, Fish and Game, and Finance, of the State of California, may acquire by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest or right in real property in order to protect, preserve, maintain, improve, restore, limit the future use of, or otherwise conserve for public use and enjoyment any of the lands and areas, identified below, alongside the Westside Freeway, Interstate Route 5, and the California Aqueduct, which have significant scenic values:

(a) Between the California Aqueduct and the Westside Freeway from Highway 41 north to Milham Avenue.

(b) Between the California Aqueduct and the Westside Freeway from Ness Avenue north to Pioneer Road.

(c) Between the California Aqueduct, the Westside Freeway and the Delta-Mendota Canal from Cottonwood Road north to the freeway-aqueduct crossing at Orestimba Creek, and between the aqueduct and freeway north of that point to the Alameda county line.

The Department of Public Works may acquire scenic easements along said Westside Freeway, provided that funds for such easements are obtained pursuant to the provisions of Section 319 of Title 23 of the United States Code relating to the purchase of interests in lands adjacent to highway rights-of-way, provided further that the federal government reimburses the State for the costs of such scenic easements, and also provided that the use of money for this purpose will not reduce the amount of funds which would otherwise be available to the State for highway purposes. (Added Stats.1963, c. 1758, p. 3509, § 3.)

§ 7001. Public purpose of acquisition. The Legislature hereby declares that the acquisition of interests or rights in real property for the preservation and conservation of the scenic lands and areas provided for in Section 7000 constitutes a public purpose for which public funds may be expended or advanced, and that any of the state departments specified in this chapter may acquire, by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter. Any of said departments may also acquire the fee to any of the property for the purpose of conveying or leasing said property back to its original owner or another person under such covenants or other contractual arrangements as will conserve the scenic character and value of the property in accordance with the purposes of this chapter. (Added Stats. 1963, c. 1758, p. 3509, § 3.)

Streets & Highways Code § 104.3

§ 104.3 Condemnation and conveyance of realty subject to reservations for protection of view, appearance, and usefulness of highway

The department may condemn real property or any interest therein for reservations in and about and along and leading to any state highway or other public work or improvement constructed or to be constructed by the department and may, after the establishment, laying out and completion of such improvement, convey out any such real property or interest therein thus acquired and not necessary for such improvement with reservations concerning the future use and occupation of such real property or interest therein, so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air and usefulness of such public work; provided, that land so condemned under authority of this section shall be limited to parcels lying wholly or in part within a distance of not to exceed 150 feet from the closest boundary of such public work or improvement; provided that when parcels which lie only partially within such limit of 150 feet are taken, only such portions may be condemned which do not exceed 200 feet from said closest boundary.

Streets & Highways Code § 965

§ 965. Eminent domain proceedings

The board of supervisors shall, by order, direct the district attorney of the county to institute eminent domain proceedings, in the name of the county, whenever it is necessary to acquire real property or any interest therein to do any of the following things for the protection of a county highway:

- (a) Raise the banks along any stream.
- (b) Remove obstructions from any stream.
- (c) Widen, change, deepen or straighten the channel of any stream.
- (d) Construct flumes, ditches or canals, or make any improvements for the purpose of carrying off storm waters or floods.

(Stats. 1935, c. 29, p. 307, § 965.)

Water Code § 256

§ 256. Condemnation for reservations in, about or leading to dam, water facility or other work or improvement; conveyance; future reservations

The department may condemn real property or any interest therein for reservations in and about and along and leading to any state dam or water facility or other public work or improvement constructed or to be constructed by the department and may, after the establishment, laying out and completion of such improvement, convey out any such real property or interest therein thus acquired and not necessary for such improvement with reservations concerning the future use and occupation of such real property or interest therein, so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air and usefulness of such public work; provided, that land so condemned under authority of this section shall be limited to parcels lying wholly or in part within a distance of not to exceed 500 feet from the closest boundary of such public work or improvement; provided, that when parcels which lie only partially within such limit of 500 feet are taken, only such portions may be condemned which do not exceed 600 feet from said closest boundary.

(Added by Stats.1957, c. 2104, p. 3728, § 1.)

The Right to Take

§ 304. Protective condemnation

304. (a) Except to the extent limited by statute, any person authorized to acquire property for a public work or improvement by eminent domain may exercise the power of eminent domain to acquire any property necessary to protect or preserve the quality, attractiveness, safety, or usefulness of the public work or improvement and its environs.

(b) Subject to any applicable procedures governing the disposition of property, any person that has acquired property for a public work or improvement may sell, lease, exchange, or otherwise dispose of such property or an interest therein subject to such restrictions or reservations as such person determines are necessary to protect or preserve the quality, attractiveness, safety, or usefulness of the public work or improvement and its environs.

Comment. Section 304 permits a condemnor to protect the quality, attractiveness, safety, or usefulness of a public work or improvement or its environs from deleterious conditions or uses by condemning a fee or any lesser interest necessary for protective purposes. See Section 101 (defining "property" to include the fee or any lesser right or interest). A taking for this purpose is a "public use." E.g., People v. Lagiss, 223 Cal. App.2d 23, 35 Cal. Rptr. 554 (1963); Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App.2d

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197, 20 Cal. Rptr. 252 (1962). See also United States v. Bowman, 367 F.2d 768, 770 (1966). See Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L.J. 571, 589-591 (1969).

Section 304 is an extremely flexible grant of condemnation authority. Where it is necessary to protect a public work or improvement from detrimental uses on adjoining property, the condemnor has the option either (1) to acquire an easement-like interest in the adjoining property which will preclude the detrimental use or (2) to acquire the fee or some other interest and then lease, sell, exchange, or otherwise dispose of it to some other public entity or a private person subject to carefully specified permitted uses.

If a condemnor has the power of eminent domain to condemn property for a particular improvement, Section 304 is sufficient authority to condemn such additional property as is necessary to preserve or protect the quality, attractiveness, safety, and usefulness of the improvement. No additional statutory authority is required, and some of the former specific grants of protective condemnation authority have been repealed as unnecessary. E.g., former Code of Civil Procedure Section 1238(18)(trees along highways). Nevertheless, not all such specific authorizations have been repealed. E.g., Streets and Highways Code Section 104(f)(trees along highways), (g)(highway drainage), (h) (maintenance of unobstructed view along highway). Except to the extent that these specific authorizations contain restrictions on protective condemnation for particular types of projects (see Govt. Code §§ 7000-7001), they do not limit the general protective condemnation authority granted by Section 304.

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In the case of a public entity, the resolution of necessity is conclusive on the necessity of taking the property or interest therein for protective purposes. See Section . However, the resolution does not preclude the condemnee from raising the question whether the condemnor actually intends to use the property for protective purposes. If the property is claimed to be needed for protective purposes but not actually going to be used for that purpose, the taking can be defeated on that ground. See Section and Comment thereto. See People v. Lagiss, 223 Cal. App.2d 23, 33-44, 35 Cal. Rptr. 554, (1963).

Section 304 is derived from and supersedes former Government Code Sections 190-196, Streets and Highways Code Section 104.3, and Water Code Section 256. See also Cal. Const., Art. I, § 14-1/2.

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Subdivision 18

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

Comment. Subdivision 18 is unnecessary because Section 304 of the Comprehensive Statute provides general authority to condemn property necessary for protective purposes, and this general authority permits condemnation to provide for the culture and growth of trees along highways. See also Streets and Highways Code Section 104(f), which authorizes the taking of property by the Department of Public Works.