

#36.400

10/2/72

First Supplement to Memorandum 72-61

Subject: Study 36.400 - Condemnation Law and Procedure

Attached to this memorandum is a rough draft of the right to take segment of the preliminary portion of the eminent domain recommendation. While this is merely a rough draft and we expect substantially to revise and expand it, the staff believes it does point out the major policy and drafting decisions previously made on the right to take. Any suggestions and editorial changes in the draft are welcome; feel free to mark your copy to return to the staff at the October meeting so the changes can be incorporated into the next draft.

In connection with the draft of the preliminary portion of the recommendation, we have just received a copy of the Minutes of the September meeting of the Southern Section of the State Bar Committee on Governmental Liability and Condemnation, reiterating that section's concern about the elimination of the right of condemnation by private persons. The Commission reviewed and affirmed its decision on this matter at the last meeting. Nevertheless, we again bring it to your attention since the State Bar Committee (Southern Section) unanimously disapproved repeal of Civil Code Section 1001 unless a comparable section is inserted in the eminent domain statute:

If the eminent domain statute is adopted without such a provision and Code of Civil Procedure Section 1238 is repealed without repeal of Civil Code Section 1001, the last section should be amended to delete its reference to Code of Civil Procedure Section 1238 and to make meaningful reference to the public uses for which it may be exercised.

The committee was unanimous and emphatic in expression of its feeling that the concept of condemnation by a private party as permitted in Civil Code Section 1001 is desirable, and that it becomes more desirable

as public agencies, with greater frequency, find themselves unable to fund projects that are admittedly necessary for the public welfare. Where the individual owner is ready, willing, and able to meet the burden of proof and responsibility attendant to proof of public use and necessity, he should possess the ability to proceed particularly where such desirable uses as byroads, utility and sewer easements, or irrigation, drainage, health, or educational facilities are involved.

On the other hand, the reasons for the Commission's decision to revoke the right of private of private condemnation are adequately set out in the attached draft of the preliminary portion of the eminent domain recommendation.

Respectfully submitted,

Nathaniel Sterling  
Legal Counsel

DELEGATION OF THE POWER OF EMINENT DOMAIN

INTRODUCTION

A public entity or other person may not exercise the power of eminent domain, even in aid of a recognized public use, unless a statute confers the power on such person, either expressly or by necessary implication.<sup>1</sup>

In California, the statutory delegation of the power of eminent domain is exceedingly broad. Section 1001 of the Civil Code provides in part: "Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure" by exercise of the power of eminent domain. Section 1001 remains as it was enacted in 1872, but Code of Civil Procedure Section 1238, which lists a great number of uses as "public uses," has been amended many times since its enactment in 1872 to list additional uses. Despite the amendments to Section 1238, many recognized public uses are not listed in the section, and the inclusion of a use in the listing is no guarantee that the use is in fact a public use.<sup>2</sup> In addition, while Section 1001 purports to authorize the exercise of eminent domain by "any person," the courts have narrowly construed this authorization when property has been sought to be condemned by a person other than a public entity or privately owned public utility.<sup>3</sup>

To a considerable extent, the listing of uses in Section 1238 is surplusage since the Legislature has generally ignored the statutory scheme established by

- 
1. State v. Superior Court, 10 Cal.2d 288, 295-296, 73 P.2d 1221, 1225 (1937).
  2. The question whether a particular use is a public use is always subject to judicial review. See discussion infra under "Public Use."
  3. See discussion infra under "Private Persons."

Sections 1001 and 1238 in delegating the power of eminent domain. The Legislature has instead enacted numerous other codified and uncodified sections that authorize condemnation for particular public uses. In fact, there are hundreds of statutes that grant the power of eminent domain to particular persons for particular purposes.

The Commission recommends that clear statements of the extent of eminent domain authority of public entities, public utilities, and others be substituted for the statutory scheme established by Sections 1001 and 1238. In addition, where a statute grants the power of eminent domain to a particular entity for a particular use, this grant should be treated as a legislative declaration that a taking by that entity for that use is a taking for a public use; it should not be necessary to add to the statute the superfluous statement that the taking is for a public use.

The adoption of this recommendation would avoid the need for a separate listing of public uses in the general eminent domain law. It would avoid the need for frequent amendments of eminent domain law to list public uses that merely duplicate grants of eminent domain authority made by other statutes. It would eliminate the existing uncertainty about the extent to which private persons may exercise the power of eminent domain and would insure that the power of eminent domain will be construed to extend only to those private persons intended.

The Commission's recommendation merely recognizes the long-standing legislative practice to delegate the power of eminent domain by specific statute despite the listing of public uses in Section 1238. Nevertheless, to assure that no public entity will be deprived of any right it now has to exercise the power of eminent domain, the Commission recommends that clear statements of condemnation authority be enacted to cover those few cases where such

authority is now based on Sections 1001 and 1238 and is not otherwise specifically provided. Likewise, the Commission recommends that clear statements of the condemnation authority of privately owned public utilities be added to the Public Utilities Code. The extent to which private individuals and corporations should be authorized to exercise the right of eminent domain is discussed later in this recommendation.

#### STATE AGENCIES

Twelve state agencies<sup>1</sup> are authorized by statute to exercise the power of eminent domain. However, the acquisition of necessary property for many of these agencies is in fact accomplished by the Public Works Board through the Property Acquisition Law.<sup>2</sup>

During recent years, there has been considerable study of the state property acquisition program and, specifically, of the extent to which property acquisition should be accomplished through the Property Acquisition Law rather than by individual state agencies.<sup>3</sup> The question whether an individual state agency should itself acquire the property it needs for its activities or should acquire such property only through the Property Acquisition Law is one that

- 
1. The agencies authorized to condemn are the Adjutant General (Mil. & Vet. Code § 437), Department of Aeronautics (Pub. Util. Code §§ 21633-21635), Trustees of the California State University and Colleges (Educ. Code § 23151), Department of Fish and Game (Fish & Game Code §§ 1348-1349), Department of General Services (Govt. Code §§ 14661-14662), State Lands Commission (Pub. Res. Code § 6808), Department of Parks and Recreation (Govt. Code § 54093; Pub. Res. Code §§ 5006, 5006.2), Department of Public Works (Sts. & Hwys. Code §§ 102, 103.5, 104-104.4, 104.6, 30400-30413; Water Code § 8304), State Public Works Board (Govt. Code § 15853), State Reclamation Board (Water Code §§ 8590, 8593-8595), Regents of the University of California (Educ. Code § 23151), and Department of Water Resources (Water Code §§ 250-256, 258-259, 345-346, 11575-11592).
  2. Govt. Code §§ 15850-15866.
  3. E.g., California Legislative Analyst, A Survey of Land Acquisition and Disposal by State Agencies (1969).

the Commission has not undertaken to resolve. Instead, the Commission recommends that the statutes be revised to eliminate the grants of condemnation authority to state agencies that do not now exercise such authority. This will restrict such grants to those agencies now actually engaged in the property acquisition function and will leave the policy decision as to which agencies should continue to engage in this function for later legislative decision. Specifically, the Commission recommends that the Department of Public Works, Department of Water Resources, the Regents of the University of California, and the State Reclamation Board (on behalf of the Sacramento and San Joaquin Drainage District) continue to be authorized by statute to condemn for their purposes. Condemnation of property for all other state purposes should be a responsibility of the Public Works Board under the Property Acquisition Law.

#### LOCAL PUBLIC ENTITIES

Special districts. The overwhelming majority of special districts have, by virtue of their enabling statutes, general authority to condemn any property necessary to carry out any of the objects or purposes of the district. Thus, approximately 160 different types of special districts, totaling more than 2,000 individual districts, have general condemnation authority. With respect to these districts, there is no need to rely on Section 1001 of the Civil Code and Section 1238 of the Code of Civil Procedure as the source of condemnation authority, and the repeal of those sections would have no effect on the condemnation authority of these districts.

Approximately 30 different types of districts either are not authorized by their enabling statutes to exercise the power of eminent domain or the grant of eminent domain power in their enabling statutes is not sufficiently broad to permit condemnation of property for some of the district's authorized functions. The Commission has reviewed these enabling statutes and has concluded,

with two exceptions noted below, that no revision of the statutes is needed. Some of the districts have no power to acquire or hold property. Others have no corporate power. In some cases, the acquisition of necessary property for the district by eminent domain is accomplished by the county or a city. The omission of a grant in other statutes appears to be a conscious legislative decision. Accordingly, absent any experience that demonstrates a need to grant the power of eminent domain to any of these special districts, the Commission proposes no change in their enabling statutes.

Public cemetery districts and resort improvement districts<sup>1</sup> derive their power of eminent domain from Sections 1001 and 1238. So that the repeal of these sections will not adversely affect these types of districts, the Commission recommends that the statutes governing these districts be revised to preserve their condemnation authority.

Cities and counties. A great number of statutes authorize cities and counties to condemn property for essentially all of their activities.<sup>2</sup> The Commission believes that such broad condemnation authority is proper and recommends for purposes of clarification that cities and counties be specifically authorized to condemn property to carry out any of their powers or functions just as special districts are now authorized to condemn for all their functions.

- 
1. No new resort improvement districts can be formed after May 19, 1965. See Pub. Res. Code § 13003.
  2. The one possible exception to this generalization is acquisition of property for open space purposes. Cf. Govt. Code §§ 6950-6954; compare Note, Property Taxation of Agricultural and Open Space Land, 8 Harv. J. Legis. 158 text at n.1 (1970) (implying condemnation authorized) with Ops. Cal. Legis. Counsel (Oct. 24, 1969) (concluding condemnation not authorized). The Commission recommends that it be made clear that condemnation by cities and counties for open space purposes is authorized with appropriate limitations to prevent any abuse of the power.

Specific restrictions on the power of cities and counties to condemn property for particular purposes<sup>3</sup> would not be affected by the recommended provision.

School districts. Section 1001 of the Civil Code and Section 1238 of the Code of Civil Procedure are the primary basis for the condemnation authority of school districts. Since these sections will not be continued, the Commission recommends that a provision be added to the Education Code to continue the authority of school districts to exercise the power of eminent domain to acquire property necessary for school purposes.

#### PRIVATELY OWNED PUBLIC UTILITIES

Sections 1001 of the Civil Code and various subdivisions of Section 1238 of the Code of Civil Procedure are the primary source of the condemnation authority of privately owned public utilities. So that the repeal of these sections will not adversely affect the condemnation authority of public utilities, the Commission recommends that provisions be added to the Public Utilities Code to continue and clarify the authority of public utilities to exercise the power of eminent domain to acquire property necessary to carry out their regulated activities.

#### PRIVATE INDIVIDUALS AND ENTITIES

The right to exercise the power of eminent domain in California is not limited to governmental entities and public utilities. Section 1001 of the Civil Code literally authorizes a private person to condemn property for any of the uses listed in Section 1238 of the Code of Civil Procedure. Nevertheless, although this right has been recognized in rare cases,<sup>1</sup> the courts

---

3. E.g., Govt. Code § 37353 (existing golf course may not be condemned by city for golf course purposes).

1. Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955)(sewer easement).

generally have refused to permit condemnation by private persons.<sup>2</sup> By statute, certain private entities (discussed below) which are engaged in quasi-public activity have been granted the power of eminent domain.

Having considered the various uses listed in Section 1238 and the judicial decisions involving attempts by private persons to exercise the power of eminent domain, the Commission recommends that condemnation by private persons should not be permitted with the following exceptions:

(1) The condemnation authority of nonprofit educational institutions of collegiate grade should be continued without change.<sup>3</sup>

(2) The existing condemnation authority of nonprofit hospitals<sup>4</sup> should be liberalized to permit condemnation not only to expand existing hospitals but also to establish a newly organized and licensed hospital and to permit the acquisition of property whether or not "immediately adjacent" to existing holdings. At the same time, no acquisition should be permitted unless it has been reviewed and approved by local health facilities planning authorities and by the State Director of Public Health and, if objection to the taking is made, by the court in the eminent domain proceeding. This would expand condemnation power and remedy the deficiencies in existing law but, at the same time, would provide more adequate limitations to prevent its abuse.

- 
2. *Lorenz v. Jacob*, 63 Cal. 73 (1883)(supplying mines with water); *Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 676, 32 P. 802 (1893)(supplying farming neighborhoods with water); *People v. Elk River M. & L. Co.*, 107 Cal. 221, 40 P. 531 (1895)(floating logs on nonnavigable streams); *General Petroleum Corp. v. Hobson*, 23 F.2d 349 (S.D. Cal. 1927)(byroad to prospect for oil).
  3. The condemnation authority of these institutions, now found in subdivision 2 of Section 1238, should be continued by a provision added to the Education Code.
  4. Code Civ. Proc. § 1238.3. Section 1238.3 should be repealed and provision made for condemnation by nonprofit hospitals in the Health and Safety Code.

(3) The condemnation authority of certain nonprofit housing corporations which provide housing for low income families should be continued and clarified.<sup>5</sup>

(4) The condemnation authority of a mutual water company should be continued without change.<sup>6</sup>

In Linggi v. Garovotti,<sup>7</sup> the California Supreme Court held that the owner of an apartment building could condemn a necessary easement for a sewer across his neighbor's property to connect the apartment building to the mains of the established sewer system. The extent to which private persons can condemn for other uses listed in Section 1238 is unclear. The Linggi case is an exceptional one; the courts generally have not permitted a private person to condemn property unless he is engaged in one of the activities discussed above.<sup>8</sup>

The Commission recommends that the rule of the Linggi case not be continued. The power of eminent domain should only be granted to public entities, public utilities, and those few entities engaged in quasi-public activities that are now granted such power. The Commission recognizes that situations may exist where the power of eminent domain may legitimately be used to provide access or sewer connections to property owned by private persons.

- 
5. See Health & Saf. Code §§ 34874-34878 (limited dividend housing corporations). It is recommended that provisions comparable to the sections relating to the exercise of eminent domain by limited dividend housing corporations be added to the statute relating to land chest corporations in the Health and Safety Code. Land chest corporations, if they now have condemnation authority, must base such authority on Section 1001 of the Civil Code and subdivision 21 of Section 1238 of the Code of Civil Procedure.
  6. The substance of subdivision 4 of Section 1238 of the Code of Civil Procedure should be continued by a provision added to the Public Utilities Code.
  7. 45 Cal.2d 20, 286 P.2d 15 (1955).
  8. See cases cited in note 2 supra.

Nevertheless, the Commission has concluded that the determination of the actual need for an access or utility easement should be made by the legislative body of the appropriate public entity rather than by a private person. A procedure should be provided that permits a person to request the appropriate public entity to undertake a condemnation to provide access or sewer service and the statute should provide that such request not be denied without a hearing.

#### EXTRATERRITORIAL CONDEMNATION

The Commission recommends that it be provided by statute that a local public entity--such as a city, county, or special district--may condemn only property within its territorial limits except where the power to condemn property outside its limits is expressly granted by statute or is necessarily implied as an incident to one of its other statutory powers. This provision would codify existing law.<sup>1</sup> Unaffected by this recommendation will be statutes that expressly authorize extraterritorial condemnation<sup>2</sup> and statutes--such as those authorizing the furnishing of sewage facilities or the supplying of water--under which the power of extraterritorial condemnation may be implied.<sup>3</sup>

- 
1. 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).
  2. E.g., Govt. Code § 61610; Harv. & 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.
  3. *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*, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963).

#### JOINT EXERCISE OF EMINENT DOMAIN POWER

The Commission recommends that two or more public entities be authorized to enter into an agreement under the Joint Powers Agreement Act<sup>1</sup> 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. This authority now exists where a school district is a party to the joint powers agreement,<sup>2</sup> and the Commission's recommendation would merely permit exercise of such authority by public entities whether or not a school district is a party to the Joint Powers Agreement.

#### ENTRY FOR SURVEY, EXAMINATION, AND TESTING

California condemners are presently authorized to enter upon property to make surveys, tests, appraisals, and the like in order to determine the suitability of the property for public use subject to the payment of just compensation for any damage caused by the entry and tests.<sup>3</sup> The present statutory provisions were enacted upon prior Commission recommendation,<sup>4</sup> and the Commission has determined that no change is needed.<sup>5</sup>

- 
1. Govt. Code §§ 6500-6583.
  2. Educ. Code § 15007.5.
  3. Code Civ. Proc. §§ 1242 and 1242.5.
  4. Cal. Stats. 1970, Ch. 662; see Recommendation Relating to Sovereign Immunity: Number 10--Revisions of the Governmental Liability Act, 9 Cal. L. Revision Comm'n Reports 801 (1969).
  5. Retention of these uniform provisions in the eminent domain law will enable the repeal of duplicating, overlapping, or variant provisions of the following sections: [listing].

## LIMITATIONS ON THE EXERCISE OF EMINENT DOMAIN

The exercise of the eminent domain power is subject to certain general limitations, often referred to as requirements of "public use and necessity." The specific elements of public use and necessity isolated and categorized by the Law Revision Commission are summarized here and discussed in detail below.

A condemnor, whether a public entity or private person, may not take property by eminent domain except for a public use and unless the condemnor actually intends to devote the property to that use within a reasonable time.<sup>1</sup> Two types of acquisitions for public use are potentially subject to abuse --condemnation of excess property for the purpose of remnant elimination and condemnation of substitute property for exchange purposes. Hence, excess and substitute condemnation authority are available only to public entity condemnors and only in limited situations.<sup>2</sup>

In addition to the public use limitation, there must also be "public necessity" for the acquisition of the property. Public necessity includes the public interest in the project, project design, project location, amount of property required, and property interest required.<sup>3</sup> Public entities need not prove necessity since, in order to condemn property, they first must make a "resolution of necessity" that includes a legislative determination of the public necessity for the acquisition.<sup>4</sup> The resolution is given conclusive

- 
1. See discussion infra under "Public use" and "Advance acquisition of property."
  2. See discussion infra under "Excess condemnation" and "Substitute condemnation."
  3. See discussion infra under "Public necessity " and "Property subject to eminent domain."
  4. See discussion infra under "Resolution of necessity."

effect on the issue of public necessity except in the case of an extraterritorial acquisition.<sup>5</sup> Private condemnors, on the other hand, must prove necessity if called upon to do so.

Besides the limitations of public use and necessity described above, there are certain other restrictions on the right to take property. When real property is taken, structures and improvements located on it must be taken with it.<sup>6</sup> Some property is made completely or partially exempt from condemnation by statute.<sup>7</sup> Property that is appropriated to public use may only be taken for joint use, provided the joint uses are compatible; if not, it may only be taken for a more necessary public use. There may be other restrictions on the acquisition of property imposed by statutes beyond the eminent domain law that must be complied with before property may be acquired by eminent domain or by any other means, e.g., environmental impact statements and public hearing requirements.<sup>8</sup>

Normally the preceding limitations on the right to take property are self-enforcing. Should the defendant object to the right to take, the plaintiff must prove its right at a hearing prior to trial of valuation issues.<sup>9</sup>

---

5. See discussion infra under "Public necessity" and "Extraterritorial condemnation."

6. See discussion infra under "Structures, improvements, and fixtures."

7. See discussion infra under "Property subject to eminent domain."

8. [footnote to be supplied later.]

9. See discussion infra under "Procedure."

## PUBLIC USE

### INTRODUCTION

Article I, Section 14, of the California Constitution prohibits the exercise of eminent domain except for a "public use."<sup>1</sup> Whether a particular purpose is a public use is an issue that is always justiciable in an eminent domain proceeding.<sup>2</sup> These constitutional restrictions must, of course, be recognized in any eminent domain statute.

Ordinarily, a taking by a public entity or public utility does not present a public use issue. The property sought to be taken will be devoted to a purpose that is declared to be a public use by statute, and there is no likelihood that a court would declare the use not to be a public use. There are, however, some situations where a public use issue of some significance is presented. These situations are discussed below.

### ADVANCE ACQUISITION OF PROPERTY

It is well established in California that statutory grants of general condemnation power carry with them the right to condemn property in anticipation of the condemnor's future needs, provided that there is a reasonable probability of use of the property within a reasonable time.<sup>3</sup> The Commission recommends that this test be codified.<sup>4</sup> The question whether there is such a probability should always be justiciable; however, any use of property within seven years after the commencement of an eminent domain proceeding should be deemed "reasonable."<sup>5</sup>

- 
1. City and County of San Francisco v. Ross, 44 Cal.2d 52, 279 P. 529 (1955).
  2. People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959).
  3. See, e.g., Central Pac. Ry. v. Feldman, 152 Cal. 303, 92 P. 849 (1907); City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585 (1899); San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961).
  4. Codification of this future use standard will enable the repeal of duplicating, overlapping, or variant provisions in the following sections: [listing].
  5. Seven years is the time within which actual construction must commence under the Federal Aid Highway Act of 1968. 23 U.S.C. § 108.

## PHYSICAL AND FINANCIAL REMNANTS

The acquisition of part of a larger parcel of property for public use will on occasion leave the remainder in such size, shape, or condition as to be of little market value. The elimination of such remnants may be of substantial benefit to the community at large as well as to the owners of such property. Generally speaking, California's condemnors with any substantial need therefor have been granted specific statutory authority to condemn the excess for the purpose of remnant elimination.<sup>1</sup> Some of these statutes are so broadly drawn that they literally authorize exercise of the power of eminent domain to acquire remnants in circumstances not constitutionally permitted.<sup>2</sup>

The Commission has concluded that all public entities should be granted the authority to condemn excess property for the purpose of remnant elimination,<sup>3</sup> whether the remnant be a physical or financial one, provided it is of little market value, with safeguards against the abuse of such authority. Accordingly, the Commission recommends that such remnants be subject to acquisition by both voluntary means and by condemnation<sup>4</sup> but that the property owner should always be able to contest whether the remainder will be of "little market value." The property owner should also be permitted to show that the condemnor has

- 
1. E.g., Code Civ. Proc. § 1266 (city and county highway authorities); Sts. & Hwys. Code § 104.1 (Department of Public Works); Water Code § 254 (Department of Water Resources); Water Code § 43533 (water districts). These statutes, however, vary from agency to agency, often with little or no apparent reason for the difference.
  2. See *People v. Superior Court*, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).
  3. Nongovernmental condemnors have no statutory authority to acquire excess property. No change in this regard is recommended.
  4. Codification of a uniform excess condemnation standard will enable the repeal of duplicating, overlapping, or variant provisions in the following sections: [listing].

available a reasonable and economically feasible means to avoid leaving a remnant; if he is successful in demonstrating such a "physical solution," condemnation of the excess should not be allowed.

#### TAKINGS FOR EXCHANGE PURPOSES

A number of California condemnors are authorized to acquire property of a third party for the purpose of exchange with the owner of property it needs for public use.<sup>1</sup> The Commission recommends that this power be extended to all public entities; but, in order to safeguard the rights of the third party, the power of substitute condemnation should be restricted to certain limited situations.<sup>2</sup> The Commission recommends that a public entity be able to take substitute property in the cases described below.

(1) Necessary property devoted to public use. Where property necessary for the use of the public entity is devoted to public use and the owner of the necessary property could have exercised the power of eminent domain to acquire substitute property for the same public use from a third party, the public entity should be permitted to acquire the substitute property by eminent domain. This rule will avoid the necessity for two condemnation proceedings. To protect against possible abuses, a substitute taking on these grounds should be allowed only where the owner of the necessary property has agreed to the exchange and it is clear that the substitute property will be devoted to the same public use as the necessary property.

(2) Exchange required to minimize adverse consequences of taking necessary property. In exceedingly rare cases, justice may require that the owner of

---

1. See, e.g., Govt. Code § 15858 (state); Sts. & Hwys. Code §§ 104(b), 104.2 (Department of Public Works); Water Code § 253(b) (Department of Water Resources).

2. Codification of a uniform substitute condemnation standard will enable the repeal of duplicating, overlapping, or variant provisions of the following sections: [listing].

property necessary for the use of the public entity be compensated in land rather than in money. The most frequently encountered situation of this sort is where the acquisition of property for public use by the public entity would leave other property in such condition as to be deprived of utility service or access to a public road. In such a case, substitute condemnation could provide a quite simple physical solution to what otherwise would constitute a case of severely damaged property. Accordingly, the Commission recommends that a public entity be authorized to condemn such property as appears reasonably necessary and appropriate to supply utility service or access after taking into account any hardship to the owner of the substitute property. In cases other than utility or access cases where justice demands that the owner of necessary property be compensated in land, the public entity should be authorized to acquire substitute property for exchange purposes only if (a) the owner of the necessary property has agreed to the exchange, (b) the substitute property is in the same general vicinity as the necessary property, and (c) taking into account the relative hardship to both owners, the exchange would not be unjust to the owner of the substitute property.

The propriety of a taking for the purpose of exchange should always be subject to challenge, and the public entity should have the burden of proof that its taking of substitute property will satisfy these criteria.

## PUBLIC NECESSITY

### THE REQUIREMENT OF PUBLIC NECESSITY

California is one of the few jurisdictions that requires that the necessity for taking be established before property may be taken by eminent domain.<sup>1</sup>

The Commission believes that this requirement is a sound one and recommends that no person be permitted to exercise the power of eminent domain unless:

- (a) The public interest and necessity require the proposed project;
- (b) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and
- (c) The property and interest therein sought to be acquired are necessary for the proposed project.<sup>2</sup>

### RESOLUTION OF NECESSITY

Requirement and contents of resolution. Some, but not all, public entities must adopt a resolution of necessity to acquire property by eminent domain before the acquisition proceeding may be commenced.<sup>3</sup> Among those public entities required to adopt a resolution of necessity, the vote requirement for most is a simple majority.<sup>4</sup> The Commission believes that the requirement of a majority adoption of the resolution of necessity is a salutary one: In addition to informing the property owner of the authority for the proposed acquisition, it helps to insure that the public entity makes a considered decision of both the

1. See, e.g., Code Civ. Proc. §§ 1240(6), 1241(2), and 1242.
2. Codification of the public necessity requirement will enable the repeal of duplicating, overlapping, or variant provisions in the following sections: [listing].
3. Compare, e.g., Code Civ. Proc. § 1241(a)(resolution not required) with Water Code § 8594 and Govt. Code § 15855 (resolution required).
4. See, e.g., Govt. Code § 15855 and Sts. & Hwys. Code § 102.

need for the property as well as for the proposed project itself. Accordingly, the Commission recommends that all public entities be required to adopt by a majority vote of all the members of its governing body<sup>5</sup> a resolution of necessity for the acquisition of any property by eminent domain.<sup>6</sup> The resolution should describe the proposed project and refer to the statutory authority for the project; it should describe the property needed for the project and its use in the project; it should declare that the public entity has found and determined that the public interest and necessity require the proposed project, that the proposed project is planned or located in the manner that will be most compatible with the greatest public good and least private injury, and that the property sought to be taken is necessary for the proposed project.

Effect of resolution. In the great majority of cases, the resolution of necessity of a public entity establishes a conclusive presumption of public necessity.<sup>7</sup> The Commission has weighed the need for court review of necessity questions against the economic and procedural burdens such review would entail and against the policy that entrusts to the legislative branch of government basically political and planning decisions concerning the need for and design and location of public projects. The Commission has concluded that the policy to provide conclusive effect to the resolution of necessity is a sound one and should be continued.<sup>8</sup> Where the condemnor is a public utility or other private

- 
5. This rule should not apply to the Regents of the University of California. See Educ. Code § 23151 (two-thirds vote required for taking by Regents of the University of California).
  6. Codification of this principle will enable the repeal of duplicating, overlapping, or variant provisions in the following sections: [listing].
  7. See, e.g., Govt. Code § 15855 (State Public Works Board); Sts. & Hwys. Code § 103 (Department of Public Works); Water Code § 251 (Department of Water Resources); Code Civ. Proc. § 1241(2)(city, county, school district). The resolution is given conclusive effect even if its passage is obtained through fraud, bad faith, corruption, or gross abuse of discretion. *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959).
  8. Codification of this principle will enable the repeal of duplicating, overlapping, or variant provisions in the following sections: [listing].

entity, however, the issue of public necessity should always be subject to court determination.

There are certain situations where the propriety of the taking by a public entity should be subject to court review. The resolution of necessity should not have a conclusive effect for acquisitions outside the territorial limits of the public entity.<sup>9</sup>

In addition, it should be made clear that the resolution of necessity has no effect on the justiciability of such "public use" issues as takings for exchange purposes, taking of remnants, and some takings for future use. These public use issues have previously been discussed.

- 
9. The Commission has determined that judicial review of necessity in extraterritorial condemnation cases is desirable since the political process may operate to deny extraterritorial property owners an effective voice in the affairs and decision-making of the local public entity. Cf. *Scott v. City of Indian Wells*, 6 Cal.3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972). For this reason, the Commission recommends that, when extraterritorial condemnation is undertaken, the local public entity be denied a conclusive presumption as to the public necessity of its acquisition. This recommendation continues existing law. See, e.g., Code Civ. Proc. § 1241(2); *City of Los Angeles v. Keck*, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971).

Codification of the principle that the resolution of necessity is not conclusive in extraterritorial condemnation cases will enable the repeal of duplicating or overlapping provisions of the following sections: [listing].

PROPERTY THAT MAY BE ACQUIRED

TYPE OF PROPERTY OR RIGHT OR INTEREST

The grants of condemnation authority to various public entities are far from consistent in describing the types of property and rights or interests therein that may be acquired by eminent domain. Some grants are restricted to "real property";<sup>1</sup> some grants broadly allow condemnation of "real or personal property"<sup>2</sup> or permit condemnation of "property" without limitation;<sup>3</sup> other grants contain an extensive listing of the various types of property and rights and interests in property that may be taken.<sup>4</sup>

The Commission recommends the enactment of a general provision that will specify that, except to the extent otherwise limited by statute,<sup>5</sup> any type of

- 
1. State condemnation authority under the Property Acquisition Law is limited, for example, to any interest in real property. See Govt. Code § 15853. The Commission does not recommend that the Property Acquisition Law be broadened to cover acquisition of "personal property" since other statutes provide for state acquisition of personal property. See also, e.g., Health & Saf. Code § 34325 (housing authority).
  2. E.g., Pub. Res. Code § 5006 (Department of Parks and Recreation), Pub. Util. Code § 30503 (Southern California Rapid Transit District).
  3. E.g., Harb. & Nav. Code §§ 5900.4 (Harbor Improvement Districts), 6076 (Harbor Districts), 6296 (Port Districts); Pub. Util. Code §§ 12703 (municipal utility districts), 16404 (public utility districts), 28903 (San Francisco Bay Area Rapid Transit District). The vast majority of condemnation grants authorize the taking of any necessary "property."
  4. E.g., Alameda County Flood Control and Water Conservation District Act § 5 ("real and personal property of every kind, including lands, structures, buildings, rights-of-way, easements, and privileges" and "all lands and water and water rights and other property necessary or convenient for [district purposes]").
  5. The Commission recommends no change in the statutory provisions which exempt certain types of property from condemnation. See, e.g., Code Civ. Proc. § 1240(2)(16th and 36th sections of certain public domain land not subject to condemnation); Govt. Code § 37353(c)(existing golf course not subject to eminent domain by city for golf course purposes); Health & Saf. Code §§ 8134, 8560, 8560.5 (cemetery land not subject to condemnation for rights of way); Pub. Res. Code § 5006.2 (property within Aptos Forest not subject to eminent domain except by permission of Legislature); Pub. Util. Code § 21632 (Department of Aeronautics cannot take existing airport owned by local public entity without consent of entity). See also Emery v. San Francisco Gas Co., 28 Cal. 345 (1865)(money not subject to eminent domain).

property or right or interest in property may be acquired pursuant to a statutory authorization to condemn property for a particular public use if necessary for that use.<sup>6</sup> Further, the existing judicially developed rule that a grant of condemnation authority includes the authority to acquire any property necessary to carry out and make effective the principal purpose involved should be codified.<sup>7</sup> Duplicating, overlapping, or inconsistent provisions should be repealed.<sup>8</sup> The resolution of necessity should, as it generally is now, be conclusive on the issue of the necessity for acquiring any right or interest in property to be devoted to public use.<sup>9</sup>

#### STRUCTURES, IMPROVEMENTS, FIXTURES

Under present law, a person who acquires real property by eminent domain must also take any structures and improvements pertaining to the realty.<sup>1</sup> By

---

Also, where a statute authorizes condemnation of only certain types of property or interests therein, the recommended provision would not broaden the scope of the grant unless such provision is amended to delete the limitation.

6. Codification of this rule will enable the repeal of duplicating or overlapping provisions in the following sections: [listing].
7. The power to condemn property for a particular purpose has inherent the power to condemn additional property to effectuate that purpose. See, e.g., *City of Santa Barbara v. Cloer*, 216 Cal. App.2d 127, 30 Cal. Rptr. 743 (1963), and *Flood Control & Water Conservation Dist. v. Hughes*, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962).
8. Numerous statutes, as well as a constitutional provision, provide a variety of tests to determine to what extent additional property may be acquired. See, e.g., Cal. Const., Art. I, § 14-1/2 (memorial grounds, streets, squares, parkways, reservations to 150 feet); Code Civ. Proc. § 1238(18) (trees along highways to 300 feet); Sts. & Hwys. Code § 104.3 (protect and preserve highways to 150 feet); Water Code § 256 (protect and preserve dams and water facilities to 500 feet). The Commission recommends that, in place of this multiplicity, there be substituted a uniform and comprehensive authorization to acquire all property necessary to carry out and make effective the principal purpose involved. Codification of a uniform protective condemnation provision will enable the repeal of duplicating, overlapping, or variant provisions of the following sections: [listing].
9. See discussion supra under "Public necessity."
1. See Code Civ. Proc. §§ 1248(1) and 1249.1; *City of Los Angeles v. Klinker*, 219 Cal. 198, 25 P.2d 826 (1933). See also 42 U.S.C. § 4655(1) (1971).

statute, equipment designed for "manufacturing" or "industrial" purposes and installed for use in a fixed location, regardless of the method of installation, must be taken if the real property is taken.<sup>2</sup> The owner of equipment designed for commercial purposes may also find that his equipment installed for use in a fixed location is of greatly limited utility and value, if not altogether useless, in a new site. Yet, there is no requirement that such equipment be taken unless it has become part of the real property. Accordingly, the Commission recommends that the requirement that structures and improvements must be taken be expanded to require acquisition of commercial equipment installed for use in a fixed location.

#### PROPERTY APPROPRIATED TO PUBLIC USE

Present California law permits to a limited extent the acquisition by eminent domain of property already appropriated to public use.<sup>1</sup> The Commission believes that joint use of property appropriated to public use should be encouraged in the interest of fullest utilization of public land and least imposition on ownership of private property. To this end, the Commission recommends that any authorized condemnor be able to acquire for use in common property devoted to public use if the joint uses are compatible or can be made compatible without substantial alteration of the preexisting public use. Only where the two uses are not compatible and cannot be made compatible should a condemnor be permitted to take for its exclusive use property already appropriated to public use. In this case, the property may be taken only for a more necessary public use than the use to which the property is already appropriated. The

---

2. Code Civ. Proc. § 1248b.

1. See Code Civ. Proc. §§ 1240(3), (4), (6), 1241(3)(acquisition of property devoted to public use for "consistent" and more necessary public uses).

resolution of necessity of a public entity should not be conclusive on the question whether a use is compatible with or more necessary than another public use.<sup>2</sup> It should be noted, however, that there is a statutory hierarchy of more necessary users--state,<sup>3</sup> local public entities,<sup>4</sup> private persons--as well as specific statutory more necessary use presumptions such as those afforded certain park property and property kept in its natural condition.<sup>5</sup> The Commission recommends no change in this scheme.

---

2. See discussion supra under "Public necessity".

3. Govt. Code § 15856.

4. Code Civ. Proc. §§ 1240(3) and 1241(3).

5. Code Civ. Proc. §§ 1241.7 and 1241.9.

RIGHTS OF FORMER OWNER IN LAND TAKEN BY EMINENT DOMAIN

The Law Revision Commission devoted much consideration to the possibility of permitting the former owner of property taken by eminent domain to repurchase that property should it become surplus to the needs of the condemnor.<sup>1</sup> The Commission has concluded, however, that a general repurchase right would create practical problems of administration that far outweigh its potential social benefits and accordingly recommends against adoption of the repurchase right as a statutory requirement.<sup>2</sup>

- 
1. For a background study prepared for the Commission on this subject, see Sterling, Former Owner's Right to Repurchase Land Taken for Public Use, 4 Pac. L.J. (1973).
  2. For a similar conclusion, see Law Reform Commission of British Columbia, Report on Expropriation 118-121 (1971).