

Memorandum 77-41

Subject: Study 36.800 - Eminent Domain (Resolution of Necessity)

Attached is a copy of the Commission's tentative recommendation relating to review of a resolution of necessity by writ of mandate, which was distributed for comment this spring. The tentative recommendation makes clear that ordinary mandamus (Code of Civil Procedure Section 1085) is a proper remedy for attack on the validity of the resolution but limits the remedy to use prior to commencement of the eminent domain proceeding. Thereafter, the validity of the resolution would be subject to attack only in the eminent domain proceeding itself.

The Comments received by the Commission are reproduced as Exhibits 1-6. The commentators generally approve the tentative recommendation (with the exception of the Los Angeles City Attorney) but raise a number of problems in connection with it.

The San Diego City Attorney (Exhibit 1--pink) makes the suggestion that, if a direct attack is made on the resolution by writ of mandate prior to the eminent domain proceeding and proves unsuccessful, a collateral attack on the resolution should not be permitted in the eminent domain proceeding itself. The staff does not believe this is a problem since the doctrine of res judicata handles precisely the problem raised. Perhaps we could add the following sentence to the Comment to Section 1245.255:

A determination of issues concerning the validity of the resolution of necessity by writ of mandate may be res judicata as to those issues in the eminent domain proceeding itself. Cf. Section 1230.040 (rules of practice in eminent domain proceedings).

A related question raised by the Los Angeles City Attorney (Exhibit 6--gold) and which the Commission has previously discussed is the effect on a pending writ of mandate action of the filing of the eminent domain proceeding. There is statutory authority in Code of Civil Procedure Section 1048 for consolidation of actions involving common questions of law or fact, but the staff does not feel that reliance on consolidation is wholly adequate since there are differing standards in the two types of actions. The preferable solution is to abate the writ of mandate

action and have the eminent domain proceeding the sole forum for resolution of challenges to validity of the resolution. This could be done by adding the following language to proposed Section 1245.255(a)(1):

Upon the commencement of the eminent domain proceeding, the court, upon motion of either party, shall dismiss the writ of mandate action unless the court determines that to do so will not be in the interest of the efficient administration of justice.

The court's discretion here will cover the situation where the eminent domain complaint is filed just as a decision in the writ action is imminent.

The Los Angeles City Attorney (Exhibit 6--gold) raises the possibility that a person other than the property owner might seek to challenge the validity of the resolution of necessity. This is an interesting suggestion, but the staff does not believe it poses a real problem. The mandamus statute requires that the petitioner must be beneficially interested in the outcome of the action, and the cases have interpreted the requirement to mean that the private individual must have some private or particular right to be protected or preserved or an interest to be subserved other than that he holds with the public at large. See Code Civ. Proc. § 1086; California Civil Writs §§ 5.17-5.20 (Cal. Cont. Ed. Bar 1970). The staff does not believe supplementary legislation on this point is necessary or desirable in the eminent domain law.

The State Bar Committee on Condemnation (Exhibit 3--green) calls to the Commission's attention a possible conflict of the tentative recommendation with the Community Redevelopment Law. Health and Safety Code Section 33500 provides that, when a redevelopment agency adopts or approves a redevelopment plan, an action attacking or otherwise questioning the validity of the plan or its adoption or approval must be brought within 60 days. Thereafter, the decision of the legislative body is final and conclusive:

33368. The decision of the legislative body shall be final and conclusive, and it shall thereafter be conclusively presumed that the project area is a blighted area as defined by Section 33031 or 33032 and that all prior proceedings have been duly and regularly taken.

This section shall not apply in any action questioning the validity of any redevelopment plan, or the adoption or approval of such plan, or any of the findings or determinations of the agency or legislative body in connection with such plan brought pursuant to Section 33501 within the time limits prescribed by Section 33500.

The provisions of the Eminent Domain law that permit an attack on the resolution of necessity were not intended, and should not be construed, to affect these provisions giving conclusive effect to the adoption of the redevelopment plan. The staff suggests that language be added to the Comment to Section 1245.255 noting that the provision permitting attack on the conclusive effect of a resolution of necessity is subject to statutory exceptions:

It should be noted that Section 1245.255 may be subject to statutory exceptions. See, e.g., Health & Saf. Code §§ 33368 and 33500 (conclusive effect of adoption of redevelopment plan).

With these changes, the staff recommends that the tentative recommendation be printed as a final recommendation and made a part of the Commission's 1978 legislative program.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Memorandum 77-41

Study 36.800

EXHIBIT I

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

JOHN W. WITT
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SAN DIEGO, CALIFORNIA 92101
(619) 534-1000

ROBERT S. TEAZE
ASSISTANT CITY ATTORNEY

CURTIS M. FITZPATRICK
SENIOR CHIEF DEPUTY CITY ATTORNEY

April 22, 1977

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMouilly:

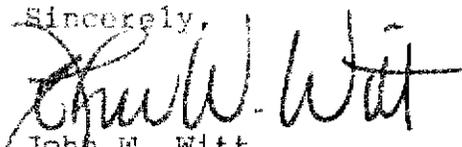
Your Transmittal Letter
dated April 13, 1977

We have reviewed your letter and recommendation relating to the review of Resolution of Necessity by Writ of Mandate and have the following comments.

While we are not overwhelmed with the possibility that our Resolutions of Public Convenience and Necessity will be subject to additional attacks by potential condemnees, we must conclude that your proposed recommendation has, with one exception, merit. We would suggest an additional amendment to the proposed 1245.255, C.C.R. provision to the effect that if a direct attack is leveled at the resolution prior to commencement of the eminent domain proceedings and then proves unsuccessful, a second attack should not be permitted in the eminent domain action itself. As presently worded, your proposed Section 1245.255 would appear to give a condemnee two chances to invalidate the resolution, especially if the judgment in the writ proceedings had not become final and therefore not res judicata (collateral estoppel). It seems only logical that an individual should not be permitted to continuously attack a resolution. This type of latitude could lead to abuses.

Therefore, if the above amendment could be included, we would wholeheartedly support your proposal.

Sincerely,


John W. Witt
City Attorney

DWD:rb

cc - City Attorney

EXHIBIT 3

[EXTRACT OF MINUTES OF STATE BAR CONDEMNATION COMMITTEE]

Minutes of Condemnation Committee
May 7, 1977
Page 5

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RESOLUTION OF NECESSITY - COLLATERAL
ATTACK BY MANDAMUS - LAW REVIEW COMMISSION

The proposal of the Law Revision Commission with respect to the remedy of mandamus for collateral attack on the resolution of necessity was discussed. Carl Newton pointed it out that the Southern Section had discussed and voted on this matter on its April 30, 1977 meeting and it was unanimously approved after a synopsis of the problem was given to cut off all further dialogue and the recommendation of the Law Revision Commission was unanimously approved with Bob Ambrose abstaining. (Copy of the Southern Section minutes attached for full discussion of this problem.)

The problem as to redevelopment agencies is that once their plan is adopted, which is possibly many months or even years before the adoption of the resolution of necessity, the law requires that the plan be attacked within either 30 or 60 days after adoption of the plan and if it is not attacked, a property owner cannot later attack the resolution of necessity adopted by the redevelopment agency. Jennifer Moran moved to have our committee communicate to the Law Revision Commission the anomaly in the law with respect to redevelopment agencies and the resolution of necessity. This motion was unanimously passed.

EXHIBIT 4
RUTAN & TUCKER

ATTORNEYS AT LAW

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May 24, 1977

IN REPLY PLEASE REFER TO

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- JAMES S. TUCKER, SR. (880) 8801
- MILFORD W. DAHL
- H. RODGER HOWELL
- JAMES B. TUCKER
- GARVIN F. SHALLENBERGER
- JAMES R. MOORE
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- JEFFREY W. GREENMAN
- ROBERT S. BOWER
- JAMES E. GLEASON, JR.

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Comment on Tentative Recommendation Relating to
Review of Resolution of Necessity by Writ of
Mandate

Gentlemen:

I have reviewed the Commission's tentative recommendations relating to a review of a resolution of necessity by writ of mandate and believe that the comments are well founded and that the recommendation should be adopted by the Legislature. Since AB 11 was adopted there has been considerable discussion among attorneys practicing eminent domain law as to the function of a writ of mandate as a device for reviewing a resolution of necessity. Some have suggested that the writ provide an alternate to the "objection to the right to take". However, I know of no one who has used that means to attack a resolution of necessity. Further confusion was generated by the comment Section 1245.255 of the CCP, indicating that an attack on the resolution by mandate would be under the aegis of Section 1094.5. In light of People v. Chevalier, 52 Cal. 2d 299 (1959), holding in part that the adoption of a resolution of necessity was a legislative action, many attorneys have believed that an attack by mandate would be under the aegis of CCP §1085, and that the comment referred to did not make sense. Because of the comment, however, some attorneys have recommended to public agencies that a full evidentiary hearing be held in connection with the adoption of the resolution, and that a record be preserved so that it could be reviewed under a §1094.5 proceedings.

The Commission's recommendation should clarify this matter and reduce the probability of future litigation over the use of a writ of mandate to review a resolution of necessity and the scope of review in the event such a writ is used.

Sincerely,

Handwritten signature: Harold Coville, Jr.

EXHIBIT 5

Ms. Wanda Underhill
2079 Market Street, No. 27
San Francisco, California 94114

May 31, 1977

To: Calif. Law Revision Commission
From: Wanda Underhill
Re: Comments--Review of Resolution of Necessity by Writ of Mandate

I. In an eminent domain proceeding the action must begin with a "Resolution of Necessity" (C.C.P. 1245.220).

A. The proper remedy for judicial review of a resolution of necessity is by a "writ of mandate."

1. This procedure must be taken before the eminent domain proceedings begin.

B. The proper remedy for judicial review after the commencement of eminent domain proceedings is by objection to "the right to take."

Commentator favors the above procedures.

Resolution of Necessity--§§ 1240.040, 1245.220, 1245.230. Couldn't these three §§ be reorganized and incorporated into one section?

The exercise of the "right to take," i.e. through the delegation of eminent domain power, may not begin until the following condition precedents are met:

- (a) Public interest and necessity require the project,
- (b) . . . Compatability with the greatest public good and the least private injury,
- (c) The property sought is necessary for the project.

C.C.P. § 1240.030

Parties to an action should be made aware of alternatives to eminent domain proceedings; the acquisition of property by:

1. grant
2. devise
3. contract
4. trading
5. or other means.

/s/ Wanda Underhill

EXHIBIT 6
OFFICE OF
CITY ATTORNEY
CITY HALL EAST
LOS ANGELES, CALIFORNIA 90012



BURT PINES
CITY ATTORNEY

June 8, 1977

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

re: Comments Regarding Tentative Recommendation
Relating to Review of Necessity by Writ of
Mandate

Dear Mr. DeMouilly:

The following are the comments of the undersigned relating to the referenced tentative recommendation of the Law Revision staff to the Commission.

We believe that the amendment proposed to Section 1245.255 is an unwise amendment. We are somewhat doubtful that any amendment is necessary. However, if an amendment is desirable, it should limit rather than broaden the methods of collateral attack upon a resolution or ordinance of necessity. It should limit rather than broaden the number of persons who could make such collateral attack.

The undersigned was present at the hearings on Assembly Bill 11, which were conducted by the Senate Judiciary Subcommittee considering the bill. It seems very clear from such hearings that the only purpose of Section 1245.255 was to allow a condemnee to challenge the resolution of necessity in the event the legislative body made a determination to acquire a property for reasons having no relationship to a public project, such as antagonism against a particular owner or to prevent some private development. We do not believe it was ever intended that the general public be given special authority to contest a condemnation resolution or ordinance, other than such right it may have to enjoin a waste of public funds or other unlawful expenditure.

If a third person is unable to defeat the construction of a public project by claiming noncompliance with the California Environmental Quality Act, by claiming the expenditure to be a waste of public funds, or by any of the other means which are available to judicially test the right of a public entity to construct a project, they should not be permitted to assert that the condemnation resolution was improperly adopted. An attack on the condemnation resolution should be limited to the person who owns the property sought to be acquired.

Allowing the person who owns the property to bring an action before the condemnation action is commenced also seems to be unnecessary. If such action were commenced, what effect would it have? Would its pendency preclude the filing of a condemnation action? If so, an unnecessary and extremely damaging delay in the construction of a public project would be caused. If not, it would merely mean that two actions would be pending rather than one. In other words, a writ of mandate or other collateral attack on the condemnation resolution, even when brought by the owner of the property sought to be acquired, would be a complicating and/or redundant litigation.

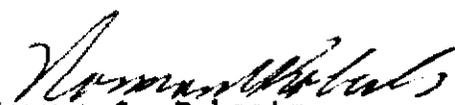
If an amendment is to be made to Section 1245.255, we would suggest that such amendment state that the validity of the resolution may only be raised by answer to an action in eminent domain by a person having an interest in the property sought to be acquired.

A third person challenging the validity of the condemnation resolution would not only adversely affect the public entity, it would also adversely affect private property owners who generally desire that condemnation actions be brought at an early date.

We would appreciate having the opportunity to discuss this matter further with members of the Commission should you believe that such a discussion would be helpful.

Yours very truly,

BURT PINES, City Attorney

By 
Norman L. Roberts
Assistant City Attorney

#36.800

April 7, 1977

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

REVIEW OF RESOLUTION OF NECESSITY BY WRIT OF MANDATE

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN JUNE 15, 1977.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

TENTATIVE RECOMMENDATION

relating to

REVIEW OF RESOLUTION OF NECESSITY BY WRIT OF MANDATE

A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity.¹ The findings and determinations made in such a resolution are conclusive in the eminent domain proceeding² except to the extent they were influenced or affected by gross abuse of discretion by the governing body.³

The validity of the resolution of necessity itself may be subject to direct attack, apart from its evidentiary effect in an eminent domain proceeding. A resolution procured by bribery is not valid;⁴ and, in the case of a conflict of interest, the resolution is subject to direct attack under the Political Reform Act of 1974.⁵ Attacks based on formal defects in the resolution, which might be made in actions for injunction, declaratory relief, or writ of mandate,⁶ are seldom successful since the defects are easily correctable by amendment or comparable action.⁷

1. Code Civ. Proc. § 1245.220.
2. Code Civ. Proc. § 1245.250(a). In case of extraterritorial condemnation, the resolution is given a presumption affecting the burden of producing evidence. Code Civ. Proc. § 1245.250(b).
3. Code Civ. Proc. § 1245.255.
4. Code Civ. Proc. § 1245.270.
5. See Govt. Code § 91003(b).
6. See California Civil Writs § 5.4, at 65 (Cal. Cont. Ed. Bar 1970).
7. Condemnation Practice in California § 6.23, at 138 (Cal. Cont. Ed. Bar 1973). See also Code Civ. Proc. § 1260.120(c) and Comment thereto (conditional dismissal subject to corrective or remedial action).

The extent to which an attack on the validity of the resolution may be made by writ of mandate is not clear, however.³ Adoption of a resolution of necessity by the governing body is a political and legislative type of action,⁹ and ordinary mandamus (rather than administrative mandamus) has been held to be the proper remedy for review of legislative actions.¹⁰ But the writ of mandate is available only where there is not a plain, speedy, and adequate remedy in the ordinary course of law,¹¹ and the Eminent Domain Law in fact provides a means of attack on the validity of the resolution by objection to the right to take.¹²

The Law Revision Commission recommends that the law be made clear by statute that ordinary mandamus is a proper remedy for judicial review of the validity of a resolution of necessity, but only prior to the commencement of the eminent domain proceeding. Thereafter, the validity of the resolution should be subject to attack pursuant to the Eminent Domain Law.

This recommendation would eliminate the need for litigation to resolve the issues of the availability of the writ of mandate and of the proper type of mandamus. It would help to limit the potential proliferation of multiple actions on the validity issue.¹³ It would permit the

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8. The Comment to Section 1245.255 of the Code of Civil Procedure states that "the validity of the resolution may be subject to direct attack by administrative mandamus (Section 1094.5)," but it would appear that ordinary mandamus (Section 1085) rather than administrative mandamus is the proper remedy.
 9. See discussions in *People v. Chevalier*, 52 Cal.2d 299, 304-307, 340 P.2d 598, 601-603 (1959), and *Wulzen v. Board of Supervisors*, 101 Cal. 15, 21, 35 P. 353, 355 (1894).
 10. See *Wilson v. Hidden Valley Mun. Water Dist.*, 256 Cal. App.2d 271, 63 Cal. Rptr. 889 (1967); *Brock v. Superior Court*, 109 Cal. App.2d 594, 241 P.2d 283 (1952).
 11. Code Civ. Proc. § 1086.
 12. Code Civ. Proc. § 1250.370(a).
 13. Limitation of the right to bring a mandamus action after commencement of the eminent domain proceeding would not be detrimental to the property owner since a successful challenge to the validity of the resolution in the proceeding entitles the property owner to compensation for litigation expenses. Code Civ. Proc. § 1268.610.

court by ordinary mandamus to examine the proceedings before the governing body to determine whether its action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether it has failed to follow the procedure and give the notices required by law; it would not, however, permit the court to substitute its judgment as to the findings and determinations made in the resolution of necessity for that of the governing board.¹⁴ Finally, the standard for judicial review of the validity of the resolution by ordinary mandamus would be analogous to that in a collateral attack on the conclusive effect of the resolution in the eminent domain proceeding.¹⁵

The Commission's recommendation would be effectuated by enactment of the following measure:

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14. See *Pitts v. Perluss*, 58 Cal.2d 824, 833-835, 377 P.2d 83, 88-90, 27 Cal. Rptr. 19, 24-26 (1962).
 15. Under Code of Civil Procedure Section 1245.255, a resolution of necessity is denied evidentiary effect in the eminent domain proceeding "to the extent its adoption or contents were influenced or affected by gross abuse of discretion by the governing body."

§ 1245.255. Attack on resolution

SECTION 1. Section 1245.255 of the Code of Civil Procedure is amended to read:

1245.255. (a) The validity of a resolution of necessity adopted by the governing body of the public entity pursuant to this article is subject to review:

(1) Before the commencement of the eminent domain proceeding, by writ of mandate pursuant to Section 1085.

(2) After the commencement of the eminent domain proceeding, by objection to the right to take pursuant to this title.

(b) A resolution of necessity does not have the effect prescribed in Section 1245.250 to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body.

(c) Nothing in this section precludes a public entity from rescinding a resolution of necessity and adopting a new resolution as to the same property ~~subject~~ subject, after the commencement of an eminent domain proceeding, to the same consequences as a conditional dismissal of the proceeding under Section 1260.120.

Comment. Subdivision (a)(1) is added to Section 1245.255 to make clear that ordinary mandamus (Section 1085) is an appropriate remedy to challenge the validity of a resolution of necessity. See Wulzen v. Board of Supervisors, 101 Cal. 15, 21, 35 P. 353, 355 (1894); Wilson v. Hidden Valley Mun. Water Dist., 256 Cal. App.2d 271, 278-281, 63 Cal. Rptr. 889, 893-895 (1967). See also Section 1230.940 (rules of practice in eminent domain proceedings). Under subdivision (a)(1), the writ of mandate is only available prior to the time the eminent domain proceeding is commenced. Thereafter, the validity of the resolution may be attacked in the eminent domain proceeding itself. Subdivision (a)(2). See Section 1250.370(a) (no valid resolution of necessity as ground for

objection to right to take). It should be noted that judicial review of the resolution of necessity by ordinary mandamus on the ground of abuse of discretion is limited to an examination of the proceedings to determine whether adoption of the resolution by the governing body of the public entity has been arbitrary, capricious, or entirely lacking in evidentiary support, and whether the governing body has failed to follow the procedure and give the notice required by law. See Pitts v. Per-
luss, 58 Cal.2d 824, 833, 377 P.2d 83, 88, 27 Cal. Rptr. 19, 24 (1962);
Brock v. Superior Court, 109 Cal. App.2d 594, 605, 241 P.2d 283, 290
(1952).

Subdivision (a) does not purport to prescribe the exclusive means by which the validity of a resolution of necessity may be challenged. The validity of the resolution may be subject to review under principles of law otherwise applicable, such as (in appropriate cases) declaratory relief and injunction. See Section 1230.040 (rules of practice in eminent domain proceedings). The validity of the resolution may be subject to attack, in the case of a conflict of interest, under the Political Reform Act of 1974 (Govt. Code § 91003(b)). See also Section 1245.270 (resolution adopted as a result of bribery).

Unlike subdivision (a), subdivision (b) does not provide a ground for attack on the validity of the resolution. Subdivision (b) provides, apart from the validity of the resolution, a ground for attack on the evidentiary effect given a resolution by Section 1245.250.