

#36.25

6/19/69

Memorandum 69-72

Subject: Study 36.25 - Condemnation (The Right to Take--Byroads)

Attached to this memorandum is a copy of the tentative recommendation and the background study relating to the right to take (byroads), together with the comments received after distribution of the recommendation (Exhibits I-VII).

You will recall that the recommendation provides for two quite different situations. The first of these is where a potential condemnor acquires property and in so doing cuts off access to a public road from property not acquired. Here new Section 1238.8 permits the condemnor to acquire such additional property as is reasonably necessary to provide access to a public road from the property not acquired. None of the comments received raises any objection to this section. The Department of Public Works (Exhibit IV) does, however, seek some assurance that, where a condemnor does provide an access road to property to replace lost access, the replacement will receive proper consideration as a mitigating factor in determining compensation for the acquisition of the original landlocked property. Specifically, the Department suggests that the section provide that, if a condemnor provides a byroad, public or private, to replace lost access, the finder of fact be required to consider this as a factor in mitigation of severance damage. It seems inconceivable that this would not be the result even in the absence of such a provision, and the staff queries whether a specific statutory provision is necessary, or whether mention in the comment to this section would be sufficient. The staff believes that the result sought is certainly that intended by the recommendation and

suggests that the Commission consider what, if anything, is needed to carry out this intention.

The second situation provided for in the recommendation is that where a landowner lacks adequate access to an established road and does not have a common law way of necessity.

Under present law (Civil Code Section 1001 and Code of Civil Procedure Section 1238), a private landowner may perhaps maintain an eminent domain proceeding to secure a byroad; however, use of the general statutory authority has not yet received judicial sanction in California. See Miller v. Johnston, 270 Adv. Cal. App. 320, 323 n.2 (1969), where the court found it unnecessary and declined to consider whether authority existed for a private person to exercise the power of eminent domain. See also the background study. The recommendation resolves any uncertainty (1) by eliminating the ability of a private person to maintain an eminent domain proceeding to secure a byroad and (2) by amending the Streets and Highways Code to ensure that the Street Opening Act of 1903 can be utilized to open a byroad and that a private person may initiate a proposal for such a road before the appropriate legislative body. It should be noted that the legislative body is given virtually unlimited discretion in granting or denying a request that an improvement be undertaken; however, the Act does provide adequate notice and hearing procedures--a protest by the owners of more than one-half of the land within the assessment district may be overruled only by a four-fifths vote of the legislative body, but political realities suggest that a strong protest is likely to be honored. Nevertheless, the Act itself does not provide any limitations or conditions on when, where, and how a road may be located and constructed. Both features of the recommendation have been criticized.

You will recall that the Commission considered Senate Bill 68 when it prepared this tentative recommendation. A copy of this bill in its latest form is attached as the last unnumbered exhibit (white pages). (The amendment the bill makes to Code of Civil Procedure Section 1238 is the same as in the Commission's tentative recommendation.) The State Bar Committee expressed the following views concerning Senate Bill 68, and these views also indicate that the Committee believes that the Commission's recommendation is far too restrictive. The Committee unanimously agreed that the proposed new Sections 1238.8 and 1238.9 of Senate Bill 68 are more restrictive than present law. The report of the Committee commenting on Senate Bill 68 and the Commission's tentative recommendation concludes as follows:

(a) The Committee is in favor of liberalizing this portion of the law of eminent domain, but does not feel that the proposed changes in Senate Bill No. 68 accomplish this goal and suggest that further study be made with the following in mind:

(1) Avoid the requirement of the approval of any public agency as a condition upon which a private condemnor must proceed, i.e., the Superior Court should have sole jurisdiction.

(2) "Strict necessity" should not be the criterion to bringing an eminent domain action for either a public or private condemnor but economic necessity should be the test.

(3) All existing statutes of special application re byroads should be repealed to be superseded by this proposed statute of general application.

In connection with the above comment, your attention is directed to Section 1238.8 which is set out at the bottom of page 5 of the printed bill which is the last exhibit. This section--which previously was considered too liberal by the Commission--is considered too restrictive by the State Bar Committee which also considers that the section is more restrictive than existing law.

The position of the State Bar Committee is repeated and supported by Mr. Homer L. McCormick, Jr., a partner in Rutan & Tucker, who states his reasons as follows (Exhibit I, page 2):

There are few if any legislative bodies or public entities who are willing to take on additional condemnation cases simply to expedite the development of property that may be landlocked. To be sure, if a contemplated condemnation action by a public entity is responsible for the landlocking of a parcel of land, the public entity should be expected to use your proposed sections, but in other events the property owner is likely only to find a deaf ear when he seeks that sort of help. If the Commission has any evidence to indicate that it is better to allow only public entities to acquire access roads to landlocked parcels, then I think the Commission should state what evidence it has that this result is desirable. Those of us who represent property owners in rapidly developing counties would certainly arrive at the opposite conclusion. If the Commission is not disposed to provide in the law that private individuals can condemn a so-called byroad when they are able to show strict necessity, then at least the Commission should not change what many of us believe is the existing law allowing such condemnations without substantial evidence that such change is necessary.

On the other hand, we have received letters that simply approve the the entire recommendation generally (see Exhibits II, III, and V). Letters from Mr. Joseph K. Horton, of Horton & Foote (Exhibit VI), not only endorse the vesting of the power of eminent domain in a public body rather than a private person, but further suggest that additional statutory limitations be placed on the exercise of the power. Specifically, Mr. Horton suggests:

that in order to establish such an easement certain factors must be present: [(1) the dominant owner] . . . must be innocent . . .; (2) irreparable injury must not result to the party against whom the easement is established; and . . . (3) the hardship to the one establishing the easement must be greatly disproportionate to the hardship caused the one against whom the easement is established. . . .

It might be noted that, at least in theory, the suggested limitations are embraced or reflected in part by the prerequisites established by Code of Civil Procedure Section 1241 for any taking, i.e., "it must appear . . .

that such . . . public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury"

The staff believes that, in view of the comments received, the Commission may wish to reconsider its decision to condition maintenance of an eminent domain action upon prior approval of a public body. Senate Bill 68 (1969) as amended (last exhibit, unnumbered, white sheets) would provide in Section 2 for the addition of a new Section 1238.8, which would permit a private property owner to maintain an eminent domain proceeding to secure an easement for access for which there is a "strict" necessity. The bill is opposed by the State Bar Committee as being too restrictive and as restricting existing law; it was strongly opposed by Mr. Horton as being too liberal. It is obvious that the tentative recommendation as now drafted will satisfy neither side; whether it or the substance of Senate Bill 68 would be a satisfactory compromise between the two views expressed, we hope can be decided at the June meeting.

Respectfully submitted,

Jack I. Horton
Associate Counsel

EXHIBIT I
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January 27, 1969

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IN REPLY PLEASE REFER TO

California Law Revision Commission
School of Law of Stanford University
Stanford, California 94305

Gentlemen:

Recently I received the Commission's "Tentative Recommendation Relating to Inverse Condemnation--The Privilege to Enter, Survey and Examine Property" and "Tentative Recommendations Relating to Condemnation Law and Procedure--The Right to Take (Byroads)". You requested my comments relating to these recommendations.

Our firm represents some 25 public agencies on the condemnor's side of condemnation cases. In addition, we represent a large number of property owners. We have no quarrel with your concept or proposals relating to the privilege to enter, survey and examine property, except wherein you propose that the court might require upon application by the condemnor that an order to enter property be conditioned upon a security deposit where that security deposit would include an amount to reimburse the owners of the property for costs and attorney's fees. Although I personally would be happy to see the entire law changed so that property owners are compensated for attorneys fees in all cases involving direct as well as inverse condemnation, your concept would certainly change the existing law. If attorney's fees are to be paid in order to secure the right to use property temporarily for surveys, why should they not be paid when we have a temporary easement, for example, for construction purposes? Why not when a permanent taking occurs? Just compensation has been held not to include attorneys fees to date. If your proposal were made I think that most attorneys for property owners would simply take the position in every case where a survey is sought that they would refuse entry. Thereafter, the public agency would apply for a court order and the property owner's attorney would come into court and claim that a security deposit be put up and also that he be awarded attorneys fees. It seems to me that this provision relating to attorneys fees should receive further consideration by the Commission.

California Law Revision Commission
January 27, 1969
Page Two

Your second recommendation relating to byroads in our opinion adds to the flexibility of condemning agencies in that they would be able to acquire access roads onto otherwise landlocked parcels without the question of public use and necessity being raised. Unfortunately, however, the recommendations of the Commission purport to change the probable existing law that a private individual could condemn an access route so that a parcel of landlocked property could be developed. Your own study points out that this change is contemplated. As your study also points out on page 10: "Maximum utilization of land is important." You state on page 3 of your tentative recommendations relating to byroads that the "Commission has concluded that if there is any need for the acquisition of a byroad by condemnation, the appropriate legislative body rather than a private person should initiate the proceedings: by deleting the word "byroads" from § 1238 of the CCP and expressly providing that a public agency can acquire byroads and by statements such as the above it can be expected that courts in the state would hold that a private person could not condemn a byroad. Any court interpreting these new proposals is certain to consider the Law Revision Commission's recommendations as part of "legislative history", if nothing else. In our opinion this proposed change is an extremely undesirable change.

There are few if any legislative bodies or public entities who are willing to take on additional condemnation cases simply to expedite the development of property that may be landlocked. To be sure, if a contemplated condemnation action by a public entity is responsible for the landlocking of a parcel of land, the public entity should be expected to use your proposed sections, but in other events the property owner is likely only to find a deaf ear when he seeks that sort of help. If the Commission has any evidence to indicate that it is better to allow only public entities to acquire access roads to landlocked parcels, then I think the Commission should state what evidence it has that this result is desirable. Those of us who represent property owners in rapidly developing counties would certainly arrive at the opposite conclusion. If the Commission is not disposed to provide in the law that private individuals can condemn a so-called byroad when they are able to show strict necessity, then at least the Commission should not change what many of us believe is the existing law allowing such condemnations without substantial evidence that such change is necessary.

Sincerely,


Homer L. McCormick, Jr.

Memo 69-72

EXHIBIT II

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COUNTY COUNSEL

MADISON 5-3611

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SPECIAL ASSISTANT

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DAVID D. MIX
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February 7, 1969

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ROBERT N. TAYLOR
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DAVID J. BERARDO
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MICHAEL LANGS
CAPTIES

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

Re: California Law Revision Commission
Condemnation Law and Procedure
The Right to Take (Byroads)

Dear Mr. DeMouilly:

This office has reviewed your tentative recommendation relating to Condemnation Law and Procedure - The Right to Take (Byroads), as revised November 26, 1968. This office approves the tentative recommendation.

Very truly yours,

JOHN D. MAHARG
County Counsel

By

Terry C. Smith
Deputy County Counsel

TCS:jac

Memo 69-72

EXHIBIT III

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FEB. 14-69.

CALIF. LAW REVISION COMMISSION,
SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIF. 94305.

ATT: MR. JOHN H. DEMOULLY.
EXECUTIVE SEC'Y.

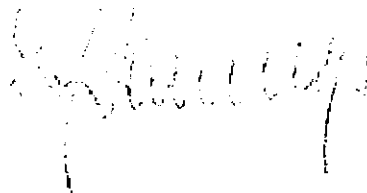
GENTLEMEN:

REGARDING # 65 AND INVERSE CONDEMNATION:
THE PRIVILEGE TO ENTER, SURVEY, AND EXAMINE PRO-
PERTY, I AGREE WITH THE RECOMMENDED LEGISLATION
AS OUTLINED AND REVISED DEC. 15TH, 1968 BY THE
LAW REVISION COMMISSION.

REGARDING # 36: THE RIGHT TO TAKE BY-ROADS
PROPERTY UNDER CONDEMNATION, AS REVISED NOV. 26TH
1968, THE ASSUMPTIONS BY THE COMMISSION ARE, IN
MY OPINION WELL TAKEN. I WOULD APPROVE THE REC-
OMMENDATION AS PROPOSED BY THE COMMISSION.

LAND ACCESS IS A SITUATION IS A SITUATION
THAT HAS LONG BEEN AN IMPEDIMENT TO THE BEST
UTILIZATION OF A GREAT AMOUNT OF LAND IN THE
UNITED STATES.

SINCERELY YOURS



DEPARTMENT OF PUBLIC WORKS

LEGAL DIVISION

Memo 69-72

EXHIBIT IV

1320 N STREET, SACRAMENTO 95814



April 3, 1969

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

Dear Mr. DeMouilly:

Re: Tentative Recommendation Relating to the
Right to Take Byroads

The Department of Public Works has not previously commented upon this tentative recommendation by the California Law Revision Commission. It now desires to do so since it feels that there is a serious problem concerning the proposal which should be considered by the Commission.

This problem revolves around the questions of whether or not the property owner must accept the byroad provided in mitigation of severance damages which would otherwise occur to a landlocked parcel, or, if he does not accept, whether the finder of fact in the condemnation case may consider his refusal to accept the byroad offered and provided as a failure to mitigate severance damages. This problem is particularly important if the byroad offered is not a public road but a private road. Attorneys for the department have, in the past, had occasion to research California law as to the duty of an owner to accept proffered private property rights and construction relating thereto as a mitigation to severance damages which would otherwise occur. California law is either nonexistent or very ambiguous on this matter.

The Commission should assure condemnors that large severance damage awards do not result in cases where byroads are provided because of a legal ruling that the property owner need not accept a private byroad

Mr. John H. DeMouilly

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April 3, 1969

constructed for the purpose of mitigating severance damage and the finder of fact may not consider the byroad in mitigating severance damages.

As part of the proposed legislation, the department therefore suggests that it is essential to provide a provision that if the condemnor builds a byroad, public or private, to replace lost access to a public road, the finder of fact in the ultimate condemnation action is absolutely required to consider this provision by the agency as a mitigating factor on the severance damage issue, or, in an appropriate case, as a special benefit.

Again the department expresses its appreciation for the opportunity afforded it by the Commission to comment on its proposals.

Very truly yours,

Robert F. Carlson
ROBERT F. CARLSON
Assistant Chief Counsel

Encls. 20 copies

cc's to: Willard A. Shank, A.G.'s Office
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Robert L. Bergman " "
Thomas H. Clayton, Gen. Serv.
Norman Wolf
League of Cities
Russell B. Jarvis
San Diego County Counsel
Santa Clara County Counsel
Santa Barbara County Counsel
K. Duane Lyders
Robert W. James, Dept. of Water Res.
John Smock, Judicial Counsel
Richard Allen, Dept. of Water Res.
Dept. of Public Wks. (S.F. Legal Office) - 10)
" " " " (L.A. Legal Office) - 10)
" " " " (S.D. Legal Office) - 5)
Los Angeles County Counsel



Memo 69-72

EXHIBIT V

County of San Diego

OFFICE OF COUNTY COUNSEL

302 COUNTY ADMINISTRATION CENTER
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February 10, 1969

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Mr. John H. DeMouilly
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

Re: Tentative Recommendations:

- (a) Inverse Condemnation - Privilege to Enter,
Survey and Examine Property
- (b) Condemnation Law and Procedure - Right to
Take Byroads

We have reviewed the tentative recommendations furnished by your office in the above referenced matters on which you have requested comments. We agree with the proposals as submitted to the Law Revision Commission.

Our office has been faced with the problem on the right of a condemning agency to survey and examine property, even after a complaint in eminent domain has been filed. Moreover, school districts do not have the right of prior possession in eminent domain proceedings and their right to enter and make surveys is not clear under existing law. The amendments to Sections 1242 and 1242.5 of the Code of Civil Procedure will clarify these issues.

This office also has had problems in specific cases where school districts have considered possible acquisition of additional property to provide access to property not taken. In the past we have advised school districts that they have no authority to acquire property for use other than school buildings and grounds unless otherwise specifically authorized. (See Education Code Section 15804 which authorizes acquisition of property by a school district for streets in front of property owned by the district when required for school purposes; and Section 15251 which authorizes a school district to acquire land for a "school approach" which is not more than one-half mile in length and is entirely outside the boundaries of any

ES	
AES	

Mr. John H. DeMouilly

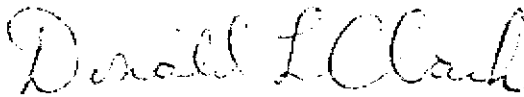
-2-

February 10, 1969

city.) The proposed amendments will clarify this problem.

Very truly yours,

BERTRAM McLEES, JR., County Counsel

By 
DONALD CLARK, Deputy

DC:AM

cc: Terry C. Smith
Deputy County Counsel
648 Hall of Administration
Los Angeles, California

Memo 69-72

EXHIBIT VI

LAW OFFICES

HORTON & FOOTE

660 CALIFORNIA FEDERAL PLAZA
5670 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90036
TELEPHONE 835-1147

April 22, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

I am advised that you are studying possible proposed laws relative to landlocked property.

We respectfully submit herewith our views in regard to any proposal such as set forth in 1969 Senate Bill No. 68 which we strongly oppose.

To give the right of eminent domain, a heretofore limited prerogative of the Sovereign, as proposed without any regard to equities, can lead to deprivation and damage to private property most unjustly. To illustrate, we need only refer to a situation where a developer, due entirely to a landlocked situation which he had occasioned, can cut through adjoining, fully developed and occupied single family residential property, depriving the owner of the full and rightful use of his home site, for personal gain in developing property to the rear thereof. Equities must and should be considered.

As you well know, this State has for years recognized the law pertaining to a way of necessity. This has been carefully developed by the courts and a broad and unfair extension of the same, under the guise of eminent domain should not be sanctioned. The California law is clear that a way of necessity is based on the inferred intent of the parties. This is discarded entirely in this proposal. For example, the land may be bordering an existing road easement which may be vacated and abandoned by the landowner or the land may be bordering a public street and the portion bordering the same conveyed by the landowner and such owner could, under this section, exercise eminent domain against an innocent third party, perhaps destroying to a considerable extent the privacy of his home, to such party's detriment. A landowner could even have provided, in connection with the conveyance, that there should be no right of way and still claim direct or by successor under this act.

We now note that the Court of Appeal has decided a case which emphasizes our position. The case is Miller v. Johnston, Court of Appeal, First Appellate District, Division 1, February 8, 1969 (as yet unreported in the advance decisions). The case considers the

April 22, 1969

establishment of an easement for access under common law for equitable principles. It stresses that in order to establish such an easement certain factors must be present, the first of which is:

"Defendant (in such case the party seeking to establish the easement) must be innocent - the encroachment must not be the result of defendant's willful act, and perhaps not the result of defendant's negligence."

Second; irreparable injury must not result to the party against whom the easement is established, and third; the hardship to the one establishing the easement must be greatly disproportionate to the hardship caused the one against whom the easement is established and this must clearly appear in the evidence and proved by the party asserting the right to the easement.

Yours sincerely,

Joseph K. Horton
of HORTON & FOOTE

JKH:nk

April 24, 1969

Joseph K. Horton, Esq.
1660 California Federal Plaza
5670 Wilshire Boulevard
Los Angeles, California 90036

Dear Mr. Horton:

Your letter of April 23 indicates an interest in the Law Revision Commission study of the laws relating to landlocked property.

I am sending you herewith a copy of a tentative recommendation the Commission has distributed for comment and the related background research study prepared by the Commission's staff. We would be pleased to have your comments on the tentative recommendation. Incidentally, as you noted, the recent case of Miller v. Johnston, 270 A.C.A. 320, 322 n.2 (1969), is of interest in this connection. The other pertinent cases are discussed in the background research study.

Sincerely,

John H. DeMouilly
Executive Secretary

JHD:aj
enc

LAW OFFICES
HORTON & FOOTE

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May 14, 1969

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

Re: Landlocked Property

Dear Mr. DeMouilly:

Thank you for your letter of April 24, 1969 in response to mine of April 22nd.

I have reviewed the tentative recommendation revised November 26, 1968 and a study relating to the use of the power of eminent domain to acquire byroads. It is noted that the recommendation of the Commission vests such power of eminent domain in the public body rather than a private person. This, I believe, to be far better and more likely to prevent inequities. I feel it is a considerable improvement over 1968 Senate Bill #18.


It appears that the tentative recommendation is the tentative action on Recommendation 4 of the study, although the recommendation is dated prior to the date of the study. If I am in error in this respect, please advise me.

We also submit that provision should be made to prevent inequities as discussed in our letter of April 22nd. Otherwise the public body might become the tool to inflict unwarranted and inequitable damage to one person for the private gain of another.

I should like to have each member of the Commission receive a copy of this letter, as well as our letter of April 22nd, and if this is not to be done, or if you would like to have us furnish you with extra copies, please let me know.

Again thanking you, I am

Yours very truly,


Joseph K. Horton
of HORTON & FOOTE

JKH:mf

May 16, 1969

Joseph K. Horton, Esq.
1660 California Federal Plaza
5670 Wilshire Blvd.
Los Angeles, California 90036

Dear Mr. Horton:

Thank you for your letter of May 14, concerning the Commission's tentative recommendation relating to byroads. Your letters of April 22 and May 14 will be reproduced, and each member of the Commission will receive a copy of them so that they can be considered at the same time that the other letters commenting on the tentative recommendation are considered.

The tentative recommendation represents the tentative decision of the Commission. The study has a later date because it was revised to eliminate some material that was not considered pertinent to the subject.

Sincerely,

John H. DeMouilly
Executive Secretary

JHD:aj

AMENDED IN SENATE MARCH 12, 1969

SENATE BILL

No. 68

Introduced by Senator Carrell

January 15, 1969

REFERRED TO COMMITTEE ON JUDICIARY

An act to amend Section 1238 of, and to add Sections 1238.8 and 1238.9 to, the Code of Civil Procedure, relating to eminent domain.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1238 of the Code of Civil Procedure is
- 2 amended to read:
- 3 1238. Subject to the provisions of this title, the right of
- 4 eminent domain may be exercised in behalf of the following
- 5 public uses:
- 6 1. Fortifications, magazines, arsenals, Navy yards, Navy and
- 7 Army stations, lighthouses, range and beacon lights, coast
- 8 surveys, and all other public uses authorized by the govern-
- 9 ment of the United States.
- 10 2. Public buildings and grounds for use of a state, or any
- 11 state institution, or any institution within the State of Cali-

LEGISLATIVE COUNSEL'S DIGEST

SB 68, as amended, Carrell (Jud.). Eminent domain.

Amends Sec. 1238, Adds Secs. 1238.8 and 1238.9, C.C.P.

Deletes provisions authorizing the exercise of the right of eminent domain in behalf of byroads.

Provides that an owner of property for which there is a strict necessity for an easement for access to a public road from such property may acquire, by eminent domain proceedings, an easement for access to a public road and that it shall afford the most reasonable access consistent with other uses of the burdened land and the location of already established roads and shall include the right to install or have installed utility facilities therein. Makes these provisions inapplicable to prescribed lands in the state park system and for the acquisition of a private or farm crossing over a railroad track.

Authorizes, in any case in which the state, a county, city, public district or other public agency in this state exercises the right of eminent domain, the taking of additional property in an amount reasonably

1 fornia which is exempt from taxation under the provisions of
2 Section 1a, of Article XIII of the Constitution of the State of
3 California, and all other public uses authorized by the Legis-
4 lature of the State of California.

5 3. Any public utility, and public buildings and grounds,
6 for the use of any county, incorporated city, or city and
7 county, village, town, school district, or irrigation district,
8 ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes,
9 ditches, or pipes, lands, water system plants, buildings, rights
10 of any nature in water, and any other character of property
11 necessary for conducting or storing or distributing water for
12 the use of any county, incorporated city, or city and county,
13 village or town or municipal water district, or the inhabitants
14 thereof, or any state institution, or necessary for the proper
15 development and control of such use of said water, either at
16 the time of the taking of said property, or for the future
17 proper development and control thereof, or for draining any
18 county, incorporated city, or city and county, village or town;
19 raising the banks of streams, removing obstructions therefrom,
20 and widening and deepening or straightening their channels;
21 roads, highways, boulevards, streets and alleys; public moor-
22 ing places for watercraft; public parks, including parks and
23 other places covered by water, and all other public uses for
24 the benefit of any county, incorporated city, or city and
25 county, village or town, or the inhabitants thereof, which may
26 be authorized by the Legislature; but the mode of apportion-
27 ing and collecting the costs of such improvements shall be such
28 as may be provided in the statutes by which the same may be
29 authorized.

30 4. Wharves, docks, piers, warehouses, chutes, booms, ferries,
31 bridges, toll roads, plank and turnpike roads; paths and roads
32 either on the surface, elevated, or depressed, for the use of
33 bicycles, trieycles, motoreycles and other horseless vehicles,
34 steam, electric, and horse railroads, canals, ditches, dams,
35 poundings, flumes, aqueducts and pipes for irrigation, public
36 transportation, supplying mines and farming neighborhoods
37 with water, and draining and reclaiming lands, and for floating
38 logs and lumber on streams not navigable, and water, water
39 rights, canals, ditches, dams, poundings, flumes, aqueducts and
40 pipes for irrigation of lands furnished with water by corpora-
41 tions supplying water to the lands of the stockholders thereof
42 only, and lands with all wells and water therein adjacent to
43 the lands of any municipality or of any corporation, or person

necessary to provide access to a public road from any property which is
not taken and for which there is a strict necessity for an easement of
access to a public road from such property.

Declares public right to use and enjoy such easements. Imposes duty
of maintenance of easement on owner of the property for which the
easement is taken.

Vote—Majority; Appropriation—No; Sen. Fin.—No; W. & M.—No.

- 1 supplying water to the public or to any neighborhood or com-
2 munity for domestic use or irrigation.
- 3 5. Roads, tunnels, ditches, flumes, pipes, aerial and surface
4 tramways and dumping places for working mines; also outlets,
5 natural or otherwise, for the flow, deposit or conduct of tail-
6 ings or refuse matter from mines; also an occupancy in com-
7 mon by the owners or possessors of different mines of any
8 place for the flow, deposit, or conduct of tailings or refuse
9 matter from their several mines.
- 10 ~~5.~~
- 11 6. Telegraph, telephone, radio and wireless lines, systems
12 and plants.
- 13 ~~6.~~
- 14 7. Sewerage of any incorporated city, city and county, or
15 of any village or town, whether incorporated or unincorpor-
16 ated, or of any settlement consisting of not less than 10
17 families, or of any buildings belonging to the state, or to any
18 college or university, also the connection of private residences
19 and other buildings, through other property, with the mains
20 of an established sewer system in any such city, city and
21 county, town or village.
- 22 ~~7.~~
- 23 8. Roads for transportation by traction engines or road loco-
24 motives.
- 25 ~~8.~~
- 26 9. Oil pipelines.
- 27 ~~9.~~
- 28 10. Railroads, roads and flumes for quarrying, logging or
29 lumbering purposes.
- 30 ~~10.~~
- 31 11. Canals, reservoirs, dams, ditches, flumes, aqueducts, and
32 pipes and outlets natural or otherwise for supplying, storing,
33 and discharging water for the operation of machinery for the
34 purpose of generating and transmitting electricity for the
35 supply of mines, quarries, railroads, tramways, mills, and
36 factories with electric power; and also for the applying of
37 electricity to light or heat mines, quarries, mills, factories,
38 incorporated cities and counties, villages, towns, or irrigation
39 districts; and also for furnishing electricity for lighting, heat-
40 ing or power purposes to individuals or corporations; together
41 with lands, buildings and all other improvements in or upon
42 which to erect, install, place, use or operate machinery for the
43 purpose of generating and transmitting electricity for any of
44 the purposes or uses above set forth.
- 45 ~~11.~~
- 46 12. Electric powerlines, electric heat lines, electric light
47 lines, electric light, heat and powerlines, and works or plants,
48 lands, buildings or rights of any character in water, or any
49 other character of property necessary for generation, trans-
50 mission or distribution of electricity for the purpose of fur-
51 nishing or supplying electric light, heat or power to any
52 county, city and county or incorporated city or town, or irri-

1 gation district, or the inhabitants thereof, or necessary for the
2 proper development and control of such use of such electricity,
3 either at the time of the taking of said property, or for the
4 future proper development and control thereof.

5 ~~14.~~
6 13. Cemeteries for the burial of the dead, and enlarging
7 and adding to the same and the grounds thereof.

8 ~~15.~~
9 14. The plants, or any part thereof, or any record therein
10 of all persons, firms or corporations heretofore, now or here-
11 after engaged in the business of searching public records, or
12 publishing public records or insuring or guaranteeing titles
13 to real property, including all copies of, and all abstracts or
14 memoranda taken from, public records, which are owned by,
15 or in the possession of, such persons, firms or corporations or
16 which are used by them in their respective businesses; pro-
17 vided, however, that the right of eminent domain in behalf of
18 the public uses mentioned in this subdivision may be exercised
19 only for the purposes of restoring or replacing, in whole or in
20 part, public records, or the substance of public records, of any
21 city, city and county, county or other municipality, which
22 records have been, or may hereafter be, lost or destroyed by
23 conflagration or other public calamity; and provided further,
24 that such right shall be exercised only by the city, city and
25 county, county or municipality whose records, or part of whose
26 records, have been, or may be, so lost or destroyed.

27 ~~16.~~
28 15. Expositions or fairs in aid of which the granting of
29 public moneys or other things of value has been authorized
30 by the Constitution.

31 ~~17.~~
32 16. Works or plants for supplying gas, heat, refrigeration
33 or power to any county, city and county, or incorporated city
34 or town, or irrigation district, or the inhabitants thereof, to-
35 gether with lands, buildings, and all other improvements in
36 or upon which to erect, install, place, maintain, use or operate
37 machinery, appliances, works and plants for the purpose of
38 generating, transmitting and distributing the same and rights
39 of any nature in water, or property of any character necessary
40 for the purpose of generating, transmitting and distributing
41 the same, or necessary for the proper development and control
42 of such use of such gas, heat, refrigeration, or power, either
43 at the time of the taking of said property, or for the future
44 proper development and control thereof.

45 ~~18.~~
46 17. Standing trees and ground necessary for the support
47 and maintenance thereof, along the course of any highway,
48 within a maximum distance of 300 feet on each side of the
49 center thereof; and ground for the culture and growth of
50 trees along the course of any highway, within the maximum
51 distance of 300 feet on each side of the center thereof.

1 ~~19.~~
2 18. Propagation, rearing, planting, distribution, protection
3 or conservation of fish.

4 ~~20.~~
5 19. Airports for the landing and taking off of aircraft, and
6 for the construction and maintenance of hangars, mooring
7 masts, flying fields, signal lights and radio equipment.

8 ~~21.~~
9 20. Any work or undertaking of a city, county, or city and
10 county, housing authority or commission, or other political
11 subdivision or public body of the state: (a) to demolish, clear
12 or remove buildings from any area which is detrimental to
13 the safety, health and morals of the people by reason of the
14 dilapidation, overcrowding, faulty arrangement or design, lack
15 of ventilation or sanitary facilities of the dwellings predomi-
16 nating in such areas; or (b) to provide dwellings, apartments
17 or other living accommodations for persons or families who
18 lack the amount of income which is necessary (as determined
19 by the body engaging in said work or undertaking) to enable
20 them to live in decent, safe and sanitary dwellings without
21 overcrowding.

22 ~~22.~~
23 21. Terminal facilities, lands, or structures for the receipt,
24 transfer or delivery of passengers or property by any common
25 carrier operating upon any public highway in this state be-
26 tween fixed termini or over a regular route, or for other termi-
27 nal facilities of any such carrier.

28 Sec. 2. Section 1238.8 is added to the Code of Civil Proce-
29 dure, to read:

30 1238.8. Subject to the provisions of this title, the right of
31 eminent domain may be exercised in behalf of the following
32 public uses:

33 The acquisition of an easement by the owner of private prop-
34 erty for which there is a strict necessity for an easement for
35 access to a public road from such property. The ease-
36 ment which may be taken shall afford the most reasonable
37 access to the property for which the easement is taken con-
38 sistent with other uses of the burdened land and the location
39 of already established roads, and shall include the right to
40 install or have installed utility facilities therein. The public
41 shall be entitled, as of right, to use and enjoy the easement
42 which is taken. The owner of the property for which the ease-
43 ment is taken shall maintain any such easement.

44 This section does not apply to lands of the state park system
45 as to which Section 5003.5 of the Public Resources Code ap-
46 plies.

47 This section shall not be utilized for the acquisition of a
48 private or farm crossing over a railroad track, the exclusive
49 remedy of an owner of a landlocked parcel to acquire a private
50 or farm crossing over such track being that provided in Section
51 7537 of the Public Utilities Code.

1 Sec. 3. Section 1238.9 is added to the Code of Civil Pro-
2 cedure, to read:

3 1238.9. In any case in which the state, a county, city, pub-
4 lic district or other public agency in this state exercises the
5 right of eminent domain, additional property may be taken in
6 an amount reasonably necessary to provide access to a public
7 road from any property which is not taken and for which
8 there is a strict necessity for an easement of access to a public
9 road from such *other* property. The easement which may be
10 taken shall afford the most reasonable access to the property,
11 consistent with other uses of the burdened land and the loca-
12 tion of already established roads. The public shall be entitled,
13 as of right, to use and enjoy the easement ~~which is taken any~~
14 ~~easement taken under this section~~. The owner of the property
15 for which the easement is taken shall maintain any such ease-
16 ment.

17 *Nothing in this section shall be construed to prohibit a public*
18 *agency from restricting the use and enjoyment by the public*
19 *of any easement or right-of-way taken under any other provi-*
20 *sion of this title.*

21 Sec. 4. The Legislature hereby declares its policy to elimi-
22 nate landlocked parcels of property in order to facilitate public
23 safety and to enable the beneficial use of all land in this state.

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

CONDEMNATION LAW AND PROCEDURE

The Right to Take (Byroads)

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

WARNING: 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 it will make to the California Legislature.

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.

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

CONDEMNATION LAW AND PROCEDURE

The Right to Take (Byroads)

As enacted in 1872, Code of Civil Procedure Section 1238 authorized takings for "byroads" in subdivision (4) and for "byroads leading from highways to residences and farms" in subdivision (6). Subdivision (6) was expanded in 1895 to cover "byroads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes." In an appropriate case, Civil Code Section 1001 would appear to authorize a private person to maintain an action to acquire private property for the "byroad" described in sub-¹division (6).

The need for resort to eminent domain to acquire property for byroads is partially alleviated by the common law doctrine of "ways of necessity." Nevertheless, situations exist where a landowner lacks adequate access to an established road and does not have a common law way of necessity. Use of the general authority of Civil Code Section 1001 to acquire property for byroads has not received judicial sanction and no explicit special statutory procedure now exists whereby either a public entity or an individual may condemn to provide byroads. The Commission therefore recommends that the provisions in

1. For additional background information, see the research study (attached) prepared by the staff of the Law Revision Commission.

subdivisions (4) and (6) of Section 1238 relating to byroads be deleted and that more explicit statutory provisions relating to byroads be enacted. Specifically, the Commission recommends:

1. The Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443) should be amended to make clear that a byroad may be opened in the manner therein provided. This act, if it does not already permit opening of byroads, is readily adaptable for this purpose and provides a complete statutory procedure covering notice, review, compensation, and assessment. To provide explicit recognition that the initiative for the opening of new roads, including byroads, frequently comes from private persons and to codify the present practice in at least some counties, a provision should be added to the Street Opening Act of 1903 to make clear that private persons may present requests for specific improvements to be undertaken under the act.

These changes will make available an existing procedure whereby the cost of the improvement (including acquisition of land by condemnation) will be paid by the benefited property owner. Of course, the legislative body acting on the request to establish a byroad should have complete discretion to refuse to undertake the project and should be permitted, for example, to assess the benefited person not only for the cost of establishing the byroad but also for the cost of its maintenance. See, e.g., Streets and Highways Code Sections 969.5 and 1160-1197.

2. A public entity acquiring property for a public use should be permitted to acquire such additional property as is necessary to provide

access to property not taken. In certain situations, the acquisition of property for a public use may cut off access to property not taken. In such situations, it is fairly clear that the taking of additional property to provide access to the otherwise isolated parcel would be held to be a public use but in California no explicit statutory or decisional authority for such takings exists. A statutory provision recognizing that such authority exists is desirable for such takings often are the most satisfactory method of mitigating the adverse consequences when land is acquired for a public improvement and such authority would minimize the need for so-called "excess condemnation."²

3. The Commission has considered whether a private person should be authorized to initiate condemnation proceedings for a byroad. Under California law, a private person may initiate such proceedings to acquire a sewer easement³ and an argument could be made for the extension of this authority to the acquisition of a byroad. The Commission has concluded however that, if there is need for the acquisition of a byroad by condemnation, the appropriate legislative body rather than a private person should initiate the condemnation proceeding.⁴

2. See *People v. Superior Court*, 68 Adv. Cal. ___, 65 Cal. Rptr. 342, 436 P.2d 342 (1968).

3. *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955).

4. The right of any public condemnor, e.g., public utility to condemn access roads to property acquired for a public use should be unaffected by this recommendation. It should also be noted that this is, in any event, merely the first in a series of recommendations dealing with the proper extent of the power of eminent domain and will be submitted to the Legislature only as a part of comprehensive legislation dealing with that subject.

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

An act to amend Section 1238 of, and to add Section 1238.8 to, the Code of Civil Procedure, and to amend Section 4008, and to add Sections 4008.1 and 4120.1 to, the Streets and Highways Code, relating to roads.

The people of the State of California do enact as follows:

Section 1. Section 1238 of the Code of Civil Procedure is amended to read:

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

1. Fortifications, magazines, arsenals, Navy yards, Navy and Army stations, lighthouses, range and beacon lights, coast surveys, and all other public uses authorized by the Government of the United States.

2. Public buildings and grounds for use of a state, or any state institution, or any institution within the State of California which is exempt from taxation under the provisions of Section 1a of Article XIII of the Constitution of the State of California, and all other public uses authorized by the Legislature of the State of California.

3. Any public utility, and public buildings and grounds, for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district, ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other character of property necessary for conducting or storing or distributing water for the use of any county, incorporated city, or city and county, village or town or municipal water district, or the inhabitants thereof, or any state institution, or necessary for the proper development and control of such use of said water, either at the time of the taking of said property, or for the future proper development and control thereof, or for draining any county, incorporated city, or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels; roads, highways, boulevards, streets and alleys; public mooring places for watercraft; public parks, including parks and other places covered by water, and all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, warehouses, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads; paths and roads either on the surface, elevated, or depressed, for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric, and horse railroads, canals, ditches, dams, poundings, flumes,

aqueducts and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable, and water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only, and lands with all wells and water therein adjacent to the lands of any municipality or of any corporation, or person supplying water to the public or to any neighborhood or community for domestic use or irrigation.

5. Roads, tunnels, ditches, flumes, pipes, aerial and surface tramways and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

~~6.--Byroads-leading-from-highways-to-residences,-farms,-mines, mills,-factories-and-buildings-for-operating-machinery,-or-necessary-to-reach-any-property-used-for-public-purposes.~~

7. Telegraph, telephone, radio and wireless lines, systems and plants.

8. Sewerage of any incorporated city, city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than 10 families, or of any buildings, belonging to the State, or to any college or university, also the

connection of private residences and other buildings, through other property, with the mains of an established sewer system in any such city, city and county, town or village.

9. Roads for transportation by traction engines or road locomotives.

10. Oil pipelines.

11. Railroads, roads and flumes for quarrying, logging or lumbering purposes.

12. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages, towns, or irrigation districts; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations; together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

13. Electric power lines, electric heat lines, electric light lines, electric light, heat and power lines, and works or plants, lands, buildings or rights of any character in water, or any other character of property necessary for generation, transmission or

distribution of electricity for the purpose of furnishing or supplying electric light, heat or power to any county, city and county or incorporated city or town, or irrigation district, or the inhabitants thereof, or necessary for the proper development and control of such use of such electricity, either at the time of the taking of said property, or for the future proper development and control thereof.

14. Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof.

15. The plants, or any part thereof, or any record therein of all persons, firms or corporations heretofore, now or hereafter engaged in the business of searching public records, or publishing public records or insuring or guaranteeing titles to real property, including all copies of, and all abstracts or memoranda taken from, public records, which are owned by, or in the possession of, such persons, firms or corporations or which are used by them in their respective businesses; provided, however, that the right of eminent domain in behalf of the public uses mentioned in this subdivision may be exercised only for the purposes of restoring or replacing, in whole or in part, public records, or the substance of public records, of any city, city and county, county or other municipality, which records have been, or may hereafter be, lost or destroyed by conflagration or other public calamity; and provided further, that such right shall be exercised only by the city, city and county, county or municipality whose records, or part of whose records, have been, or may be, so lost or destroyed.

16. Expositions or fairs in aid of which the granting of public moneys or other things of value has been authorized by the Constitution.

17. Works or plants for supplying gas, heat, refrigeration or power to any county, city and county, or incorporated city or town, or irrigation district, or the inhabitants thereof, together with lands, buildings, and all other improvements in or upon which to erect, install, place, maintain, use or operate machinery, appliances, works and plants for the purpose of generating, transmitting and distributing the same and rights of any nature in water, or property of any character necessary for the purpose of generating, transmitting and distributing the same, or necessary for the proper development and control of such use of such gas, heat, refrigeration, or power, either at the time of the taking of said property, or for the future proper development and control thereof.

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.

19. Propagation, rearing, planting, distribution, protection or conservation of fish.

20. Airports for the landing and taking off of aircraft, and for the construction and maintenance of hangars, mooring masts, flying fields, signal lights and radio equipment.

21. Any work or undertaking of a city, county, or city and county, housing authority or commission, or other political subdivision or public body of the State: (a) to demolish, clear or remove buildings from any area which is detrimental to the safety, health and morals of the people by reason of the dilapidation, overcrowding, faulty arrangement or design, lack of ventilation or sanitary facilities of the dwellings predominating in such areas; or (b) to provide dwellings, apartments or other living accommodations for persons or families who lack the amount of income which is necessary (as determined by the body engaging in said work or undertaking) to enable them to live in decent, safe and sanitary dwellings without overcrowding.

22. Terminal facilities, lands, or structures for the receipt, transfer or delivery of passengers or property by any common carrier operating upon any public highway in this State between fixed termini or over a regular route, or for other terminal facilities of any such carrier.

Comment. Section 1238 is amended to delete subdivision (6) and to delete the reference to "byroads" from subdivision (4). These provisions are superseded by Code of Civil Procedure Section 1238.8 and revisions of the Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443). See Streets and Highways Code Sections 4008, 4008.1 and 4120.1 and the comments to those sections. The Street Opening Act of 1903 includes specific authority to exercise the right of eminent domain for byroads in Section 4090.

Sec. 2. Section 1238.8 is added to the Code of Civil Procedure, to read:

1238.8. Where a public entity acquires property for a public use and exercises or could have exercised the right of eminent domain to acquire such property for such use, the public entity may exercise the right of eminent domain to acquire such additional property as is reasonably necessary to provide access to an existing public road from any property which is not acquired for such public use but which is cut off from access to a public road as a result of the acquisition by the public entity.

Comment. Section 1238.8 provides explicit statutory recognition of the right of a public condemnor that acquires property for a public use to condemn such additional property as is necessary to provide access to property not taken which would otherwise lack access as a result of the acquisition. The access road need not be one that is open to the public. Although no explicit statutory or decisional authority for such a taking exists in California, the right to exercise the power of eminent domain for such purpose probably would be necessarily implied from the right to take property for the public improvement itself. Such a taking would be a taking for a public use. E.g., Department of Public Works v. Farina, 29 Ill.2d 474, 194 N.E.2d 209 (1963); Luke v. Mass. Turnpike Auth., 337 Mass. 304, 149 N.E.2d 225 (1958); May v. Ohio Turnpike Comm., 172 Ohio St. 555, 178 N.E.2d 920 (1962); Tracy v. Preston, Director of Highways, 172 Ohio St. 567, 178 N.E.2d 923 (1962).

Sec. 3. Section 4008 of the Streets and Highways Code is amended to read:

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

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

Sec. 4. Section 4008.1 is added to the Streets and Highways Code, to read:

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

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

Sec. 5. Section 4120.1 is added to the Streets and Highways Code, to read:

4120.1. The owner of any property that may be benefited by a proposed improvement may file with the legislative body a request that the improvement be undertaken. Such request may, but need not include the maps, plats, plans, profiles, specifications, and other information referred to in Sections 4120 and 4122.

Comment. Section 4120.1 is added to the Street Opening Act of 1993 to expressly authorize initiation of improvement proposals by individual property owners. Similar procedures already exist in many counties and cities.

THE USE OF THE POWER OF EMINENT DOMAIN TO ACQUIRE BYROADS*

*This study was prepared for the California Law Revision Commission by the Commission's legal staff. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

A STUDY
relating to
THE USE OF THE POWER OF EMINENT DOMAIN
TO ACQUIRE BYROADS

As enacted in 1872, Code of Civil Procedure Section 1238 authorized takings for "byroads" in subdivision (4) and for "byroads leading from highways to residences and farms" in subdivision (6). Subdivision (6) was amended in 1895¹ to cover "byroads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes."²

The need for resort to eminent domain to provide byroads is partially alleviated by the common law doctrine of "ways of necessity." When the facts that give rise to a common law way of necessity are established, the right will be recognized; there is no need to institute eminent domain proceedings or to compensate the owner of the land over which the way of necessity is located.³ Nevertheless, subdivision (6) and the "byroad" provision of subdivision (4) are not merely statutory substitutes for the common law way of necessity. A way of necessity arises when a grantor conveys land shut off from access to a road by the grantor's remaining land or by his land and the land of a stranger or where a similar situation is created by a partition, either voluntary or involuntary.⁴ Situations, therefore, exist where a landowner lacks access to an established road and does not have a common law way of necessity.⁵ The right to take property by eminent domain for a "byroad" may provide a solution to this problem where the owner's efforts to purchase a right of access across his neighbor's land fail.

In the leading California decision, Sherman v. Buick,⁶ the taking of private property for a byroad was held proper where the road was in fact to be a public road, open to all who desired to use it, even though the road was designed to provide access for the land of a private person and he bore the cost of establishing and maintaining the road. In Sherman, the court held constitutional an 1861 act⁷ that authorized the county board of supervisors to take private property to establish "public" and "private" roads. The court held that the term "private road" was used merely to designate a particular kind of public road,⁸ and that, notwithstanding the somewhat inaccurate language, the use was public:⁹

Roads, leading from the main road, which run through the county to the residences or farms of individuals, are of public concern and under the control of the Government. Taking private property for the purposes of such roads is not a taking for private use. They are open to everyone who may have occasion to use them, and are therefore public. Their character as public roads is unaffected by the circumstances, that in view of their situation, they are but little used, and are mainly convenient for the use of a few individuals, and such as may have occasion to visit them socially or on matters of business, nor by the circumstance that in view of such conditions the Legislature may deem it just to open and maintain them at the cost of those most immediately concerned instead of the public at large. The object for which they are established is none the less of a public character, and therefore within the supervision of the Government. To call them "private roads" is simply a legislative misnomer, which does not affect or change their real character. By-roads is a better name for them and one which is less calculated to mislead the uninitiated.

In drafting subdivision (6) of Section 1238, which superseded a part of the 1861 act referred to in the Sherman case, the 1872 Code Commissioners adopted the court's suggestion that roads used primarily for the convenience of a few individuals be described as "byroads."¹¹ The pertinent portion of the remainder of the 1861 act was compiled in Section 2711 of the 1872 Political Code, which read:

Private or by-roads may be opened for the convenience of one or more residents of any road district in the same manner as public roads are opened, whenever the Board of Supervisors may for like cause order the same to be viewed and opened, the person for whose benefit the same is required paying the damages awarded to the landowners, and keeping the same in repair.

In 1883, Section 2711 was repealed and substantially reenacted as Political Code Section 2692.¹¹ Section 2692 was amended in 1913¹² to include coverage for ways for "a canal" and in 1919¹³ the words "irrigation, seepage, or drainage" were inserted before "canal." The section was repealed in 1943,¹⁴ the portion relating to canals being compiled in Water Code Sections 7020-7026 and the portion relating to private or byroads not being continued. In 1949, Political Code Section 2692 was again repealed,¹⁵ and Streets and Highways Code Sections 1128-1133 were enacted by the same act¹⁶ to permit "private or by-roads" to be opened, laid out, or altered for "timber access purposes." A 1955 amendment¹⁷ made these sections applicable to any private or byroad but the sections were repealed in 1961.¹⁸ No special statutory procedure now exists¹⁹ whereby an individual or public entity may condemn to provide the "byroads" described in subdivision (6).

In City of Los Angeles v. Leavis,²⁰ it was held that a city could condemn property for a public street relying solely on Civil Code Section 1001 and Section 1238. Hence, although no appellate decision on this question has been found, it seems fairly clear that subdivision (6) of Section 1238 is itself authority for a public entity to exercise the power of eminent domain to provide "byroads."²¹ However, many cities and counties are reluctant to institute condemnation proceedings to provide a "byroad" even though the benefited person is willing to bear the cost of acquiring and maintaining the road.²²

Appellate courts in California have not decided whether a private person may maintain an action under Civil Code Section 1001 to acquire private property for the sort of byroad described in subdivision (6).²³ Nevertheless, a series of cases has established the proposition that such a byroad is a public use,²⁴ and the California Supreme Court held in Linggi v. Garovotti²⁵ that a private individual may maintain an eminent domain proceeding to provide a sewer connection for a single residence. Although landlocked property does not present the health hazard present in the Linggi case, it is likely that California would follow the holdings in numerous other states²⁶ and permit a private person to acquire a byroad in an appropriate case.

Private corporations have sought unsuccessfully in two cases to condemn access to land. In General Petroleum Corporation v. Hobson²⁷ the holder of an oil and gas prospecting permit granted by the state under a 1921 act²⁸ brought an eminent domain proceeding in the federal court to acquire an easement over private property from the highway

to the place where it planned to prospect for oil. A demurrer to the corporation's complaint was sustained. The corporation contended that the taking was a public use authorized both under the 1921 act and under the Code of Civil Procedure Section 1238. The 1921 act included a provision giving the right of eminent domain to permittees to acquire a right of way over private property, but the court held this provision void as not embraced within the title of the act. An alternative ground for the holding was that the complaint did not show that the taking was for a public purpose:

Nor can section 1238, subd. 5, C.C.P. of California, authorize the taking of private property for "roads * * * for working mines." Subdivision 6: "By-roads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes." The plaintiff has no working mines, nor any active industry, nor is it in any sense within any of the provisions of this section, nor is the property covered by the permit used or contemplated to be used for a public purpose, nor can the court assume a public use or purpose where none is claimed, or none can be reasonably deduced from conceded or established facts. *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577, is not elucidating, nor is *Monterey County v. Cushing*, 83 Cal. 507, 23 P. 700; nor was this issue before the court in *County of Madera v. Raymond Granite Co.*, 139 Cal. 128, 72 P. 915. These cases are cited because particularly relied upon by the plaintiff. All cases cited have been examined, but have not [sic] application.

Eminent domain can only be invoked because the interest of the public is greater than the interest of the private individual, and may not be invoked by a private person for private gain or advantage. The plaintiff's permit prospecting for oil enterprise by reason thereof is speculative and wholly private, and the private property may not be taken for a private purpose. Clearly the complaint does not state a cause of action; complainant does not show that it has legal capacity to maintain the action, nor that the taking is for a public purpose. [Emphasis in original.]²⁹

The meaning of this language is not entirely clear. It is clear, however, that the court concluded that the use for which the property was sought to be acquired--prospecting for oil--was not one within any of the provisions of Section 1238. The court may have overlooked the general authorization to condemn for "byroads" in subdivision (4). Some of the language indicates that the court also may have had in mind the well-established proposition that the mere fact that a particular use is listed in Section 1238 does not mean that the use is a public use under the facts of a particular case.³⁰ The court also seems to take the position that the residence, farm, mine, mill, factory or buildings for operating machinery referred to in subdivision (6) must already be in existence at the time access is sought to be condemned. This line of reasoning would not apply to subdivision (4) which authorizes exercise of the power of eminent domain for "byroads" without any

limitation or description such as that found in subdivision (6), but the court did not refer to subdivision (4). The opinion does not appear absolutely to preclude a private person from taking private property for a byroad described in subdivision (6). At the same time, the holding in the case would permit no significant application of the "byroad" authorization in subdivision (4).

³¹
In City of Sierra Madre v. Superior Court, a land developer sought to maintain a proceeding in the name of the city to acquire an access road to a planned subdivision in order to meet the requirements for subdivision approval. As the city had not authorized the proceeding, prohibition issued to prevent its prosecution. The opinion does not indicate whether the proceeding would have been permitted had the developer brought the suit in its own name.

In addition to establishing that the byroad would be a "public use" under the circumstances of the particular case, the condemnor³² would also have to show that the proposed taking is "necessary."³³ Reasoning from the common law way of necessity cases³⁴ and the Linggi decision, it seems safe to predict that the courts would not allow condemnation if there were any other reasonable alternative to the taking.

This survey demonstrates the uncertainty that now exists as to whether property may be taken to provide an access road from an established highway to the land of a private person. This uncertainty

should be eliminated in any revision of the law of eminent domain. The following recommendations are made in this connection:

1. The provision in subdivision (4) of Section 1238 of the Code of Civil Procedure relating to "byroads" and subdivision (6) of the same section should be eliminated. These provisions should be superseded by more explicit statutory provisions.

2. A statutory provision should be enacted to provide expressly that any public condemnor that acquires property for a public use may acquire by eminent domain such additional property as is necessary to provide access to property not taken which would otherwise become landlocked by the taking. It is fairly clear that the taking of property to provide access in this situation would be held to be a public use.³⁵ Although such a statute might be limited to takings for limited access highways, such a limitation is not recommended. Since it is the taking by the condemnor that creates the need for the access road, the condemnor should have authority to provide access where this would be the appropriate method of mitigating the adverse consequences of the taking. Any attempted abuse could be prevented by finding that the taking for the access road is not a public use under the facts of the particular case.³⁶ The California Supreme Court has recently taken a very liberal position toward "excess condemnation"³⁷ and a significant benefit of the recommended statutory provision would be elimination of the need for excess condemnation in some situations.

3. A procedure similar in substance to that provided by former Streets and Highways Code Sections 1128-1133 should be reenacted. These sections were repealed in 1961. They permitted the county board of supervisors to take property for a road, open to all who desired to use it, but required that the cost of acquisition, establishment, and maintaining the road be imposed on the person or persons primarily benefited. This procedure places the board of supervisors in the position of determining whether the access road should be established. On the other hand, it imposes the costs on the benefited persons. If this type of procedure were adopted, the statute should permit cities and other public entities concerned with road work to utilize the procedure.

A convenient means of accomplishing this recommendation would be to amend the Street Opening Act of 1903 (Street and Highways Code Sections 4000-4443) to make clear that byroads may be provided pursuant to that act. The act appears to be the one most readily adaptable for the opening of byroads since it provides a complete and satisfactory procedure covering notice, legislative and judicial review, compensation and assessment.

4. As an alternative to the preceding recommendation, private persons might be authorized to condemn easements that would be dedicated to public use, be open to the public, and provide ingress and egress from private property to established roads. Such a taking should be permitted only upon a showing of strict necessity and not where the person has another method of access, even though the latter is inconvenient. The burden of maintaining the access

road should be imposed on the person seeking access. Many of the other states authorize the use of the power of eminent domain to acquire property for such purposes. As maximum utilization of land is important, and as a strict showing of necessity might adequately protect the condemnee, this may be one of the few instances in which "private condemnation" would be justified. It is possible that this alternative would merely restate existing California law.

Senate Bill No. 18, introduced at the 1968 session of the California Legislature but not enacted, dealt with this problem and would have enacted the substance of items 1, 3, and 4 above.³⁸

THE DECLARED PUBLIC USES
BYROADS AND WAYS OF NECESSITY
FOOTNOTES

1. Cal. Stats. 1895, Ch. 98, §.1, p. 89.
2. It is interesting to trace the historical development of "byroads." In colonial times, statutes permitted individuals to condemn private property for access roads for their private use. As additional areas of the country were opened to settlement, similar statutes were enacted. It was generally assumed that these statutes were valid until the 1840's and 1850's when a narrowing of the concept of public use occurred; in all but a few states, the use of eminent domain to acquire land for private roads for the exclusive use of a few persons was held a private use. In California and some other states, the statutes were either construed or revised to permit the taking of lands for access roads only if the roads were open to public use. In a substantial number of states, constitutional provisions were adopted to permit the taking of private property by eminent domain for access roads. E.g., Ala. Const., Art. I, § 23 (1901); Ariz. Const., Art. II, § 17 (1910); Colo. Const., Art. II, § 14 (1876); Ga. Const., Art. I, § 2-301, para. 1 (1877); Ill. Const., Art. IV, § 30 (1870); Kan. Const., Art. 12, § 4 (1859); La. Const., Art. III, § 37 (1921); Miss. Const., Art. 4, § 110 (1890); Mo. Const. of 1945, Art. I, § 28 (1875); N.Y. Const., Art. I, § 7, subd. (c) (1846); Okla. Const., Art. II, § 23 (1907); Wash. Const., Art. I, § 16 (1889); Wyo. Const., Art. 1, § 32 (1889). See also Fla. Const., Art. XVI, § 29 (1885); Ore. Const., Art. I, § 18 (1857). The California Constitutional Convention did not consider such a provision; only a passing reference was made in the debates to this problem. II Debates and Proceedings of the Constitutional

Convention of the State of California 1028 (1881) [1878-1879]
(Remarks of Mr. Shafter).

It has been recognized in California and elsewhere that the taking of property for use as a public road is a taking for a public use, even though the road is used primarily to provide access to the land of a single individual. E.g., *Sherman v. Buick*, 32 Cal. 241 (1867). 29A C.J.S. Eminent Domain § 34 (1965)("[T]he principle to be deduced from the cases bearing on the question seems to be that if the road, when laid out, is in fact a public road, open to all who may desire to use it, it is a public use, and valid, although the road is primarily designed for the benefit of an individual, and although the cost of laying out and maintaining such road is borne in whole or in part by the petitioners therefor." [footnotes omitted]). Compare 26 Am.Jur.2d Eminent Domain § 47 (1966).

The historical development is traced in Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 Boston U. L. Rev. 615, 617-626 (1940). For an historical account in a particular state, see Notes, 11 Ala. L. Rev. 182 (1958)(Alabama); 33 Ky. L. J. 129 (1944) (Kentucky).

3. *Taylor v. Warnaky*, 55 Cal. 350 (1880); *Blum v. Weston*, 102 Cal. 362, 369, 36 Pac. 778, 780 (1894); *Reese v. Borghi*, 216 Cal. App.2d 324, 30 Cal. Rptr. 868 (1963).
4. E.g., *Mesmer v. Uharriet*, 174 Cal. 110, 162 Pac. 104 (1916) (partition); *Reese v. Borghi*, 216 Cal. App.2d 324, 332-333, 30 Cal. Rptr. 868, 873 (1963); *Tarr v. Watkins*, 180 Cal. App.2d 362, 4 Cal. Rptr. 293 (1960). See also *Daywalt v. Walker*, 217 Cal. App.2d 669, 675, 31 Cal. Rptr. 899, 902 (1963). A way of necessity continues only

so long as the necessity exists. See generally *Martinelli v. Luis*, 213 Cal. 183, 1 Pac. 980 (1931); *Cassin v. Cole*, 153 Cal. 677, 679, 96 Pac. 277, 278 (1908).

5. In addition, the showing of "necessity" required to acquire a byroad by eminent domain may not be the same as that required to establish a common law way of necessity. The common law right exists only in cases of extreme necessity and not where the landowner has another means of access even though inconvenient. *Marin County Hosp. Dist. v. Cicurel*, 154 Cal. App. 2d 294, 302, 316 P.2d 32, 37 (1957). See also *Smith v. Shrbek*, 71 Cal. App.2d 351, 360, 162 P.2d 674, 678 (1945).
6. 32 Cal. 242 (1867).
7. Cal. Stats. 1861, Ch. 380, § 7, p. 392.
8. "[T]he legislature of this state . . . [i]n the plan devised by them . . . have for the purpose of classification divided roads into 'public and private,' and provided how they may be laid out and established and how maintained. The former are to be laid out and maintained at the expense of the county or road district at large, and are therefore called 'public.' The latter at the expense of such persons as are more especially and directly interested in them, and therefore called 'private.' But the latter are as much public as the former, for any one can travel them who has occasion--and no more can be said of the former." 32 Cal. at 253. See also 45 Ops. Cal. Atty. Gen. 98 (1965). Cf. *Brick v. Keim*, 208 Cal. App.2d 499, 503-504, 25 Cal. Rptr. 321, 323-324 (1962).
9. 32 Cal. at 255-256.
10. See Code Commissioners' Note to subdivision (6): "Subdivision 6 supersedes part of § 7 (Stats. 1861, p. 392), which prescribes the mode for laying out private roads. This clause has been drawn to make it conformable to the decision in *Sherman v. Buick*, 32 Cal.

241, 91 Am. Dec. 597." The same word--"byroad"--was also used in subdivision (4) of Section 1238.

11. Cal. Stats. 1883, Ch. 10, p. 5. Section 2692 was held constitutional. *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. 700 (1890); *Los Angeles County v. Reyes*, 3 Cal. Unrep. 775, 32 Pac. 233 (1893); *Lake County v. Allman*, 102 Cal. 432, 36 Pac. 767 (1895); *County of Madera v. Raymond G. Co.*, 139 Cal. 128, 72 Pac. 915 (1903).
12. Cal. Stats. 1913, Ch. 61, § 1, p. 62.
13. Cal. Stats. 1919, Ch. 73, § 1, p. 117.
14. Cal. Water Code § 15002, Cal. Stats. 1943, Ch. 368, p. 1895.
15. Cal. Stats. 1949, Ch. 883, § 6, p. 1652.
16. Cal. Stats. 1949, Ch. 883, §§ 1-5, p. 1652.
17. Cal. Stats. 1955, Ch. 1308, § 1, p. 2374.
18. Cal. Stats. 1961, Ch. 1354, § 1, p. 3133.
19. Streets and Highways Code Sections 969.5 and 1160-1197 provide a procedure for the improvement of a private easement or road-way not accepted or acceptable into the county highway system but upon which a permanent public easement is offered or a privately owned road where a right of way has been granted or leased to the county for its own use or for the use of the state or other public agency for public purposes, but these sections do not authorize condemnation. As to expenditure of public funds to maintain roads not accepted as county roads, see 45 Ops. Cal. Atty. Gen. 98 (1965)..Cf. *City of Oakland v. Parker*, 70 Cal. App. 295, 233 Pac. 68 (1924).
20. 119 Cal. 164, 51 Pac. 34 (1897).

21. The mere fact that individuals have subscribed money or given a bond to a public entity to contribute toward the expense of establishing a public road would not make the taking one for "private" use. E.g., Santa Ana v. Harlin, 99 Cal. 538, 541, 34 Pac. 224, 226 (1893); City of Oakland v. Parker, 70 Cal. App. 295, 233 Pac. 68 (1924).
22. But see City of Oakland v. Parker, 70 Cal. App. 295, 233 Pac. 68 (1924).
23. People v. Superior Court,
68 Cal.2d , 65 Cal. Rptr. 342, 436 P.2d 342 (1968), the leading California case on "excess condemnation," the Brief of Amicus Curiae in the Court of Appeal contended that the condemnor's rationale for the excess condemnation--that the remainder would be "landlocked"--was unsound:

The condemnor's theory contains a fatal legal flaw. That flaw is the failure to recognize that in California, as a matter of law, there is no such thing as a "landlocked" parcel.

Civil Code § 1001 provides that any person may exercise the power of eminent domain without further legislative action. C.C.P. § 1238 lists the various purposes for which such power may be used, including the acquisition of access to a highway.

An application of the above principle may be found in Linggi v. Garovotti (1955) 45 Cal.2d 20 where a private individual was permitted to condemn a sewer easement across his neighbor's land. . . .

It is, therefore, plain that just as Mr. Linggi did, the Rodonis [owners of remainder] can condemn an easement of access to Parcel 9 [the remainder], across neighboring land. The condemnor's "landlocked and therefore worthless" parcel theory therefore lacks merit. [Brief of Amicus Curiae in Court of Appeal at 7-8.]

The Department of Public Works did not dispute the possibility that the private owner could condemn a byroad,

but pointed out that no "jury would be favorably inclined towards the condemnor were it to leave a property owner in such a predicament." [Reply of Petitioner to Memorandum in Opposition of Real Parties in Interest and Amicus Curiae Brief, Court of Appeal, at 4.]

24. See cases cited in note 11 supra.
25. 45 Cal.2d 20, 286 Pac. 15 (1955).
26. E.g., Komposh v. Powers, 75 Mont. 493, 244 Pac. 298 (1926), Derryberry v. Beck, 153 Tenn. 220, 280 S.W. 1014 (1926), State v. Superior Court, 145 Wash. 307, 260 Pac. 527 (1927). See also note 2 supra.
27. 23 F.2d 349 (1927).
28. Cal. Stats. 1921, Ch. 303, p. 404.
29. 23 F.2d at 350.
30. See discussion, supra, at p. ____.
31. 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961).
32. See discussion supra, at p. ____.
33. See note 5, supra.
34. Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955).
35. Department of Public Works v. Farina, 29 Ill.2d 474, 194 N.E.2d 209 (1963); Luke v. Mass. Turnpike Auth., 337 Mass. 304, 149 N.E.2d 225 (1958); May v. Ohio Turnpike Comm., 172 Ohio St. 555, 178 N.E.2d 920 (1962); Tracy v. Preston, Director of Highways, 172 Ohio St. 567, 178 N.E.2d 923 (1962).

36. See People v. Superior Court, 68 Cal.2d , 65 Cal. Rptr. 342.
436 P.2d 342 (1968).

37. Id.

38. The bill was amended after its introduction so that it would have amended Code of Civil Procedure Section 1238 to delete "byroad" from subdivision (4) and to delete subdivision (6) and would have added two new sections to the Code of Civil Procedure to read:

1238.8. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

The acquisition of an easement by the owner of private property for which there is a strict necessity for an easement for access to a public road from such property. The easement which may be taken shall afford the most reasonable access to the property for which the easement is taken consistent with other uses of the burdened land and the location of already established roads, and shall include the right to install or have installed utility facilities therein. The public shall be entitled, as of right, to use and enjoy the easement which is taken. The owner of the property for which the easement is taken shall maintain any such easement.

This section does not apply to lands of the state park system as to which Section 5003.5 of the Public Resources Code applies.

This section shall not be utilized for the acquisition of a private or farm crossing over a railroad track, the exclusive remedy of an owner of a landlocked parcel to acquire a private or farm crossing over such track being that provided in Section 7537 of the Public Utilities Code.

1238.9. In any case in which the state, a county, city, public district or other public agency in this state exercises the right of eminent domain, additional property may be taken in an amount reasonably necessary to provide access to a public road from any property which is not taken and for which there is a strict necessity for an easement of access to a public road from such property. The easement which may be taken shall afford the most reasonable access to the property, consistent with other uses of the burdened land and the location of already established roads. The public shall be entitled, as of right, to use and enjoy the easement which is taken. The owner of the property for which the easement is taken shall maintain any such easement.