

## Memorandum 70-25

Subject: Study 36.206 - Condemnation (The Declared Public Uses--Condemnation by "Private" Persons Generally)

One part of the right to take aspect of the eminent domain study is the right of private persons to condemn for limited "public" uses. This memorandum focuses on some of the issues raised in connection with such condemnations.

Civil Code Section 1001 provides:

1001. Any person may, without further legislative action, acquire private property for any use specified in section twelve hundred and thirty-eight of the Code of Civil Procedure . . . by proceedings had under the provisions . . . of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is "an agent of the State" or a "person in charge of such use," within the meaning of those terms as used in such title.

When we refer to "private" persons, we intend to exclude such public office holders as the Director of the Department of General Services who appears to be authorized to condemn property in the name of the state for state purposes. Although the tendency is to think only of individuals, the term "private persons" should, however, also include partnerships, associations, and corporations, and Section 1001 seems certainly broad enough to cover such usage.

As indicated, Section 1001 apparently permits condemnation by private persons for any of the public uses specified in Code of Civil Procedure Section 1238. However, as noted in other memoranda, it is our plan to repeal Sections 1001 and 1238. It is necessary therefore to review the latter section and determine what uses presently contemplate condemnation by private persons and which, if any, should be retained in the comprehensive eminent domain statute.

It should be noted preliminarily that we are inquiring here into the public use aspect. However, ever present are the issues of "necessity"-- (1) whether there is a public necessity for the improvement; (2) whether

there is a necessity that this particular property be taken for the improvement; and (3) whether the "improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury"--and the procedural handling of these issues. It need only be noted here that even an apparently expansive statement of public use can be narrowed significantly by a restrictive approach to "necessity."

We also note that the case law is extremely sparse. The leading case is, of course, Linggi v. Garovotti, and we have attached a copy of that Supreme Court opinion to this memorandum (Exhibit I--pink sheets) as well as a Note reviewing the decision (Exhibit II--yellow sheets). The Linggi case probably represents the greatest extension of the right to take to private individuals. The law review Note mentions Moran v. Ross (1889), but that case involved a taking for railroad purposes and would, we believe, be considered now to be a public utility taking even though the condemnor was organized as a partnership rather than as a corporation. Public utility takings we have dealt with as a part of the right to take for utility purposes (Memorandum 70-13, considered at the March 1970 meeting). Condemnation by private institutions of higher education is permitted, but this subject has been dealt with separately as a part of the right to take for educational purposes (Memorandum 70-12, considered at the March 1970 meeting). It might be noted that condemnation by private persons for educational purposes generally is not permitted. Yeshiva Torath Emeth Academy v. University of So. Calif., 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962)(no power to condemn for elementary school open to public). There are decisions dealing with the right to take for byroads, but this subject has also been dealt with separately (see Memorandum 70-30). Finally, there have been suggestions in dictum and argument that a right of

private condemnation exists generally (see, e.g., Reese v. Borghi, 216 Cal. App.2d 324, 30 Cal. Rptr. 868 (1968)). However, the Linggi case is the only example of condemnation by a private person for basically his own purposes and use that is known to exist.

Turning to Code of Civil Procedure Sections 1238 through 1238.7--the declared public uses (see attached Exhibit III--green sheets)--, we find very few stated uses that appear to contemplate or permit condemnation by private persons. Excluding takings for public utilities, educational purposes, and byroads, the following uses remain:

Drainage, reclamation, and flood control. Subdivision 3 of Section 1238 provides in part that the right of eminent domain may be exercised for "raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels." Section 1238.6 expands on this theme by providing that

the right of eminent domain may be exercised in behalf of the . . . protection, preservation, or reclamation of land, whether covered or uncovered by water, against the overflow or incursion of water or the threat thereof, or against the effects of subsidence of the surface of said land, as by constructing levees or by filling, diking, draining or other appropriate remedial method.

Although these sections seem to contemplate works on a relatively grand scale, one very important exercise of the right might be to secure surface water drainage easements for newly developed property. See Pagliotti v. Acquistapace, 46 Cal. Rptr. 533, 540 (1965)(unreported DCA decision preceding review by Supreme Court). We have already seen that the after-the-fact resolution of water damage cases under existing tort or inverse condemnation doctrine can be unsatisfactory. It might be preferable to encourage or at least permit a private person desiring to develop his property to provide suitable facilities at his expense and, if necessary, on adjoining property.

However, as will be true for each of the uses discussed in this memorandum, it seems clear that the motivating force is the private benefit to the individual. Whether, in the words of the law review Note, the individual in this situation can ever "show that exigent public need and policy far outweigh any incidental advantage to him" is perhaps questionable.

Irrigation. Subdivision 4 of Section 1238 provides in part that the right of eminent domain may be exercised for "canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation"; Section 1238.5 provides generally that "irrigation is a public use in behalf of which the right of eminent domain may be exercised . . . ." There can obviously be public benefit in the development of natural resources through irrigation; however, as noted above, where such development requires the exercise of the right of eminent domain by a private individual or group, one suspects that the primary benefit is private.

Logging and mining facilities. Subdivisions 4, 5, and 11 of Section 1238 seem to authorize the exercise of the right of eminent domain by private persons for logging and mining purposes. However, the California decisions have refused to give these subdivisions their apparent effect (or any effect at all). The rationale of these decisions is perhaps best stated in Consolidated Channel Co. v. Central Pac. R.R., 51 Cal. 269, 271 (1876):

The proposed flume is to be constructed solely for the purpose of advantageously and profitably washing and mining plaintiff's mining ground. It is not even pretended that any person other than the plaintiff will derive any benefit whatever from this structure when completed. No public use can possibly be subserved by it. It is a private enterprise and is to be conducted solely for the personal profit of the plaintiff, and in which the community at large have no concern.

Perhaps the position is overstated--there is a public benefit generally from the development of natural resources and in certain circumstances a local economy may be completely dependent upon a mine or mines--but the holding is clear and only one of several to the same effect.

Sewage. Subdivision 8 of Section 1238 provides in part that the right of eminent domain may be exercised to provide "the connection of private residences and other buildings, through other property, with the mains of an established sewer system in any . . . city, city and county, town or village." This was, of course, the source of condemnation authority relied upon in the Linggi case. There is no analogous provision for connections to supply water (for domestic purposes), gas, electricity, or telephone service. This is due probably to the power of the Public Utilities Commission to require within reasonable limits the extension of such services by the utility servicing the area in question. See Public Utilities Code Section 451.

Cemeteries. Subdivision 14 authorizes the exercise of eminent domain for cemeteries. The staff sees no reason to permit condemnation by private persons for this purpose.

Conservation of fish. Subdivision 19 authorizes the exercise of eminent domain for "the propagation, rearing, planting, distribution, protection or conservation of fish." There is no designation of the person or body in charge of such use but, where the activity is carried on by private persons for profit, it seems analogous to logging and mining and the same conclusion indicated above seems appropriate. Whether a nonprofit conservation society carrying on this activity should have the power of eminent domain seems dubious.

Airports. Subdivision 20 authorizes the exercise of eminent domain for airports generally. The staff believes that, where this activity is carried on by private persons for profit, it also is similar to logging and mining, and the power of eminent domain should not be extended.

Nonprofit hospitals. Section 1238.3 authorizes the exercise of eminent domain for property to be used for research activities of a nonprofit hospital. The staff believes this authority should be preserved in substance, although perhaps transferred to a suitable place in the Health and Safety Code.

In summary, with the exception last noted, the staff is uncertain whether a private person should ever be permitted to exercise the right of eminent domain. Such relief, if ever necessary, seems most needed for (1) byroads, (2) sewage facilities, and (3) drainage. As noted in Memorandum 70-30, the Commission to date has denied such relief to private persons for byroads. However, a byroad can be opened with the approval of the respective county or city legislative body. With respect to sewage facilities, existing law permits "private" condemnation at least in certain circumstances. With respect to drainage, the existing statutes could be construed to permit "private" condemnation, but there is no case authority for such a construction. Authority to condemn for each of these uses could be provided for private persons by a section in the form attached as Exhibit IV (gold sheet). The suggested section would provide the necessary declaration of public use, but the potential condemnor would still presumably have to satisfy a court on the necessity issues. It seems apparent that these "public uses" satisfy mixed public and private purposes. Whether they are ever sufficiently "public" to merit exercise of the right of eminent domain is the basic policy decision for the Commission.

Respectfully submitted,

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[S. F. No. 19197. In Bank. July 22, 1955.]

**MELCHIOR LINGGI, Appellant, v. MARIA GAROVOTTI,  
Respondent.**

- [1] **Pleading—Demurrer—Amendment After Demurrer Sustained.**  
—Where any deficiency in a complaint attacked by special demurrer can be corrected by amendment, it is abuse of discretion to sustain such demurrer without leave to amend.
- [2] **Eminent Domain—Who May Exercise Right—Individuals.**  
Under Civ. Code, § 1001, declaring that any person may maintain action to acquire property by eminent domain, private individual may maintain action.
- [3] **Id.—Uses for Which Exercised—Provinces to Determine.**  
Legislative designation of uses in behalf of which right of eminent domain may be exercised is declaration that such uses are public and will be recognized by courts, but whether, in individual case, use is public use must be determined by judiciary from facts and circumstances.
- [4] **Id.—Uses for Which Exercised—Provinces to Determine.—If**  
subject matter of legislation designating uses in behalf of which right of eminent domain may be exercised be of such

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[1] See Cal.Jur., Pleading, § 77; Am.Jur., Pleading, § 249.

[3] See Cal.Jur.2d, Eminent Domain, § 158 et seq.; Am.Jur., Eminent Domain, § 46 et seq.

McK. Dig. References: [1] Pleading, § 103(3); [2] Eminent Domain, § 11; [3, 4] Eminent Domain, § 14; [5] Eminent Domain, § 150(1); [6-8] Eminent Domain, § 150(3); [9, 10] Eminent Domain, § 154.

nature that there is doubt of its character, or if by any possibility legislation may be for welfare of public, will of Legislature must prevail over doubts of court.

- [6] *Id.*—*Proceedings—Pleading.*—Statutory requirement that complaint in eminent domain action must allege plaintiff's right to take property for public use (Code Civ. Proc., § 1244) is satisfied by general allegations of facts showing proposed taking pursuant to Civ. Code, § 1001, relating to acquisition of property by exercise of eminent domain, and Code Civ. Proc., § 1238, subd. 8, relating to exercise of right of eminent domain for connection of private residences, through other property, with mains of established sewer system.
- [8] *Id.*—*Proceedings—Pleading.*—Code Civ. Proc., § 1241, requiring condemnor to show that use to which property taken is to be applied is one authorized by law and that taking is necessary to such use, must be construed in conjunction with § 1244, relating to requirements of complaint, and statement of necessity is essential element of complaint.
- [7] *Id.*—*Proceedings—Pleading.*—A general allegation of necessity for proposed taking is sufficient in complaint in eminent domain action.
- [8] *Id.*—*Proceedings—Pleading.*—A statement in complaint in eminent domain action "That it is necessary to take an easement over and across [adjoining property] . . . in order to abate the nuisance" created by inadequacy of existing public sewer main servicing plaintiff's property, abatement of which nuisance has been determined to be for public benefit, meets requirement of Code Civ. Proc., § 1241, that condemnor show necessity for condemnation.
- [9] *Id.*—*Proceedings—Burden of Proof.*—On trial of eminent domain action instituted by private individual, plaintiff must prove by preponderance of evidence his right and justification for proposed condemnation, and stronger showing of those requirements is necessary than if condemnor were public or quasi public entity.
- [10] *Id.*—*Proceedings—Presumptions.*—On trial of eminent domain action instituted by private individual for purpose of acquiring easement to be used for sewer connection from private residence, plaintiff does not have benefit of conclusive presumption "(a) of the public necessity of such . . . public improvements; (b) that such property is necessary therefor, and (c) that such proposed . . . public improvement is planned or located in the manner which will be most

[8] Establishment of sewer as public use for which eminent domain may be exercised, note, 169 A.L.R. 576. See also Cal.Jur. 2d, Eminent Domain, § 176; Am.Jur., Eminent Domain, § 51.



compatible with the greatest public good and the least private injury" (Code Civ. Proc., § 1241, subd. 2), and he may be denied easement if other remedy is available that would be less injurious to private property.

APPEAL from a judgment of the Superior Court of Marin County. Thomas F. Keating, Judge. Reversed.

Action in eminent domain. Judgment entered on order sustaining demurrer to complaint without leave to amend, reversed.

Wallace S. Myers for Appellant.

Freitas, Freitas & Allen, Freitas, Allen, McCarthy & Bettini and Richard V. Bettini for Respondent.

EDMONDS, J.—Melchior Linggi is endeavoring to condemn a right of way for a sewer line over adjoining land used for residence purposes. His appeal is from a judgment entered upon an order sustaining a demurrer to his complaint.

A two family apartment building stands on land owned by Linggi facing Sir Francis Drake Boulevard. The apartment house is connected with a public sewer in that street which, during certain seasons of the year, according to the complaint, is inadequate to carry off the sewage. At these times, it is alleged, the sewage backs up and overflows on the Linggi property, creating an unhealthy condition and a nuisance.

Adjoining the Linggi property on the south is the residence of Maria Garovotti which fronts on Oak Street. On this street, the complaint asserts, is a public sewer which provides the only adequate outlet for the sewage from the Linggi building. Mrs. Garovotti has refused to convey to Linggi an easement for the construction and maintenance of a pipe line across her property in order to abate the nuisance. Such an easement, the complaint concludes, is for a public use within the meaning of section 1238, subdivision 8 of the Code of Civil Procedure.

The ground of general demurrer is that to give Linggi the right of eminent domain would be in violation both of article 1, section 13 of the Constitution of the state, and of the Fourteenth Amendment of the United States Constitution. The demurrer also asserts that the complaint is ambiguous, unintelligible, and uncertain in that it does not

appear therein that the public sewer system in Sir Francis Drake Boulevard is inadequate.

[1] Any deficiency in the complaint attacked by the special demurrer could have been corrected by amendment. If the demurrer on these grounds was sustained without leave to amend it was an abuse of discretion. The decisive question, therefore, concerns the sufficiency of the facts pleaded by the complaint to state a cause of action and the constitutionality of the applicable statutes.

Linggi contends that section 1001 of the Civil Code authorizes a private individual to maintain an action to acquire by eminent domain property for any use specified in section 1238 of the Code of Civil Procedure. As he reads these statutes, they allow him to obtain by condemnation an easement over private property for the purpose of connecting his building with the mains of the established public sewer system in Oak Street. Such an easement, he says, would be for a public use.

Respondent asserts that the court, not the Legislature, is the final arbiter of whether the facts of the particular case justify a condemnation for a public use. A public use is not established, the argument continues, unless the public is entitled, as of right, to use or enjoy the property taken. The complaint also is attacked upon the ground that it does not show wherein the taking of property sought to be condemned is necessary, a requirement specified by section 1241(2) of the Code of Civil Procedure.

[2] Section 1001 of the Civil Code provides:

"Any person may, without further legislative action, acquire private property for any use specified in section twelve hundred and thirty-eight of the Code of Civil Procedure either by consent of the owner or by proceedings had under . . . [eminent domain]; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the state,' or a 'person in charge of such use,' within the meaning of those terms as used in such title."

In *Moran v. Ross*, 79 Cal. 159 [21 P. 547], partners who owned a railroad sought to condemn private property for a right of way across it. The court said: "[T]he power of the state to condemn land for public uses must, in the main, be exercised by agents, and for that reason this power may be delegated by the legislature of the state either to corporations or individuals, who act as such agents and under legislative control." (P. 160.) After quoting from the pro-

visions of the Code of Civil Procedure governing the right of eminent domain and section 1001 of the Civil Code, it was held: "These provisions of the codes, taken together, confer upon private individuals the right of eminent domain, in this class of cases, in plain and unequivocal terms." (P. 162.)

Similar reasoning has been employed to authorize the use of eminent domain by a private water company (*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221 [128 P. 924]), and in *University of So. Calif. v. Robbins*, 1 Cal.App.2d 523 [37 P.2d 163], a private university was allowed to condemn land for use as part of a landscaping program in connection with its library building.

The respondent particularly relies upon the terms of the applicable statute for her position that, although an individual may maintain an action in eminent domain, the purpose pleaded by the complaint is not one specified by section 1238 of the Code of Civil Procedure. Under that statute, "the right of eminent domain may be exercised in behalf of the following public uses:

"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." (Emphasis added.)

[3] A fundamental principle of the law of eminent domain has been stated as follows: "The legislature must designate, in the first place, the uses in behalf of which the right of eminent domain may be exercised, and this designation is a legislative declaration that such uses are public and will be recognized by courts; but whether, in any individual case, the use is a public use must be determined by the judiciary from the facts and circumstances of that case." [Citation.] [4] "If the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court." (*University of So. Calif. v. Robbins*, *supra*, pp. 525-526.)

No appellate court of California has considered the question as to whether an individual may maintain an action

under section 1238 of the Code of Civil Procedure for the purpose of acquiring an easement to be used for a sewer connection from a single residence. *City of Pasadena v. Stimson*, 91 Cal. 238 [27 P. 604], was an action by a municipal corporation to condemn a right of way for a sewer over several lots. In upholding the right of the municipality to condemn the land for that purpose, the court said: "A sewer in the neighborhood of dwellings may be an evil, but it is evident that the legislature regards it as a necessary evil, since it allows private property to be taken for the construction of sewers. Sewers are in fact a necessary evil; but when they are planned and constructed with reasonable regard to the results of sanitary teachings, they are authorized by statute. . . ." (Pp. 254-255.)

In *Machado v. Board of Public Works of Arlington* (1947), 321 Mass. 101 [71 N.E.2d 886], one DiMaggio owned property abutting on the Parkway and adjacent to the land owned by Machado. DiMaggio's residence was serviced by a cesspool, which was declared to be "impractical." His application to the Board of Public Works to have a sewer installed in the Parkway was denied upon the ground that the cost would be prohibitive. DiMaggio renewed his application, suggesting that a pipe line be constructed across Machado's lot and another owned by Machado to the rear of it to connect with a sewer on Decatur Street, a block south of the Parkway. The board, upon condition that DiMaggio bear the cost of the "easement rights," granted the application and condemned an easement across Machado's two lots. Machado sought certiorari to quash the proceedings. In affirming the judgment, the court held:

"The purpose of the legislature . . . was to place in possession of the city council the means of abating nuisances offensive to the community and dangerous to the health of the people. The objects therefore to be accomplished by the exercise of the power it confers are so obviously connected with means to be adopted for the promotion of the general welfare of the community, and in which all citizens have a common interest, that the suggestion of a want of constitutional power in the legislature for its enactment seems to be entirely without foundation." [*Hildreth v. Lowell*, 11 Gray (Mass.) 345, 350, 351.]

"It is true that the immediate purpose of the easement taken in the petitioners' land was to afford DiMaggio access to the sewer in Decatur Street, and it might seem at first

blush that he alone was benefited. But actually that is not so. As the return shows, one of the reasons, if not the chief one, which gave rise to his application was the unsatisfactory condition of his cesspool, which the board of health had ordered him to remedy. It requires no discussion to demonstrate that this was a condition of such concern to the health and welfare of the town that its elimination by the means here adopted was a public purpose. This is not a case, therefore, where the taking can be said to be colorably for the use of the town, but really for the benefit of an individual.

"We have not overlooked the fact pressed upon us by petitioners that at one of the meetings of the respondents, as noted above, DiMaggio assented to a proposal that he 'assume the cost of all easement rights.' But the mere fact that DiMaggio may have agreed to reimburse the town for the cost of the taking would not render it invalid. The essential thing is whether the purpose for which the taking was made was a public one. It is settled that a taking otherwise lawful is not invalid merely because those specially benefited pay for the cost of it either in whole or in part." (P. 888.)

The respondent attacks the complaint, not only upon the ground that the statute does not authorize condemnation by an individual for his sole use, but also because the facts alleged show no right or necessity to invoke such power in the circumstances pleaded. This argument suggests that the complaint is defective because Linggi does not allege that the public authorities have refused to enlarge the sewer in Sir Francis Drake Boulevard, or that the easement desired is the only, or even the most feasible, route to Oak Street.

[5] Section 1244 of the Code of Civil Procedure, which states the requirements of the complaint in an eminent domain action, specifies only that the plaintiff must allege his right to take the property for public use. That requirement is satisfied by the general allegations in Linggi's complaint of facts showing a proposed taking pursuant to sections 1001 of the Civil Code and 1238, subdivision 8 of the Code of Civil Procedure. (*Kern County Union High School Dist. v. McDonald*, 180 Cal. 7, 10 [179 P. 180].) [6] In addition, section 1241 of the Code of Civil Procedure requires the condemnor to show that the use to which it is to be applied is one authorized by law and that the taking is neces-

sary to such use. This section must be construed in conjunction with section 1244, and a statement of necessity is an essential element of the complaint. (See *Rialto Irr. Dist. v. Brandon*, 103 Cal. 384, 386 [37 P. 484]; *Central Pac. Ry. Co. v. Feldman*, 152 Cal. 303, 308 [92 P. 849]; *Laguna Drainage Dist. v. Charles Martin Co.*, 5 Cal.App. 166, 173 [89 P. 993]; *Northern Light & Power Co. v. Stacher*, 13 Cal. App. 404, 408 [109 P. 896].) [7] However, a general allegation of necessity is sufficient. (*Northern Light & Power Co. v. Stacher*, 13 Cal.App. 404, 408 [109 P. 896]; accord: *People v. Thomas*, 108 Cal.App.2d 832, 838 [239 P.2d 914]; *People v. Marblehead Land Co.*, 82 Cal.App. 289, 297 [255 P. 553].) [8] The statement in Linggi's complaint "That it is necessary to take an easement over and across . . . [the Garovotti property] . . . in order to abate the nuisance," the abatement of which has been determined to be for the benefit of the public, meets the requirement of section 1241. *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123 [28 P. 447], which is relied on by Garovotti, concerned the sufficiency of the evidence and not the pleadings.

[9] Upon a trial of the action, it will be necessary for Linggi to prove, by a preponderance of the evidence, his right and justification for the proposed condemnation. A somewhat stronger showing of those requirements is necessary than if the condemnor were a public or quasi public entity.

[10] Linggi will not have the benefit of the conclusive presumption "(a) of the public necessity of such . . . public improvements; (b) that such property is necessary therefor, and (c) that such proposed . . . public improvement is planned or located in the manner which will be most compatible with the greatest public good and the least private injury." (Code Civ. Proc., § 1241, subd. 2.) He might be denied the easement which he is endeavoring to obtain if other remedy is available to him which would be less injurious to private property. For example, the evidence may show that the proper public authorities have not been asked to enlarge the present facilities in Sir Francis Drake Boulevard and make that line adequate to carry off all of the sewage from Linggi's property. (Cf. *Machado v. Board of Public Works of Arlington*, *supra*, 71 N.E.2d 886.) The proposed route may not be the most direct one to reach the line in Oak Avenue, or possibly another route, although less direct, might be less injurious to all property owners concerned.

But such facts need not be alleged in the complaint.  
The judgment is reversed.

Gibson, C. J., Shenk, J., Traynor, J., and Spence, J., concurred.

SCHAUER, J.—The majority declare that “Section 1244 of the Code of Civil Procedure, which states the requirements of the complaint in an eminent domain action, specifies only that the plaintiff must allege his right to take the property for public use. That requirement is satisfied by the general allegations in Linggi’s complaint of facts showing a proposed taking pursuant to sections 1001 of the Civil Code and 1238, subdivision 8 of the Code of Civil Procedure. . . . In addition, section 1241 of the Code of Civil Procedure requires the condemnor to show that the use to which it is to be applied is one authorized by law and that the taking is necessary to such use. This section must be construed in conjunction with section 1244, and a statement of necessity is an essential element of the complaint. . . . The statement in Linggi’s complaint ‘That it is necessary to take an easement over and across . . . [the Garovotti property] . . . in order to abate the nuisance,’ the abatement of which has been determined to be for the benefit of the public, meets the requirements of section 1241.”

I do not agree that the complaint meets any of the requirements above set forth. On the contrary, the pleading shows: (1) that the plaintiff seeks to take defendant’s property for a private use, not a public use; (2) that the proposed taking is for a use not authorized by law and that the taking is not necessary for any use authorized by law; (3) that the nuisance to be abated, if any nuisance at all is shown, is one which is not created by defendant but is created by the plaintiff and by the private use of plaintiff’s property; and (4) that any duty to furnish more abundant or extensive sewer facilities to plaintiff and to the private uses of plaintiff’s property is not one which the law imposes or can validly impose upon defendant or her property.

The Constitution of this state provides (art. I, § 1) that “All men . . . have certain inalienable rights, among which are those of . . . acquiring, possessing, and protecting property” and (art. I, § 14) that “Private property shall not be taken or damaged for public use without just compensation . . .,” and section 1238 of the Code of Civil Procedure,

relied upon by plaintiff, states that "the right of eminent domain may be exercised in behalf of the following public uses: . . ." I think it is clearly implied from the language above quoted that private property shall not be taken for a private use, with or without compensation.

Plaintiff alleges in his complaint that "there is erected upon the [parcel owned by him] . . . a certain apartment house . . . ; that said apartments, as private residences, require a good, sufficient and healthy sewage disposal system; that heretofore said sewage disposal system has been so constructed as to lead to a public sewage disposal line in Sir Francis Drake Boulevard on the northerly end of said Parcel . . . ; that said public sewage system in Sir Francis Drake Boulevard is not adequate to take the line from plaintiff's property . . . during the rainy season . . . That affiant has been informed and believes that upon such information and belief alleges that the only way plaintiff is able to dispose of sewage collected in his apartment houses . . . will be over and across [defendant's land on which is erected her residence] . . . to the public sewage line in Oak Avenue [on which defendant's land borders]." It is not alleged that plaintiff's multiple-unit property is to be used for other than his private purposes or that rental rates are to be fixed or controlled by a public agency.

It appears to me that for this court to so construe the code sections upon which plaintiff relies, as to permit him to exercise the right of eminent domain upon such allegations will result in the unlawful taking of private property for a private use, rather than a permissible taking for a public purpose, and will offend all sense of pertinent constitutional guarantees. We have only recently ruled that "The Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need." (*City & County of San Francisco v. Ross* (1955), 44 Cal.2d 52, 59 [279 P.2d 529].) If the same principle is applied here the judgment must be affirmed.

Carter, J., concurred.

Respondent's petition for a rehearing was denied August 17, 1955. Carter, J., and Schauer, J., were of the opinion that the petition should be granted.



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NOTES AND RECENT DECISIONS

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## EMINENT DOMAIN: RIGHT OF EXERCISE BY A PRIVATE PERSON

Section 1001<sup>1</sup> of the California Civil Code gives a private person the power to exercise the right of eminent domain if certain statutory requirements<sup>2</sup> are satisfied. The condemnor must allege (1) that the taking is for a public use and (2) that his taking is necessary for that use.<sup>3</sup> *Linggi v. Garavotti*<sup>4</sup> is only the second case<sup>5</sup> reaching the appellate level in California where the condemnor was a private person. The court held a complaint containing sufficient allegations of public use and necessity not subject to a demurrer.

Condemnor's apartment building was connected to a public sewer, but the latter was inadequate during the rainy season as the sewer backed up and the overflow created an unfavorable condition. To remedy the situation plaintiff sought a right-of-way over defendant's property to another allegedly adequate sewer. The court said that a somewhat stronger showing of public use and necessity is required when the condemnor is an individual rather than an agent of the sovereign. How much stronger a showing is required was not indicated, and the compelling question is whether there is a tendency to expand the area of permissible exercise of the right by a private individual. Since the court stated the burden on the individual to show public use and necessity to be greater than that imposed on the government, in order to ascertain the private condemnor's greater burden of proof, resort must be had to the decisions involving governmental exercise of eminent domain.

The subdivisions enumerated in section 1238 of the California Code of Civil Procedure prescribe specific uses deemed "public," but cases hold that these specifications are not conclusive.<sup>6</sup> The concept of "public use" is susceptible to two interpretations.<sup>7</sup> The liberal construction is that a use is public when there is a

<sup>1</sup> CAL. CIV. CODE § 1001: "Any person may, without further legislative action, acquire private property for any use specified in section twelve hundred and thirty-eight of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of title seven, part three, of the Code of Civil Procedure [§§ 1238-66.2]; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the State' or a 'person in charge of such use,' within the meaning of those terms as used in such title."

<sup>2</sup> Substantively the condemnor must seek to exercise the right within the terms of CAL. CODE CIV. PROC. § 1238, which provides in part: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: 1. Fortifications . . . . 2. Public buildings and grounds for use of a State . . . . 3. Any public utility . . . . 4. Sewerage of any incorporated city . . . 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 . . . . 22. Terminal facilities, lands, or structures for the receipt, transfer or delivery of passengers or property by any common carrier . . . ." and with CAL. CODE CIV. PROC. § 1241, which provides in part: "Before property can be taken, it must appear: 1. That the use to which it is to be applied is a use authorized by law; 2. That the taking is necessary to such use . . . ."

<sup>3</sup> CAL. CODE CIV. PROC. § 1241, note 2 *supra*.

<sup>4</sup> 45 Cal. 2d 20, 286 P.2d 15 (1955).

<sup>5</sup> In *Moran v. Ross*, 79 Cal. 159, 21 Pac. 547 (1889), a private individual was allowed to exercise eminent domain to acquire a railway route.

<sup>6</sup> *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1922) "The nature of a use, whether public or private, is ultimately a judicial question." *Id.* at 705; *County of San Mateo v. Coburn*, 130 Cal. 631, 63 Pac. 78 (1900). "If it is sought to condemn the property for a use which is evidently private, or to accomplish some purpose which is not of a public character, courts will disregard the legislation that such use is public." *Id.* at 634, 63 Pac. at 79; *Lindsay Irrigation Co. v. Mehriens*, 97 Cal. 676, 679, 32 Pac. 802 (1893) "[B]ut whether, in any individual case, the use is a public use, must be determined by the judiciary from the facts and circumstances of that case." *Id.* at 679, 32 Pac. at 802.

<sup>7</sup> See cases in *Annot.*, 54 A.L.R. 7-45 (1928).

*public advantage or benefit.*<sup>8</sup> The strict interpretation is that it must be capable of use by the public.<sup>9</sup>

The interpretations given the phrase by the California courts are not wholly consistent. "Public use" has in the past been said to mean *use by the public*,<sup>10</sup> but recent cases have stated<sup>11</sup> and others have implied<sup>12</sup> that such a rigid construction will not necessarily be followed. The very nature of certain of the public uses designated in the statute manifests the impossibility of a direct use by the public.<sup>13</sup> Policy interests such as promotion of industry and utilization of natural resources,<sup>14</sup> operation of necessary governmental functions,<sup>15</sup> and provision for those conveniences and benefits<sup>16</sup> recognized as essential to everyday life appear to be the considerations underlying the legislative designation.

Strict reliance on either interpretation would be misleading in attempting to predict whether a proposed employment of land would meet the requirement of public use. Unacceptable results might follow rigid adherence to either construction. For example, following a "use by the public" theory, eminent domain could be employed to secure sites for hotels which by statute or custom must serve the public indiscriminately. And under the "public advantage" premise any large industry could be allowed a taking because a benefit to the public might result. The preferable approach, and the tendency in California apparent from recent decisions,<sup>17</sup> would seem to be a determination of whether the use by the condemnor would effectuate the public purpose contemplated by the legislative designation.<sup>18</sup>

An individual is in a more difficult position to show a proposed condemnation will be for a public purpose than is a public entity. Where the dominating purpose

<sup>8</sup> *Clark v. Nash*, 198 U.S. 361 (1905); *Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 144 Pac. 277 (1914).

<sup>9</sup> *Economic Power & Constr. Co. v. Buffalo*, 195 N.Y. 286, 88 N.E. 389 (1909); *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 36 Cal. App. 556, 178 Pac. 150 (1918).

<sup>10</sup> *Thayer v. California Development Co.*, 164 Cal. 117, 128 Pac. 21 (1921). "It must be of such a character as that the general public may if they choose, avail themselves of it." *Id.* at 129, 128 Pac. at 25. *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 36 Cal. App. 556, 178 Pac. 150 (1918). "It has consistently held that public use means use by the public . . . ." *Id.* at 563, 178 Pac. at 153.

<sup>11</sup> *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 266 P.2d 105 (1954). "It might be pointed out that as . . . our cities grow . . . and . . . the pressing needs of the public [become] more imperative, a broader concept of what is a public use is necessitated." *Id.* at 802, 266 P.2d at 122.

<sup>12</sup> *University of So. Cal. v. Robbins*, 1 Cal. App. 2d 523, 37 P.2d 163 (1934). The court held a taking by a private institution of land for a library to be used by its students was an authorized taking for a public purpose. *Tuolumne Water Power Co. v. Frederick*, 13 Cal. App. 498, 110 Pac. 134 (1910). "The courts would not be aiding the great enterprises of the west by adopting a narrow and restricted view of the meaning of the words public use . . . ." *Id.* at 503, 110 Pac. at 136.

<sup>13</sup> See CAL. CODE CIV. PROC. § 1238 which provides in part: "1. Fortifications . . . 10. Oil pipe lines . . . 19. Propagation, rearing, distribution, protection or conservation of fish."

<sup>14</sup> See CAL. CONST. art. I, § 14: "The taking of private property for a railroad run by steam or electric power for logging or lumbering purpose shall be deemed a taking for a public use . . . ."

<sup>15</sup> See CAL. CODE CIV. PROC. § 1238: "2. Public buildings and grounds . . . 3. Any public utility . . . ."

<sup>16</sup> See CAL. CODE CIV. PROC. § 1238: "7. Telegraph, telephone, radio and wireless lines, systems and plants. 8. Sewerage . . . 17. Works or plants for supplying gas, heat, refrigeration or power . . . ."

<sup>17</sup> See notes 11 and 12 *supra*.

<sup>18</sup> CAL. CODE CIV. PROC. § 1238.

of the taking is held to be private, even a public entity will not succeed.<sup>19</sup> However, if the dominating purpose is public, incidental private benefit will not destroy the public character of the taking.<sup>20</sup> One might predict generally that the private individual in taking private property, where there is to be benefit to himself, must show that exigent public need and policy far outweigh any incidental advantage to him.<sup>21</sup>

The condemnor must also show that the proposed taking is necessary to the public use.<sup>22</sup> Assuming a public purpose necessitates a taking, still the condemnor must show that this is *the* necessary manner in which to accomplish the public purpose. In 1913 a provision was added to section 1241 of the Code of Civil Procedure making a finding of necessity conclusive when made pursuant to a resolution or ordinance adopted by certain political entities.<sup>23</sup> It states that such resolution shall be conclusive evidence of the public necessity of such proposed public utility or public improvement, that such property is necessary therefor, and that such public utility or public improvement is planned or located in the manner which will promote the greatest public good and result in the least private injury. Case law supports the conclusiveness of such determinations when made by boards of public entities<sup>24</sup> or by a public agency legislatively delegated this power.<sup>25</sup>

The private individual, not being within the statute, has no conclusive presumption<sup>26</sup> of necessity for the taking in his favor. Without this conclusive presumption, it has been held that necessity is a question of fact,<sup>27</sup> that "necessary" means indispensably necessary, not merely convenient or profitable,<sup>28</sup> and that the taking must be in the manner which is compatible with the least private injury

<sup>19</sup> *San Francisco v. Ross*, 44 Cal. 2d 52, 279 P.2d 529 (1955). A city could not exercise eminent domain to acquire off-street parking facilities when the operation would be a private enterprise.

<sup>20</sup> *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 266 P.2d 105 (1954). Acquisition of slum property to eliminate a public health menace was held a valid exercise of eminent domain even though subsequent disposition of the lands was to be to private persons.

<sup>21</sup> *Cf. Miller v. Board of Public Works*, 195 Cal. 477, 488, 234 Pac. 381, 386 (1925). In upholding restrictions on private property imposed by a zoning ordinance the court stated that, "Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare."

<sup>22</sup> CAL. CODE CIV. PROC. § 1241.

<sup>23</sup> CAL. CODE CIV. PROC. § 1241 provides in part that "when the board of directors of an irrigation district, of a public utility district, or a water district or the legislative body of a county, city and county, or an incorporated city or town, or the governing board of a school district, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, . . . such resolution or ordinance shall be conclusive evidence; (a) of public necessity . . . (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury . . ."

<sup>24</sup> *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1922).

<sup>25</sup> *People v. Olsen*, 109 Cal. App. 523, 293 Pac. 645 (1930).

<sup>26</sup> There is no conclusive presumption as to necessity when the condemnor is not within the statute. *Turlock Irrigation Dist. v. Sierra & San Francisco Power Co.*, 69 Cal. App. 150, 230 Pac. 671 (1924) (an irrigation district acting prior to the amendment was held not within the code section making the issue of necessity conclusive). Nor is there a conclusive presumption when the taking is not within the territorial limits of the political subdivision specified. CAL. CODE CIV. PROC. § 1241(2).

<sup>27</sup> *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681 (1891).

<sup>28</sup> *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123, 28 Pac. 447 (1883).

and the greatest public good.<sup>29</sup> This implies that if there is available any other means within the realm of non-exorbitant undertaking, it must be utilized.<sup>30</sup>

If mere qualification under the statute's terms should be held the determinative factor, the exercise of the right could cause harsh, arbitrary results in many situations. For example, assume a newly developing community in which there presently exists only a single sewer line. Condemnor's unimproved property does not abut the sewer line, but contiguous intervening property does. Condemnor erects a ten-family apartment building on his property. He thus qualifies under the statute.<sup>31</sup> If literal compliance with the statute is the sole criterion, he can condemn an easement through one or more of the improved, adjoining parcels. Such a result seems clearly unfair to the adjoining owner. Bad faith on the part of the condemnor should surely preclude him from exercising eminent domain. Even when in good faith, if there is any alternative not entirely unreasonable, it is not to be assumed that the courts will be quick to allow condemnation.

The superseding of private property rights by individual exercise of the right of eminent domain can be justified. Maximum utilization of land is most important. In order to achieve this result, a private right of eminent domain is desirable. There is no indication, however, that such a right will be allowed without compelling proof of exigent public need and purpose, and that the taking is indispensably necessary to fulfill that need. By superimposing a requirement of a stronger showing of the prerequisites upon the private condemnor, it seems that the court in *Linggi v. Garovotti* has taken cognizance of possible public need for private exercise of this right, while retaining control sufficient to preclude exercise in derogation of private property rights.

*Richard T. LemMon*

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**§ 1238. Exercise of right; uses**

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

1. **Uses by United States.** 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.** 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. **Public utilities; municipal corporations; water works; drainage; highways; mooring places; parks; etc.** 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; warehouses; ferries; roads; dams; irrigation and public transportation projects; water companies; etc.** 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. **Mining facilities.** 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.** 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, etc.** Telegraph, telephone, radio and wireless lines, systems and plants.

8. **Sewerage.** 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.** Roads for transportation by traction engines or road locomotives.

10. **Pipelines.** Oil pipelines.

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

12. **Hydroelectric facilities.** 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 facilities.** 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.** Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof.

15. **Abstract and title companies for preservation of public records.** 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.** Expositions or fairs in aid of which the granting of public moneys or other things of value has been authorized by the Constitution.

17. **Gas, heat, refrigeration or power plants and facilities.** 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. **Trees along highways.** 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. **Conservation of fish.** Propagation, rearing, planting, distribution, protection or conservation of fish.

20. **Airports.** 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. **Slum clearance; housing.** 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)



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to enable them to live in decent, safe and sanitary dwellings without overcrowding.

22. **Terminal facilities for common carriers.** 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.

### **§ 1238.1 Off-street parking**

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

1. **Off-street parking.** Off-street motor vehicle parking places, including property necessary or convenient for ingress thereto or egress therefrom, established by any city or city and county for public use. (Added Stats.1945, c. 649, p. 1305, § 1.)

### **§ 1238.2 Farmers' free market**

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

1. **Farmers' Free Market.** Contiguous property at one site necessary for the establishment of a farmers' free market solely for the vending of fresh fruits and vegetables, including property necessary or convenient for ingress thereto or egress therefrom may be acquired under this title for a public use by a county or city and county whose average population per square mile is more than ten thousand persons. (Added Stats.1947, c. 744, p. 1799, § 1.)

### **§ 1238.3 Nonprofit hospitals**

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

1. Property immediately adjacent to and necessary for the operation or expansion of a nonprofit hospital then in existence and engaged in scientific research or an educational activity and the ac-

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quisition of which has been certified as necessary by the Director of the State Department of Public Health, except that property devoted to use for the relief, care, or treatment of the spiritual, mental, or physical illness or ailment of humans shall not be taken under this section.

2. As used in this section, "nonprofit hospital" means any health center or general, tuberculosis, mental, chronic disease, or other type of hospital holding a license in good standing issued under the provisions of Chapter 2 of Division 2 of the Health and Safety Code<sup>1</sup> and owned and operated by a fund, foundation or corporation, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual. (Added Stats. 1951, c. 791, p. 2280, § 1.)

<sup>1</sup> Health and Safety Code § 1400 et seq.

## **§ 1238.4 Public assembly facilities**

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

**Public Assembly Facilities.** Public buildings and grounds for convention and exhibition halls, trade and industrial centers, auditoriums, opera houses, music halls and centers, and related facilities for public assembly including off-street motor vehicle parking places and property necessary or convenient for ingress thereto or egress therefrom. (Added Stats. 1955, c. 804, p. 1425, § 1.)

## **§ 1238.5 Irrigation**

Irrigation is a public use in behalf of which the right of eminent domain may be exercised pursuant to this title. (Added Stats. 1953, c. 52, p. 706, § 9.)

## **§ 1238.6 Protection, preservation or reclamation of land against overflow or incursion of water**

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

1. Protection, preservation, or reclamation of land, whether covered or uncovered by water, against the overflow or incursion of water or the threat thereof, or against the effects of subsidence of the surface of said land, as by constructing levees or by filling, diking, draining or other appropriate remedial method. (Added Stats. 1957, c. 1395, p. 2728, § 1.)

## **§ 1238.7 Earth fill source**

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

1. Property as a source of earth fill material for use in the development of a school site by a school district which is situated wholly or partly within a city or city and county having in excess of 750,000 population and an average population per square mile of more than 4,500 persons. (Added Stats. 1957, c. 1136, p. 2430, § 1.)

## PRIVATE PERSONS

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

. Subject to the limitations imposed by statute, an owner of private property may exercise the right of eminent domain to acquire an easement for any of the following uses:

(a) To provide connections from his property to the mains of an established public sewer system.

(b) To provide access to an existing public road from property lacking reasonable access to any existing road.

(c) To provide drainage or to protect his property against the overflow of water or the threat thereof.

Comment. Section states the limited uses for which a private person may exercise the right of eminent domain. Subdivision (a) retains the substance of former subdivision 8 of Section 1238 of the Code of Civil Procedure. See Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955). Subdivision (b) retains the substance of former subdivisions 4 and 6 of Section 1238. Although no appellate decision to date has decided whether a private person may acquire property for an access road, such a "byroad" has been declared to be a public use. See Sherman v. Buick, 32 Cal. 241 (1867). Reasoning from the Linggi case, it appears that the courts would allow condemnation on a proper showing of "necessity." Subdivision (c) retains the substance of former subdivision 3 of Section 1238 and former Section 1238.6. It should be noted that this section merely provides a declaration of public use. The owner seeking to exercise the right of eminent domain must still establish the "necessity" for the taking. See Code of Civil Procedure Section 1241(?).