

Memorandum 70-29

Subject: Study 36 - Condemnation (General Status of Work on This Topic)

Attached as Exhibit I is a general description of the Commission's past activity in the field of eminent domain. This material is a revised version of a portion of Memorandum 70-22 which was considered at the last meeting. You should read this material before the meeting because you may wish to discuss it at the meeting. The staff will assume that you have read the material when we present this memorandum at the meeting.

The right to take aspect of condemnation will involve several hundred (perhaps more) statute sections. In addition, we should begin now to develop drafts of sections that we will include in our comprehensive statute. We need a method of preserving decisions as we go along in a form that will not involve a substantial secretarial and operating expense to the Commission and will be convenient for use by Commissioners.

The staff suggests that we adopt the practice of keeping an up-to-date compilation of statute provisions tentatively approved by the Commission. Also, in some cases, in order that the compilation will be more useful, certain statute provisions recommended by the staff (but not approved by the Commission) should be included in the compilation.

Because of the substantial turnover in Commission membership, we believe that it will be necessary for the Commission to review substantially all the decisions made on matters discussed within the past few years in the eminent domain field. The members of the Commission must become experts in this field, and a review of all aspects of condemnation law is essential to an understanding of eminent domain problems because they are interrelated. At an early meeting, we plan to present for your study and review the tentative

recommendation on possession prior to judgment and related problems. This tentative recommendation was published in pamphlet form in September 1967; it was sent out to interested persons and organizations for comment in 1968, but the comments have never been reviewed by the Commission.

The staff does not believe that we will determine to recommend the enactment of a new separate code to deal with eminent domain. Nevertheless, it will be most convenient if we preserve our tentative decisions on provisions to be included in our comprehensive statute on eminent domain in the form of a new code. We can later determine where the statute will be compiled and renumber our provisions accordingly. Attached to this memorandum are a series of provisions--some recommended by the staff and some tentatively approved by the Commission--for inclusion in the comprehensive statute. These provisions are on green paper. Also attached are a series of sections (on yellow paper) that are additions, amendments, or repeals of sections in other codes.

We plan to bring this compilation up to date after each meeting to reflect the decisions at the meeting. Each Commissioner will then have a compilation, which he can bring to each meeting, that reflects the past tentative decisions on eminent domain. If possible, we would like to avoid reproducing all the provisions after each meeting. However, if we do reproduce all the provisions after each meeting, you will avoid the need to file the changed provisions in the material previously sent to you. The changes made since the last version of the material could be indicated by dates at the top of the provisions. We do not want to number the pages in the material because we do not want to have to renumber everything each time we rerun the material.

Time did not permit us to include in this compilation certain tentatively approved provisions that should be included. When staff resources permit, we plan to review the past Minutes (for meetings prior to March 1970) and to

include in the compilation all those statutory provisions previously tentatively approved by the Commission. We will also need to work into the compilation the provisions on possession prior to final judgment and related problems, but we will defer doing that until after the Commission has reviewed the comments on these provisions.

We suggest that the Commission consider and tentatively approve most of the attached provisions. This tentative approval would be of assistance in drafting provisions. For example, if the definitions are approved, we can use the defined terms in statute provisions we draft later.

COMPREHENSIVE STATUTE (green)

Division 1. Preliminary Provisions and Construction

Sections 1, 3, 4, 5, 6, 7, 8, 9, 10, and 11 are standard provisions taken from the Evidence Code. They present no significant policy issues.

Division 2. Words and Phrases Defined

Sections 100, 104, 105, 106, 107, 108, and 109 present no significant policy questions. Note that Section 110 includes a charter provision within the word "statute."

Division 3. General Provisions

The content of this division will be determined later. We do believe that the policy statement set out on the sheet for this division in the compilation should be our objective in this project. Whether that objective can be accomplished cannot be determined at this time.

Division 4. The Right to Take

The general content of this division is indicated in the outline of the division set out in the compilation. As we make policy decisions in this area of the law, we will be including the tentatively approved sections in the compilation.

Section 320 should not be considered at this time; we will prepare background material on the "within-without the territorial boundaries" problem for consideration at a future meeting.

Section 360 has been tentatively approved.

Additional sections for inclusion in this division will be considered at the April meeting. Also, we will go through past Minutes to pick up tentatively approved provisions that will be compiled in this division.

Divisions 5-10

No provisions are compiled in these divisions at this time.

ADDITIONS, AMENDMENTS, REPEALS TO OTHER CODES (yellow)

Except for two sections, these all have been tentatively approved. The two unapproved sections will be considered at a subsequent meeting when we consider the general problem of "public necessity."

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

BACKGROUND INFORMATION ON PROGRESS ON CONDEMNATION STUDY

In 1956, the Legislature directed the Law Revision Commission to make a study to determine "whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens." In 1965, the Legislature directed that this topic be given high priority, and revised the directive to provide that the Commission should make a study to determine "whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings." In 1965, the Legislature thus determined that the topic should be given high priority, should be fair to "all parties," not just the property owner, and should be conducted with a view to preparing a comprehensive statute.

The Commission originally obtained a private law firm in Los Angeles to prepare background research studies. This firm hired an outstanding student who had served as a teaching fellow at Stanford Law School. The compensation for the study was based on paying the salary of the person hired who was to work full time on the study until completed. The senior members of the firm agreed to review and revise the material prepared by the new lawyer without compensation and did, indeed, devote a substantial amount of time to the project. The studies that were prepared were found to be inadequate. First of all, the firm could not prepare a series of adequate studies using only one person within the three-year period anticipated. Second, the lawyer preparing the studies was not experienced in procedure and condemnation. As a result, the staff of the Commission devoted a substantial amount of time to revising the studies that have been published, and the Commission several years ago concluded that the

studies in this field would have to be prepared by the Commission's staff. Several small studies have been prepared by the staff. Although Mr. Taylor devoted much of his time during the last several years to research on the study on the right to take, very little of this research is reduced to writing. The staff does not plan to prepare a comprehensive study on the right to take. We plan to cover the various aspects of this topic in a series of memoranda and will prepare background studies as necessary. We do not plan to prepare a comprehensive study on just compensation, but will handle this in the same manner as we plan to handle the right to take.

During the period of 1959-61, the Commission devoted considerable time to the condemnation study. Three recommendations were submitted to the 1961 Legislature. Part of one recommendation--taking possession and passage of title--was enacted. Another recommendation--relating to evidence in eminent domain proceedings--was vetoed by the Governor in 1961, was introduced by Senator Cobey in 1963 and again vetoed, and finally--after it was significantly amended and made acceptable to the public entities--was enacted in 1965. The third recommendation--relating to moving expenses--was not approved by the first committee that considered it because federal law did not permit reimbursement for moving expenses. This recommendation has never been enacted although numerous moving expense statutes have been enacted in California.

In 1963, the Commission submitted a recommendation relating to discovery in eminent domain proceedings. The bill passed the Senate but died in the Assembly Judiciary Committee. A revised bill relating to discovery, which was acceptable to public entities, was submitted to the 1967 Legislature and was enacted.

At the 1968 session, legislation was submitted upon Commission recommendation to provide for increased recovery by the condemnee when an eminent

domain proceeding is abandoned. After revisions were made to make the bill acceptable to the public entities, it was enacted by the Legislature.

In September 1967, the Commission published its first tentative recommendation relating to condemnation law and procedure. (The Commission determined that it would follow the same procedure on condemnation law as it followed on evidence. A series of tentative recommendations and related studies will be published covering the entire field, the comments on the various tentative recommendations will be considered, and the entire series of tentative recommendations will be put together in one comprehensive statute. Where a problem that requires immediate attention is discovered, the Commission will submit a recommendation to the Legislature on that problem and not wait until the comprehensive statute has been prepared.) The 1967 tentative recommendation relates to possession prior to final judgment and related problems and includes suggested revisions of Article I, Section 14 of the California Constitution. Within the next few months, the Commission will be reviewing the comments on this tentative recommendation so that the members of the Commission will become familiar with this aspect of condemnation law and can determine what changes are needed in the tentative recommendation when it is incorporated into the comprehensive statute.

The Commission has submitted a recommendation to the 1970 Legislature relating to arbitration of just compensation. In addition, a provision relating to the right to enter upon private property to determine whether it is suitable for public use and the damages that must be paid and the procedure to be followed in such cases is included in the governmental liability recommendation submitted to the 1970 Legislature.

The Commission also has prepared a tentative recommendation on byroads, and this has been distributed for comment. The comments have been reviewed.

We will need to review the comments of the State Bar Committee on this proposal within the next few months. This particular tentative recommendation probably will be incorporated into a larger tentative recommendation on the right to take insofar as its publication is concerned.

The Commission has considered the problem of recovery for litigation expenses in condemnation proceedings and has determined to make no substantial change--that is, the Commission has determined not to adopt a jurisdictional offer provision or a similar provision or to make litigation expenses generally recoverable.

The Commission has determined that a general statute should be enacted to provide for the recovery of moving expenses as a matter of right. A tentative recommendation to effectuate this decision has been distributed for comment.

The Commission has determined that some priority should be given to the preparation of a study on the right of the former owner to repurchase property when it is to be sold by the public entity. Mr. Taylor devoted some time to the preparation of this study, but was unable to work out a practical procedure that would provide any significant relief to the former owner in this type of case. As soon as we can complete work on certain broader aspects of the right to take study, we will return to this aspect of the study. Perhaps then we will have some inspiration as to the solution of the "right to return" desire of former owners.

The Commission has discussed the problem of proximity damage from highway construction--the damage to property not taken but injuriously affected. This problem was considered in the context of inverse condemnation. The Commission has decided to return to this problem after it has considered the cases where property is actually taken.

A major difficulty in making significant progress on this study is that background studies must be prepared before the Commission can profitably consider particular problems. We have not had success in having such studies prepared by persons who are not members of the Commission's staff. In addition to our experience with the private law firm (previously described), we made a contract with Professor Ayer of Stanford Law School to prepare a study on the procedural aspects of condemnation law. He prepared one relatively small part of the total study and concluded that it was a job of such substantial magnitude that he did not have the energy or time to complete the whole study. We have obtained another consultant on this aspect of condemnation law.

We have two vacancies on the legal staff, and the Executive Secretary must devote more than one-half of his time to the 1970 legislative program during the next few months. Nevertheless, we do believe that the staff can produce enough material so that substantial progress can be made on the right to take during the next year. Much of the work that must be accomplished is clarification and codification of provisions that make little sense.

In connection with the condemnation study, you should note the statement in a letter, dated August 12, 1968, from Roy A. Gustafson, former Chairman of the Commission, who was recently elevated from the Superior Court to the Court of Appeal by Governor Reagan:

In the latest issue of the State Bar Journal, a professor of law from the University of Wyoming notes that the decisions are slanted in favor of the condemnor. The fact is that the law in this area is in a hopeless mess and one can find just about any statement for which he is looking if he reads enough cases. And it is certainly true that both the decisional law and the statutory law heavily favor the condemnor.

When I was on the Commission, studies on eminent domain had already begun. I had great misgivings about approaching the matter on the basis that the existing law was generally satisfactory and that it needed to be patched up only here and there. Now I am convinced that this was the wrong approach and that what is needed is a massive project which starts from scratch.

It is my belief that the Legislature looks to the Commission to prepare a comprehensive statute that will remedy the worst problems in eminent domain law and do so without substantially increasing the overall cost of property acquisition. This may be possible if additional compensation is provided only in those cases where it is most justified and the procedure for condemnation can be improved to reduce the condemnee's ability to delay the proceedings and to permit the condemnor to obtain early possession of the property in appropriate cases. In the light of our past experience with the Governor on eminent domain legislation, it seems extremely unlikely that any Governor (whether a Democrat or Republican) will approve an eminent domain bill that will substantially increase condemnation costs.

3/19/70-1

COMPREHENSIVE STATUTE § 1

Staff recommendation

DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

§ 1. Short title

1. This code shall be known as the Eminent Domain Code.

3/19/70-2

COMPREHENSIVE STATUTE § 3

Staff recommendation

Preliminary Provisions and Construction

§ 3. Constitutionality

3. If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

3/19/70-3

COMPREHENSIVE STATUTE § 4

Staff recommendation

Preliminary Provisions and Construction

§ 4. Construction of code

4. Unless the provision or context otherwise requires, these preliminary provisions and rules of construction shall govern the construction of this code.

3/19/70-4

COMPREHENSIVE STATUTE § 5

Staff recommendation

Preliminary Provisions and Construction

§ 5. Effect of headings

5. Division, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code.

3/19/70-5

COMPREHENSIVE STATUTE § 6

Staff recommendation

Preliminary Provisions and Construction

§ 6. References to statutes

6. Whenever any reference is made to any portion of this code or to any other statute, such reference shall apply to all amendments and additions heretofore or hereafter made.

3/19/70-6

COMPREHENSIVE STATUTE § 7

Staff recommendation

Preliminary Provisions and Construction

§ 7. "Division," "chapter," "article," "section," "subdivision," and "paragraph"

7. Unless otherwise expressly stated:

(a) "Division" means a division of this code.

(b) "Chapter" means a chapter of the division in which that term occurs.

(c) "Article" means an article of the chapter in which that term occurs.

(d) "Section" means a section of this code.

(e) "Subdivision" means a subdivision of the section in which that term occurs.

(f) "Paragraph" means a paragraph of the subdivision in which that term occurs.

3/19/70-7

COMPREHENSIVE STATUTE § 8

Staff recommendation

Preliminary Provisions and Construction

§ 8. Construction of tenses

8. The present tense includes the past and future tenses; and the future, the present.

3/19/70-8

COMPREHENSIVE STATUTE § 9

Staff recommendation

Preliminary Provisions and Construction

§ 9. Construction of genders

9. The masculine gender includes the feminine and neuter.

3/19/70-9

COMPREHENSIVE STATUTE § 10

Staff recommendation

Preliminary Provisions and Construction

§ 10. Construction of singular and plural

10. The singular number includes the plural; and the plural, the singular.

3/19/70-10

COMPREHENSIVE STATUTE § 11

Staff recommendation

Preliminary Provisions and Construction

§ 11. "Shall" and "may"

11. "Shall" is mandatory and "may" is permissive.

3/19/70-11

COMPREHENSIVE STATUTE § 100

Staff recommendation

DIVISION 2. WORDS AND PHRASES DEFINED

§ 100. Application of definitions

100. Unless the provision of context otherwise requires,
these definitions govern the construction of this code.

3/19/70-12

COMPREHENSIVE STATUTE § 104

Staff recommendation

Words and Phrases Defined

§ 104. City

104. "City" includes city and county.

3/19/70-13

COMPREHENSIVE STATUTE § 105

Staff recommendation

Words and Phrases Defined

§ 105. County

105. "County" includes city and county.

3/19/70-14

COMPREHENSIVE STATUTE § 106

Staff recommendation

Words and Phrases Defined

§ 106. Local public entity

106. "Local public entity" means any public entity other than the state.

3/19/70-15

COMPREHENSIVE STATUTE § 107

Staff recommendation

Words and Phrases Defined

§ 107. Person

107. "Person" includes any individual, firm association, organization, partnership, business trust, corporation, or company.

3/19/70-16

COMPREHENSIVE STATUTE § 108

Staff recommendation

Words and Phrases Defined

§ 108. Public entity

108. "Public entity" includes the state, a county, city, district, public authority, public agency, and any other political subdivision or municipal corporation in the state.

3/19/70-17

COMPREHENSIVE STATUTE § 109

Staff recommendation

Words and Phrases Defined

§ 109. State

109. "State" means the State of California and includes
the Regents of the University of California.

3/19/70-18

COMPREHENSIVE STATUTE § 110

Staff recommendation

Words and Phrases Defined

§ 110. Statute

110. "Statute" means a constitutional provision, statute,
or charter provision.

3/19/70-19

COMPREHENSIVE STATUTE § 200 et seq.

Staff recommendation

DIVISION 3. GENERAL PROVISIONS

Chapter 1. Right of eminent domain may be exercised only as provided
in this code unless otherwise specifically provided by
statute.

3/19/70-20

COMPREHENSIVE STATUTE § 300 et seq.

Staff recommendation

DIVISION 4. THE RIGHT TO TAKE

CHAPTER 1. The right to exercise the power of eminent domain

Article 1. Statutory authorization required to exercise power

Article 2. Property interest that may be acquired

Article 3. Right to take property outside territorial limits
of entity

Article 4. Condemnation for future use

Article 5. Substitute condemnation

Article 6. Excess condemnation

Article 7. Joint exercise of power

Article 8. Preliminary location, survey, and tests

Article 9. Failure to devote property to use for which taken

CHAPTER 2. Public necessity

CHAPTER 3. More necessary public use

CHAPTER 4. Property exempt from condemnation

3/19/70-21

COMPREHENSIVE STATUTE § 320

Staff recommendation

The Right to Take

§ 320. Condemnation outside territorial limits of local public entity

320. Except where expressly or necessarily implied from the authorizing statute, a local public entity authorized to condemn property may condemn only property within its territorial limits.

3/19/70-22

COMPREHENSIVE STATUTE § 360

Tentatively approved February 1970

The Right to Take

§ 360. Joint exercise of condemnation power

360. (a) As used in this section, "public agencies" includes all those agencies included within the definition of "public agency" in Section 6500 of the Government Code.

(b) Two or more public agencies may enter into an agreement for the joint exercise of their respective powers of eminent domain, whether or not possessed in common, for the acquisition of real property as a single parcel. Such agreement shall be entered into and performed pursuant to the provisions of Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code.

Comment. Section 360 permits several public agencies to jointly acquire a particular parcel under the Joint Powers Agreements Act, not only where the particular parcel is needed for a joint project but also where each of the agencies requires a portion of the parcel for its own purposes. The section is based on former Education Code Section 15007.5. However, Section 15007.5 applied only where a school district was a party to the joint powers agreement, and Section 360 is not so restricted.

3/19/70-23

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 5. JUST COMPENSATION AND MEASURE OF DAMAGES

CHAPTER 1. GENERAL PROVISIONS

Right to just compensation

Measure of damages

"Fair market value" defined

Effect of imminence of condemnation

Date of valuation

The larger parcel

Effect of condemnation use on after-market value

Machinery, equipment, and fixtures

Churches and other property devoted to unique or
special use

Harvesting and marketing of crops

CHAPTER 2. RELOCATION EXPENSES

CHAPTER 3. ADDITIONAL ITEMS OF COMPENSATION

Refinancing costs

Net rental loss

Expense of plans rendered unusable

CHAPTER 4. PRORATION OF TAXES

CHAPTER 5. DELAY COMPENSATION (INTEREST)

CHAPTER 6. LITIGATION EXPENSES

3/19/70-24

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 6. APPORTIONMENT AND ALLOCATION OF THE AWARD

3/19/70-25

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 7. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO
JUDGMENT; OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT

See California Law Revision Commission,
Tentative Recommendation and A Study
Relating to Condemnation Law and Proce-
dure: Number 1--Possession Prior to
Final Judgment and Related Problems, 1101,
1142-1166 (September 1967).

3/19/70-26

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 8. PROCEDURE

CHAPTER 1. JURISDICTION AND VENUE

CHAPTER 2. COMPLAINT

CHAPTER 3. SUMMONS

CHAPTER 4. PARTIES

CHAPTER 5. ANSWER

CHAPTER 6. TRIAL PRACTICE

CHAPTER 7. JUDGMENT

CHAPTER 8. PAYMENT OF JUDGMENT

CHAPTER 9. ABANDONMENT

CHAPTER 10. NEW TRIALS AND APPEALS

3/19/70-27

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 9. EXCHANGE OF VALUATION DATA

3/19/70-28

COMPREHENSIVE STATUTE

Staff recommendation

DIVISION 10. ARBITRATION OF COMPENSATION IN
ACQUISITIONS OF PROPERTY FOR PUBLIC USE

See Recommendation of California Law Revision
Commission Relating to Arbitration of Just Com-
pensation (September 1969)

3/19/70-29

CODE OF CIVIL PROCEDURE § 1238.7

Tentatively approved March 1970

Sec. . Section 1238.7 of the Code of Civil Procedure is repealed.

~~1238.7.--Subject-to-the-provisions-of-this-title,-the-right
of-eminant-domain-may-be-exereised-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-persens.~~

Comment. Section 1238.7 is repealed as unnecessary since Section 1047, which is added to the Education Code, permits condemnation of any property necessary to carry out the functions of the district and therefore would permit condemnation of an earth fill source. See also Section 350 of the comprehensive statute.

3/19/70-30

EDUCATION CODE § 1047

Tentatively approved March 1970

SCHOOL DISTRICTS

§ 1047. Power of eminent domain

Sec. . Section 1047 is added to the Education Code, to read:

1047. Subject to any limitations specifically imposed by statute, the governing board of any school district may condemn any property necessary to carry out any of the powers or functions of the district.

Comment. Section 1047 supersedes the grant of condemnation authority formerly contained in subdivision 3 of Section 1238 of the Code of Civil Procedure (condemnation authorized for "public buildings and grounds for the use . . . of any . . . school district"). It continues the prior authority of school districts to condemn for school purposes. E.g., Hayward Union High School Dist. v. Madrid, 234 Cal. App.2d 100, 121, 44 Cal. Rptr. 268, (1965) ("The district had the right to condemn for any school purpose and on acquisition, to change to some other school purpose any time during its ownership of the property."). Kern County High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919). See also Anaheim Union High School Dist. v. Vieria, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966) (future use); Hayward Union High School Dist. v. Madrid, supra (temporary use for school purposes with resale to follow within several years); Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959) (school purposes may be a more necessary public use than private cemetery).

The introductory clause of Section 1047 recognizes that specific limitations may be imposed on the exercise of the power of eminent domain. See Education Code Section 1048.

3/19/70-31

EDUCATION CODE § 1047

Tentatively approved March 1970

Section 1047 grants a school district (defined in Section 41) the power of eminent domain to acquire any property necessary to carry out any of the powers or functions of the district. Thus, for example, a school district may condemn property outside its boundaries, subject to such limitations as are provided by statute, even though the pertinent statute does not expressly grant the district the power of eminent domain. E.g., Education Code Section 15009. It should be recognized, however, that a school district is an agency of limited authority and may engage in only those functions authorized by statute. E.g., Yreka Union High School Dist. v. Siskiyou Union High School Dist., 227 Cal. App.2d 666, 39 Cal. Rptr. 112 (1964); Uhlmann v. Alhambra City High School Dist., 221 Cal. App.2d 228, 34 Cal. Rptr. 341 (1963).

In some cases, a particular statute may expressly grant school districts the power of eminent domain for a particular purpose. E.g., Education Code Section 6726. These specific grants of condemnation authority are not to be construed to limit the broad grant of such authority under Section 1047.

Private schools which are not of the collegiate grade may not exercise the power of eminent domain. Yeshiva Torath Emeth Academy v. University of So. Calif., 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962). It is also not permissible for a private citizen to acquire property by eminent domain for the operation of a public school. People v. Oken, 159 Cal. App.2d 456, 324 P.2d 58 (1958).

3/19/70-32

EDUCATION CODE § 1048

Tentatively approved March 1970

§ 1048. Acquisition of property for utility purposes

Sec. . Section 1048 is added to the Education Code, to read:

1048. The governing board of a school district may acquire property in an adjoining school district by lease, or purchase and dispose of such property in the same manner as property within the boundary of the district is purchased and disposed of, where the acquisition of such property is deemed necessary by the governing board for use as garages, warehouse, or other utility purposes.

The power of eminent domain shall not be applicable and such acquisitions by purchase shall be subject to the approval of the governing board of school district in which the property is located.

Comment. Section 1048 continues without change the provisions of former Education Code Section 16003.

3/19/70-33

EDUCATION CODE § 15007.5

Tentatively approved March 1970

Sec. . . Section 15007.5 of the Education Code is repealed.

~~15007.5.--The-governing-board-of-any-school-district-may-enter
into-an-agreement-with-the-governing-body-of-any-public-agency-for
the-joint-exercise-by-such-school-district-and-such-agency-of-their
respective-powers-of-eminent-domain,whether-or-not-possessed-in
common,-for-the-aquisition-of-real-property-as-a-single-parcel.
Such-agreement-shall-be-entered-into-and-performed-pursuant-to-the
provisions-of-Chapter-5-(commencing-with-Section-6500)-of-Division-7
of-Title-1-of-the-Government-Code,-and-each-public-agency-therein
designated-is-authorized-to-enter-into-such-an-agreement-with-the
governing-board-of-any-school-district-for-such-purpose.~~

Comment. Section 15007.5 is superseded by Section 360 of the
Eminent Domain Code.

3/19/70-34

EDUCATION CODE § 16003

Tentatively approved March 1970

Sec. . Section 16003 of the Education Code is repealed.

~~16003.---The-governing-board-of-a-school-district-may-acquire property-in-an-adjoining-school-district-by-lease,-or-purchase-and dispose-of-such-property-in-the-same-manner-as-property-within-the boundary-of-the-district-is-purchased-and-disposed-of,-where-the acquisition-of-such-property-is-deemed-necessary-by-the-governing board-for-use-as-garages,-warehouse,-or-other-utility-purposes.~~

~~The-power-of-eminent-domain-shall-not-be-applicable-and-such acquisitions-by-purchase-shall-be-subject-to-the-approval-of-the governing-board-of-school-district-in-which-the-property-is-located.~~

Comment. Section 16003 is superseded by Section 1048 of the Education Code.

3/19/70-35

EDUCATION CODE § 23151

Tentatively approved March 1970

UNIVERSITY OF CALIFORNIA

Sec. . Section 23151 of the Education Code is amended to read:

23151. The Regents of the University of California may condemn any property ~~or interest therein for the public buildings and grounds~~ necessary to carry out any of the powers or functions of the University of California ~~under the provisions of the Code of Civil Procedure relating to eminent domain~~ . The Regents of the University of California shall not commence any such proceeding in eminent domain unless it first adopts a resolution by a two-thirds vote declaring that the public interest and necessity require the acquisition, construction or completion by the Regents of the University of California of the public improvement for which the property or interest therein is required and that the property or interest therein described in such resolution is necessary for the public improvement.

Comment. Section 23151 is amended to make clear that the condemnation authority of the Regents of the University of California is broad enough to acquire all property necessary to carry out the functions of the University of California even though the property is to be acquired for a project that does not clearly fall within the former language "public buildings and grounds of the University of California."

A general provision in the comprehensive eminent domain statute will make clear that "property" includes "any interest in property."

3/19/70-36

EDUCATION CODE § 23619

Tentatively approved March 1970

STATE COLLEGE SYSTEM

Sec. . Section 23619 is added to the Education Code, to read:

23619. Subject to the Property Acquisition Law, Part 11 (commencing with Section 15850) of Division 3 of Title 2 of the Government Code, the trustees may condemn any property necessary to carry out any of the powers or functions of the state colleges.

Comment. Section 23619 supersedes subdivision 2 of Section 1238 of the Code of Civil Procedure ("public buildings and grounds for the use of a state, or any state institution") insofar as that subdivision may relate to the state college system. The phrasing of Section 23619 is based in part on subdivision (a) of Section 24503 of the Education Code, which grants the right of eminent domain to acquire property necessary for dormitories or other housing facilities, boarding facilities, student union or activity facilities, vehicle parking facilities, or any other auxiliary or supplemental facilities for individual or group accommodation for use by students, faculty members, or other employees of any one or more state colleges. Section 23619 covers not only the facilities covered by Section 24503 but also all other buildings and grounds necessary to the state college system.

3/19/70-37

EDUCATION CODE § 30051

Tentatively approved March 1970

NONPROFIT EDUCATIONAL INSTITUTIONS OF COLLEGIATE GRADE

Sec. . Chapter 3 (commencing with Section 30051) is added to Division 21 of the Education Code, to read:

Chapter 3. Eminent Domain

30051. Any educational institution of collegiate grade, within this state, not conducted for profit, may exercise the right of eminent domain to acquire any property necessary to carry out any of its powers or functions.

Comment. Section 30051 continues the grant of condemnation authority formerly found in subdivision 2 of Section 1238 of the Code of Civil Procedure ("Public buildings and grounds for the use of . . . 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"). See University of So. Calif. v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934), cert. den., 295 U.S. 738 (1935); Redevelopment Agency v. Hayes, 122 Cal. App.2d 777, 266 P.2d 105 (1954). Private schools which are not of the collegiate grade may not exercise the power of eminent domain. Yeshiva Torath Emeth Academy v. University of So. Calif., 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962).

3/19/70-38

PUBLIC UTILITIES CODE §§ 610-627

Tentatively approved March 1970

PRIVATELY OWNED PUBLIC UTILITIES

ARTICLE 7. EMINENT DOMAIN

- § 610. Article applies to "public utilities" only
- § 611. Railroad corporations
- § 612. Electrical corporations
- § 613. Gas corporations
- § 614. Heat corporations
- § 615. Pipeline corporations
- § 616. Telephone corporations
- § 617. Telegraph corporations
- § 618. Water corporations
- § 619. Wharfingers
- § 620. Ferries
- § 621. Street railroad corporations
- § 622. Motor carriers
- § 623. Warehousemen
- § 625. Resolution of Public Utilities Commission
- § 626. Effect of resolution

3/19/70-39

PUBLIC UTILITIES CODE § 610

Tentatively approved March 1970

Sec. . Article 7 (commencing with Section 610) is added to Chapter 3 of Part 1 of Division 1 of the Public Utilities Code, to read:

Article 7. Eminent Domain

§ 610. Article applies to "public utilities" only

610. This article applies only to a corporation or person that is a public utility.

Comment. Section 610 is included to make clear that this article extends the right of eminent domain only to "public utilities" as defined in Section 216 ("service is performed for or the commodity delivered to the public or any portion thereof") and not to persons or corporations that are not subject to regulation and rate control. It has been held that the exercise of the right of eminent domain conclusively evidences an intention to devote the property so acquired to a public use, thereby rendering the condemnor a public utility. Producers Transp. Co. v. Railroad Comm'n, 176 Cal. 499, 505, 169 P. 59, (1917). Compare McCullagh v. Railroad Comm'n, 190 Cal. 13, 210 P. 264 (1922). This section is consistent with the holding in the Producers Transp. Co. case.

3/19/70-40

PUBLIC UTILITIES CODE § 611

Tentatively approved March 1970

§ 611. Railroad corporations

611. A railroad corporation may condemn any property necessary for the construction and maintenance of its railroad.

Comment. Section 611 grants "railroad corporations" (defined in Section 230) the right of eminent domain to acquire property necessary for the construction and maintenance of its "railroad." "Railroad" is defined in Section 229 to mean in substance all railroad property devoted to public use in the transportation of persons or property. Thus, Section 611 authorizes condemnation of any property necessary to carry out the regulated activities of the railroad. It retains in substance the authority formerly found in subdivision (g) of Section 7526 of the Public Utilities Code and in Section 1238 of the Code of Civil Procedure. See, e.g., Southern Pac. Co. v. Los Angeles Mill Co., 177 Cal. 395, P. (1918)(spur tracks); Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238 (1915)(land for wharves for transfer of freight between railroad cars and boats where reasonably necessary for railroad corporation's future business); Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 92 P. 849 (1907)(land adjacent to station grounds required for a freight house); Southern Pacific R. R. Co. v. Raymond, 53 Cal. 223, P. () (workshop); Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 688, 87 P. 27 (1906)(spur tracks). Cf. City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916)(land for pole line for transmission of power to public railway). Section 611 would not, however, permit condemnation by a railroad corporation of land to be used, for example, as an industrial park.

3/19/70-41

PUBLIC UTILITIES CODE § 611

Tentatively approved March 1970

Section 611 supersedes provisions formerly contained in the Public Utilities Code and Code of Civil Procedure insofar as those provisions related to privately owned public utilities. See subdivision (g) of Section 7526 of the Public Utilities Code (right to condemn lands "to be used in the construction and maintenance of its roads, and all necessary appendages and adjuncts"); Section 1238 of the Code of Civil Procedure, subdivision 4 ("steam, electric and horse railroads"), subdivision 11 (railroads "for quarrying, logging or lumbering purposes"). See also Section 1238, subdivision 9 ("roads for transportation by traction engines or road locomotives").

Section 611 has no effect on various specific grants of the power to railroads to condemn private property. See Public Utilities Code Sections 7533 (additional tracks), 7535 (railroad intersections), 7536 (railroad crossings). See also Public Utilities Code Section 7508 (right of eminent domain in transferee of railroad corporation).

3/19/70-42

PUBLIC UTILITIES CODE § 612

Tentatively approved March 1970

§ 612. Electrical corporations

612. An electrical corporation may condemn any property necessary for the construction and maintenance of its electric plant.

Comment. Section 612 grants "electrical corporations" (defined in Section 218) the right of eminent domain to acquire property necessary for the construction and maintenance of its "electric plant." "Electric plant" is defined in Section 217 to mean in substance all property devoted to public use in the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power. Thus, Section 612 authorizes condemnation of any property necessary to carry out the regulated activities of the electrical corporation. It retains and possibly broadens the authority formerly found in subdivisions 12 and 13 of Section 1238 of the Code of Civil Procedure and supersedes those subdivisions insofar as they apply to privately owned public utilities. See also the Comment to Section 613. Insofar as subdivision 13 permits acquisition of property for future use, it is anticipated that that authority will be given to privately owned public utilities by a general provision to be included in the comprehensive condemnation statute.

3/19/70-43

PUBLIC UTILITIES CODE § 613

Tentatively approved March 1970

§ 613. Gas corporations

613. A gas corporation may condemn any property necessary for the construction and maintenance of its gas plant.

Comment. Section 613 grants "gas corporations" (defined in Section 222) the right of eminent domain to acquire property necessary for the construction and maintenance of its "gas plant." "Gas plant" is defined in Section 221 to include all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of gas, natural or manufactured, for light, heat, or power. Thus, Section 613 authorizes condemnation of any property necessary to carry out the regulated activities of the gas corporation.

Sections 612, 613, and 614 largely supersede subdivision 17 of Section 1238 of the Code of Civil Procedure. Insofar as subdivision 17 permits acquisition of property for future use, it is anticipated that that authority will be given privately owned public utilities by a general provision to be included in the comprehensive condemnation statute.

3/19/70-44

PUBLIC UTILITIES CODE § 614

Tentatively approved March 1970

§ 614. Heat corporations

614. Any heat corporation may condemn any property necessary for the construction and maintenance of its heating plant.

Comment. Section 614 grants "heat corporations" (defined in Section 224) the right of eminent domain to acquire property necessary for the construction and maintenance of its "heating plant." "Heating plant" is defined in Section 223 to include all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of heat for domestic, business, industrial, or public use. Thus, Section 614 authorizes condemnation of any property necessary to carry out the regulated activities of the heat corporations. See the Comment to Section 613.

3/19/70-45

PUBLIC UTILITIES CODE § 615

Tentatively approved March 1970

§ 615. Pipeline corporations

615. A pipeline corporation may condemn any property necessary for the construction and maintenance of its pipeline.

Comment. Section 615 grants "pipeline corporations" (defined in Section 228) the right of eminent domain to acquire property necessary for the construction and maintenance of its "pipeline." "Pipeline" is defined in Section 227 to include all property used in connection with or to facilitate the transmission, storage, distribution, or delivery of crude oil or other fluid substances except water through pipelines.. Thus, Section 615 authorizes condemnation of any property necessary to carry out the regulated activities of the pipeline corporation.

Section 615 supersedes subdivision 10 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "oil pipelines") insofar as that subdivision relates to privately owned public utilities.

3/19/70-46

PUBLIC UTILITIES CODE § 616

Tentatively approved March 1970

§ 616. Telephone corporations

616. A telephone corporation may condemn any property necessary for the construction and maintenance of its telephone line.

Comment. Section 616 grants "telephone corporations" (defined in Section 234) the right of eminent domain to acquire property necessary for the construction and maintenance of its "telephone line." "Telephone line" is defined in Section 233 to include all property used in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires. Thus, Section 616 authorizes condemnation of any property necessary to carry out the regulated activities of the telephone corporation.

Section 616 supersedes a portion of subdivision 7 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "telephone . . . lines, systems and plants") insofar as that subdivision relates to privately owned public utilities.

3/19/70-47

PUBLIC UTILITIES CODE § 617

Tentatively approved March 1970

§ 617. Telegraph corporations

617. A telegraph corporation may condemn any property necessary for the construction and maintenance of its telegraph line.

Comment. Section 617 grants "telegraph corporations" (defined in Section 236) the right of eminent domain to acquire property necessary for the construction and maintenance of its "telegraph line." "Telegraph line" is defined in Section 235 to include all property used in connection with or to facilitate communication by telegraph, whether such communication is had with or without the use of transmission wires. Thus, Section 617 authorizes condemnation of any property necessary to carry out the regulated activities of the telegraph corporation.

Section 617 supersedes a portion of subdivision 7 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "telegraph . . . lines, systems and plants") insofar as that subdivision relates to privately owned public utilities.

3/19/70-48

PUBLIC UTILITIES CODE § 618

Tentatively approved March 1970

§ 618. Water corporations

618. A water corporation may condemn any property necessary for the construction and maintenance of its water system.

Comment. Section 618 grants "water corporations" (as defined in Section 241) the right of eminent domain to acquire property necessary for the construction and maintenance of its "water system." "Water system" is defined in Section 240 to include all property used in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement of water for power, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use. Thus, Section 618 authorizes condemnation of any property necessary to carry out the regulated activities of the water corporation.

Section 618 supersedes portions of subdivisions 3 and 4 of Section 1238 of the Code of Civil Procedure insofar as those portions relate to condemnation by privately owned public utilities.

3/19/70-49

PUBLIC UTILITIES CODE § 619

Tentatively approved March 1970

§ 619. Wharfingers

619. A wharfinger may condemn any property necessary for the construction and maintenance of facilities for the receipt or discharge of freight or passengers.

Comment. Section 619 grants a "wharfinger" the right of eminent domain to acquire property necessary for facilities for the receipt or discharge of freight or passengers. "Wharfinger" is defined in Section 242 to include "every corporation or person owning, controlling, operating, or managing any dock, wharf, or structure used by vessels in connection with or to facilitate the receipt or discharge of freight, other than bulk liquid commodities, or passengers for compensation within this State."

Section 619 supersedes portions of subdivisions 3 ("public mooring places for watercraft") and 4 ("wharves, docks, piers, . . . chutes, booms") of Section 1238 of the Code of Civil Procedure insofar as those portions relate to privately owned public utilities.

3/19/70-50

PUBLIC UTILITIES § 620

Tentatively approved March 1970

§ 620. Ferries

620. Common carriers, as defined in subdivision (b) of Section 211, may condemn any property necessary for the construction and maintenance of facilities for their transportation of persons or property.

Comment. Section 620 grants the power of eminent domain to acquire property necessary for ferry facilities. The reference to subdivision (b) of Section 211 incorporates a definition of those public utilities that transport persons or property for compensation by vessel upon inland waters or upon the high seas between points within this state. Section 620 supercedes the grant of condemnation for "ferries" in subdivision 4 of Section 1238 of the Code of Civil Procedure insofar as that subdivision relates to the privately owned public utilities. See Streets and Highways Code Sections 30802, 30866 (regulation of amount of ferry tolls).

3/19/70-51

PUBLIC UTILITIES § 621

Tentatively approved March 1970

§ 621. Street railroad corporations

621. A street railroad corporation may condemn any property necessary for the construction and maintenance of terminal facilities for the receipt, transfer, or delivery of the passengers or property it carries.

Comment. Section 621 grants "street railroad corporations" (as defined in Section 232) the right of eminent domain to acquire property necessary for its terminal facilities. The section supersedes subdivision 22 of Section 1238 of the Code of Civil Procedure insofar as that subdivision applied to privately owned street railroad corporations.

3/19/70-52

PUBLIC UTILITIES CODE § 622

Tentatively approved March 1970

§ 622. Motor carriers

622. (a) As used in this section, "motor carrier" means:

- (1) A highway common carrier as defined in Section 213.
- (2) A passenger stage corporation as defined in Section 226.

(b) A motor carrier may condemn any property necessary for the construction and maintenance of terminal facilities for the receipt, transfer, or delivery of the passengers or property it carries.

Comment. Section 622 grants certain motor carriers the right of eminent domain to acquire property necessary for terminal facilities. Sections 621 and 622 supersede subdivision 22 of Section 1238 of the Code of Civil Procedure which granted condemnation authority for "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."

3/19/70-53

PUBLIC UTILITIES CODE § 623

Tentatively approved March 1970

§ 623. Warehousemen

623. A warehouseman may condemn any property necessary for the construction and maintenance of its facilities for storing property.

Comment. Section 623 grants a "warehouseman" (defined in Section 239) the right of eminent domain to acquire property necessary for storing property. Section 623 supersedes a portion of subdivision 4 of Section 1238 of the Code of Civil Procedure (granting authority to condemn for "warehouses") insofar as that portion relates to privately owned public utilities.

3/19/70-54

PUBLIC UTILITIES CODE § 625

Staff recommendation considered by
Commission March 1970--action deferred

§ 625. Resolution of Public Utilities Commission

625. No condemnation proceeding shall be commenced under the authority granted by this article unless the Public Utilities Commission first adopts a resolution declaring that the public interest and necessity require the acquisition, construction, or completion by the public utility of the project for which the property is required and that the fee or such interest in the property as is described in the resolution is necessary for the project.

Comment. Sections 625 and 626 impose a requirement not found in prior law. The sections, which are based on Streets and Highways Code Sections 102 and 103, make the question of necessity one for determination by the Public Utilities Commission rather than by the court as under former law.

3/19/70-55

PUBLIC UTILITIES CODE § 626

Staff recommendation considered by
Commission March 1970--action deferred

§ 626. Effect of resolution

626. The resolution of the commission is conclusive evidence:

(a) Of the public necessity of such proposed project.

(b) That such fee or interest in the property is necessary
therefor.

(c) That such proposed project is planned or located in a
manner which will be most compatible with the greatest public good
and the least private injury.

Comment. See the Comment to Section 625.

3/19/70-56

PUBLIC UTILITIES CODE § 2729

Tentatively approved March 1970

MUTUAL WATER COMPANIES

Sec. . Section 2729 is added to the Public Utilities Code,
to read:

2729. A mutual water company may exercise the power of eminent domain for water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by such company.

Comment. Section 2729 specifies the condemnation authority of a mutual water company (defined in Section 2725). The section continues without substantive change the authority to condemn formerly conferred by Code of Civil Procedure Section 1238(4)(condemnation authorized for "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").

Mutual water companies are not generally subject to the jurisdiction of the Public Utilities Commission. See Pub. Util. Code § 2705. However, it is possible that exercise of the power of eminent domain by a mutual water company may demonstrate an intention to devote the property so acquired to public use and thereby render the company subject to regulation as a public utility. See Corona City Water Co. v. Public Utilities Comm'n, 54 Cal.2d 834, 357 P.2d 301, 9 Cal. Rptr. 245 (1960); Lamb v. California Water & Tel. Co., 21 Cal.2d 33, 129 P.2d 371 (1942).