

#36.65

7/30/70

Memorandum 70-86

Subject: Study 36.65 - Condemnation (Disposition of Existing Statutes--Code of Civil Procedure Section 1238.2)

Attached is a background research study on Section 1238.2 of the Code of Civil Procedure, enacted in 1947 to authorize the City and County of San Francisco to take "contiguous property at one site" to establish a farmer's free market.

The study was prepared before the Commission tentatively approved the addition of Section 25350.5 to the Government Code ("The board of supervisors of any county may condemn any property necessary to carry out any of the powers or functions of the county.") Since Section 1238.2 was obviously intended to facilitate a particular acquisition, its retention is undesirable, especially since San Francisco will have authority to condemn for a public market if it has charter authority to engage in that activity. Accordingly, the staff recommends repeal of Section 1238.2 as unnecessary.

Exhibit I (attached) is suggested for inclusion in the Tentative Comprehensive Statute.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

CODE OF CIVIL PROCEDURE § 1238.2

Staff recommendation

Code of Civil Procedure Section 1238.2 (repealed)

Sec. . Section 1238.2 of the Code of Civil Procedure is repealed.

~~1238.2--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 fruit 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.~~

Comment. Section 1238.2, which applied only to the City and County of San Francisco, has been repealed as unnecessary. The section obviously was intended to facilitate a particular acquisition, and the retention of the section adds nothing to the general condemnation authority given counties by Section 25350.5 which has been added to the Government Code to provide: "The board of supervisors of any county may condemn any property necessary to carry out any of the powers or functions of the county."

THE DECLARED PUBLIC USES

Farmers' Free Markets

Section 1238.2 was added to the Code of Civil Procedure in
¹ 1947 to authorize the City and County of San Francisco to take
"contiguous property at one site" to establish a "farmers' free
² market." Although the section was obviously intended to
facilitate a particular acquisition, the Law Revision Commission
is advised that the section is still considered of some value by
San Francisco officials.

It does not appear that, as a general matter, cities and
counties are authorized by legislation to establish and provide
farmers' markets or other types of public markets. It seems
clear, however, that they could now be provided under charter
³ provisions. It might, therefore, be appropriate to codify
Section 1238.2 in the Government Code and to make it applicable
to any city and county that is authorized by charter provision
or general legislation to establish and provide public markets.

THE DECLARED PUBLIC USES
FARMERS' FREE MARKETS
FOOTNOTES

1. Cal. Stats. 1947, Ch. 744, § 1, p. 1799.
2. The entire section authorizes condemnation of:

Contiguous property at one site necessary for the establishment of a farmers' free market solely for the vending of fresh fruit 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.

The population density limitation restricts application of the section to the City and County of San Francisco.

3. Nichols expresses his view, based on decisions from other states, that private property may be taken to establish public markets even though the various parts or sections of the market are leased to and operated by individuals. See 2 Nichols, Eminent Domain § 7.518 (3rd rev. ed. 1963).