

8/6/70

## Memorandum 70-95

Subject: Study 36.25 - Condemnation (Byroads)

You will recall that the Commission has received several letters from Mr. Joseph K. Horton, Los Angeles attorney, objecting to any grant of the right of eminent domain to acquire property for byroads, whether the condemnation be by a public entity or by a private person.

His letters were taken into account when the Commission determined that a private person should not have a right to condemn a byroad but that the Street Opening Act of 1903 should be clarified to permit byroad construction pursuant to that act.

Mr. Horton has sent us another letter. He has just finished litigation in the case which apparently is the cause of his interest in this subject. He suggests that any provision for use of eminent domain to acquire byroads be limited to instances where it is equitable to permit the same and that language to this effect be included in the statute. Inclusion of the suggested limitation might be appropriate if the Commission were willing to give a private person a right to exercise the power of eminent domain to acquire a byroad; then the suggested provision would be somewhat like the determination on necessity that is required when nonpublic condemnors seek to acquire property. However, the Commission has not been willing to give private persons this power--and the staff does not suggest that the power be given to private persons--and, for this reason, it does not appear that any change is needed in the provisions previously approved by the Commission. See Tentative Statute--Sta. & Hwy. Code §§ 4008 (amended), 4008.1 (added), and 4120.1 (added). In

determining whether to make the improvement, the board of supervisors can take into account the matters suggested by Mr. Horton as well as many other matters.

A copy of the opinion in Lincoln Savings & Loan Assn. v. Riviera Estates Association, 7 Cal. App.3d 449 (1970), referred to by Mr. Horton, is attached.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

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EXHIBIT I

LAW OFFICES  
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July 15, 1970

California Law Revision Commission  
School of Law  
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Attention: John H. DeMouilly, Executive Secretary

Dear Mr. DeMouilly:

Re: Eminent Domain - Byroads - Easements

We refer to our previous correspondence and particularly our letters of April 22 and May 14, 1969. In these we emphasize that provisions should be made to prevent inequities as otherwise the public body might become the tool to inflict unwarranted and inequitable damage to one person for the private gain of another.

We have just finished litigation which is now set forth in the decision of the District Court of Appeal in Lincoln Savings & Loan Association vs The Riviera Estates Association May 8, 1970 7 C.A. 3d 449. We believe this illustrates a situation where the exercise of eminent domain to provide a byroad or easement would be completely inequitable.

We suggest that any provision for eminent domain be limited to instances where it is equitable to permit the same and that language to such effect be included. In this connection, we also again make reference to the case of Miller vs Johnston 270 A.C.A. 320 February 8, 1969.

Please have copies of this letter distributed to the members of the Commission. Thanking you, I am

Yours sincerely,

  
Joseph K. Horton  
of HORTON & FOOTE

JKH:rt