

#36.20(1)

12/8/70

Memorandum 70-122

Subject: Study 36.20(1) - Condemnation (The Declared Public Uses--Disposition of Section 1238--Cemeteries)

Summary

This memorandum presents subdivision 14 of Section 1238 of the Code of Civil Procedure, declaring cemeteries a public use, for repeal.

Analysis

Code of Civil Procedure Section 1238 states that the right of eminent domain may be exercised for the following public use;

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

This subdivision was added in 1905. It has possible application to the following condemnors, who are statutorily authorized to own and maintain cemeteries:

The State (Govt. Code §§ 14700-14703)

Cities (Govt. Code §§ 37681-37685; Health & Saf. Code §§ 8125-8134)

Counties (Health & Saf. Code §§ 8125-8134)

Public Cemetery Districts (Health & Saf. Code §§ 8890-9225)

Private Persons (Health & Saf. Code §§ 8250-8829)

Since the power to maintain cemeteries is specifically authorized elsewhere in the codes, subdivision 14 may be repealed, and the right to condemn continued explicitly in the specific authorizing sections.

The state. The state needs no additional authorizing authority, for it is granted general acquisition power under the Property Acquisition Law (Govt. Code §§ 15850-15866):

15853. The board shall select and acquire, in the name and on behalf of the State, suitable and adequate real property for such purposes as may be specified in the legislation making funds available for such acquisition. . . .

Cities. Two sections authorize cities to acquire property for cemeteries. The more general section is in the Government Code:

37681. The city legislative body may acquire and maintain cemeteries, situated outside or inside of the city.

This broad but ambiguous authority to "acquire" cemeteries is supplemented by a more narrow and specific provision in the Health and Safety Code:

8127. The inhabitants of any city may by subscription or otherwise purchase or receive by gift or donation, lands not exceeding five acres to be used as a cemetery

The Commission has previously determined that the cities should be able to condemn for any proper city function and has approved a general Government Code provision to that effect:

37350.5. The legislative body of any city may condemn any property necessary to carry out any of the powers or functions of the city.

This broad condemnation authority, combined with the specific authority to maintain and acquire cemeteries, is adequate to give cities the power to condemn for cemeteries. However, a sentence should be added to the Comment to the general condemnation authority (Section 37350.5) to indicate that the power to condemn is not to be restricted by implication in order to prevent the Health and Safety Code authorization of purchase and gift acquisitions from being construed as a restriction on the power of the city. The final paragraph of the Comment to Government Code Section 37350.5 should be expanded to read:

Specific limitations may, of course, be imposed on the exercise of the power of eminent domain under some circumstances. See Govt. Code § 37353(c)(no existing golf course may be acquired by eminent

domain). But a specific grant of authority to acquire property by means other than eminent domain should not be construed to limit the additional power of a city to acquire by eminent domain. E.g., Health & Saf. Code § 8127 (city may acquire cemetery property by purchase or gift) does not limit general city authority to condemn for cemeteries.

Counties. With counties, the problems involved in multiple authorization do not arise. There is only one statutory provision granting counties the power to acquire cemeteries, which appears in the Health and Safety Code:

8125. . . . [F]or unincorporated towns the supervisors of the county, may survey, lay out, and dedicate for burial purposes not exceeding five acres of public lands situated in or near the . . . town. . . .

This power, combined with the general condemnation authority granted to counties in the Commission's proposed Government Code Section 25350.5, are sufficient to give the county power to condemn for cemeteries:

The board of supervisors of any county may condemn any property necessary to carry out any of the powers or functions of the county.

Public cemetery districts. Under present law, public cemetery districts do not have condemnation authority independent of subdivision 14 of Section 1238. The Commission has already remedied this defect by approving the following amendment to Health & Safety Code Section 8961:

The district may maintain a cemetery or cemeteries, and for this purpose may take and hold title to property by grant, gift, devise, condemnation, lease, or any other method. Cemeteries shall be limited in use to burial in the ground of residents or taxpayers. . . .

Private cemeteries. With the repeal of Section 1238(14) and Civil Code Section 1001, private cemeteries will not have the power to condemn. Private cemeteries may acquire land by other means, however, as provided in the Health and Safety Code:

8500. Cemetery authorities may take by purchase, donation or devise, property consisting of lands

This specific authorization to acquire land does not need to be expanded to include eminent domain authority because the Commission has previously tentatively determined that private persons should not be given the power to condemn for cemetery purposes. Minutes, April 3 and 4, 1970.

Since the authority of all potential condemnors of cemeteries will not be adversely affected by the repeal of subdivision 14 of Section 1238, the staff recommends that it be approved for repeal. Exhibit I is the section as repealed, with Comment appended. If we discover any additional sections authorizing public entities to acquire property for cemetery purposes or to operate cemeteries, we will make an appropriate revision in the Comment to subdivision 14.

Respectfully submitted,

Nathaniel Sterling
Legal Assistant

EXHIBIT I

CODE OF CIVIL PROCEDURE § 1238

Staff recommendation December 1970

Subdivision 14

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

Comment. Subdivision 14 is unnecessary because all public entities that operate cemeteries have specific authority to condemn for cemetery purposes. The state's authority appears in Government Code Section 15853. The cities' authority appears in Government Code Section 37350.5. See also Health and Safety Code Section 37681. The counties' authority appears in Government Code Section 25350.5. See also Health and Safety Code Section 8125. The authority of public cemetery districts is in Health and Safety Code Section 8961. Private cemeteries are not authorized to condemn property. See Health and Safety Code Section 8500.