

#36.20(1)

5/25/71

Memorandum 71-39

Study 36.20(1) - Condemnation--The Right to Take (Legislatively Declared Public Uses: Sewers)

Subdivision 8 of Section 1238 of the Code of Civil Procedure declares the following to be a public use:

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.

The authority of various public entities, public utilities, and certain other condemnors to condemn for sewer systems is adequately provided by other statutes; subdivision 8 is not needed for this purpose. Subdivision 8, operating in connection with Section 1001 of the Civil Code, also gives private individuals a right to condemn property for a sewer easement. However, the Commission has determined that private persons should not have the right to condemn for this purpose, but instead should be able to request a local public entity to make the connection on their behalf.

Attached are provisions drafted to carry out these Commission decisions. One provision (Exhibit I--pink) repeals subdivision 8 of Section 1238; the other (Exhibit II--yellow) proposes a new section--Health and Safety Code Section 4967--which gives private persons the right to request sewer connections.

Respectfully submitted,

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EXHIBIT I

CODE OF CIVIL PROCEDURE § 1238

Staff recommendation June 1971

Subdivision 8

~~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-sys-
tem-in-any-such-city,-city-and-county,-town-or-village.~~

Comment. Insofar as subdivision 8 authorizes condemnation by public entities, it is unnecessary. Cities have general condemnation authority for connection to sewer systems. E.g., Govt. Code §§ 37350.5, 38900, 40404. See also Govt. Code §§ 39040, 55003, 54340; Health & Saf. Code §§ 5001, 5008. Counties also have general condemnation authority for connection to sewer systems. E.g., Govt. Code §§ 25350.5, 25825. See also Health & Saf. Code §§ 4740, 4760 (county sanitation districts). The authority of an incorporated village or town to condemn for sewer purposes is the same as that of a city. See Govt. Code § 20 ("city" includes "incorporated town").

Unincorporated towns, villages, and small settlements have no authority to condemn, but there are a number of methods by which sewer service can be provided in these areas. **For example, the county may condemn for a sewer**

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system on their behalf. Govt. Code § 25825. The county may form a county sanitation district on their behalf. Health & Saf. Code § 4711. A city may form an improvement district on their behalf. Health & Saf. Code § 4614.4. A sewer maintenance district may be formed. Health & Saf. Code § 4870. In addition, 25 persons in any county may form a sanitary district with the power to condemn for sewage. Health & Saf. Code § 6514. A municipal utility district may be formed. Pub. Util. Code §§ 12703, 12771.

The authority of the state and of any college or university to condemn for sewage from its buildings is continued elsewhere. The state may condemn for any purpose specified in legislation making funds available for a project. Govt. Code § 15853. The University of California, the state college system, and nonprofit higher education institutions may condemn property necessary to carry out any of their functions. Educ. Code §§ 23151, 23619, 30051. See also the Comment to subdivision 2 supra.

Under prior law, private persons were authorized to condemn for the connection of buildings with city or county sewer mains. See Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955). This authority is not continued. Instead, a private person may request the public entity that operates the sewer system in his vicinity to make the connection for him and to condemn an easement or other property if needed for that purpose. See Health & Saf. Code § 4967. A sewer system corporation, as a public utility, is authorized to condemn property. See Pub. Util. Code § 624.

EXHIBIT II

HEALTH & SAFETY CODE § 4967

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SEWER CONSTRUCTION

Health and Safety Code Section 4967 (added)

Sec. . Section 4967 is added to the Health and Safety Code, to read:

4967. The owner of property that may be benefited by the acquisition, construction, extension, or operation of the works referred to in this chapter may file with the district a request that a particular work be undertaken. The request may, but need not, include the descriptions and estimates referred to in Section 4966, and shall not be denied without a public hearing.

Comment. Section 4967 is added to the Health and Safety Code to expressly authorize initiation of sewerage construction and extension proposals by individual property owners. The request may be made of any city, county, city and county, or any municipal or public corporation or district which is authorized to acquire, construct, own, or operate a sewer system. See Section 4951. In reviewing a property owner's request, the district should consider both the necessity for the requested action, and its relative hardship on any party whose land is sought to be used compared with the benefit to the requester. For a comparable provision relating to access road construction, see Streets and Highways Code Section 4120.1.

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Under prior law, private individuals under certain circumstances were authorized to condemn property for a sewer easement. Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955). Private individuals no longer have a right to condemn property for this purpose. See the Comment to subdivision 8 of former Code of Civil Procedure Section 1238. Instead, Section 4967 provides a procedure whereby the property owner can initiate proceedings to have the public entity acquire a sewer easement or any other necessary property. The public entity is authorized to acquire the necessary property by gift, purchase, condemnation, or otherwise. See Sections 5000, 5001.