

#36.24

7/8/71

Memorandum 71-50

Subject: Study 36.24 - Condemnation (The Right to Take--"More Necessary"  
Public Use)

At the September 1970 meeting, the Commission tentatively approved Chapter 8 (Sections 450 through 455) of the Comprehensive Statute relating to the right to take for a "more necessary" public use. This chapter replaces paragraph (3) of both Section 1240 and 1241 of the Code of Civil Procedure. There remains in the Code of Civil Procedure three additional sections relating to the "more necessary" public use issue which should be disposed of in our comprehensive revision of the law of eminent domain. These are Sections 1241.7 (Exhibit I), 1241.9 (Exhibit II), and 1245.4 (footnote 1, Exhibit IV). This memorandum deals with the disposition of these three sections.

Sections 1241.7 and 1241.9 were both recently enacted for the apparent purpose of protecting parks, preserves, open space, and historical sites from condemnation for public use. However, special procedural limitations are provided where the use for which the property is sought is a state highway. The staff recommends that the substance of both of these sections be retained but that the sections themselves be divided and their provisions be transferred to more appropriate places in the Eminent Domain Code and the Streets and Highways Code. Exhibit III indicates how we would make this disposition.

Section 1245.4 is a special section apparently added to the Code of Civil Procedure to facilitate a taking by the City of Marysville of the rights and interests in property known as "Cortez Square." See Exhibit IV. The section has a "more necessary" use aspect insofar as it authorizes a taking

by a city of property apparently already devoted to a public use in which other public entities may have some ownership interest. As enacted, however, the section is very narrowly drawn and seems to be the sort of vestigial remnant that can safely be repealed. In making this recommendation, however, the staff suggests that the more general matter of joinder of the state and other public entities with potential interests in property sought to be taken by eminent domain be preserved and dealt with in connection with our work on the procedural aspects of the comprehensive eminent domain study.

Respectfully submitted,

Jack I. Horton  
Assistant Executive Secretary

EXHIBIT I

CODE OF CIVIL PROCEDURE

§ 1241.7

§ 1241.7 Park property; presumption as to best public use; declaratory relief against highway use

(a) Except as provided in subdivision (b), notwithstanding any other provision of law to the contrary, the fact that property is appropriated for public use as a state, regional, county, or city park or recreation area, or wildlife or waterfowl management area as presently established by the Department of Fish and Game pursuant to Section 1525 of the Fish and Game Code, or historic site included in the National Register of Historic Places or state-registered landmarks, or as an ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code, establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

(b) When property appropriated for a public use as a state, regional, county, or city park or recreation area, or wildlife or waterfowl management area as presently established by the Department of Fish and Game pursuant to Section 1525 of the Fish and Game Code, or historic site included in the National Register of Historic Places or state-registered landmarks, or as an ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code, is sought to be acquired for state highway purposes, and such park or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve was dedicated to or established for park or recreational purposes, or as a wildlife or waterfowl management area, or as a historic site included in the National Register of Historic Places or state-registered landmarks, or as an ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code, prior to the initiation of highway route location studies, an action for declaratory relief may be brought only by the public agency owning such park or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve in the superior court to determine the question of which public use is the best and most necessary public use for such property. Such action for declaratory relief shall be filed and served within 120 days after written notice to the public agency owning such park or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve by the California Highway Commission that a proposed route or an adopted route includes park land or recreational area, or a wildlife or waterfowl management area, or \* \* \* an historic site, or an ecological reserve owned by that agency. In such declaratory relief action, the resolution of the commission shall not be conclusive evidence of the matters set forth in Section 103 of the Streets and Highways Code. Such action for declaratory relief shall have preference over all other civil actions in the matter of setting the same for hearing or trial to the end that any such action shall be quickly heard and determined. If an action for declaratory relief is not filed and served within such 120-day period, the right to bring such action is waived and the provisions of subdivision (a) shall not apply. When a declaratory relief action, with respect to such property being sought for highway purposes, may not be brought pursuant to this subdivision, the provisions of subdivision (a) of this section shall not apply.

(Added by Stats.1968, c. 1328, p. 2534, § 1. Amended by Stats.1969, c. 357, p. 872, § 1; Stats.1970, c. 854, p. —, § 1.)

EXHIBIT II

**§ 1241.9 CODE OF CIVIL PROCEDURE**

**§ 1241.9 Preservation of certain property in its natural condition; presumption as to best public use; declaratory relief against highway use**

(a) Except as provided in subdivision (b), notwithstanding any other provision of law to the contrary, the fact that property is owned by a nonprofit organization contributions to which are deductible for state and federal income tax purposes under the law of this state and of the United States and having the primary purpose of preserving areas in their natural condition, and that such property is open to the public subject to reasonable restrictions and is appropriate, and used exclusively, for the preservation of native plants, or native animals, including, but not limited to, mammals, birds, and marine life, or biotic communities, or geological or geographical formations of scientific or educational interest; and further that such property is irrevocably dedicated to such uses so that upon liquidation, dissolution, or abandonment of or by the owner, such property will be distributed only to a fund, foundation, or corporation whose property is likewise irrevocably dedicated to such uses, or to a governmental agency holding land for such uses; establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

(b) When property described in subdivision (a) is sought to be acquired for state highway purposes, and such property was exclusively devoted to a use or uses described in subdivision (a) prior to the initiation of highway route location studies, an action for declaratory relief may be brought only by such nonprofit organization owning such property in the superior court to determine the question of which public use is the best and most necessary public use for such property. Such action for declaratory relief shall be filed and served within 120 days after written notice to the nonprofit organization owning such property by the California Highway Commission that a proposed route or an adopted route includes such property owned by that organization; provided that such written notice need only be given to nonprofit organizations that are on file with the Registrar of Charitable Trusts of this state. In such declaratory relief action, the resolution of the commission shall not be conclusive evidence of the matters set forth in Section 103 of the Streets and Highways Code. Such action for declaratory relief shall have preference over all other civil actions in the matter of setting the action for hearing or trial to the end that any such action shall be quickly heard and determined. If an action for declaratory relief is not filed and served within such 120-day period, the right to bring such action is waived and the provisions of subdivision (a) shall not apply. When a declaratory relief action, with respect to such property being sought for highway purposes, may not be brought pursuant to this subdivision, the provisions of subdivision (a) of this section shall not apply.

(Added by Stats.1970, c. 854, p. —, § 2.)

EXHIBIT III

CODE OF CIVIL PROCEDURE § 1241.7

Staff recommendation September 1971

Code of Civil Procedure Section 1241.7 (repealed)

1241.7.--(a)--Except as provided in subdivision (b), notwithstanding any other provision of law to the contrary, the fact that property is appropriated for public use as a state, regional, county, or city park or recreation area, or wildlife or waterfowl management area as presently established by the Department of Fish and Game pursuant to Section 1525 of the Fish and Game Code, or historic site included in the National Register of Historic Places or state-registered landmarks, or as an ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code, establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use.--The presumption established by this section is a presumption affecting the burden of proof.

(b)--When property appropriated for a public use as a state, regional, county, or city park or recreation area, or wildlife or waterfowl management area as presently established by the Department of Fish and Game pursuant to Section 1525 of the Fish and Game Code, or historic site included in the National Register of Historic Places or state-registered landmarks, or as an ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code, is sought to be acquired for state highway purposes, and such park or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve was dedicated to or established for

CODE OF CIVIL PROCEDURE § 1241.7

Staff recommendation September 1971

for park or recreational purposes, or as a wildlife or waterfowl management area, or as a historic site included in the National Register of Historic Places or state-registered landmarks, or as an ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code, prior to the initiation of highway route location studies, an action for declaratory relief may be brought only by the public agency owning such park or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve in the superior court to determine the question of which public use is the best and most necessary public use for such property. -- Such action for declaratory relief shall be filed and served within 120 days after written notice to the public agency owning such park or ecological reserve by the California Highway Commission that a proposed route or an adopted route includes park land or recreational area, or a wildlife or waterfowl management area, or an historic site, or an ecological reserve owned by that agency. -- In such declaratory relief action, the resolution of the commission shall not be conclusive evidence of the matters set forth in Section 103 of the Streets and Highways Code. -- Such action for declaratory relief shall have preference over all other civil actions in the matter of setting the same for hearing or trial to the end that any such action shall be quickly heard and determined. -- If an action for declaratory relief is not filed and served within such 120-day period, the right to bring such action is waived and the provisions of subdivision (a) shall not apply. -- When a declaratory

CODE OF CIVIL PROCEDURE § 1241.7

Staff recommendation September 1971

~~relief-action,-with-respect-to-such-property-being-sought-for-highway  
purposes,-may-not-be-brought-pursuant-to-this-subdivision,-the-pro-  
visions-of-subdivision-(a)-of-this-section-shall-not-apply.~~

Comment. Section 1241.7 is superseded by Section 454.5 of the Eminent Domain Code and Section 103.5 of the Streets and Highways Code.

CODE OF CIVIL PROCEDURE § 1241.9

Staff recommendation September 1971

Code of Civil Procedure Section 1241.9 (repealed)

1241.9.--(a)--Except as provided in subdivision (b), notwithstanding any other provision of law to the contrary, the fact that property is owned by a nonprofit organization contributions to which are deductible for state and federal income tax purposes under the law of this state and of the United States and having the primary purpose of preserving areas in their natural condition, and that such property is open to the public subject to reasonable restrictions and is appropriate, and used exclusively, for the preservation of native plants, or native animals, including, but not limited to, mammals, birds, and marine life, or biotic communities, or geological or geographical formations of scientific or educational interest; and further that such property is irrevocably dedicated to such uses so that upon liquidation, dissolution, or abandonment of or by the owner, such property will be distributed only to a fund, foundation, or corporation whose property is likewise irrevocably dedicated to such uses, or to a governmental agency holding land for such uses; establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use.--The presumption established by this section is a presumption affecting the burden of proof.

(b)--When property described in subdivision (a) is sought to be acquired for state highway purposes, and such property was exclusively devoted to a use or uses described in subdivision (a) prior to the initiation of highway route location studies, an action for declaratory relief may be brought only by such nonprofit organization owning such property



COMPREHENSIVE STATUTE § 1241.9

Staff recommendation September 1971

in-the-superior-court-to-determine-the-question-of-which-public-use-is  
the-best-and-most-necessary-public-use-for-such-property.--Such-action  
for-declaratory-relief-shall-be-filed-and-served-within-120-days-after  
written-notice-to-the-nonprofit-organization-owning-such-property-by  
the-California-Highway-Commission-that-a-proposed-route-or-an-adopted  
route-includes-such-property-owned-by-that-organization; provided-that  
such-written-notice-need-only-be-given-to-nonprofit-organizations-that  
are-on-file-with-the-Registrar-of-Charitable-Trusts-of-this-state.--In  
such-declaratory-relief-action,-the-resolution-of-the-commission-shall  
not-be-conclusive-evidence-of-the-matters-set-forth-in-Section-103-of  
the-Streets-and-Highways-Code.--Such-action-for-declaratory-relief-shall  
have-preference-over-all-other-civil-actions-in-the-matter-of-setting  
the-action-for-hearing-or-trial-to-the-end-that-any-such-action-shall-be  
quickly-heard-and-determined.--If-an-action-for-declaratory-relief-is  
not-filed-and-served-within-such-120-day-period,-the-right-to-bring  
such-action-is-waived-and-the-provisions-of-subdivision-(a)-shall-not  
apply.--When-a-declaratory-relief-action,-with-respect-to-such-property  
being-sought-for-highway-purposes,-may-not-be-brought-pursuant-to-this  
subdivision,-the-provisions-of-subdivision-(a)-of-this-section-shall-not  
apply.

Comment. Section 1241.9 is superseded by Section 453.5 of the Eminent  
Domain Code and Section 103.5 of the Streets and Highways Code.

§ 453.5. Preservation of certain property in its natural condition; presumption as to best public use

453.5. Except as provided in Section 103.5 of the Streets and Highways Code, notwithstanding any other provision of law, the fact that property is owned by a nonprofit organization contributions to which are deductible for state and federal income tax purposes under the laws of this state and of the United States and having the primary purpose of preserving areas in their natural condition, and that such property is open to the public subject to reasonable restrictions and is appropriate, and used exclusively for the preservation of native plants, or native animals, including but not limited to, mammals, birds, and marine life, or biotic communities, or geological or geographical formations of scientific or educational interest; and further that such property is irrevocably dedicated to such uses so that upon liquidation, dissolution, or abandonment of or by the owner, such property will be distributed only to a fund, foundation, or corporation whose property is likewise irrevocably dedicated to such uses, or to a governmental agency holding land for such uses, establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

Comment. Section 453.5 continues without substantive change the provisions of subdivision (a) of former Section 1241.9 of the Code of Civil Procedure. For special procedural limitations where the property described is sought to be taken for state highway purposes, see Section 103.5 of the Streets and Highways Code.

§ 454.5. Park property; presumption as to best public use

454.5. Except as provided in Section 103.5 of the Streets and Highways Code, notwithstanding any other provision of law, the fact that property is appropriated for public use as a state, regional, county, or city park or recreation area, or historic site included in the National Register of Historic Places or state-registered landmarks, or state wildlife or waterfowl management area, or state ecological preserve, establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

Comment. Section 454.5 continues without substantive change the provisions of subdivision (a) of former Section 1241.7 of the Code of Civil Procedure. The term "wildlife or waterfowl management area" refers to an area as provided for in Article 2 (commencing with Section 1525) of Chapter 5 of Division 2 of the Fish and Game Code. The term "ecological preserve" refers to an area as provided for in Article 4 (commencing with Section 1580) of that same chapter of the Fish and Game Code. For special procedural limitations where the property described is sought to be taken for state highway purposes, see Section 103.5 of the Streets and Highways Code.

STREETS & HIGHWAYS CODE § 103.5

Staff recommendation September 1971

Streets & Highways Code § 103.5 (amended)

Sec. . Section 103.5 of the Streets and Highways Code is amended to read:

103.5. (a) The real property which the department may acquire by eminent domain, or otherwise, includes any property dedicated to park purposes, however it may have been dedicated, when the commission has determined by ~~such~~ resolution that such property is necessary for state highway purposes.

(b) When property described in Section 453.5 or Section 454.5 of the Eminent Domain Code is sought to be acquired for state highway purposes, and such property was dedicated or devoted to the uses described in those sections, prior to the initiation of highway route location studies, an action for declaratory relief may be brought only by the public agency or nonprofit organization owning such property in the superior court to determine the question of which public use is the best and most necessary public use for such property. Such action for declaratory relief shall be filed and served within 120 days after written notice to the public agency or nonprofit organization owning such property by the commission that a proposed route or an adopted route includes such property; provided that such written notice need only be given to nonprofit organizations that are on file with the Registrar of Charitable Trusts of this state. In such declaratory relief action, the resolution of the commission shall not be conclusive evidence of the matters set forth in Section 103. Such action for

STREETS & HIGHWAYS CODE § 103.5

Staff recommendation September 1971

declaratory relief shall have preference over all other civil actions in the matter of setting the action for hearing or trial to the end that any such action shall be quickly heard and determined. If an action for declaratory relief is not filed and served within such 120-day period, the right to bring such action is waived and the provisions of Sections 453.5 and 454.5 of the Eminent Domain Code shall not apply. When a declaratory relief action, with respect to such property being sought for highway purposes, may not be brought pursuant to this section, the provisions of Sections 453.5 and 454.5 of the Eminent Domain Code do not apply.

Comment. Subdivision (b) of Section 103.5 continues without substantive change the provisions of subdivision (b) of former Sections 1241.7 and 1241.9 of the Code of Civil Procedure. These provisions set forth significant procedural limitations on the rights granted under Sections 453.5 and 454.5 of the Eminent Domain Code.

EXHIBIT IV

CONDEMNATION OF LAND "SHOWN AS A SQUARE OR  
OTHER OPEN SPACE"

Section 1245.4 of the Code of Civil Procedure authorizes a municipal corporation seeking to condemn land or an interest in land which is shown upon a map, recorded for more than 50 years, as a "square" or other open space without other indication of the uses or purposes for the land and for which no deed, offer of dedication, or other similar instrument has been found in the office of the county recorder, to join the county in which the land is located and the State of California in the condemnation proceedings to determine the title to the land and the purposes to which the land may be put.<sup>1</sup>

---

1. Section 1245.4 reads as follows:

Whenever in any proceeding brought under this title in which any municipal corporation is the plaintiff it is sought to condemn to public use any land or any remainder, reversion, easement, or other estate therein, which land is shown upon any filed or recorded map as a "square" or other open space without any further words specifying the intentions of the owners thereof filing such map with respect thereto or the uses or purposes for which the same may have been abandoned or dedicated, and no deed, offer of dedication or other instrument appears of record in the office of the county recorder showing or indicating the uses or purposes for which the same may have been abandoned or dedicated and such map has been on file or on record for more than 50 years, the plaintiff may in said proceeding seek a judgment against the county in which the land is located and the inhabitants thereof and against the State of California and the people thereof, determining its title thereto, the uses or trusts, if any, under which it holds the same, and the purposes to which it may put the same. Authority is hereby granted in any such proceeding to sue the State of California and in any such proceeding service of process shall be made upon the Attorney General and the Director of General Services. In any such action the Attorney General shall represent the State of California in its sovereign and in its proprietary capacity and also the people of the State of California as the beneficiaries of any trust under which said land is, or is alleged to be, held. Any judgment rendered in such proceeding shall be conclusive upon the State of California and the people thereof and upon the county in which said land is located and the inhabitants thereof, if said county is made a party to said proceedings.

Sections 50530-50533 of the Government Code authorize a city or county<sup>2</sup> to erect a public building on a public square after acquiring "by purchase, condemnation, or otherwise all outstanding titles, reversions, easements, or other interest in or to the public square."<sup>3</sup> Thus, under these sections, after a city in which a square is located has acquired all outstanding interests in the square, the city may grant or lease the property to the county for erection of a county courthouse or other public building.

The act enacting Sections 50530-50533<sup>4</sup> was filed in the Office of the Secretary of State on the same day as the act which enacted Section 1245.4.<sup>5</sup> Subsequently Sections 50530 through 50533 received judicial mention in City of Marysville v. Boyd.<sup>6</sup> Here, the Court of Appeal issued a writ of mandate compelling the city clerk to execute a deed of "Cortez Square" to the county for the purpose of erecting a county courthouse. The city, having acquired by condemnation all rights and interests in Cortez Square, the court held it had a right to convey the property to the county. In passing, Sections

---

2. See Govt. Code § 50001 (defining "local agency" to mean county, city, or city and county).

3. See Govt. Code § 50531.

4. Cal. Stats. 1949, Ch. 1146, p. 2046. Another act filed with the Secretary of State on the same day provided a procedure whereby unknown persons could be named as defendants in an eminent domain proceeding and a judgment conclusive on all persons claiming any interest in the property condemned could be obtained. Cal. Stats. 1949, Ch. 1145, p. 2044 (enacting Code Civ. Proc. § 1245.3).

5. Cal. Stats. 1949, Ch. 1144, p. 2043.

6. 181 Cal. App.2d 755, 5 Cal. Rptr. 598 (1960).

50530-50533 were held inapplicable, even though the city had complied with those provisions, because the city was a freehold charter city and could dispose of the property subject only to such limitations as were contained in its charter (the charter contained no limitations). This legislative and judicial history compel the conclusion that Section 1245.4 and Sections 50530-50533 were enacted to facilitate this plan for the City of Marysville to condemn Cortez Square and convey it to the county of Yuba for the purpose of erecting a county courthouse. In view of the conditions which must be met in order to make Section 1245.4 applicable in any other case, it is highly improbable that this section will ever be used or useful again, and the entire piece of legislation serves as a classic example of special legislation that should be excised from the general codes.<sup>7</sup>

---

7. While Section 1245.4 is too narrowly drawn to offer any more than the remotest chance of future applicability, the apparent purpose behind its enactment suggests that the ability to join all persons or entities, private or public, with a possible interest in property sought to be condemned should be made clear in a comprehensive revision of the procedural aspects of condemnation law.