

Memorandum 71-67

Subject: Study 36 - Supplement to Comprehensive Statute

Attached is a supplement to the Comprehensive Statute. You should file the attached supplement with your Comprehensive Statute so you will have it available for the October meeting and subsequent meetings. We will reproduce the entire Comprehensive Statute at some future time to integrate the attached provisions with the other provisions of the Comprehensive Statute.

The provisions contained in the attached supplement reflect prior Commission action. Technical changes have been made. Absent a discussion below, the approved provision appears exactly as it was approved by the Commission or contains minor editorial revisions or conforming revisions to reflect renumbering of sections.

COMPREHENSIVE STATUTE (pink pages)

Section 113 (pages 1-2)

This section, previously approved, has been renumbered to place the definition in the general definition portion of the Eminent Domain Code.

Sections 450-456 (pages 6-17)

These sections have been renumbered and incorporate revisions approved at the September meeting.

Sections 470-471 (pages 18-23)

These sections have been revised to incorporate revisions made at the September meeting. The sections and Comments thereto should be checked.

Suggested Revision

To further clarify that the provisions authorizing condemnation for a more necessary public use and the provisions authorizing condemnation for a compatible public use are alternative (nonexclusive) methods of acquiring property already appropriated to a public use, the staff suggests that Chapter 8 be reorganized as follows:

CHAPTER 8. CONDEMNATION OF PROPERTY

APPROPRIATED TO A PUBLIC USE

Article 1. Condemnation of Property Appropriated to a Public Use

§ 440. Purposes for which property appropriated to a public use may be condemned

440. Except as otherwise provided by statute, property appropriated to a public use may be taken only for:

- (1) A more necessary public use under Article 2 (commencing with Section 450) of this chapter; or
- (2) A compatible public use under Article 3 (commencing with Section 470) of this chapter.

[Comment will indicate that Articles 2 and 3 provide alternative (non-exclusive) authorizations to condemn.]

Article 2. Condemnation for More Necessary Public Use

[Here insert provisions of Chapter 8 (Sections 450-456).]

Article 3. Condemnation for Compatible Public Use

[Here insert provisions of Chapter 9 (Sections 470-471).]

If this suggestion is approved, necessary conforming changes will be made in the previously approved sections.

AMENDMENTS, REPEALS, AND ADDITIONS--EXISTING CODES (white pages)

Code of Civil Procedure Section 1238

The repeal of this section and the Comment thereto was approved at the September meeting, subject to revision of the Comment. Significant revisions of the Comment--made as directed by the Commission at the September meeting--are as follows:

(1) The discussion in the preliminary portion of the Comment dealing with the right and constitutionality of condemnation by private persons has been expanded (pages 9-10 of Comment).

(2) The discussion of the right of publicly owned utilities to condemn private utility property has been expanded (see page 12 of Comment).

(3) The Comment to subdivision 4 has been revised to indicate the holding in Los Angeles v. Koyer (see page 21 of Comment).

(4) A statement has been added to the Comment to subdivision 18 to indicate that the 300-foot limitation on condemnation has not been continued (page 45 of Comment).

Code of Civil Procedure Section 1239.4 (page 55)

The last sentence has been added to the Comment as directed by the Commission at the September meeting.

Code of Civil Procedure Section 1245.4 (pages 69-70)

The repeal of this section was approved at the September meeting. The Comment is new.

Government Code Section 6953 (pages 83-84)

This section and the Comment thereto are revised in accordance with decisions made at the September meeting.

Government Code Section 6956 (pages 86-88)

This section is revised in accordance with decisions made at the September meeting. The section should be carefully checked.

Health and Safety Code Section 1427 (pages 92-96)

This section and the Comment thereto are revised in accordance with decisions made at the September meeting. The section and Comment should be carefully checked.

Public Utilities Code Section 21652 (pages 107-109)

This section and the Comment thereto are revised in accordance with the decisions made at the September meeting. The section should be carefully checked.

The staff has researched the problem whether the language relating to purchase, gift, devise, and the like should be deleted from this section and has determined that--to be safe--the language should be retained. Otherwise, condemnation authority under Section 21652 would be unclear in some cases.

Respectfully submitted,

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SUPPLEMENT TO COMPREHENSIVE EMINENT DOMAIN STATUTE

Note. This Supplement contains provisions reflecting Commission action after the Comprehensive Eminent Domain Statute was last revised. Some of the provisions in this Supplement are not contained in the last revision of the Comprehensive Eminent Domain Statute; other provisions of this Supplement supersede provisions contained in the last revision of the Comprehensive Eminent Domain Statute.

This Supplement should be checked in any case where a reference is made to the Comprehensive Eminent Domain Statute.

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AMENDMENTS, REPEALS, ADDITIONS--EXISTING CODES (White Pages)

Code of Civil Procedure

- § 1238 (repealed)
- § 1238.4 (repealed)
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- § 1264.9 (repealed)

Government Code

- § 6950 (amended)
- § 6952 (amended)
- § 6953 (amended)
- § 6955 (added)

Government Code (continued)

§ 6956 (added)

§ 50485.13 (repealed)

Health and Safety Code

§ 438.4 (amended)

§ 1427 (added)

§ 4267 (added)

Public Resources Code

§ 7994 (added)

Public Utilities Code

§ 7526 (amended)

§ 21633 (amended)

§ 21634 (repealed)

§ 21635 (repealed)

§ 21652 (added)

§ 21653 (added)

Streets and Highways Code

§ 103.5 (amended)

Water Code

§ 22425 (amended)

COMPREHENSIVE STATUTE § 113

Tentatively approved July 1970
Renumbered October 1971

§ 113. "Property appropriated to a public use"

113. "Property appropriated to a public use" means property either already in use for a public purpose or set aside for a specific public purpose with the intention of using it for such purpose within a reasonable time.

Comment. Section 113 defines "property appropriated to a public use" in accordance with prior California decisions. See East Bay Mun. Util. Dist. v. Lodi, 120 Cal. App. 740, 750-758, 8 P.2d 532, (1932). The general concept of "public use" is discussed in connection with Section 300. See Section 300 and Comment thereto. It should be noted that appropriation to a public use does not require actual physical use, but may be satisfied by formal dedication or facts indicating a reasonable prospect of use within a reasonable time. See e.g., Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959)(property formally dedicated but not yet used by corporation for cemetery purposes); City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916)(property assembled by electric railway for planned subway).

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Moreover, property may be appropriated to a public use even though it is owned by a private individual or corporation. E.g., Woodland School Dist. v. Woodland Cemetery Ass'n, supra; City of Los Angeles v. Los Angeles Pac. Co., supra. Conversely, property may be owned by a public entity but not be so appropriated, and, hence, be subject to condemnation without a showing that it will be appropriated to a "more necessary" use. Deseret Water, Oil & Irr. Co. v. State, 167 Cal. 147, 138 P. 981 (1914), rev'd on other grounds, 243 U.S. 415, and 176 Cal. 745, 171 P. 287 (1917).

COMPREHENSIVE STATUTE § 304

Tentatively approved July 1971

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The Right to Take

§ 304. Right to acquire property for related or protective purposes

304. (a) Except to the extent limited by statute, any person authorized to acquire property for a particular purpose by eminent domain may exercise the power of eminent domain to acquire property necessary to carry out and make effective the principal purpose involved, including but not limited to property to be used for the protection or preservation of the attractiveness, safety, and usefulness of the public work or improvement.

(b) Subject to any applicable procedures governing the disposition of property, a person that has acquired property under subdivision (a) may sell, lease, exchange, or otherwise dispose of such property or an interest therein subject to such reservations or restrictions as are necessary to protect or preserve the attractiveness, safety, and usefulness of the public work or improvement.

Comment. Subdivision (a) of Section 304 codifies the rule that, absent any express limitation imposed by the Legislature, the power to condemn property for a particular purpose includes the power to condemn property necessary to carry out and make effective the principal purpose involved. See City of Santa Barbara v. Cloer, 216 Cal. App.2d 127, 30 Cal. Rptr. 734 (1963). See also University of So. Cal. v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934). Cf. Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962).

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Section 304 permits a condemnor to protect the attractiveness, safety, or usefulness of a public work or improvement from deleterious conditions or uses by condemning a fee or any lesser interest necessary for protective purposes. See Section 101 (defining "property" to include the fee or any lesser right or interest). A taking for this purpose is a "public use." E.g., People v. Lagiss, 223 Cal. App.2d 23, 35 Cal. Rptr. 554 (1963); Flood Control & Water Conservation Dist. v. Hughes, supra. See also United States v. Bowman, 367 F.2d 768, 770 (1966). See Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L.J. 571, 589-591 (1969).

Section 304 is an extremely flexible grant of condemnation authority. Where it is necessary to protect a public work or improvement from detrimental uses in adjoining property, the condemnor has the option either (1) to acquire an easement-like interest in the adjoining property which will preclude the detrimental use or (2) to acquire the fee or some other interest and then lease, sell, exchange, or otherwise dispose of it to some other public entity or a private person subject to carefully specified permitted uses.

If a condemnor has the power of eminent domain to condemn property for a particular improvement, Section 304 is sufficient authority to condemn such additional property as is necessary to preserve or protect the attractiveness, safety, and usefulness of the improvement. No additional statutory authority is required, and some of the former specific grants of protective condemnation authority have been repealed as unnecessary. E.g., former Code of Civil Procedure Section 1238(18) (trees along highways). Nevertheless, not all such

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specific authorizations have been repealed. E.g., Streets and Highways Code Section 104(f)(trees along highways), (g)(highway drainage), (h)(maintenance of unobstructed view along highway). Except to the extent that these specific authorizations contain restrictions on protective condemnation for particular types of projects (see Govt. Code §§ 7000-7001), they do not limit the general protective condemnation authority granted by Section 304.

In the case of a public entity, the resolution of necessity is conclusive on the necessity of taking the property or interest therein for protective purposes. See Section . However, the resolution does not preclude the condemnee from raising the question whether the condemnor actually intends to use the property for protective purposes. If the property is claimed to be needed for protective purposes but not actually going to be used for that purpose, the taking can be defeated on that ground. See Section and Comment thereto. See People v. Lagiss, 223 Cal. App.2d 23, 33-44, 35 Cal. Rptr. 554, (1963).

Section 304 is derived from and supersedes former Government Code Sections 190-196, Streets and Highways Code Section 104.3, and Water Code Section 256.

COMPREHENSIVE STATUTE § 450

Tentatively approved July 1970
Renumbered October 1971

Division 4 - The Right to Take

CHAPTER 8. MORE NECESSARY PUBLIC USE

§ 450. Property appropriated to a public use may be taken for more necessary use

450. Except as provided in Section 470, property appropriated to a public use may be taken by eminent domain only for a more necessary public use.

Comment. Section 450 retains the general rule formerly found in Code of Civil Procedure Section 1240(3) and repeated elsewhere. This rule prevails over the general authority granted elsewhere to a number of condemnors to condemn property "whether the property is already devoted to the same use or otherwise." See, e.g., Harb. & Nav. Code § 6296. The rule is given much greater specificity in the succeeding sections in this chapter as well as numerous provisions in other codes. See, e.g., Health & Saf. Code § 8560 (no railroad, street, or utility line may be laid across dedicated cemetery without consent of cemetery authority). For the definition of "property appropriated to a public use," see Section 113.

The introductory clause of Section 450 recognizes that takings of property appropriated to a public use for a use that will be compatible with the existing use are permissible notwithstanding that the taking is not for a "more

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necessary public use." The authority granted by Sections 450 and 470 is independent; the fact that two uses might be compatible under Section 470 does not preclude acquisition under the "more necessary" authority of Section 450. See Section 470 and Comment thereto.

COMPREHENSIVE STATUTE § 451

Tentatively approved July 1970
Renumbered October 1971

§ 451. Use by state more necessary than other uses

451. Except as otherwise provided by statute:

(a) Where property has been appropriated to a public use by any person other than the state, the use thereof by the state for the same use or any other public use is a more necessary use than the use to which such property has already been appropriated.

(b) Where property has been appropriated to a public use by the state, the use thereof by the state is a more necessary use than any use to which such property might be put by any other person.

Comment. Section 451 broadens somewhat the general rule stated under former Code of Civil Procedure Section 1240 and Government Code Section 15856 (Property Acquisition Law). Section 1240 formerly provided a state priority over private ownership and Section 15856 provides an absolute priority for all acquisitions under that statute. Section 451 embraces state acquisitions under other authority, most notably by the Department of Water Resources and the Department of Public Works. The exception clause recognizes that specific exemptions or qualifications may be stated elsewhere. E.g., Code Civ. Proc. § 1241.7 (park use presumed "more necessary" than highway use under special declaratory relief procedure); Health & Saf. Code § 8560 (no street may be laid across existing cemetery without consent of cemetery authority or plot owners); Sts. & Hwys. Code §§ 103.5, 210.1 (Department of Public Works may condemn parks but shall avoid doing so wherever possible).

COMPREHENSIVE STATUTE § 452

Tentatively approved July 1970
Renumbered October 1971

§ 452. Use by public entity more necessary than use by other persons

452. Except as otherwise provided by statute:

(a) Where property has been appropriated to a public use by any person other than a public entity, the use thereof by a public entity for the same use or any other public use is a more necessary use than the use to which such property has already been appropriated.

(b) Where property has been appropriated to a public use by a public entity, the use thereof by the public entity is a more necessary use than any use to which such property might be put by any person other than a public entity.

Comment. Section 452 is similar in substance to former Code of Civil Procedure Section 1240(3), except that Section 452 embraces all public entities. Thus, for example, Section 452 includes school districts which formerly were not included.

The preference under Section 452 is not merely one of public ownership over private ownership for the same use but includes any use. Thus, for example, a public entity may condemn the easement of a privately owned public utility not merely to perpetuate the utility use in public ownership but also to provide some separate and distinct use. The introductory clause recognizes that specific exceptions may be legislatively declared

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elsewhere. Cf. Govt. Code §§ 26301, 37353 (county and city, respectively, may not provide public course by condemning existing privately owned golf course). Perhaps the most notable of these exceptions are contained in Section 453. Under the latter section, property appropriated by any person to the use of certain public entities is protected from subsequent appropriation by certain other public entities. See Section 453 and Comment thereto. See also Mono Power Co. v. City of Los Angeles, 284 Fed. 784 (9th Cir. 1922)(city precluded by former Code of Civil Procedure Sections 1240(3) and 1241(3)--now Section 453--from condemning property appropriated to use of other governmental entities by private corporation).

COMPREHENSIVE STATUTE § 453

Tentatively approved Sept. 1970

Renumbered October 1971

§ 453. Property appropriated to a public use by cities, counties, or
certain special districts

453. Notwithstanding Sections 451 and 452, property appropriated to the public use of any city, county, municipal water district, irrigation district, transit district, rapid transit district, public utility district, or water district may not be taken by eminent domain by any other city, county, municipal water district, irrigation district, transit district, rapid transit district, public utility district, or water district while such property is so appropriated to such use.

Comment. Section 453 codifies prior law under former Sections 1240(3) and 1241(3) of the Code of Civil Procedure. Section 453, like its predecessors, protects property appropriated to a public use by or to the use of one of a group of public entities from condemnation by any other entity in the group. The list of entities in Section 453 conforms to that contained in former Section 1241(3). Former Section 1241(3) listed a greater number of entities than former Section 1240(3); however, the discrepancy appears to have been unintentional, and the sections were apparently regarded as interchangeable. See City of Beaumont v. Beaumont Irr. Dist., 63 Cal.2d 291, 46 Cal. Rptr. 465, 405 P.2d 377 (1965); County of Marin v. Superior Court, 53 Cal.2d 633, 2 Cal. Rptr. 758, 349 P.2d 526 (1960). The term "appropriated to a public use" is defined by Section 113. See Section 113 and Comment thereto. Former Sections 1240(3) and 1241(3) prohibited takings

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Tentatively approved Sept. 1970

Renumbered October 1971

"while such property is so appropriated and used for the public purposes for which it has been appropriated." (Emphasis added.) This language implied that the property must not only be appropriated, but also actually used for a public purpose. However, the cases did not so construe the section. See East Bay Mun. Util. Dist. v. Lodi, 120 Cal. App. 740, 750, 8 P.2d 532, (1932)("'used' does not mean actual physical use . . . but . . . property reasonably necessary for use" which will be used within a reasonable time). The term "used" has accordingly been eliminated from Section 453 to conform with the actual construction. Similarly, both sections referred to takings of "private" property appropriated to the use of the respective entities. It was clear, however, that the sections were not limited to private property devoted to public use but included property owned by public entities as well as by private individuals or corporations. See City of Beaumont v. Beaumont Irr. Dist., supra (city may not condemn property appropriated to use by irrigation district); County of Marin v. Superior Court, supra (county road may not be condemned by municipal water district); Mono Power Co. v. City of Los Angeles, 284 Fed. 784 (9th Cir. 1922)(city may not condemn property appropriated to use of other governmental entities by private corporation). The modifying word "private" has, therefore, been deleted as meaningless.

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Tentatively approved September 1970

Renumbered October 1971

Section 453, like its predecessors, protects property appropriated to a public use by the specific condemnees listed from only the condemners listed. Thus, for example, a city may not take from a rapid transit district, but a school district which is not listed may both take from those listed and its property may be taken by those listed without regard to these provisions (although the general rule stated in Section 450 would still apply).

Note: The Commission solicits comments on whether the provisions of existing law reflected in Section 453 are presently causing difficulty, whether Section 453 is needed, and whether it should be retained, repealed, or modified.

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

454. 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 454 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.

COMPREHENSIVE STATUTE § 455

Tentatively approved September 1971
Renumbered October 1971

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

455. 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 455 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.

COMPREHENSIVE STATUTE § 456

Tentatively approved Sept. 1970
Renumbered October 1971

§ 456. Procedure for raising and resolving more necessary public use issue

456. If property already appropriated to a public use is sought to be condemned and the condemnee desires to contest the taking as not being for a more necessary public use, he shall raise the issue in the manner provided by Section 2401. Upon the hearing of such issue, the condemnee has the burden of proving that the property is already appropriated to a public use; and if it is established by proof or otherwise that the property sought to be condemned is already appropriated to a public use, the condemnor has the burden of proving that its use is a more necessary public use than that to which the property has already been appropriated.

Comment. Section 456 makes clear certain procedural aspects of raising and resolving the issues involved in a taking for a "more necessary" public use.

Section 456 requires a condemnee desiring to contest the taking on the ground that the proposed use is not a more necessary public use than that to which the property is already appropriated to raise this defense by preliminary objection. See Section 2401 and Comment thereto. If the taking is contested, the court must first determine whether the property is in fact already appropriated to a public use and the condemnee bears the burden of proof on this issue. See City of Los Angeles v. Los Angeles Pac. Co., 31

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Cal. App. 100, 159 P. 992 (1916). Where this fact is proved or otherwise established, the condemnor must then prove that its use is a more necessary public use than the existing use.

Prior law apparently required a condemnor seeking to condemn property already appropriated to a public use to allege facts showing that its proposed use was a more necessary public use than that to which the property was already appropriated. See Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959). Section 456 eliminates this pleading requirement but continues the rule that the condemnor has the burden of proving that the proposed use is a more necessary public use.

COMPREHENSIVE STATUTE § 470

Tentatively approved September 1971
Revised October 1971

Division 4 - The Right to Take

CHAPTER 9. CONDEMNATION FOR COMPATIBLE PUBLIC USE

§ 470. Property appropriated to a public use may be taken for compatible public use

470. Notwithstanding Chapter 8 (commencing with Section 450), the authority to acquire property by eminent domain includes authority to exercise the power of eminent domain to acquire property appropriated to a public use if the proposed use would not unreasonably interfere with or impair the continuance of the existing use or such future use as may reasonably be anticipated for the purpose for which the property is already appropriated. The complaint in a proceeding to acquire property under authority of this section, and the resolution of necessity if such a resolution is required, shall refer specifically to this section.

Comment. Section 470 makes clear that the authority to condemn property includes the general authority to condemn for compatible joint use property already devoted to a public use. See Section 113 ("property appropriated to a public use" defined). Section 470, unlike the "more necessary" use provisions of Chapter 8, does not contemplate displacement of the existing use by the second use, but rather authorizes common enjoyment of the property where the second use does not unreasonably interfere with the existing use.

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Tentatively approved September 1971
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Under prior law, the compatible use principle was stated partly in connection with provisions dealing with the more necessary use issue. See former Code Civ. Proc. § 1240(3). See also former Code Civ. Proc. § 1240(4), (6). The principle was not, however, a more necessary public use principle and did not involve that issue.

The authority granted by Section 470 is independent of the authority contained in Chapter 8 and is not limited in any way by the rules set forth therein. Likewise, condemnation of property appropriated to a public use may be accomplished under Chapter 8 even where Section 470 would otherwise be applicable. In effect, Section 470 is not a defense to a taking under Chapter 8 just as Chapter 8 is not a defense to a taking under Section 470. To help make these distinctions clear, Section 470 has been set forth in a separate chapter.

The requirement that the proposed use be compatible with the existing use continues prior law that permitted condemnation for consistent uses. See former Code Civ. Proc. § 1240(3), (4), (6). The term "consistent" was necessarily imprecise because of the variety of circumstances it embraced. See, e.g., City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 287 P. 496 (1930), cert. denied 282 U.S. 863 (19) (abundant water for use of both parties) (alternate holding); Reclamation Dist. No. 551 v. Superior Court, 151 Cal. 263, 90 P. 545 (1907) (railroad right of way sought on top of reclamation district levee); City of Pasadena v. Stimson, 91 Cal. 238, 255,

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27 P. 604, ____ (1891)(sewer line in highway right of way); City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (railway company's electric transmission lines and subway on property taken for city park).

Section 470 continues the basic principle of consistency by requiring that the proposed use not unreasonably interfere with or impair the continuance of the existing use or such future use as may reasonably be anticipated for the purpose for which the property is already appropriated. See San Bernardino County Flood Control Dist. v. Superior Court, 269 Cal. App.2d 514, 75 Cal. Rptr. 24 (1969). Any interference or detriment must be immaterial or trivial. See Reclamation Dist. No. 551 v. Superior Court, supra. See generally 1 P. Nichols, Eminent Domain § 2.2[8], at 235-238 (3d ed. 1964). Section 470 does not grant authority to displace or interfere substantially with a prior use. The power to displace a condemnee is dealt with in Chapter 8 (commencing with Section 450).

Section 470 authorizes any condemnor able to satisfy the requirement that its proposed use will be compatible with the preexisting one to condemn the property of any person. Under former law, this point was not clear. See San Bernardino County Flood Control Dist. v. Superior Court, 269 Cal. App.2d 514, 523-524, n.10, 75 Cal. Rptr. 24, (1969). Subdivision (3) of former Code of Civil Procedure Section 1240 referred only to property "appropriated to a public use or purpose, by any person, firm or private corporation," thereby implying that property appropriated to a public use

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by a public entity could not be subjected to imposition of a consistent use. Subdivision (4) was limited to irrigation districts. However, subdivision (6) of that section authorized the imposition of "rights-of-way" with no such limitation. In view of the very limited nature of the authority granted and the desirability of encouraging common use, Section 470 adopts the latter approach and is applicable to all condemnors and all condemnees.

It should be noted that Section 470 has no effect on the respective rights of the owner of the underlying fee and any easement holders to compensation for the additional burdens imposed by a condemnor exercising the authority granted by this section. Such a situation may call for intervention by the owners or a separate inverse action. Cf. Section (intervention) and People v. Schultz Co., 123 Cal. App.2d 925, 268 P.2d 117 (1954) (possibility of subsequent action).

Section 470 requires the plaintiff to refer specifically to this section in its complaint where it seeks to exercise the authority granted here. If the plaintiff is a public entity, it must refer to this section in its resolution of necessity also.

In certain situations, a plaintiff may be uncertain of its authority to condemn under Chapter 8 and may, therefore, proceed under both that chapter and Section 470. Such inconsistent allegations are proper. See Section and Comment thereto.

COMPREHENSIVE STATUTE § 471

Tentatively approved September 1971

Revised October 1971

§ 471. Procedure for raising and resolving compatible public use issue

471. (a) If the condemnee desires to contest the taking as not being authorized under this section, he shall raise the issue in the manner provided by Section 2401. Upon the hearing of such issue, the condemnee has the burden of proving that his property is already appropriated to a public use; and if it is established by proof or otherwise that the property is already appropriated to a public use, the condemnor has the burden of proving that its proposed use will comply with Section 470.

(b) If in a hearing pursuant to this section the court determines that the plaintiff is authorized to condemn the property under Section 470, the court shall fix the terms and conditions upon which the property may be taken, and the manner and extent of its use by each of the parties.

Comment. Section 471 requires a condemnee desiring to contest the taking on the ground that the proposed use will be incompatible with the public use to which he has already appropriated the property to raise this defense by objection to the right to take. See Section 2401. If the taking is contested, the court must first determine whether the property is in fact already appropriated to a public use, and the defendant bears the burden of proof on this issue. Cf. City of Los Angeles v. Los Angeles Pac. Co.,

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31 Cal. App. 100, 159 P. 992 (1916). Where this fact is established, the plaintiff must then show that its use will be consistent with the preexisting one.

Subdivision (b) provides that, if the court determines that the condemnor has the right to acquire property for a compatible use, the court may regulate the manner in which the proposed and prior uses will be enjoyed. This continues the substance of portions of former Code of Civil Procedure Sections 1240(3), 1247(1), 1247a. In this regard, it should be noted that, while the condemnee may be required to make accommodations for the proposed use, paid for by the condemnor, the authority granted by Section 470 does not permit displacement of or substantial interference with either the existing use or reasonably foreseeable extensions of such use.

[NOTE: This provision does not deal with the relationship of the Public Utilities Commission to the determination of compatible use issues. The Commission has yet to consider this area.]

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Code of Civil Procedure § 1238 (repealed)

Sec. . Section 1238 of the Code of Civil Procedure is repealed.

~~1238.--Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:~~

~~1.--Fortifications, magazines, arsenals, Navy yards, Navy and Army stations, lighthouses, range and beacon lights, coast surveys, and all other public uses authorized by the government of the United States.~~

~~2.--Public buildings and grounds for use of a state, or any state institution, or any institution within the State of California which is exempt from taxation under the provisions of Section 14, of Article XIII of the Constitution of the State of California, and all other public uses authorized by the Legislature of the State of California.~~

~~3.--Any public utility, and public buildings and grounds, for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district, ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other character of property necessary for conducting or storing or distributing water for the use of any county, incorporated city, or city and county, village or town or municipal water district, or the inhabitants thereof, or any state institution, or necessary for the proper development and control of such use of said water, either at the time of the taking of said property, or for the future proper development and control thereof, or~~

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for draining any county, incorporated city, or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels; roads, highways, boulevards, streets and alleys; public mooring places for watercraft; public parks, including parks and other places covered by water, and all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. -- Wharves, docks, piers, warehouses, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, paths and roads either on the surface, elevated, or depressed, for the use of bicycles, trieycles, motereycles and other horseless vehicles, steam, electric, and horse railroads, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable, and water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only, and lands with all wells and water therein adjacent to the lands of any municipality or of any corporation, or person supplying water to the public or to any neighborhood or community for domestic use or irrigation.

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5.--Roads,-tunnels,-ditches,-flumes,-pipes,-aerial-and-surface tramways-and-dumping-places-for-working-mines;-also-outlets,-natural or-otherwise,-for-the-flow,-deposit-or-conduct-of-tailings-or-refuse matter-from-mines;-also-an-occupancy-in-common-by-the-owners-or-possessors-of-different-mines-of-any-place-for-the-flow,-deposit,-or-conduct of-tailings-or-refuse-matter-from-their-several-mines.

6.--Byroads-leading-from-highways-to-residences,-farms,-mines, mills,-factories-and-buildings-for-operating-machinery,-or-necessary-to reach-any-property-used-for-public-purposes.

7.--Telegraph,-telephone,-radio-and-wireless-lines,-systems-and plants.

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.

9.--Roads-for-transportation-by-traction-engines-or-road-locomotives.

10.--Oil-pipelines.

11.--Railroads,-roads-and-flumes-for-quarrying,-logging-or-lumbering-purposes.

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12.--Canals,-reservoirs,-dams,-ditches,-flumes,-aqueducts,-and pipes-and-outlets-natural-or-otherwise-for-supplying,-storing,-and-discharging-water-for-the-operation-of-machinery-for-the-purpose-of-generating-and-transmitting-electricity-for-the-supply-of-mines,-quarries, railroads,-tramways,-mills,-and-factories-with-electric-power,-and-also for-the-applying-of-electricity-to-light-or-heat-mines,-quarries,-mills, factories,-incorporated-cities-and-counties,-villages,-towns,-or-irrigation-districts,-and-also-for-furnishing-electricity-for-lighting,-heating or-power-purposes-to-individuals-or-corporations,-together-with-lands, buildings-and-all-other-improvements-in-or-upon-which-to-erect,-install, place,-use-or-operate-machinery-for-the-purpose-of-generating-and-transmitting-electricity-for-any-of-the-purposes-or-uses-above-set-forth.

13.--Electric-power-lines,-electric-heat-lines,-electric-light-lines, electric-light,-heat-and-power-lines,-and-works-or-plants,-lands,-buildings-or-rights-of-any-character-in-water,-or-any-other-character-of property-necessary-for-generation,-transmission-or-distribution-of-electricity-for-the-purpose-of-furnishing-or-supplying-electric-light,-heat or-power-to-any-county,-city-and-county-or-incorporated-city-or-town,-or irrigation-district,-or-the-inhabitants-thereof,-or-necessary-for-the proper-development-and-control-of-such-use-of-such-electricity,-either at-the-time-of-the-taking-of-said-property,-or-for-the-future-proper development-and-control-thereof.

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

15.--The-plants,-or-any-part-thereof,-or-any-record-therein-of
all-persons,-firms-or-corporations-heretofore,-now-or-hereafter-engaged
in-the-business-of-searching-public-records,-or-publishing-public-records
or-insuring-or-guaranteeing-titles-to-real-property,-including-all-copies
of,-and-all-abstracts-or-memoranda-taken-from,-public-records,-which-are
owned-by,-or-in-the-possession-of,-such-persons,-firms-or-corporations
or-which-are-used-by-them-in-their-respective-businesses,-provided,-how-
ever,-that-the-right-of-eminent-domain-in-behalf-of-the-public-uses-men-
tioned-in-this-subdivision-may-be-exercised-only-for-the-purposes-of
restoring-or-replacing,-in-whole-or-in-part,-public-records,-or-the-sub-
stance-of-public-records,-of-any-city,-city-and-county,-county-or-other
municipality,-which-records-have-been,-or-may-hereafter-be,-lost-or
destroyed-by-conflagration-or-other-public-calamity,-and-provided-further,
that-such-right-shall-be-exercised-only-by-the-city,-city-and-county,
county-or-municipality-whose-records,-or-part-of-whose-records,-have-been,
or-may-be,-so-lost-or-destroyed.

16.--Expositions-or-fairs-in-aid-of-which-the-granting-of-public
moneys-or-other-things-of-value-has-been-authorized-by-the-Constitution.

17.--Works-or-plants-for-supplying-gas,-heat,-refrigeration-or
power-to-any-county,-city-and-county,-or-incorporated-city-or-town,-or
irrigation-district,-or-the-inhabitants-thereof,-together-with-lands,

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buildings, -and- all- other- improvements- in- or- upon- which- to- erect, -install, place, -maintain, -use- or- operate- machinery, -appliances, -works- and- plants for- the- purpose- of- generating, -transmitting- and- distributing- the- same and- rights- of- any- nature- in- water, -or- property- of- any- character- necessary for- the- purpose- of- generating, -transmitting- and- distributing- the- same, -or necessary- for- the- proper- development- and- control- of- such- use- of- such- gas, heat, -refrigeration, -or- power, -either- at- the- time- of- the- taking- of- said property, -or- for- the- future- proper- development- and- control- thereof.

18.-- Standing- trees- and- ground- necessary- for- the- support- and- maintenance- thereof, -along- the- course- of- any- highway, -within- a- maximum distance- of- 300- feet- on- each- side- of- the- center- thereof; -and- ground- for the- culture- and- growth- of- trees- along- the- course- of- any- highway, -within the- maximum- distance- of- 300- feet- on- each- side- of- the- center- thereof.

19.-- Propagation, -rearing, -planting, -distribution, -protection- or conservation- of- fish.

20.-- Airports- for- the- landing- and- taking- off- of- aircraft, -and- for the- construction- and- maintenance- of- hangars, -mooring- masts, -flying fields, -signal- lights- and- radio- equipment.

21.-- Any- work- or- undertaking- of- a- city, -county, -or- city- and- county, housing- authority- or- commission, -or- other- political- subdivision- or- public body- of- the- state; --(a)- to- demolish, -clear- or- remove- buildings- from- any area- which- is- detrimental- to- the- safety, -health- and- morals- of- the- people by- reason- of- the- dilapidation, -overcrowding, -or- faulty- arrangement- or

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~~design, -lack-of-ventilation-or-sanitary-facilities-of-the-dwellings
predominating-in-such-areas;-or-(b)-to-provide-dwellings,-apartments
or-other-living-accommodations-for-persons-or-families-who-lack-the
amount-of-income-which-is-necessary-(as-determined-by-the-body-engaging
in-said-work-or-undertaking)-to-enable-them-to-live-in-decent,-safe-and
sanitary-dwellings-without-overcrowding.~~

~~22.---Terminal-facilities,-lands,-or-structures-for-the-receipt,
transfer-or-delivery-of-passengers-or-property-by-any-common-carrier
operating-upon-any-public-highway-or-waterway-in-this-state-between
fixed-termini-or-over-a-regular-route,-or-for-other-terminal-facilities
of-any-such-carrier.~~

Comment. Section 1238 of the Code of Civil Procedure, which listed public uses in behalf of which the right of eminent domain might be exercised, is not continued in the Eminent Domain Code. This legislative listing of public uses was intended to satisfy the constitutional requirement that property be taken by eminent domain only for a public use. See Cal. Const., Art. I, § 14. It attempted to do so by providing a definitive schedule of such uses. However, many recognized public uses were not included in the schedule and the inclusion of a use in the schedule was no guarantee that the use was in fact a public use under the Constitution. See Comment to Section 300 of the Eminent Domain Code.

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The scheme of the Eminent Domain Code renders this listing unnecessary. Under that code, the power of eminent domain may be exercised to acquire property only by a person expressly authorized by statute to exercise the power for a particular use. Eminent Domain Code § 301. However, a statutory authorization to condemn property for a particular use is a legislative declaration that that use is a public use. Eminent Domain Code § 300. There is, therefore, no need to maintain a separate listing of public uses.

Under the scheme of the Eminent Domain Code, the state (Govt. Code § 15853) and cities (Govt. Code § 37350.5), counties (Govt. Code § 25350.5), and school districts (Educ. Code § 1047) may exercise the power of eminent domain to acquire property necessary for any of their powers or functions. These general authorizations to condemn for proper state, city, county, and school district functions often overlap more specific authorizations to condemn or simply to acquire property for particular public uses. On occasion, a statute authorizes a public entity to undertake a public use but specifically denies the right of eminent domain for that use. See, e.g., Govt. Code § 37353(c)(existing golf course may not be acquired by city by eminent domain). In such a case, the specific provision controls over the general authorization. Special districts may condemn only for those specific public uses for which they have expressly been granted the power of eminent domain. The great majority of special districts have, by virtue of their enabling statutes, general authority to condemn all property necessary to carry out any powers of the district. A few districts, such as soil conservation districts (Pub. Res. Code §§ 9074-9953) and the City of Marysville Levee District (Cal. Stats. 1875-1876, Ch. 134), have limited condemnation authority or none at all.

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The repeal of Section 1238, together with the repeal of Civil Code Section 1001, deprives private persons of condemnation rights previously recognized by the courts. See Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955). Separately enacted provisions in other codes, however, continue the right of some types of private persons to condemn for certain public uses. Privately-owned public utilities may condemn for utility purposes. Pub. Util. Code §§ 610-624. Mutual water companies may condemn to irrigate lands that they service. Pub. Util. Code § 2729. Land chest corporations (Health & Saf. Code § 35167) and limited dividend housing corporations (Health & Saf. Code § 34874) may condemn property for their projects. Nonprofit hospitals may condemn property for their purposes. Health & Saf. Code § 1427. Nonprofit educational institutions of collegiate grade may condemn to carry out their functions. Educ. Code § 30051. Although private persons may no longer condemn for sewers or byroads, they may request the appropriate public authority to undertake such condemnation on their behalf. Health & Saf. Code § 4967 (sewers); Sts. & Hwys. Code § 4120.1 (byroads).

The particular private persons authorized to condemn are quasi-public, and the purposes for which they are authorized to condemn are public in nature. Whether it would be constitutional to authorize a private person to condemn for what appear to be predominantly private purposes, is doubtful. Cf. Lorenz

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v. Jacob, 63 Cal. 73 (1883)(supplying mines with water); Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 P. 802 (1893)(supplying farming neighborhoods with water); People v. Elk River M. & L. Co., 107 Cal. 221 (1895)(floating logs on nonnavigable streams); General Petroleum Corp. v. Hobson, 23 F.2d 349 (1927)(byroad to prospect for oil).

There follows below an indication where, in other codes, the authorization to condemn for specific public uses formerly listed in Section 1238 can be found. It should be noted that, although Section 1238 purported to list only public uses in behalf of which the right of eminent domain might be exercised, it in fact on occasion also indicated what types of property or interests may be taken. In general, under the Eminent Domain Code, this type of particularization is not continued. The authority to condemn property for a public use includes the authority to condemn any property right or interest necessary for that use. See Eminent Domain Code §§ 101 ("property" defined), 303 and 304 (right to take property or interest necessary for project). Section 1238 also in some instances indicated which persons were authorized to condemn property for specific uses. The persons authorized to condemn for particular uses are indicated in the Comments to particular subdivisions below.

Subdivision 1

Subdivision 1, which was intended to authorize taking for federal purposes, is not continued since it no longer serves any useful purpose. The 1872 Code Commissioner's Note to subdivision 1 cites two California cases expressing doubt that the federal government had an independent right of eminent domain.

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It is now clear, however, that federal eminent domain power is not dependent on state authority and cannot be limited by the state. Kohl v. United States, 91 U.S. 367 (1875); C. M. Patten & Co. v. United States, 61 F.2d 970 (9th Cir. 1932).

Subdivision 2

Insofar as subdivision 2 authorized takings for state purposes, it is unnecessary because it has been superseded by the much broader condemnation powers conferred upon the Director of the Department of General Services and the State Public Works Board. See Govt. Code §§ 14660-14662. See also Govt. Code §§ 15853-15858. Insofar as the subdivision might have authorized condemnation on behalf of a state other than California, it is not continued. Takings under the eminent domain power of one state for the benefit of another state raise serious problems under the public use doctrine. See 1 P. Nichols, Eminent Domain § 2.112 (3d ed. 1964). If property is to be condemned by or for another state for a particular purpose, the takings should be authorized by a specific statute dealing with the specific situation. E.g., Water Code § 5901, Art. VI, § A (Klamath River Basin Compact). The authorization in subdivision 2 for acquisitions for nonprofit colleges and universities ("institution . . . which is exempt from taxation under the provisions of Section 1a, of Article XIII of the Constitution of the State of California") is continued in Section 30051 of the Education Code. The reference in subdivision 2 to "all other public uses authorized by the Legislature of the State of California" was superfluous and had no substantive effect.

Subdivision 3

Any public utility. The authority to condemn "any public utility . . . for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district" was ambiguous in that it may have authorized condemnation of property owned by a public utility or may have authorized condemnation of property to be used for public utility purposes whether or not already devoted to public utility purposes. Cf. Breeze, Limitations on the Right of a Municipality in California to Condemn a Public Utility, 16 Cal. L. Rev. 105, 106 (1927). The apparent original intent of the provision was to authorize only the taking of property owned by public utilities, as evidenced by other statutes enacted the same year relating to condemnation of public utility property. Compare Cal. Stats. 1913, Ch. 291, § 1, p. 544 with Cal. Stats. 1913, Ch. 339, § 1, p. 683. See also Cal. Stats. 1913: Ch. 292, § 1, p. 547; Ch. 293, § 1, p. 549; Ch. 200, § 1, p. 349; Ch. 298, § 1, p. 555; Ch. 158, § 1, p. 239; Ch. 159, § 1, p. 240; Ch. 160, § 1, p. 241.

To the extent this provision authorized the acquisition of property belonging to a public utility, it was superfluous. A municipal corporation may acquire utility property. See Pub. Util. Code § 10002; former Code Civ. Proc. §§ 1240(3), (4), (5), and 1241(3). See also Pub. Util. Code §§ 1401-1421 (just compensation where utility property acquired by a political subdivision) and former Code Civ. Proc. §§ 1264.1-1264.9. Cf. Comment, Eminent Domain Powers Exercisable Over California Property by Oil and Gas Corporations, 7 U.C.L.A. L. Rev. 327 (1960).

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It is not clear whether the provision concerning any public utility "for the use of" the local public entities in subdivision 3 restricted the exercise of condemnation to the named entities or permitted condemnation by private public utilities providing service within the territorial limits of the named entities. Whichever is the proper construction of the provision, it is unnecessary. The authority of private corporations to condemn for particular public utility purposes is continued in Public Utilities Code Sections 611-624; the authority of local entities to condemn for particular public utility purposes is continued in specific grants of authority in other codes. See, e.g., the Comments to other repealed provisions of subdivisions 3, 4, 12, 13, and 17 infra.

Public buildings and grounds. The authority granted in subdivision 3 to condemn for "public buildings and grounds . . . for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district" is continued in other sections. E.g., Govt. Code §§ 25351 (county), 37353 (city); Educ. Code § 1047 (school district); Water Code § 22425 (irrigation districts). See also Govt. Code §§ 50333, 50531 (local agencies may acquire property for public buildings and grounds on public squares or to grant to the state). Villages and towns, as unincorporated territory, may not condemn. In addition to the general authority to condemn for public buildings and grounds, entities also have specific authority to condemn for particular types of buildings and works. For a compilation of statutes authorizing condemnation for certain types of public assembly facilities, see Comment to former Section 1238.4.

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It should be noted that an entity authorized to acquire property for a building may acquire grounds necessary to protect or preserve the attractiveness, safety, or usefulness of the building. See Eminent Domain Code § 304; University of So. Cal. v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934).

Water supply. The portion of subdivision 3 relating to condemnation of property necessary for conducting, storing, or distributing water is superseded by other sections. Where other sections authorize the acquisition of "property," the authorization subsumes particular types of property, such as those mentioned in subdivision 13: ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, any other "character of property." See Eminent Domain Code . § 101 ("property" defined). The authority to condemn for a particular purpose includes the authority to condemn all property necessary for the proper control and development of that purpose at the time of the taking of the property as well as in the future. Eminent Domain Code §§ 304 and 400. See also Section 401 for limitations on acquisition for future use.

Insofar as this portion of subdivision 3 may have been intended to grant any county, incorporated city, city or county, municipal water district, or state institution authority to condemn property necessary to conduct, store, or distribute water, such authority is continued in the following sections: Streets and Highways Code Sections 5101(h), 5102, 100010, 10100(a), 10101-10102 (cities and counties); Government Code Sections 54309(a), 54340-54341 ("local agencies," including cities and counties), 38730 (city), 25353, 25662, 25691 (county), 15853 (state institutions); Water Code Section 71694 (municipal

water districts). An unincorporated town or village, not being a public entity, may not condemn; however, water supplies can be condemned on their behalf. See below.

The authority granted by subdivision 3 to condemn property necessary to conduct, store, or distribute water for the use of any county, incorporated city, city or county, town or village, municipal water district, or state institution, or the inhabitants thereof, is continued in other sections. There are numerous special water districts servicing the people of the state. See, e.g., Govt. Code §§ 61600, 61610 (community services districts); Water Code §§ 35600 (California water districts), 31040-31044 (county water districts), 55370 (county waterworks districts), 22424, 22455 (irrigation districts). Water corporations, which are public utilities, may also condemn for these purposes. Pub. Util. Code § 618. Private corporations may not condemn for other than public utility purposes. See Burr v. MacLay Rancho Water Co., 160 Cal. 268, 280, 116 P. 715, 721 (1911) (a leading case adopting a strict view of public use where it was held that water used to fulfill a contract obligation was a private use because "it is not offered to the public generally, or to all who may want it within a certain territory"); Thayer v. California Development Co., 164 Cal. 117, 128 P. 21 (1912). Cf. Civil Code §§ 548-552.

Drainage. The authority provided by subdivision 3 to condemn for draining named local entities is continued in other sections. Where other sections authorize the acquisition of "property" for drainage purposes, the authorization includes property and interests of all types, including the types listed in subdivision 3: ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, pipes, lands, buildings, rights of any nature in water, and any other "character of property."

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The authority of the state to condemn for drainage is expressed in Government Code Section 15853. See also Water Code § 8304. The authority granted to cities and counties to condemn for drainage is continued in the following sections: Streets and Highways Code Sections 5101(d), 5102; Government Code Sections 39040, 40404(b)(cities only); Water Code Appendix Sections 42-45 (Uncodified Water Acts 2208 Section 5)(counties). See also Health & Saf. Code §§ 4602.4, 4627 (community facilities); Water Code § 8010(b)(cities). Drainage for villages, towns, and other areas can be provided by some of the numerous special water districts authorized to provide drainage. See, e.g., Govt. Code §§ 61600, 61610 (community service districts); Pub. Util. Code § 16404 (public utilities districts); Water Code §§ 22425, 22455 (irrigation districts), 31040-31044 (county water districts), 35600 (California water districts), 43500 (California water storage districts).

Although drainage is an established public use (e.g., Bauer v. Ventura Co., 45 Cal.2d 276, 289 P.2d 1 (1955)), private persons may not condemn to supply drainage. Sewer system corporations may provide drainage (Pub. Util. Code § 230.5) and may condemn for that purpose (Pub. Util. Code § 624) being public utilities (Pub. Util. Code § 216).

Generally, the authority to provide for drainage overlaps the authority to provide for sewerage, reclamation, and flood control. For a compilation of statutes authorizing condemnation for sewerage, see Comment to subdivision 8 infra. For statutes relating to reclamation, see Comment to subdivision 4 infra. For flood control, see Comment to former Section 1238.6. See also stream improvements, immediately below.

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Stream improvements. Raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels is in itself a public use. See, e.g., Reclamation District No. 551 v. Superior Court, 151 Cal. 263, 90 P. 545 (1907) ("levee" is a public use, although not specifically mentioned). Nonetheless, the authority to condemn for stream improvements is not normally a "use" or end in itself but rather a means to some other end such as flood control, navigation, irrigation, drainage, reclamation, water supply, and the like. These uses may, and often do, involve stream improvements. See Comments to subdivisions 3 (water supply, drainage) and 4 (water supply, water transport, drainage, reclamation, irrigation). See also Comments to former Sections 1238.5 (irrigation) and 1238.6 (reclamation, flood control). See also Water Code §§ 7040-7045 (maintenance of flow in streams for various purposes).

In addition to the general public uses described above under authority of which stream improvements might be undertaken, there is specific authority granted in various codes for entities to engage in stream improvement. Some statutes authorizing public entities to condemn for stream improvements, including raising its bank (levees and dikes) and altering its channel (widening, deepening, straightening), are: Government Code Sections 39901, 40404(c) (cities may alter channels), 25680-25684 (county control of streams and floodwaters), 54152 ("local agency" action for flood relief); Health and Safety Code Section 2270(d) (mosquito abatement district may raise banks); Streets and Highways Code Section 965 (county stream improvements for highway

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protection); Water Code Sections 12934(3)(state water development projects), 8110, 8126 (county stream improvements), 8590(a), 8631 (Sacramento-San Joaquin Drainage District), 50930, 50932 (reclamation district).

Roads, highways, boulevards, streets, alleys. The authority to condemn for roads, highways, boulevards, streets, and alleys duplicates authority contained in other sections. E.g., Sts. & Hwys. Code §§ 104 (state for state highway), 941-943 (county for county highway), 25050 (joint highway district); Govt. Code § 38304 (city for extra-urban highways); Sts. & Hwys. Code § 4090 (county for streets); Govt. Code §§ 37353, 39934, 40404(a); Sts. & Hwys. Code § 4090 (city for streets); Pub. Res. Code §§ 5157 (county for boulevards), 5301 (city for boulevards), 5541-5542 (regional park districts for boulevards); Sts. & Hwys. Code § 26113 (boulevard districts). For a discussion of the right to condemn for byroads, see Comment to subdivision 6 infra.

Public mooring places for watercraft. The authority to condemn for public mooring places for watercraft is continued in other sections. See discussion under subdivision 4 infra, relating to the authority to condemn for wharves, docks, and piers. See also, e.g., Govt. Code §§ 39961(b)(authority of city to acquire property for public mooring places for watercraft), 26301(b) (authority of county to acquire property for public small boat harbors), 50701 (authority of "local agencies" to acquire property for marinas and small craft harbors).

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Public parks. The authority to condemn for public parks, including parks and other places covered by water, is continued in other sections. Where other sections authorize the condemnation of land for parks, that authorization includes submerged lands and water rights for parks of all types, including aquatic parks. See Eminent Domain Code § 101 ("property" defined). Cf. Govt. Code § 61600(e) ("park" includes "aquatic park").

The State Department of Parks and Recreation is authorized to condemn property for the state park system. Pub. Res. Code § 5006. Cities may condemn for public parks. Govt. Code §§ 38002, 38010, 39732, 40401(b). Counties may acquire property interests for public parks. Govt. Code § 25353; Pub. Res. Code § 5157 (this section authorizes only "purchase," "lease," and "gift" acquisitions; however, the authority to acquire, combined with the general power of the county to condemn for its proper functions--Government Code Section 25350.5--enables the county to make use of the power of eminent domain for park purposes). In addition, cities and counties may acquire land for state parks (Pub. Res. Code § 5150), and counties may acquire land for federal parks (Pub. Res. Code § 8402).

Special districts having the power to condemn for public parks include community facilities districts (Govt. Code §§ 61600(e), 61610), public utilities districts (Pub. Util. Code §§ 16404, 16463), recreation and park districts (Pub. Res. Code §§ 5782.2, 5782.5;

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but see Sections 4700-4791--districts with powers not including eminent domain), and regional park districts (Pub. Res. Code §§ 5541-5542).

All other public uses. The authority to condemn for all uses authorized by the Legislature is superseded by Section 300 of the Eminent Domain Code, which provides that a legislative authorization of condemnation on behalf of a particular purpose constitutes a declaration that that purpose is a public use. This rule is applicable to legislative authorizations to any person, not merely to counties, incorporated cities, cities and counties, villages, towns, and their inhabitants, as previously provided in subdivision 3.

Costs of public improvements. The provision formerly found in subdivision 3 that the mode of apportioning and collecting the costs of public improvements was to be in the manner provided in their authorizing statutes is not continued. With the repeal of Section 1238 of the Code of Civil Procedure, the only public use declarations that exist are in particular statutory authorizations, which carry with them any applicable financial limitations on the construction of improvements.

Subdivision 4

Wharves, docks, piers, chutes, booms. The authority to condemn for wharves, docks, piers, chutes, and booms is continued in other sections. Cities, counties, and cities and counties may provide harbors and construct any structures necessary or convenient to promote commerce and navigation. Govt. Code §§ 39901(a), 39962, 54309(g), 54309.1(e), 54340, 54341; Sts. & Hwys. Code §§ 5101(m) and 5102. These entities may also condemn for authorized uses. Govt. Code §§ 25350.5 and 37350.5. See also Govt. Code § 40404(d)-(f). The authority of special districts to condemn for wharves, docks, piers, chutes, and booms is expressed in their enabling legislation. Public utilities may condemn for wharves, docks, piers, chutes, and booms. Harb. & Nav. Code § 4009; Pub. Util. Code § 619. Private persons that are not public utilities may not condemn property for these purposes.

Warehouses. The authority to condemn for warehouses is continued in other sections. Cities and counties have general authority to condemn for any proper function. Govt. Code §§ 25350.5 (county), 37350.5 (city). As to warehouses operated in connection with a harbor, see the sections cited above in connection with wharves, docks, piers, chutes, and booms. See also Clark v. Los Angeles, 160 Cal. 317, 323, 116 P. 966, 968 (1911). Since cities and counties have general authority to condemn for proper city or county functions, they may condemn for a warehouse if they have general authority to construct and operate such warehouse. Contrast Los Angeles v. Koyer, 48 Cal. App. 720, 192 P. 301 (1920)(city may not condemn for warehouses apart from wharves absent express authority), the rule of this case not being continued.

The authority of special districts to condemn for warehouses is expressed in their enabling legislation. See, e.g., Harb. & Nav. Code §§ 6075, 6076,

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6077.3 (Harbor Districts); Harb. & Nav. Code §§ 6295, 6296, 6307 (Port Districts); Harb. & Nav. Code §§ 6895, 6896 (River Port Districts); Harb. & Nav. Code §§ 7147, 7149(b), (c) (Small Craft Harbor Districts). Privately operated public warehouses that are public utilities may condemn property. Pub. Util. Code § 623. Private persons that are not public utilities may not condemn property for this purpose.

Ferries. The authority to condemn for ferries is continued in other sections. Cities, counties, and cities and counties are fully authorized to acquire and maintain public ferries. See, e.g., Govt. Code §§ 39731, 39963, 54301, 54309(e), 54340, 54341; Sts. & Hwys. Code §§ 1750-1757. These entities may condemn to carry out their functions. Govt. Code §§ 25350.5, 37350.5. A privately owned public ferry system is a common carrier (Pub. Util. Code § 211(b)) and may not operate unless granted a franchise by the Department of Public Works or by the city within which they provide service. Sts. & Hwys. Code §§ 30800-30902. See also Civil Code §§ 528-531. As common carriers, the ferries are also public utilities (Pub. Util. Code § 216) and may condemn property. Pub. Util. Code § 620.

Bridges. The authority to condemn for bridges was enacted in 1872, based on Sections 9 and 10 of an act concerning toll bridges. Cal. Stats. 1855, Ch. 147, p. 183, amended Cal. Stats. 1864, Ch. 196, p. 192. For legislative intent, see 2 Cal. Code Civ. Proc. Ann. § 1238 at 102, n. 5 (Raymond & Burch 1872). The word "toll" was deleted at the time the authorization for bridges was inserted in subdivision 4. As it relates to bridges generally, this authorization is superfluous, for under Streets and Highways Code Section 23, "highway" includes bridges; hence any authorization to condemn for highways includes authorization to condemn for bridges. See Comment to subdivision 3 supra. See also Sts. & Hwys. Code §§ 1300-1404 (county bridges).

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As it relates to toll bridges, the authority of public entities to condemn is continued in other sections. See Sts. & Hwys. Code §§ 30400-30413 (California Toll Bridge Authority); Sts. & Hwys. Code § 27165 (County Bridge and Highway Districts); Sts. & Hwys. Code §§ 31000-31010 (Gold Rush Parkway). Private toll bridge corporations (defined in Public Utilities Code Section 237) are a public utility. Pub. Util. Code § 216(a). They may not operate without a franchise granted by the Department of Public Works. Sts. & Hwys. Code §§ 30800-30873; see also Civil Code §§ 528-531. Their authority to condemn is not continued since it is state policy to acquire and own all toll bridges and, ultimately, to eliminate all toll charges thereon. Sts. & Hwys. Code § 30001. See also Comment to former Code Civ. Proc. §§ 1264.1-1264.9 (condemnation of toll bridge franchises). If the power to condemn property for a privately owned toll bridge is to be granted, it should be granted by a specific statute.

Toll roads. If the power of public entities to condemn property for toll roads is to be provided, it should be expressly stated by statute.

The authority of private corporations to condemn for toll roads is not continued. A private toll road must be granted a franchise by the Department of Public Works (Sts. & Hwys. Code § 30800) unless the franchise was granted prior to August 14, 1929 (Section 30811). Under Streets and Highways Code Section 902, at the expiration of a franchise to

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run a toll road, the road becomes public with no need for compensation. See People v. Davidson, 79 Cal. 166, 21 P. 538 (1889); People v. O'Keefe, 79 Cal. 171, 21 P. 539 (1889). No evidence has been found that the Department of Public Works has granted franchises for toll roads; under modern conditions, there appears to be no need to continue the authority of private persons to condemn for such roads. See also Comment to former Code Civ. Proc. §§ 1264.1-1264.9 (condemnation of toll road franchises).

Byroads. The authority to condemn for byroads is superseded by other sections. See the Comment to subdivision 6 infra.

Plank and turnpike roads. The authority to condemn for plank and turnpike roads is discontinued as obsolete. This provision was enacted in 1872, based on Section 15 of an act authorizing the formation of private corporations for the construction of plank or turnpike roads. See Cal. Stats. 1853, Ch. 121, p. 169. See also the discussion in 2 Cal. Code Civ. Proc. Ann. § 1238 at 102, n. 5 (Haymond & Burch 1872). This act was repealed years ago. Moreover, any plank or turnpike roads that existed at the time of repeal would have since become free public roads upon the expiration of the private franchise to collect tolls. See People v. Auburn & Yankee Jim's Turnpike Co., 122 Cal. 335, 55 P. 10 (1898).

Paths or roads for bicycles, tricycles, motorcycles, other horseless vehicles. The authority to condemn for paths or roads either on the surface, elevated, or depressed for the use of bicycles, tricycles, motorcycles, and other horseless vehicles duplicates other provisions and is not continued. This provision was added to Section 1238 in 1897 to provide an express grant

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of authority to condemn for public ways for driver-propelled and self-propelled vehicles. The apparent reasoning behind this addition was that the authority to condemn for roads contained in subdivision 3, having been enacted in 1872, applied only to horse-drawn vehicles. This reasoning is not sound, however, for the authority to condemn for "roads" includes the authority to condemn for public ways for all types of vehicles and non-vehicles. See Muscolino v. Superior Court, 172 Cal. App.2d 525, 341 P.2d 773 (1959)(pedestrian and equestrian trails). Thus, the authority to condemn for bicycle, and the like, paths and roads duplicates general authority to condemn for roads found in other sections and is repealed as unnecessary. See Comment to subdivision 3 supra.

In addition to the general authority found in other sections to condemn for roads, there is added special authority to condemn for bicycle and other paths separate from automotive thoroughfares. See, e.g., Sts. & Hwys. Code §§ 951 (county may construct "sidepaths" along highways), 5101(b), 5102 (city and county construction of sidewalks and parkways). See also Vehicle Code § 21207 (bicycle regulations not to be construed to deny right to construct bicycle lanes). But see Sts. & Hwys. Code § 105.5 (state may construct pedestrian and bicycle paths but the right of eminent domain not available).

Steam, electric, and horse railroads. The authority contained in subdivision 4 to condemn for "steam, electric, and horse railroads" is discontinued. (These words are not to be read in series with any other uses or

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qualifications--e.g., "public transportation"--contained in subdivision 4. San Francisco & San Joaquin Valley Ry. v. Leviston, 134 Cal. 412, 66 P. 473 (1901); Central Pac. Ry. v. Feldman, 152 Cal. 303, 92 P. 849 (1907)). The grant is obsolete because such railroads have largely been replaced by railroads using diesel-powered locomotives. Further, railroad corporations are given the power of eminent domain by Section 611 of the Public Utilities Code. See also Pub. Util. Code §§ 7533 (additional tracks), 7535 (railroad intersections), 7536 (railroad crossings). Cf. § 7508 (right of eminent domain in transferee of railroad corporation). Cities may condemn for facilities in aid of railroads and other public utilities. Govt. Code §§ 39790-39794.

Irrigation. The authority to condemn for irrigation is continued in other sections. Where other sections authorize the acquisition of "property" for irrigation, the authorization subsumes particular types of property, such as those mentioned in subdivision 4: canals, ditches, dams, poundings, flumes, aqueducts, and pipes. See Eminent Domain Code Section 101 ("property" defined). See also Stratford Irr. Dist. v. Empire Water Co., 44 Cal. App.2d 61, 111 P.2d 957 (1941)(property ~~an~~ irrigation district may condemn).

The power of any local agency authorized to supply irrigation to condemn property is continued generally in Government Code Sections 54309(a), 54340-54341 (local agency includes city, county, city and county, municipal or public corporation or district). In addition, numerous special districts are specifically authorized to condemn for irrigation. See, e.g., Govt. Code §§ 61600, 61610 (community services districts); Water Code §§ 35600 (California water districts), 31040-31044 (county water districts), 55370 (county waterworks

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districts), 22425, 22455 (irrigation districts), 50903 (reclamation districts).

In addition, a water corporation, as a public utility (Pub. Util. Code § 216; see also Civil Code §§ 548-552) may condemn (Pub. Util. Code § 618) for irrigation purposes (Pub. Util. Code § 240). This is a valid public use. See Gravelly Ford Canal Co. v. Pope & Talbot Land Co., 36 Cal. App. 556, 178 P. 150 (1918); compare former Code Civ. Proc. § 1238.5 (eminent domain for irrigation).

Public transportation by water. The authority granted by subdivision 4 to condemn canals, ditches, dams, poundings, flumes, aqueducts, and pipes for public transportation is not continued. This grant of authority was enacted in 1872 primarily for the benefit of private canal transport companies and is obsolete.

Condemnation authority for public transportation by water is provided by other statutes. Any water carrier may condemn for terminal facilities. Pub. Util. Code § 622. See also Pub. Util. Code § 620 (certain common carriers by water may condemn property necessary for transportation purposes. See also Harb. & Nav. Code §§ 4150-4153 (county may acquire towpath easement along navigable streams); Govt. Code § 39900 (city may construct deep water canal, waterway, or water facilities for transportation purposes).

Supplying mines with water. The authority of private persons to condemn for canals, ditches, dams, poundings, flumes, aqueducts, and pipes for supplying mines with water is of doubtful constitutionality and is not continued. See Lorenz v. Jacob, 63 Cal. 73 (1883); see also former subdivision 5, infra. Public entities and public utilities have adequate condemnation authority. See discussion of their authority in other portions of the Comment to this section.

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Supplying farming neighborhoods with water. The authority granted in subdivision 4 to condemn canals, ditches, dams, poundings, flumes, aqueducts, and pipes for supplying farming neighborhoods with water is not continued since it is superfluous. Although this grant of authority has been held to be a public use, it has also been construed to be a grant of authority for irrigation purposes. See Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674 (1886). As a consequence, those public entities authorized to supply irrigation (see discussion above) are likewise authorized to supply farming neighborhoods with water.

This grant of authority could be interpreted as bestowing an added power upon private farms to condemn for their own use. As such, it has been held to be a private use; in order for a private person to condemn to supply irrigation to farming neighborhoods, he must become in essence a public utility, offering to supply every person in the farming neighborhood he services. Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 P. 802 (1893); Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674 (1886). As a consequence, water corporations, which are public utilities (see discussion above), have adequate authorization to supply farming neighborhoods with water. In addition, farming neighborhoods may obtain their irrigation through the mechanism of mutual water companies (see discussion below), which have the power of eminent domain. Pub. Util. Code § 2729. Also many special water districts have condemnation authority. Compare former Code Civ. Proc. § 1238.5 (eminent domain for irrigation).

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Drainage. The authority provided by subdivision 4 to condemn for draining lands is continued in other sections. Where other sections authorize the acquisition of "property" for drainage purposes, the authorization includes property and interests of all types, including the types listed in subdivision 4: canals, ditches, dams, poundings, flumes, aqueducts, and pipes. The authority of various entities and utilities to condemn for drainage is set out in the Comment to subdivision 3 supra. Generally, the authority to provide for drainage overlaps the authority to provide for sewerage, reclamation, and flood control. For a compilation of statutes authorizing condemnation for sewerage, see Comment to subdivision 8 infra. For statutes relating to reclamation, see Comment immediately below. For flood control, see Comment to former Section 1238.6. See also stream improvements, subdivision 3 supra.

Reclamation. The authority granted by subdivision 4 to condemn for reclaiming lands is continued in other sections. Where other sections authorize the acquisition of "property" for reclamation of land, the authorization extends to all types of and interests in property, including but not limited to the types mentioned in subdivision 4: canals, ditches, dams, poundings, flumes, aqueducts, and pipes.

The authority of the state to condemn for reclamation is continued in Government Code Section 15853. See also Water Code § 8593 (Reclamation Board). The authority of cities and counties to condemn for reclamation is continued in Government Code Sections 25681.1 (counties) and 38901 (cities). See also Redwood City v. Moore, 231 Cal. App.2d 563, 42 Cal. Rptr. 72 (1965). The authority of special districts, if any, to condemn for reclamation is contained

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in their grants of power. See, e.g., Water Code §§ 31040-31044 (county water districts), 35600 (California water districts), 43500 (California water storage districts), 50930 (reclamation districts).

Private persons do not have authority to condemn for reclamation. Although reclamation of land is a public use (cf. Reclamation Dist. No. 511 v. Superior Court, 151 Cal. 263, 90 P. 545 (1907)), reclamation by private persons of land for their own benefit remains a private use. While a water corporation may condemn for "reclamation," it is clear that reclamation of water only is authorized rather than land reclamation. See Pub. Util. Code § 240.

Generally, the authority to provide for reclamation of land overlaps with the authority to provide for drainage. See discussion of the authority to condemn for drainage immediately above, and under subdivision 3 supra. See also former Section 1238.6 (eminent domain for protection, preservation, reclamation of land, flood control).

Floating logs on nonnavigable streams. The authority to condemn for canals, ditches, dams, poundings, flumes, aqueducts, and pipes for floating lumber on nonnavigable streams is of doubtful constitutionality and is not continued. See 51 A.L.R. 1199 (1927); Cf. People v. Elk River M. & L. Co., 107 Cal. 221 (1895). See also former subdivision 11 infra.

Mutual water company. The authority of a mutual water company to condemn for water, water rights, canals, ditches, dams, poundings, flumes, aqueducts, and pipes for irrigation of lands serviced by the company is continued in Public Utilities Code Section 2729. See the Comment to Pub. Util. Code § 2729.

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Extraterritorial condemnation for domestic and irrigation water. The grant of authority for any municipality, corporation, or person that supplies water to the public or to any neighborhood or community for domestic use or irrigation to condemn land with wells and water adjacent to it is not continued because it is unduly restrictive.

A municipality, or any local public entity, may condemn property beyond its territorial limits, regardless whether that property is adjacent or whether it consists of lands with wells and water if the right to condemn is expressly granted by statute or is necessarily implied as an incident to one of its other statutory powers. Eminent Domain Code § 490. With regard to the right of a municipality to condemn property beyond its jurisdictional limits in aid of supplying water for domestic use and irrigation, municipalities are expressly granted the right by statute. See Govt. Code § 54341. In addition, absent such a provision, the power of extraterritorial condemnation would be necessarily implied as an incident of the power to supply water. See City of No. Sacramento v. Citizens Util. Co., 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961). See also Eminent Domain Code § 490.

The limitations on the extraterritorial condemnation rights of special districts, if any, are expressed in their particular authorizing statutes. See, e.g., Water Code §§ 35628 (California water districts), 71694 (municipal water districts).

A corporation or person that supplies water to the public for domestic use or irrigation, of course, may no longer condemn at all unless it is a water corporation--a public utility--or a mutual water company. See discussion

above. There are no restrictions upon the locations in which a water corporation or any public utility may condemn; the only limitation is that the property condemned must be "necessary" for the water system. Pub. Util. Code § 618.

Subdivision 5

Subdivision 5 is not continued. It is clear from the language of the subdivision itself, and from the statute that is superseded (Cal. Stats. 1870, Ch. CCCCIV, p. 569), that the Legislature intended to authorize takings by individual mine owners to facilitate the working of their mines. However, the California courts have refused to give the subdivision its intended application or any effect whatsoever. Sutter County v. Nichols, 152 Cal. 688, 93 P. 872 (1908); Amador Queen Min. Co. v. Dewitt, 73 Cal. 482, 15 P. 74 (1887); Lorenz v. Jacob, 63 Cal. 73 (1883); Consolidated Channel Co. v. Central Pac. R. Co., 51 Cal. 269 (1876). Although the courts have not held the subdivision unconstitutional, they have invoked the constitutional doctrine of public use to prevent any takings under the subdivision. The only possible application of the subdivision might have been under the former Placer Mining District Act (Pub. Res. Code §§ 2401-2512, repealed Cal. Stats. 1953, Ch. 1365, § 1, p. 2935). See Black Rock Placer Mining Dist. v. Summit Water & Irrigation Co., 56 Cal. App.2d 513, 133 P.2d 58 (1943). Although the repeal of that act did not affect the existence or powers of any district previously organized pursuant to the repealed act, there are no such districts presently reporting financial transactions to the State

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Controller. See Financial Transactions Concerning Special Districts in California (Cal. State Controller 1965-66). The repeal of subdivision 5 does not, of course, affect in any way the power of the appropriate public entity to provide a byroad where necessary or desirable under the Street Opening Act of 1903. See Sts. & Hwys. Code §§ 4008, 4008.1, 4090.

Subdivision 6

Subdivision 6 is superseded by Sections 4008, 4008.1, and 4120.1 of the Streets and Highways Code. These sections provide a procedure for the establishment of byroads--roads, open to public use, that furnish access to an existing public road from or primarily from otherwise isolated property--under the Street Opening Act of 1903. Private persons have no right to condemn property for byroads. The former law was unclear, there being no case precisely in point. See General Petroleum Corp. v. Hobson, 23 F.2d 349 (1927)(prospecting for oil not a use listed in Section 1238); City of Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961)(land developer not authorized to bring condemnation action in name of city). Cf. Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955) (private individual may condemn sewer easement over property adjoining his). See also Sherman v. Buick, 32 Cal. 241 (1867)("byroad" a public use for which county could acquire property). A private person may request the appropriate public authority to condemn for a byroad on his behalf. See Sts. & Hwys. Code § 4120.1.

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Subdivision 7

The authority granted in subdivision 7 to condemn for telegraph, telephone, radio, and wireless, and by implication other forms of communication lines, systems, and plants, to a considerable extent duplicated other provisions. ("Wireless" duplicated "radio," the former being the word preferred in British usage. See Websters Third New International Dictionary (1961) at 1872, 2624.)

The state has a teletype system (Govt. Code §§ 14710, 14711) and the Department of Justice maintains a statewide telecommunication system for the use of law enforcement agencies (Govt. Code § 15152). In addition, the Department of General Services is authorized to acquire, construct, and maintain communications systems and facilities available to all public agencies in the state. Govt. Code § 14931. The state may exercise the power of eminent domain on behalf of these uses and any other communication purposes for which appropriations are made. Govt. Code § 15853.

Cities, counties, and cities and counties, as municipal corporations, may establish and operate public works to provide their inhabitants with telephone service or other means of communication. Pub. Util. Code §§ 10001-10004, 10101; Govt. Code §§ 39732, 39790, 39792, 25350.5, 37350.5; Sts. & Hwys. Code §§ 5101(e), 5102. Moreover, municipal utility districts may be formed to provide their members with telephone service or other means

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of communication. Pub. Util. Code § 12801. These districts are empowered to exercise eminent domain to provide and maintain the facilities necessary to afford their members the requisite means of communication. Pub. Util. Code §§ 12703, 12771.

Private communications companies may continue to condemn only if they are public utilities. Telephone and telegraph companies are public utilities that are strictly regulated by the Public Utilities Commission. Pub. Util. Code §§ 216, 1001. These companies may exercise the power of eminent domain to take land for almost any purpose that would facilitate communication by telephone and telegraph. See Pub. Util. Code §§ 616, 617, 233-236. Such exercise is a public use. San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961). It should be noted that these utilities may use the public highways for the creation and maintenance of telephone and telegraph lines and the fixtures necessary thereto. Pub. Util. Code § 7901. See also Pacific Tel. & Tel. Co. v. San Francisco, 51 Cal.2d 766, 336 P.2d 514 (1959)(construction by utilities amounts to state franchise); Sts. & Hwys. Code §§ 117, 5101(e)(location of structures of fixtures in public rights of way); federal "Post Roads Act" (discussion in 1 P. Nichols, Eminent Domain § 2.15 (1964)).

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Subdivision 8

Insofar as subdivision 8 authorized condemnation by public entities, it was 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 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.

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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.

Subdivision 9

Subdivision 9, which was enacted in 1891, is obsolete. Traction engines and road locomotives--essentially steam powered locomotives which ran on wheels rather than tracks--have long been considered collector's items. See Clymer, Album of Historical Steam Traction Engines (1949);

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J. Fisher, Road Locomotives, 31st Annual Rep. of the Amer. Inst. of the City of New York 1870-1871 at 877; Gilford, The Traction Engine 1842-1936 (1952).

Subdivision 10

Subdivision 10 is superseded by Section 615 of the Public Utilities Code which grants the power of eminent domain to pipeline corporations. See the Comment to Section 615.

Subdivision 11

Subdivision 11 is repealed as unnecessary.

The authority of public entities to condemn for quarrying is not affected by the repeal of subdivision 11 and is continued in other provisions. See Sts. & Hwys. Code § 104(c) and Govt. Code § 39793.

The authority of logging railroads to condemn is valid only to the extent that the railroads are common carriers. See Great Northern Ry. v. Superior Court, 126 Cal. App. 575, 14 P.2d 899 (1932); cf. Cal. Const., Art. I, § 14 (last sentence). This authority is continued in Public Utilities Code Section 611.

Byroads servicing private lumbering or quarrying property may no longer be condemned by private persons. See former subdivision 6 supra. Cf. Sts. & Hwys. Code §§ 4008.1, 4120.1.

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Insofar as quarrying, logging, and lumbering are businesses carried on by private persons for private profit, the attempt to grant the right to condemn for rights of way servicing those businesses is of doubtful constitutionality and is not continued. See former subdivision 4 supra (logging). Cf. former subdivision 5 and Comment thereto supra (mining).

Subdivision 12

Subdivision 12 is superseded in whole by other provisions. Where other sections authorize the acquisition of "property," the authorization subsumes particular types of property, such as those mentioned in subdivision 12: canals, reservoirs, dams, ditches, flumes, aqueducts, pipes, outlets, buildings, and "all other improvements." See Eminent Domain Code § 101 ("property" defined).

Subdivision 12 authorized condemnation for generating and transmitting electricity to supply power, light, and heat to individuals and corporations, both public and private. This grant of authority duplicated, and was broader than, that found in subdivision 13.

The power of local public entities to condemn for these purposes is continued in other sections. E.g., Sts. & Hwys. Code §§ 5101(e); 5102, 10010, 10100(b), 10101-10102 (cities and counties); Govt. Code §§ 39732, 39790-39792 (cities); Pub. Util. Code § 10002 (municipal corporation).

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The power of special districts to condemn for the purposes listed above also is continued in other sections. E.g., Pub. Util. Code §§ 12703, 12801 (municipal utility district), 16404, 16461 (public utility district); Water Code § 22115, 22456 (irrigation districts). See also Pub. Util. Code §§ 8101-8134 (joint operation by irrigation district and public utility); Govt. Code §§ 55300-55367 (joint city, county, sanitation district project for electric lines).

The power of private persons generally to condemn is not continued. However, a public utility may condemn to generate and transmit electricity for the purposes listed above. See Pub. Util. Code § 612.

In addition, insofar as railroads and "tramways" are common carriers, their authority to condemn in aid of their operations is continued in Public Utilities Code Sections 611 and 621.

Subdivision 13

Subdivision 13 is superseded in whole by provisions of other sections. Where other sections authorize the acquisition of "property," the authorization subsumes particular types of property, such as those mentioned in subdivision 13: electric lines, works or plants, lands, buildings, rights of any character in water, or "any other character of property." See Eminent Domain Code § 101 ("property" defined).

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Insofar as subdivision 13 specifically authorized takings for future use, it is continued in the Eminent Domain Code; the authority to condemn for a particular purpose includes authority to condemn for the proper development and control of that purpose at the time of the taking of the property as well as in the future. Eminent Domain Code § 400. See also § 401 for limitations on acquisition for future use.

Subdivision 13 authorized condemnation for generating, transmitting, and distributing electricity to supply power, light, and heat to local public entities or their inhabitants. This grant of authority duplicated, and was narrower than, that found in subdivision 12. For a listing of statutes authorizing condemnation for these purposes, see Comment to subdivision 12 supra.

Subdivision 14

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 & Saf. Code § 37681. The authority of public cemetery districts is in Health and Safety Code Section 8961. Private cemeteries are not authorized to condemn property. See Health & Saf. Code § 8500.

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Subdivision 15

Subdivision 15 is superseded by Sections 14770 and 53030 of the Government Code.

Subdivision 16

Subdivision 16 is obsolete and merely duplicates other specific grants of condemnation authority.

All public entities that might utilize the power of eminent domain for fair or exposition purposes are specifically granted the power of eminent domain. Specific grants are made to the state (Govt. Code § 15853), cities (Govt. Code § 37350.5; see also Govt. Code § 50331), counties (Govt. Code § 25350.5; see also Govt. Code §§ 25900-25908), district agricultural associations (Govt. Code § 15853; see also Agri. Code § 4051), and citrus fruit fairs (Govt. Code § 15853; see also Agri. Code § 4701). Private fair corporations (e.g., Civil Code § 620) do not have the power of eminent domain.

With the repeal in 1949 of all special constitutional grants in aid of private expositions, subdivision 16 became obsolete. (The subdivision was enacted in 1911, apparently as a grant of eminent domain power to the Panama-Pacific International Exposition Company. See former Cal. Const., Art. XI,

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§ 8a.) But see County of Alameda v. Meadowlark Dairy Corp., 227 Cal. App.2d 80, 38 Cal. Rptr. 474 (1964)(subdivision 16 relied upon to authorize condemnation by a county for fair purposes on the theory that the Constitution grants to counties a tax-exempt status which is a "thing of value . . . authorized by the Constitution" within the meaning of subdivision 16). However, subdivision 16 is no longer necessary because counties now have a specific grant of condemnation authority. Govt. Code § 25350.5. See also Govt. Code §§ 25900-25908.

Subdivision 17

Subdivision 17 is in part discontinued and in part superseded by provisions of other sections. Where other sections authorize the acquisition of "property," the authorization subsumes particular types of property, such as those mentioned in subdivision 17: works or plants, lands, buildings, and all other improvements, rights of any nature in water, or property "of any character necessary for the purpose." See Eminent Domain Code § 101 ("property" defined). The authority to condemn for a particular purpose includes the authority to condemn all property necessary for the proper development and control of that purpose at the time of the taking of the property, as well as in the future. Eminent Domain Code § 400; see also § 401, for limitations on acquisition for future use.

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The authority granted by subdivision 17 to condemn property necessary for the generating, transmitting, distributing, and supplying refrigeration to any county, city and county, incorporated city or town, or irrigation district, or the inhabitants thereof is not continued. The provision has no apparent present application. There is no statute regulating the incorporation or operation of "refrigeration" companies. Hence, there is no justification for continuing a general condemnation authority for refrigeration. Insofar as a railroad company, for example, supplies "refrigeration" in connection with the transportation of property (see Pub. Util. Code §§ 209, 210), such company can condemn necessary property under Public Utilities Code Section 611.

The authority granted by subdivision 17 to public entities to condemn property necessary for generating, transmitting, distributing, and supplying gas, heat, and power is continued in other sections. E.g., Sts. & Hwys. Code §§ 5101(i), 5102 (Improvement Act of 1911--gas), 10010, 10100(c), 10101-10102 (Municipal Improvement Act of 1913--gas, heat, power); Govt. Code § 39732 (cities--gas, heat, power); Pub. Util. Code §§ 10002 (municipal corporation--heat, power), 12703, 12801 (municipal utility districts), 16404, 16461 (public utility districts). See also Comments to subdivisions 12 and 13 supra, relating to electrical power. For the authority of irrigation districts to condemn for electrical power, see Comments to subdivisions 12 and 13 supra.

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The authority granted by subdivision 17 to private persons to condemn property necessary for generating, transmitting, distributing, and supplying gas, heat, and power is continued to the extent the private person is a public utility. See Comments to subdivisions 12 and 13 supra for power of electrical corporations to supply electrical power. A gas corporation (see Pub. Util. Code § 222) may condemn property (Pub. Util. Code § 613) for its gas plant (Pub. Util. Code § 221). See also 15 U.S.C. § 717(f)(h)(1964)(Natural Gas Act--condemnation by public utility in interstate commerce). A heat corporation (see Pub. Util. Code § 224) may condemn property (Pub. Util. Code § 614) for its heating plant (Pub. Util. Code § 223).

Subdivision 18

Subdivision 18 is superseded by Section 304 of the Eminent Domain Code, providing general authority to condemn property necessary for protective purposes. This general authority permits condemnation to provide for the culture and growth of trees along highways without the 300-foot limitation formerly found in subdivision 18. Under Eminent Domain Code Section 304, a condemnor may take any property "necessary" for protective purposes. See also Streets and Highways Code Section 104(f), which authorizes the taking of property by the Department of Public Works.

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Subdivision 19

Subdivision 19 duplicated authority found elsewhere in the codes to condemn for fish conservation purposes. The power of state agencies to condemn is found in the general authorization of Government Code Section 15853 and the more specific grants to specific agencies. E.g., Water Code §§ 253, 11900; Fish & Game Code §§ 1120, 1301, 1345, 1348. See State v. Natomas Co., 239 Cal. App.2d 547, 49 Cal. Rptr. 64 (1966). The authority of counties to condemn is found in Government Code Section 25350.5; see also Fish and Game Code Sections 1150 and 13100. The authority of special districts, if any, is to be found in their particular authorizing grants. See, e.g., Monterey County Flood Control and Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962), in which the district's power to condemn for recreational purposes was upheld based upon a general condemnation power in its authorizing statute plus policy statements in the Water Code that fish and wildlife values, both economic and recreational, were to be given consideration in any flood control or water conservation program. Private persons do not have the right to condemn for fish conservation purposes.

Subdivision 20

Subdivision 20 is superseded by provisions conferring adequate condemnation authority on all public entities authorized to operate airports. See Govt. Code §§ 26020 (counties), 50470 (cities, counties, cities and counties);

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Pub. Util. Code §§ 21633 (State Department of Aeronautics), 22553 (airport districts); Harb. & Nav. Code App. 1, §§ 4, 5, 27 (West Supp. 1967)(San Diego Unified Port District). Insofar as subdivision 20 may have authorized condemnation for airport purposes by private persons (see 9 Ops. Cal. Atty. Gen. 187 (1947)), it is not continued.

Subdivision 21

Subdivision 21 was unnecessary because it merely duplicated express grants of the power of eminent domain given the agencies engaged in slum clearance and low-rent housing by other statutes. Thus, housing authorities, which may be activated within any city or county, may condemn property for slum clearance, construction of low-cost housing, or construction of farm labor camps. Health & Saf. Code §§ 34240, 34325, 36059(i). See also Health & Saf. Code §§ 34874, 34875, 34879 (limited dividend housing corporations). The addition of Sections 35167-35171 to the Health and Safety Code to grant condemnation authority to community land chest corporations (nonprofit corporations formed under Health and Safety Code Sections 35100-35237 to provide "housing in rural and suburban areas for families of low income") provides all of the agencies covered by subdivision 21 with adequate condemnation authority.

Subdivision 22

Subdivision 22 is superseded by Section 622 of the Public Utilities Code.

CODE OF CIVIL PROCEDURE § 1238.4

Tentatively approved September 1971

Code of Civil Procedure § 1238.4 (repealed)

Sec. . Section 1238.4 of the Code of Civil Procedure is repealed.

~~1238.4. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:~~

~~Public buildings and grounds for convention and exhibition halls, trade and industrial centers, auditoriums, opera houses, music halls and centers, and related facilities for public assembly including off-street motor vehicle parking places and property necessary or convenient for ingress thereto or egress therefrom.~~

Comment. Section 1238.4 was added to the Code of Civil Procedure in 1955, apparently to authorize counties to condemn for the purposes listed. Compare Government Code Section 25351.3(a), enacted simultaneously with Section 1238.4, granting counties the authority to construct and acquire land for such public assembly facilities. For this purpose, Section 1238.4 is repealed as no longer necessary, for a county may condemn for any proper county function. Govt. Code § 25350.5.

To the extent that Section 1238.4 may incidentally have authorized other entities to condemn for the purposes listed, it is superseded by other sections. Generally, the state may condemn for public buildings and grounds for any of its activities. See Comment to subdivision 2 of former Section 1238. It should be noted, however, that the Department of Commerce may not exercise the power of eminent domain on behalf of California World Trade Centers. Govt. Code § 8324.

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Cities may condemn land for public assembly and convention halls as well as for public buildings and grounds generally. Govt. Code § 37501. See Comment to subdivision 3 of former Section 1238 of the Code of Civil Procedure. In addition, cities (and counties) may construct exhibition halls, historical museums, and art galleries. Govt. Code § 50331. The power of eminent domain is available for these purposes. Govt. Code § 37350.5.

District agricultural associations and citrus fruit fairs (and counties) may construct recreational and cultural facilities of general public interest. Bus. & Prof. Code § 19630.5. For a compilation of statutes authorizing the power of eminent domain for fair and exposition purposes, see Comment to subdivision 16 of former Section 1238 of the Code of Civil Procedure.

Although public assembly facilities are a public use (see, e.g., Los Angeles County v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308, cert. denied, 376 U.S. 963 (1964)), private persons may not condemn for that use. See former Section 1001 of the Civil Code and Comment thereto.

The authority contained in former Section 1238.4 to condemn for off-street parking servicing public assembly facilities is repealed because it duplicates broader and more general authority to condemn for off-street parking. See Comment to former Section 1238.1 of the Code of Civil Procedure.

The authority contained in former Section 1238.4 to condemn for access to public assembly facilities is repealed as unnecessary. The right to condemn for public assembly facilities has inherent in it the right to provide for ingress to and egress from the facilities. See Eminent Domain Code Section 304.

CODE OF CIVIL PROCEDURE § 1238.5

Tentatively approved September 1971

Code of Civil Procedure § 1238.5 (repealed)

Sec. . Section 1238.5 of the Code of Civil Procedure is repealed.

~~1238.5.--Irrigation-is-a-public-use-in-behalf-of-which-the-right
of-eminant-domain-may-be-exercised-pursuant-to-this-title.~~

Comment. Section 1238.5, declaring irrigation to be a public use, is repealed as unnecessary. All public entities authorized to supply irrigation to the public have adequate independent authority to condemn for that purpose. See Comment to former Section 1238, subdivision 4 (irrigation generally, and for various specific purposes, declared to be a public use). Irrigation is a public use only so long as it is offered to the public. See Gravelly Ford Canal Co. v. Pope & Talbot Land Co., 36 Cal. App. 556, 178 P. 150 (1918). Private persons may not condemn for this purpose. See former Civil Code § 1001 and Comment thereto. However, a mutual water company does have the power of eminent domain for irrigation purposes. See Pub. Util. Code § 2729 and the Comment to that section.

CODE OF CIVIL PROCEDURE § 1238.6

Tentatively approved September 1971

Code of Civil Procedure § 1238.6 (repealed)

Sec. . Section 1238.6 of the Code of Civil Procedure is repealed.

~~1238.6.---Subject-to-the-provisions-of-this-title,-the-right-of
eminent-domain-may-be-exercised-in-behalf-of-the-following-public-uses:~~

~~1.---Protection,-preservation,-or-reclamation-of-land,-whether
covered-or-uncovered-by-water,-against-the-overflow-or-incursion-of
water-or-the-threat-thereof,-or-against-the-effects-of-subsidence-of
the-surface-of-said-land,-as-by-constructing-levees-or-by-filling,
diking,-draining-or-other-appropriate-remedial-method.~~

Comment. Former Section 1238.6 was enacted in 1957 to declare as a public use the protection, preservation, and reclamation of lands subject to flooding or subsidence. This declaration is no longer necessary because the scheme of the Eminent Domain Code is to eliminate a listing of general public uses and to rely instead on specific legislative authorizations to condemn. Generally speaking, the state (Govt. Code § 15853), cities (Govt. Code § 37350.5), and counties (Govt. Code § 25350.5) may condemn for any of their functions. Special districts may condemn if expressly authorized to do so. Private persons may not condemn for this purpose.

Specific authority for the above-named entities to preserve, protect, and reclaim lands subject to flooding or subsidence can be found in numerous sections. See, e.g., Water Code §§ 12579, 12861 (flood control policy declaration), 8300-8304 (flood control by Department of Water Resources), 8590-8596,

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8619 (flood control by Reclamation Board), 8000-8061 (flood control by cities), 8100 (flood control by counties), 8110 (flood control by county-formed districts), 50930 (flood control by reclamation districts), 70150 (flood control by protection districts). See also Pub. Res. Code §§ 3315-3347 (land subsidence in oil and gas pool areas), 6303 (flood control policy declaration); Health & Saf. Code §§ 4602.4(e), 4627 (flood control by municipal utilities); Govt. Code §§ 25680-25684 (flood control by counties).

The authority granted in former Section 1238.6 overlaps the authority of governmental entities to condemn for drainage, land reclamation, stream improvements, and sewerage. For compilations of these statutes, see Comments to subdivisions 3, 4, and 8 of former Section 1238.

CODE OF CIVIL PROCEDURE § 1239.2

Tentatively approved September 1971

Code of Civil Procedure Section 1239.2 (repealed)

Sec. . Section 1239.2 of the Code of Civil Procedure is repealed.

~~1239.2. -- Airspace above the surface of property or an air easement in such airspace may be acquired under this title by a county, city or airport district if such taking is necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such height or character as to interfere with or be hazardous to the use of such airport.~~

Comment. The substance of former Section 1239.2 of the Code of Civil Procedure is continued in Public Utilities Code Section 21652.

CODE OF CIVIL PROCEDURE § 1239.3

Tentatively approved September 1971

Code of Civil Procedure Section 1239.3 (repealed)

~~1239.3.--Airspace-above-the-surface-of-property-or-an-air-easement
in-such-airspace-may-be-acquired-under-this-title-by-a-county,-city,
port-district,-or-airport-district-if-such-taking-is-necessary-to-pre-
vide-an-area-in-which-excessive-noise,-vibration,-discomfort,-incon-
venience-or-interference-with-the-use-and-enjoyment-of-real-property
located-adjacent-to-or-in-the-vicinity-of-an-airport-and-any-reduction
in-the-market-value-of-real-property-by-reason-thereof-will-occur-through
the-operation-of-aircraft-to-and-from-the-airport.~~

Comment. The substance of former Code of Civil Procedure Section 1239.3
is continued in Public Utilities Code Section 21652.

CODE OF CIVIL PROCEDURE § 1239.4

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Code of Civil Procedure Section 1239.4 (repealed)

Sec. . Section 1239.4 of the Code of Civil Procedure is repealed.

~~1239.4. --Where necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such a height or character as to interfere with or be hazardous to the use of such airport, land adjacent to, or in the vicinity of, such airport may be acquired under this title by a county, city or airport district reserving to the former owner thereof an irrevocable free license to use and occupy such land for all purposes except the erection or maintenance of structures or the growth or maintenance of vegetable life above a certain prescribed height or may be acquired by a county, city or airport district in fee.~~

Comment. The substance of former Section 1239.4 of the Code of Civil Procedure is continued in Public Utilities Code Section 21652. The right under former Section 1239.4 to take a fee interest or a fee with an "irrevocable free license" reserved to the original owner is continued under Section 21652 of the Public Utilities Code which permits the taking of a fee or any lesser interest.

CODE OF CIVIL PROCEDURE § 1240

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Code of Civil Procedure Section 1240 (repealed)

1240.--The-private-property-which-may-be-taken-under-this-title
includes:

1.--All-real-property-belonging-to-any-person;

2.--Lands-belonging-to-this-state,-including-tide-and-submerged
lands,-not-within-the-corporate-limits-of-any-city,-or-city-and-county,
or-to-any-county,-incorporated-city,-or-city-and-county,-village-or
town,-not-appropriated-to-some-public-use;-provided,-that-all-16th-and
36th-sections,-both-surveyed-and-unsurveyed,-owned-by-the-state-or-the
United-States,-which-may-now-or-may-hereafter-be-included-within-the
exterior-boundaries-of-a-national-reservation,-or-of-a-reserve,-or-within
the-exterior-boundaries-of-lands-withdrawn-from-public-entry,-shall-be
and-hereby-are-withheld-from-the-operation-of-this-title-and-shall-not
be-condemned-as-against-the-state-or-the-United-States;

3.--Property-appropriated-to-public-use;-but-such-property-shall
not-be-taken-unless-for-a-more-necessary-public-use-than-that-to-which
it-has-already-been-appropriated;-provided,-that-where-any-such-property
has-been-so-appropriated-by-any-individual,-firm-or-private-corporation,
the-use-thereof-for-a-state-highway-or-a-public-street-or-highway-of-the
state,-or-a-county,-city-and-county,-or-incorporated-city-or-town,-joint
highway-district,-or-the-use-thereof-by-the-state-or-a-county,-city-and

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county,--incorporated-city-or-town,--joint-highway-district,--or-irrigation
or-municipal-water-district,--for-the-same-public-purpose-to-which-it-has
been-so-appropriated,--or-for-any-other-public-purpose-shall-be-deemed-more
necessary-uses-than-the-public-use-to-which-such-property-has-already
been-appropriated;--and-provided-further,--that-where-property
already-appropriated-to-a-public-use-or-purpose,--by-any-person,--firm
or-private-corporation,--is-sought-to-be-taken-by-the-state,--a-county,
city-and-county,--incorporated-city-or-town,--joint-highway-district,
irrigation-or-municipal-water-district,--for-another-public-use-or-purpose,
which-is-consistent-with-the-continuance-of-the-use-of-such-property
or-some-portion-thereof-for-such-existing-purpose,--to-the-same-extent
as-such-property-is-then-used,--or-to-a-less-or-modified-extent,--then
the-right-to-use-such-property-for-such-proposed-public-purpose,--in
common-with-such-other-use-or-purpose,--either-as-then-existing,--or-to
a-less-or-modified-extent,--may-be-taken-by-the-state,--such-county,--city
and-county,--incorporated-city-or-town,--joint-highway-district,--or
irrigation-or-municipal-water-district,--and-the-court-may-fix-the-terms
and-conditions-upon-which-such-property-may-be-so-taken,--and-the-manner
and-extent-of-the-use-thereof-for-each-of-such-public-purposes,--and-may
order-the-removal-or-relocation-of-any-structures,--or-improvements-there-
in-or-thereon,--so-far-as-may-be-required-by-such-common-use.---But
property-appropriated-to-the-use-of-any-county,--city-and-county,--incorpe-
rated-city-or-town,--or-municipal-water-district,--may-not-be-taken-by
any-other-county,--city-and-county,--incorporated-city-or-town,--or

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municipal-water-district, while-such-property-is-so-appropriated-and used-for-the-public-purposes-for-which-it-has-been-so-appropriated.

4.--Property-appropriated-to-any-public-use-by-any-irrigation district, may-be-taken-by-another-irrigation-district-for-another public-use-and-purpose, which-is-consistent-with-the-use-of-such property-for-such-existing-purposes-to-the-same-extent-as--such property-is-then-used; provided, that-the-right-to-such-limited-use in-common-shall-include-the-right-to-enlarge, change-or-improve-the property-so-taken; provided-further, that-such-enlargement, change-or improvement-shall-not-interfere-with-the-original-use-or-any-necessary extension-or-enlargement-of-such-use.

5.--Franchises-for-any-public-utility, and-all-kinds-of-property of-any-nature-whatever-used, either-during-the-existence-of-or-at the-termination-of-said-franchise, to-supply-and-furnish-the-service-of such-public-utility, but-such-franchise-or-property-shall-not-be-taken except-for-a-more-necessary-public-use.

6.--All-rights-of-way-for-any-and-all-the-purposes-mentioned-in Section-1238, and-any-and-all-structures-and-improvements-on, over, across-or-along-such-rights-of-way, and-the-lands-held-or-used-in connection-there-with-shall-be-subject-to-be-connected-with, crossed, or intersected-by-or-embraced-within-any-other-right-of-way-or-improvements, or-structures-thereon.--They-shall-also-be-subject-to-a-limited-use, in common-with-the-owner-thereof, when-necessary; but-such-uses, crossings,

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~~intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury.~~

~~7.--All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.~~

~~8.--Proceedings to condemn lands belonging to this state are hereby authorized, and must be maintained and conducted in the same manner as are other condemnation proceedings provided for in this title; except, that in such proceedings the summons and a copy of the complaint must be served on the Governor, Attorney General, and the State Lands Commission of this state.~~

Comment. Section 1240 is superseded by the provisions listed below.

Section 1240

Eminent Domain Code

Paragraph 1- - - - -	See §§ 101, 303
Paragraph 2- - - - -	See [Public Resources Code § 7994]
Paragraph 3- - - - -	See §§ 450-456, 470-471. See also § 113
Paragraph 4- - - - -	See §§ 470-471. See also § 113
Paragraph 5- - - - -	See §§ 450-456. See also §§ 101, 303
Paragraph 6- - - - -	See §§ 470-471. See also §§ 101, 303
Paragraph 7- - - - -	See §§ 101, 303
Paragraph 8- - - - -	[to be determined later]

Code of Civil Procedure Section 1241 (repealed)

1241.--Before property can be taken, it must appear:

1.--That the use to which it is to be applied is a use authorized by law;

2.--That the taking is necessary to such use; provided, when the board of a sanitary district or the board of directors of an irrigation district, of a transit district, of a rapid transit district, of a public utility district, of a county sanitation district, or of a water district or the legislative body of a county, city and county, or an incorporated city or town, or the governing board of a school district, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, or water district, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; -(a) of the public necessity of such proposed public utility or public improvement; -(b) that such property is necessary therefor, and -(c) that such proposed public utility or public improvement is planned or located in the manner

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which-will-be-most-compatible-with-the-greatest-public-good-and-the least-private-injury;-provided,-that-said-resolution-or-ordinance shall-not-be-such-conclusive-evidence-in-the-case-of-the-taking-by any-county-city-and-county--or-incorporated-city-or-town-or school district--or-sanitary--irrigation--transit--rapid-transit--public utility--county-sanitation--or-water-district--of-property-located outside-of-the-territorial-limits-thereof.

3--If-already-appropriated-to-some-public-use;-that-the-public use-of-which-it-is-to-be-applied-is-a-more-necessary-public-use;-provided, that-where-such-property-has-been-so-appropriated-by-any-individual firm-or-private-organization-the-use-thereof-for-a-public-street-or highway-of-the-state-a-county-city-and-county--or-any-incorporated city-or-town--or-joint-highway-district--or-the-use-thereof-by-the state-a-county-city-and-county--or-any-incorporated-city-or-town--or-joint-highway-district--or-a-municipal-water-district--or-an district-district-a-transit-district--a-rapid-transit-district--a public-utility-district--or-a-water-district-for-the-same-purposes-to which-it-has-been-appropriated--or-for-any-public-purpose,-shall-be deemed-a-more-necessary-use-than-the-public-use-to-which-such-property has-been-already-appropriated--and-provided,-further,-that-property-of any-elsewhere;-whether-already-appropriated-to-public-use-or-not;- including-all-rights-of-any-nature-in-water-owned-by-any-person;-firm or-private-organization-may-be-taken-by-a-county-city-and-county;

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or-any-incorporated-city-or-town-or-by-a-municipal-water-district,-or
an-irrigation-district,-a-transit-district,-a-rapid-transit-district,
a-public-utility-district,-or-a-water-district,-for-the-purpose-of
supplying-water,-or-electricity-for-power,-lighting-or-heating-purposes
to-such-county,-city-and-county,-or-incorporated-city-or-town,-or
municipal-water-district,-or-an-irrigation-district,-a-transit-district,
a-rapid-transit-district,-a-public-utility-district,-or-a-water-district,
or-the-inhabitants-thereof,-or-for-the-purpose-of-supplying-any-other
public-utility,-or-for-any-other-public-use.--And-such-taking-may-be
made,-either-to-furnish-a-separate-and-distinct-supply-of-such-water,
and-such-electricity-for-power,-lighting-or-heating-purposes,-or-to
provide-for-any-such-separate-and-distinct-other-public-utility-or-other
public-use;-to-furnish-such-a-supply-or-provide-for-any-such-other-public
utility-or-other-public--use-in-conjunction-with-any-other-supply-or
with-any-other-public-utility-or-other-public-use-that-may-have-been
theretofore-provided-for-or-that-may-thereafter-be-provided-for-in-so
supplying-or-providing-for-such-county,-city-and-county,-or-incorporated
city-or-town,-or-municipal-water-district-or-an-irrigation-district,-a
transit-district,-a-rapid-transit-district,-a-public-utility-district,
or-a-water-district,-or-the-inhabitants-thereof;-or-in-conjunction-with
any-other-supply-or-with-any-other-public-utility-or-other-public-use
that-may-have-been-theretofore-determined-upon-or-that-may-thereafter
be-determined-upon-in-accordance-with-law-by-the-people-of-any-such

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county, -city-and-county, -incorporated-city-or-town-or-municipal-water district-or-an-irrigation-district, -a-transit-district, -a-rapid-transit district, -a-public-utility-district, -or-a-water-district, --Nothing herein-contained-shall-be-constructed-as-in-any-way-limiting-such-rights as-may-by-given-by-any-other-law-of-this-State-to-counties, -cities and-counties, -incorporated-cities-or-towns-or-municipal-water-districts or-irrigation-districts, -transit-districts, -rapid-transit-districts, public-utility-districts, -or-water-districts.

But-private-property-appropriated-to-the-use-of-any-county, -city and-county, -incorporated-city-or-town, -or-municipal-water-district, -or irrigation-district, -or-transit-district, -or-rapid-transit-district, -or public-utility-district, -or-water-district, -may-not-be-taken-by-any other-county, -city-and-county, -incorporated-city-or-town, -or-municipal district, -or-irrigation-district, -or-transit-district, -or-rapid-transit district, -or-public-utility-district, -or-water-district, -while-such property-is-so-appropriated-and-used-for-the-public-purposes-for-which it-has-been-so-appropriated.

Comment. Section 1241 is superseded by provisions of the Eminent Domain Code indicated below.

Section 1241

Eminent Domain Code

Paragraph 1 - - - - - §§ 300, 301

Paragraph 2 - - - - - §§ 302, 310-313

Paragraph 3 - - - - - §§ 450-456. See also § 113.

CODE OF CIVIL PROCEDURE § 1241.7

Tentatively approved 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

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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

Tentatively approved September 1971

~~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 1241.7 is superseded by Section 455 of the Eminent Domain Code and Section 103.5 of the Streets and Highways Code.

CODE OF CIVIL PROCEDURE § 1241.9

Tentatively approved 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

CODE OF CIVIL PROCEDURE § 1241.9

Tentatively approved 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 454 of the Eminent Domain Code and Section 103.5 of the Streets and Highways Code.

CODE OF CIVIL PROCEDURE § 1245.4

Tentatively approved September 1971

Code of Civil Procedure § 1245.4 (repealed)

~~1245.4.--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~~

CODE OF CIVIL PROCEDURE § 1245.4

Tentatively approved September 1971

~~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-judg-
ment-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.~~

Comment. Section 1245.4 was evidently intended as narrowly-drawn special legislation designed to aid the City of Marysville to condemn property known as Cortez Square and to convey it to the County of Yuba for the purpose of erecting a county courthouse. Cf. Govt. Code §§ 50530 and 50533, and City of Marysville v. Boyd, 181 Cal. App.2d 755, 5 Cal. Rptr. 598 (1960). As such, it has outlasted any usefulness it may have had. See City of Marysville v. Boyd, supra.

The right of a person authorized to condemn property for a public use to name as defendants all persons public and private, known or unknown, is continued in Eminent Domain Code Section .

CODE OF CIVIL PROCEDURE § 1264.1

Tentatively approved September 1971

Code of Civil Procedure § 1264.1 (repealed)

Sec. . Section 1264.1 of the Code of Civil Procedure is repealed.

~~1264.1.--Where the property sought to be condemned is a franchise of limited duration to collect tolls on any bridge or highway, the plaintiff may condemn the right to take such franchise as of a future date, which date shall be specified in the complaint and in the judgment of condemnation.~~

Comment. Section 1264.1 and its implementing Sections 1264.2-1264.6 and 1264.8, relating to condemnation of toll franchises of limited duration as of a future date, are not continued. These sections were of extremely limited application and are presently of little or not significance, for there appear to be no existing toll bridge or toll road franchises. In addition, these sections largely restated the rules of eminent domain that would be applicable in their absence. See Work of the 1937 California Legislature, 11 So. Cal. L. Rev. 1, 33-39 (1937).

For related provisions, see Eminent Domain Code Section 101 ("property" defined); Streets and Highways Code Sections 30800 and 20810 (granting franchises); Public Utilities Code Section 1403 (condemnation of utilities); Cal. Const., Art XII, § 8 (right of Legislature). See also former Code of Civil Procedure Sections 1238(4) and 1240(5) and Comments thereto (condemnation of toll bridges and roads, and of franchises).

CODE OF CIVIL PROCEDURE § 1264.2

Tentatively approved September 1971

Code of Civil Procedure § 1264.2 (repealed)

Sec. . Section 1264.2 of the Code of Civil Procedure is repealed.

~~1264.2.--The measure of damages in the case of a proceeding coming under section 1264.1 shall, except as provided in section 1264.3, be the value of the rights granted under said franchise for the period between said date and the expiration of said franchise, due consideration being had to the burdens as well as the benefits conferred by such franchise.~~

Comment. See Comment to former Section 1264.1.

CODE OF CIVIL PROCEDURE § 1264.3

Tentatively approved September 1971

Code of Civil Procedure § 1264.3 (repealed)

Sec. . Section 1264.3 of the Code of Civil Procedure is repealed.

~~1264.3. -- If provision was made in the franchise sought to be condemned or in the applicable statutes under which the franchise was granted for the acquisition of said toll bridge or toll road or said franchise by the county granting the franchise or by the counties, jointly acting, in which the toll bridge or toll road is situated, on the payment of the fair cash value of said toll bridge or toll road, without consideration of the value of the franchise, then and in that event, in any proceeding brought for the taking of such franchise, the compensation awarded shall not exceed the fair cash value of such toll bridge or toll road, exclusive of the value of the franchise.~~

Comment. See Comment to former Section 1264.1.

CODE OF CIVIL PROCEDURE § 1264.4

Tentatively approved September 1971

Code of Civil Procedure § 1264.4 (repealed)

Sec. . Section 1264.4 of the Code of Civil Procedure is repealed.

~~1264.4.--If-a-new-trial-is-granted-or-the-judgment-is-reversed and-remanded-for-a-new-trial,-the-plaintiff-shall-have-the-right-as a-matter-of-course,-in-cases-coming-under-section-1264.1-to-amend the-complaint-to-specify-a-different-date-as-of-which-said-franchise shall-be-taken.~~

Comment. See Comment to former Section 1264.1.

CODE OF CIVIL PROCEDURE § 1264.5

Tentatively approved September 1971

Code of Civil Procedure § 1264.5 (repealed)

Sec. . Section 1264.5 of the Code of Civil Procedure is repealed.

~~1264.5.--If-the-defendant-appeals-from-the-judgment-and-the-judgment-is-affirmed-in-a-case-coming-under-Section-1264.1,-the-plaintiff shall-be-entitled-to-have-deducted-from-the-principal-of-the-judgment to-be-paid-the-net-receipts-of-tolls-collected-or-collectible-from-the date-for-the-taking-as-specified-in-the-judgment-to-the-date-on-which the-judgment-of-the-reviewing-court-becomes-final,-on-showing-that prior-to-the-date-specified-for-said-taking-the-plaintiff-was-able-to pay-the-said-judgment-and-offered-to-pay-the-same-to-the-defendant,-or into-court-for-his-benefit,-in-return-for-a-waiver-of-the-appeal.--The term-"net-receipts"-means-the-sum-obtained-by-subtracting-from-the total-amount-of-tolls-collected-or-collectible-the-amounts-actually and-necessarily-expended-or-incurred-for-the-operation-and-maintenance of-said-toll-road-or-toll-bridge-during-said-period.~~

~~This-section-does-not-apply-in-these-cases-in-which-the-plaintiff takes-possession-pending-appeal-pursuant-to-the-provisions-of-Section 1254-or-takes-possession-under-the-provisions-of-Section-14-of-Article I-of-the-Constitution.~~

Comment. See Comment to former Section 1264.1.

CODE OF CIVIL PROCEDURE § 1264.6

Tentatively approved September 1971

Code of Civil Procedure § 1264.6 (repealed)

Sec. . Section 1264.6 of the Code of Civil Procedure is repealed.

~~1264.6.--To secure the deduction specified in Section 1264.5 the plaintiff must within 10 days after the remittitur is received from the reviewing court serve on the defendant and file in the superior court his motion to set for hearing the question of the deduction to be made.--If, on the hearing of said motion, proof is made to the satisfaction of the court of plaintiff's ability to pay, and offer to pay, the judgment, as specified in Section 1264.5, the court shall grant the motion and shall fix a time for the determination of the amount to be deducted, which amount shall be determined by the court sitting without a jury unless plaintiff or defendant on or before the date of the hearing of said motion to set files with the court a demand in writing for a jury, in which case the said amount shall be determined by a jury.~~

Comment. See Comment to former Section 1264.1.

CODE OF CIVIL PROCEDURE § 1264.8

Tentatively approved September 1971

Code of Civil Procedure § 1264.8 (repealed)

Sec. . Section 1264.8 of the Code of Civil Procedure is
repealed.

~~1264.8. -- In any case brought under section 1264.1, the plaintiff shall have the full period specified in section 1251 in which to pay the judgment, but in case the period specified in that section expires prior to the date specified in the judgment for the taking of said franchise, the period shall be extended to and including the day preceeding said specified date.~~

~~No abandonment shall be implied under section 1255a unless the judgment is not paid within the time herein specified.~~

Comment. See Comment to former Section 1264.1.

CODE OF CIVIL PROCEDURE § 1264.9

Tentatively approved September 1971

Code of Civil Procedure § 1264.9 (repealed)

Sec. . Section 1264.9 of the Code of Civil Procedure is repealed.

~~1264.9.--In any action for the acquisition hereunder of a toll road or toll bridge or the franchise for the collection of tolls thereon, the court in which such action is pending shall have jurisdiction to determine the liability of the condemning party to any county, city or other public mandatory for taxes, license fees or franchise payments and to determine the reversionary rights of any such county, city or other public mandatory in or to the franchise or property so sought to be acquired, and if, and in the event, any such liability be so determined against said condemning party, then and in that event an award shall be made to such county, city or other public mandatory, pursuant to the provisions of the law.~~

Comment. Section 1264.9, relating the the jurisdiction of the court to determine the liability of a condemnor for taxes, license fees, and franchise payments on, as well as, reversionary interests of a city, county, or other public mandatory in, a toll bridge or toll road, or franchise thereon, is not continued. The section was of little or no current significance, for there appear to be few existing private toll roads or bridges and no existing franchises for their operation. Moreover, the court has general jurisdiction to determine matters incident to the condemnation of property (see Eminent Domain Code Section ____; see also former Code of Civil Procedure Section

CODE OF CIVIL PROCEDURE § 1264.9

Tentatively approved September 1971

1247(2) and Comment thereto), as well as specific jurisdiction to determine liability for taxes (see Revenue and Taxation Code Section 4986; see also former Code of Civil Procedure Sections 1252.1 and 1252.2 and Comments thereto).

GOVERNMENT CODE §§ 6950-6956

Tentatively approved September 1971

ACQUISITION OF PROPERTY BY COUNTY OR CITY
FOR OPEN SPACE

Sec. . The heading for Chapter 12 (commencing with Section 6950)
of Division 7 of Title 1 of the Government Code is amended to read:

Chapter 12. ~~Purchase-of-Interests-and-Rights-in-Real~~

~~Property~~ Acquisition of Property for Open Space

GOVERNMENT CODE § 6950

Tentatively approved September 1971

Government Code § 6950 (amended)

Sec. . Section 6950 of the Government Code is amended to read:

6950. It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.

Comment. See Comment to Section 6953.

Tentatively approved September 1971

Government Code § 6952 (amended)

Sec. . Section 6952 of the Government Code is amended to read:

6952. The Legislature hereby declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this State for any county or city to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions.

Comment. See Comment to Section 6953.

GOVERNMENT CODE § 6953

Tentatively approved September 1971

Government Code § 6953 (amended)

Sec. . Section 6953 of the Government Code is amended to read:

6953. (a) The Legislature further declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended or advanced ,~~and that any~~ .

(b) Any county or city may acquire, by purchase, gift, grant, bequest, devise, lease , condemnation or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter.

Notwithstanding Section 313 of the Eminent Domain Code, where property is sought to be acquired under this section by condemnation, the resolution of necessity adopted pursuant to Section 310 of the Eminent Domain Code is not conclusive on the matters referred to in Section 302 of the Eminent Domain Code.

(c) Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter.

Comment. Section 6953 is amended to make clear that a city or county may exercise the power of eminent domain to acquire property for open space use under this chapter. The former law was unclear, but condemnation for open

GOVERNMENT CODE § 6953

Tentatively approved September 1971

space probably was not authorized. Compare Note, Property Taxation of Agricultural and Open Space Land, 8 Harvard J. Legis. 158 text at n.1 (1970) (implying that condemnation was authorized) with Ops. Cal. Legis. Counsel (Oct. 24, 1969)(concluding that condemnation was not authorized). Compare Pub. Res. Code §§ 5540, 5541 (authorizing condemnation by regional park district for "natural areas" and "ecological and open space preserves"). Where property is acquired by condemnation under this chapter, the resolution of necessity is not conclusive on the issues of public interest and necessity. See Eminent Domain Code § 313(a).

The power of eminent domain provided in Section 6953 will facilitate compliance with Section 65564 (requiring local open space plans to incorporate an "action program" consisting of specific programs the city or county intends to pursue in implementing its open space plan). See also §§ 25350.5 and 37350.5 (power of cities and counties to condemn to carry out city and county functions). The power of eminent domain will also provide a means to compel open space preservation where zoning fails. See § 65912 (open space zoning may not be used to take or damage property for public use without payment of just compensation).

For limitations on the right to acquire property under this chapter, see Section 6955.

GOVERNMENT CODE § 6955

Tentatively approved September 1971

Government Code § 6955 (added)

Sec. . Section 6955 is added to the Government Code, to read:

6955. Property may be acquired under this chapter only if its acquisition is consistent with the local open space plan adopted by the city or county pursuant to Section 65563.

Comment. Section 6955 makes clear that cities and counties may acquire open space or open area only if such acquisition is consistent with the local open space plan adopted pursuant to Section 65563 (requiring every city and county to prepare and adopt, by June 30, 1972, a local open space plan for the comprehensive and long-range preservation and conservation of open space land within its jurisdiction). Section 6955 is thus merely a specific application of Section 65566 (requiring all acquisitions of open space land to be consistent with the local open space plan). See also Section 65567 (prohibiting issuance of building permits, approval of subdivision maps, or adoption of open space zoning ordinances unless consistent with the local open space plan).

Section 6955 parallels Section 65910 (requiring cities and counties to adopt open space zoning ordinances consistent with the local open space plan by January 1, 1973). By providing that, when open space is acquired by purchase, condemnation, or otherwise, the acquisition must also be consistent with the **local** open space plan, Section 6955 recognizes that acquisition of property is an alternative to open space zoning.

GOVERNMENT CODE § 6956

Tentatively approved September 1971

Government Code § 6956 (added)

Sec. . Section 6956 is added to the Government Code, to read:

6956. (a) A city or county may divert property from use as open space or open area only after it has obtained replacement property for the property to be diverted. Any replacement property, whether substituted or received in exchange, shall be substantially equivalent in usefulness and location for permanent open space or open area as the property it replaces and must be held subject to all the provisions of this chapter. Money received for property diverted from use as open space or open area shall be used to acquire the replacement property or shall be held in a trust fund to be used only to acquire other open space or open area subject to the provisions of this chapter.

(b) This section applies only to property acquired under this chapter after June 30, 1974.

(c) This section does not apply where property or a right or interest therein is conveyed or otherwise subjected to uses that are compatible with its character as open space or open area and that do not significantly adversely affect such character.

Comment. Before open space or open area may be diverted to other use, Section 6956 requires that substantially equivalent property be acquired for open space or open area. The equivalent property may be acquired, for example, in exchange for the diverted property, by purchase with funds available for open space acquisition, or (if the city or county uses the open space or open area for its own public project) by public funds available for the project.

Tentatively approved September 1971

It should be noted that the restriction contained in Section 6956 is not the only restriction upon disposal of open space property by cities and counties. Section 65566 requires that acquisition, disposition, restriction, or regulation of open space property be in accordance with the local open space plan. This requirement applies to property acquired for open space under this chapter or under any other provision of law.

Subdivision (a). Subdivision (a) of Section 6956, which requires substitution of equivalent property, adopts the substance of the limitation found in 42 U.S.C. § 1500c (limitation on conversion of open space to another use if federal assistance used to acquire the open space). See also the 1970 Cumulative State Legislative Program (1969) of the Advisory Commission on Intergovernmental Relations, containing suggested state legislation including a similar limitation. For a somewhat comparable provision, see Pub. Res. Code § 5096.27 (property acquired by local entity with state grant under Cameron-Unruh Beach, Park, Recreational, and Historical Facilities Bond Act of 1964 to be used only for purpose for which state grant funds requested unless otherwise permitted by specific act of the Legislature). Compare Pub. Res. Code § 5540 (authorization by voters or by act of Legislature required for conveyance of property used for park purposes by regional park district).

Subdivision (b). The requirements of subdivision (a) apply only to open space property acquired after the time cities and counties have been granted the power of eminent domain to acquire open space. Nonetheless, the requirements apply not only to open space acquired by eminent domain but also to such property acquired by any other method.

Tentatively approved September 1971

Subdivision (c). The requirements of subdivision (a) do not affect the right of cities and counties to convey or lease open space property, or a right or interest therein, under such covenants or other contractual arrangements as will limit its future use in accordance with the provisions of this chapter. See Section 6953. Subdivision (c) permits improvements in the open space area that do not significantly adversely affect its usefulness as open space. If, however, the improvement significantly adversely affects the usefulness of the open space area as open space, subdivision (a) is applicable.

Tentatively approved September 1971

Government Code Section 50485.13 (repealed)

Sec. . Section 50485.13 of the Government Code is repealed.

50485.13.---In-any-case-in-which:--(a)-it-is-desired-to-remove,-lower,
or-otherwise-terminate-a-nonconforming-structure-or-use;-or-(b)-the
approach-protection-necessary-cannot,-because-of-constitutional-limita-
tions,-be-provided-by-airport-zoning-regulations-under-this-article;-or
(c)-it-appears-advisable-that-the-necessary-approach-protection-be-pre-
vided-by-aquisition-of-property-rights-rather-than-by-airport-zoning
regulations,-the-city-or-county-within-which-the-property-or-nonconform-
ing-use-is-located-or-the-city-or-county-owning-the-airport-or-served-by
it-may-acquire,-by-purchase,-grant,-or-condemnation-in-the-manner-provided
by-the-law-under-which-a-city-or-county-is-authorized-to-acquire-real
property-for-public-purposes,-such-air-right,-air-navigation-easement,
or-other-estate-or-interest-in-the-property-or-nonconforming-structure
or-use-in-question-as-may-be-necessary-to-effectuate-the-purposes-of-this
article.---In-the-case-of-the-purchase-or-grant-of-any-property-or-any
easement-or-estate-or-interest-therein-or-the-aquisition-of-the-same-by
the-power-of-eminent-domain-by-a-city-or-county-making-such-purchase-or
exercising-such-power,-there-shall-be-included-in-the-damages-for-the
taking,-injury-or-destruction-of-property-the-cost-of-the-removal-and
relocation-of-any-structure-or-public-utility-which-is-required-to-be
moved-to-a-new-location.

GOVERNMENT CODE § 50485.13

Tentatively approved September 1971

Comment. Section 50485.13 of the Government Code, granting to cities and counties the power of eminent domain to eliminate airport hazards, is superseded by other sections.

The power to condemn for the elimination of airport hazards is continued in Public Utilities Code Section 21652. To the extent that entities were limited in their exercise of eminent domain under Section 50485.13 to situations in which zoning would have been inadvisable or unconstitutional, the limitation is not continued. Any entity authorized to condemn for airports may condemn to eliminate airport hazards without limitation under Public Utilities Code Section 21652. It should be noted, however, that cities and counties are mandated to achieve this end, to the extent legally possible, by exercise of the police power, rather than by exercise of the power of eminent domain. Section 50485.2.

The requirement that cities and counties pay the cost of relocation of structures when acquiring property to eliminate airport hazards is continued in Public Utilities Code Section 21653.

The authority of cities and counties to condemn property outside their limits for airport purposes is retained in Government Code Section 50470.

[NOTE: The policy expressed in Section 50485.2 to encourage exercise of the police power--rather than eminent domain--is subject to Commission review.]

HEALTH AND SAFETY CODE § 438.4

Tentatively approved September 1971

Health and Safety Code § 438.4 (amended)

Sec. . Section 438.4 of the Health and Safety Code is amended to read:

438.4. The voluntary area health planning agency, acting upon an application originally or reviewing a recommendation of a voluntary local health planning agency or the consumer members of a voluntary area health planning agency acting as an appeals body, and the Health Planning Council shall make one of the following decisions:

- (a) Approve the application in its entirety;
- (b) Deny the application in its entirety;
- (c) Approve the application subject to modification by the applicant, as recommended by the body involved.

A decision shall become final when all rights to appeal have been exhausted. Approval shall terminate 12 months after the date of such approval unless the applicant has commenced construction , or conversion to a different license category , or an action to condemn property pursuant to Section 1427, and is diligently pursuing the same to completion as determined by the voluntary area health planning agency; or unless the approval is extended by the voluntary area health planning agency for an additional period of up to 12 months upon the showing of good cause for the extension.

Comment. Section 1427 requires that health planning agency approval be secured before condemnation for the construction of hospital facilities is commenced. The amendment to Section 438.4 recognizes that condemnation may require more than a year, and provides that approval may be extended at the end of 12 months if condemnation has been commenced and is diligently pursued.

HEALTH AND SAFETY CODE § 1427

Tentatively approved September 1971

§ 1427. Eminent domain power of nonprofit hospital

Sec. . Section 1427 is added to the Health and Safety Code, to read:

1427. (a) As used in this section, "nonprofit hospital" means any institution, place, building, or agency currently licensed under this chapter to provide 24-hour inpatient services for the diagnosis, care, and treatment of various physical or mental illnesses or ailments of humans, in multiple departments having an organized medical or medical-dental staff, and which is owned and operated by a fund, foundation, or corporation, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual. "Non-profit hospital" does not include institutions the primary purpose of which is to provide convalescent, rehabilitative, nursing, or resident care.

(b) Any nonprofit hospital may exercise the right of eminent domain to acquire property necessary for the establishment, operation, or expansion of the hospital if both the following requirements are met:

(1) A final and favorable decision concerning the project for which the property is sought to be condemned has been made by the voluntary area health planning agency approved pursuant to Section 437.7, the consumer members of such a voluntary area health planning agency acting as an appeals body, or the Health Planning Council.

HEALTH AND SAFETY CODE § 1427

Tentatively approved September 1971

(2) The Director of the State Department of Public Health has certified that (i) the acquisition of the property sought to be condemned is necessary for the establishment, operation, or expansion of the hospital, (ii) the public interest and necessity require the proposed project, and (iii) the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(c) The certificate of the Director of the State Department of Public Health pursuant to subdivision (b) establishes a presumption that the matters referred to in Section 302 of the Eminent Domain Code are true. This presumption is a presumption affecting the burden of proof.

Comment. Section 1427 supersedes former Code of Civil Procedure Section 1238.3.

Subdivision (a). The term "nonprofit" has the same meaning under subdivision (a) as under former Code of Civil Procedure Section 1238.3. However, the definition of "hospital" in subdivision (a) has been narrowed to include only those institutions that are licensed to provide diversified, professional, short-term services, and to exclude institutions that provide only long-term or specialized services. The definition is in keeping with the Administrative Code definitions of "hospital" and "general hospital." See 9 Cal. Admin. Code § 515; 17 Cal. Admin. Code, Ch. 1, § 230.

HEALTH AND SAFETY CODE § 1427

Tentatively approved September 1971

Subdivision (b). Subdivision (b) grants broader authority to condemn than was provided by Code of Civil Procedure Section 1238.3, for it permits acquisition of property to establish a newly-organized and licensed hospital, dispenses with the requirement that the property be "immediately adjacent" to existing holdings, and no longer requires that the hospital condemnor be engaged in "scientific research or an educational activity." The limitation to property immediately adjacent unduly restricted the ability of existing hospitals to acquire one parcel in a large tract needed for expansion. The limitation to hospitals engaged in scientific research or education was both narrow and ineffective and is no longer necessarily characteristic of true hospitals. And, the limitation to expansion of existing hospitals was illogical in view of the equal or greater need of new hospitals for the right of eminent domain.

In place of the restrictions contained in former Section 1238.3, Section 1427 makes the necessity and desirability of each hospital condemnation project subject to a triple review process: by local health facilities planning authorities, by the State Director of Public Health, and by the court in an eminent domain proceeding. The new scheme is intended to aid expansion to meet public needs as determined by authorized agencies.

New hospital projects must be submitted for approval to local health services planning boards (voluntary area health planning agencies or voluntary local health planning agencies) before they can be licensed to be operated. The local boards are instructed to determine whether proposed

HEALTH AND SAFETY CODE § 1427

Tentatively approved September 1971

projects are necessary and convenient to the community and to approve those projects conducive to comprehensive community medical services. Decisions of the local boards may be appealed, either by the applicant for approval or by members of the local planning boards, the final decision in any case resting with the Health Planning Council. See Health & Saf. Code §§ 437.7, 437.8, 437.9, 438, 438.1, 438.2, 438.4, 438.5. Approval, once granted, expires within a year but may be extended if a project has been started and, in the opinion of the local planners, is diligently pursued, or for other good cause shown. Health & Saf. Code § 438.4. Applications for licensure of new projects must indicate that the applicant has submitted the project for local board approval and has participated in hearings to that end, and that approval was granted or that 12 months have passed since a decision on the project was reached. See Health & Saf. Code §§ 1402.1, 1402.2. In view of the latter provision, it is possible to acquire a license for a new hospital project even though the project has been disapproved by local planning authorities so long as the decision of the local authorities is at least one year old. Paragraph (1) of subdivision (b) requires that a project be actually approved by local authorities before condemnation will be authorized, regardless of whether the project might later be licensed though it had never been approved.

Paragraph (2) continues the requirement of former Code of Civil Procedure Section 1238.3 that the Director of the Department of Public Health certify that

HEALTH AND SAFETY CODE § 1427

Tentatively approved September 1971

the acquisition is necessary. The Department of Public Health makes and enforces detailed regulations for construction or alterations of hospital buildings. Health & Saf. Code § 1411; Cal. Admin. Code §§ 265, 400-499. See West Covina Enterprises, Inc. v. Chalmers, 49 Cal.2d 754, 322 P.2d 13 (1956). In addition, paragraph (2) requires the certificate to indicate the public interest and necessity for the acquisition. Cf. Eminent Domain Code § 302.

Subdivision (c). Subdivision (c) establishes and classifies the presumption of necessity afforded the certificate of the Director of the Department of Public Health for the purposes of Section 302 of the Eminent Domain Code.

HEALTH & SAFETY CODE § 4967

Tentatively approved April 1971

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.

Tentatively approved April 1971

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.

PUBLIC RESOURCES CODE § 7994

Tentatively approved September 1971

DIVISION 6. PUBLIC LANDS

Part 3. Sale of Public Lands

Chapter 4. Provisions Relating to Public Lands Generally

Article 9. Miscellaneous Provisions Relating to State Lands

Public Resources Code Section 7994. Limitation on condemnation of state lands

Sec. . Section 7994 is added to the Public Resources Code, to read:

7994. Notwithstanding any other provision of law, all 16th and 36th sections, both surveyed and unsurveyed, owned by the state or the United States, which are now or may hereafter be included within the exterior boundaries of a national reservation, a reserve, or lands withdrawn from public entry, are exempt from taking by eminent domain.

Comment. Section 7994 continues without substantive change the limitation upon condemnation of state lands stated in paragraph 2 of former Code of Civil Procedure Section 1240.

[NOTE: This section is approved subject to reconsideration upon receipt of further information.]

PUBLIC UTILITIES CODE § 7526

Tentatively approved September 1971

Public Utilities Code § 7526 (amended)

Sec. . Section 7526 of the Public Utilities Code is amended to read:

7526. Every railroad corporation has all of the following powers:

(a) To make such examination and surveys as are necessary to the selection of the most advantageous route for the railroad. The officers, agents, and employees of the corporation may enter upon the lands or waters of any person, for this purpose, subject to liability for all damages which they do thereto.

(b) To receive, hold, take, and convey, by deed or otherwise, as a natural person, such voluntary grants and donations of real estate and other property as are made to it to aid and encourage the construction, maintenance, and accommodation of the railroad.

(c) To purchase, or by voluntary grants or donations to receive, enter, take possession of, hold, and use all such real estate and other property as is necessary for the construction and maintenance of such railroad, and for all stations, depots, and other purposes necessary to successfully work and conduct the business of the road.

(d) To lay out its road, not exceeding 10 rods wide, and to construct and maintain it, with one or more tracks, and with such appendages and adjuncts as are necessary for the convenient use of the road.

(e) To construct its roads across, along, or upon any stream of water, watercourse, roadstead, bay, navigable stream, street, avenue, or highway, or across any railway, canal, ditch, or flume which the

PUBLIC UTILITIES CODE § 7526

Tentatively approved September 1971

route of its road intersects, crosses, or runs along, in such manner as to afford security for life and property. The corporation shall restore the stream or watercourse, road, street, avenue, highway, railroad, canal, ditch, or flume thus intersected to its former state of usefulness as near as may be, or so that the railroad does not unnecessarily impair its usefulness or injure its franchise.

(f) To cross, intersect, join, or unite its railroad with any other railroad, either before or after construction, at any point upon its route, and upon the grounds of the other railroad corporation, with the necessary turnouts, sidings, and switches, and other conveniences in furtherance of the objects of its connections. Every corporation whose railroad is intersected by any new railroad shall unite with the owners of the new railroad in forming the intersections and connections, and grant facilities therefor. If the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of the crossings, intersections, and connections, such matters shall be ascertained and determined as is provided in Title 7, Part 3 of the Code of Civil Procedure.

(g) To ~~purchase~~ acquire lands, timber, stone, gravel, or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts ~~,-er-acquire-them-in-the manner-provided-in-Title-7,-Part-3-of-the-Code-of-Civil-Procedure,-for the-condemnation-of-lands~~ .

PUBLIC UTILITIES CODE § 7526

Tentatively approved September 1971

(h) To change the line of its road, in whole or in part, whenever a majority of the directors so determine, as provided in Section 7531, but the change shall not vary the general route of the road, as contemplated in its articles of incorporation.

Comment. The authority to condemn for lands, timber, stone, gravel, or other materials used in the construction or maintenance of a railroad is deleted from subdivision (g) of Section 7526 because it duplicates and is more restrictive than the general power of railroad corporations to condemn any property necessary for the construction and maintenance of its railroad provided by Section 611.

PUBLIC UTILITIES CODE § 21633

Tentatively approved September 1971

Public Utilities Code Section 21633. Acquisition of property (amended)

Sec. . Section 21633 of the Public Utilities Code is amended
to read:

21633. For the purposes of this article, the department, by purchase, gift, devise, lease, condemnation, or otherwise, may acquire real or personal property, or any interest therein .
~~including easements in airport hazards or land outside the boundaries of an airport or airport site, necessary to permit safe and efficient operation of the airports or to permit the removal, elimination, obstruction marking, or obstruction lighting of airport hazards, or to prevent the establishment of airport hazards.~~

Comment. Section 21633 as amended continues the authority of the Department of Aeronautics to acquire property for airport purposes. The portion of Section 21633 that formerly authorized acquisition of property for the elimination of airport hazards is continued in Section 21652.

Tentatively approved September 1971

Public Utilities Code Section 21634 (repealed)

Sec. . Section 21634 of the Public Utilities Code is repealed.

~~21634.--The department may contract or otherwise provide, by condemnation if necessary, for the removal or relocation of any airport hazard or the removal or the relocation of all private structures, railways, highways, mains, pipes, conduits, wires, cables, poles, and all other facilities and equipment which may interfere with the location, expansion, development, or improvement of the airports and other air navigation facilities or with the safe approach thereto or takeoff therefrom by aircraft, and may pay the cost of the removal or relocation.--When exercising its power of removal or relocation, the department shall pay the cost of removal and relocation of any private structures, railways, mains, pipes, conduits, wires, cables, poles, or any other structure or equipment required to be moved to a new location.~~

Comment. The substance of former Section 21634 is continued in Section 21653.

PUBLIC UTILITIES CODE § 21635

Tentatively approved September 1971

Public Utilities Code Section 21635 (repealed)

Sec. . Section 21635 of the Public Utilities Code is repealed.

~~21635.--In-the-condemnation-of-property,-the-department-shall proceed-in-the-name-of-the-state-in-the-manner-provided-by-the-Code of-Civil-Procedure.--For-the-purpose-of-making-surveys-and-examinations-relative-to-any-condemnation-proceedings,-it-is-lawful-to enter-upon-any-land.--The-power-of-the-department,-by-condemnation, to-acquire-or-require-the-relocation-of-any-railway,-highway,-main, pipe,-conduit,-wires,-cables,-poles,-and-all-other-facilities-and equipment-or-other-property-held-for-or-devoted-to-a-public-use-shall be-exercised-only-after-the-court-in-which-the-condemnation-proceedings are-pending-finds-that-the-taking-or-relocation-for-the-public-use-of-the department-is-of-greater-public-necessity-than-the-public-use-for which-the-property-is-presently-held-or-used.--The-court-may-fix-the terms-and-conditions-for-the-enjoyment-of-a-right-of-common-use,-in lieu-of-taking-or-relocation,-as-it-determines-will-best-suit-the public-interest-and-necessity.~~

Comment. Section 21635 is not continued. The requirement that the Department of Aeronautics proceed in the name of the state is expressed in Section 21631. The rules governing the conduct of eminent domain proceedings generally are prescribed in the Eminent Domain Code. See Eminent Domain Code Section 200. Particular provisions of former Section 21635 may be found in the following sections:

Entry for survey and examination	Em. Dom. Code § 500
More necessary use requirement.	Em. Dom. Code §§ 450-456
Right of common use	Em. Dom. Code §§ 470, 471

PUBLIC UTILITIES CODE §§ 21652-21653

Tentatively approved September 1971

Sec. . Article 2.6 (commencing with Section 21652) is added
to Chapter 4 of Part 1 of Division 9 of the Public Utilities Code,
to read:

Article 2.6. Hazard Elimination; Flight Disburbance

PUBLIC UTILITIES CODE § 21652

Tentatively approved September 1971

§ 21652. Acquisition of property for hazard elimination or flight disturbance

21652. (a) Any person authorized to exercise the power of eminent domain for airport purposes may acquire by purchase, gift, devise, lease, condemnation, or otherwise:

(1) Any property necessary to permit the safe and efficient operation of the airport, or to permit the removal, elimination, obstruction-marking, or obstruction-lighting of airport hazards, or to prevent the establishment of airport hazards.

(2) Airspace or an easement in such airspace above the surface of property where necessary to permit imposition upon such property of excessive noise, vibration, discomfort, inconvenience, interference with use and enjoyment, and any consequent reduction in market value, due to the operation of aircraft to and from the airport.

(3) Remainder property underlying property taken pursuant to subdivision (2), where permitted by Section 421 of the Eminent Domain Code.

(b) As used in this section, "property" includes real and personal property and any right or interest therein, whether within, beyond, adjacent to, or in the vicinity of, the boundaries of an airport or airport site, and, by way of illustration and not by way of limitation, includes air rights, airspace, air easements, and easements in airport hazards.

Comment. Section 21652 continues the authority of the Department of Aeronautics (formerly found in Section 21633), of cities, of counties, and

PUBLIC UTILITIES CODE § 21652

Tentatively approved September 1971

of airport districts (formerly found in Code Civ. Proc. §§ 1239.2 and 1239.4 and Govt. Code § 50485.13) to condemn or otherwise acquire property for the elimination and prevention of airport hazards. See Pub. Util. Code § 21017 ("airport hazard" defined). In addition, it extends this authority to entities previously not covered by a specific grant, e.g., San Diego Unified Port District. See Harb. & Nav. Code App. 1, §§ 4, 5, 27 (West Supp. 1967). For a listing of statutes authorizing the power of eminent domain for airport purposes, see Comment to former Code of Civil Procedure Section 1238, subdivision 20.

Section 21652 also continues and expands the authority (formerly found in Code Civ. Proc. § 1239.3) of cities, counties, airport districts, and the San Diego Unified Port District to condemn to provide areas where flight disturbance will result in damage that might otherwise be the subject of actions for property damage. Section 21652 extends this authority to the State Department of Aeronautics and to any other airport condemnors previously not covered by specific grant.

Subdivision (a). Paragraph (1) of subdivision (a) is based on language formerly found in Public Utilities Code Section 21633 (authority of Department of Aeronautics). As a specific authorization of condemnation for airport protective purposes, it duplicates the more general authority found in Eminent Domain Code Section 304, but this duplication has been retained because it provides useful detail.

Tentatively approved September 1971

Paragraph (2) of subdivision (a) retains the substance of former Code of Civil Procedure Section 1239.3 that airspace or airspace rights may be taken in any area to which flight disturbance will penetrate.

Paragraph (3) of subdivision (a) permits airport condemnors to take, in addition to airspace interests, land and other property for the purpose of providing areas of flight disturbance where a taking pursuant to paragraph (2) would leave a physical or financial remnant. The procedures and standards applicable to such takings are those set forth in Section 421 of the Eminent Domain Code. The right to take pursuant to Section 421 of the Eminent Domain Code entails the right to dispose of property thus acquired pursuant to Section 422 of the Eminent Domain Code.

Subdivision (b). Subdivision (b) makes clear that property of any character or degree may be condemned for airport protective or flight disturbance purposes. As such, it supersedes the restrictive language of former Code of Civil Procedure Sections 1239.2 and 1239.3, and it duplicates the more general definition of property found in Eminent Domain Code Section 101.

The provision formerly found in Code of Civil Procedure Section 1239.4 authorizing acquisition of land, reserving an "irrevocable free license" in the former owner to use and occupy such land has not been continued since subdivision (b) defines "property" so broadly that a condemnor may take land subject to such an interest where necessary.

[NOTE: Section 421 of the Eminent Domain Code, as presently drawn, speaks in terms of the remainder of a larger parcel, rather than in terms of remaining interests in property. This draft of Public Utilities Code Section 21652 is predicated on the assumption that Section 421 will be reworded to accommodate property interests.]

PUBLIC UTILITIES CODE § 21653

Tentatively approved September 1971

§ 21653. Removal or relocation of structures for airport purposes (added)

21653. Any person authorized to exercise the power of eminent domain for airport purposes may provide, by purchase, gift, devise, lease, condemnation, or otherwise, for the removal or relocation of any airport hazard or the removal or relocation of all facilities, structures, and equipment that may interfere with the location, expansion, development, or improvement of the airport and other air navigation facilities or with the safe approach thereto and takeoff therefrom by aircraft. Any person acting under authority of this section shall pay the cost of such removal or relocation.

Comment. Section 21653 continues the authority of the Department of Aeronautics (formerly found in Section 21634), of cities and of counties (formerly found in Government Code Section 50485.13), to require the removal or relocation of airport hazards. See Pub. Util. Code § 21017 ("airport hazard" defined). In addition, it extends this authority to entities previously not covered by a specific grant, e.g., airport districts. See Pub. Util. Code § 22553.

Section 21653 also continues the authority of the Department of Aeronautics to require the removal and relocation of structures, facilities, and equipment that might interfere with the location, expansion, development, or

PUBLIC UTILITIES CODE § 21653

Tentatively approved September 1971

improvement of the airport and its facilities, and extends this authority to other public entities. In addition, it requires payment for relocation or removal of airport hazards generally.

While Section 21653 is phrased as a separate grant of authority to require removal or relocation, such authority can be exercised in connection with an eminent domain proceeding brought under Section 21652.

It should be noted that the removal or relocation of property held for or devoted to a public use may be required only after the court in which proceedings are pending finds that the relocation for airport purposes is of greater public necessity than the public use for which the property was previously held or used. See Eminent Domain Code §§ 470, 471; see Comment to former Pub. Util. Code § 21635.

STREETS & HIGHWAYS CODE § 103.5

Tentatively approved 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 454 or Section 455 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

Tentatively approved 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 454 and 455 of the Eminent Domain Code.

IRRIGATION DISTRICTS

Water Code § 22425 (amended)

Sec. . Section 22425 of the Water Code is amended to read:

22425. A district may acquire by any means any property or interest in property to carry out its purposes, including any of the following:

(a) Property for the construction, improvement, and operation of works in this state or in any other state or in a foreign nation.

(b) Works being constructed.

(c) Stock of domestic or foreign corporations owning water, water rights, canals, waterworks, franchises, concessions, or rights.

(d) Works by which land has been or may be supplied with water for irrigation.

(e) Property not otherwise authorized herein that may be required as a condition to obtaining state financial assistance for local projects as set forth in Chapter 5 (commencing with Section 12880), of Part 6, Division 6, of the Water Code.

(f) Public buildings and grounds.

Comment. Subdivision (f) is added to Section 22425 of the Water Code to preserve the authority of irrigation districts to condemn property for public buildings and grounds for their use. This addition was necessitated by the repeal of subdivision 3 of Section 1238 of the Code of Civil Procedure which authorized the exercise of the power of eminent domain for "public buildings and grounds . . . for the use of any . . . irrigation district." See former Section 1238 and Comment thereto. -114-