#36.24 11/29/71

First Supplement to Memorandum 71-92

Subject: Study 36.24 - Condemnation (Compatible Use)

At the last meeting, the Department of Public Works took the position that the existing law concerning the right of privately or publicly owned facilities to occupy state highway property was satisfactory and should not be changed. Attached is a letter and memorandum from the Department of Public Works in support of this position.

The staff suggests that a new section be added to the draft attached to Memorandum 71-92, to read:

§ 453. State highways

453. Nothing in this article authorizes the exercise of the power of eminent domain to acquire the right to use property appropriated to state highway use. Nothing in this article affects the law relating to the use of property appropriated to state highway use for other uses.

Comment. The Comment would note that occupation of state highway property by other uses is covered by other statutes and would summarize the statutes collected in the Memorandum prepared by the Department of Public Works.

Respectfully submitted,

John H. DeMoully
Executive Secretary

First Supplement to Memorandum 71-92

EXHIBIT I

STATE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY RONALD REAGAN, Governor

DEPARTMENT OF PUBLIC WORKS
LEGAL DIVISION
1120 N STREET, SACRAMENTO 95814

November 24, 1971

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear John:

In re: Study 36 - Condemnation, Compatible Use

At a recent Law Revision Commission meeting, one of the commissioners was inquiring as to the law with regard to the right of privately or publicly owned facilities to occupy state highways.

Enclosed is a memorandum outlining the means by which private utilities and other governmental entities are allowed to occupy state highways for their facilities. There has been no problem with this regard with the existing law on this subject, and therefore, no need for the Commission to change the right of private utilities and other governmental entities to occupy state highways.

The relationships between the department and these public and private entities have been excellent and any change however minor would cause serious problems in our relationships.

Please do not hesitate to ask if you require further information on this subject.

Very truly yours,

ROBERT F. CARLSON
Assistant Chief Counsel

Enclosure

SUBJECT: Existing Law Pertaining to the Right of Private and Publicly Owned Facilities to Occupy State Highways

Private utilities and lesser governmental entities occupy State highways under the following rights or permissions:

1. Joint and Consent to Common Use Agreements.

   (a) These agreements have been developed and used by the Department of Public Works for many years to perpetuate pre-existing rights within the limits of newly-constructed State Highways. For example, when a privately owned utility occupies its deeded easement and said area is incorporated within a new highway, it is frequently necessary to protect or relocate the physical facilities. This is accomplished at the cost of the State and the utility's right to a compatible use of the highway is perpetuated by means of Joint or Consent to Common Use Agreements. There is no express statutory provision for this arrangement, but literally thousands of these agreements have been accepted by private and public entities.

2. Legislative Franchises.

   (a) The authority to install a variety of facilities in State highways, county roads and city streets is found in legislation, i.e.: statutes characterized as franchises. (See: State v. Marin Municipal Water District, 17 Cal.2d 699)

   (b) This authority extends to irrigation, reclamation, water, public utility, sanitation and transit districts, among others. (See: Water Code, §§ 22431, 31062, 55377; Health & Safety Code, §§ 4759 and 6518; Public Utilities Code, §§ 12808, 16464 and 25805.)

   (c) A similar authority extending the right to municipalities and telephone and telegraph corporations is found in Public Utilities Code, §§ 10101, 7901.

3. Neither the Department of Public Works nor the California Highway Commission has power to grant franchises in State highways but the Department is directed to issue encroachment permits for installations within the State highways:

   (a) Streets and Highways Code §§ 660 through 711.

   (b) Counties, cities, public corporations or political subdivisions which are authorized by law to establish or maintain any works or facilities in, under or over any public highway are entitled, as a matter of right to permits. (See: Streets and Highways Code § 678)

   (c) Every utility is entitled to a permit for such reasonable crossings of any freeway required for the discharge of the utility's service to the public. (See: Streets and Highways Code § 708)

   (d) Discretion as to the granting, and the right of refusal, is given to the Department with respect to longitudinal installations in freeways. (See: Streets and Highways Code § 709)

   (e) As to all permits, reasonable control over the manner, method and location of installation is reserved to the Department. (See: Streets and Highways Code §§ 672-711)

   (f) Where the right to refuse a permit is retained (as with private persons, corporations, etc.) refusal cannot be arbitrary or capricious. (See: People v. Henderson, 85 Cal.App.2d 653)

4. Cities may grant franchises in State highways within its jurisdiction (See: Streets and Highways Code § 682):

   (a) subject to the limitations of §§ 682 through 695, principally Departmental approval in writing as to freeways (Section 683) and street railroads (Section 684) and notice to the Department in the case of conventional State highways (Section 688) and

   (b) subject to the issuance of a permit and compliance with permit terms and conditions (Sections 690-691).

5. There is no express statutory provision for counties to grant franchises in State highways as in the case of cities, but the right is implied (Sections 680, 681) and it is commonplace and customary. Counties' powers with regard to county highways are found in Sections 940 and 942 of the Streets and Highways Code.

6. Several utilities (water and power among others) maintain facilities under Section 19 of Article XI of the California Constitution where said facilities were installed prior to the Article's amendment in 1911. This has been referred to as a constitutional franchise.

7. The Post Roads Act of 1866 (repealed) granted telegraph corporations the right to install poles on Post Roads. Where there has been continual exercise of this right the right has been treated as a franchise.

8. In the case of all franchise facilities, whether in State highways or county roads, upon the abandonment thereof provision may be made for reserving and excepting an easement to replace existing franchise rights. (See: Streets and Highways Code §§ 838 and 859.1)

9. A further inhibition against the condemnation of State highways (and local roads) for any use, including "compatible uses" to be determined by the court, is that a large percentage of such roads and highways (approximately 80%) have been built with federal as well as State funds. Such roads and highways are subject to federal laws, rules and regulations. (See: Streets and Highways Code § 830). As stated in County of Marin v. Superior Court, 53 Cal.2d 633:

> "In the light of these provisions [23 U.S.C.A.] and the specific assent thereto by the state Legislature a serious question is presented as to whether condemnation of projects constructed under the federal act is at all possible or is totally inconsistent with the act. It appears clear that the Legislature has at least forbidden condemnation of such projects in the absence of some provision for their relocation and reconstruction. (See i.e., 23 U.S.C.A., § 116, supra, placing upon the state the duty to maintain all projects.)"

As further pointed out in this case:

> "The Legislature may well have had in mind that, in the past, pressing water problems have been dealt with by it in such a manner as to preserve the integrity of the general exemption from condemnation given to property previously put to a public use. ..."

SUMMARY:

The aforementioned franchises and permit provisions have provided a workable and satisfactory method of accommodating "other uses" in State highways since 1915. Similar provisions with respect to county highways can be found in Sections 1460 et seq. of the Streets and Highways Code.

We are unaware of any situation where publicly or privately-owned facilities have been prevented from or seriously inconvenienced in the performance of their public service functions by reason of not being permitted entry into or across a State highway, including freeways.

ROBERT A. MUNROE
Attorney