

## Memorandum 73-12

Subject: Study 36.20 - **Condemnation (Right to Condemn Generally)**

It is anticipated that various special grants of condemnation authority will be repealed when the comprehensive eminent domain statute is proposed for enactment. Thus, various sections of the Streets and Highways Code, which constitute grants of condemnation authority to the Department of Public Works, will be repealed. Specifically, the following provisions will be repealed: Streets and Highways Code Sections 104.1 (excess condemnation authority), 104.2 (condemnation for exchange purposes), 104.3 (condemnation for protective purposes), 104.6 (first sentence)(taking for future use). The repeal of these sections will permit repeal of Section 104.7, which provides:

104.7. None of the provisions of Section 104 [authority to take fee or lesser interest in real property for various specified highway purposes--a section that will not be repealed], 104.1, 104.2, 104.3, or 104.6 is intended to limit, or shall limit, the provisions of any other of said sections, each of which is a separate and distinct authorization.

This memorandum presents the question whether a section similar to Section 104.7 should be included in the comprehensive statute. A draft of such a section is attached as Exhibit I. The proposed Section 1240.170 would appear in Article 2. The following is an outline of the relevant portions of the comprehensive statute:

Article 2. Rights Included in Grant of Eminent Domain Authority

§ 1240.110. Right to acquire any necessary right or interest in any type of property

§ 1240.120. Right to acquire property to make effective the principal use

§ 1240.130. Acquisition by gift, purchase, lease, or other means

§ 1240.140. Joint exercise of condemnation power pursuant to Joint Powers Agreements Act

§ 1240.150. Acquisition of all or portion of remainder with owner's consent

§ 1240.160. Acquisition of structure with owner's consent

§ 1240.170. Interpretation of grants of eminent domain authority; separate authorizations [section set out as Exhibit I of this memorandum]

Article 3. Future Use

Article 4. Substitute Condemnation

Article 5. Excess Condemnation

Article 6. Condemnation for Compatible Use

Article 7. Condemnation for More Necessary Public Use

Article 8. Preliminary Location, Survey, and Tests

The section set out in Exhibit I is consistent with the view expressed by the Commission when the various articles were being drafted. The policy question is whether the section is necessary or whether Comments in each of the articles should be revised to state the substance of the attached section. I asked Mr. Spencer for his views on this matter. He recommends that the section be included in the comprehensive statute. See Exhibit II attached. I see no harm in including the section in the comprehensive statute.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

§ 1240.170. Interpretation of grants of eminent domain authority; separate authorizations

1240.170. (a) None of the provisions of this article is intended to limit, or shall limit, any other provision of this article, each of which is a distinct and separate authorization.

(b) None of the provisions of Article 2 (commencing with Section 1240.110), Article 3 (commencing with Section 1240.210), Article 4 (commencing with Section 1240.310), Article 5 (commencing with Section 1240.410), Article 6 (commencing with Section 1240.510), Article 7 (commencing with Section 1240.610), or Article 8 (commencing with Section 1240.810) is intended to limit, or shall limit, the provisions of any other of the articles, each of which articles is a distinct and separate authorization.

Comment. Section 1240.170 makes clear that the various articles contained in this chapter are distinct and separate authorizations. The section is based on former Section 104.7 of the Streets and Highways Code.

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December 20, 1972

Mr. John H. DeMouilly, Executive Secretary  
California Law Revision Commission  
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Dear John:

I believe that it would be advantageous to retain Section 1240.170 which you have proposed. While it probably should not be necessary to do so, we have in the past had some problems where an attempt has been made to apply limitations in one section to those of another. For example, the old limitation in 104.3, Streets and Highways Code of 150 feet was attempted to be applied to the excess acquisition statute. While that attempt was unsuccessful, a section such as 1240.170 would tend to minimize any such misreading of statutes.


I have not forgotten the request by Bruce Donald to provide examples of contractual indemnity provisions. To date I have not succeeded in obtaining copies of any useful examples, but hope to do so by the time of the next Commission meeting.

In addition I will forward to you a copy of a proposed statute regarding modification of C.C.P. Section 1248b by the 10th of January 1973.

Very truly yours,

Joseph A. Montoya  
Deputy Chief Counsel

By

  
Charles E. Spencer, Jr.  
Attorney

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