

First Supplement to Memorandum 75-1

Subject: Study 35.300 - Eminent Domain (AB 11--Condemnation Authority of Private Cemeteries)

The Commission has recommended the elimination of condemnation by private persons, with four exceptions: (1) nonprofit educational institutions of collegiate grade, (2) nonprofit hospitals, (3) nonprofit housing corporations, and (4) mutual water companies. The staff has received orally objections to this recommendation from the legislative representative of private cemeteries.

At present, private cemeteries have eminent domain authority by virtue of Civil Code Section 1001 and Code of Civil Procedure Section 1238(14) ("Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof."). The Commission voted in 1970 to delete this authority, in part because it had serious doubts whether such authority satisfies the constitutional "public use" requirement. Cf. City & County of San Francisco v. Ross, 44 Cal.2d 52, 279 P. 529 (1955) (acquisition of property to be leased to private profit-making parking garage not a public use); General Petroleum Corp. v. Hobson, 23 F.2d 349 (S.D. Cal. 1927) (byroad to prospect for oil); People v. Elk River Mill & Lumber Co., 107 Cal. 221, 40 P. 531 (1895) (floating logs on nonnavigable streams); Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 P. 802 (1893) (supplying farming neighborhoods with water); Lorenz v. Jacob, 63 Cal. 73 (1883) (supplying mines with water).

The rationale of the four exceptions recommended by the Commission is that all four of the entities, like public utilities, are quasi-public in nature, performing services for the benefit of the public. In addition, they

are not profit-making activities. For these reasons, they may satisfy the constitutional public use requirement. The staff believes that a similar case could be made for nonprofit cemeteries.

If the Commission believes that nonprofit cemeteries should retain their eminent domain authority, the staff recommends that such authority be limited to expansion of existing cemeteries. The placing of cemeteries is not so critical that eminent domain is necessary to establish new ones; this is particularly true in light of the fact that cemeteries are normally established outside city boundaries in generally undeveloped areas. For this purpose, cemeteries have adequate acquisition authority:

Health & Safety Code § 8500

8500. Cemetery authorities may take by purchase, donation or devise, property consisting of lands, mausoleums, crematories, and columbariums, or other property within which the interment of the dead may be authorized by law.

Expansion within an existing cemetery may be critical to maintenance and care of old cemeteries, however. For this reason, cemeteries are expressly authorized by statute to condemn previously dedicated roadways within the cemetery grounds for new plots:

Health & Safety Code § 8715

8715. The provisions of this article are hereby declared to be a necessary exercise of the police power of the State in order to preserve and keep existing cemeteries as resting places for the dead and to preserve cemeteries from becoming unkept and places of reproach and desolation in the communities in which they are located. The taking of roadways, alleys, walks, avenues, driveways, streets and parks for the purposes and by the method in this section specified, regardless of the private character of the association or person applying therefor, is hereby declared an exercise of the right of eminent domain in behalf of the public health, safety, comfort, pleasure, protection, and historic instruction to present and future generations.

Expansion of existing cemeteries likewise appears to be the primary focus of present Code of Civil Procedure Section 1238(14). A staff draft of a statute to allow condemnation by private nonprofit cemeteries for expansion of an existing cemetery is attached as Exhibit I.

Respectfully submitted,

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EXHIBIT I

Health & Safety Code § 8501 (added)

SEC. __. Section 8501 is added to the Health and Safety Code, to read:

8501. Any cemetery authority described in Section 23701c of the Revenue and Taxation Code may acquire by eminent domain any property necessary to enlarge and add to an existing cemetery for the burial of the dead and the grounds thereof.

Comment. Section 8501 is new. It continues the grant of condemnation authority formerly found in subdivision (14) of Section 1238 of the Code of Civil Procedure ("Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof"). Section 8501 limits the condemnation authority to cemeteries not operated for profit (see Rev. & Tax. Code § 23701c), and solely for the purpose of expansion of an existing cemetery. "Cemetery authority" is defined in Section 7018 ("'Cemetery authority' includes cemetery association, corporation sole, or other person owning or controlling cemetery lands or property"). It should be noted that Section 8501 applies to all cemetery authorities notwithstanding the limitations of Section 8250 (application of Part 3).

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EXHIBIT II

Revenue and Taxation Code 23701c provides:

23701c. Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose and no part of the net earning of which inures to the benefit of any private shareholder or individual.