#36.60 9/11/75

Memorandum 75-72

Subject: Study 36.60 - Condemnation for Byroads and Utility Easements

Background

Attached to this memorandum is a copy of the tentative recommendation relating to condemnation for byroads and utility easements that the Commission distributed for comment this summer. The tentative recommendation would restore, to a limited extent, the power of private persons to condemn which the Commission's eminent domain bills delete. Basically, the tentative recommendation permits a private person to condemn for a byroad or for utility service where there is a great necessity to do so; the property that may be taken is limited to an easement, located in such a manner as to afford the most reasonable service consistent with the least damage to property burdened by the easement; the easement must be open to use by the public; and the condemnation must be consented to by the city or county.

The Commission received three letters commenting on this tentative recommendation which are attached as Exhibits I-III. The letters basically approve the concept of the tentative recommendation, with the reservations discussed immediately below.

Public Entitled to Use and Enjoy Easement

Section 1001, subdivision (b)(last sentence), provides that "The public shall be entitled, as of right, to use and enjoy the easement which is taken." The Commission proposed this requirement because of language in Sherman v. Buick, 32 Cal. 241 (1867), indicating that the taking of property for a byroad was proper (even though designed to provide access to land of a private person) because it was in fact open to use by the public.

This facet of the tentative recommendation is opposed by the California Cattlemen's Association (Exhibit I--green). The Cattlemen's Association points out that this provision will create problems of liability, fire control, and the like, and will make the cost of acquiring and maintaining the easement prohibitive.

The staff believes that the opposition of the Cattlemen's Association on this point would prove fatal, even though the provision is constitutionally mandated (at least for byroads). On the other hand, the California Supreme Court imposed no open-to-use-by-the-public requirement in its decision allowing private condemnation for a sewer easement. The staff suggests that the language relating to use and enjoyment by the public be deleted, but reference made in the Comment to the Sherman v. Buick case:

> See Sherman v. Buick, 32 Cal. 241 (1867)(condemnation for byroad proper where road open to public use).

Requirement That City or County Consent to Condemnation

The City of Arcadia (Exhibit II--yellow) and the Sacramento Municipal Utility District (Exhibit III--white) object to the requirement of Section 1002 that the city or county consent to the private condemnation. The letters point out that the consent requirement seems an inappropriate function for the cities and counties, that it will impose added expense without corresponding benefit, and that it will duplicate the effort of the trial court.

The staff believes that these are telling points. However, the staff also believes that it is essential to the recommendation that cities and counties be given a veto power over private condemnation within their jurisdiction. The legislative committees have shown open hostility to the concept of private condemnation by quadi-public entities (nonprofit hospitals, nonprofit cemeteries, nonprofit higher educational institutions, nonprofit housing corporations, and

mutual water companies). We believe the legislative committees will refuse to approve any bill that recommends private condemnation without such safeguards as those proposed by the Commission. Since quasi-public entities (under AB 11) must obtain the consent of cities and counties, it would be anomalous to exempt other private persons from this requirement.

Moreover, as a practical matter, the expense to the local public entities can be completely recouped under the Commission's recommendation. Other local public entities, such as the City of Los Angeles, support the concept of control over condemnation within their jurisdiction.

Conclusion

The staff recommends that the Commission approve this recommendation for printing and submission to the Legislature, with the deletion of the "use by the public" provision, discussed above. Section 1001 will have to be recast as a new, rather than amended, section if the Commission's eminent domain bills are enacted, and other conforming changes in section references will have to be made. The staff proposes to eliminate the reference to the byroad background study from footnote 4 on page 1, and substitute the following note:

> 4. Condemnation for byroads was authorized by Code of Civil Procedure Section 1238(4), (6), and Civil Code Section 1001; see also Sherman v. Buick, 32 Cal. 241 (1867)(taking of private property for byroad proper where road is open to public). The authorizing statutes were repealed in 1975. See Cal. Stats. 1975, Ch. ___ § ___, Ch. ___ § ___.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Memorandum 75-72

EXHIBIT I

CALIFORNIA CATTLEMEN'S ASSOCIATION

CCA

TELEPHONE 444-0845 (AREA CODE 916)
MEZZANINE, SENATOR HOTEL · 12TH AND L STREETS
SACRAMENTO, CALIFORNIA
ZIP CODE 95814

August 20, 1975

California Law Revision Commission
School of Law
[redacted] University
[redacted], CA 94305

Gentlemen:

This letter is in response to a tentative regulation and study relating to condemnation for byroads and utility easements, dated July 30, 1975. Our Association is concerned with the first recommendation contained in this study to the effect that "private persons be authorized to condemn appurtenant easements for byroads and utility service, subject to the following limitations designed to prevent abuse of the condemnation power." Our objection is with the fourth limitation contained in the recommendation which reads as follows:

"The easement is subject to the use and enjoyment of the public."

This Association would virgorously oppose that provision because we do not believe that private landowners should be forced into granting an easement which is subject to all of the inherent dangers which public use of such easements would produce. In our opinion, if easements were to become subject to the widespread use and enjoyment of the public, utilities and other private persons authorized to condemn would find the cost of acquiring and maintaining such easements or byroads to be prohibitive. The necessity on the part of the private landowner to face the issues of liability, fire control, suppression and a host of other protections would be difficult, if not impossible, for such private condemnors to provide.

Our Association does support the general concept contained in this recommendation and the balance of the limitations designed to prevent abuse of the condemnation power, but we feel that the Commission should give much further study to the suggestion of granting the right of use and enjoyment of such easement to the public.

Sincerely,

Wm. B. Staiger

Wm. B. Staiger
Executive Vice President

vs

cc: John Callaghan, Larry Kiml

Memorandum 75-72

EXHIBIT II

Office of the
City Attorney

J. WILLIAM PHILLIPS
City Attorney

446-4471
L.A.: 681-0276

City of Arcadia

240 West Huntington Drive
Arcadia, California 91006

August 15, 1975

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Tentative Recommendation on
Condemnation for Byroads and
Utility Easements -- Comment

Gentlemen:

I have reviewed with care your tentative recommendation and study relating to condemnation for byroads and utility easements and desire to comment thereon.

I agree with your conclusion that private condemnation under limited conditions should be continued, that a showing of great necessity for such private condemnation be required, that the easement be limited to the most reasonable access to the property of the condemnor consistent with the least damage to the property burdened by the easement and that the easement be subject to the use and enjoymnet of the public.

However, as a city attorney in California for the past nine years, I question the advisability of your recommended fact-finding by the local legislative agency as a prerequisite to maintaining a private condemnation action. Since the findings of fact by the legislative body are precisely the same findings of fact required by the trial court, there would appear to be a duplication of effort. Secondly, since the findings by the legislative body have no conclusive effect upon the trial court and the majority of defenses raised by the prospective condemnee would directly attack those specific facts, there would appear to be no timesaving in the judicial proceeding by the prior fact-finding of the legislative body.

Additionally, since the hearings before the legislative body are not controlled by the Evidence Code, a great deal of inadmissable testimony and documentation would be introduced and the inability to cross-examine and subpoena could further confuse the issue on fact-finding.

Finally, a prospective private condemnor who fails in his attempt at convincing the legislative body to intervene with a resolution would be left with his remedy in the field of extraordinary writs, which additional litigation would seem to outweigh any possible judicial timesaving.

It would be my recommendation that the findings of fact necessary to prosecute a suit in private condemnation be confined to the judicial proceedings and not require local legislative bodies to operate as a type of inconclusive referee.

Thank you for your consideration.

Very truly yours,

J. WILLIAM PHILLIPS
City Attorney

JWP:at

Memorandum 75-72

SMUD
SACRAMENTO MUNICIPAL UTILITY DISTRICT 6201 S Street, Box 15830, Sacramento, California 95813; (916) 452-3211

July 29, 1975

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

I have read through the Tentative Recommendations dated June 30, 1975, relating to the admissibility of "duplicates" in evidence and to condemnation for byroads and utility easements. I approve the former recommendation. My only comment about the latter relates to the provision in the proposed measure that a condemnation proceeding may be commenced only after the governing body of each city and county has adopted a resolution consenting thereto. I question (a) whether cities and counties should be given the power to veto condemnation of easements for access and for utility service purposes, and (b) whether any benefit will result sufficient to compensate for the effort and expense of the paper work that will result.

Sincerely yours,

David S. Kaplan
General Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

AND A STUDY

relating to

CONDEMNATION FOR BYROADS AND

UTILITY EASEMENTS

June 30, 1975

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN AUGUST 20, 1975.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

TENTATIVE 7/75

RECOMMENDATION AND A STUDY

relating to

CONDEMNATION FOR BYROADS AND UTILITY EASEMENTS

Existing law permits the condemnation of property for public use by private persons.[1] The California Law Revision Commission in December 1974 recommended that private condemnation authority be abolished except for condemnation by four types of quasi-public entities--nonprofit hospitals, nonprofit educational institutions of collegiate grade, certain nonprofit housing corporations, and mutual water companies;[2] the bill introduced to effectuate the 1974 recommendation[3] was amended on Commission recommendation to permit condemnation by nonprofit cemeteries.

This recommendation is concerned with private condemnation to provide appurtenant easements to property of the condemnor that are necessary for access or utility service to the property. Existing law permits private persons to condemn appurtenant easements for access and utility service purposes.[4] This authority serves the function of open-

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1. Civil Code Section 1001 provides:

   1001. Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of Title VII, Part III, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such Title is "an agent of the State," or a "person in charge of such use," within the meaning of those terms as used in such Title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two.

2. Recommendation Proposing the Eminent Domain Law 1635-1636 (1974), reprinted in 12 Cal. L. Revision Comm'n Reports 1635-1636 (1974).

3. Assembly Bill 278 (1975-76 Reg. Sess.).

4. For the law relating to byroad condemnation, see the attached background study, "The Use of the Power of Eminent Domain to Acquire Byroads." Condemnation for utility connections is authorized by Civil Code Section 1001 and Code of Civil Procedure Section 1238, subdivisions 3-4 (water and drainage), 7 (telephone), 8 (sewerage), 12-13 (electricity), 17 (gas). See Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955) (apartment owner may condemn appurtenant sewerage easement under authority of Civil Code Section 1001 and Code of Civil Procedure Section 1238(8)).

ing what would otherwise be landlocked property to enable its most beneficial use. As a practical matter, land that is cut off from access to public roads and land to which utility service cannot be extended cannot be developed.[5]

The need for private condemnation for byroad and utility easements is unrelieved by the ability of public entities to condemn for such easements on behalf of private persons. Many local public entities and public utilities are reluctant or unwilling to institute such proceedings even though the benefited person offers and is willing to bear the cost of acquiring and maintaining the easement.

For these reasons, the Law Revision Commission recommends that private persons be authorized to condemn appurtenant easements for byroads and utility service, subject to the following limitations designed to prevent abuse of the condemnation power:

(1) Existing law limits the interest in property that a private condemnor may take to an easement;[6] this limitation should be continued.

(2) The private condemnor must show a "great necessity" for the taking of the easement by eminent domain. This standard is consistent with the holding of Linggi v. Garovotti[7] requiring a stronger showing of necessity for condemnation by a private person than if the condemnor were a public or quasi-public entity.

(3) The easement must be located in such a manner as to afford the most reasonable service or access to the property of the condemnor consistent with the least damage to the property burdened by the easement. This requirement is comparable to that imposed on public entities that the location of their projects be compatible with the greatest public good and the least private injury.[8]

(4) The easement is subject to the use and enjoyment of the public. This requirement implements the constitutional public use limitation.[9]

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5. The common law doctrine of "way of necessity" affords only limited relief to the landlocked property owner. See background study, p. 1.

6. Code Civ. Proc. § 1239.

7. 45 Cal.2d 20, 286 P.2d 15 (1955).

8. Code Civ. Proc. § 1241(2).

9. Cal. Const., Art. I, § 19; see Sherman v. Buick, 32 Cal. 242 (1867).

(5) An eminent domain proceeding to acquire the easement may be commenced only after the governing body of each affected city or county has adopted a resolution consenting to the condemnation. The resolution may be adopted only by a two-thirds vote of all the members of the governing body (following a hearing of which the owner of the burdened property has 15 days' mailed notice) upon a finding that there is a great necessity for the taking, that the easement taken is located in such a manner as to minimize the damage to the property burdened by the easement, and that the hardship to the owner of the burdened property is outweighed by the hardship to the condemnor if the taking is denied.

(6) The adoption of the resolution should not have a conclusive effect in the eminent domain proceeding. The private condemnor should be required to prove the propriety of the acquisition if the taking is challenged in court. This continues existing law which places the burden of proof of necessity on the private condemnor.[10]

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Section 1001 of, and to add Section 1002 to, the Civil Code, relating to eminent domain.

The people of the State of California do enact as follows:

Civil Code Section 1001 (amended)

SECTION 1. Section 1001 of the Civil Code is amended to read:

1001. (a) As used in this section, "utility service" means water, gas, electric, drainage, sewer, or telephone service.

(b) Any ~~person~~ owner of real property may, ~~without further legislative action~~ subject to the requirements of Section 1002 , acquire ~~private property~~ by eminent domain ~~for any use specified in Section 1238 of the Code of Civil Procedure either by consent of the owner~~

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10. Code Civ. Proc. § 1241.

~~or by proceedings had under the provisions of Title VII, Part III, of the Code of Civil Procedure, and any person seeking to acquire property for any of the uses mentioned in such Title is "an agent of the State," or a "person in charge of such use," within the meaning of those terms as used in such Title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two~~ an appurtenant easement over private property for which there is a great necessity to provide utility service to, or access to a public road from, the owner's property. The easement that may be taken shall afford the most reasonable service or access to the property to which it is appurtenant consistent with the least damage to the property burdened by the easement . The public shall be entitled, as of right, to use and enjoy the easement which is taken.

(c) This section shall not be utilized for the acquisition of a private or farm crossing over a railroad track. The exclusive method of acquiring such a private or farm crossing is that provided in Section 7537 of the Public Utilities Code.

Comment. Section 1001 is amended to provide the right of eminent domain to private persons for the limited purposes of establishing byroads and making utility connections. Compare Code Civ. Proc. § 1240.350 (substitute condemnation by public entities to provide utility service or access to public road). The exercise of eminent domain authority under Section 1001 is subject to consent of the appropriate local public entities under Section 1002. See Section 1002 and Comment thereto.

Condemnation under this section must comply with the provisions of the Eminent Domain Law. See Code Civ. Proc. § 1230.020 (law governing exercise of eminent domain power). Under the Eminent Domain Law, there must be "public necessity" for the acquisition (Code Civ. Proc. § 1240.030), and any necessary interest in property may be acquired (Code Civ. Proc.

§ 1240.110); under Section 1001, however, there must be "great necessity" for the acquisition and only an easement may be acquired. See also Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955)(condemnation by private person for sewer connection a public use, but a "stronger showing" of necessity required than if plaintiff were a public or quasi-public entity). It should be noted that, in addition to compensation for the easement taken, the condemnor must also pay compensation for damage to the property from which it is taken. See Code Civ. Proc. §§ 1263.010-1263.620.

The provisions of Section 1001 prior to this amendment, and former Code of Civil Procedure Section 1238 to which it referred, are superseded by Code of Civil Procedure Sections 1240.010 (public use limitation) and 1240.020 (statutory delegation of condemnation authority required) and by specific statements of the condemnation authority of particular persons for particular public uses which are found in the various codes. See Comment to Code Civ. Proc. § 1240.020 and the Comment to former Code Civ. Proc. § 1238.

[NOTE: References to sections in the Code of Civil Procedure in the above Comment are to the code as it would be amended by AB 11 (1975-76 Reg. Sess.).]

Civil Code § 1002 (new)

SEC. 2. Section 1002 is added to the Civil Code, to read:

1002. (a) A person may not acquire an easement by eminent domain under Section 1001 unless the legislative body of each city within whose boundaries the proposed easement is located and each county within whose boundaries the proposed easement is located (if the proposed easement is not located entirely within city boundaries) adopts a resolution consenting to the acquisition and containing all of the following:

(1) A statement of the purpose for which the easement is to be taken and a reference to Section 1001.

(2) A description of (i) the location of the burdened property, (ii) the extent of the easement thereon, and (iii) the location of the

property to which the easement is appurtenant.

(3) A declaration that the legislative body has found and determined that (i) there is a great necessity for the taking, (ii) the location of the easement affords the most reasonable service or access to the property to which it is appurtenant consistent with the least damage to the burdened property, and (iii) the hardship to the owner of the burdened property is outweighed by the hardship to the owner of the appurtenant property if the taking is not permitted.

(b) The legislative body may refuse to consent to the acquisition with or without a hearing, but it may adopt the resolution required by this section only by a two-thirds vote of all its members after holding a hearing at which the owner of the burdened property has had an opportunity to be heard, after notice stating the time, place, and subject of the hearing has been sent by first-class mail at least 15 days prior to the date of the hearing to the address of such owner as it appears on the last equalized county assessment roll (including the roll of state-assessed property).

(c) The legislative body may require that the person seeking consent to acquire the easement by eminent domain pay all of the costs reasonably incurred by the legislative body under this section and may require payment, deposit, or other security satisfactory to it before it takes any action under this section.

(d) The requirement of this section is in addition to any other requirements imposed by law. Nothing in this section relieves the person authorized to acquire the easement by eminent domain from satisfying the requirements of Civil Code Section 1001 or any other requirements imposed by law.

(e) The adoption of a resolution under this section does not make the city or county liable for any damages caused by the acquisition, construction, or use of the easement acquired pursuant to the resolution.

Comment. Section 1002 is new. It supplements, but does not replace, the requirements of Section 1001 and of the Eminent Domain Law. See subdivision (d). Thus the adoption of a resolution by the legislative body under this section declaring that there is a great necessity for the taking does not preclude the defendant from raising the issue and obtaining an independent court determination during the proceeding. The resolution does not have the effect afforded a resolution of necessity of a public entity. Compare Article 2 (commencing with Section 1245.210) of Chapter 4 of the Eminent Domain Law (Code of Civil Procedure Section 1230.010 et seq.).

[NOTE: References to sections in the Code of Civil Procedure in the above Comment are to the code as it would be amended by AB 11 (1975-76 Reg. Sess.).]

36 12/12/68

THE USE OF THE POWER OF EMINENT DOMAIN TO ACQUIRE BYROADS*

*This study was prepared for the California Law Revision Commission by the Commission's legal staff. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

36 12/12/68

A STUDY

relating to

THE USE OF THE POWER OF EMINENT DOMAIN

TO ACQUIRE BYROADS

As enacted in 1872, Code of Civil Procedure Section 1238 authorized takings for "byroads" in subdivision (4) and for "byroads leading from highways to residences and farms" in subdivision (6). Subdivision (6) was amended in 1895[1] to cover "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."[2]

The need for resort to eminent domain to provide byroads is partially alleviated by the common law doctrine of "ways of necessity." When the facts that give rise to a common law way of necessity are established, the right will be recognized; there is no need to institute eminent domain proceedings or to compensate the owner of the land over which the way of necessity is located.[3] Nevertheless, subdivision (6) and the "byroad" provision of subdivision (4) are not merely statutory substitutes for the common law way of necessity. A way of necessity arises when a grantor conveys land shut off from access to a road by the grantor's remaining land or by his land and the land of a stranger or where a similar situation is created by a partition, either voluntary or involuntary.[4] Situations, therefore, exist where a landowner lacks access to an established road and does not have a common law way of necessity.[5] The right to take property by eminent domain for a "byroad" may provide a solution to this problem where the owner's efforts to purchase a right of access across his neighbor's land fail.

In the leading California decision, Sherman v. Buick,[6] the taking of private property for a byroad was held proper where the road was in fact to be a public road, open to all who desired to use it, even though the road was designed to provide access for the land of a private person and he bore the cost of establishing and maintaining the road. In Sherman, the court held constitutional an 1861 act[7] that authorized the county board of supervisors to take private property to establish "public" and "private" roads. The court held that the term "private road" was used merely to designate a particular kind of public road,[8] and that, notwithstanding the somewhat inaccurate language,[9] the use was public:

> Roads, leading from the main road, which run through the county to the residences or farms of individuals, are of public concern and under the control of the Government. Taking private property for the purposes of such roads is not a taking for private use. They are open to everyone who may have occasion to use them, and are therefore public. Their character as public roads is unaffected by the circumstances, that in view of their situation, they are but little used, and are mainly convenient for the use of a few individuals, and such as may have occasion to visit them socially or on matters of business, nor by the circumstance that in view of such conditions the legislature may deem it just to open and maintain them at the cost of those most immediately concerned instead of the public at large. The object for which they are established is none the less of a public character, and therefore within the supervision of the Government. To call them "private roads" is simply a legislative misnomer, which does not affect or change their real character. By-roads is a better name for them and one which is less calculated to mislead the uninitiated.

In drafting subdivision (6) of Section 1238, which superseded a part of the 1861 act referred to in the Sherman case, the 1872 Code Commissioners adopted the court's suggestion that roads used primarily for the convenience of a few individuals be described as "byroads."[1] The pertinent portion of the remainder of the 1861 act was compiled in Section 2711 of the 1872 Political Code, which read:

> Private or by-roads may be opened for the convenience of one or more residents of any road district in the same manner as public roads are opened, whenver the Board of Supervisors may for like cause order the same to be viewed and opened, the person for whose benefit the same is required paying the damages awarded to the landowners, and keeping the same in repair.

In 1883, Section 2711 was repealed and substantially reenacted as Political Code Section 2692.[11] Section 2692 was amended in 1913[12] to include coverage for ways for "a canal" and in 1919[13] the words "irrigation, seepage, or drainage" were inserted before "canal." The section was repealed in 1943,[14] the portion relating to canals being compiled in Water Code Sections 7020-7026 and the portion relating to private or byroads not being continued. In 1949, Political Code Section 2692 was again repealed,[15] and Streets and Highways Code Sections 1128-1133 were enacted by the same act[16] to permit "private or by-roads" to be opened, laid out, or altered for "timber access purposes." A 1955 amendment[17] made these sections applicable to any private or byroad but the sections were repealed in 1961.[18] No special statutory procedure now exists[19] whereby an individual or public entity may condemn to provide the "byroads" described in subdivision (6).

In City of Los Angeles v. Leavis,[20] it was held that a city could condemn property for a public street relying solely on Civil Code Section 1001 and Section 1238. Hence, although no appellate decision on this question has been found, it seems fairly clear that subdivision (6) of Section 1238 is itself authority for a public entity to exercise the power of eminent domain to provide "byroads."[21] However, many cities and counties are reluctant to institute condemnation proceedings to provide a "byroad" even though the benefited person is willing to bear the cost of acquiring and maintaining the road.[22]

Appellate courts in California have not decided whether a private person may maintain an action under Civil Code Section 1001 to acquire private property for the sort of byroad described in subdivision (6).[23] Nevertheless, a series of cases has established the proposition that such a byroad is a public use,[24] and the California Supreme Court held in Linggi v. Carovotti[25] that a private individual may maintain an eminent domain proceeding to provide a sewer connection for a single residence. Although landlocked property does not present the health hazard present in the Linggi case, it is likely that California would follow the holdings in numerous other states[26] and permit a private person to acquire a byroad in an appropriate case.

Private corporations have sought unsuccessfully in two cases to condemn access to land. In General Petroleum Corporation v. Hobson[27] the holder of an oil and gas prospecting permit granted by the state under a 1921 act[28] brought an eminent domain proceeding in the federal court to acquire an easement over private property from the highway

to the place where it planned to prospect for oil. A demurrer to the corporation's complaint was sustained. The corporation contended that the taking was a public use authorized both under the 1921 act and under the Code of Civil Procedure Section 1238. The 1921 act included a provision giving the right of eminent domain to permittees to acquire a right of way over private property, but the court held this provision void as not embraced within the title of the act. An alternative ground for the holding was that the complaint did not show that the taking was for a public purpose:

> Nor can section 1238, subd. 5, C.C.P. of California, authorize the taking of private property for "roads * * * for working mines." Subdivision 6: "By-roads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes." The plaintiff has no working mines, nor any active industry, nor is it in any sense within any of the provisions of this section, nor is the property covered by the permit used or contemplated to be used for a public purpose, nor can the court assume a public use or purpose where none is claimed, or none can be reasonably deduced from conceded or established facts. Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577, is not elucidating, nor is Monterey County v. Cushing, 83 Cal. 507, 23 P. 700; nor was this issue before the court in County of Madera v. Raymond Granite Co., 139 Cal. 128, 72 P. 915. These cases are cited because particularly relied upon by the plaintiff. All cases cited have been examined, but have not [sic] application.
>
> Eminent domain can only be invoked because the interest of the public is greater than the interest of the private individual, and may not be invoked by a private person for private gain or advantage. The plaintiff's permit prospecting for oil enterprise by reason thereof is speculative and wholly private, and the private property may not be taken for a private purpose. Clearly the complaint does not state a cause of action; complainant does not show that it has legal capacity to maintain the action, nor that the taking is for a public purpose. [Emphasis in original.][29]

The meaning of this language is not entirely clear. It is clear, however, that the court concluded that the use for which the property was sought to be acquired--prospecting for oil--was not one within any of the provisions of Section 1238. The court may have overlooked the general authorization to condemn for "byroads" in subdivision (4). Some of the language indicates that the court also may have had in mind the well-established proposition that the mere fact that a particular use is listed in Section 1238 does not mean that the use is a public use under the facts of a particular case.[30] The court also seems to take the position that the residence, farm, mine, mill, factory or buildings for operating machinery referred to in subdivision (6) must already be in existence at the time access is sought to be condemned. This line of reasoning would not apply to subdivision (4) which authorizes exercise of the power of eminent domain for "byroads" without any

limitation or description such as that found in subdivision (6), but the court did not refer to subdivision (4). The opinion does not appear absolutely to preclude a private person from taking private property for a byroad described in subdivision (6). At the same time, the holding in the case would permit no significant application of the "byroad" authorization in subdivision (4).

In City of Sierra Madre v. Superior Court,[31] a land developer sought to maintain a proceeding in the name of the city to acquire an access road to a planned subdivision in order to meet the requirements for subdivision approval. As the city had not authorized the proceeding, prohibition issued to prevent its prosecution. The opinion does not indicate whether the proceeding would have been permitted had the developer brought the suit in its own name.

In addition to establishing that the byroad would be a "public use" under the circumstances of the particular case, the condemnor would also have to show that the proposed taking is "necessary."[32] Reasoning from the common law way of necessity cases[33] and the Linggi decision,[34] it seems safe to predict that the courts would not allow condemnation if there were any other reasonable alternative to the taking.

This survey demonstrates the uncertainty that now exists as to whether property may be taken to provide an access road from an established highway to the land of a private person. This uncertainty

should be eliminated in any revision of the law of eminent domain. The following recommendations are made in this connection:

1. The provision in subdivision (4) of Section 1238 of the Code of Civil Procedure relating to "byroads" and subdivision (6) of the same section should be eliminated. These provisions should be superseded by more explicit statutory provisions.

2. A statutory provision should be enacted to provide expressly that any public condemnor that acquires property for a public use may acquire by eminent domain such additional property as is necessary to provide access to property not taken which would otherwise become landlocked by the taking. It is fairly clear that the taking of property to provide access in this situation would be held to be a public use.[35] Although such a statute might be limited to takings for limited access highways, such a limitation is not recommended. Since it is the taking by the condemnor that creates the need for the access road, the condemnor should have authority to provide access where this would be the appropriate method of mitigating the adverse consequences of the taking. Any attempted abuse could be prevented by finding that the taking for the access road is not a public use under the facts of the particular case.[36] The California Supreme Court has recently taken a very liberal position toward "excess condemnation"[37] and a significant benefit of the recommended statutory provision would be elimination of the need for excess condemnation in some situations.

3. A procedure similar in substance to that provided by former Streets and Highways Code Sections 1128-1133 should be reenacted. These sections were repealed in 1941. They permitted the county board of supervisors to take property for a road, open to all who desired to use it, but required that the cost of acquisition, establishment, and maintaining the road be imposed on the person or persons primarily benefited. This procedure places the board of supervisors in the position of determining whether the access road should be established. On the other hand, it imposes the costs on the benefited persons. If this type of procedure were adopted, the statute should permit cities and other public entities concerned with road work to utilize the procedure.

A convenient means of accomplishing this recommendation would be to amend the Street Opening Act of 1903 (Street and Highways Code Sections 4000-4443) to make clear that byroads may be provided pursuant to that act. The act appears to be the one most readily adaptable for the opening of byroads since it provides a complete and satisfactory procedure covering notice, legislative and judicial review, compensation and assessment.

4. As an alternative to the preceding recommendation, private persons might be authorized to condemn easements that would be dedicated to public use, be open to the public, and provide ingress and egress from private property to established roads. Such a taking should be permitted only upon a showing of strict necessity and not where the person has another method of access, even though the latter is inconvenient. The burden of maintaining the access

road should be imposed on the person seeking access. Many of the other states authorize the use of the power of eminent domain to acquire property for such purposes. As maximum utilization of land is important, and as a strict showing of necessity might adequately protect the condemnee, this may be one of the few instances in which "private condemnation" would be justified. It is possible that this alternative would merely restate existing California law.

Senate Bill No. 18, introduced at the 1968 session of the California Legislature but not enacted, dealt with this problem and would have enacted the substance of items 1, 3, and 4 above.[38]

THE DECLARED PUBLIC USES
BYROADS AND WAYS OF NECESSITY
FOOTNOTES

1. Cal. Stats. 1895, Ch. 98, §.1, p. 89.

2. It is interesting to trace the historical development of "byroads." In colonial times, statutes permitted individuals to condemn private property for access roads for their private use. As additional areas of the country were opened to settlement, similar statutes were enacted. It was generally assumed that these statutes were valid until the 1840's and 1850's when a narrowing of the concept of public use occurred; in all but a few states, the use of eminent domain to acquire land for private roads for the exclusive use of a few persons was held a private use. In California and some other states, the statutes were either construed or revised to permit the taking of lands for access roads only if the roads were open to public use. In a substantial number of states, constitutional provisions were adopted to permit the taking of private property by eminent domain for access roads. E.g., Ala. Const., Art. I, § 23 (1901); Ariz. Const., Art. II, § 17 (1910); Colo. Const., Art. II, § 14 (1876); Ga. Const., Art. I, § 2-301), para. 1 (1877); Ill. Const., Art. IV, § 30 (1870); Kan. Const., Art. 12, § 4 (1859); La. Const., Art. III, § 37 (1921); Miss. Const., Art. 4, § 110 (1890); Mo. Const. of 1945, Art. I, § 28 (1875); N.Y. Const., Art. I, § 7, subd. (c) (1846); Okla. Const., Art. II, § 23 (1907); Wash. Const., Art. I, § 16 (1889); Wyo. Const., Art. 1, § 32 (1889). See also Fla. Const., Art. XVI, § 29 (1885); Ore. Const., Art. I, § 18 (1857). The California Constitutional Convention did not consider such a provision; only a passing reference was made in the debates to this problem. II Debates and Proceedings of the Constitutional

Convention of the State of California 1028 (1881) [1878-1879] (Remarks of Mr. Shafter).

It has been recognized in California and elsewhere that the taking of property for use as a public road is a taking for a public use, even though the road is used primarily to provide access to the land of a single individual. E.g., Sherman v. Buick, 32 Cal. 241 (1867). 29A C.J.S. Eminent Domain § 34 (1965)("[T]he principle to be deduced from the cases bearing on the question seems to be that if the road, when laid out, is in fact a public road, open to all who may desire to use it, it is a public use, and valid, although the road is primarily designed for the benefit of an individual, and although the cost of laying out and maintaining such road is borne in whole or in part by the petitioners therefor." [footnotes omitted]). Compare 26 Am.Jur.2d Eminent Domain § 47 (1966).

The historical development is traced in Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 Boston U. L. Rev. 615, 617-626 (1940). For an historical account in a particular state, see Notes, 11 Ala. L. Rev. 182 (1958)(Alabama); 33 Ky. L. J. 129 (1944) (Kentucky).

3. Taylor v. Warnaky, 55 Cal. 350 (1880); Blum v. Weston, 102 Cal. 362, 369, 36 Pac. 778, 780 (1894); Reese v. Borghi, 216 Cal. App.2d 324, 30 Cal. Rptr. 868 (1963).

4. E.g., Mesmer v. Uharriet, 174 Cal. 110, 162 Pac. 104 (1916) (partition); Reese v. Borghi, 216 Cal. App.2d 324, 332-333, 30 Cal. Rptr. 868, 873 (1963); Tarr v. Watkins, 180 Cal. App.2d 362, 4 Cal. Rptr. 293 (1960). See also Daywalt v. Walker, 217 Cal. App.2d 669, 675, 31 Cal. Rptr. 899, 902 (1963). A way of necessity continues only

so long as the necessity exists. See generally Martinelli v. Luis, 213 Cal. 183, 1 Pac. 980 (1931); Cassin v. Cole, 153 Cal. 677, 679, 96 Pac. 277, 278 (1908).

5. In addition, the showing of "necessity" required to acquire a byroad by eminent domain may not be the same as that required to establish a common law way of necessity. The common law right exists only in cases of extreme necessity and not where the landowner has another means of access even though inconvenient. Marin County Hosp. Dist. v. Cicurel, 154 Cal. App. 2d 294, 302, 316 P.2d 32, 37 (1957). See also Smith v. Shrbek, 71 Cal. App.2d 351, 360, 162 P.2d 674, 678 (1945).

6. 32 Cal. 242 (1867).

7. Cal. Stats. 1861, Ch. 380, § 7, p. 392.

8. "[T]he legislature of this state . . . [i]n the plan devised by them . . . have for the purpose of classification divided roads into 'public and private,' and provided how they may be laid out and established and how maintained. The former are to be laid out and maintained at the expense of the county or road district at large, and are therefore called 'public.' The latter at the expense of such persons as are more especially and directly interested in them, and therefore called 'private.' But the latter are as much public as the former, for any one can travel them who has occasion--and no more can be said of the former." 32 Cal. at 253. See also 45 Ops. Cal. Atty. Gen. 98 (1965). Cf. Brick v. Keim, 208 Cal. App.2d 499, 503-504, 25 Cal. Rptr. 321, 323-324 (1962).

9. 32 Cal. at 255-256.

10. See Code Commissioners' Note to subdivision (6): "Subdivision 6 supersedes part of § 7 (Stats. 1861, p. 392), which prescribes the mode for laying out private roads. This clause has been drawn to make it conformable to the decision in Sherman v. Buick, 32 Cal.

241, 91 Am. Dec. 597." The same word--"byroad"--was also used in subdivision (4) of Section 1238.

11. Cal. Stats. 1883, Ch. 10, p. 5. Section 2692 was held constitutional. Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700 (1890); Los Angeles County v. Reyes, 3 Cal. Unrep. 775, 32 Pac. 233 (1893); Lake County v. Allman, 102 Cal. 432, 36 Pac. 767 (1895); County of Madera v. Raymond G. Co., 139 Cal. 128, 72 Pac. 915 (1903).

12. Cal. Stats. 1913, Ch. 61, § 1, p. 62.

13. Cal. Stats. 1919, Ch. 73, § 1, p. 117.

14. Cal. Water Code § 15002, Cal. Stats. 1943, Ch. 368, p. 1895.

15. Cal. Stats. 1949, Ch. 883, § 6, p. 1652.

16. Cal. Stats. 1949, Ch. 883, §§ 1-5, p. 1652.

17. Cal. Stats. 1955, Ch. 1308, § 1, p. 2374.

18. Cal. Stats. 1961, Ch. 1354, § 1, p. 3133.

19. Streets and Highways Code Sections 969.5 and 1160-1197 provide a procedure for the improvement of a private easement or roadway not accepted or acceptable into the county highway system but upon which a permanent public easement is offered or a privately owned road where a right of way has been granted or leased to the county for its own use or for the use of the state or other public agency for public purposes, but these sections do not authorize condemnation. As to expenditure of public funds to maintain roads not accepted as county roads, see 45 Ops. Cal. Atty. Gen. 98 (1965). Cf. City of Oakland v. Parker, 70 Cal. App. 295, 233 Pac. 68 (1924).

20. 119 Cal. 164, 51 Pac. 34 (1897):

21. The mere fact that individuals have subscribed money or given a bond to a public entity to contribute toward the expense of establishing a public road would not make the taking one for "private" use. E.g., Santa Ana v. Harlin, 99 Cal. 538, 541, 34 Pac. 224, 226 (1893); City of Oakland v. Parker, 70 Cal. App. 295, 233 Pac. 68 (1924).

22. But see City of Oakland v. Parker, 70 Cal. App. 295, 233 Pac. 68 (1924).

23. People v. Superior Court, 68 Cal.2d , 65 Cal. Rptr. 342, 436 P.2d 342 (1968), the leading California case on "excess condemnation," the Brief of Amicus Curiae in the Court of Appeal contended that the condemnor's rationale for the excess condemnation--that the remainder would be "landlocked"--was unsound:

> The condemnor's theory contains a fatal legal flaw. That flaw is the failure to recognize that in California, as a matter of law, there is no such thing as a "landlocked" parcel.
>
> Civil Code § 1001 provides that any person may exercise the power of eminent domain without further legislative action. C.C.P. § 1238 lists the various purposes for which such power may be used, including the acquisition of access to a highway.
>
> An application of the above principle may be found in Linggi v. Garovotti (1955) 45 Cal.2d 20 where a private individual was permitted to condemn a sewer easement across his neighbor's land. . . .
>
> It is, therefore, plain that just as Mr. Linggi did, the Rodonis [owners of remainder] can condemn an easement of access to Parcel 9 [the remainder], across neighboring land. The condemnor's "landlocked and therefore worthless" parcel theory therefore lacks merit. [Brief of Amicus Curiae in Court of Appeal at 7-8.]

The Department of Public Works did not dispute the possibility that the private owner could condemn a byroad,

but pointed out that no "jury would be favorably inclined towards the condemnor were it to leave a property owner in such a predicament." [Reply of Petitioner to Memorandum in Opposition of Real Parties in Interest and Amicus Curiae Brief, Court of Appeal, at 4.]

24. See cases cited in note 11 supra.

25. 45 Cal.2d 20, 286 Pac. 15 (1955).

26. E.g., Komposh v. Powers, 75 Mont. 493, 244 Pac. 298 (1926), Derryberry v. Beck, 153 Tenn. 220, 280 S.W. 1014 (1926), State v. Superior Court, 145 Wash. 307, 260 Pac. 527 (1927). See also note 2 supra.

27. 23 F.2d 349 (1927).

28. Cal. Stats. 1921, Ch. 303, p. 404.

29. 23 F.2d at 350.

30. See discussion, supra, at p.____.

31. 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961).

32. See discussion supra, at p. ____.

33. See note 5, supra.

34. Linggi v. Garovotti, 45 Cal.2d 20, 285 P.2d 15 (1955).

35. Department of Public Works v. Farina, 29 Ill.2d 474, 194 N.E.2d 209 (1963); Luke v. Mass. Turnpike Auth., 337 Mass. 304, 149 N.E.2d 225 (1958); May v. Ohio Turnpike Comm., 172 Ohio St. 555, 178 N.E.2d 920 (1962); Tracy v. Preston, Director of Highways, 172 Ohio St. 567, 178 N.E.2d 923 (1962).

36. See People v. Superior Court, 68 Cal.2d , 65 Cal. Rptr. 342. 436 P.2d 342 (1968).

37. Id.

38. The bill was amended after its introduction so that it would have amended Code of Civil Procedure Section 1238 to delete "byroad" from subdivision (4) and to delete subdivision (6) and would have added two new sections to the Code of Civil Procedure to read:

> 1238.8. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:
>
> The acquisition of an easement by the owner of private property for which there is a strict necessity for an easement for access to a public road from such property. The easement which may be taken shall afford the most reasonable access to the property for which the easement is taken consistent with other uses of the burdened land and the location of already established roads, and shall include the right to install or have installed utility facilities therein. The public shall be entitled, as of right, to use and enjoy the easement which is taken. The owner of the property for which the easement is taken shall maintain any such easement.
>
> This section does not apply to lands of the state park system as to which Section 5003.5 of the Public Resources Code applies.
>
> This section shall not be utilized for the acquisition of a private or farm crossing over a railroad track, the exclusive remedy of an owner of a landlocked parcel to acquire a private or farm crossing over such track being that provided in Section 7537 of the Public Utilities Code.
>
> 1238.9. In any case in which the state, a county, city, public district or other public agency in this state exercises the right of eminent domain, additional property may be taken in an amount reasonably necessary to provide access to a public road from any property which is not taken and for which there is a strict necessity for an easement of access to a public road from such property. The easement which may be taken shall afford the most reasonable access to the property, consistent with other uses of the burdened land and the location of already established roads. The public shall be entititled, as of right, to use and enjoy the easement which is taken. The owner of the property for which the easement is taken shall maintain any such easement.