

Memorandum 77-23

Subject: Study 36.800 - Eminent Domain (Resolution of Necessity)

At the March 1977 meeting, the Commission considered the problems created by the statement in the Comment to Section 1245.255 of the Code of Civil Procedure that the validity of the resolution of necessity to take property by eminent domain is subject to direct attack by administrative mandamus (Code of Civil Procedure Section 1094.5). The Commission requested the staff to devise some statutory language upon which to append a new Comment that negates the statement and that clarifies the law.

Attached is a staff draft of a tentative recommendation that will accomplish this. The draft makes clear that ordinary mandamus (Code of Civil Procedure Section 1085) is a proper remedy for attack on the validity of the resolution but limits the remedy to use prior to commencement of the eminent domain proceeding. Thereafter, the validity of the resolution would be subject to attack only in the eminent domain proceeding itself.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Staff Draft

TENTATIVE RECOMMENDATION

relating to

REVIEW OF RESOLUTION OF NECESSITY BY WRIT OF MANDATE

A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity.¹ The findings and determinations made in such a resolution are conclusive in the eminent domain proceeding² except to the extent they were influenced or affected by gross abuse of discretion by the governing body.³

The validity of the resolution of necessity itself may be subject to direct attack, apart from its evidentiary effect in an eminent domain proceeding. A resolution procured by bribery is not valid;⁴ and, in the case of a conflict of interest, the resolution is subject to direct attack under the Political Reform Act of 1974.⁵ Attacks based on formal defects in the resolution, which might be made in actions for injunction, declaratory relief, or writ of mandate,⁶ are seldom successful since the defects are easily correctable by amendment or comparable action.⁷

1. Code Civ. Proc. § 1245.220.
2. Code Civ. Proc. § 1245.250(a). In case of extraterritorial condemnation, the resolution is given a presumption affecting the burden of producing evidence. Code Civ. Proc. § 1245.250(b).
3. Code Civ. Proc. § 1245.255.
4. Code Civ. Proc. § 1245.270.
5. See Govt. Code § 91003(b).
6. See California Civil Writs § 5.4, at 65 (Cal. Cont. Ed. Bar 1970).
7. Condemnation Practice in California § 6.23, at 138 (Cal. Cont. Ed. Bar 1973). See also Code Civ. Proc. § 1260.120(c) and Comment thereto (conditional dismissal subject to corrective or remedial action).

The extent to which an attack on the validity of the resolution may be made by writ of mandate is not clear, however.⁸ Adoption of a resolution of necessity by the governing body is a political and legislative type of action,⁹ and ordinary mandamus (rather than administrative mandamus) has been held to be the proper remedy for review of legislative actions.¹⁰ But the writ of mandate is available only where there is not a plain, speedy, and adequate remedy in the ordinary course of law,¹¹ and the Eminent Domain Law in fact provides a means of attack on the validity of the resolution by objection to the right to take.¹²

The Law Revision Commission recommends that the law be made clear by statute that ordinary mandamus is a proper remedy for judicial review of the validity of a resolution of necessity, but only prior to the commencement of the eminent domain proceeding. Thereafter, the validity of the resolution should be subject to attack pursuant to the Eminent Domain Law.

This recommendation would eliminate the need for litigation to resolve the issues of the availability of the writ of mandate and of the proper type of mandamus. It would help to limit the potential proliferation of multiple actions on the validity issue. It would permit the

8. The Comment to Section 1245.255 of the Code of Civil Procedure states that "the validity of the resolution may be subject to direct attack by administrative mandamus (Section 1094.5)," but it would appear that ordinary mandamus (Section 1085) rather than administrative mandamus is the proper remedy.

9. See discussions in *People v. Chevalier*, 52 Cal.2d 299, 304-307, 340 P.2d 598, 601-603 (1959), and *Wulzen v. Board of Supervisors*, 101 Cal. 15, 21, 35 P. 353, 355 (1894).

10. See *Wilson v. Hidden Valley Mun. Water Dist.*, 256 Cal. App.2d 271, 63 Cal. Rptr. 889 (1967); *Brock v. Superior Court*, 109 Cal. App.2d 594, 241 P.2d 283 (1952).

11. Code Civ. Proc. § 1086.

12. Code Civ. Proc. § 1250.370(a).

court by ordinary mandamus to examine the proceedings before the governing body to determine whether its action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether it has failed to follow the procedure and give the notices required by law; it would not, however, permit the court to substitute its judgment as to the findings and determinations made in the resolution of necessity for that of the governing board.¹³ Finally, the standard for judicial review of the validity of the resolution by ordinary mandamus would be analogous to that in a collateral attack on the conclusive effect of the resolution in the eminent domain proceeding.¹⁴

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

An act to amend Section 1245.255 of the Code of Civil Procedure, relating to eminent domain.

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

-
13. See *Pitts v. Perluss*, 58 Cal.2d 824, 833-835, 377 P.2d 83, 88-90, 27 Cal. Rptr. 19, 24-26 (1962).
 14. Under Code of Civil Procedure Section 1245.255, a resolution of necessity is denied evidentiary effect in the eminent domain proceeding "to the extent its adoption or contents were influenced or affected by gross abuse of discretion by the governing body."

§ 1245.255. Attack on resolution

SECTION 1. Section 1245.255 of the Code of Civil Procedure is amended to read:

1245.255. (a) The validity of a resolution of necessity adopted by the governing body of the public entity pursuant to this article is subject to review:

(1) Before the commencement of the eminent domain proceeding, by writ of mandate pursuant to Section 1085.

(2) After the commencement of the eminent domain proceeding, by objection to the right to take pursuant to this title.

(b) A resolution of necessity does not have the effect prescribed in Section 1245.250 to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body.

(c) Nothing in this section precludes a public entity from rescinding a resolution of necessity and adopting a new resolution as to the same property subject to the same consequences as a conditional dismissal of the proceeding under Section 1260.120.

Comment. Subdivision (a)(1) is added to Section 1245.255 to make clear that ordinary mandamus (Section 1085) is an appropriate remedy to challenge the validity of a resolution of necessity. See Wulzen v. Board of Supervisors, 101 Cal. 15, 21, 35 P. 353, 355 (1894); Wilson v. Hidden Valley Mun. Water Dist., 256 Cal. App.2d 271, 278-281, 63 Cal. Rptr. 889, 893-895 (1967). See also Section 1230.040 (rules of practice in eminent domain proceedings). Under subdivision (a)(1), the writ of mandate is only available prior to the time the eminent domain proceeding is commenced. Thereafter, the validity of the resolution may be attacked in the eminent domain proceeding itself. Subdivision (a)(2). See Section 1250.370(a) (no valid resolution of necessity as ground for objection to right to take). It should be noted that judicial review of the resolution of necessity by ordinary mandamus on the ground of abuse of discretion is limited to an examination of the proceedings to determine whether adoption of the resolution by the governing body of the public entity has been arbitrary, capricious, or entirely lacking in evidentiary support, and whether the governing body has failed to follow

the procedure and give the notice required by law. See Pitts v. Per-
luss, 58 Cal.2d 824, 833, 377 P.2d 83, 88, 27 Cal. Rptr. 19, 24 (1962);
Brock v. Superior Court, 109 Cal. App.2d 594, 605, 241 P.2d 283, 290
(1952).

Subdivision (a) does not purport to prescribe the exclusive means by which the validity of a resolution of necessity may be challenged. The validity of the resolution may be subject to review under principles of law otherwise applicable, such as (in appropriate cases) declaratory relief and injunction. See Section 1230.040 (rules of practice in eminent domain proceedings). The validity of the resolution may be subject to attack, in the case of a conflict of interest, under the Political Reform Act of 1974 (Govt. Code § 91003(b)). See also Section 1245.270 (resolution adopted as a result of bribery).

Unlike subdivision (a), subdivision (b) does not provide a ground for attack on the validity of the resolution. Subdivision (b) provides, apart from the validity of the resolution, a ground for attack on the evidentiary effect given a resolution by Section 1245.250.