

#36.800

7/13/77

Memorandum 77-50

Subject: Study 36.800 - Condemnation Law and Procedure (Review of  
Resolution of Necessity by Writ of Mandate)

Attached to this memorandum for Commission approval to print are two copies of the staff draft of the recommendation relating to review of resolution of necessity by writ of mandate, revised in accordance with Commission decisions at the July 1977 meeting. Mark any suggested editorial changes on one copy to turn in to the staff at the September meeting.

The Commission also requested further information concerning the appealability of an order granting or denying mandate. Code of Civil Procedure Section 1110 makes the statutes on appeals applicable to writs. A superior court decision granting or denying mandamus is appealable; and, since appeal is the normal and adequate remedy, an appellate court will usually decline to consider a new and independent application for the same writ. See 5 B. Witkin, California Procedure Extraordinary Writs § 178 (2d ed. 1971) and California Civil Writs §§ 21.1 and 21.2 (Cal. Cont. Ed. Bar 1970). In light of this information, the staff has drafted Section 1245.255(a)(1) in terms of the court having jurisdiction of the writ of mandate action ordering its dismissal.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

#36.800

September 8, 1977

STAFF DRAFT

STATE OF CALIFORNIA

C A L I F O R N I A   L A W  
R E V I S I O N   C O M M I S S I O N

RECOMMENDATION

relating to

REVIEW OF RESOLUTION OF NECESSITY BY WRIT OF MANDATE

SEPTEMBER 1977

CALIFORNIA LAW REVISION COMMISSION  
Stanford Law School  
Stanford, California 94305

September 8, 1977

LETTER OF TRANSMITTAL

To: The Honorable Edmund G. Brown Jr.  
Governor of California and  
The Legislature of California

The Eminent Domain Law was enacted in 1975 on recommendation of the California Law Revision Commission. Pursuant to legislative authority of Resolution Chapter 130 of the Statutes of 1965, the Commission has maintained a continuing review of condemnation law and procedure to determine whether any technical or substantive changes are necessary.

As a result of this continuing review the Commission submits herewith a recommendation that includes proposed legislation to make clear the circumstances under which the resolution of necessity may be reviewed by writ of mandate. The recommended legislation would provide review of the resolution by ordinary mandamus rather than by administrative mandamus and only prior to the time the eminent domain proceeding is commenced. Thereafter, the resolution would be subject to review in the eminent domain proceeding itself.

Respectfully submitted,

John N. McLaurin  
Chairman

STAFF DRAFT  
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.<sup>1</sup> The findings and determinations made in such a resolution are conclusive in the eminent domain proceeding<sup>2</sup> except to the extent they were influenced or affected by gross abuse of discretion by the governing body.<sup>3</sup>

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;<sup>4</sup> and, in the case of a conflict of interest, the resolution is subject to direct attack under the Political Reform Act of 1974.<sup>5</sup> Attacks based on formal defects in the resolution, which might be made in actions for injunction, declaratory relief, or writ of mandate,<sup>6</sup> are seldom successful since the defects are easily correctable by amendment or comparable action.<sup>7</sup>

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1. Code Civ. Proc. § 1245.220.
  2. Code Civ. Proc. § 1245.250(a). In the case of an 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.<sup>8</sup> Adoption of a resolution of necessity by the governing body is a political and legislative type of action,<sup>9</sup> and ordinary mandamus (rather than administrative mandamus) has been held to be the proper remedy for review of legislative actions.<sup>10</sup> But the writ of mandate is available only where there is not a plain, speedy, and adequate remedy in the ordinary course of law,<sup>11</sup> 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.<sup>12</sup>

The adoption of a resolution of necessity may have the effect of clouding title or otherwise hindering the full use of the property prior to the time the eminent domain proceeding is commenced.<sup>13</sup> During this period, the property owner should have available a clear means of directly attacking the validity of the resolution.

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.<sup>14</sup> Thereafter, the validity of the resolution should be subject to attack pursuant to the Eminent Domain Law. In the case of a writ of mandate action pending at

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8. The Comment to Code of Civil Procedure Section 1245.255 (as originally enacted) 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, 304-07, 340 P.2d 598, 601-03 (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).
  13. A property owner must wait six months after adoption of the resolution before seeking pursuant to Code of Civil Procedure Section 1243.260 to compel the payment of damages for failure to commence the eminent domain proceeding.
  14. Limitation of the right to bring a mandamus action after commencement of the eminent domain proceeding would not be detrimental to the property owner since a successful challenge to the validity of the resolution in the eminent domain proceeding entitles the property owner to compensation for litigation expenses. Code Civ. Proc. § 1268.610.

the time of commencement of the eminent domain proceeding, the plaintiff should be allowed to prosecute the writ action to completion if the interest of justice so requires.

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 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.<sup>15</sup> 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.<sup>16</sup>

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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:

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15. See *Pitts v. Perluss*, 58 Cal.2d 824, 833-35, 377 P.2d 83, 88-90, 27 Cal. Rptr. 19, 24-26 (1962).
16. 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."

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. The court having jurisdiction of the writ of mandate action, upon motion of any party, shall order the action dismissed without prejudice upon commencement of the eminent domain proceeding unless the court determines that dismissal will not be in the interest of justice.

(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~~ subject, after the commencement of an eminent domain proceeding, 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, 278-81, 63 Cal. Rptr. 889, 893-95 (1967). See also Section 1230.040 (rules of practice in eminent domain proceedings). Under subdivision (a)(1), the writ of mandate is 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). In the case of a writ of mandate action pending at the time of commencement of the eminent domain proceeding,

the writ action may be prosecuted to completion only if the interest of justice so requires. 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. Perluss*, 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. 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.

It should be noted that Section 1245.255 may be subject to statutory exceptions. See, e.g., Health & Saf. Code §§ 33368 and 33500 (conclusive effect of adoption of redevelopment plan).