#36

045/128

2/17/77

Memorandum 77-10

Subject: Study 36 - Eminent Domain (Resolution of Necessity)

Attached as Exhibit 1 (pink) is a letter from Robert J. Logan, City Attorney of the City of Pittsburg. Mr. Logan points out a problem with the Comment to Section 1245.255 of the Eminent Domain Law relating to attack on the validity of a resolution of necessity. See also on this point a letter from Norval Fairman of the Department of Transportation, attached as Exhibit 5 (blue). The text of Section 1245.255 and the Comment is attached as Exhibit 2 (yellow). This memorandum gives the background behind Section 1245.255 and the Comment, analyzes Mr. Logan's problem, and offers several alternative solutions.

Background

One of the major issues considered by the Commission in developing the Eminent Domain Law was the extent to which the resolution of necessity is subject to collateral attack on its validity in a condemnation proceeding. Existing law generally gave conclusive effect to the resolution, even if its passage were obtained through fraud, bad faith, corruption, or gross abuse of discretion. People v. Chevalier, 52 Cal.2d 299, 340 P.2d 498 (1959).

The Commission determined that there should be no change in existing law, stating in its recommendation:

> The Commission has weighed the need for court review of necessity questions against the economic and procedural burdens such review would entail and against the policy that entrusts to the legislative branch of government basic political and planning decisions concerning the need for and design and location of public projects. The Commission has concluded that the policy to provide conclusive effect to the resolution of necessity of a public entity is a sound one and should be continued.

After this recommendation was printed, the Commission determined that there should be a limited exception for a resolution that was procured by bribery. This exception is presently embodied in Section 1245.270, attached as Exhibit 3 (green).

During the legislative process, the Assembly Judiciary Committee added a provision that the resolution is subject to collateral attack in the condemnation proceeding if its adoption or contents were influenced or affected by "abuse of discretion" on the part of the adopting agency, and a Comment was added stating that the resolution is also subject to direct attach under Section 1094.5 (administrative mandamus). The text of Section 1094.5 is attached as Exhibit 4 (buff). The Senate Judiciary Committee revised this provision to permit collateral attack only in cases of "gross" abuse of discretion, and the Comment was modified to indicate the difference in standard for a collateral attack ("gross abuse of discretion") and a direct attack ("abuse of discretion"). Section 1245.255 and the Comment were adopted in this form. See Exhibit 2 (yellow).

Analysis

Mr. Logan (Exhibit 1--pink) believes that the Comment to Section 1245.255 is incorrect--Section 1094.5 (administrative mandamus) is not the proper remedy or procedure for a direct attack on a resolution of necessity. Mr. Logan's argument may be summarized as follows: (1) administrative mandamus is available for quasi-judicial and not for quasi-legislative acts; (2) adoption of a resolution of necessity is a quasi-legislative act; (3) therefore administrative mandamus is not a proper remedy to attack the resolution of necessity.

The staff has researched these points and believes that Mr. Logan's analysis and supporting authority are generally very good. However, the key point of whether adoption of a resolution of necessity is a quasi-legislative act is not as clear as Mr. Logan's analysis seems to indicate. See Deering, California Administrative Mandamus § 2.8 (Cal. Cont. Ed. Bar 1966):

> A difficult problem of classification is presented when the agency's action has both quasi-legislative and adjudicatory aspects, as in many zoning and condemnation proceedings. See 1 Davis, Administrative Law Treatise § 7.03 at 417 (1958). In such a case attention must be focused on the aspect of the decision being attacked. For example, in Wulzen v. Board of Supervisors [101 Cal. 15, 35 P. 353 (1894)] the city condemned and appropriated certain land for street use. The Supreme Court analyzed the components of the agency's order as follows: "The order included not only a legislative expression of the will of the board adopting it that a

street should be opened, but in addition thereto sought to perform the judicial act of taking the land of citizens, rendered necessary under the legislation involved in the order. To the extent which it sought to accomplish this last object it was judicial. 101 Cal. at 25, 35 P. at 356.

In other words, adoption of a resolution of necessity is a mixed legislative and judicial act; it has elements of both.

Likewise, Mr. Logan indicates that the Supreme Court in HFH, Ltd. v. Superior Court, 15 Cal.3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), initially mistakenly indicated that administrative mandamus (Section 1094.5) was the appropriate vehicle for review of a legislative (zoning) action but that, when its error was pointed out, the opinion was modified to refer to ordinary mandamus (Section 1085). However, a review of that opinion reveals that the court states "we have recognized mandamus as the proper remedy for allegedly arbitrary or discriminatory zoning" (15 Cal.3d at 508), cites Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 128, 514 P. 111, 109 Cal. Rptr. 799 (1973), which states, "The gravamen of plaintiff's complaint is that the city refused to issue the permit unless plaintiff complied with an assertedly invalid condition. The approprate method with which to consider such a claim is by a proceeding in mandamus under Section 1094.5 of the Code of Civil Procedure. [citations]"

What is the up-shot of all this? The law on whether administrative mandamus may be used for a direct attack on a resolution of necessity is unclear. As Mr. Logan recognizes, "I am not sure anything can be accomplished without litigating the issue." However, the existence of the statement in the Comment to the effect that an action under Section 1094.5 is available will indubitably affect any judicial resolution of the question. What, if anything, should be done?

Alternative Solutions

The reason the reference to Section 1094.5 presents a problem is that the standard for attack under that section is "abuse of discretion," and the court may try the issue de novo. Mr. Logan is concerned that, under this standard, there will be frequent, and perhaps successful attacks on resolution of necessity. This "unreasonably and incorrectly burdens public entities in moving forward with projects.

Furthermore, it encourages greater court participation in making what is essentially a legislative determination. Courts simply are not policy makers." This reasoning corresponds with the Commission's reasoning in initially recommending that the resolution of necessity not be subject to collateral attack on any grounds.

There are several alternative solutions to Mr. Logan's problem that the staff can easily conceive.

(1) Do nothing. It is arguable that the characterization of the resolution of necessity in the Comment as subject to attack under Section 1094.5 is accurate. It is also arguable that, whether or not the characterization is accurate, it was the legislative intent that the standard be simply "abuse of discretion." However, the Commission's staff drafted the Comment for the legislative committees, and we do not now recollect whether the issue of the standard for direct attack was ever fully considered by the committees, other than by vague reference to Section 1094.5.

(2) Make clear that Section 1094.5 is available. The law could be clarified that Section 1094.5 is available to attack the resolution, or alternatively, that the resolution may be directly attacked under a standard of "abuse of discretion." This would not help Mr. Logan's problem, but would eliminate the need for court resolution of the issue.

(3) Make clear that Section 1094.5 is not available. The law could be clarified that Section 1094.5 is not available to attack the resolution. If this is done, the question then arises how can the resolution be attacked directly, and what is the standard. Both Mr. Logan and Mr. Fairman suggest that ordinary mandamus under Section 1085 is the appropriate remedy for abuse of discretion in quasi-legislative acts. See discussion C.E.B., California Civil Writs §§ 5.35-5.37 (1970), attached as Exhibit 6 (gold). The standard for attack under Section 1085 is whether the agency action has been "arbitrary, capricious or entirely lacking in evidenciary support, or otherwise unlawful." See, e.g., Wilson v. Hidden Valley Mun. Water Dist., 256 Cal. App.2d 271, 63 Cal. Rptr. 889 (1967). Unfortunately, the statement of this standard in the cases is dictum, and there is no indication in the cases of any statutory basis for the standard. Moreover, as Mr. Logan recognizes, Section 1085 would not be applicable if "the determinations in a resolution of

necessity are determined to be quasi-judicial," a matter that is not clear.

(4) Enunciate some other standard. A provision could be added to the statute to make clear that a resolution of necessity is subject to direct attack, and to specify the standard. The availability of Section 1085 relief could be statutorily prescribed, or the "arbitrary, capricious or entirely lacking in evidenciary support, or otherwise unlawful" standard could be codified. Or the standard could be the same as the standard for collateral attack--"gross abuse of discretion." It is certainly arguable that, if a resolution of necessity can be attacked collaterally in an eminent domain proceeding, it should be attackable on its adoption on the same or additional grounds.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

OFFICE OF

THE CITY ATTORNEY

City of Pittsburg

ROBERT J. LOGAN
CITY ATTORNEY

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(415) 439-4242

February 9, 1977

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California Law Revision Committee
Stanford Law School
Stanford, CA 94305

Roger Sullivan, Esq.
Chairman State Bar Committee on
Eminent Domain
4th Floor
800 Wilshire Blvd.
Los Angeles, CA 90017

Dear Sirs:

I am directing this letter of concern to you in hopes that something can be done to correct what I feel is an unfortunate misapplication of the administrative mandamus review provisions of §1094.5 of the California Code of Civil Procedure.

As you are aware, under the new eminent domain law, in particular §1245.255, the conclusiveness of a resolution of necessity can be collaterally attacked to the extent that its' adoption or content was influenced or affected by gross abuse of discretion on the part of the governing body. The legislative committee comment accompanying that section indicates that "the validity of the resolution may be subject to direct attack by administrative mandamus." (CCP §1094.5). I suggest that view is incorrect.

Several months ago, I had occasion to present a paper to the City Attorney's Department of the California League of Cities analyzing administrative review under §1094.5. As a result of my research, I am convinced that the method of review of a resolution of necessity is not under CCP §1094.5 since the determination of necessity is legislative in character and is not quasi-judicial. The necessity for appropriating private property for the use of the public or the government is not a judicial question, but one which lies in the domain of the legislature. (Wulzen v. Board of Supervisors (1894) 101 Cal. 15, 20; City of Oakland v. Parker (1924) 70 CA 295, 297-298). This well established principle has not been altered by statute or case law. Even §1245.250 recognizes with limited exception that a determination by the governing body is conclusive as to the matters referred to in §1240.030. This principle is a carry-over from prior law and still exists in its' basic unaltered form.

The only basic change in the statute is provision for collateral attack (CCP §1245.255) if gross abuse of discretion is established. A scope of review based upon "gross abuse of discretion" is a far stricter standard than the scope of review under §1094.5, "abuse of discretion." Moreover, it is consistent with the standard of review for legislative acts, to wit: arbitrary, capricious, or entirely lacking in evidentary support or otherwise unlawful.

It is clear and unquestioned that CCP §1094.5 was designed to apply to quasi-judicial acts. Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506; Strumsky v. San Diego Employees' Retirement Association (1974) 11 Cal. 3d 28; Bixby v. Pierno (1971) 4 C3d 130; Wilson v. Hidden Valley Municipal Water District (1967) 256 CA 2nd 271; Brock v. Superior Court of the County of San Francisco (1952) 109 CA 2d 594. It is equally clear that CCP §1094.5 is not the appropriate vehicle for review of legislative or quasi-legislative acts. Strumsky v. San Diego Employees' Retirement Association, cited supra; Topanga Association v. County of Los Angeles, cited supra; Brock v. Superior Court; cited supra; HFH, Ltd., v. Superior Court (1975) 15 C3d 508; San Diego Building Contractor's Association v. City Council of San Diego (1974) 13 C3d 205; Wilson v. Hidden Valley, supra; Tandy v. City of Oakland (1962) 208 CA 2d 609.

While it is true that §1094.5 makes clear reference to the situation where a hearing is required and evidence taken, such elements are not restricted to quasi-judicial proceedings only. Consequently, the distinction between the two cannot be made on that basis alone. The presence of certain elements usually characteristic of the judicial process do not necessarily mean that the agency action is any less legislative or quasi-legislative. (Wilson v. Hidden Valley, supra).

The process of distinguishing between quasi-legislative and quasi-judicial acts must be one of ascertaining function over form. In making this distinction, emphasis should be placed on the third element set forth in §1094.5, that is, that discretion in the determination of facts is vested in the inferior tribunal. If an action can be characterized as legislative, then the determination need not solely rest on the facts presented, but instead may be based on a legislative conclusion as to what is best for the health, safety and general welfare of the public. There is no need to determine whether a resolution of necessity and location of projects is legislative or quasi-judicial. The courts have already made that determination (Wulzen v. Board of Supervisors, supra).

The above mentioned distinctions become terribly important affecting not only the conduct of the hearings, but also the content of the resolution. The statutory findings required in the adoption of a resolution of necessity are not that dissimilar to those which are required in zoning actions. In both cases, the legislature has set forth certain statutory findings that must be made. In both cases, the actual determinations are legislative in character. A legislative action of a local agency is subject to review only to determine whether the agency action has been arbitrary, capricious or entirely lacking in evidenciary support or otherwise unlawful. Kahn v. East Bay Municipal Utility District (1974) 41 CA 3d 397; Pitts v. Perluss (1962) 58 Cal. 2d 824; Bixby; Wilson; and Brock, supra. On the other hand, §1094.5 requires, especially after Topanga, supra, reasoned findings supporting the conclusions of the public entities acting in a quasi-judicial fashion.

The law revision commission's mischaracterization of the vehicle for review of a resolution of necessity unreasonably and incorrectly burdens public entities in moving forward with projects. Furthermore, it encourages greater court participation in making what is essentially a legislative determination. Courts simply are not policy makers.

Even the State Supreme Court got caught up in the seductive simplicity of §1094.5 in its' initial publication of HFH Ltd., v. Superior Court (1975) 15 Cal. 3d 508, when it mistakenly indicated that §1094.5 was the appropriate vehicle for review of a legislative (zoning) action. That particular determination was modified after I forwarded a letter as the then City Attorney of the City of Livermore indicating to the Supreme Court that it had apparently misspoken itself on the appropriate vehicle for review of a legislative decision. Several other cities joined with me in this effort to clear up that point. Thereafter, the court noted on page 513 of the HFH decision that ordinary mandamus (CCP §1085) is the proper remedy for allegedly arbitrary or discriminatory zoning.

I am not sure anything can be accomplished without litigating the issue. However, unless the determinations in the resolution of necessity are determined to be quasi-judicial, it would appear that the above analysis applies.

I would respectfully request that the State Bar Committee and Law Revision Commission take necessary steps to modify the legislation to correctly reflect the law as set forth herein. I would be happy to discuss this further or render any assistance you might need.

Sincerely yours,

ROBERT J. LOGAN
City Attorney
City of Pittsburg

RJL:dk
cc: League of California Cities
Attn: Carlyn Galway
Assemblyman Alister McAlister

EXHIBIT 2

### § 1245.255. Collateral attack on conclusiveness of resolution

**1245.255.** 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. 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.

**Legislative Committee Comment—Senate**

**Comment.** Section 1245.255 is new. It permits a collateral attack on the conclusive effect of the resolution of necessity. Section 1245.255 overrules the case of *People v. Chevalier*, 52 Cal.2d 299, 340, P.2d 598 (1959), insofar as that case precluded a collateral attack on the conclusive effect of the resolution of necessity.

In addition to the collateral attack on the conclusive effect of the resolution permitted by Section 1245.255, the validity of the resolution may be subject to direct attack by administrative mandamus (Section 1094.5) and, 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).

Because Section 1245.255 permits collateral attack on the conclusiveness of the resolution, the standard for attack is a stricter standard than under the administrative mandamus statute. *Compare* Section 1245.255 ("gross abuse of discretion") *with* Section 1094.5 ("abuse of discretion"). Moreover, the scope of the court's review is limited to a determination of whether the resolution is supported by substantial evidence. Contrast *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal.3d 28, 520 P.2d 29, 112 Cal. Reptr. 805 (1974) (in certain types of cases, the court must exercise its independent judgment on the evidence in finding an abuse of discretion under Section 1094.5).

It should be noted that an attack on the resolution under Section 1245.255 must be pleaded promptly (Section 1250.345) and must recite the specific facts upon which it is based (Section 1250.350). In addition, the property owner's attorney must certify that, to the best of his knowledge, information, and belief, there is ground to support the attack on the resolution (Section 1250.330).

EXHIBIT 3

## § 1245.270. Resolution procured by bribery

1245.270. (a) A resolution of necessity does not meet the requirements of this article if the defendant establishes by a preponderance of the evidence both of the following:

(1) A member of the governing body who voted in favor of the resolution received or agreed to receive a bribe (as that term is defined in subdivision 6 of Section 7 of the Penal Code) involving adoption of the resolution.

(2) But for the conduct described in paragraph (1), the resolution would not otherwise have been adopted.

(b) Where there has been a prior criminal prosecution of the member for the conduct described in paragraph (1) of subdivision (a), proof of conviction shall be conclusive evidence that the requirement of paragraph (1) of subdivision (a) is satisfied, and proof of acquittal or other dismissal of the prosecution shall be conclusive evidence that the requirement of paragraph (1) of subdivision (a) is not satisfied. Where there is a pending criminal prosecution of the member for the conduct described in paragraph (1) of subdivision (a), the court may take such action as is just under the circumstances of the case.

(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.

#### Legislative Committee Comment—Senate

**Comment.** Section 1245.270 is new. Its effect is to preclude condemnation where the resolution of necessity was procured by bribery. See Section 1245.220 (resolution of necessity required). It should be noted that, where a resolution was influenced by a conflict of interest the resolution may be subject to direct attack under Government Code Section 91003(b) (Political Reform Act of 1974). In addition, where its contents or adoption were influenced or affected by gross abuse of discretion, its conclusive effect may be avoided. Section 1245.255.

The introductory portion of subdivision (a) of Section 1245.270 makes clear that the defendant need not demonstrate the bribery to the same degree required for a criminal conviction. However, where there has been a prior criminal conviction, the defendant may satisfy his burden of proof by showing the prior conviction. On the other hand, a prior criminal proceeding that ended in acquittal or dismissal for any other reason will preclude the defendant from raising the issue again in the eminent domain proceeding. Subdivision (b). Where there is a pending criminal proceeding, the court may use its discretion to take such actions as staying the eminent domain proceeding until the criminal case is resolved, permitting the eminent domain proceeding to continue while reserving the issue of necessity, or permitting the defendant to make his case on bribery notwithstanding the concurrent criminal action.

Memorandum 77-10

EXHIBIT 4

**§ 1094.5. [Inquiry into validity of administrative order or decision]**

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

(f) Except as provided in subdivision (g), the court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing such notice whichever occurs first; provided that no such stay shall be imposed or continued if the court is satisfied that it is against the public interest; provided that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part

2. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken; provided that, in cases where a stay is in effect at the time of filing the notice of appeal, such stay shall be continued by operation of law for a period of twenty (20) days from the filing of such notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings.

(g) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision of any licensing board respecting any person licensed pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, except Chapter 11 (commencing with Section 4800) thereof, or licensed pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative Act pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing such notice, whichever occurs first; provided that such stay shall not be imposed or continued unless the court is satisfied that the public interest will not suffer and the licensing board is unlikely to prevail ultimately on the merits; and provided further that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken; provided that, in cases where a stay is in effect at the time of filing the notice of appeal, such stay shall be continued by operation of law for a period of twenty (20) days from the filing of such notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings.

STATE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY EXHIBIT 5 EDMUND G. BROWN JR., Governor

DEPARTMENT OF TRANSPORTATION
LEGAL DIVISION
349 PINE STREET, SAN FRANCISCO 94104
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February 15, 1977

John H. DeMoully
Executive Secretary
Law Revision Commission
Stanford, CA 94305

Re: CCP §1245.255 and Legislative Committee Comment Thereto

Dear John:

Mr. John P. Horgan, Chief Counsel of this office, recently showed me a letter from Robert J. Logan, City Attorney of Pittsburg, addressed to you and Roger Sullivan concerning the unfortunate legislative comment currently appended to CCP §1245.255. As you are aware, the comment suggests that the validity of a condemnation resolution may be subject to direct attack by way of administrative mandamus. The ambiguity and potential for mischief threatened by this legislative oversight was of considerable concern to those of the Bar attending the autumn CEB program on AB 11.

It is our recommendation that the Commission address itself to this problem. We are in total agreement with Mr. Logan's analysis of the situation created. While comments in contravention of established law not directly addressed by the legislation itself should not change that established law, such comments can result in ambiguities which take a great deal of time by way of litigation to clarify. In the meantime, both agency and owner counsel are left in unenviable uncertainty as to how to advise their clients. This is particularly true of legislative comments which, even more strongly than Commission comments, brings the troublesome problem of legislative intent into the picture.

One solution which suggests itself would be to totally delete the unfortunate reference to "direct" (as distinguished from "collateral") attack on the resolution. It would appear that AB 11 provisions are mainly directed to eminent domain actions and, specifically, §1245.255 appropriately deals with the remedy available to the owner in attacking the resolution in an eminent domain action. It would appear unnecessary to address by way of comment other actions which might be taken against the validity of the resolution outside of an eminent

domain action. The deletion of any reference in the comment to such other legal remedies would not affect them and would leave to the courts the application of the proper judicial standards of review. However, if such reference should be considered necessary by way of comment, the comment should make reference to the correct remedy by way of ordinary mandamus (CCP §1085) rather than the incorrect remedy of administrative mandamus (CCP §1094.5).

Very truly yours,

NORVAL FAIRMAN
Assistant Chief Counsel
NF:lma
cc: Roger Sullivan, Esq., Chairman State Bar Committee on Eminent Domain
Robert J. Logan, City Attorney of Pittsburg

EXHIBIT 6
[C.E.B., California Civil Writs pp. 87-90]

(b) [§5.35] Qualification Applied to Administrative Agencies

In certain instances, traditional mandamus may lie to correct an abuse of discretion by an administrative officer or agency, but such abuse is generally subject to administrative mandamus under CCP §1094.5. This method for review of adjudicatory decisions (defined in §5.8) developed from the concept that mandamus lies to correct abuses of discretion (3 Witkin, CALIFORNIA PROCEDURE 2529 (1954)). See generally CALIFORNIA ADMINISTRATIVE MANDAMUS chap 5 (Cal CEB 1966).

Administrative review under CCP §1094.5 is the sole method for reviewing adjudicatory actions of state-level agencies of legislative origin. (For a table of these agencies, see ADMIN MANDAMUS Appendix A.) It is also available to review actions of all other agencies exercising adjudicatory or quasi-judicial functions. See ADMIN MANDAMUS §§2.11, 3.2.

But under CCP §1094.5, administrative mandamus applies only if the action sought to be reviewed is (1) a "final" administrative order or decision (2) made in the exercise of an *adjudicatory* or quasi-judicial function (3) as a result of a proceeding in which a hearing is required by law to be given and evidence to be taken. CCP §1094.5(a); *Keeler v Superior Court* (1956) 46 C2d 596, 297 P2d 967; *Wilson v Hidden Valley Munic. Water Dist.* (1967) 256 CA2d 271, 63 CR 889. See ADMIN MANDAMUS §§6.12–6.26 for discussion of when a decision is final.

Counsel should, therefore, first determine whether the officer or agency was compelled by law to hold a hearing and to take evidence. CCP §1094.5(a). On the question of when a hearing is required, see ADMIN MANDAMUS §§2.3–2.6, particularly the discussions in §§2.5–2.6 on when a statute is silent or vague and when it explicitly authorizes a decision without a hearing. See also *Endler v Schutzbank* (1968) 68 C2d 162, 65 CR 297. If a hearing was required and actually held, a petition for extraordinary relief in the nature of traditional mandamus is inappropriate and subject to demurrer. See *Temescal Water Co. v Department of Pub. Works* (1955) 44 C2d 90, 106, 280 P2d 1, 11. But this rule does not apply when no hearing or taking of evidence was required. *Munns v Stenman* (1957) 152 CA2d 543, 556, 314 P2d 67, 76, and cases cited.

Consequently, traditional mandamus under CCP §1085 (set out in §5.16) is available in limited situations to control or to correct abuses of discretion by administrative officers and agencies. See *Manjares v Newton* (1966) 64 C2d 365, 370, 49 CR 805, 809 (to compel school board to reinstate school bus transportation); *Griffin v Board of Supervisors* (1963) 60 C2d 318, 33 CR 101 (to compel board to redistrict); *Thompson v Board of Directors* (1967) 247 CA2d 587, 55 CR 689 (to compel irrigation district to change boundaries of its divisions); *Munns v Stenman, supra* (to compel city officials to issue residential building permit); *Baldwin-Lima-Hamilton Corp. v Superior Court* (1962) 208 CA2d 803, 25 CR 798 (to compel city officials to refrain from awarding illegal contract ("prohibitory mandamus"; see 3 Witkin, PROCEDURE 2576–2577)).

*Note:* Since quasi-legislative hearings do not involve adjudicatory functions (*i.e.*, hearing held and evidence taken with respect to a specific person), they are not reviewable under CCP §1094.5, even though such hearings are frequently required by statute; they are reviewable under CCP §1085. *Wilson v Hidden Valley Munic. Water Dist., supra,* 256 CA2d 271, 63 CR 889.

#### (4) [§5.36] QUALIFICATIONS TO BASIC RULE MAY OVERLAP

The two qualifications to the general rule that mandamus does not lie to control discretion, discussed in §§5.30–5.35, are distinct and separate. They may, nevertheless, overlap and be difficult at times to distinguish.

For example, in *Halpin v Superior Court* (1966) 240 CA2d 701, 49 CR 857 (writ granted to compel superior court to set reasonable attorneys' fees for services rendered by court-appointed counsel in accordance with Pen C §987a), the court stated (240 CA2d at 705, 49 CR at 860):

> [I]f the trial court's action in this case represented an independent exercise of the court's discretion, the result demonstrates an abuse of discretion; if, on the other hand the court embraced the fee scale adopted by the county as the prevailing standard, the court failed to exercise the independent discretion required by Penal Code, section 987a.

### c. [§5.37] *Actions of Administrative Agencies: Recapitulation*

Unless otherwise specifically provided by statute or the state constitution (see §§5.2, 6.18), administrative officers and agencies in California are subject to traditional mandamus, as well as to administrative mandamus. The use of traditional, as distinguished from administrative, mandamus depends on the nature of the particular acts or omissions of the officer or agency.

They are subject to traditional, not administrative, mandamus when they fail to perform a "ministerial" duty or when they act in a "quasi-legislative" capacity, regardless of the agency's origin or character and whether a hearing was had or even required by statute. CALIFORNIA ADMINISTRATIVE MANDAMUS §2.3 (Cal CEB 1966). See CCP §1085 (set out in §5.16); §§5.25–5.26.

They are subject to traditional mandamus under CCP §1085, and not to administrative review under CCP §1094.5, for relief from an officer's or agency's failure to assume jurisdiction or to exercise discretion (see §5.32), and for relief from abuse of discretion in those situations in which by law no hearing was required (see §§5.35–5.36). They are also subject to traditional mandamus, not administrative mandamus, when they are authorized to exercise discretion in situations that are not strictly quasi-legislative or adjudicatory and they exercise that discretion in an arbitrary or unreasonable manner. See *Manjares v Newton* (1966) 64 C2d 365, 370, 49 CR 805, 809 (school board held to have abused discretion in terminating school bus transportation), and other decisions cited at the end of §5.35.

Normally, they are subject to administrative mandamus (under CCP §1094.5), and not traditional mandamus, when they act in an "adjudicatory" or quasi-judicial capacity, whether the agency is constitutional or legislative in origin, statewide or local in character, and whether or not the agency is governed by the Administrative Procedure Act (Govt C §11523). ADMIN MANDAMUS §2.3. See §§5.9, 5.32, 5.35. Constitutional and local agencies may also be subject to certiorari. See §6.17.

Memorandum 77-10

EXHIBIT 7

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February 14, 1977

Mr. John H. DeMoully
California Law Revision Committee
Stanford Law School
Stanford, California 94305

Mr. Roger Sullivan
Chairman, State Bar Committee
on Eminent Domain
4th Floor
800 Wilshire Blvd.
Los Angeles, California 90017

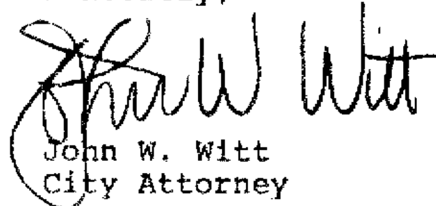
Dear Sirs:

Pittsburg City Attorney's Letter
to you dated February 9, 1977
Regarding Section 1245.255, C.C.P.
and Accompanying Legislative
Committee Comment

Please note our full endorsement and adoption of the comments of the above referenced letter to you. In our view, Mr. Logan's remarks are clearly a correct statement of the law and should require, at a minimum, a repudiation of the Committee's comment that "the validity of the resolution may be subject to direct attack by administrative mandamus." (C.C.P. § 1094.5.) In fact, we think an amendment to Section 1245.255, Code of Civil Procedure, should be prepared to the effect that the resolution could only be attacked for the reasons stated in the direct condemnation action. Direct attacks by traditional or administrative mandamus against the subject resolutions could open the door to unwarranted delays and much confusion. The "mini-trial" concept contained within A.B. 11's provisions provides a shortcut procedure to determine the validity of any resolution of public convenience and necessity.

Your attention to this matter is solicited.

Sincerely,



John W. Witt
City Attorney

DWD:rb
cc R. J. Logan
Carlyn Galway,
Staff Atty. to League of CA Cities
J. Witzel w/enc