

#36.60

9/23/75

First Supplement to Memorandum 75-72

Subject: Study 36.60 - Condemnation for Byroads and Utility Purposes

Attached to this memorandum is a letter from the Southern California Edison Company commenting on the tentative recommendation relating to condemnation for byroads and utility service. The letter makes basically the same points as the other letters so far received--that the easement should not be open to the public, and that there should be no approval by the appropriate public entity. The staff would repeat its observations of Memorandum 75-72--that the open-to-the public requirement can be removed from the section and placed in the Comment, and that the review by a public entity is essential to enactment of the statute.

Respectfully submitted,

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Mr. John H. DeMouilly  
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Dear Mr. DeMouilly:

This is with reference to the Commission's Tentative Recommendation on extending the right of condemnation to property owners for the purpose of condemning for byroads and utility easements. Southern California Edison Company's experience has been that this legislation is necessary and desirable. With one exception, we feel that the form of the proposed amendment to Section 1001 will do the job, but we also believe that adding Section 1002 is unnecessary.

The one exception to Section 1001 is the last sentence in proposed subsection (b) which indicates that "The public shall be entitled, as of right, to use and enjoy the easement which is taken." It is not clear just what is intended by this sentence. In the context of access roads, I can see no problem if what is intended is for the public as well as the property owner to be able to use the road. In applying this sentence to a utility easement, however, it doesn't make too much sense. It quite obviously would be unsatisfactory to utilities for the public to have the right to make use of an electric line easement, for example. Just how this might be done is confusing, to say the least. Some clarification is needed inasmuch as if the sentence remains as it is, the easement acquired would probably be unsatisfactory to utility companies. Southern California Edison Company's rules relating to providing electric service indicate that such service need not be extended unless a "satisfactory right of way" is provided by the party requesting service. Most other utilities have similar regulations.

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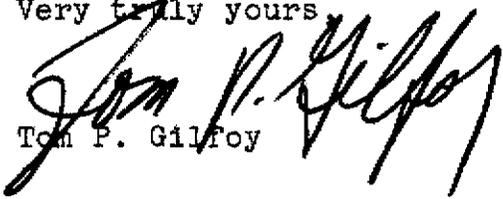
It may be that the Commission has confused the public use constitutional limitation on the right to condemn with the public having a right to use property condemned for such a public use. These are not opposite sides of the same coin. One does not necessarily follow the other. The public, for example, would not have the right to use a Top Secret Military Reservation just because it was condemned for a public use.

In view of the above, it is suggested that the sentence in question either be eliminated entirely or be amended in such a way as to limit its applicability to byroads.

It also seems to us that the added burden imposed on property owners by proposed Section 1002 is both unnecessary and unreasonable. If a property owner has to prove in court as he will that a taking is for a public use, that it is not just necessary but for a great necessity, and that the location selected is the one most compatible with the greatest public good and the least private injury, why isn't this enough? What justification is there for creating the additional political burden of convincing a Board of Supervisors by two-thirds vote that he should be able to condemn? No such burden would be imposed, for example, on the utilities for them to be able to condemn for the same easement. But because of the high cost of condemnation in relation to the relatively small return from individual services, most utilities are not required to serve unless an easement is provided "without cost or condemnation". Some of the rationale behind this rule should be applied for the benefit of the poor property owner who may only need an overhead service drop across a corner of a spiteful neighbor's property to get electricity. He shouldn't have to go to the Board of Supervisors. The courts provide enough protection against abuse.

Thanks for your consideration of these suggestions.

Very truly yours,

  
Tom P. Gilfoyle

TPG:bjs