

#36.20(2)

4/7/71

Memorandum 71-30

Subject: Study 36.20(2) - Condemnation (Tentative Statute)

SUMMARY

You have a copy of the Tentative Comprehensive Eminent Domain Statute. We recently sent you supplemental pages for this statute. With two exceptions, the staff has no suggestions for further changes in the revised copy of the statute at this time. One exception is a minor change in subdivision (c) of Section 401 explained below. The second exception is changes in the possession prior to judgment provisions (Division 7), which will be considered in a separate memorandum.

The rest of these materials have either already been tentatively approved or are staff recommendations which have been, and should continue to be, deferred for consideration. Unless individual Commissioners have questions concerning these materials, we do not plan to discuss them at the April 29-May 1 meeting. We do, however, urge you to read them over carefully, especially Chapters 5, 6, and 8 of Division 4 which were tentatively approved with revisions in September.

BACKGROUND

PLEASE BRING THE TENTATIVE STATUTE TO THE APRIL 29-MAY 1 MEETING. We made many minor, nonsubstantive revisions in the prior draft which have not been reviewed by the Commission.

Divisions 1 (pink), 2 (yellow), and 3 (green)

We have added some very brief Comments to the sections in Division 1. With this exception, these three divisions were reviewed previously by the Commission in this identical form, and the staff suggests no additional changes.

Division 4 (white)

Chapter 1. General Provisions. These sections are substantively identical to those previously tentatively approved. We have revised slightly the Comment to Section 300 (as previously directed by the Commission) and have added a Comment to Section 301. We suggest no additional changes.

Chapter 2. Limitations on Takings by Local Public Entities. Article 1, relating to the resolution of necessity, has been retyped with absolutely no change. Eventually, this article will probably serve as a model for all public entities, but we are not ready for this step yet. Former Article 2, relating to extraterritorial condemnation, has been renumbered Chapter 10 of this division (new Section 490). We suggest no additional changes in either of these articles.

Chapters 3 and 4. Limitations on Takings by Public Utilities; Limitations on Takings by Other Condemnors. These are nothing more than chapter titles.

Chapter 5. Future Use. Section 400 has not been changed. Section 401, however, has been extensively revised in conformity with the Commission's directions at the September 1970 meeting. You should note that subdivision (a) has been added to define "date of use" as used in this section. Subdivision (b) states the basic limitation on takings for future use, i.e., that the property taken must be used within seven years from the date of adoption of the resolution of necessity or such longer period of time as is reasonable. Subdivision (c) sets forth a notice provision under which the condemnor must advise the condemnee of the potential future use issue. Subdivision (c) presently requires

that this notice be given whenever the condemnor plans that the date of use will be more than three years from the date of adoption of the resolution of necessity. The staff believes that three should be changed to seven years. Only where the condemnor believes that the date of use will be more than seven years from the date of adoption of the resolution does the condemnee have a really meaningful opportunity to challenge the taking and we believe only in this situation should the condemnor have to give notice of this issue. The three-year provision is a now meaningless remnant left over from a prior draft when the recitation of use within three years was "conclusive" as to this matter. It seems that the choice now is between making the condemnor give notice either in every case or only where the condemnor knows that there is a real issue involved. The staff opts for the latter solution. Subdivisions (d) and (e) are self-explanatory and represent the Commission's decisions at the last meeting. With the change suggested in regard to subdivision (c), the staff hopes that Section 401 can and should now be tentatively approved. (We have also attached as Exhibit I a newspaper clipping--Los Angeles Daily Journal, 8/24/70--that we thought you would find of interest.)

Chapter 6. Substitute Condemnation. This chapter was tentatively approved with substantial revisions at the September 1970 meeting. The staff believes that you will want to read these sections over carefully; however, we have no suggestions for further changes. Should public utilities be given substitute condemnation authority?

Chapter 7. Excess Condemnation. We have reproduced for inclusion here the materials previously approved for distribution for comment. Certain changes will have to be made in this chapter in connection with the procedure for raising the right to take issue. However, we do not want to do this until we have received and discussed the comments on this topic. Accordingly, we do not want to spend any time on this chapter at the April 29-May 1 meeting.

Chapter 8. More Necessary Public Use. This chapter was tentatively approved in part in July and the remainder in September. Further changes may be necessary after these sections have been distributed for comment; however, we have no suggestions for change now.

Chapter 9. Condemnation for Consistent Use. This chapter has not been approved, but we plan to discuss it in a separate memorandum at a future meeting; accordingly, we do not wish to consider the issues it raises at the April 29-May 1 meeting.

Chapter 10. Extraterritorial Condemnation. As indicated above, this is merely former Section 320, renumbered as Section 490. Eventually, the principle expressed in this section may be broadened to apply in some way to other condemnors. However, we suggest no further changes at this time.

Chapter 11. Preliminary Location, Survey, and Tests. This chapter was tentatively approved at the September 1970 meeting. We suggest no additional changes.

Division 5 (gold) and 6 (blue)

These are nothing more than possible subject titles.

Division 7 (buff)

This division will be considered in detail in a separate memorandum.

Division 8 (pink)

We have prepared a skeletal outline of the division and included preliminary staff recommendations with respect to the response to a complaint in condemnation. We do not, however, plan any discussion of this division at the April 29-May 1 meeting. We will soon be considering a report from our consultant on procedural aspects.

Division 9 (yellow)

Suggested division title only.

Division 10 (green)

This division, based on the Commission's recommendation which was enacted into law by the 1970 Legislature, was approved for inclusion in the Tentative Statute at the September 1970 meeting. The staff suggests no additional changes.

Amendments, Additions, Repeals (white)

A number of new sections have been included as a result of the Commission's action at the July and September 1970, and March 1971 meetings. See the following sections:

Code of Civil Procedure

1238(6), (9), (10), (14), (16), (19), (22)  
1238.1  
1238.2  
1238.3  
1242  
1242.5  
1243.4  
1243.5  
1243.6  
1243.7  
1252  
1253  
1254  
1266  
1266.1  
1273.01-1273-06

Government Code

15854  
16425-16427

Public Utilities Code

622  
624

Streets and Highways Code

104.1  
943.1

Water Code

254  
8590.1  
11575.2  
43533

The Commission has already reviewed these sections and no further action seems necessary or desirable at this time.

Respectfully submitted,

John H. DeMouly  
Executive Secretary

# City Councilmen Vote to Acquire More International Airport Land

The Los Angeles International Airport is now one step closer to acquiring more East Westchester land, despite a group of property owners' complaints that they are being "railroaded out of existence."

The City Council voted 9-2 to approve an Industry and Transport Committee report condemning ordinance for 170 acres of land the Airport says it needs for future use.

The land in question is part of the total acreage and contains some 270 hold-out parcels scattered among those already acquired by the Airport through voluntary sale and purchase.

The land is part of an original ordinance requesting Airport use for a safety and clear-zone approach to the north runway complex. The original request contains 929 parcels of land, of which 659 already have been purchased.

Councilwoman Pat Russell, whose district includes the area, voted against report approval. She said that although the Council would be criticized for voting either way, she could not support condemnation.

She said the land in question was not defined to her mind as a clear-zone and that the Airport had not been specific enough in its plans for the land's future use.

"I feel it is a mistake to condemn so large an area without knowing its future use," she said.

The council earlier voted 6-6 not to allow East Westchester residents present any public hearing time. Opposition to the hearing was based on the fact that residents already had lengthy hearings during prior committee sessions.

Residents voiced their concern, however, through questions read by various councilmen to Airport officials.

Specifically, residents asked

about interest rates and the possibility of enacting lease agreements with the Airport.

They were told by Airport officials that lease agreements were not feasible. They were also told that the land would only be used for airport facilities and that acquisition of it was not a "real estate venture."

Airport officials said the land might be used for additional parking and a rapid-transit system.

Supporters of the condemnation ordinance, including Councilman Louis R. Nowell, said it would not be fair to allow some Westchester residents a chance to keep their property. He said if the Council did not approve the condemnation, they would be accused of giving "preferential treatment" to some of the residents.

Councilman John Ferraro, chairman of the Industry Committee, said approval of the condemnation was a difficult decision.

He said his committee based their decision, in part, on the impairing noise factors present in the area.

Voting with Mrs. Russell against condemnation was Councilman James Potter.

He said the Council had delayed too long on the matter and had "locked themselves in."

According to an airport spokesman, the situation is "still hanging."

After the ordinance is drawn up, it must be checked by the Planning Department and then it must return to the Council for final approval.

If the condemnation is approved, residences are expected to bring about \$4.70 a square foot, including land and improvements.

C O M P R E H E N S I V E    S T A T U T E

DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION (§ 1 et seq.) - PINK

DIVISION 2. WORDS AND PHRASES DEFINED (§ 100 et seq.) - YELLOW

DIVISION 3. GENERAL PROVISIONS (§ 200 et seq.) - GREEN

DIVISION 4. THE RIGHT TO TAKE (§ 300 et seq.) - WHITE

Chapter 1. General Provisions (§ 300 et seq.)

Chapter 2. Limitations on Takings by Local Public Entities (§ 310 et seq.)

Chapter 3. Limitations on Takings by Public Utilities (§ 350 et seq.)

Chapter 4. Limitations on Takings by Other Condemnors (§ 380 et seq.)

Chapter 5. Future Use (§ 400 et seq.)

Chapter 6. Substitute Condemnation (§ 410 et seq.)

Chapter 7. Excess Condemnation (§ 420 et seq.)

Chapter 8. More Necessary Public Use (§ 450 et seq.)

Chapter 9. Condemnation for Consistent Use (§ 470 et seq.)

Chapter 10. Extraterritorial Condemnation (§ 490 et seq.)

Chapter 11. Preliminary Location, Survey, and Tests (§ 500 et seq.)

DIVISION 5. JUST COMPENSATION AND MEASURE OF DAMAGES (§ 1000 et seq.) - GOLD

Chapter 1. General Provisions

Chapter 2. Relocation Expenses

Chapter 3. Additional Items of Compensation

Chapter 4. Proration of Taxes

Chapter 5. Delay Compensation (Interest)

Chapter 6. Litigation Expenses

DIVISION 6. APPORTIONMENT AND ALLOCATION OF THE AWARD (§ 1100 et seq.) - BLUE

DIVISION 7. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT; OBTAINING  
POSSESSION PRIOR TO FINAL JUDGMENT (§ 1268.01 et seq.) - BUFF

Chapter 1. Deposit of Probable Just Compensation Prior to Judgment  
(§ 1268.01 et seq.)

Chapter 2. Possession Prior to Judgment (§ 1269.01 et seq.)

Chapter 3. Deposits and Possession After Judgment (§ 1270.01 et seq.)

DIVISION 8. PROCEDURE (§ 2000 et seq.) - PINK

Chapter 1. Jurisdiction and Venue (§ 2000 et seq.)

Chapter 2. Complaint (§ 2100 et seq.)

Chapter 3. Summons (§ 2200 et seq.)

Chapter 4. Parties (§ 2300 et seq.)

Chapter 5. Response to Complaint (§ 2400 et seq.)

Chapter 6. Trial Practice (§ 2500 et seq.)

Chapter 7. Judgment (§ 2600 et seq.)

Chapter 8. Payment of Judgment (§ 2700 et seq.)

Chapter 9. Abandonment (§ 2800 et seq.)

Chapter 10. New Trials and Appeals (§ 2900 et seq.)

DIVISION 9. EXCHANGE OF VALUATION DATA (§ 3000 et seq.) - YELLOW

DIVISION 10. ARBITRATION OF COMPENSATION IN ACQUISITIONS OF PROPERTY FOR PUBLIC  
USE (§ 3500 et seq.) - GREEN

EXISTING CODES

AMENDMENTS, ADDITIONS, REPEALS - WHITE

COMPREHENSIVE STATUTE

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COMPREHENSIVE STATUTE § 1

Tentatively approved April 1970

DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

§ 1. Short title

1. This code shall be known as the Eminent Domain Code.

Comment. Section 1 is similar to comparable sections in recently enacted California codes. E.g., Evidence Code § 1; Vehicle Code § 1.

Preliminary Provisions and Construction

§ 3. Constitutionality

3. If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

Comment. Section 3 is the same as Section 3 of the Evidence Code and Section 1108 of the Commercial Code.

Preliminary Provisions and Construction

§ 4. Construction of code

4. Unless the provision or context otherwise requires, these preliminary provisions and rules of construction shall govern the construction of this code.

Comment. Section 4 is a standard provision in the various California codes. E.g., Evidence Code § 4; Vehicle Code § 6.

Preliminary Provisions and Construction

§ 5. Effect of headings

5. Division, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code.

Comment. Provisions similar to Section 5 appear in almost all of the existing California codes. E.g., Evidence Code § 5; Vehicle Code § 7.

Preliminary Provisions and Construction

§ 6. References to statutes

6. Whenever any reference is made to any portion of this code or to any other statute, such reference shall apply to all amendments and additions heretofore or hereafter made.

Comment. Section 6 is a standard provision in various California codes. E.g., Evidence Code § 6; Vehicle Code § 10.

Preliminary Provisions and Construction

§ 7. "Division," "chapter," "article," "section," "subdivision," and  
"paragraph"

7. Unless otherwise expressly stated:

(a) "Division" means a division of this code.

(b) "Chapter" means a chapter of the division in which that term occurs.

(c) "Article" means an article of the chapter in which that term occurs.

(d) "Section" means a section of this code.

(e) "Subdivision" means a subdivision of the section in which that term occurs.

(f) "Paragraph" means a paragraph of the subdivision in which that term occurs.

Comment. Section 7 is the same as Evidence Code § 7. Somewhat similar provisions appear in various California codes. E.g., Vehicle Code § 11.

See also Code Civ. Proc. § 17(8).

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 8. Construction of tenses

8. The present tense includes the past and future tenses;  
and the future, the present.

Comment. Section 8 is a standard provision in various California codes.  
E.g., Evidence Code § 8; Vehicle Code § 12. See also Code Civ. Proc. § 17.

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 9. Construction of genders

9. The masculine gender includes the feminine and neuter.

Comment. Section 9 is a standard provision in various California codes. E.g., Evidence Code § 9; Vehicle Code § 13. See also Code Civ. Proc. § 17.

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 10. Construction of singular and plural

10. The singular number includes the plural; and the plural,  
the singular.

Comment. Section 10 is a standard provision in various California codes.  
E.g., Evidence Code § 10; Vehicle Code § 14. See also Code Civ. Proc. § 17.

COMPREHENSIVE STATUTE § 11

Tentatively approved April 1970

Preliminary Provisions and Construction

§ 11. "Shall" and "may"

11. "Shall" is mandatory and "may" is permissive.

Comment. Section 11 is a standard provision in various California codes.  
E.g., Evidence Code § 11; Vehicle Code § 15.

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COMPREHENSIVE STATUTE § 100

Tentatively approved April 1970

DIVISION 2. WORDS AND PHRASES DEFINED

§ 100. Application of definitions

100. Unless the provision or context otherwise requires,  
these definitions govern the construction of this code.

Comment. Section 100 is a standard provision found in the definitional  
portion of recently enacted California codes. See, e.g., Evidence Code § 100;  
Vehicle Code § 100.

COMPREHENSIVE STATUTE § 101

Tentatively approved April 1970

Words and Phrases Defined

§ 101. Property

101. "Property" includes real and personal property and any right or interest therein and, by way of illustration and not by way of limitation, includes rights of any nature in water, subsurface rights, airspace rights, flowage or flooding easements, aircraft noise or operation easements, rights to limit the use or development of property, public utility franchises, and franchises to collect tolls on a bridge or highway.

Comment. Section 101 is intended to provide the broadest possible definition of property and to include any type of interest in property that may be required for public use. It is expected that this definition will be improved as the Commission's work on condemnation law progresses.

Words and Phrases Defined

§ 102. Nonprofit college

102. "Nonprofit college" means an educational institution that is authorized to exercise the power of eminent domain under Section 30051 of the Education Code.

Comment. Section 30051 is a new section to be added to the Education Code in the legislation relating to the right to take.

COMPREHENSIVE STATUTE § 104

Tentatively approved April 1970

Words and Phrases Defined

§ 104. City

104. "City" includes city and county.

COMPREHENSIVE STATUTE § 105

Tentatively approved April 1970

Words and Phrases Defined

§ 105. County

105. "County" includes city and county.

COMPREHENSIVE STATUTE § 106

Tentatively approved April 1970

Words and Phrases Defined

§ 106. Local public entity

106. "Local public entity" means any public entity other than the state.

COMPREHENSIVE STATUTE § 107

Tentatively approved April 1970  
Revised May 1970

Words and Phrases Defined

§ 107. Person

107. "Person" includes any public entity, individual, association, organization, partnership, trust, or corporation.

COMPREHENSIVE STATUTE § 108

Tentatively approved April 1970  
Revised May 1970

Words and Phrases Defined

§ 108. Public entity

108. "Public entity" includes the state, a county, city, district, public authority, public agency, and any other political subdivision in the state.

Comment. Subject to further review, the Commission has determined that, if "public corporations" are granted the power of eminent domain, the term "public corporation" will be defined and a section included which provides that, "unless otherwise provided by statute, a public corporation shall have the same rights, powers, and duties as a local public entity."

COMPREHENSIVE STATUTE § 109

Tentatively approved April 1970

Words and Phrases Defined

§ 109. State

109. "State" means the State of California and includes the Regents of the University of California.

COMPREHENSIVE STATUTE § 110

Tentatively approved April 1970

Words and Phrases Defined

§ 110. Statute

110. "Statute" means a constitutional provision or statute,  
but does not include a charter provision or ordinance.

COMPREHENSIVE STATUTE § 200 et seq.

Staff recommendation

DIVISION 3. GENERAL PROVISIONS

Chapter 1. Right of eminent domain may be exercised only as provided in this code unless otherwise specifically provided by statute.

COMPREHENSIVE STATUTE

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The Right to Take

DIVISION 4. THE RIGHT TO TAKE

Chapter 1. General Provisions

§ 300. Condemnation permitted only for a public use

300. The power of eminent domain may be exercised only to acquire property for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is a declaration by the Legislature that such use, purpose, object, or function is a public use.

Comment. The first sentence of Section 300 reiterates the basic constitutional requirement that property may be acquired by eminent domain only for a "public use." Cal. Const., Art. I, § 14; U.S. Const., Amend. XIV.

The second sentence is included in Section 300 to avoid the need to state in each condemnation authorization statute that the taking by eminent domain under that statute is a taking for a public use. For example, Section 104 of the Streets and Highways Code authorizes the acquisition of property by eminent domain for state highway purposes.

Tentatively approved June 1970

Section 300 provides that such legislative action is also deemed to be a legislative declaration that state highway purposes constitute a public use. Section 300 supersedes former Section 1238 of the Code of Civil Procedure, which purported to declare the public uses for which property could be taken by eminent domain.

The fact that Section 300 declares that a particular use for which the power of eminent domain may be exercised is a public use does not preclude judicial review to determine whether the proposed use in the particular case is actually a public use. E.g., City & County of San Francisco v. Ross, 44 Cal.2d 52, 279 P.2d 529 (1955). Nevertheless, the Legislature's declaration that the particular use is a public use will be accepted as controlling unless clearly erroneous and without reasonable foundation. E.g., People v. Superior Court, 68 Adv. Cal. 206, 210 (1968); Housing Authority v. Dockweiler 14 Cal.2d 437, 449-450, 94 P.2d 794, 801 (1939). Doubts are resolved in favor of the legislative declaration. University of So. Calif. v. Robbins, 1 Cal. App.2d 523, 525-526, 37 P.2d 163, 164 (1934). A legislatively authorized taking will be upheld if the taking is for a "use which concerns the whole community, or promotes the general interest of such community in its relation to any legitimate [governmental objective]." Bauer v. Ventura County, 45 Cal.2d 276, 284, 289 P.2d 1, 6 (1955). For further discussion, see Capron, Excess Condemnation in California-- A Further Expansion of the Right to Take, 20 Hastings L.J. 571, 574-576 (1969); Note, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599 (1949).

The Right to Take

§ 301. Condemnation permitted only where authorized by statute

301. The power of eminent domain may be exercised to acquire property for a public use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use.

Comment. Section 301 codifies the prior law that no person can condemn property for a particular public use unless the Legislature has delegated the power to that person to condemn property for that use. E.g., San Francisco v. Ross, 44 Cal.2d 52, 55, 279 P.2d 529, 531 (1955); People v. Superior Court, 10 Cal.2d 288, 295-296, 73 P.2d 1221, 1225 (1937); Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 590, 12 Cal. Rptr. 836, 838 (1961); Eden Memorial Park Ass'n v. Superior Court, 189 Cal. App.2d 421, 425, 11 Cal. Rptr. 189, 192 (1961); City of Menlo Park v. Artino, 151 Cal. App.2d 261, 266, 311 P.2d 135, 139 (1957).

The Right to Take

§ 302. Condemnation permitted only when necessity established

302. Before property may be taken by eminent domain, all of the following must be established:

- (a) The proposed project is a necessary project.
- (b) The proposed project is planned or located in the manner which will be most compatible with the greatest public good and the least private injury.
- (c) The property sought to be acquired is necessary for the proposed project.

The Right to Take

§ 303. Right to acquire any necessary right or interest

303. Except to the extent limited by statute, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire any right or interest in property necessary for that use.

Comment. Section 303 supersedes former Section 1239 of the Code of Civil Procedure insofar as that section specified the type of interest--whether a fee or lesser interest--that might be acquired by eminent domain.

Section 303 permits any condemnor to take whatever interest is required for a particular use subject, of course, to a showing that such interest is necessary for such use. See Section 302 of the Comprehensive Statute. Section 303 is generally consistent with the former law that permitted a public entity to take a fee rather than merely an easement. See former Code Civ. Proc. § 1239(4)(local public entities). However, under former law, most privately owned public utilities and some local public entities were permitted to acquire only an easement except in certain circumstances. See former Code Civ. Proc. § 1239. Moreover, under former law, the distinction generally made was between taking a fee or an easement, and Section 303 permits taking of the fee or any other right or interest. See Section 101 of the Comprehensive Statute (defining "property").

The Right to Take

§ 304. Joint exercise of condemnation power pursuant to Joint Powers  
Agreements Act

304. (a) As used in this section, "public agencies" includes all those agencies included within the definition of "public agency" in Section 6500 of the Government Code.

(b) Two or more public agencies may enter into an agreement for the joint exercise of their respective powers of eminent domain, whether or not possessed in common, for the acquisition of property as a single parcel. Such agreement shall be entered into and performed pursuant to the provisions of Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code.

Comment. Section 304 authorizes several public agencies to acquire a particular parcel under the Joint Powers Agreements Act, not only where the particular parcel is needed for a joint project but also where each of the agencies requires a portion of the parcel for its own purposes. The section is based on former Education Code Section 15007.5. Section 15007.5, however, applied only where a school district was a party to the joint powers agreement, and Section 304 is not so restricted.

The Right to Take

Chapter 2. Limitations on Takings by Local Public Entities

Article 1. Resolution of Necessity

§ 310. Resolution of necessity required

310. An eminent domain proceeding may not be commenced by a local public entity until after its governing body has adopted a resolution of necessity that meets the requirements of this chapter.

The Right to Take

§ 311. Contents of resolution

311. The resolution of necessity shall expressly set forth all of the following:

(a) A general description of the proposed project and a reference to the specific statute authorizing the local public entity to exercise the power of eminent domain to acquire property for such project.

(b) A description of the parcel or parcels of property to be acquired for the proposed project and the relationship of each such parcel to the proposed project.

(c) A declaration that the legislative body of the local public entity has found and determined each of the following:

(1) The public interest and necessity require the proposed project.

(2) The proposed project is planned or located in the manner which will be most compatible with the greatest public good and the least private injury.

(3) The property described in the resolution is necessary for the project.

COMPREHENSIVE STATUTE § 312

Tentatively approved May 1970

The Right to Take

§ 312. Adoption of resolution

312. The resolution of necessity must be adopted by a vote of not less than two-thirds of all of the members of the governing body of the local public entity.

Tentatively approved May 1970

The Right to Take

§ 313. Effect of resolution

313. (a) If the property described in the resolution is located entirely within the boundaries of the local public entity, the resolution of necessity conclusively establishes the matters referred to in Section 302.

(b) If the property described in the resolution is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a presumption that the matters referred to in Section 302 are true. This presumption is a presumption affecting the burden of producing evidence.

Note: Tentative approval of this section does not foreclose further review or changes providing broader justiciability of the matters covered herein. Nor does it affect in any way the justiciability of such issues as "excess condemnation," "substitute condemnation," "protective condemnation," "future use," and the like. The issue whether the resolution may be attacked by a showing of actual fraud has been expressly reserved.

The Right to Take

CHAPTER 5. FUTURE USE

§ 400. Authorization to acquire property for future use

400. The authority to acquire property by eminent domain for a public use includes authority to exercise the power of eminent domain to acquire property to be used in the future for that public use.

Comment. Section 400 continues prior case law and makes clear that statutory grants of condemnation power carry with them the power to condemn property in anticipation of the condemnor's future needs. See, e.g., Central Pac. Ry. v. Feldman, 152 Cal. 303, 309, 92 P. 849, 852 (1907); City of Los Angeles v. Pomeroy, 124 Cal. 597, 616, 57 P. 585, 591 (1899); San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 480-481, 14 Cal. Rptr. 899, 904-905 (1961). Despite the existence of the implied power, condemnation for future use was formerly specifically authorized by statute for a few condemnors for particular purposes. See, e.g., Cal. Stats. 1968, Ch. 354, § 1, p. 736 (former Cal. Sts. & Hwys. Code § 104.6) (Department of Public Works authorized to acquire real property for future highway needs); Cal. Stats. 1957, Ch. 2104, § 1 p. 3729 (former Cal. Water Code § 258) (Department of Water Resources authorized to acquire real property for future state dam and water purposes). Section 400 obviates the need for these additional statutory statements which have accordingly been repealed. (NB. the staff

COMPREHENSIVE STATUTE § 400

Tentatively approved June 1970

has not attempted to locate all of these provisions. This task has been postponed so that it may be performed together with other "clean-up tasks," such as designating the property interest that may be acquired and so on.]

Note. Sections 400 and 401 as tentatively approved contain a general grant of authority to condemn for future use as well as general substantive limits upon such authority. Statutory provisions providing a procedure for handling this and similar issues have not yet been drafted.

§ 401. Acquisitions for future use

401. (a) For the purpose of this section, the "date of use" of property taken for a public use is that date when the property is devoted to that public use or when construction is started on the project for which the property is taken with the intent to complete the project within a reasonable time. In determining the "date of use" under this section, periods of delay caused by extraordinary litigation or by failure to obtain agreements or permits necessary for construction from other public entities shall not be included.

(b) Property may be taken pursuant to Section 400 for future use only if there is a reasonable probability that its date of use will be within seven years from the date of the adoption of the resolution of necessity or within such longer period as is reasonable.

(c) Unless the condemnor plans that the date of use of property taken will be within three years from the date of the adoption of the resolution of necessity, the resolution of necessity and any complaint filed pursuant thereto shall refer specifically to this section and shall state the estimated date of use.

COMPREHENSIVE STATUTE § 401

Staff recommendation November 1970

(d) If the condemnee desires to contest the taking under this section, he shall raise the issue in the manner provided by Section 2401. Unless the condemnee proves that there is no reasonable probability that the date of use of his property will be within seven years from the date of the adoption of the resolution of necessity, the taking may not be denied under this section.

(e) When the resolution and complaint state, or when it is established by proof, that there is no reasonable probability that the date of use of property sought to be taken will be within seven years from the date of adoption of the resolution of necessity, the condemnor has the burden of proving that the taking is authorized under subdivision (b).

Comment. Section 401 limits the authority to condemn for future use.

The basic substantive test that determines when condemnation for future needs is permitted is stated in subdivision (b). If the date of use of property will be within seven years from the date of adoption of the resolution of necessity, the taking is permitted. (The date of use is that date when property is actually devoted to the use for which taken or when construction on the project is commenced in good faith. See subdivision (a).) If the date of use will not be within the seven-year period, the taking is permitted only if there is a reasonable probability that the date of use will be within a "reasonable time." What constitutes a reasonable time depends upon all the circumstances of the particular case--e.g.,

COMPREHENSIVE STATUTE § 401

Staff recommendation November 1970

is there a reasonable probability that funds for the construction of the project will become available, have plans been drawn and adopted, is the project a logical extension of existing improvements, is future growth likely, and should the condemnor anticipate and provide for that growth. However, it should be noted that periods of delay caused by litigation other than the normal resolution of valuation issues or by difficulty in obtaining agreements or permits necessary for construction from other public entities--e.g., freeway route agreements from local public entities-- are not to be included in determining date of use. See subdivision (a).

Subdivision (c) specifies additional requirements for the resolution of necessity and the complaint if the condemnor does not plan to use the property for the public use within three years from the date the resolution is adopted. The additional information required in the complaint will put the condemnee on notice that there is a potential issue whether the condemnor is authorized to take the property under this section.

The condemnee who desires to contest the taking of his property on the ground that the taking is for a future use and is not authorized under subdivision (b) must raise this defense by preliminary objection. Failure to raise the defense in the manner provided in Section 2401 constitutes a waiver of the defense, even though the complaint states that the condemnor does not plan to use the property within the seven-year period. See Section 2401 and the Comment thereto.

Staff recommendation November 1970

If the condemnee does contest the taking, the court must first find that there is no reasonable probability that date of use will be within the seven-year period. Unless the court so finds, the taking cannot be defeated on the ground that it is not authorized under subdivision (b). Except where the complaint indicates that date of use will not be within the seven-year period, the condemnee has the burden of proof to establish that there is no reasonable probability that his property will be used for the public use within that period. When the condemnor estimates that the date of use will not be within the seven-year period or when it is established by proof that there is no reasonable probability that the property will be used for the designated use within such period, the burden shifts to the condemnor to prove that there is a reasonable probability that the property will actually be used for the public use within a "reasonable time." See discussion of subdivision (b), supra.

Section 401 makes a significant change in former practice. Under prior law, as under Section 401, the basic substantive test permitted condemnation for future use only if there was a reasonable probability that the property would be devoted to the public use within a reasonable time. See, e.g., San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 480-481, 14 Cal. Rptr. 899, 904-905 (1961). See also East Bay Mun. Util. Dist. v. City of Lodi, 120 Cal. App. 720, 750-755, 8 P.2d

COMPREHENSIVE STATUTE § 401

Staff recommendation November 1970

532, 536-538 (1932). However, under prior law, this issue--i.e., whether there was a reasonable probability of use within a reasonable time--was ordinarily nonjusticiable. The issue was regarded as an issue of necessity. The resolution of necessity was conclusive on issues of necessity in the great majority of takings, hence the issue could be raised only in those few cases where the resolution was not conclusive. Compare Anaheim Union High School Dist. v. Vieira, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966)(resolution conclusive) and County of San Mateo v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960)(resolution conclusive) with San Diego Gas & Elec. Co. v. Lux Land Co., supra (resolution not conclusive). This aspect of the prior law has not been continued. The resolution of necessity is not conclusive on the issue of whether a taking is authorized under Section 401. See Section . [Section to be drafted covering conclusive effect of resolution and providing a specific exception to permit the raising of the issue under Section 401. This exception, and exceptions for several related matters, will be stated in the new section to be drafted and discussed in the Comment to that section.]

[Note: Section 400 and other sections conferring special grants of condemnation authority provide independent and cumulative grants of authority.]

The Right to Take

CHAPTER 6. SUBSTITUTE CONDEMNATION

§ 410. Definitions

410. As used in this chapter:

(a) "Necessary property" means property to be used for a public use for which the public entity is authorized to acquire property by eminent domain.

(b) "Substitute property" means property to be exchanged for necessary property.

Comment. Section 410 provides definitions useful in applying the "substitute condemnation" provisions contained in this chapter. Briefly stated, "substitute condemnation" involves the following type of situation: the potential condemnor determines that it needs certain real property (the "necessary property") for its use. It agrees to compensate the owner of the necessary property in whole or in part by other real property or an interest in real property (the "substitute property") rather than money. It then condemns the "substitute property" and exchanges it for the "necessary property." See generally Note, Substitute Condemnation, 54 Cal. L. Rev. 1097 (1966).

The Right to Take

§ 411. Condemnation of substitute property where owner of necessary property has power to condemn property for use to which substitute property will be devoted

411. (a) A public entity may acquire by eminent domain substitute property if all of the following are established:

(1) The owner of the necessary property has agreed in writing to the exchange.

(2) The necessary property is devoted to or held for some public use and the substitute property will be devoted to or held for the same public use by the owner of the necessary property.

(3) The owner of the necessary property is authorized to exercise the power of eminent domain to acquire the substitute property for such use.

(b) The resolution, ordinance, or declaration authorizing the taking of property under this section and the complaint filed pursuant to such authorization shall specifically refer to this section and shall recite a determination by the officer or body adopting the resolution, ordinance, or declaration that the property is necessary for the purpose specified in this section. The determination in the resolution, ordinance, or declaration that the taking of the substitute property is necessary is conclusive.

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Tentatively approved June 1970  
Revised Sept. 1970

Comment. Subdivision (a) of Section 411 authorizes a public entity to condemn property to be exchanged only where the person with whom the property is to be exchanged has agreed in writing to such exchange, and such person could himself have condemned the property to be exchanged. In this situation, the same end can be reached no matter which party to the exchange exercises the power of condemnation, so that the authority provided here is simply a shortcut to an identical result. Subdivision (a) extends the advantages of this procedure to public entities generally. Under former law, only certain entities were explicitly authorized to condemn for exchange purposes. See, e.g., Sts. & Hwys. Code §§ 104(b), 104.2; People v. Garden Grove Farms, 231 Cal. App.2d 666, 42 Cal. Rptr. 118 (1965)(state may condemn property to be conveyed to school district in exchange for property necessary for highway right-of-way). See generally Langenau Mfg. Co. v. City of Cleveland, 159 Ohio St. 525, 112 N.E.2d 658 (1953)(relocation of railroad by municipality); Tiller v. Norfolk & W. Ry., 201 Va. 222, 110 S.E.2d 209 (1959)(relocation of state highway by railroad); Note, Substitute Condemnation, 54 Cal. L. Rev. 1097, 1099-1100 (1966).

Where the owner of the necessary property does not have the power to condemn the substitute property for the use contemplated, the public entity must rely upon the authority granted under Section 412.

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Revised Sept. 1970

Subdivision (b) makes clear that the determination in the resolution authorizing the taking that the property to be taken is necessary for exchange purposes is conclusive. See People v. Garden Grove Farms, supra. See also Section 313 and Comment thereto (effect of resolution of necessity).

Note: The issue of necessity under Section 411 will be treated in the same manner as the issue of necessity in condemnation actions generally. For the most part, this means that the resolution of necessity will be conclusive as provided in subdivision (b). See also Section 313(a). However, in certain situations, e.g., condemnation outside the boundaries of the condemnor's territory, the resolution is not conclusive. See Section 313(b). The Commission intends to conform the treatment of the resolution under Section 411 to that provided generally when a final decision on this matter has been reached.

The Right to Take

§ 412. Condemnation of substitute property where owner of necessary property lacks power to condemn property for use to which substitute property will be devoted

412. (a) A public entity may acquire by eminent domain substitute property if all of the following are established:

(1) The owner of the necessary property has agreed in writing to the exchange and, under the circumstances of the particular case, justice requires that he be compensated in whole or in part by substitute property rather than by money.

(2) The substitute property is in the vicinity of the public improvement for which the necessary property is taken.

(3) Taking into account the relative hardship to both owners, it is not unjust to the owner of the substitute property that his property be taken so that the owner of the necessary property may be compensated by such property rather than by money.

(b) The resolution, ordinance, or declaration authorizing the taking of property under this section and the complaint filed pursuant to such authorization shall specifically refer to this section and shall recite a determination by the officer or body adopting the resolution, ordinance, or declaration that the property is necessary for the purpose specified in this section.

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Tentatively approved June 1970

Revised Sept. 1970

(c) If the owner of the substitute property desires to contest the taking, he shall raise the issue in the manner provided by Section 2401. Where the owner of the substitute property does contest the taking, the court in its discretion upon motion of the owner of the substitute property, the owner of the necessary property, or the public entity, may order the owner of the necessary property to be joined as a party plaintiff.

(d) Upon the hearing of this issue, the public entity has the burden of proof as to the facts that justify the taking of the property.

(e) If, after the hearing of this issue, the court's determination is in favor of the owner of the substitute property, the taking of such property shall be deleted from the proceeding. Upon final judgment, such owner shall be awarded his recoverable costs and disbursements. Recoverable costs and disbursements include (1) all expenses reasonably and necessarily incurred in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action and (2) reasonable attorney's fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the owner's interests in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action, whether such fees were incurred for services

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rendered before or after the filing of the complaint. Where the substitute property is only a portion of the property sought to be taken by the condemnor from the owner of such property, costs and disbursements recoverable under this section, shall include only those recoverable costs and disbursements, or portions thereof, which would not have been incurred had the property or property interest sought to be taken after deletion of the substitute property been the property or property interest originally sought to be taken. Recoverable costs and disbursements, including expenses and fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions.

Comment. Section 412 authorizes substitute condemnation where the requirements of Section 411 cannot be satisfied, but, under the circumstances, justice demands that the owner of the necessary property be compensated in land rather than money. Under former law, only certain condemnors were explicitly authorized to condemn for exchange purposes generally. See, e.g., Sts. & Hwys. Code § 104(b) (Department of Public Works); Water Code § 253(b) (Department of Water Resources). However, the right to exercise the power of eminent domain for exchange purposes probably would have been implied from the right to take property for the

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improvement itself in the circumstances contemplated. See Brown v. United States, 263 U.S. 78 (1923)(property acquired to relocate town displaced by reservoir); Pitznogle v. Western Md. R.R., 119 Md. 637, 87 A. 917 (1913) (property needed to relocate private road). One of the more common examples of such substitute condemnation is a taking to provide access to a public road from property cut off from access by the condemnor's original acquisition. This situation is provided for specifically by Section 413. See Section 413 and the Comment thereto. Similar situations may arise where private activities--such as a nonpublic utility, railroad serving a mining, quarrying, or logging operation or belt conveyors, or canals and ditches--are displaced by a public improvement. However, the authority granted by Section 412 is reserved for only these and similarly extraordinary situations. Paragraph (3) of subdivision (a) requires the court to consider the relative hardship to both owners and to permit condemnation only where both owners can be treated fairly.

Section 412 also contains certain special procedural provisions to help insure complete fairness for the owner of the substitute property. First, he will receive notice that the condemnor is relying on the authority conferred by this section because subdivision (b) requires the condemnation complaint to specifically refer to this section in such cases. Then, in contrast to the procedure under Section 411, the resolution authorizing

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the taking under this section is not conclusive, the necessity for the taking is justiciable, and the condemnor has the burden of proof of showing that the facts justify the taking of the substitute property. Compare Section 412(b), (d) with Section 411(b). The court is provided the power to join the person who is to receive the substitute property as a party to the action, thereby securing complete representation of all positions. See subdivision (c). Finally, subdivision (e) permits the owner of the substitute property to recover litigation expenses connected with the taking of the property to be exchanged where the condemnor is unable to justify such taking. Compare Code of Civil Procedure Section 1255a(c)(recoverable costs and disbursements upon abandonment). The risk of incurring this additional burden should aid in limiting the exercise of this power to the most deserving situations.

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Tentatively approved April 1970

Revised May 1970

Revised July 1970

Revised Sept. 1970

The Right to Take

§ 413. Condemnation to provide access to public road

413. (a) Notwithstanding Section 412, whenever a public entity acquires property for a public use and exercises or could have exercised the right of eminent domain to acquire such property for such use, the public entity may exercise the right of eminent domain to acquire such additional property, as appears reasonably necessary and appropriate after taking into account any hardship to the owner of the additional property, to provide access to a public road from any property which is not acquired for such public use but which is cut off from access to a public road as a result of the acquisition by the public entity.

(b) Where a public entity has furnished or committed itself to furnish, according to a specific plan, access to property cut off from access to a public road as a result of the acquisition of property for public use by the public entity, such fact shall be taken into account in determining the damage to the property which is not acquired for public use.

Comment. Section 413 provides explicit statutory recognition of the right of a public condemnor that acquires property for a public use

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Tentatively approved April 1970

Revised May 1970

Revised July 1970

Revised Sept. 1970

to condemn such additional property as is necessary to provide access to property not taken which would otherwise lack access as a result of the acquisition. The access road need not be one that is open to the general public. Under former law, the right to exercise the power of eminent domain for such purpose probably would have been implied from the right to take property for the public improvement itself. Such a taking would be a taking for a public use. E.g., Department of Public Works v. Farina, 29 Ill.2d 474, 194 N.E.2d 209 (1963); Pitznogle v. Western Md. R.R., 119 Md. 637, 87 Atl. 917 (1913); 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).

Section 413 is related to Section 412 but is intended to resolve somewhat different problems and is accordingly quite different in content. As indicated above, Section 413 authorizes condemnation to provide substitute access to a public road. Frequently, where property is acquired for a major, engineering-oriented project, such as a freeway or irrigation canal, parcels not acquired will be deprived of access to a public road. To restore these parcels to a useful life and, in so doing, to avoid claims of substantial severance damage, a condemnor should be authorized

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Revised June 1970

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to provide substitute access in connection with the improvement itself. Although the agreement of the owner of the landlocked parcel will generally be obtained, this is not a prerequisite here. Contrast Section 412(a)(1). The owner is not being compensated for property taken; the condemnor is simply minimizing the damage to property retained by the owner. The substitute access will by necessity be located in the general vicinity of the improvement and it is unnecessary to provide such a requirement here. Compare Section 412(a)(2). Subdivision (a) of Section 413 requires the condemnor to consider and to minimize the hardship to the owner of both the landlocked parcel and the substitute property; however, in contrast with Section 412, no special procedural safeguards are set forth here, and the condemnor's resolution of necessity will generally be conclusive as to issues of necessity. See Section 313 and Comment thereto (effect of resolution of necessity).

Subdivision (b) of Section 413 is included to insure that, where a condemnor provides an access road to property to replace lost access or commits itself to making such provision, the provision or offer will receive proper consideration as a mitigating factor in determining compensation for the damage, if any, to the property not acquired. Obviously,

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where the work has not been completed, there must be a specific plan which indicates not only what access will be substituted but equally important, when such access will be provided. In the latter situation, in determining any damages to be awarded, proper consideration must be given to the fact that access will not be immediately provided.

Section 413 provides discretionary authority for the condemnor to provide access. Where the condemnor does not choose to avail itself of this authority, an owner of property has no right to force such a physical solution upon it, but is limited to the recovery of damages. The owner may, however, at any time seek separate relief under the Street Opening Act of 1903. See Sts. & Hwys. Code §§ 4008, 4008.1, 4120.1.

The Right to Take

§ 414. Special statutes not affected

414. This chapter does not limit any authority a public entity may have under any other provision of law to acquire property for exchange purposes nor does it limit any authority a public entity may have to acquire, other than by eminent domain, property for exchange purposes.

Note: It is intended to repeal many of the existing substitute condemnation provisions so that Chapter 6 (Substitute Condemnation) will eventually be the primary statutory authority for substitute condemnation. It is possible, however, that some special substitute condemnation provisions will be retained, and Section 414 will protect these special provisions from being impliedly repealed.

Division 4. The Right to Take

Chapter 7. Excess Condemnation

§ 420. Voluntary acquisition of physical or financial remnants

420. Whenever a part of a larger parcel of property is to be acquired by a public entity for public use and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little value to its owner or to give rise to a claim for severance or other damages, the public entity may acquire the remainder, or portion of the remainder, by any means expressly consented to by the owner.

Comment. Section 420 provides a broad authorization for public entities to acquire physical or "financial" remnants of property by voluntary transactions, including condemnation proceedings initiated with the consent of the owner. Compare Section 421 and the Comment to that section relating to the condemnation of remnants. The language of this section is similar to that contained in former Sections 104.1 and 943.1 of the Streets and Highways Code and Sections 254, 8590.1, 11575.2, and 43533 of the Water Code [all to be repealed]. Inasmuch as

COMPREHENSIVE STATUTE § 420

Tentatively approved July 1970

exercise of the authority conferred by this section depends upon the consent and concurrence of the property owner, the language of the section is broadly drawn to authorize acquisition whenever the remnant would have little value to its owner (rather than little market value or value to another owner) or would give rise to a "claim" for "damages" (rather than raise a "substantial risk" that the entity will be required to pay an amount substantially equivalent to the amount that would be required to be paid for the entire parcel). Compare Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956). This section does not specify the procedure to be followed by the entity in disposing of the property so acquired. That matter is provided for by Section 422. See Section 422 and Comment thereto.

The Right to Take

§ 421. Condemnation of physical or financial remnants

421. (a) Whenever a part of a larger parcel of property is to be taken by a public entity through condemnation proceedings and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little market value or to give rise to a substantial risk that the entity will be required to pay in compensation an amount substantially equivalent to the amount that would be required to be paid for the entire parcel, the entity may take such remainder, or portion of the remainder, in accordance with this section.

(b) The resolution, ordinance, or declaration authorizing the taking of a remainder, or a portion of a remainder, under this section and the complaint filed pursuant to such authority shall specifically refer to this section. It shall be presumed from the adoption of the resolution, ordinance, or declaration that the taking of the remainder, or portion of the remainder, is justified under this section. This presumption is a presumption affecting the burden of producing evidence.

Tentatively approved July 1970

(c) If the condemnee desires to contest the taking under this section, he shall specifically raise the issue in his answer. Upon motion of either the condemnor or the condemnee, made not later than 20 days prior to the day set for trial of the issue of compensation, the court shall determine whether the remainder, or portion of the remainder, may be taken under this section. If the condemnee does not specifically raise the issue in his answer, or if a motion to have this issue heard is not timely made, the right to contest the taking under this section shall be deemed waived.

(d) The determination whether the remainder, or portion of the remainder, may be taken under this section, shall be made before trial of the issue of compensation. If the court's determination is in favor of the condemnee, the taking of the remainder, or portion of the remainder, shall be deleted from the proceeding, and upon trial of the issue of compensation no reference shall be made to the fact that the public entity previously sought to invoke this section to acquire the remainder, or portion of the remainder.

(e) The court shall not permit a taking under this section if the condemnee proves that the public entity has a reasonable, practicable, and economically sound means of avoiding or substantially reducing the damages that might cause the taking of the remainder, or portion of the remainder, to be justified under subdivision (a).

COMPREHENSIVE STATUTE § 421

Tentatively approved July 1970

(f) Nothing in this section affects (1) the privilege of the entity to abandon the proceeding or abandon the proceeding as to particular property, or (2) the consequence of any such abandonment.

Comment. Section 421 provides a uniform standard and a uniform procedure for determining whether property may be taken to eliminate physical and financial "remnants." With respect to physical remnants, see Kern County High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1955). As to the concept of "financial remnants," see Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); People v. Jarvis, 274 Adv. Cal. App. 243, Cal. Rptr. (1969); People v. Myrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 303 (1956). See generally 2 Nichols, Eminent Domain § 7.5122 (3d ed. 1963); Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L.J. 571 (1969); Matheson, Excess Condemnation in California: Proposals for Statutory and Constitutional Change, 42 So. Cal. L. Rev. 421 (1969). This section supersedes Section 1266 of the Code of Civil Procedure, Section 104.1 and 943.1 of the Streets and Highways Code,

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Sections 254, 8590.1, 11575.2, and 43533 of the Water Code, and various sections of special district laws.

Subdivision (a). It should be noted preliminarily that the terms "larger parcel" and "entire parcel" are not synonymous. "Larger parcel" refers to the original, contiguous, unified parcel held by the condemnee. See Code of Civil Procedure Section 1248(2); People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967). "Entire parcel" refers to the entire parcel sought to be acquired by the condemnor; this includes the part taken for the improvement itself and the remainder, or portion of the remainder sought to be acquired under this section. The term "portion of the remainder" is used in various subdivisions of this section to allow for the case in which a taking affecting a parcel leaves more than one remnant (e.g., the complete severance of a ranch by a highway). In certain cases, the taking of only one remnant (i.e., "a portion of the remainder") might be justified. The term does not mean or refer to artificially contrived "zones" of damage or benefit sometimes used in appraisers' analyses.

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Subdivision (a) undertakes to provide a common sense rule to be applied by the court in determining whether physical remnants (those of "little market value") or financial remnants (those raising a "substantial risk" that assessed damages will be "substantially equivalent" to value) may be taken. The test is essentially that stated as a matter of constitutional law in Dep't of Public Works v. Superior Court, *supra*, except that the confusing concept of "excessive" damages is not used and "sound economy" alone, or an estimate as to "sound economy" on the part of the condemnor, is not made a basis for total-parcel takings. As the Supreme Court made clear in that decision, such takings are not justified (1) to avoid the cost and inconvenience of litigating damages; (2) to preclude the payment of damages, including damages substantial in amount in appropriate cases; (3) to coerce the condemnee to accept whatever value the condemnor offers for the property actually needed for the project; or (4) to afford the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public work or improvement. In general, a usable and generally salable piece of property is neither a physical nor financial remnant even though its "highest and best use" has been downgraded by its severance or a serious controversy exists as to its best use or value

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after severance. See, e.g., La Mesa v. Tweed & Gambrell Planing Mill, supra; State Highway Commission v. Chapman, 446 P.2d 709 (Mont. 1968). However, if it is totally "landlocked" and no physical solution is practical, or reduced beneath minimum zoning size and there is no reasonable probability of a zoning change, or rendered unusable for any of its plausible applications, or made to be of significant value to only one or a few persons (e.g., adjoining landowners), it is a "remnant" irrespective of its size. See, e.g., Dep't of Public Works v. Superior Court, supra; State v. Buck, 226 A.2d 840 (N.J. 1968). The test provided by subdivision (a) is the objective one of marketability and market value generally of the remainder, rather than "value to its owner" as specified in Section 420 (which authorizes the purchase of remnants) and certain superseded provisions such as former Section 104.1 of the Streets and Highways Code. See State Highway Commission v. Chapman, supra. The term "substantial risk" and the concept of "substantial" equivalence of damages and value are taken directly from Dep't of Public Works v. Superior Court, supra. Obviously, those general terms are only guides to the exercise of judgment on the part of the court. They are intended to serve as such, rather than to indicate with precision the requisite range of probability or the closeness of arithmetical amounts.

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Subdivision (b). Although this subdivision requires a specific reference in both the resolution and the complaint to Section 421 as the statutory basis for the proposed taking, it does not require either the recitation or the pleading of the facts that may bring the case within the purview of the section. See People v. Jarvis, supra. The resolution (or ordinance or declaration) is given the effect of raising a presumption that the taking is justified under this section. Thus, in the absence of a contest of that issue, the subdivision permits a finding and judgment that the remainder be taken. However, the presumption is specified to be one affecting the burden of producing evidence (see Evidence Code Sections 603, 604), rather than one affecting the burden of proof (see Evidence Code Sections 605, 606). Accordingly, the burden of proving the facts that bring the case within the section is left with the plaintiff (i.e., the condemnor). See People v. Van Garden, 226 Cal. App.2d 634, 38 Cal. Rptr. 265 (1964); People v. O'Connell Bros., 204 Cal. App. 34, 21 Cal. Rptr. 890 (1962). In this respect, the subdivision eliminates any greater effect that might be attributed to the resolution (compare People v. Chevalier, 52 Cal.2d 299, 340 P.2d 603 (1959)) or that might be drawn from a legislative (see Los Angeles County v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964)) or administrative (see San Mateo County v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960)) determination or declaration as to "public use."

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Subdivisions (c) and (d). Remnant-elimination condemnation inevitably raises the problem of requiring both condemnor and condemnee to assume one position as to the right-to-take issue and an opposing position in the valuation trial. Thus, to defeat the taking, the property owner logically contends that the remainder is usable and valuable, but to obtain maximum severance damages, his contention is the converse. To sustain the taking, the condemnor emphasizes the severity of the damage to the remainder, but if the right-to-take issue is lost, its position in the partial-taking valuation trial is reversed. Under decisional law, the right-to-take issue as to remnants has been disposed of at various stages. See, e.g., Dep't of Public Works v. Superior Court, supra (mandamus as to preliminary adverse decision by trial court); People v. Nyrin, supra (appeal from condemnation judgment as to trial motion to delete remnant); People v. Jarvis, supra (appeal from condemnation judgment as to motion prior to pre-trial to add remnant); La Mesa v. Tweed & Gambrell Planing Mill, supra (appeal from condemnation judgment following post-trial attempt to amend complaint to add remnant). To obviate this procedural confusion and jousting, subdivision (c) makes clear that either party is entitled to demand a determination by the trial court of the right-to-take issue before the valuation trial. Moreover, failure to make such demand shall be deemed a waiver of this issue. Subdivisions (c) and (d) make no change in existing law as to the appellate remedies (appeal from final judgment of condemnation, prohibition, mandamus) that may be available as to the trial court's determination. However, these

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subdivisions do not contemplate that results of the valuation trial as to values, damages, or benefits may be invoked either in post-verdict proceedings in the trial court or on appeal to disparage a determination of the right-to-take issue made before the valuation trial. Such a determination is necessarily based on matters made to appear at the time it is made and it should be judged accordingly.

The preliminary hearing will be concluded and a determination reached prior to the trial of issue of compensation. Where the court's determination is in favor of the condemnee, the taking of the remainder, or portion of the remainder should be completely removed from the proceeding. Moreover, subdivision (d) specifically forbids reference in the valuation trial to the fact that the condemnor sought to take under this section. Whether specific evidence introduced at the preliminary hearing may be used for impeachment or other purposes at the valuation trial should be determined under the usual rules of evidence (see below). However, subdivision (d) makes clear that it is improper to refer directly or indirectly to the resolution, pleadings, or other papers on file to show that the condemnor previously sought to invoke this section to take the entire parcel. For a somewhat analogous provision, see Code of Civil Procedure Section 1243.5(e)(amount deposited or withdrawn in immediate possession cases).

Subdivision (e). This subdivision permits the condemnee to contest a taking under this section upon the grounds that a "physical solution" could be provided by the condemnor as an alternative to either a total

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taking or a partial taking that would leave an unusable or unmarketable remainder. In at least a few cases, the condemnee may be able to demonstrate that, given construction of the public improvement in the manner proposed, the public entity is able to provide substitute access or take other steps that would be equitable under the circumstances of the particular case. If he can do so, subdivision (e) prevents acquisition of the remainder. Clearly, in almost every case, some physical solution would be possible. Subdivision (e), however, requires that the solution also be "reasonable, practicable, and economically sound." To be "economically sound," the proposed solution must, at a minimum, reduce the overall cost to the condemnor of the taking. Thus, the cost of the solution plus compensation paid for the part taken plus any remaining damages must never exceed the amount that would be required to be paid if the entire parcel were taken. The court should, moreover, consider questions of maintenance, hardship to third persons, potential dangers, and so on, in determining whether the solution is also "reasonable and practicable."

Subdivision (f). Subdivision (f) makes clear that the procedure provided by this section has no bearing upon the privilege to abandon or the consequences of abandonment. The subdivision makes no change in existing law. See Section 1255a and People v. Myrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967).

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§ 422. Disposal of acquired physical or financial remnants

422. A public entity may sell, lease, exchange, or otherwise dispose of property taken under Section 420 or Section 421 and may credit the proceeds to the fund or funds available for acquisition of the property being acquired for the public work or improvement. Nothing in this section relieves a public entity from complying with any applicable statutory procedures governing the disposition of property.

Comment. Section 422 authorizes the entity to dispose of property acquired under Sections 420 and 421.

Division 4 - The Right to Take

CHAPTER 8. MORE NECESSARY PUBLIC USE

§ 450. "Property appropriated to a public use"

450. As used in this chapter, "property appropriated to a public use" means property either already in use for a public purpose or set aside for a specific public purpose with the intention of using it for such purpose within a reasonable time.

Comment. Section 450 defines "property appropriated to a public use" in accordance with prior California decisions. See East Bay Mun. Util. Dist. v. Lodi, 120 Cal. App. 740, 750-758, 8 P.2d 532, (1932). The general concept of "public use" is discussed in connection with Section 300. See Section 300 and Comment thereto. It should be noted that appropriation to a public use does not require actual physical use, but may be satisfied by formal dedication or facts indicating a reasonable prospect of use within a reasonable time. See e.g., Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959)(property formally dedicated but not yet used by corporation for cemetery purposes); City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916)(property assembled by electric railway for planned subway).

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Moreover, property may be appropriated to a public use even though it is owned by a private individual or corporation. E.g., Woodland School Dist. v. Woodland Cemetery Ass'n, supra; City of Los Angeles v. Los Angeles Pac. Co., supra. Conversely, property may be owned by a public entity but not be so appropriated, and, hence, be subject to condemnation without a showing that it will be appropriated to a "more necessary" use. Deseret Water, Oil & Irr. Co. v. State, 167 Cal. 147, 138 P. 981 (1914), rev'd on other grounds, 243 U.S. 415, and 176 Cal. 745, 171 P. 287 (1917).

§ 451. Property appropriated to a public use may be taken only for more necessary use

451. Except as provided in Section 471, property appropriated to a public use may be taken by eminent domain only for a more necessary public use.

Comment. Section 451 retains the general rule formerly set forth in Code of Civil Procedure Section 1240(3) and repeated elsewhere. This rule prevails over the general authority granted elsewhere to a number of condemnors to condemn property "whether the property is already devoted to the same use or otherwise." See, e.g., Harb. & Nav. Code § 6296. The rule is given much greater specificity in the succeeding sections in this chapter as well as numerous provisions in other codes. See, e.g., Health & Saf. Code § 8560 (no railroad, street, or utility line may be laid across dedicated cemetery without consent of cemetery authority). The introductory clause of Section 451 recognizes the exception for takings for a use that will be wholly consistent with the existing use. See Section 471 and Comment thereto.

§ 452. Use by state more necessary than other uses

452. Except as otherwise provided by statute:

(a) Where property has been appropriated to a public use by any person other than the state, the use thereof by the state for the same use or any other public use is a more necessary use than the use to which such property has already been appropriated.

(b) Where property has been appropriated to a public use by the state, the use thereof by the state is a more necessary use than any use to which such property might be put by any other person.

Comment. Section 452 broadens somewhat the general rule stated under former Code of Civil Procedure Section 1240 and Government Code Section 15856 (Property Acquisition Law). Section 1240 formerly provided a state priority over private ownership and Section 15856 provides an absolute priority for all acquisitions under that statute. Section 452 embraces state acquisitions under other authority, most notably by the Department of Water Resources and the Department of Public Works. The exception clause recognizes that specific exemptions or qualifications may be stated elsewhere. E.g., Code Civ. Proc. § 1241.7 (park use presumed "more necessary" than highway use under special declaratory relief procedure); Health & Saf. Code § 8560 (no street may be laid across existing cemetery without consent of cemetery authority or plot owners); Sts. & Hwys. Code §§ 103.5, 210.1 (Department of Public Works may condemn parks but shall avoid doing so wherever possible).

§ 453. Use by public entity more necessary than use by other persons

453. Except as otherwise provided by statute:

(a) Where property has been appropriated to a public use by any person other than a public entity, the use thereof by a public entity for the same use or any other public use is a more necessary use than the use to which such property has already been appropriated.

(b) Where property has been appropriated to a public use by a public entity, the use thereof by the public entity is a more necessary use than any use to which such property might be put by any person other than a public entity.

Comment. Section 453 is similar in substance to former Code of Civil Procedure Section 1240(3), except that Section 453 embraces all public entities. Thus, for example, Section 453 includes school districts which formerly were not included.

The preference under Section 453 is not merely one of public ownership over private ownership for the same use but includes any use. Thus, for example, a public entity may condemn the easement of a privately owned public utility not merely to perpetuate the utility use in public ownership but also to provide some separate and distinct use. The introductory clause recognizes that specific exceptions may be legislatively declared

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elsewhere. Cf. Govt. Code §§ 26301, 37353 (county and city, respectively, may not provide public course by condemning existing privately owned golf course). Perhaps the most notable of these exceptions are contained in Section 454. Under the latter section, property appropriated by any person to the use of certain public entities is protected from subsequent appropriation by certain other public entities. See Section 454 and Comment thereto. See also Mono Power Co. v. City of Los Angeles, 284 Fed. 784 (9th Cir. 1922)(city precluded by former Code of Civil Procedure Sections 1240(3) and 1241(3)--now Section 454--from condemning property appropriated to use of other governmental entities by private corporation).

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§ 454. Property appropriated to a public use by cities, counties, or certain special districts

454. Notwithstanding Sections 451 and 453, property appropriated to the public use of any city, county, municipal water district, irrigation district, transit district, rapid transit district, public utility district, or water district may not be taken by eminent domain by any other city, county, municipal water district, irrigation district, transit district, rapid transit district, public utility district, or water district while such property is so appropriated to such use.

Comment. Section 454 codifies prior law under former Sections 1240(3) and 1241(3) of the Code of Civil Procedure. Section 454, like its predecessors, protects property appropriated to a public use by or to the use of one of a group of public entities from condemnation by any other entity in the group. The list of entities in Section 454 conforms to that contained in former Section 1241(3). Former Section 1241(3) listed a greater number of entities than former Section 1240(3); however, the discrepancy appears to have been unintentional, and the sections were apparently regarded as interchangeable. See City of Beaumont v. Beaumont Irr. Dist., 63 Cal.2d 291, 46 Cal. Rptr. 465, 405 P.2d 377 (1965); County of Marin v. Superior Court, 53 Cal.2d 633, 2 Cal. Rptr. 758, 349 P.2d 526 (1960). The term "appropriated to a public use" is defined by Section 450. See Section 450 and Comment thereto. Former Sections 1240(3) and 1241(3) prohibited takings

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"while such property is so appropriated and used for the public purposes for which it has been appropriated." (Emphasis added.) This language implied that the property must not only be appropriated, but also actually used for a public purpose. However, the cases did not so construe the section. See East Bay Mun. Util. Dist. v. Lodi, 120 Cal. App. 740, 750, 8 P.2d 532, (1932)("'used' does not mean actual physical use . . . but . . . property reasonably necessary for use" which will be used within a reasonable time). The term "used" has accordingly been eliminated from Section 454 to conform with the actual construction. Similarly, both sections referred to takings of "private" property appropriated to the use of the respective entities. It was clear, however, that the sections were not limited to private property devoted to public use but included property owned by public entities as well as by private individuals or corporations. See City of Beaumont v. Beaumont Irr. Dist., supra (city may not condemn property appropriated to use by irrigation district); County of Marin v. Superior Court, supra (county road may not be condemned by municipal water district); Mono Power Co. v. City of Los Angeles, 284 Fed. 784 (9th Cir. 1922)(city may not condemn property appropriated to use of other governmental entities by private corporation). The modifying word "private" has, therefore, been deleted as meaningless.

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Section 454, like its predecessors, protects property appropriated to a public use by the specific condemnees listed from only the condemners listed. Thus, for example, a city may not take from a rapid transit district, but a school district which is not listed may both take from those listed and its property may be taken by those listed without regard to these provisions (although the general rule stated in Section 451 would still apply).

Note: The Commission solicits comments on whether the provisions of existing law reflected in Section 454 are presently causing difficulty, whether Section 454 is needed, and whether it should be retained, repealed, or modified.

§ 455. Procedure for raising and resolving more necessary public use issue

455. If property already appropriated to a public use is sought to be condemned and the condemnee desires to contest the taking as not being for a more necessary public use, he shall raise the issue in the manner provided by Section 2401. Upon the hearing of such issue, the condemnee has the burden of proving that the property is already appropriated to a public use; and if it is established by proof or otherwise that the property sought to be condemned is already appropriated to a public use, the condemnor has the burden of proving that its use is a more necessary public use than that to which the property has already been appropriated.

Comment. Section 455 makes clear certain procedural aspects of raising and resolving the issues involved in a taking for a "more necessary" public use.

Section 455 requires a condemnee desiring to contest the taking on the ground that the proposed use is not a more necessary public use than that to which the property is already appropriated to raise this defense by preliminary objection. See Section 2401 and Comment thereto. If the taking is contested, the court must first determine whether the property is in fact already appropriated to a public use and the condemnee bears the burden of proof on this issue. See City of Los Angeles v. Los Angeles Pac. Co., 31

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Cal. App. 100, 159 P. 992 (1916). Where this fact is proved or otherwise established, the condemnor must then prove that its use is a more necessary public use than the existing use.

Prior law apparently required a condemnor seeking to condemn property already appropriated to a public use to allege facts showing that its proposed use was a more necessary public use than that to which the property was already appropriated. See Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959). Section 455 eliminates this pleading requirement but continues the rule that the condemnor has the burden of proving that the proposed use is a more necessary public use.

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Division 4 - The Right to Take

CHAPTER 9. CONDEMNATION FOR CONSISTENT USE

§ 470. "Property appropriated to a public use"

470. As used in this chapter, "property appropriated to a public use" has the meaning given that phrase by Section 450.

Division 4 - The Right to Take

§ 471. Taking for consistent use

471. (a) The authority to acquire property by eminent domain for a public use includes authority to exercise the power of eminent domain to acquire property appropriated to a public use for a use which is consistent with the existing physical use or such future use as may be reasonably necessary for the purpose for which the property is already appropriated.

(b) The resolution of necessity authorizing the taking of property under this section and the complaint filed pursuant to such authority shall specifically refer to this section.

(c) If the condemnee desires to contest the taking under this section, he shall raise the issue in the manner provided by Section 2401. Upon the hearing of this issue, the condemnee shall have the burden of proving that his property is already appropriated to a public use. The condemnor shall have the burden of proving that its use will be consistent with the public use to which the property is already appropriated. Except as otherwise provided by statute, if the court's determination is in favor of the condemnor, the court shall fix the terms and conditions upon which the property may be taken and the manner and extent of its use for each of the uses.

COMPREHENSIVE STATUTE § 471

Staff recommendation (September 1970)

Comment. Section 471 makes clear that the authority to condemn for a public use includes the authority to condemn property already appropriated to a public use for a use which is compatible with the preexisting one. Under prior law, the principle was stated in connection with provisions dealing with the "more necessary use" issue. See former Code of Civil Procedure Section 1240(3). The provision was not, however, a "more necessary" public use provision and did not involve that issue. On the contrary, the authority provided here does not contemplate displacement but rather joint use without undue interference with the preexisting use. Accordingly, the authority to condemn for a consistent use is not limited in any way by the rules set forth in Chapter 8. To help make this distinction clear, Section 471 has been set forth in a separate chapter.

Subdivision (a) of Section 471 authorizes a condemnor to acquire property already appropriated to a public use for uses "consistent" with the use to which the property is already appropriated. For definition and discussion of the term "appropriated to a public use," see Sections 450 and 470 and Comments thereto. The requirement that the proposed use be "consistent" with the existing use continues prior law. See former Code of Civil Procedure Section 1240(3), (6). The term is necessarily imprecise because of the variety of circumstances it must embrace. See, e.g., City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 287 P. 496 (1930), cert. denied 282 U.S. 863 (19 ) (abundant water for use of both parties) (alternate holding); Reclamation Dist. No. 551 v. Superior Court, 151 Cal. 263,

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Staff recommendation (September 1970)

90 P. 545 (1907)(railroad right-of-way sought on top of reclamation district levee); City of Pasadena v. Stimson, 91 Cal. 238, 255, 27 P. 604 (1891)(sewer line in highway right-of-way); City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (railway company's electric transmission lines and subway on property taken for city park). However, the basic principle requires that the proposed use not unduly or unreasonably interfere with or impair the continuance of either the existing physical use or such future use as may be reasonably necessary for the purpose for which the property is already appropriated. See San Bernardino County Flood Control Dist. v. Superior Court, 269 Cal. App.2d 514, 75 Cal. Rptr. 24 (1969). Any interference or detriment must be immaterial or trivial. See Reclamation Dist. No. 551 v. Superior Court, supra. See generally 1 Nichols, Eminent Domain § 2.2[8], at pages 235-238 (3d ed. 1964). Section 471 does not grant authority to displace or to interfere substantially with a prior use. The power to displace a condemnee is dealt with in Chapter 8 (commencing with Section 450).

Section 471 authorizes any condemnor able to satisfy its requirement that the proposed use will be consistent with the preexisting one to condemn the property of any condemnee. Under former law, this point was unclear. See San Bernardino County Flood Control Dist. v. Superior Court, 269 Cal. App.2d 514, 523-524, n.10, 75 Cal. Rptr. 24, (1969). Subdivision (3) of

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Staff recommendation September 1970

former Code of Civil Procedure Section 1240 referred only to property "appropriated to a public use or purpose, by any person, firm or private corporation," thereby implying that property appropriated to a public use by a public entity could not be subjected to imposition of a consistent use. However, subdivision (6) of that section authorized the imposition of "rights-of-way" with no such limitation. In view of the very limited nature of the authority granted and the desirability of encouraging common use, Section 471 adopts the latter approach and is applicable to all condemnors and all condemnees. It should be noted, however, that Section 471 has no effect on the respective rights of the owner of the underlying fee and any easement holders to compensation for the additional burdens imposed by a condemnor exercising the authority granted by this section.

Subdivision (b) requires the condemnor to refer specifically to this section in its resolution of necessity and complaint in condemnation where it seeks to exercise the authority granted here. It might be noted that, in certain situations, a condemnor may be unsure of its authority to condemn under Chapter 8 and may therefore proceed under both that chapter and Section 471. Such inconsistent allegations are proper.

Subdivision (c) requires a condemnee desiring to contest the taking on the ground that the proposed use will be inconsistent with the public use to which he has already appropriated the property to raise this defense by preliminary objection. See Section 2401 and Comment thereto. If the taking is contested, the court must first determine whether the property

is in fact already appropriated to a public use and the condemnee bears the burden of proof on this issue. Cf. City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916). Where this fact is established, the condemnor must then show that its use will be consistent with the preexisting one. If the court's determination on this issue is in favor of the condemnor, subdivision (c) continues the power of the court to regulate the manner in which the proposed and prior uses will be enjoyed. See former Code of Civil Procedure Sections 1240(3), 1247(1), 1247a. In this regard, it should be noted again, however, that, while the condemnee may be required to make slight accommodations for the proposed use, the authority granted by this section does not permit displacement of or substantial interference with either the existing use or reasonable foreseeable extensions of such use.

Chapter 10. Extraterritorial Condemnation

The Right to Take

§ 490. Condemnation outside territorial limits of local public entity

490. A local public entity may condemn only property within its territorial limits except where the power to condemn property outside its limits is expressly granted by statute or necessarily implied as an incident to one of its other statutory powers.

Comment. Section 490 codifies prior law. Although express statutory authority generally is required, extraterritorial condemnation also is permitted where this power is necessarily implied as an incident to the existence of other powers expressly granted. See City of No. Sacramento v. Citizens Util. Co., 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961) (implied authority); City of Hawthorne v. Peebles, 166 Cal. App.2d 758, 333 P.2d 442 (1959)(statutory authority); Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co., 72 Cal. App.2d 638, 165 P.2d 741 (1946) (statutory authority). See also Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955); City of Carlsbad v. Wight, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963). Cf. Mulville v. City of San Diego, 183 Cal. 734, 737, 192 P. 702, (1920); McBean v. City of Fresno, 112 Cal. 159, 44 P. 358 (1896). Furnishing sewage facilities and supplying water are services for which the power of extraterritorial condemnation may be implied. City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891)(sewage)

(dictum); City of No. Sacramento v. Citizens Util. Co., supra (water).  
Cf. Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 718,  
329 P.2d 289, (1958). Compare City of Carlsbad v. Wight, supra.

There are a number of statutes that expressly authorize extra-  
territorial condemnation. E.g., Govt. Code § 61610; Harb. & Nav. Code  
§ 7147; Health & Saf. Code §§ 6514, 13852(c); Pub. Res. Code § 5540.  
Such statutes are constitutional. City of Hawthorne v. Peebles, supra;  
Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co., supra.

A significant limitation on the exercise of extraterritorial con-  
demnation is that the resolution of necessity is not conclusive where  
the property to be taken is outside the boundaries of the condemnor.  
Comprehensive Statute Section 313(b). See City of Hawthorne v. Peebles,  
supra. The "necessity" required to justify extraterritorial condemnation  
is only a reasonable necessity under all the circumstances of the case and  
not an absolute or imperative necessity. City of Hawthorne v. Peebles,  
supra. While economic considerations alone may not be sufficient to  
justify extraterritorial condemnation, considerations of economy may  
be taken into account in determining necessity. Sacramento Mun. Util.  
Dist. v. Pacific Gas & Elec. Co., supra. Compare City of Carlsbad  
v. Wight, supra.

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The Right to Take

Chapter 11. Preliminary Location, Survey, and Tests

§ 500. Right to make examinations and tests

500. Subject to requirements of this chapter, a person having the power of eminent domain may enter upon property to make studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities reasonably related to the purpose for which the power may be exercised.

Comment. Section 500 continues without substantive change the provisions of subdivision (b) of former Code of Civil Procedure Section 1242.

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Tentatively approved September 1970

The Right to Take

§ 501. Liability for damages

501. (a) The liability, if any, of a public entity for damages to property that arise from the entry and activities mentioned in Section 500 is determined by Section 816 of the Government Code.

(b) Any person that has the power of eminent domain, other than a public entity, is liable for damages to property that arise from the entry and activities mentioned in Section 500 to the same extent that a public entity is liable for such damages under Section 816 of the Government Code.

Comment. Section 501 continues without substantive change the provisions of subdivisions (c) and (d) of former Code of Civil Procedure Section 1242.

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Tentatively approved September 1970

The Right to Take

§ 502. Consent or court order required in certain cases

502. In any case in which the entry and activities mentioned in Section 500 will subject the person having the power of eminent domain to liability under Section 816 of the Government Code, before making such entry and undertaking such activities, the person shall secure:

(a) The written consent of the owner to enter upon his property and to undertake such activities; or

(b) An order for entry from the superior court in accordance with Section 503.

Comment. Except as noted in the Comment to Section 506, Sections 502-506 continue without substantive change the provisions of former Code of Civil Procedure Section 1242.5.

COMPREHENSIVE STATUTE § 503

Tentatively approved September 1970

The Right to Take

§ 503. Court order permitting entry: deposit of probable compensation.

503. (a) The person seeking to enter upon the property may petition the court for an order permitting the entry and shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case.

(b) Upon such petition and after such notice has been given, the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use.

(c) After such determination, the court may issue its order permitting the entry. The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit the probable amount of compensation in the manner provided in Section 1268.11.

Comment. See the ~~Comment~~ to Section 502.

COMPREHENSIVE STATUTE § 504

Tentatively approved September 1970

The Right to Take

§ 504. Modification of court order

504. At any time after an order has been made pursuant to Section 503, either party may, upon noticed motion, request the court to determine whether the nature and scope of the activities reasonably necessary to accomplish the purpose of the entry should be modified or whether the amount deposited is the probable amount of compensation that will be awarded. If the court determines that the nature and scope of the activities to be undertaken or the amount of the deposit should be modified, the court shall make its order prescribing the necessary changes.

Comment. See the Comment to Section 502.

The Right to Take

§ 505. Management of amount deposited

505. The court shall retain the amount deposited under this chapter for a period of six months following the termination of the entry. Such amount shall be deposited in the Condemnation Deposits Fund in the State Treasury and shall be held, invested, deposited, and disbursed in accordance with Article 9 (commencing with Section 16425) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code.

Comment. See the Comment to Section 502.

The Right to Take

§ 506. Recovery of damages and expenses

506. (a) The owner is entitled to recover from the person who entered his property the amount necessary to compensate the owner for any damage which arises out of the entry and for his court costs in the proceeding under this chapter. In the interests of justice, the court may award the owner, in addition to his court costs, reasonable attorney's fees in an amount fixed by the court.

(b) Where a deposit has been made pursuant to this chapter, the owner may, upon noticed motion made within six months following the termination of the entry, request the court to determine the amount he is entitled to recover under this section. Thereupon, the court shall determine such amount and award it to the owner and the money on deposit shall be available for the payment of such amount.

(c) Nothing in this section affects the availability of any other remedy the owner may have for the damaging of his property.

Comment. Section 506 continues without substantive change the provisions of subdivision (e) of former Code of Civil Procedure Section 1242.5 except that Section 506 permits the award of reasonable attorney's fees only in the interests of justice--e.g., where the person who entered or sought to enter acted arbitrarily and without any reasonable justification--whereas former Section 1242.5 contained no such limitation on the award of reasonable attorney's fees.

COMPREHENSIVE STATUTE

Staff recommendation

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DIVISION 7. DEPOSIT OF PROBABLE JUST COMPEN-  
SATION PRIOR TO JUDGMENT; OBTAINING POS-  
SESSION PRIOR TO FINAL JUDGMENT

Note: Unless otherwise specified, all section references  
are to the Tentative Eminent Domain Code.

CHAPTER 1. DEPOSIT OF PROBABLE JUST COMPENSATION  
PRIOR TO JUDGMENT

*Comment.* This chapter supersedes Code of Civil Procedure Sections 1243.6 and 1243.7 and those portions of Section 1243.5 that relate to the deposit and withdrawal of compensation prior to judgment. Under this chapter the condemnor may deposit the amount indicated by an appraisal to be the compensation for the taking of the property (including any damage incident to the taking) at any time after filing the complaint and prior to the entry of judgment. The deposit may be made whether or not possession of the property is to be taken. This deposit serves a number of purposes:

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(1) It is a condition to obtaining an order for possession prior to entry of judgment under Chapter 2 (commencing with Section 1269.01).

(2) It may entitle the condemnor to obtain an order for possession after entry of judgment under Chapter 3 (commencing with Section 1270.01). See Section 1270.02.

(3) In some cases, it fixes the date of valuation. See  $\surd$

[Code of Civil  
Procedure Sec-  
tion 1249a].

(4) If the deposit is withdrawn, interest ceases on the amount withdrawn on the date of withdrawal, and interest ceases in any event on the amount deposited upon entry of judgment. See  $\surd$

(5) If the deposit is withdrawn, the withdrawal entitles the plaintiff to an order of possession. See Section 1269.06.

[Code of Civil  
Procedure Sec-  
tion 1255b].

The deposit to be made after judgment is not governed by Chapter 1, but is covered by Chapter 3 (commencing with Section 1270.01). However, deposits made under Chapter 1 may be increased to the amount of the judgment after entry of judgment. See Section 1268.03(b).

**Section 1268.01. Deposit of amount of appraised value of property**

1268.01. (a) At any time after filing the complaint and prior to entry of judgment in any proceeding in eminent domain, the plaintiff may deposit with the court the amount indicated by the appraisal referred to in subdivision (b) to be the compensation for the taking of any parcel of property included in the complaint. The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

(b) Before making a deposit under this section, the plaintiff shall have an appraisal made of the property for which the deposit is to be made. The appraisal shall be made by an expert qualified to express an opinion as to the value of the property.

(c) Subject to subdivision (d), before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property prepare a statement of valuation data justifying the appraisal referred to in subdivision (b). The statement of valuation data shall set forth all amounts, opinions, and supporting data required by [Code of Civil Procedure Section 1272.02] to be included in a statement of valuation data with respect to:

(1) The value of the property or property interest being valued.

(2) If the property is a portion of a larger parcel, the amount of the damage, if any, to the remainder of the larger parcel.

(3) If the property is a portion of a larger parcel, the amount of the benefit, if any, to the remainder of the larger parcel.

special

(d) Upon ex parte application, the court may make an order permitting the plaintiff to defer preparation of the statement of valuation data for a reasonable time not exceeding 50 days from the date the deposit is made if the plaintiff, by affidavit, presents facts showing that an emergency exists and that the statement of valuation data cannot reasonably be prepared prior to making the deposit.

**Comment.** Section 1268.01 is new. In contrast with former practice, (1) the deposit may be made without obtaining the court's order therefor and without regard to an order for possession and (2) the amount of the initial deposit is determined by an appraisal obtained by the plaintiff, rather than by the court upon ex parte application of the plaintiff. Under Section 1268.03, however, the amount deposited may be determined or redetermined by the court on motion of any interested party.

The words "any parcel of property included in the complaint" have been used to make clear that a deposit may be made for one parcel only even though, under [Code of Civil Procedure Section 1244], several parcels may be included in one complaint. See *Weiler v. Superior Court*, 188 Cal. 729, 207 Pac. 247 (1922).

As used in this section and in this chapter, "compensation" refers to all elements of compensation, including the value of the property actually taken and any severance or other damages less those special benefits, if any, that are required to be offset against such damages. See [Code of Civil Procedure Section 1248]; Evidence Code Sections 811 and 812. However, pre-judgment interest is not required to be estimated or deposited under this section because the termination date of such interest and the ultimate effect of any offsets would be speculative at the time the deposit is made.

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The appraisal required by subdivision (b) and the statement of valuation data required by subdivision (c) may be made either by a member of the condemnor's appraisal staff or by an independent appraiser.

The statement of valuation data required by subdivision (c) is necessary to enable the plaintiff to comply with Section 1268.02 which requires the notice of the deposit to be accompanied by or to refer to the statement of valuation data which justifies the amount of the deposit. The required statement must contain all the information required to be included in a statement of valuation data. See [Code of Civil Procedure Section 1272.02 (added by Chapter 1104 of the Statutes of 1967)] which requires that such a statement set forth the appraiser's opinions as to the property's value, severance damages, and special benefits and specified items of supporting data, including "comparable" transactions, to the extent that the opinions are based thereon. An appraisal report containing all of such information could be used as a statement of valuation data. See [Code Civ. Proc. § 1272.02(f)].

Under emergency circumstances, it may be possible to make only a rough, preliminary appraisal of the property. In such cases, subdivision (d) permits the plaintiff to apply ex parte to the court for an order permitting the plaintiff to defer preparation of the statement of valuation data for a reasonable time not exceeding 50 days from the date of the deposit. Even where the plaintiff obtains such an order, the order does not relieve the plaintiff from depositing the amount of its appraisal of the property.

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Section 1268.02. Service of notice of deposit

1268.02. (a) On making a deposit pursuant to this chapter, the plaintiff shall serve a notice that the deposit has been made on all of the other parties to the proceeding who have an interest in the property for which the deposit was made. Service of such notice shall be made in the manner provided in Section 1269.04 for service of an order for possession.

(b) The notice shall either (1) be accompanied by a copy of the statement of valuation data referred to in subdivision (c) of Section 1268.01 or (2) state the place where and the times when such statement may be inspected. If the notice designates a place where and times when the statement may be inspected, the plaintiff shall make the statement available to all parties who have an interest in the property at such place and times.

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(c) If the plaintiff has obtained an order under Section 1268.01 deferring completion of the statement of valuation data, the plaintiff shall comply with subdivision (a) on making the deposit and shall comply with subdivision (b) upon completion of the statement.

*Comment.* Section 1268.02 is new. It requires that notice of the deposit be given in all cases to facilitate motions to change the amount of the deposit (Section 1268.03) or applications to withdraw the funds deposited (Sections 1268.04 and 1268.07).

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Section 1268.03. Increase or decrease in amount of deposit

1268.03. (a) At any time after a deposit has been made pursuant to this chapter, the court shall, upon motion of the plaintiff or of any party having an interest in the property for which the deposit was made, determine or redetermine whether the amount deposited is the probable amount of compensation that will be made for the taking of the property.

(b) If the court redetermines the amount after entry of judgment and before that judgment has been reversed, vacated, or set aside, it shall redetermine the amount to be the amount of the judgment. If a motion for redetermination of the amount is made after entry of judgment and a motion for a new trial is pending, the court may stay its redetermination until disposition of the motion for a new trial.

(c) If the plaintiff has taken possession or obtained an order for possession and the court determines that the probable amount of compensation exceeds the amount deposited, the court shall order the amount deposited to be increased accordingly.

(d) If the court determines that the probable amount of compensation exceeds the amount deposited and the amount on deposit is not increased accordingly within 30 days from the date of the court's order, no deposit shall be considered to have been made for the purpose of [subdivision (f) of Section 1249a of the Code of Civil Procedure].

(e) After any amount deposited pursuant to this chapter has been withdrawn by a defendant, the court may not determine or redetermine the probable amount of compensation to be less than the total amount already withdrawn.

(f) The plaintiff may at any time increase the amount deposited without making a motion under this section. In such case, notice of the increase shall be served as provided in subdivision (a) of Section 1268.02.

*Comment.* Section 1268.03 is new. It supersedes Code of Civil Procedure Section 1243.5(d) which provided for redetermination of the amount of probable just compensation. As to the duty of the plaintiff and the power of the court to maintain the deposit in an adequate amount, see *G. H. Deacon Inv. Co. v. Superior Court*, 220 Cal. 392, 31 P.2d 372 (1934); *Marblehead Land Co. v. Superior Court*, 60 Cal. App. 644, 213 Pac. 718 (1923).

Under [subdivision (f) of Code of Civil Procedure Section 1249a], the making of a deposit under this chapter establishes the date of valuation unless an earlier date is applicable. Subdivision (d) of Section 1268.03 denies that effect to the making of a deposit if the amount deposited is determined by the court to be inadequate and is not increased in keeping with the determination. Subdivision (d) applies only where the plaintiff has not taken possession of the property; if the plaintiff has taken possession, subdivision (c) requires that the plaintiff increase the amount of the deposit in accordance with the court's order.

Section 1268.09 provides for recovery of any excessive withdrawal after final determination of amounts in the eminent domain proceeding. No provision is made for recovery, prior to such final determination, of any amount withdrawn. Accordingly, subdivision (e) prevents determination or redetermination of the amount of probable compensation to be less than the total sum withdrawn.

Subdivision (f) of Section 1268.03 is included primarily so that the deposit may be increased after entry of judgment without the need for a court determination under this section.

Nothing in this subdivision precludes the court from making a determination or redetermination that probable just compensation is greater than the amount withdrawn.

COMPREHENSIVE STATUTE § 1268.04

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**Section 1268.04. Withdrawal of deposit prior to judgment**

1268.04. Prior to entry of judgment, any defendant who has an interest in the property for which a deposit has been made under this chapter may apply to the court for the withdrawal of all or any portion of the amount deposited in accordance with Sections 1268.05 and 1268.06. The application shall be verified, set forth the applicant's interest in the property, and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff.

**Comment.** Section 1268.04 is derived from Section 1243.7(a), (c).

former Code of Civil Procedure

## Section 1268.05. Procedure for withdrawal

1268.05. (a) Subject to subdivisions (c) and (d), the court shall order the amount requested in the application, or such portion of that amount as the applicant may be entitled to receive, to be paid to the applicant. No withdrawal may be ordered until 20 days after service of a copy of the application on the plaintiff, or until the time for all objections has expired, whichever is later.

(b) Within the 20-day period, the plaintiff may file objections to withdrawal on the grounds:

(1) That other parties to the proceeding are known or believed to have interests in the property; or

(2) That an undertaking should be filed by the applicant as provided in subdivision (e) or in Section 1268.06, or that the amount of such an undertaking or the sureties thereon are insufficient.

(c) If an objection is filed on the ground that other parties are known or believed to have interests in the property, the plaintiff shall serve or attempt to serve on such other parties a notice that they may appear within 10 days after such service and object to the withdrawal. The notice shall advise such parties that their failure to object will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn. The notice shall be served in the manner provided in subdivision (d) of Section 1269.04 for service of an order for possession. The plaintiff shall report to the court (1) the names of parties served and the dates of service, and (2) the names and last known addresses of parties who have neither appeared in the proceeding nor been served with process and whom the plaintiff was unable to serve personally. The applicant may serve parties whom the plaintiff has been unable to serve. Parties served in the manner provided in subdivision (d) of Section 1269.04 shall have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants. The plaintiff shall remain liable to parties having an interest of record who are not so served, but if such liability is enforced the plaintiff shall be subrogated to the rights of such parties under Section 1268.09.

(d) If any party objects to the withdrawal, or if the plaintiff so requests, the court shall determine, upon hearing, the amounts to be withdrawn, if any, and by whom.

(e) If the court determines that an applicant is entitled to withdraw any portion of a deposit that another party claims or to which another person may be entitled, the court may require the applicant, before withdrawing such portion, to file an undertaking. The undertaking shall secure payment to such party or person any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. If withdrawal is permitted notwithstanding the lack of personal service of the application for withdrawal upon any party to the proceeding, the court may also require that the undertaking indemnify the plaintiff against any liability it may incur under subdivision (c). The undertaking shall be in such amount as is fixed by the court, but if executed by an admitted surety insurer the amount shall not exceed the portion claimed by the adverse claimant or appearing to belong to another person. The undertaking may be executed by two or more sufficient sureties approved by the court, and in such case the amount shall not exceed double such portion.

COMPREHENSIVE STATUTE § 1268.05

Tentatively approved September 1970

(f) Unless the undertaking is required primarily because of an issue as to title between the applicant and another party or person, if the undertaking is executed by an admitted surety insurer the applicant filing the undertaking is entitled to

reasonably

recover the premium paid for the undertaking as a part of the recoverable costs in the eminent domain proceeding.

Code of Civil Procedure

*Comment.* Section 1268.05 is based on subdivisions (a), (c), (d), (e), and (f) of former Section 1243.7. Unlike the subsections on which it is based, Section 1268.05 does not forbid withdrawal of the deposit if notice of the application cannot be personally served upon all parties. The section permits the court to exercise its discretion as to withdrawal in such cases, as to the amount to be withdrawn, and as to the requirement of an undertaking.

Nothing in this section precludes withdrawal of the deposit upon stipulation of all parties having an interest in the property for which the deposit was made.

Subdivision (f) has been added to permit recovery of the bond premium as costs in the proceeding unless the necessity for the undertaking arises primarily from an issue of title. For use of the same distinction in assessing the costs of apportionment proceedings, see Code of Civil Procedure Section 1246.1 and *People v. Nogarr*, 181 Cal. App.2d 312, 5 Cal. Rptr. 247 (1960).

COMPREHENSIVE STATUTE § 1268.06

Tentatively approved September 1970

Section 1268.06. Security when amount in excess of original deposit is withdrawn

1268.06. (a) If the amount originally deposited is increased pursuant to Section 1268.03 and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicant, or each applicant if there are two or more, shall file an undertaking. The undertaking shall be in favor of the plaintiff and shall secure repayment of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. If the undertaking is executed by an admitted surety insurer, the undertaking shall be in the amount by which the total amount to be withdrawn exceeds the amount originally deposited. The undertaking may be executed by two or more sufficient sureties approved by the court, and in such case the undertaking shall be in double such amount, but the maximum amount that may be recovered from such sureties is the amount by which the total amount to be withdrawn exceeds the amount originally deposited.

(b) If there are two or more applicants, the applicants, in lieu of filing separate undertakings, may jointly file a single undertaking in the amount required by subdivision (a).

(c) The plaintiff may waive the undertaking required by this section or may consent to an undertaking that is less than the amount stated by this section.

(d) If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking may recover the premium paid for the undertaking.

reasonably

as a part of the recoverable costs in the eminent domain proceeding.

Code of Civil Procedure

*Comment.* Section 1268.06 is the same in substance as subdivision (b) of former Section 1243.7. Withdrawal by one or more defendants of an amount in excess of the original deposit is possible if the deposit has been increased as provided for by Section 1268.03.

except that the two-percent limitation in the former section of the amount recoverable for a premium on an undertaking has been replaced by the "reasonably paid" limitation.

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**Section 1268.07. Withdrawal of deposit after entry of judgment**

1268.07. (a) After entry of judgment, whether or not the judgment has been reversed, vacated, or set aside, any defendant who has an interest in the property for which a deposit has been made under this chapter may apply to the court for the withdrawal of all or any portion of the amount deposited.

(b) Subject to subdivisions (c), (d), and (e), upon application of a defendant under this section, the court shall order that the defendant be paid the amount to which he is entitled under the judgment, whether or not such judgment has been reversed, vacated, or set aside.

(c) If the amount deposited is not sufficient to permit payment to all defendants of the amount to which they are entitled under the judgment, the court, upon application of a defendant under this section, shall order that the defendant be paid that portion of the amount deposited that the amount to which he is entitled under the judgment bears to the total amount of the judgment. Nothing in this subdivision relieves the plaintiff from the obligation imposed by subdivision (c) of Section 1268.03 to increase the amount of the deposit.

(d) Upon objection to such withdrawal made by any party to the proceeding, the court, in its discretion, may require the defendant to file an undertaking in the manner and upon the conditions specified in Sections 1268.05 and 1268.06 for withdrawal of a deposit prior to entry of judgment.

(e) No payment shall be made under this section unless the defendant receiving payment files (1) a satisfaction of the judgment or (2) a receipt for the money and an abandonment of all claims and defenses except his claim to greater compensation.

*Comment.* Section 1268.07 is new, but it provides a procedure for withdrawing deposits that was available under former Sections 1243.7 and 1254. Under former practice, where a deposit was made to obtain possession prior to judgment, the defendant was nonetheless entitled to proceed under the comparatively simple provisions for withdrawal provided by Section 1254 after the entry of judgment. See *People v. Dittmer*, 193 Cal. App.2d 681, 14 Cal. Rptr. 560 (1961). Section 1268.07 has been added to provide explicitly for this practice. Section 1268.07 thus permits a defendant, after entry of judgment, to withdraw a deposit that was made before judgment under the same simple procedure provided for withdrawal of a deposit made after entry of judgment. Compare Section 1270.05 (withdrawal of a deposit made after entry of judgment). Upon entry of the judgment, any reason for use of the more complex pre-judgment withdrawal procedure (see Sections 1268.05 and 1268.06) disappears.

Subdivision (c) provides for the possible situation in which a defendant applies to withdraw the amount to which he is entitled under the judgment, but the amount then on deposit is insufficient to satisfy the judgment. The subdivision permits him to withdraw his proportionate part of the amount on deposit. For example, if the amount of the deposit is \$20,000, the total judgment is for \$30,000, and the particular defendant is entitled to \$15,000 under the judgment, the subdivision permits him to withdraw \$10,000. The subdivision thus obviates any question as to the entitlement of a defendant in such a situation and prevents withdrawal of a disproportionate share of the deposit by any particular defendant.

Subdivision (d) authorizes the court to require an undertaking to secure repayment of an excessive withdrawal. The subdivision thus per-

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Code of Civil Procedure

COMPREHENSIVE STATUTE § 1268.07

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mits the court to protect the condemnor or another defendant in a case in which the court believes that it is likely that the judgment entered will be vacated, reversed, or set aside and that the ultimate recovery by the applicant in the proceeding will be less than the amount to which he is entitled under the judgment. The subdivision makes any such requirement discretionary with the court; it does not entitle any party to the proceedings to insist upon an undertaking. Further, the subdivision contemplates that any objection to withdrawal will be made known to the court by the objecting party; it imposes no duty upon either the court or the applicant to ascertain whether a party may have such an objection.

Subdivision (e) requires the defendant receiving payment to file either (1) a satisfaction of judgment or (2) a receipt and an abandonment of claims and defenses other than his claim to greater compensation. The requirement is the same as the one imposed in connection with the withdrawal of a deposit made after entry of judgment. See Section 1270.05(b).

**Section 1268.08. Withdrawal waives all defenses except claim to greater compensation**

1268.08. If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation. Any amount so paid to any party shall be credited upon the judgment in the eminent domain proceeding.

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*Comment.* Section 1268.08 restates the substance of subdivision (g) of former Section 1243.7. In addition to the defendant's waiving claims and defenses other than the claim to greater compensation, withdrawal of the deposit may also entitle the plaintiff to an order for possession. See Section 1269.06. *Cf. People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

COMPREHENSIVE STATUTE § 1268.09

Tentatively approved September 1970

**Section 1268.09. Repayment of amount of excess withdrawal**

1268.09. Any amount withdrawn by a party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the party entitled to such amount, together with legal interest from the date of its withdrawal. The court which ordered such withdrawal shall enter judgment accordingly. If the judgment is not paid within 30 days after its entry, the court may, on motion, enter judgment against the sureties, if any, for such amount and interest.

*Comment.* Section 1268.09 restates the substance of subdivision (h) of former Section 1243.7.

Code of Civil Procedure

Section 1268.10. Limitation on use of evidence submitted in connection with deposit

1268.10. Neither the amount deposited nor any amount withdrawn pursuant to this chapter shall be given in evidence or referred to in the trial of the issue of compensation.

Comment. Section 1268.10 restates the substance of subdivision (e) of former Code of Civil Procedure Section 1243.5. Its purpose is to encourage the plaintiff to make an adequate deposit by preventing the amount deposited or withdrawn from being given in evidence on the issue of compensation. This section does not prevent the defense either from using the appraisal data for impeachment purposes or from calling the appraiser as an expert witness on its own behalf. See People v. Cowan, 1 Cal. App.3d 1001, 81 Cal. Rptr. 713 (1969).

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**Section 1268.11. Deposit in State Treasury unless otherwise required**

1268.11. (a) When money is deposited as provided in this chapter, the court shall order the money to be deposited in the State Treasury or, upon written request of the plaintiff filed with the deposit, in the county treasury. If money is deposited in the State Treasury pursuant to this section, it shall be held, invested, deposited, and disbursed in the manner specified in Article 9 (commencing with Section 16425) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that article.

(b) As between the parties to the proceeding, money deposited pursuant to this chapter shall remain at the risk of the plaintiff until paid or made payable to the defendant by order of the court.

*Comment.* Subdivision (a) of Section 1268.11 is the same in substance as former Section 1243.6. Subdivision (b) is based on the first two sentences of subdivision (h) of former Section 1254.

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COMPREHENSIVE STATUTE § 1269.01 et seq.

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**CHAPTER 2. POSSESSION PRIOR TO JUDGMENT**

**Comment.** This chapter provides for orders for possession prior to judgment and supersedes Code of Civil Procedure Sections 1243.4 and 1243.5. Orders for possession subsequent to judgment are governed by Chapter 3 (commencing with Section 1270.01). See Section 1270.02.

§ 1269.01. Application for order for possession prior to judgment

1269.01. If the plaintiff is a public entity or a public utility, the plaintiff may apply to the court for an order for possession under this chapter at the time of filing the complaint or at any time after filing the complaint and prior to entry of judgment. The application for the order for possession shall be made by motion. Notice of the motion shall be served in the same manner as an order for possession is served under Section 1269.04.

Comment. Section 1269.01 permits the condemnor, if a public entity or public utility, to make application for an order for possession prior to judgment in any condemnation case. Under former Code of Civil Procedure Section 1243.4, possession prior to judgment was allowed only if the taking was for right of way or reservoir purposes, and the right to immediate possession was limited to public entities; public utilities did not have the right to obtain immediate possession.

Section 1269.01 requires that notice be given of the motion for the order for possession. Former Code of Civil Procedure Section 1243.5(a) provided an ex parte procedure for obtaining an order for immediate possession, a procedure that appears to violate the due process clause of the Fourteenth Amendment to the U.S. Constitution, which requires an opportunity for interested persons to be heard.

§ 1269.02. Hearing

1269.02. (a) On hearing of the motion for the order for possession, the court shall consider all relevant evidence, including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to such schedule or plan, and shall make an order that authorizes the plaintiff to take possession of the property if the court determines all of the following:

(1) The plaintiff is entitled to take the property by eminent domain.

(2) The plaintiff needs possession of the property prior to judgment.

(3) The plaintiff has deposited the amount indicated by an appraisal to be the compensation for the taking of the property in accordance with Chapter 1 (commencing with Section 1268.01).

(b) Before making an order for possession under this chapter, the court shall:

(1) Dispose of any pending motion under Section 1268.03 to determine or redetermine the probable amount of compensation and, if an increase in the amount of the deposit is determined, shall require the additional amount to be deposited by the plaintiff.

(2) Determine the date after which the plaintiff is authorized to take possession, which date shall be not less than 60 days after the making of the order and shall take into consideration the need of the

COMPREHENSIVE STATUTE § 1269.02

Staff recommendation

plaintiff for early possession of the property and the hardship the owner or occupant will suffer if possession is taken before judgment.

Comment. Section 1269.02 specifies the determinations to be made at the hearing on the motion for immediate possession.

Subdivision (a). The required findings that the plaintiff is entitled to take the property by eminent domain, and that the plaintiff has deposited the amount of probable just compensation, are derived from former Code of Civil Procedure Section 1243.5(b). The requirement that plaintiff show a need for immediate possession is new to California but is based upon comparable provisions in other jurisdictions. See, e.g., Ill. Stat. Ann., Ch. 47, §§ 2.1-2.3 (Supp. 1966); Dep't of Pub. Works & Bldgs. v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958). See also Taylor, Possession Prior to Final Judgment in California Condemnation Procedure, 7 Santa Clara Lawyer 37, 81-86 (1966).

Subdivision (b). With respect to paragraph (1) of subdivision (b), see Section 1268.03 and the Comment to that section.

Paragraph (2) of subdivision (b) provides a minimum 60-day period following the rendering of the order before possession can be physically assumed. Because the order is obtained by regularly noticed motion, the time period is computed from the date of the order, rather than the date of its service. However, if the order is not promptly served, the period is tolled under Section 1269.04. The 60-day period is a minimum period; the period is to be determined by the court in each case, taking into account the need of the plaintiff for

COMPREHENSIVE STATUTE § 1269.02

Staff recommendation

possession of the property and the hardship to the defendant. Nothing in subdivision (b) should be construed to limit the state's ability to take property immediately in case of an emergency.

Review of orders authorizing or denying possession. Under former statutes, judicial decisions held that an appeal might not be taken from an order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari were held to be the appropriate remedies. See Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950); Weiler v. Superior Court, 188 Cal. 729, 207 P. 247 (1922); State v. Superior Court, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962); City of Sierra Madra v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961). However, an order for possession following entry of judgment has been held to be an appealable order. San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App.2d 668, 267 P.2d 349 (1954). No change is made in these rules as to orders made under Section 1269.02, or Chapter 3 (commencing with Section 1270.01).

Note: See note to Section 1269.04.

Staff recommendation

§ 1269.03. Contents of order for possession

1269.03. The order for possession shall:

- (a) Describe the property and the estate or interest to be acquired, which description may be by reference to the complaint.
- (b) State the date after which the plaintiff is authorized to take possession of the property.

Comment. The contents of the order for possession are substantially the same as those of former Code of Civil Procedure Section 1243.5(b). However, the requirement that the order state the amount of the deposit has been eliminated; Section 1268.02 requires that a notice of the making of a deposit be served on interested parties. Also, the requirement that the order state the purpose of the condemnation has been omitted since immediate possession is now authorized for any public use.

Tentatively approved September 1970

Section 1269.04. Service of order for possession

1269.04. (a) As used in this section, "record owner" means both (1) the person in whom the legal title to the fee appears to be vested by duly recorded deeds or other instruments and (2) the person, if any, who has an interest in the property under a duly recorded lease or agreement of purchase.

(b) At least 60 days prior to the time possession is taken pursuant to an order for possession made under Section 1269.02, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any.

or such longer time as the court prescribes,

(c) At least 30 days prior to the time possession is taken pursuant to an order for possession made under Section 1269.06, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any.

(d) Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or been served with summons in the proceeding. If the person has appeared or been served with the summons, service of the order for possession may be made by mail upon such person and his attorney of record, if any.

(e) If a person required to be personally served resides out of the state, or has departed from the state or cannot with due diligence be found within the state, the plaintiff may, in lieu of such personal service, send a copy of the order by registered or certified mail addressed to such person at his last known address.

(f) The court may, for good cause shown on ex parte application, authorize the plaintiff to take possession of the property without serving a copy of the order for possession upon a record owner not occupying the property.

(g) A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

*Comment.* Section 1269.04 is derived from former Section 1243.5(e). The requirement that an affidavit be filed concerning service by mail has been eliminated. Subdivision (g) is a clarification of a sentence in the first paragraph of Section 1243.5(e). The term "address" refers to a single residential unit or place of business, rather than to several such units or places that may happen to have the same street or post office "address." For example, each apartment is regarded as having a separate address although the entire apartment house may have a single street address.

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Note: The 60-day notice requirement does not, of course, apply to an emergency taking pursuant to the police powers, a matter that also is under study.

Tentatively approved September 1970

for relocation purposes

Section 1269.05. Deposit on motion of certain defendants

1269.05. (a) If the property to be taken includes a dwelling containing not more than two residential units and the dwelling or one of its units is occupied as his residence by a defendant, and if the plaintiff has not deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01), such defendant may move the court for an order determining the amount of such compensation for the dwelling and so much of the land upon which it is constructed as may be required for its convenient use and occupation. The notice of motion shall specify the date on which the moving party desires the deposit to be made. Such date shall not be earlier than 30 days after the date noticed for the hearing of the motion and may be any later date. The motion shall be heard and determined in the same manner as a motion made to modify a deposit under Section 1268.03.

(b) The court shall make its order determining the probable just compensation. If the plaintiff deposits the amount stated in the order on or before the date specified by the moving party (1) interest upon that amount shall not accrue and (2) the plaintiff may, after making the deposit and upon ex parte application to the court, obtain an order for possession that authorizes the plaintiff to take possession of the property 30 days after the date for the deposit specified by the moving party. If the deposit is not made on or before the date specified by the moving party, the compensation awarded in the proceeding to the moving party shall draw legal interest from that date.

(c) If the proceeding is abandoned by the plaintiff, the amount of such interest may be recovered as costs in the proceeding in the manner provided for the recovery of other costs and disbursements on abandonment. If, in the proceeding, the court or a jury verdict eventually determines the compensation that would have been awarded to the moving party, then such interest shall be computed on the amount of such award. If no such determination is ever made, then such interest shall be computed on the amount of probable just compensation as determined on the motion. The moving party shall be entitled to the full amount of such interest without offset for rents or other income received by him or the value of his continued possession of the property.

(d) The filing of a motion pursuant to this section constitutes a waiver by operation of law, conditioned upon subsequent deposit by the plaintiff of the amount determined to be probable just compensation, of all claims and defenses in favor of the moving party except his claim for greater compensation.

(e) Notice of a deposit made under this section shall be served as provided by subdivision (a) of Section 1268.02. The defendant may withdraw the deposit in accordance with Chapter 1 (commencing with Section 1268.01) on condition the deposit is used for relocation purposes only.

(f) No motion may be made by a defendant under this section after entry of judgment in the proceeding unless the judgment is reversed, vacated, or set aside and no other judgment is entered.

*Comment.* Section 1269.05 is new. Except as provided in this section, the depositing of probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) or the taking of possession pursuant to this chapter is optional with the plaintiff. If a deposit is not

if the court determines that the defendant will use the amount deposited for relocation purposes only.

COMPREHENSIVE STATUTE § 1269.05

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made and possession is not taken, a defendant is not entitled to be paid until 30 days after final judgment. [Code of Civil Procedure Section 1251] Section 1269.05 makes available to homeowners a procedure by which probable just compensation may be determined, deposited and withdrawn within a relatively brief period after the beginning of the proceeding. For a comparable but much broader provision, see PA. STAT. ANN., Tit. 26, § 1-407(b) (Supp. 1966).

for relocation purposes

Although Section 1269.05 does not require the plaintiff to deposit the amount determined, if no deposit is made interest on the eventual award begins to accrue. See [Section 1255b(a)(4)]. If the proceeding is abandoned, the interest is computed on the amount determined by the court to be probable just compensation. This section apart, interest would not begin to accrue until entry of judgment. See [Section 1255b(a)(1)]. Interest does not accrue as to any amount deposited under this section after the date the deposit is made. See [Section 1255b(d)(2)].

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Under subdivision (b), the timely making of a deposit under this section entitles the plaintiff to an order for possession effective 30 days after the date for the making of the deposit specified in the notice of motion served by the moving party.

Under subdivision (c), abandonment by the plaintiff entitles the defendant to recover interest in the manner provided for recovery of other costs, as prescribed in [subdivision (c) of Code of Civil Procedure Section 1255a]. The plaintiff may not abandon, however, if the defendant, to his detriment, has substantially changed his position in justifiable reliance upon the proceeding. [Code Civ. Proc. § 1255a(b).]

The reference in subdivision (a) to the amount of land required for the "convenient use and occupation" of the dwelling is taken from Section 1183.1 of the Code of Civil Procedure, which deals with mechanic's liens. The limitation precludes application of this section to land being taken and owned in common with the dwelling but unnecessary to the convenient use of the dwelling.

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**Section 1269.06. Right of plaintiff to take possession after vacation of property or withdrawal of deposit**

1269.06. (a) If the plaintiff has deposited probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01), possession of the property or property interest for which the deposit was made may be taken in accordance with this section at any time after each of the defendants entitled to possession:

(1) Expresses his willingness to surrender possession of the property; or

(2) Withdraws any portion of the deposit.

(b) The plaintiff may apply ex parte to the court for an order for possession. The court shall authorize the plaintiff to take possession of the property if the court determines that the plaintiff has deposited probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) and that each of the defendants entitled to possession has:

(1) Expressed his willingness to surrender possession of the property; or

(2) Withdrawn any portion of the deposit.

(c) The order for possession shall:

(1) Recite that it has been made under this section.

(2) Describe the property and the estate or interest to be acquired, which description may be by reference to the complaint.

(3) State the date after which plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under subdivision (c) of Section 1269.04 on the day the order is made.

**Comment.** Section 1269.06 is new. Chapter 1 (commencing with Section 1268.01) permits the plaintiff to deposit probable just compensation whether or not it obtains an order for possession. This section makes applicable to withdrawal of a deposit made prior to judgment the analogous rule that applies when a deposit made after judgment is withdrawn. *Cf. People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962). It also permits the plaintiff to take possession of the property after each of the defendants entitled to possession has expressed his willingness to surrender it. Service of the order for possession is required by subdivision (c) of Section 1269.04.

**Section 1269.07. Taking possession does not waive right of appeal**

1269.07. The plaintiff does not abandon or waive the right to appeal from the judgment in the proceeding or to request a new trial by taking possession of the property pursuant to this chapter.

**Comment.** Section 1269.07 is the same in substance as former Section 1243.5(f). The language has been changed to preclude implied waiver of appeal or right to new trial by taking possession pursuant to any order obtained under this chapter, including orders under Section 1269.05. Under Section 1268.08, the defendant also retains his right to appeal or to request a new trial upon the issue of compensation even though he withdraws the deposit made by the plaintiff. However, such withdrawal does waive all claims and defenses other than the claim to compensation.

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**Section 1269.08. Court may enforce right to possession**

1269.08. The court in which a proceeding in eminent domain is brought has the power to:

(a) Determine the right to possession of the property, as between the plaintiff and the defendants, in accordance with **Division 7** (commencing with Section 1268.01).

(b) Enforce any of its orders for possession by appropriate process.

(c) Stay any actions or proceedings brought against the plaintiff arising from possession of the property.

*Comment.* Section 1269.08 is new. Subdivision (c) is derived from a sentence formerly contained in Code of Civil Procedure Section 1254. In general, the section codifies judicial decisions which hold that, after an eminent domain proceeding is begun, the court in which that proceeding is pending has the exclusive power to determine the respective rights of the plaintiff and of the defendants to possession and to enforce its determination. See, e.g., *Neale v. Superior Court*, 77 Cal. 28, 18 Pac. 790 (1888); *In re Bryan*, 65 Cal. 375, 4 Pac. 304 (1884); *San Bernardino Valley Municipal Water Dist. v. Gage Canal Co.*, 226 Cal. App.2d 206, 37 Cal. Rptr. 856 (1964). In addition to the writs of possession or writs of assistance which the court may issue and enforce in exercise of its general jurisdiction (see *Marblehead Land Co. v. Los Angeles County*, 276 Fed. 305 (S.D. Cal. 1921); 3 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment*, § 64 (1954)), orders for possession contemplated by the section include those made under Chapter 2 (commencing with Section 1269.01) of **Division 7**, Chapter 3 (commencing with Section 1270.01) of and [Section 1253 of Code of Civil Procedure].

Division 7,

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CHAPTER 3. DEPOSITS AND POSSESSION AFTER JUDGMENT

*Comment.* This chapter relates to deposits that may be made and orders for possession that may be obtained after entry of the "interlocutory judgment" in condemnation. The chapter supersedes former Section 1254 and eliminates whatever distinction there may have been between deposits made under Section 1252 and Section 1254. Under this chapter, there is but one uniform post-judgment deposit procedure. As to the distinction between the "judgment" and the "final judgment" in eminent domain proceedings, see Section 1264.7 and *Bellflower City School Dist. v. Skaggs*, 52 Cal.2d 278, 339 P.2d 848 (1959).

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**Section 1270.01. Deposit after judgment**

1270.01. (a) Unless the plaintiff has made a deposit under Chapter 1 (commencing with Section 1268.01) prior to entry of judgment, the plaintiff may, at any time after entry of judgment, deposit for the defendants the amount of the judgment together with the interest then due thereon. The deposit may be made notwithstanding an appeal, a motion for a new trial, or a motion to vacate or set aside the judgment, and may be made whether or not the judgment has been reversed, vacated, or set aside.

(b) Upon making the deposit, the plaintiff shall serve a notice that the deposit has been made on all of the other parties to the proceeding determined by the judgment to have an interest in the money deposited thereon. Service of the notice shall be made in the manner provided in Section 1270.03 for the service of an order for possession. Service of an order for possession under Section 1270.03 is sufficient compliance with this subdivision.

*Comment.* Subdivision (a) of Section 1270.01 is similar to subdivision (a) of former Section 1254. However, the deposit provided for in this subdivision is merely the amount of the judgment and accrued interest. The provision for an additional sum to secure payment of further compensation and costs is contained in Section 1270.04. In addition, the deposit may be made under this section without regard to an order for possession. This section thus supersedes the deposit procedures formerly provided by Sections 1252 and 1254. Although this section applies only to the making of a deposit after judgment, a deposit made before judgment may be increased after entry of judgment pursuant to subdivision (f) of Section 1268.03.

Subdivision (b) is new. In requiring that notice of the deposit be given, it parallels Section 1268.02 which requires that notice of a pre-judgment deposit be sent to the parties having an interest in the property for which the deposit is made. Under former Section 1254, the defendant received notice that the deposit had been made only when served with an order for possession.

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COMPREHENSIVE STATUTE § 1270.02

Tentatively approved September 1970

Section 1270.02. Order for possession

1270.02. (a) If the plaintiff is not in possession of the property to be taken, the plaintiff may, at any time after entry of judgment, whether or not the judgment has been reversed, vacated, or set aside, apply ex parte to the court for an order for possession, and the court shall authorize the plaintiff to take possession of the property pending conclusion of the litigation if:

(1) The judgment determines that the plaintiff is entitled to take the property; and

(2) The plaintiff has deposited for the defendants an amount not less than the amount of the judgment, together with the interest then due thereon, in accordance with Section 1270.01 or Chapter 1 (commencing with Section 1268.01).

(b) The court's order shall state the date after which the plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be 10 days after the date the order is made.

**Comment.** Section 1270.02 restates the substance of a portion of subdivision (b) of former Section 1254.

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COMPREHENSIVE STATUTE § 1270.03

Tentatively approved September 1970

Section 1270.03. Service of order

1270.03. At least 10 days prior to the date possession is to be taken, the plaintiff shall serve a copy of the order for possession upon the defendants and their attorneys, either personally or by mail. A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

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Comment. Section 1270.03 is the same in substance as subdivision (c) of former Section 1254. With respect to the last sentence, see the Comment to Section 1269.04.

COMPREHENSIVE STATUTE § 1270.04

Tentatively approved September 1970

Section 1270.04. Increase or decrease in amount of deposit

1270.04. At any time after the plaintiff has made a deposit upon the judgment pursuant to this chapter, the court may, upon motion of any defendant, order the plaintiff to deposit such additional amount as the court determines to be necessary to secure payment of any further compensation, costs, or interest that may be recovered in the proceeding. After the making of such an order, the court may, on motion of any party, order an increase or a decrease in such additional amount.

*Comment.* Section 1270.04 supersedes subdivision (d) of former Section 1254. The additional amount referred to in Section 1270.04 is the amount determined by the court to be necessary, in addition to the amount of the judgment and the interest then due thereon, to secure payment of any further compensation, costs, or interest that may be recovered in the proceeding. Deposit of the amount of the judgment itself after entry of judgment is provided for by Section 1270.01.

Former Section 1254 was construed to make the amount, if any, to be deposited in addition to the judgment discretionary with the trial court. *Orange County Water Dist. v. Bennett*, 156 Cal. App.2d 745, 320 P.2d 536 (1958). This construction is continued under Section 1270.04.

For the provision permitting increase or decrease in a deposit made prior to entry of judgment, see Section 1268.03.

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Section 1270.05. Withdrawal of deposit

1270.05. (a) Any defendant for whom an amount has been deposited upon the judgment pursuant to this chapter is entitled to demand and receive the amount to which he is entitled under the judgment upon obtaining an order from the court, whether or not such judgment has been reversed, vacated, or set aside. Upon application by such defendant, the court shall order that such money be paid to him upon his filing (1) a satisfaction of the judgment or (2) a receipt for the money and an abandonment of all claims and defenses except his claim to greater compensation.

(b) Upon objection to such withdrawal made by any party to the proceeding, the court, in its discretion, may require the defendant to file an undertaking in the manner and upon the conditions specified in Sections 1268.05 and 1268.06 for withdrawal of a deposit prior to entry of judgment.

*Comment.* Section 1270.5 is based on subdivision (f) of former, Section 1254.

*Former.* Section 1254 was construed to permit the defendant to withdraw any amount paid into court upon the judgment, whether or not the plaintiff applied for or obtained an order for possession. See *People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962). That construction is continued in effect by Section 1270.05. Inferentially, Section 1254 permitted withdrawal only of the amount deposited upon the judgment and not the additional amount, if any, deposited as security. That construction also is continued in effect.

For the provision for withdrawal after entry of judgment of a deposit made prior to judgment, see Section 1268.07.

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COMPREHENSIVE STATUTE § 1270.06

Tentatively approved September 1970

**Section 1270.06. Repayment of amount of excess withdrawal**

1270.06. When money is withdrawn pursuant to this chapter, any amount withdrawn by a person in excess of the amount to which he is entitled as finally determined in the proceeding shall be paid without interest to the plaintiff or other party entitled thereto, and the court shall enter the judgment accordingly.

*Comment.* Section 1270.06 is the same in substance as subdivision (g) of former Section 1254.

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COMPREHENSIVE STATUTE § 1270.07

Tentatively approved September 1970

**Section 1270.07. Taking possession does not waive right of appeal**

1270.07. The plaintiff does not abandon or waive the right to appeal from the judgment or to request a new trial by depositing the amount of the judgment or taking possession pursuant to this chapter.

*Comment.* Section 1270.07 is the same in substance as subdivision (e) of former Section 1254. Under Section 1270.05, the defendant may also retain his right to appeal or to request a new trial upon the issue of compensation only even though he withdraws the deposit. This may be accomplished by filing a receipt and waiver of all claims and defenses except the claim to greater compensation. *Cf. People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

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COMPREHENSIVE STATUTE § 1270.08

Tentatively approved September 1970

Section 1270.08. Deposit in State Treasury unless otherwise required

1270.08. Money deposited as provided in this chapter shall be deposited in accordance with Section 1268.11 and the provisions of that section are applicable to the money so deposited.

*Comment.* Section 1270.08, which incorporates by reference Section 1268.11, supersedes a portion of subdivision (h) of former Section 1254.

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Procedure

DIVISION 8. PROCEDURE

Chapter 5. Response to Complaint

§ 2400. Answer

2400. (a) Within 30 days of the service of summons upon him a condemnee shall serve an answer.

(b) The answer shall state:

(1) The caption of the action.

(2) A description of the property in which the condemnee claims an interest and the nature and extent of the interest claimed.

(3) The name and address of the condemnee or the person designated as agent for service of notice of all proceedings affecting the condemnee's property.

Comment. Section 2400 replaces in part former Section 1246 of the Code of Civil Procedure which stated certain requirements for an answer to a complaint in condemnation proceedings. Section 2400 retains the requirement that the condemnee describe the property in which he claims an interest and the nature and extent of that interest. However, the former requirement that he set forth an itemization of the damages claimed has been eliminated. The answer provided by Section 2400 is similar in form and effect to the notice of appearance provided in federal condemnation proceedings. See Rule 71A(e) of the Federal Rules of Civil Procedure.

[Note: This section has not been approved by the Commission. Further study will be undertaken to determine how right to take issues should be raised and resolved.]

Procedure

§ 2401. Preliminary objections

2401. (a) A condemnee desiring to raise any defense to the taking of his property shall file and serve upon the condemnor preliminary objections to the complaint for condemnation within 45 days after the service of summons upon him or within such longer period of time as is stipulated or as the court may allow upon good cause shown. A condemnee who needs additional time to prepare preliminary objections, shall apply to the court for such time within the 45-day period.

(b) All defenses shall be raised at one time and in one document. They may be inconsistent. The grounds for each defense shall be specifically stated. Any defense not raised by a timely preliminary objection is waived unless the court for good cause shown determines otherwise.

(c) Within such period as the court determines is reasonable, the court shall determine all preliminary objections and shall make such preliminary or final orders as are required.

Comment. Section 2401 sets forth the procedure to be followed by a condemnee desiring to raise any defense to the taking of his property.

COMPREHENSIVE STATUTE § 2401

Staff recommendation

The section makes significant changes in form but is similar in substance to former law. Formerly, the condemnee was required to raise objections to the taking of his property by demurrer or answer. See

People v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968)(answer); People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959) (answer); Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955) (demurrer). These pleadings have been replaced in condemnation proceedings by the answer (see Section 2400 and Comment thereto) and preliminary objections. As before, however, the condemnee is required to raise his objections early in the proceedings. Subdivision (a) of Section 2401 requires preliminary objections to be filed and served by the condemnee upon the condemnor within 45 days after the condemnee has been served with the summons and complaint. This time period may be extended by stipulation of the parties or upon application and for good cause--for example, to permit discovery or the acquisition of preliminary appraisal reports where this information would be vital to an informed decision (see Section 421).

Subdivision (b) requires the condemnee to raise his defenses at one time, in one document and to state specifically the grounds for each defense. These requirements are generally consistent with former decisional law that, for example, required the condemnee to affirmatively allege how or in what manner a proposed use would not be public or specific facts indicating an abuse of discretion, i.e., an intention not to

use the property as resolved. See People v. Chevalier, supra. Failure to raise a defense by timely objection constitutes a waiver of that defense except where judicial relief is granted upon a showing of good cause--for example, where the condemnee has been misled by a condemnor's failure to properly plead its statutory authority. See Sections 401(c), 412(b).

Where preliminary objections have been properly and timely raised, subdivision (c) directs the court to determine them promptly making any preliminary or final orders required. Subdivision (c) merely continues prior law insofar as it requires the issues raised by preliminary objections to be tried by the court. See People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

[Note: Subdivision (c) reflects the policy decision that preliminary objections should be disposed of promptly--generally well in advance of the valuation trial, if the latter is necessary. Prompt disposition will permit the parties to either avoid the expensive preparations necessary for trial of the issue of compensation or at least plan with greater certainty concerning the issues that will be involved. Present law presents a variety of procedures--for example, a hearing held on a motion to strike a portion of the complaint, People v. Superior Court, supra; prior, separate trial as a special defense not involving the merits, County of San Mateo v. Bartole, 184 Cal. App.2d

COMPREHENSIVE STATUTE § 2401

Staff recommendation

422, 7 Cal. Rptr. 569 (1960); trial in conjunction with the issue of compensation, Anaheim Union High School Dist. v. Vieira, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966). It is anticipated that these will be replaced by special provisions which will be coordinated with pretrial procedures, but will grant the court discretion to hear these issues as expeditiously as the circumstances warrant.]

C

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Staff recommendation

DIVISION 9. EXCHANGE OF VALUATION DATA

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COMPREHENSIVE STATUTE § 3500

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DIVISION 10. ARBITRATION OF COMPENSATION IN  
ACQUISITIONS OF PROPERTY FOR PUBLIC USE

Comment. Division 10 (commencing with Section 3500) continues without substantive change the provisions of former Chapter 3 (commencing with Section 1273.01) of Title 7 of Part 3 of the Code of Civil Procedure. For background, see Recommendation Relating to Arbitration of Just Compensation, 9 Cal. L. Revision Comm'n Reports 123 (1969).

§ 3500. Arbitration of amount of compensation authorized

3500. (a) Any person authorized to acquire property for public use may enter into an agreement to arbitrate any controversy as to the compensation to be made in connection with the acquisition of the property.

(b) Where property is already appropriated to a public use, the person authorized to compromise or settle the claim arising from a taking or damaging of such property for another public use may enter into an agreement to arbitrate any controversy as to the compensation to be made in connection with such taking or damaging.

(c) For the purposes of this section, in the case of a public entity, "person" refers to the particular department, officer, commission, board, or governing body authorized to acquire property on

COMPREHENSIVE STATUTE § 3500

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behalf of the public entity or to compromise or settle a claim arising from the taking or damaging of the entity's property.

Comment. Section 3500, which supersedes former Section 1273.02 of the Code of Civil Procedure, authorizes arbitration in connection with the acquisition of property for public use.

The phrase "compensation to be made in connection with the acquisition of the property" is intended to encompass any amounts that may be assessed or awarded in a condemnation proceeding and, specifically, to include severance or other damages.

The term "controversy" is defined, for purposes of arbitration, in subdivision (c) of Section 1280 of the Code of Civil Procedure.

The enactment of this division does not imply that public entities authorized to purchase, but not to condemn, property are not authorized to agree to arbitration. See Section 3502(d).

This division contains no provisions comparable to [Code of Civil Procedure Sections 1244, 1246, and 1246.1], which require that all persons having an interest in the property be named as defendants in the condemnation complaint, permit any unnamed interest holder to intervene in the proceeding, and provide for allocation of the award among holders of various interest. The division assumes that prudence on the part of the acquiring agency will assure that it agrees to arbitrate with the person who owns the interest it seeks to acquire. Also, the interests of persons other than parties to the arbitration would be unaffected by the

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Tentatively approved September 1970

arbitration agreement or the carrying out of that agreement. In short, an arbitration agreement and award operates only as a contract and conveyance between the parties to the particular agreement.

Subdivision (a). Subdivision (a) authorizes any acquirer of property for public use to agree to arbitrate the question of compensation and to act in accordance with the agreement. The subdivision does not imply that the public entity must have complied with the formalities (such as the adoption of a formal condemnation resolution) commonly prescribed as conditions precedent to the commencement of an eminent domain proceeding. Rather, the subdivision contemplates that the question of compensation may be submitted to arbitration whenever acquisition has been authorized in the manner required of the particular entity or agency. As the arbitration agreement ordinarily would commit the public entity to purchase the property at the amount of the award (see Section 3503), the agreement should be approved and executed in the same manner as a contract to purchase property. Cf. Santa Monica Unified School Dist. v. Persh, 5 Cal. App.3d 945, Cal. Rptr. (1970).

Subdivision (b). Subdivision (b) authorizes "persons" who own, hold, or control public property that may be taken by eminent domain proceedings to agree to arbitrate the amount of compensation. Public property may be taken by eminent domain proceedings whether or not it is already "appropriated to a public use" (see Sections [1240 and 1241]), and condemnation by one public entity of property already devoted to a public use by another public entity is a fairly common occurrence.

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§ 3501. Expenses of arbitration

3501. (a) Notwithstanding Sections 1283.2 and 1284.2 of the Code of Civil Procedure, the party acquiring the property shall pay all of the expenses and fees of the neutral arbitrator and the statutory fees and mileage of all witnesses subpoenaed in the arbitration, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including attorney's fees or expert witness fees or other expenses incurred by other parties for their own benefit.

(b) An agreement authorized by this division may require that the party acquiring the property pay reasonable attorney's fees or expert witness fees, or both, to any other party to the arbitration. If the agreement requires the payment of such fees, the amount of the fees is a matter to be determined in the arbitration proceeding unless the agreement prescribes otherwise.

(c) The party acquiring the property may pay the expenses and fees referred to in subdivisions (a) and (b) from funds available for the acquisition of the property or other funds available for the purpose.

Comment. Section 3501 supersedes former Code of Civil Procedure Section 1273.03. Subdivision (a) of Section 3501 is consistent with the rule applicable to eminent domain proceedings that the condemnee is entitled to

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recover all "taxable costs." See City of Oakland v. Pacific Coast Lumber & Mill Co., 172 Cal. 332, 156 P. 468 (1916); City & County of San Francisco v. Collins, 98 Cal. 259, 33 P. 56 (1893). Subdivision (a) precludes the parties by agreement from imposing costs of this nature on the party from whom the property is being acquired.

Subdivision (b), on the other hand, does permit the parties to provide in the arbitration agreement that the party acquiring the property will pay reasonable attorney's fees or expert witness fees incurred by other parties to the agreement. Absent such provision in the agreement, the party from whom the property is being acquired must pay his own attorney's fees and expert witness fees.

§ 3502. Effect and enforceability of agreements

3502. (a) Except as specifically provided in this division, agreements authorized by this chapter are subject to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

(b) An agreement authorized by this division may be made whether or not an eminent domain proceeding has been commenced to acquire the property. If an eminent domain proceeding has been commenced or is commenced, any petition or response relating to the arbitration shall be filed and determined in the eminent domain proceeding.

(c) Notwithstanding Section 1281.4 of the Code of Civil Procedure, an agreement authorized by this division does not waive or restrict the power of any person to commence and prosecute an eminent domain proceeding, including the taking of possession prior to judgment, except that, upon motion of a party to the eminent domain proceeding, the court shall stay the determination of compensation until any petition for an order to arbitrate is determined and, if arbitration is ordered, until arbitration is had in accordance with the order.

(d) The effect and enforceability of an agreement authorized by this division is not defeated or impaired by contention or

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Tentatively approved September 1970

proof by any party to the agreement that the party acquiring the property pursuant to the agreement lacks the power or capacity to take the property by eminent domain proceedings.

(e) Notwithstanding the rules as to venue provided by Sections 1292 and 1292.2 of the Code of Civil Procedure, any petition relating to arbitration authorized by this division shall be filed in the superior court in the county in which the property, or any portion of the property, is located.

Comment. Section 3502 supersedes former Code of Civil Procedure Section 1273.04. Although Section 3502 provides that arbitration under this division is governed by the general arbitration statute (Code of Civil Procedure Sections 1280-1294.2), a few minor modifications in the procedure provided by the general statute are desirable when arbitration is used to determine the compensation for property acquired for public use.

Subdivision (a). Subdivision (a) makes clear that, in general, agreements to arbitrate under this division are subject to the general arbitration statute. See, in particular, Code of Civil Procedure Sections 1285-1288.8 (enforcement of the award) and 1290-1294.2 (judicial proceedings relating to the arbitration or the award).

Subdivision (b). Subdivision (b) makes clear that it is not necessary to commence an eminent domain proceeding in order to arbitrate under this division and also provides a special rule concerning the court in which any petition or response relating to the arbitration shall be filed and determined when an eminent domain proceeding is pending.

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Subdivision (c). Subdivision (c) makes clear that an eminent domain proceeding may be begun and prosecuted notwithstanding an agreement to arbitrate the question of compensation and that such an agreement does not impair the condemnor's power to take "immediate possession." There is, of course, nothing to preclude the parties from including a provision in the arbitration agreement that permits the condemnor to take possession of the property prior to the award in the arbitration proceeding. Subdivision (c) also provides for staying the determination of compensation in an eminent domain proceeding pending an agreed arbitration--a practice provided for as to other arbitrations by Code of Civil Procedure Section 1281.4. Subdivision (c) contemplates that, if an eminent domain proceeding is pending, the arbitration award, whether confirmed or not (see Code of Civil Procedure Section 1287.4), may be entered as the amount of compensation in the judgment of condemnation. See Cary v. Long, 181 Cal. 443, 184 P. 857 (1919); In re Silliman, 159 Cal. 155, 113 P. 135 (1911).

Subdivision (d). Subdivision (d) makes clear that an agreement to arbitrate and to purchase and sell at the amount of the award does not require, and is not impaired by the acquirer's lack of, power to take the property by eminent domain. Cf. People v. Myrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967); Beistline v. City of San Diego, 256 F.2d 421 (9th Cir. 1958).

Subdivision (e). Subdivision (e) requires that petitions relating to arbitration be filed in the county in which the property lies. The venue

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provided by this subdivision corresponds with the rule as to venue for eminent domain proceedings. See Code of Civil Procedure Section 1243.

§ 3503. Abandonment of acquisition

3503. (a) Except as provided in subdivision (b), an agreement authorized by this division may specify the terms and conditions under which the party acquiring the property may abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding that may have been, or may be, filed. Unless the agreement provides that the acquisition may not be abandoned, the party acquiring the property may abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding at any time not later than the time for filing and serving a petition or response to vacate an arbitration award under Sections 1288 and 1288.2 of the Code of Civil Procedure.

(b) If the proceeding to acquire the property is abandoned after the arbitration agreement is executed, the party from whom the property was to be acquired is entitled to recover (1) all expenses reasonably and necessarily incurred (i) in preparing for the arbitration proceeding and for any judicial proceedings in connection with the acquisition of the property, (ii) during the arbitration proceeding and during any judicial proceedings in connection with the acquisition, and (iii) in any subsequent judicial proceedings in connection with the acquisition and (2) reasonable attorney's fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily

incurred to protect his interests in connection with the acquisition of the property. Unless the agreement otherwise provides, the amount of such expenses and fees shall be determined by arbitration in accordance with the agreement.

Comment. Subdivision (a) of Section 3503 permits the parties to the agreement to provide whether and under what conditions the acquirer may abandon the acquisition. If the agreement does not so provide, the party who was to have acquired the property may abandon the acquisition within the time within which a petition or response to vacate an arbitration award may be filed and served. Generally, this period is 100 days after service of the award or 10 days after service of a petition to confirm an award. See Code of Civil Procedure Sections 1288-1288.4. See also Coordinated Constr., Inc. v. Canoga Big "A," Inc., 238 Cal. App.2d 313, 47 Cal. Rptr. 749 (1965). Subdivision (b)--which makes clear that the right of the "condemnee" to recover certain expenses is not subject to modification under the arbitration agreement--is consistent with Section [1255a] which prescribes the rule governing abandonment of a judicial condemnation action.

§ 3504. Recordation of agreements

3504. (a) An agreement authorized by this division may be acknowledged and recorded, and rerecorded, in the same manner and with the same effect as a conveyance of real property except that two years after the date the agreement is recorded, or rerecorded, the record ceases to be notice to any person for any purpose.

(b) In lieu of recording the agreement, there may be recorded a memorandum thereof, executed by the parties to the agreement, containing at least the following information: the names of the parties to the agreement, a description of the property, and a statement that an arbitration agreement affecting such property has been entered into pursuant to this division. Such memorandum when acknowledged and recorded, or rerecorded, in the same manner as a conveyance of real property has the same effect as if the agreement itself were recorded or rerecorded.

Comment. Section 3504 supersedes former Code of Civil Procedure Section 1273.06. Section 3504 permits an agreement authorized by this division, or a memorandum thereof, to be acknowledged and recorded to afford "constructive notice" to subsequent purchasers and lienors. Arbitration rules may provide for the escrowing of an instrument of transfer (see, e.g., Sections 1, 44, and 45 of the Eminent Domain

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Tentatively approved September 1970

Arbitration Rules of the American Arbitration Association (June 1, 1968)), but such an escrow would not, of itself, protect the "condemnor" against subsequent transferees. Section 3504 provides a means for obtaining such protection (see Civil Code Sections 1213-1220) and is calculated to make unnecessary the filing of an eminent domain proceeding for no purpose other than to obtain the effect of a lis pendens.

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CIVIL CODE § 1001

Tentatively approved April 1970

CIVIL CODE § 1001 (repealed)

Sec. . Section 1001 of the Civil Code is repealed.

~~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 7, Part 3, 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 these 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.~~

Comment. Section 1001 is repealed because it and Section 1238 of the Code of Civil Procedure (also repealed) are superseded by Section 300 of the Eminent Domain Code and by specific statements of the condemnation authority of particular persons for particular public uses which are found in the various codes.

CODE OF CIVIL PROCEDURE § 1238 (repealed)

Sec. . Section 1238 of the Code of Civil Procedure is repealed.

~~1238.--Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:~~

SUBDIVISION 1

~~1.--Fortifications, magazines, arsenals, Navy yards, Navy and Army stations, lighthouses, range and beacon lights, coast surveys, and all other public uses authorized by the Government of the United States.~~

Comment. Subdivision 1, which was intended to authorize taking for federal purposes, is not continued since it no longer serves any useful purpose. The 1872 Code Commissioner's Note to subdivision 1 cites two California cases expressing doubt that the federal government had an independent right of eminent domain. It is now clear, however, that federal eminent domain power is not dependent on state authority and cannot be limited by the state. Kohl v. United States, 91 U.S. 367 (1875); C. M. Patten & Co. v. United States, 61 F.2d 970 (9th Cir. 1932).

SUBDIVISION 2

~~2. -- Public buildings and grounds for use of a state, or any state institution, or any institution within the State of California which is exempt from taxation under the provisions of Section 1a, of Article XIII of the Constitution of the State of California, and all other public uses authorized by the Legislature of the State of California.~~

Comment. Insofar as subdivision 2 authorizes takings for state purposes, it is unnecessary because it has been superseded by the much broader condemnation powers conferred upon the Director of the Department of General Services and the State Public Works Board. See Govt. Code §§ 14660-14662. See also Govt. Code §§ 15853-15858. Insofar as the subdivision might authorize condemnation on behalf of a state other than California, it is not continued. Takings under the eminent domain power of one state for the benefit of another state raise serious problems under the public use doctrine. See 1 P. Nichols, Eminent Domain § 2.112 (3d ed. 1964). If property is to be condemned by or for another state for a particular purpose, the taking should be authorized by a specific statute dealing with the specific situation. E.g., Water Code § 5901, Art. VI, § A (Klamath River Basin Compact). The authorization in subdivision 2 for acquisitions

CODE OF CIVIL PROCEDURE § 1238

Tentatively approved April 1970

for nonprofit colleges and universities ("institution . . . which is exempt from taxation under the provisions of Section 1a, of Article XIII of the Constitution of the State of California") is continued in Section 30051 of the Education Code. The reference in subdivision 2 to "all other public uses authorized by the Legislature of the State of California" was superfluous and had no substantive effect.

Tentatively approved May 1970

Subdivision 5

~~5. -- Roads, tunnels, ditches, flumes, pipes, aerial and surface tramways and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.~~

Comment. Subdivision 5 is not continued. It is clear from the language of the subdivision itself, and from the statute that it superseded (Cal. Stats. 1870, Ch. CCCCIV, p. 569), that the Legislature intended to authorize takings by individual mine owners to facilitate the working of their mines. However, the California courts have refused to give the subdivision its intended application or any effect whatsoever. Sutter County v. Nichols, 152 Cal. 688, 93 P. 872 (1908); Amador Queen Min. Co. v. Dewitt, 73 Cal. 482, 15 P. 74 (1887); Lorenz v. Jacob, 63 Cal. 73 (1883); Consolidated Channel Co. v. Central Pac. R. Co., 51 Cal. 269 (1876). Although the courts have not held the subdivision unconstitutional, they have invoked the constitutional doctrine of public use to prevent any takings under the subdivision. The only possible application of the subdivision might have been under the former Placer Mining

District Act (Pub. Res. Code §§ 2401-2512, repealed Cal. Stats. 1953, Ch. 1365, § 1, p. 2935). See Black Rock Placer Mining Dist. v. Summit Water & Irrigation Co., 56 Cal. App.2d 513, 133 P.2d 58 (1943). Although the repeal of that act did not affect the existence or powers of any district previously organized pursuant to the repealed act, there are no such districts presently reporting financial transactions to the State Controller. See Financial Transactions Concerning Special Districts in California (Cal. State Controller 1965-66). The repeal of subdivision 5 does not, of course, affect in any way the power of the appropriate public entity to provide a byroad where necessary or desirable under the Street Opening Act of 1903. See Sts. & Hwys. Code §§ 4008, 4008.1, 4090.

Subdivision 6

~~6.---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.~~

Comment. Subdivision 6 is superseded by Sections 4008, 4008.1, and 4120.1 of the Streets and Highways Code. These sections provide a procedure for the establishment of byroads--roads, open to public use, that furnish access to an existing public road from or primarily from otherwise isolated property--under the Street Opening Act of 1903. Private persons have no right to condemn property for byroads. The former law was unclear, there being no case precisely in point. See General Petroleum Corp. v. Hobson, 23 F.2d 349 (1927)(prospecting for oil not a use listed in Section 1238); City of Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961)(land developer not authorized to bring condemnation action in name of city). Cf., Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955) (private individual may condemn sewer easement over his adjoining property). See also Sherman v. Buick, 32 Cal. 241 (1867)("byroad" a public use for which county could acquire property).

Subdivision 9

~~9.--Roads-for-transportation-by-traction-engines-or-road  
locomotives.~~

Comment. Subdivision 9, which was enacted in 1891, is obsolete. Traction engines and road locomotives--essentially steam powered locomotives which ran on wheels rather than tracks--have long been considered collector's items. See Clymer, Album of Historical Steam Traction Engines (1949); J. Fisher, Road Locomotives, 31st Annual Rep. of the Amer. Inst. of the City of New York 1870-1871, at 877; Gilford, The Traction Engine 1842-1936 (1952).

CODE OF CIVIL PROCEDURE § 1238

Tentatively approved February 1971

Subdivision 10

~~10.--Oil-pipelines.~~

Comment. Subdivision 10 is superseded by Section 615 of the Public Utilities Code which grants the power of eminent domain to pipeline corporations. See the Comment to Section 615.

CODE OF CIVIL PROCEDURE § 1238

Tentatively approved February 1971

Subdivision 14

~~14.-- Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof.~~

Comment. Subdivision 14 is unnecessary because all public entities that operate cemeteries have specific authority to condemn for cemetery purposes. The state's authority appears in Government Code Section 15853. The cities' authority appears in Government Code Section 37350.5. See also Health and Safety Code Section 37681. The authority of public cemetery districts is in Health and Safety Code Section 8961. Private cemeteries are not authorized to condemn property. See Health and Safety Code Section 8500.

Subdivision 15

~~15. -- The plants, or any part thereof, or any record therein of all persons, firms or corporations heretofore, now or hereafter engaged in the business of searching public records, or publishing public records or insuring or guaranteeing titles to real property, including all copies of, and all abstracts or memoranda taken from, public records, which are owned by, or in the possession of, such persons, firms or corporations or which are used by them in their respective businesses; provided, however, that the right of eminent domain in behalf of the public uses mentioned in this subdivision may be exercised only for the purposes of restoring or replacing, in whole or in part, public records, or the substance of public records, of any city, city and county, county or other municipality, which records have been, or may hereafter be, lost or destroyed by conflagration or other public calamity, and provided further, that such right shall be exercised only by the city, city and county, county or municipality whose records, or part of whose records, have been, or may be, so lost or destroyed.~~

Comment. Subdivision 15 is superseded by Sections 14770 and 53030 of the Government Code.

Subdivision 16

~~16.--Expositions-or-fairs-in-aid-of-which-the-granting-of-public  
moneys-or-ether-things-of-value-has-been-authorized-by-the-Constitution.~~

Comment. Subdivision 16 is obsolete and merely duplicates other specific grants of condemnation authority.

All public entities that might utilize the power of eminent domain for fair or exposition purposes are specifically granted the power of eminent domain. Specific grants are made to the state (Govt. Code § 15853), cities (Govt. Code § 37350.5; see also Govt. Code § 50331), counties (Govt. Code § 25350.5; see also Govt. Code §§ 25900-25908), district agricultural associations (Govt. Code § 15853; see also Agri. Code § 4051), and citrus fruit fairs (Govt. Code § 15853; see also Agri. Code § 4701). Private fair corporations (e.g., Civil Code § 620) do not have the power of eminent domain.

With the repeal in 1949 of all special constitutional grants in aid of private expositions, subdivision 16 became obsolete. (The subdivision was enacted in 1911, apparently as a grant of eminent domain power to the Panama-Pacific International Exposition Company. See former Cal. Const., Art. XI, § 8a.) But see County of Alameda v. Meadowlark Dairy Corp., 227 Cal. App.2d 80, 38 Cal. Rptr. 474 (1964)(subdivision 16 relied upon to authorize condemnation by a county for fair purposes on the theory that the Constitution grants to counties a tax-exempt status which is a "thing of value . . . authorized

by the Constitution" within the meaning of subdivision 16). However, subdivision 16 is no longer necessary because counties now have a specific grant of condemnation authority. Govt. Code § 25350.5. See also Govt. Code §§ 25900-25908.

Subdivision 19

~~19.--Propagation,-rearing,-planting,-distribution,-protection-or  
conservation-of-fish.~~

Comment. Subdivision 19 duplicates authority found elsewhere in the codes to condemn for fish conservation purposes. The power of state agencies to condemn is found in the general authorization of Government Code Section 15853 and the more specific grants to specific agencies. E.g., Water Code Sections 253 and 11900, and Fish and Game Code Sections 1120, 1301, 1345, 1348. See State v. Natomas Co., 239 Cal. App.2d 547, 49 Cal. Rptr. 64 (1966). The authority of counties to condemn is found in Government Code Section 25350.5; see also Fish and Game Code Sections 1150 and 13100. The authority of special districts, if any, is to be found in their particular authorizing grants. See, e.g., Monterey County Flood Control and Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962), in which the district's power to condemn for recreational purposes was upheld based upon a general condemnation power in its authorizing statute plus policy statements in the Water Code that fish and wildlife values, both economic and recreational, were to be given consideration in any flood control or water conservation program. Private persons do not have the right to condemn for fish conservation purposes.

Subdivision 21

~~21.--Any work or undertaking of a city, county, or city and county, housing authority or commission, or other political subdivision or public body of the State:--(a) to demolish, clear or remove buildings from any area which is detrimental to the safety, health and morals of the people by reason of the dilapidation, overcrowding, faulty arrangement or design, lack of ventilation or sanitary facilities of the dwellings predominating in such areas; or (b) to provide dwellings, apartments or other living accommodations for persons or families who lack the amount of income which is necessary (as determined by the body engaging in said work or undertaking) to enable them to live in decent, safe and sanitary dwellings without overcrowding.~~

Comment. Subdivision 21 is unnecessary because it merely duplicates express grants of the power of eminent domain given the agencies engaged in slum clearance and low rent housing by other statutes. Thus, housing authorities, which may be activated within any city or county, may condemn property for slum clearance, construction of low-cost housing, or construction of farm labor camps. Health & Saf. Code §§ 34240, 34325, 36059(1). See also Health & Saf. Code §§ 34874, 34875, 34879 (limited dividend housing corporations). The addition of Sections 35167-35171 to the Health and Safety Code to grant condemnation authority to community land chest corporations (nonprofit

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Tentatively approved June 1970

corporations formed under Health and Safety Code Sections 35100-35237 to provide "housing in rural and suburban areas for families of low income") provides all of the agencies covered by subdivision 21 with adequate condemnation authority.

CODE OF CIVIL PROCEDURE § 1238

Tentatively approved February 1971

Subdivision 22

~~22---Terminal-facilities,-lands,-or-structures-for-the-receipt,  
transfer-or-delivery-of-passengers-or-property-by-any-common-carrier  
operating-upon-any-public-highway-or-waterway-in-this-state-between  
fixed-termini-or-over-a-regular-route,-or-for-other-terminal-facilities  
of-any-such-carrier.~~

Comment. Subdivision 22 is superseded by Section 622 of the Public  
Utilities Code.

tentatively approved September 1970

Code of Civil Procedure Section 1238.1 (repealed)

Sec. . Section 1238.1 of the Code of Civil Procedure is repealed.

~~1238.1.--Subject-to-the-provisions-of-this-title,-the-right-of eminent-domain-may-be-exercised-in-behalf-of-the-following-public-uses:~~

~~1.--Off-street-parking--Off-street-meter-vehicle-parking-places, including-property-necessary-or-convenient-for-ingress-thereto-or-egress-therefrom,-established-by-any-city-or-city-and-county-for-public-use.~~

Comment. Section 1238.1, which applied only to cities and to the City and County of San Francisco, has been repealed as unnecessary. Cities are authorized to acquire property for parking facilities by numerous other statutes. Some of these authorizations contain express powers of condemnation. E.g., Govt. Code § 54031; Sts. & Hwys. Code § 4090 (a) (b) (off-street parking authorizations); Govt. Code § 54341 (off-street revenue-producing parking); Sts. & Hwys. Code § 31506 (d) (off-street vehicle parking districts); Sts. & Hwys. Code § 35108 (j) (off-street parking districts); Sts. & Hwys. Code § 32802 (b) (off-street parking authorities). Other statutes merely provide for acquisition of the necessary property. E.g., Govt. Code § 37353(a) (off-street parking); Govt. Code § 54061 (off-street stadium-coliseum parking); Sts. & Hwys. Code § 36000 (a) (off-street business area parking

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facilities). However, these latter statutes are both augmented and supplemented by Section 37350.5 of the Government Code which has been added to provide: "The legislative body of any city may condemn any property necessary to carry out any of the powers or functions of the city." Cf. City of Anaheim v. Michel, 259 Cal. App.2d 835, 66 Cal. Rptr. 543 (1968). Thus, retention of Section 1238.1 would add nothing to the condemnation authority given cities by other statutes.

CODE OF CIVIL PROCEDURE § 1238.2

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Code of Civil Procedure Section 1238.2 (repealed)

Sec. . Section 1238.2 of the Code of Civil Procedure is repealed.

~~1238.2.--Subject-to-the-provisions-of-this-title,-the-right-of eminent-domin-may-be-exercised-in-behalf-of-the-following-public-uses:  
1.--Farmers'-Free-Market.--Contiguous-property-at-one-site necessary-for-the-establishment-of-a-farmers'-free-market-solely-for the-vending-of-fresh-fruit-and-vegetables,-including-property-necessary or-convenient-for-ingress-thereto-or-egress-therefrom-may-be-acquired under-this-title-for-a-public-use-by-a-county-or-city-and-county-whose average-population-per-square-mile-is-more-than-ten-thousand-persons.~~

Comment. Section 1238.2, which applied only to the City and County of San Francisco, has been repealed as unnecessary. The section obviously was intended to facilitate a particular acquisition.

Code of Civil Procedure Section 1238.3 (repealed)

Sec. . Section 1238.3 of the Code of Civil Procedure is repealed.

~~1238.3.--Subject-to-the-provisions-of-this-title,-the-right-of eminent-domain-may-be-exercised-in-behalf-of-the-following-public-uses:~~

~~1.--Property-immediately-adjacent-to-and-necessary-for-the-operation-or-expansion-of-a-nonprofit-hospital-then-in-existence-and-engaged-in-scientific-research-or-an-educational-activity-and-the-acquisition-of-which-has-been-certified-as-necessary-by-the-Director-of-the-State-Department-of-Public-Health,-except-that-property-devoted-to-use-for-the-relief,-care,-or-treatment-of-the-spiritual,-mental,-or-physical-illness-or-ailment-of-humans-shall-not-be-taken-under-this-section.~~

~~2.--As-used-in-this-section,-"nonprofit-hospital"-means-any-health-center-or-general,-tuberculosis,-mental,-chronic-disease,-or-other-type-of-hospital-holding-a-license-in-good-standing-issued-under-the-provisions-of-Chapter-2-of-Division-2-of-the-Health-and-Safety-Code-and-owned-and-operated-by-a-fund,-foundation-or-corporation,-no-part-of-the-net-earnings-of-which-inures,-or-may-lawfully-inure,-to-the-benefit-of-any-private-shareholder-or-individual.~~

Comment. Section 1238.3 is superseded by Section 1427 of the Health and Safety Code.

Code of Civil Procedure § 1238.7 (repealed)

Sec. . Section 1238.7 of the Code of Civil Procedure is repealed.

~~1238.7--Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:~~

~~1.--Property as a source of earth-fill material for use in the development of a school site by a school district which is situated wholly or partly within a city or city and county having in excess of 750,000 population and an average population per square mile of more than 4,500 persons.~~

Comment. Section 1238.7 is repealed as unnecessary since Section 1047, which is added to the Education Code, permits condemnation of any property necessary to carry out the functions of the district and therefore would permit condemnation of an earth fill source. See also Section 350 of the comprehensive statute.

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Code of Civil Procedure § 1242 (repealed)

1242,--(a)-In-all-cases-where-land-is-required-for-public use,-such-use-must-be-located-in-the-manner-which-will-be-most compatible-with-the-greatest-public-good-and-the-least-private injury.

(b)-Subject-to-Section-1242.5,-a-person-having-the-power of-eminant-domain-may-enter-upon-property-to-make-studies, surveys,-examinations,-tests,-soundings,-or-appraisals-or-to engage-in-similar-activities-reasonably-related-to-the-purpose for-which-the-power-may-be-exercised.

(c)-The-liability,-if-any,-of-a-public-entity-for-damages to-property-that-arise-from-the-entry-and-activities-mentioned in-subdivision-(b)-is-determined-by-Section-816-of-the-Government-Code.

(d)--Any-person-that-has-the-power-of-eminant-domain, other-than-a-public-entity,-is-liable-for-damages-to-property that-arise-from-the-entry-and-activities-mentioned-in-subdivision-(b)-to-the-same-extent-that-a-public-entity-is-liable-for such-damages-under-Section-816-of-the-Government-Code.

(e)-As-used-in-this-section,-"public-entity"-means-a-public entity-as-defined-in-Section-811.2-of-the-Government-Code.

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Comment. Section 1242 is superseded by provisions of the Eminent Domain Code. The disposition of the section is indicated below.

<u>Section 1242</u>	<u>Eminent Domain Code</u>
Subdivision (a) -----	[to be determined later]
Subdivision (b) -----	§ 500
Subdivisions (c), (d) -----	§ 501
Subdivision (e) -----	unnecessary, see § 108

CODE OF CIVIL PROCEDURE § 1242.5

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Code of Civil Procedure § 1242.5 (repealed)

~~1242.5--(a)-In any case in which the entry and activities mentioned in subdivision (b) of Section 1242 will subject the person having the power of eminent domain to liability under Section 816 of the Government Code, before making such entry and undertaking such activities, the person shall secure:~~

~~(1)--The written consent of the owner to enter upon his property and to undertake such activities; or~~

~~(2)--An order for entry from the superior court in accordance with subdivision (b).~~

~~(b)--The person seeking to enter upon the property shall petition the court for an order permitting the entry and shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case.--Upon such petition and after such notice has been given, the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use.--After such determination, the court may issue~~

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~~its order permitting the entry.-- The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit the probable amount of compensation in the manner provided in Section 1243.6.~~

~~(c) At any time after an order has been made pursuant to subdivision (b); either party may, upon noticed motion, request the court to determine whether the nature and scope of the activities reasonably necessary to accomplish the purpose of the entry should be modified or whether the amount deposited is the probable amount of compensation that will be awarded.-- If the court determines that the nature and scope of the activities to be undertaken or the amount of the deposit should be modified, the court shall make its order prescribing the necessary changes.~~

~~(d) The court shall retain the amount deposited under this section for a period of six months following the termination of the entry.-- Such amount shall be held, invested, deposited, and disbursed in accordance with Section 1254.~~

~~(e) The owner is entitled to recover from the person who entered his property the amount necessary to compensate the~~

CODE OF CIVIL PROCEDURE § 1242.5

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~~owner for any damage which arises out of the entry and for his court costs, and reasonable attorney fees to be fixed by the court, in the proceeding under this section. Where a deposit has been made pursuant to this section, the owner may, upon notice made within six months following the termination of the entry, request the court to determine the amount he is entitled to recover under this subdivision. Thereupon, the court shall determine such amount and award it to the owner and the money on deposit shall be available for the payment of such amount. Nothing in this subdivision affects the availability of any other remedy the owner may have for the damaging of his property.~~

Comment. Section 1242.5 is superseded by provisions of the Eminent Domain Code. The disposition of the section is indicated below.

<u>Section 1242.5</u>	<u>Eminent Domain Code</u>
Subdivision (a) -----	§ 502
Subdivision (b) -----	§ 503
Subdivision (c) -----	§ 504
Subdivision (d) -----	§ 505
Subdivision (e) -----	§ 506

CODE OF CIVIL PROCEDURE § 1243.4

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Section 1243.4 (repealed)

SECTION . Section 1243.4 of the Code of Civil Procedure is repealed.

~~1243.4. In any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the plaintiff may take immediate possession and use of any right-of-way, or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought, in the manner and subject to the conditions prescribed by law.~~

*Comment.* Section 1243.4 is superseded by Section 1269.01 of the

Eminent Domain Code.

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Section 1243.5 (repealed)

SEC. . Section 1243.5 of the Code of Civil Procedure is repealed.

1243.5. (a) In any proceeding in eminent domain, if the plaintiff is authorized by law to take immediate possession of the property sought to be condemned, the plaintiff may, at any time after the issuance of summons and prior to the entry of judgment, apply ex parte to the court for an order determining the amount to be deposited as security for the payment of the just compensation which will be made for the taking of the property and any damage incident thereto. Such security shall be in the amount the court determines to be the probable just compensation which will be made for the taking of the property and any damage incident thereto. After depositing the security, the plaintiff may, at any time prior to the entry of judgment, apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property sought to be condemned.

(b) If the court determines that the plaintiff is entitled to take the property by eminent domain and to take immediate possession thereof, and if the court determines that the plaintiff has deposited the security, the court shall by order authorize the plaintiff to take immediate possession of and to use the property sought to be condemned. The order authorizing immediate possession shall:

(1) Describe the property and the estate or interest therein sought to be condemned, which description may be made by reference to the complaint.

(2) State the purposes of the condemnation.

(3) State the amount of the deposit.

(4) State the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under subdivision (c) of this section on the day the order is made.

(c) At least 20 days prior to the time possession is taken, the plaintiff shall serve a copy of the order on the record owner or owners of the property and on the occupants, if any. Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or has previously been served with a copy of the summons and complaint in the manner prescribed by law, in which case service of the order may be made by mail upon such person and his attorney of record, if any. If a person upon whom a copy of the order authorizing immediate possession is required to be personally served under this section resides out of the State, or has departed from the State or cannot after due diligence be found within the State, the plaintiff may in lieu of such personal service send a copy of the order by registered or certified mail addressed to such person at his last known address. If a copy of the order is sent by registered or certified mail in lieu of personal service, the plaintiff shall file an affidavit in the proceeding setting forth the facts showing the reason personal service could not have been made. The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property

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without serving a copy of the order of immediate possession upon a record owner not occupying the property. A single service upon or mailing to those at the same address shall be sufficient. The court may, for good cause shown by affidavit, shorten the time specified in this subdivision to a period of not less than three days.

As used in this subdivision, "record owner or owners of the property" means both the person or persons in whose name the legal title to the fee appears by deeds or other instruments duly recorded in the recorder's office of the county in which the property is located and the person or persons, if any, in possession of the property under a written and duly recorded lease or agreement of purchase.

(d) At any time after the court has made an order authorizing immediate possession, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the security that the plaintiff is required to deposit pursuant to this section if the court determines that the security which should be deposited for the taking of the property and any damage incident thereto is different from the amount of the security theretofore deposited. Prior to judgment, such security may not be reduced to an amount less than that already withdrawn pursuant to Section 1243.7.

(e) The amount required to be deposited by the plaintiff and the amount of such deposit withdrawn by the defendant may not be given in evidence or referred to in the trial of the issue of compensation.

(f) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by taking possession of the property pursuant to this section.

*Comment.* Section 1243.5 is superseded by Chapter 1 (commencing with Section 1268.01) and Chapter 2 (commencing with Section 1269.01) of Division 7 of the Eminent Domain Code. The provisions relating to the deposit are superseded by provisions contained in Chapter 1; the provisions relating to an order for possession prior to judgment are superseded by provisions contained in Chapter 2.

The disposition of the various provisions of Section 1243.5 is indicated below.

<i>Section 1243.5</i>	<i>Recommended Legislation (Eminent Domain Code)</i>
Subdivision (a) .....	1268.01, 1269.01
Subdivision (b) .....	1269.02, 1269.03
Subdivision (c) .....	1269.04
Subdivision (d) .....	1268.03
Subdivision (e) .....	1268.10
Subdivision (f) .....	1269.07

CODE OF CIVIL PROCEDURE § 1243.6

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Section 1243.6 (repealed)

Sec. .. Section 1243.6 of the Code of Civil Procedure is repealed.

1243.6. When money is required to be deposited as provided by Section 1243.6, the court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section it shall be held, invested, deposited, and disbursed in the manner specified in Section 1264, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that section.

*Comment.* Section 1243.6 is superseded by Section 1268.11 of the

Eminent Domain Code.

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## Section 1243.7 (repealed)

Sec. . Section 1243.7 of the Code of Civil Procedure is repealed.

1243.7. (a) At any time after money has been deposited as provided in Section 1243.5, the party whose property or interest in property is being taken may apply to the court, in the manner hereinafter provided, for the withdrawal of all or any portion of the amount deposited for his property or property interest. Upon such application, the court shall order that portion of the amount applied for, which the applicant is entitled to withdraw under the provisions of this section, to be paid to such applicant from the money deposited in connection with such property or property interest.

(b) If the total amount sought to be withdrawn prior to judgment exceeds the amount of the original deposit, each applicant, before any of such excess is withdrawn, shall file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicant that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal.

If there is more than one applicant and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicants, in lieu of filing separate undertakings, may jointly file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicants that exceeds the amount to which the applicants are entitled as finally determined in the eminent domain proceeding together with legal interest from the date of its withdrawal.

If the undertaking required by this subdivision is executed by an admitted surety insurer, the undertaking is sufficient in amount if the surety is bound only to the extent that the amount sought to be withdrawn exceeds the amount originally deposited.

The plaintiff may consent to an undertaking that is less than the amount required under this subdivision.

If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking is entitled to recover the premium paid for the undertaking, but not to exceed 2 percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

(c) The application shall be made by affidavit wherein the applicant shall set forth his interest in the property and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff and no withdrawal shall be made until at least 20 days after such service of the application, or until the time for all objections has expired, whichever is later.

(d) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the ground that an undertaking should be filed or that the amount of, or the sureties upon, such an undertaking are insufficient.

(e) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the grounds that other persons are known or believed to have interests in the property. In this event the plaintiff shall attempt to personally serve on such other persons a notice to such persons that they may appear within 10 days after such service and

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object to such withdrawal, and that failure to appear will result in the waiver of any right to such amount withdrawn or further rights against the plaintiff to the extent of the sum withdrawn. The plaintiff shall state in such objection the names and last known addresses of other persons known or believed to have an interest in the property, whether or not it has been able to serve them with such notice and the date of such service. If the plaintiff in its objection reports to the court that it is unable to personally serve persons known or believed to have interests in the property within the 30-day period, said money shall not be withdrawn until the applicant causes such personal service to be made.

(f) If the persons so served appear and object to the withdrawal, or if the plaintiff so requests, the court shall thereupon hold a hearing after notice thereof to all parties and shall determine the amounts to be withdrawn, if any, and by whom. If the court determines that a party is entitled to withdraw any portion of a deposit which another person claims, the court may require such party, before withdrawing such portion, to file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the adverse claimant in such amount as is fixed by the court, but not to exceed double the portion claimed by the adverse claimant, for the payment to the person entitled thereto of any amount withdrawn that exceeds the amount to which such party is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. No persons so served shall have any claim against the plaintiff for compensation for the value of the property taken or severance damages thereto, or otherwise, to the extent of the amount withdrawn by all parties; provided, the plaintiff shall remain liable for said compensation to persons having an interest of record who are not so served.

(g) If withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all defenses in favor of the person receiving such payment except his claim for greater compensation. Any amount so paid to any party shall be credited upon the judgment in the eminent domain proceeding.

(h) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the party entitled thereto together with legal interest thereon from the date of its withdrawal, and the court in which the eminent domain proceeding is pending shall enter judgment therefor against the defendant. If the defendant does not pay the judgment within 30 days after the judgment is entered, the court may, on motion, enter judgment against the sureties for such amount together with the interest that may be due thereon.

*Comment.* Section 1243.7 is superseded by Chapter 1 (commencing with Section 1268.01) of Division 7 of the Eminent Domain Code. The disposition of the various provisions of Section 1243.7 is indicated below.

*Section 1243.7*

*Recommended Legislation  
(Eminent Domain Code)*

Subdivision (a).....	1268.04, 1268.05
Subdivision (b).....	1268.06
Subdivision (c).....	1268.04, 1268.05
Subdivision (d).....	1268.05
Subdivision (e).....	1268.05
Subdivision (f).....	1268.05
Subdivision (g).....	1268.08
Subdivision (h).....	1268.09

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## Section 1252 (amended)

SEC. . Section 1252 of the Code of Civil Procedure is amended to read:

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1252. (a) Payment may be made to the defendants entitled thereto, or the money may be deposited in Court for the defendants, and be distributed to those entitled thereto as provided in Chapter 3 (commencing with Section 1270.01) of Division 7 of the Eminent Domain Code and withdrawn by those entitled thereto in accordance with that chapter. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

(b) Subject to subdivision (c):

(1) If the plaintiff fails to pay or deposit the money within the time specified in Section 1251, the defendants may elect to treat such failure as an implied abandonment of the proceeding or may have execution as in civil cases.

(2) If the money cannot be had on execution, the defendants may again elect to treat the plaintiff's failure to pay or deposit the money within the time specified in Section 1251 as an implied abandonment of the proceeding.

(c) The defendants may elect to treat a failure to pay or deposit the money within the time specified in Section 1251 as an implied abandonment of the proceeding only if:

(1) The defendants have filed in court and served upon the plaintiff, by registered or certified mail, a written notice of the plaintiff's failure; and

(2) The plaintiff has failed for 20 days after such service to pay or deposit the money as provided in subdivision (a).

(d) In case of an implied abandonment of the proceeding, upon motion of the defendants a judgment shall be entered dismissing the proceeding and awarding the defendants their recoverable costs and disbursements as provided in subdivision (c) of Section 1255a, and such relief and damages as are provided in subdivision (d) of Section 1255a, to the same extent as if the proceeding were dismissed under Section 1255a on motion of the plaintiff.

**Comment.** Subdivision (a) of Section 1252 is amended to eliminate any distinction between the kinds of deposits that may be made after entry of judgment. This amendment and enactment of Sections 1270.01-1270.07 make it clear that withdrawal of any deposit does not result in a waiver of appeal or a right to new trial on the issue of compensation if that issue is preserved in accordance with Section 1270.05. In this respect, the prior law is continued. See *People v. Neider*, 55 Cal.2d 832, 13 Cal. Rptr. 196, 361 P.2d 916 (1961); *People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

Subdivisions (b), (c), and (d) supersede the second sentence of Section 1252 as it formerly read and a portion of [subdivision (a) of Section 1255a].

Subdivision (c) adds a provision that failure to pay or deposit within the time specified in [Section 1251] may be treated as an implied abandonment only after 20 days' notice to the plaintiff. This subdivision is included to protect the plaintiff in case of an inadvertent failure to pay the judgment within the time specified in [Section 1251]. See, e.g., *County of Los Angeles v. Bartlett*, 223 Cal. App.2d 353, 36 Cal. Rptr. 193 (1963).

Subdivision (d) codifies the holding in *County of Los Angeles v. Bartlett*, *supra*, that an implied abandonment has the same conse-

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queerees as an abandonment on motion of the plaintiff under [Section 1255a]. See also *Capistrano Union High School Dist. v. Capistrano Beach Acreage Co.*, 188 Cal. App.2d 612, 10 Cal. Rptr. 750 (1961). Under subdivision (d), the defendants may recover expenses reasonably and necessarily incurred in preparing for trial and during trial and reasonable attorney's fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendants' interests in the proceeding. See [Section 1255a(c)]. In addition, the defendants are entitled to an order restoring them to possession of the property and to damages arising out of the plaintiff's taking and use of the property and damages for any loss or impairment of value suffered by the land and improvements after the time the plaintiff took possession of or the defendants moved from the property in compliance with an order of possession, whichever is the earlier. See [Section 1255a(d)].

Note: This section ultimately will be redrafted and numbered for inclusion in the Eminent Domain Code.

CODE OF CIVIL PROCEDURE § 1253

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Section 1253 (amended)

SEC. Section 1253 of the Code of Civil Procedure is amended to read:

1253. When payments have been made and the bond given, if the plaintiff elects to give one, as required by Sections 1251 and 1252, the court shall make a final order of condemnation, which shall describe the property condemned; ~~and state the estate or interest acquired therein; by the plaintiff and the purposes of such the condemnation; and if possession is taken. If the court has made an order authorizing the plaintiff to take possession of the property pursuant to Section 1243.5 or 1254 Chapter 2 (commencing with Section 1269.01) or Chapter 3 (commencing with Section 1270.01) of~~ the Eminent Domain Code, ~~the final order of condemnation shall also state the date upon or after which the plaintiff was authorized to take possession. prior to the making and entry of the final order of condemnation, the date of such possession. For the purposes of this section, the date of possession shall be the date upon or after which the plaintiff is authorized by order of the court to take possession of the property.~~ A certified copy of the order shall thereupon be recorded in the office of the recorder of the county in which the property is located. The title to the property described in the final order of condemnation vests in the plaintiff for the purposes described therein upon the date that a certified copy of the final order of condemnation is recorded in the office of the recorder of the county.

Division 7 of

*Comment.* Section 1253 is amended to change the references to the appropriate statutory provisions and to make nonsubstantive, clarifying changes.

Note: This section ultimately will be redrafted and numbered for inclusion in the Eminent Domain Code.

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## Section 1254 (repealed)

Sec. . Section 1254 of the Code of Civil Procedure is repealed.

1254. (a) In any case in which the plaintiff is not in possession of the property sought to be condemned, the plaintiff may, at any time after trial and judgment entered or pending an appeal from the judgment and after payment into court for the defendant of the full amount of the judgment and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in the proceeding, apply ex parte for an order authorizing it to take possession of and to use the property sought to be condemned.

(b) If in the judgment the court determined that the plaintiff is entitled to acquire the property by eminent domain and if the court determines that the plaintiff has made the required payment into court, the court shall by order authorize the plaintiff to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and shall, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The order shall state the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be 10 days after the date of the order.

(c) At least 10 days prior to the time possession is taken, the plaintiff shall serve upon the defendants and their attorneys, either personally or by mail, a copy of the order of the court authorizing it to take possession of the property. A single service upon or mailing to those at the same address is sufficient.

(d) At any time after the court has made an order authorizing the plaintiff to take possession pursuant to this section, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the amount that the plaintiff is required to pay into court as a further sum pursuant to this section.

(e) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by paying into court the amount of the judgment and such further sum as may be required by the court and taking possession of the property pursuant to this section.

(f) The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the full amount of the judgment at any time thereafter upon obtaining an order therefor from the court. The court, or a judge thereof, upon application by such defendant, shall order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial is granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation.

(g) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid without interest to the party entitled thereto, and the court in which the eminent domain proceeding is pending shall enter judgment therefor against such party.

Tentatively approved September 1970

(h) The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceeding), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided. The court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If the court orders deposit in the State Treasury, it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and to safely keep the same in the Condemnation Deposits Fund, which fund is hereby created in the State Treasury and for such duty he shall be liable to the plaintiff upon his official bond. Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Section 16430, Government Code, or deposited in banks as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2, Government Code. The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the Treasurer shall invest or make deposits in bank accounts in accordance with the designations.

(i) For the purposes of this section, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

(j) Interest earned and other increment derived from investments or deposits made pursuant to this section, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the Treasurer in taking and making delivery of bonds or other securities under this section, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

CODE OF CIVIL PROCEDURE § 1254

Tentatively approved September 1970

(k) In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

*Comment.* The disposition of the provisions of Section 1254 is indicated below.

<i>Section 1254</i>	<i>Recommended Legislation</i>
Subdivision (a) -----	§ 1270.01
Subdivision (b) -----	§ 1270.02
Subdivision (c) -----	§ 1270.03
Subdivision (d) -----	§ 1270.04
Subdivision (e) -----	§ 1270.07
Subdivision (f) -----	§ 1270.05
Subdivision (g) -----	§ 1270.06
Subdivision (h) -----	§§ 1268.11, 1270.08,
Subdivisions (i) and (j) -----	Govt. Code §§ 16425-16427 Govt. Code §§ 16425-16427
Subdivision (k) -----	Not yet considered by the Commission

(Eminent Domain Code unless otherwise indicated)

CODE OF CIVIL PROCEDURE § 1266

Tentatively approved July 1970

Sec. . Section 1266 of the Code of Civil Procedure is repealed.

~~1266.--Whenever land is to be condemned by a county or city for the establishment of any street or highway, including express highways and freeways, and the taking of a part of a parcel of land by such condemning authority would leave the remainder thereof in such size or shape or condition as to require such condemner to pay in compensation for the taking of such part an amount equal to the fair and reasonable value of the whole parcel, the resolution of the governing body of the city or county may provide for the taking of the whole of such parcel and upon the adoption of any such resolution it shall be deemed necessary for the public use, benefit, safety, economy, and general welfare that such condemning authority acquire the whole of such parcel.~~

Comment. Section 1266 is superseded by Section 421 of the Comprehensive Statute.

CODE OF CIVIL PROCEDURE § 1266.1

Tentatively approved July 1970

Sec. . Section 1266.1 of the Code of Civil Procedure is repealed.

~~1266.1.--A-county-or-a-city-may-acquire-land-by-gift-or-purchase  
from-the-owner-thereof-for-any-of-the-purposes-enumerated-in-Section  
1266-of-this-code.~~

Comment. Section 1266.1 is superseded by Section 420 of the Comprehensive Statute.

CODE OF CIVIL PROCEDURE §§ 1273.01-1273.06

Tentatively approved September 1970

Code of Civil Procedure §§ 1273.01-1273.06 (repealed)

Sec. . Chapter 3 (commencing with Section 1273.01) of Title 7 of Part 3 of the Code of Civil Procedure is repealed.

Comment. The repealed provisions are continued without substantive change in the Eminent Domain Code. The disposition of the repealed sections is indicated below.

<u>Repealed Section</u>	<u>New Section</u>
1273.01 - - - - -	Unnecessary. See § 108
1273.02 - - - - -	3500
1273.03 - - - - -	3501
1273.04 - - - - -	3502
1273.05 - - - - -	3503
1273.06 - - - - -	3504

EDUCATION CODE § 1047

Tentatively approved March 1970  
Revised April 1970

SCHOOL DISTRICTS

§ 1047. Power of eminent domain

Sec. . Section 1047 is added to the Education Code,  
to read:

1047. The governing board of any school district may  
condemn any property necessary to carry out any of the powers  
or functions of the district.

Comment. Section 1047 supersedes the grant of condemnation  
authority formerly contained in subdivision 3 of Section 1238 of  
the Code of Civil Procedure (condemnation authorized for "public  
buildings and grounds for the use . . . of any . . . school district").  
It continues the prior authority of school districts to condemn for  
school purposes. E.g., Hayward Union High School Dist. v. Madrid,  
234 Cal. App.2d 100, 121, 44 Cal. Rptr. 268, (1965) ("The district  
had the right to condemn for any school purpose and on acquisition,  
to change to some other school purpose any time during its ownership  
of the property."). Kern County High School Dist. v. McDonald,  
180 Cal. 7, 179 P. 180 (1919). See also Anaheim Union High School  
Dist. v. Vieira, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966) (future  
use); Hayward Union High School Dist. v. Madrid, supra (temporary use  
for school purposes with resale to follow within several years);  
Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243,  
344 P.2d 326 (1959) (school purposes may be a more necessary public  
use than private cemetery).

EDUCATION CODE § 1047

Tentatively approved March 1970  
Revised April 1970

The section is, of course, subject to specific limitations that may be imposed on the exercise of the power of eminent domain. See Education Code Section 1048.

Section 1047 grants a school district (defined in Section 41) the power of eminent domain to acquire any property necessary to carry out any of the powers or functions of the district. Thus, for example, a school district may condemn property outside its boundaries, subject to such limitations as are provided by statute, even though the pertinent statute does not expressly grant the district the power of eminent domain. E.g., Education Code Section 15009. It should be recognized, however, that a school district is an agency of limited authority and may engage in only those functions authorized by statute. E.g., Yreka Union High School Dist. v. Siskiyou Union High School Dist., 227 Cal. App.2d 666, 39 Cal. Rptr. 112 (1964); Uhlmann v. Alhambra City High School Dist., 221 Cal. App.2d 228, 34 Cal. Rptr. 341 (1963).

In some cases, a particular statute may expressly grant school districts the powers of eminent domain for a particular purpose. E.g., Education Code Section 6726 (operation of a technical, agricultural, and natural resource conservation school). These specific grants of condemnation authority are not to be construed to limit the broad grant of such authority under Section 1047.

Private schools which are not of the collegiate grade may not exercise the power of eminent domain. Yeshiva Torath Emeth Academy v. University of So. Calif., 208 Cal. App.2d 618, 25 Cal. Rptr. 422 .

EDUCATION CODE § 1047 (cont.)

Tentatively approved March 1970

Revised April 1970

(1962). It is also not permissible for a private citizen to acquire property by eminent domain for the operation of a public school.

People v. Oken, 159 Cal. App.2d 456, 324 P.2d 58 (1958).

EDUCATION CODE § 1048

Tentatively approved March 1970

§ 1048. Acquisition of property for utility purposes

Sec. . Section 1048 is added to the Education Code,  
to read:

1048. The governing board of a school district may acquire property in an adjoining school district by lease, or purchase and dispose of such property in the same manner as property within the boundary of the district is purchased and disposed of, where the acquisition of such property is deemed necessary by the governing board for use as garages, warehouse, or other utility purposes.

The power of eminent domain shall not be applicable and such acquisitions by purchase shall be subject to the approval of the governing board of school district in which the property is located.

Comment. Section 1048 continues without change the provisions of former Education Code Section 16003.

EDUCATION CODE § 15007.5

Tentatively approved March 1970

Education Code. § 15007.5 (repealed)

Sec. . Section 15007.5 of the Education Code is repealed.

~~15007.5.--The governing board of any school district may enter into an agreement with the governing body of any public agency for the joint exercise by such school district and such agency of their respective powers of eminent domain, whether or not possessed in common, for the acquisition of real property as a single parcel.--Such agreement shall be entered into and performed pursuant to the provisions of Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code, and each public agency therein designated is authorized to enter into such an agreement with the governing board of any school district for such purpose.~~

Comment. Section 15007.5 is superseded by Section 360 of the Eminent Domain Code.

EDUCATION CODE § 16003

Tentatively approved March 1970

Education Code § 16003 (repealed)

Sec. . Section 16003 of the Education Code is repealed.

~~16003.--The governing board of a school district may acquire property in an adjoining school district by lease, or purchase and dispose of such property in the same manner as property within the boundary of the district is purchased and disposed of, where the acquisition of such property is deemed necessary by the governing board for use as garages, warehouse, or other utility purposes.~~

~~The power of eminent domain shall not be applicable and such acquisitions by purchase shall be subject to the approval of the governing board of school district in which the property is located.~~

Comment. Section 16003 is superseded by Section 1048 of the Education Code.

EDUCATION CODE § 23151

Tentatively approved March 1970  
Revised April 1970  
Revised June 1970

UNIVERSITY OF CALIFORNIA

Education Code § 23151 (amended)

Sec. . Section 23151 of the Education Code is amended  
to read:

23151. The Regents of the University of California may condemn any property ~~er-interest-therein-for-the-public-buildings and-grounds~~ necessary to carry out any of the powers or functions of the University of California ~~under-the-provisions-of-the-Code of-Civil-Procedure-relating-to-eminant-deman.~~ The Regents of the University of California shall not commence any such proceeding in eminent domain unless it first adopts a ~~resolution~~ by a two-thirds vote ~~declaring-that-the-public-interest-and-necessity require-the-acquisition,-construction-or-completion-by-the-Regents of-the-University-of-California-of-the-public-improvement-for which-the-property-or-interest-therein-is-required-and-that-the property-or-interest-therein-described-in-such-resolution-is necessary-for-the-public-improvement~~ a resolution that meets the requirements of Section 311 of the Comprehensive Statute.

Comment. Section 23151 is amended to make clear that the condemnation authority of the Regents of the University of California is broad enough to acquire any property or right or interest in property necessary to carry out the functions of the University of California

EDUCATION CODE § 23151

Tentatively approved March 1970

Revised April 1970

Revised June 1970

even though the property is to be acquired for a project that does not clearly fall within the former language "public buildings and grounds of the University of California." See Section 310 of the comprehensive eminent domain statute.

EDUCATION CODE § 23619

Tentatively approved March 1970  
Revised April 1970

STATE COLLEGE SYSTEM

Education Code § 23619 (added)

Sec. . Section 23619 is added to the Education Code,  
to read:

23619. Subject to the Property Acquisition Law, Part 11  
(commencing with Section 15850) of Division 3 of Title 2 of  
the Government Code, the trustees may condemn any property  
necessary to carry out any of the powers or functions of the  
state colleges.

Comment. Section 23619 supersedes subdivision 2 of Section  
1238 of the Code of Civil Procedure (~~"public buildings and grounds~~  
for the use of a state, or any state institution") insofar as that  
subdivision may relate to the state college system. The phrasing  
of Section 23619 is based in part on subdivision (a) of Section 24503  
of the Education Code, which grants the right of eminent domain to  
acquire property necessary for dormitories or other housing facil-  
ties, boarding facilities, student union or activity facilities,  
vehicle parking facilities, or any other auxiliary or supplemental  
facilities for individual or group accommodation for use by students,  
faculty members, or other employees of any one or more state colleges.  
Section 23619 covers not only the facilities covered by Section 24503  
but also all other property necessary to the state college system.

EDUCATION CODE § 30051

Tentatively approved March 1970

NONPROFIT EDUCATIONAL INSTITUTIONS OF COLLEGIATE GRADE

Education Code § 30051 (added)

Sec. . Chapter 3 (commencing with Section 30051) is added to Division 21 of the Education Code, to read:

Chapter 3. Eminent Domain

30051. Any educational institution of collegiate grade, within this state, not conducted for profit, may exercise the right of eminent domain to acquire any property necessary to carry out any of its powers or functions.

Comment. Section 30051 continues the grant of condemnation authority formerly found in subdivision 2 of Section 1238 of the Code of Civil Procedure ("Public buildings and grounds for the use of . . . any institution within the State of California which is exempt from taxation under the provisions of Section 1a, of Article XIII of the Constitution of the State of California"). See University of So. Calif. v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934), cert. den., 295 U.S. 738 (1935); Redevelopment Agency v. Hayes, 122 Cal. App.2d 777, 266 P.2d 105 (1954). Private schools which are not of the collegiate grade may not exercise the power of eminent domain. Yeshiva Torath Emeth Academy v. University of So. Calif., 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962).

GOVERNMENT CODE § 184

Tentatively approved April 1970

Government Code § 184 (repealed)

Sec. . Section 184 of the Government Code is repealed.

~~184.--The-State-may-acquire-or-authorize-others-to-acquire  
title-to-property-for-public-use-in-the-cases-and-in-the-mode  
provided-by-law.~~

Comment. Section 184 is repealed as unnecessary.

GOVERNMENT CODE § 14770

Tentatively approved June 1970

§ 14770. Restoration of state public records destroyed by public calamity

Sec. . Article 7 (commencing with Section 14770) is added to Chapter 5 of Part 5.5 of Division 3 of Title 2 of the Government Code, to read:

Article 7. Restoration of Records Destroyed by  
Public Calamity

14770. (a) As used in this section:

(1) "Acquire" includes acquisition by gift, purchase, lease, eminent domain, or otherwise.

(2) "Public record plant" means the plant, or any part thereof, or any record therein, of any person engaged in the business of searching or publishing public records or insuring or guaranteeing titles to real property, including copies of public records and abstracts or memoranda taken from public records, which is owned by or in the possession of such person or which is used by him in his business.

(b) If public records of any state agency have been lost or destroyed by conflagration or other public calamity, the director may acquire the right to reproduce such portion of a public record plant as is necessary for the purpose of restoring or replacing the records or their substance.

GOVERNMENT CODE § 14770

Tentatively approved June 1970

Comment. Section 14770 is new but reflects the same policy as subdivision 15 of former Code of Civil Procedure Section 1238 which applied only to certain local public entities.

The broad authority to acquire the "right to reproduce" lost or destroyed records permits the reproduction of records by such means as making copies, obtaining a computer print-out or other visual representation of records preserved in data processing equipment, or duplicating magnetic tapes or other means for preserving such records in data processing equipment.

Cross Reference:

Similar authority for local public entities, Govt. Code § 53030.

Tentatively approved September 1970

Government Code § 15854 (conforming amendment)

Sec. . Section 15854 of the Government Code is amended to read:

15854. Property shall be acquired pursuant to this part by condemnation in the manner provided for in ~~Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure~~ the Eminent Domain Code, and all money paid from any appropriation made pursuant to this part shall be expended only in accordance with a judgment in condemnation or with a verdict of the jury or determination by the trial court fixing the amount of compensation to be paid. This requirement shall not apply to any of the following:

(a) Any acquisitions from the federal government or its agencies.

(b) Any acquisitions from the University of California or other state agencies.

(c) The acquisitions of parcels of property, or lesser estates or interests therein, for less than five thousand dollars (\$5,000), unless part of an area made up of more than one parcel which in total would cost more than five thousand dollars (\$5,000) which the board by resolution exempts from this requirement.

GOVERNMENT CODE § 15854

Tentatively approved September 1970

(d) Any acquisition as to which the owner and the State have agreed to the price and the State Public Works Board by unanimous vote determines that such price is fair and reasonable and acquisition by condemnation is not necessary.

(e) Any acquisition as to which the owner and the State Public Works Board have agreed to arbitrate the amount of the compensation to be paid in accordance with ~~Chapter 3-(commencing with Section 1273.01)-of-Title-7-of-Part-3-of-the-Code-of-Civil-Procedure~~ Division 10 (commencing with Section 1300) of the Eminent Domain Code .

Comment. Section 15854 is amended to substitute references to the provisions that superseded those previously listed.

GOVERNMENT CODE § 16425 et seq.

Tentatively approved September 1970

**Government Code**

Sec. . Article 9 (commencing with Section 16425) is added to Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, to read:

Article 9. Condemnation Deposits Fund

Tentatively approved September 1970

**Section 16425. Condemnation Deposits Fund**

16425. The Condemnation Deposits Fund in the State Treasury is continued in existence. The fund consists of all money deposited in the State Treasury under Division 7 (commencing with Section 1268.01) of the Eminent Domain Code and all interest earned or other increment derived from its investment. The State Treasurer shall receive all such moneys, duly receipt for, and safely keep the same in the fund, and for such duty he is liable upon his official bond.

*Comment.* Sections 16425-16427 restate the substance of a portion of subdivision (h) and all of subdivisions (i) and (j) of former Section 1254.

Code of Civil Procedure

Tentatively approved September 1970

**Section 16426. Investment of fund**

16426. (a) Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Section 16430 of the Government Code or deposited in banks as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2 of the Government Code.

(b) The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the State Treasurer shall invest or make deposits in bank accounts in accordance with the designations. For the purposes of this subdivision, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

**Comment.** See the Comment to Section 16425.

GOVERNMENT CODE § 16427

Tentatively approved September 1970

**Section 16427. Apportionment and disbursement of fund**

16427. Interest earned and other increment derived from investments or deposits made pursuant to this article, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the State Treasurer in taking and making delivery of bonds or other securities under this article, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

*Comment.* See the Comment to Section 16425.

GOVERNMENT CODE § 25350.5

Tentatively approved April 1970

COUNTIES

§ 25350.5. Power of eminent domain

Sec. . Section 25350.5 is added to the Government Code, to read:

25350.5. The board of supervisors of any county may condemn any property necessary to carry out any of the powers or functions of the county.

Comment. Section 25350.5 supersedes the grant of condemnation authority formerly contained in various subdivisions of Section 1238 of the Code of Civil Procedure and supplements the specific grants of such authority contained in this and other codes. E.g., Govt. Code § 26020 (airports); Sts. & Hwys. Code § 943 (highways). Its purpose is to give a county adequate authority to carry out its functions.

Specific limitations may, of course, be imposed on the exercise of the power of eminent domain. See Penal Code § 4106 (no industrial farm may be established on land outside county without consent of the affected county).

Tentatively approved April 1970

CITIES

§ 37350.5. Power of eminent domain

Sec. . Section 37350.5 is added to the Government Code, to read:

37350.5. The legislative body of any city may condemn any property necessary to carry out any of the powers or functions of the city.

Comment. Section 37350.5 supersedes the grant of condemnation authority formerly contained in various subdivisions of Section 1238 of the Code of Civil Procedure and supplements the specific grants of such authority contained in this and other codes. E.g., Govt. Code § 37501 (public assembly or convention halls); Sts. & Hwys. Code § 4090 (streets, walks, parking places). Its purpose is to give a city adequate authority to carry out its municipal functions.

Specific limitations may, of course, be imposed on the exercise of the power of eminent domain under some circumstances. See Govt. Code § 37353(c) (no existing golf course may be acquired by eminent domain).

Tentatively approved June 1970

§ 53030. Restoration of local public records destroyed by public calamity

Sec. . Article 2.5 (commencing with Section 53030) is added to Chapter 1 of Part 1 of Division 2 of Title 5 of the Government Code, to read:

Article 2.5. Restoration of Records Destroyed by  
Public Calamity

53030. (a) As used in this section:

(1) "Acquire" includes acquisition by gift, purchase, lease, eminent domain, or otherwise.

(2) "Local public entity" means any public entity other than the state.

(3) "Public record plant" means the plant, or any part thereof, or any record therein, of any person engaged in the business of searching or publishing public records or insuring or guaranteeing titles to real property, including copies of public records and abstracts or memoranda taken from public records, which is owned by or in the possession of such person or which is used by him in his business.

(b) If public records of a local public entity have been lost or destroyed by conflagration or other public calamity, the local public entity may acquire the right to reproduce such portion of a public record plant as is necessary for the purpose of restoring or replacing the records or their substance.

GOVERNMENT CODE § 53030

Tentatively approved June 1970

Comment. Section 53030 is derived from and reflects the same policy as subdivision 15 of former Code of Civil Procedure Section 1238. However, the provision is broadened to cover all local public entities and is limited to acquiring the "right to reproduce" such records and does not permit permanent acquisition of the public records plant itself.

The broad authority to acquire the "right to reproduce" lost or destroyed records permits the reproduction of records by such means as making copies, obtaining a computer print-out or other visual representation of records preserved in data processing equipment, or duplicating magnetic tapes or other means for preserving such records in data processing equipment.

Cross Reference:

Similar authority for state agencies, Govt. Code § 14770.

NONPROFIT HOSPITALS

§ 1427. Eminent domain power of nonprofit hospital

Sec. . Section 1427 is added to the Health and Safety Code, to read:

1427. (a) As used in this section, "nonprofit hospital" means any health center or general, tuberculosis, mental, chronic disease, or other type of hospital holding a license in good standing issued under this chapter and owned and operated by a fund, foundation, or corporation, no part of the new earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(b) Any nonprofit hospital then in existence and engaged in scientific research or an educational activity may exercise the right of eminent domain to acquire property immediately adjacent to and necessary for the operation or expansion of the hospital if the director has certified that the acquisition of the property sought to be acquired is necessary for the operation or expansion of the hospital.

(c) The certificate of the director that the acquisition of the property sought to be acquired is necessary for the operation or expansion of the hospital establishes a presumption that:

- (1) The proposed project is a necessary project;
- (2) The proposed project is planned or located in the manner which will be most compatible with the greatest public good and least private injury; and

Staff recommendation September 1970

(3) The property sought to be acquired is necessary for the proposed project.

(d) The presumption established by subdivision (c) is a presumption affecting the burden of proof.

(e) Property devoted to use for the relief, care, or treatment of the spiritual, mental, or physical illness or ailment of humans may not be taken under this section.

Comment. Subdivisions (a), (b), and (e) of Section 1427 continue without substantive change the provisions of former Code of Civil Procedure Section 1238.3. Subdivisions (c) and (d), which establish a presumption of necessity for the purposes of Section 302 of the Comprehensive Statute, are new. The certificate of the Director of the State Department of Public Health is a prerequisite before an action to condemn property may be commenced. In this connection, it should be noted that the Department of Public Health makes and enforces detailed regulations for construction or alteration of hospital buildings. Health & Saf. Code § 1411; 17 Cal. Admin. Code §§ 265, 400-499. See West Covina Enterprises, Inc. v. Chalmers, 49 Cal.2d 754, 322 P.2d 13 (1956). Accordingly, it is appropriate that the certificate of the director be given a presumptive effect that the taking is necessary.

PUBLIC CEMETERY DISTRICTS

§ 8961. Power to acquire property by condemnation or otherwise

Sec. . Section 8961 of the Health and Safety Code is amended to read:

8961. The district may maintain a cemetery or cemeteries, and for this purpose may take and hold title to property by grant, gift, devise, condemnation, lease, or any other method. Cemeteries shall be limited in use to burial in the ground of residents or taxpayers of the district or former residents or taxpayers of the district who purchased lots or plots while residents or taxpayers of the district or members of their families. Families shall be limited to a spouse, parents, grandparents, children and brothers and sisters.

Comment. Section 8961 is amended to make clear the right of public cemetery districts to acquire and hold title to realty for cemetery purposes. See 14 Ops. Cal. Atty. Gen. 252 (noting the confusion engendered by the recodification of Sections 8961, 8962, and 8963). The term "condemnation" preserves the grant of condemnation authority formerly contained in subdivision 14 of Section 1238 of the Code of Civil Procedure (condemnation authorized for "cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof").

LAND CHEST CORPORATIONS

§ 35167. Acquisition of property

Sec. . Section 35167 is added to the Health and Safety Code, to read:

35167. When the commissioner has approved a housing project, the corporation may acquire the property necessary for the project by gift, bequest, purchase, or eminent domain.

Comment. Sections 35167-35171 retain the substance of subdivision 21 of former Code of Civil Procedure Section 1238 insofar as that subdivision may have applied to land chest corporations (nonprofit corporations formed for the purpose of providing "housing in rural and suburban areas for families of low income"). Sections 35167-35171 use the same language as Sections 34874-34878 relating to limited dividend housing corporations (corporations formed for the purpose of providing housing for families of low income or reconstructing slum areas).

HEALTH & SAFETY CODE § 35168

Tentatively approved June 1970

LAND CHEST CORPORATIONS

§ 35168. Eminent domain; authorization by commissioner

Sec. . Section 35168 is added to the Health and Safety Code, to read:

35168. The power of eminent domain shall not be exercised by a corporation except with the specific authorization of the commissioner.

Comment. See the Comment to Section 35167.

HEALTH & SAFETY CODE § 35169

Tentatively approved June 1970

LAND CHEST CORPORATIONS

§ 35169. Certificate of authorization

Sec. . Section 35169 is added to the Health and Safety Code, to read:

35169. The authorization shall be contained in a certificate of the commissioner specifying that after public hearing the commissioner has determined that the acquisition of the property by eminent domain and the construction of the housing on the property is in the public interest and necessary for the public use.

Comment. See the Comment to Section 35167.

HEALTH & SAFETY CODE § 35170

Tentatively approved June 1970

LAND CHEST CORPORATIONS

§ 35170. Public hearing

Sec. . Section 35170 is added to the Health and Safety Code, to read:

35170. The hearing shall be held at a time and place designated by the commissioner. At least 10 days prior to the hearing the corporation shall give notice of the hearing by publication in a newspaper designated by the commissioner and published or circulated in the city or county where the property is located.

Comment. See the Comment to Section 35167.

HEALTH & SAFETY CODE § 35171

Tentatively approved June 1970

LAND CHEST CORPORATIONS

§ 35171. Effect of certificate

Sec. . Section 35171 is added to the Health and Safety Code, to read:

35171. A certified copy of the certificate of the commissioner is conclusive evidence of the matters certified in it in any proceeding in eminent domain to acquire the property or any part of it set forth in the certificate.

Comment. See the Comment to Section 35167.

RESORT IMPROVEMENT DISTRICTS

§ 13070.1. Definition of "acquire"

Sec. . Section 13070.1 is added to the Public Resources Code, to read:

13070.1. As used in this chapter, "acquire" includes but is not restricted to taking by condemnation, purchase, or lease, and receiving by donation or dedication.

Comment. Section 13070.1 is added to give the term "acquire" used in Section 13070 its broadest possible meaning and to insure that the repeal of Code of Civil Procedure Section 1238 will not affect adversely the districts formed under the Resort Improvement District Law.

PUBLIC UTILITIES CODE §§ 610-626

Tentatively approved March 1970

PRIVATELY OWNED PUBLIC UTILITIES

ARTICLE 7. EMINENT DOMAIN

- § 610. Article applies to "public utilities" only
- § 611. Railroad corporations
- § 612. Electrical corporations
- § 613. Gas corporations
- § 614. Heat corporations
- § 615. Pipeline corporations
- § 616. Telephone corporations
- § 617. Telegraph corporations
- § 618. Water corporations
- § 619. Wharfingers
- § 620. Ferries
- § 621. Street railroad corporations
- § 622. Motor carriers
- § 623. Warehousemen
- § 625. Resolution of Public Utilities Commission
- § 626. Effect of resolution

PUBLIC UTILITIES CODE § 610

Tentatively approved March 1970

Sec. . Article 7 (commencing with Section 610) is added to Chapter 3 of Part 1 of Division 1 of the Public Utilities Code, to read:

Article 7. Eminent Domain

§ 610. Article applies to "public utilities" only

610. This article applies only to a corporation or person that is a public utility.

Comment. Section 610 is included to make clear that this article extends the right of eminent domain only to "public utilities" as defined in Section 216 ("service is performed for or the commodity delivered to the public or any portion thereof") and not to persons or corporations that are not subject to regulation and rate control. It has been held that the exercise of the right of eminent domain conclusively evidences an intention to devote the property so acquired to a public use, thereby rendering the condemnor a public utility. Producers Transp. Co. v. Railroad Comm'n, 176 Cal. 499, 505, 169 P. 59 (1917). Compare McCullagh v. Railroad Comm'n, 190 Cal. 13, 210 P. 264 (1922). This section is consistent with the holding in the Producers Transp. Co. case.

PUBLIC UTILITIES CODE § 611

Tentatively approved March 1970

§ 611. Railroad corporations

611. A railroad corporation may condemn any property necessary for the construction and maintenance of its railroad.

Comment. Section 611 grants "railroad corporations" (defined in Section 230) the right of eminent domain to acquire property necessary for the construction and maintenance of its "railroad." "Railroad" is defined in Section 229 to mean in substance all railroad property devoted to public use in the transportation of persons or property. Thus, Section 611 authorizes condemnation of any property necessary to carry out the regulated activities of the railroad. It retains in substance the authority formerly found in subdivision (g) of Section 7526 of the Public Utilities Code and in Section 1238 of the Code of Civil Procedure. See, e.g., Southern Pac. Co. v. Los Angeles Mill Co., 177 Cal. 395, P. (1918)(spur tracks); Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238 (1915) (land for wharves for transfer of freight between railroad cars and boats where reasonably necessary for railroad corporation's future business); Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 92 P. 849 (1907)(land adjacent to station grounds required for a freight house); Southern Pacific R. R. Co. v. Raymond, 53 Cal. 223, P. ( ) (workshop); Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 688, 87 P. 27 (1906)(spur tracks). Cf. City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992

PUBLIC UTILITIES CODE § 611

Tentatively approved March 1970

(1916)(land for pole line for transmission of power to public railway). Section 611 would not, however, permit condemnation by a railroad corporation of land to be used, for example, as an industrial park.

Section 611 supersedes provisions formerly contained in the Public Utilities Code and Code of Civil Procedure insofar as those provisions related to privately owned public utilities. See subdivision (g) of Section 7526 of the Public Utilities Code (right to condemn lands "to be used in the construction and maintenance of its roads, and all necessary appendages and adjuncts"); Section 1238 of the Code of Civil Procedure, subdivision 4 ("steam, electric and horse railroads"), subdivision 11 (railroads "for quarrying, logging or lumbering purposes"). See also Section 1238, subdivision 9 ("roads for transportation by traction engines or road locomotives").

Section 611 has no effect on various specific grants of the power to railroads to condemn private property. See Public Utilities Code Sections 7533 (additional tracks), 7535 (railroad intersections), 7536 (railroad crossings). See also Public Utilities Code Section 7508 (right of eminent domain in transferee of railroad corporation).

§ 612. Electrical corporations

§ 612. An electrical corporation may condemn any property necessary for the construction and maintenance of its electric plant.

Comment. Section 612 grants "electrical corporations" (defined in Section 218) the right of eminent domain to acquire property necessary for the construction and maintenance of its "electric plant." "Electric plant" is defined in Section 217 to mean in substance all property devoted to public use in the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power. Thus, Section 612 authorizes condemnation of any property necessary to carry out the regulated activities of the electrical corporation. It retains and possibly broadens the authority formerly found in subdivisions 12 and 13 of Section 1238 of the Code of Civil Procedure and supersedes those subdivisions insofar as they apply to privately owned public utilities. See also the Comment to Section 613. Insofar as subdivision 13 permits acquisition of property for future use, it is anticipated that that authority will be given to privately owned public utilities by a general provision to be included in the comprehensive condemnation statute.

PUBLIC UTILITIES CODE § 613

Tentatively approved March 1970

§ 613. Gas corporations

613. A gas corporation may condemn any property necessary for the construction and maintenance of its gas plant.

Comment. Section 613 grants "gas corporations" (defined in Section 222) the right of eminent domain to acquire property necessary for the construction and maintenance of its "gas plant." "Gas plant" is defined in Section 221 to include all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of gas, natural or manufactured, for light, heat, or power. Thus, Section 613 authorizes condemnation of any property necessary to carry out the regulated activities of the gas corporation.

Sections 612, 613, and 614 largely supersede subdivision 17 of Section 1238 of the Code of Civil Procedure. Insofar as subdivision 17 permits acquisition of property for future use, it is anticipated that that authority will be given privately owned public utilities by a general provision to be included in the comprehensive condemnation statute.

PUBLIC UTILITIES CODE § 614

Tentatively approved March 1970

§ 614. Heat corporations

614. A heat corporation may condemn any property necessary for the construction and maintenance of its heating plant.

Comment. Section 614 grants "heat corporations" (defined in Section 224) the right of eminent domain to acquire property necessary for the construction and maintenance of its "heating plant." "Heating plant" is defined in Section 223 to include all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of heat for domestic, business, industrial, or public use. Thus, Section 614 authorizes condemnation of any property necessary to carry out the regulated activities of the heat corporations. See the Comment to Section 613.

PUBLIC UTILITIES CODE § 615

Tentatively approved March 1970

§ 615. Pipeline corporations

615. A pipeline corporation may condemn any property necessary for the construction and maintenance of its pipeline.

Comment. Section 615 grants "pipeline corporations" (defined in Section 228) the right of eminent domain to acquire property necessary for the construction and maintenance of its "pipeline." "Pipeline" is defined in Section 227 to include all property used in connection with or to facilitate the transmission, storage, distribution, or delivery of crude oil or other fluid substances except water through pipelines. Thus, Section 615 authorizes condemnation of any property necessary to carry out the regulated activities of the pipeline corporation.

Section 615 supersedes subdivision 10 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "oil pipelines") insofar as that subdivision relates to privately owned public utilities.

PUBLIC UTILITIES CODE § 616

Tentatively approved March 1970

§ 616. Telephone corporations

616. A telephone corporation may condemn any property necessary for the construction and maintenance of its telephone line.

Comment. Section 616 grants "telephone corporations" (defined in Section 234) the right of eminent domain to acquire property necessary for the construction and maintenance of its "telephone line." "Telephone line" is defined in Section 233 to include all property used in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires. Thus, Section 616 authorizes condemnation of any property necessary to carry out the regulated activities of the telephone corporation.

Section 616 superseded a portion of subdivision 7 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "telephone . . . lines, systems and plants") insofar as that subdivision relates to privately owned public utilities.

PUBLIC UTILITIES CODE § 617

Tentatively approved March 1970

§ 617. Telegraph corporations

617. A telegraph corporation may condemn any property necessary for the construction and maintenance of its telegraph line.

Comment. Section 617 grants "telegraph corporations" (defined in Section 236) the right of eminent domain to acquire property necessary for the construction and maintenance of its "telegraph line." "Telegraph line" is defined in Section 235 to include all property used in connection with or to facilitate communication by telegraph, whether such communication is had with or without the use of transmission wires. Thus, Section 617 authorizes condemnation of any property necessary to carry out the regulated activities of the telegraph corporation.

Section 617 supersedes a portion of subdivision 7 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "telegraph . . . lines, systems and plants") insofar as that subdivision relates to privately owned public utilities.

PUBLIC UTILITIES CODE § 618

Tentatively approved March 1970

§ 618. Water corporations

618. A water corporation may condemn any property necessary for the construction and maintenance of its water system.

Comment. Section 618 grants "water corporations" (as defined in Section 241) the right of eminent domain to acquire property necessary for the construction and maintenance of its "water system." "Water system" is defined in Section 240 to include all property used in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement of water for power, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use. Thus, Section 618 authorizes condemnation of any property necessary to carry out the regulated activities of the water corporation.

Section 618 supersedes portions of subdivisions 3 and 4 of Section 1238 of the Code of Civil Procedure insofar as those portions relate to condemnation by privately owned public utilities.

PUBLIC UTILITIES CODE § 619

Tentatively approved March 1970

§ 619. Wharfingers

619. A wharfinger may condemn any property necessary for the construction and maintenance of facilities for the receipt or discharge of freight or passengers.

Comment. Section 619 grants a "wharfinger" the right of eminent domain to acquire property necessary for facilities for the receipt or discharge of freight or passengers. "Wharfinger" is defined in Section 242 to include "every corporation or person owning, controlling, operating, or managing any dock, wharf, or structure used by vessels in connection with or to facilitate the receipt or discharge of freight, other than bulk liquid commodities, or passengers for compensation within this State."

Section 619 supersedes portions of subdivisions 3 ("public mooring places for watercraft") and 4 ("wharves, docks, piers, . . . chutes, booms") of Section 1238 of the Code of Civil Procedure insofar as those portions relate to privately owned public utilities.

PUBLIC UTILITIES CODE § 620

Tentatively approved March 1970  
Revised April 1970

§ 620. Ferries

620. A common carrier, as defined in subdivision (b) of Section 211, may condemn any property necessary for the construction and maintenance of facilities for its transportation of persons or property.

Comment. Section 620 grants the power of eminent domain to acquire property necessary for ferry facilities. The reference to subdivision (b) of Section 211 incorporates a definition of those public utilities that transport persons or property for compensation by vessel upon inland waters or upon the high seas between points within this state. Section 620 supersedes the grant of condemnation for "ferries" in subdivision 4 of Section 1238 of the Code of Civil Procedure insofar as that subdivision relates to the privately owned public utilities. See Streets and Highways Code Sections 30802, 30866 (regulation of amount of ferry tolls).

PUBLIC UTILITIES CODE § 621

Tentatively approved March 1970  
Revised May 1970

§ 621. Street railroad corporations

621. A street railroad corporation may condemn any property necessary for the construction and maintenance of its street railroad.

Comment. Section 621 grants "street railroad corporations" (defined in Section 232) the right of eminent domain to acquire property necessary for the construction and maintenance of its "street railroad" (defined in Section 231). It replaces in substance the authority formerly found in subdivision (g) of Section 7526 and incorporated by reference by Section 7801 and in Section 1238 of the Code of Civil Procedure. See the Comment to Section 611.

PUBLIC UTILITIES CODE § 622

Tentatively approved March 1970

Revised February 1971

§ 622. Motor and water carriers

622. (a) As used in this section, "motor carrier" means:

(1) A highway common carrier as defined in Section 213.

(2) A passenger stage corporation as defined in Section 226.

(b) As used in this section, "water carrier" means a common carrier operating upon any waterway in this state between fixed termini or over a regular route.

(c) A motor carrier or water carrier may condemn any property necessary for the construction and maintenance of terminal facilities for the receipt, transfer, or delivery of the passengers or property it carries.

Comment. Section 622 grants certain motor carriers and water carriers the right of eminent domain to acquire property necessary for terminal facilities. Sections 621 and 622 supersede subdivision 22 of Section 1238 of the Code of Civil Procedure which granted condemnation authority for "terminal facilities, lands or structures for the receipt, transfer or delivery of passengers or property by any common carrier operating upon any public highway or waterway in this state between fixed termini or over a regular route, or for other terminal facilities of any such carrier."

PUBLIC UTILITIES CODE § 623

Tentatively approved March 1970

§ 623. Warehousemen

623. A warehouseman may condemn any property necessary for the construction and maintenance of its facilities for storing property.

Comment. Section 623 grants a "warehouseman" (defined in Section 239) the right of eminent domain to acquire property necessary for storing property. Section 623 supersedes a portion of subdivision 4 of Section 1238 of the Code of Civil Procedure (granting authority to condemn for "warehouses") insofar as that portion relates to privately owned public utilities.

§ 624. Sewer system corporations

624. A sewer system corporation may condemn any property necessary for the construction and maintenance of its sewer system.

Comment. Section 624 grants a "sewer system corporation" (defined in Section 230.6) the right of eminent domain to acquire property necessary for the construction and maintenance of its "sewer system." "Sewer system" is defined in Section 230.5 to include all property used in connection with or to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes. Thus, Section 624 authorizes condemnation of any property necessary to carry out the regulated activities of sewer system corporations. Section 624 does not, however, authorize condemnation for a sewer system which merely collects sewage on the property of a single individual (Section 230.5); nor does it authorize condemnation by anyone other than a public utility subject to the jurisdiction, control, and regulation of the Public Utilities Commission.

Section 624 supersedes portions of subdivisions 3, 4, and 8 of Section 1238 of the Code of Civil Procedure insofar as those portions relate to condemnation by privately owned public utilities.

PUBLIC UTILITIES CODE § 625

Staff recommendation considered  
by Commission March 1970--action  
deferred

§ 625. Resolution of Public Utilities Commission

625. No condemnation proceeding shall be commenced under the authority granted by this article unless the Public Utilities Commission first adopts a resolution declaring that the public interest and necessity require the acquisition, construction, or completion by the public utility of the project for which the property is required and that the fee or such interest in the property as is described in the resolution is necessary for the project.

Comment. Sections 625 and 626 impose a requirement not found in prior law. The sections, which are based on Streets and Highways Code Sections 102 and 103, make the question of necessity one for determination by the Public Utilities Commission rather than by the court as under former law.

PUBLIC UTILITIES CODE § 626

Staff recommendation considered  
by Commission March 1970--action  
deferred

§ 626. Effect of resolution

626. The resolution of the commission is conclusive evidence:

(a) Of the public necessity of such proposed project.

(b) That such fee or interest in the property is necessary  
therefor.

(c) That such proposed project is planned or located in a  
manner which will be most compatible with the greatest public good  
and the least private injury.

Comment. See the Comment to Section 625.

MUTUAL WATER COMPANIES

Public Utilities Code § 2729 (added)

Sec. . Section 2729 is added to the Public Utilities Code, to read:

2729. A mutual water company may exercise the power of eminent domain for water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by such company.

Comment. Section 2729 specifies the condemnation authority of a mutual water company (defined in Section 2725). The section continues without substantive change the authority to condemn formerly conferred by Code of Civil Procedure Section 1238(4)(condemnation authorized for "water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only").

Mutual water companies are not generally subject to the jurisdiction of the Public Utilities Commission. See Pub. Util. Code § 2705. However, it is possible that exercise of the power of eminent domain by a mutual water company may demonstrate an intention to devote the property so acquired to public use and thereby render the company subject to regulation as a public utility. See Corona City Water Co. v. Public Utilities Comm'n, 54 Cal.2d 834, 357 P.2d 301, 9 Cal. Rptr. 245 (1960); Lamb v. California Water & Tel. Co., 21 Cal.2d 33, 129 P.2d 371 (1942). Nevertheless, the authority granted by this section is not dependent upon whether a company is or is not held to be a public utility by exercising such authority.

Tentatively approved July 1970

Sec. . Section 104.1 of the Streets and Highways Code is repealed.

~~104.1.--Wherever-a-part-of-a-parcel-of-land-is-to-be-taken-for state-highway-purposes-and-the-remainder-is-to-be-left-in-such-shape or-condition-as-to-be-of-little-value-to-its-owner,-or-to-give-rise to-claims-or-litigation-concerning-severance-or-other-damage,-the department-may-acquire-the-whole-parcel-and-may-sell-the-remainder or-may-exchange-the-same-for-other-property-needed-for-state-highway purposes.~~

Comment. Section 104.1 is superseded by Sections 420 through 422 of the Comprehensive Statute.

STREETS & HIGHWAYS CODE § 943.1

Tentatively approved July 1970

Sec. . Section 943.1 of the Streets and Highways Code is repealed.

~~943.1. --Whenever a part of a parcel of land is to be taken for county-highway purposes and the remainder of such parcel is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damages, the county may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for county-highway purposes.~~

Comment. Section 943.1 is superseded by Sections 420 through 422 of the Comprehensive Statute.

STREETS & HIGHWAYS CODE § 4008

Tentatively approved April 1970

STREET OPENING ACT OF 1903

Streets & Highways Code § 4008 (amended)

Sec. . Section 4008 of the Streets and Highways Code is amended to read:

4008. "Street" includes public street, avenues, roads, highways, byroads, squares, lanes, alleys, courts or places.

Comment. The addition of "byroads" to Section 4008 makes it clear that byroads--roads, open to public use, that furnish access to an existing public road from or primarily from otherwise isolated property--may be established under the Street Opening Act of 1903. See Section 4008.1 defining "byroad." This addition probably codifies existing law. Cf. City of Oakland v. Parker, 70 Cal. App. 295, 233 P. 68 (1924).

STREETS & HIGHWAYS CODE § 4008.1

Tentatively approved April 1970

STREET OPENING ACT OF 1903

Streets & Highways Code § 4008.1 (added)

Sec. . Section 4008.1 is added to the Streets and Highways Code, to read:

4008.1. "Byroad" means a road, open to public use, that furnishes access to an existing public road from or primarily from otherwise isolated property.

Comment. The definition of "byroad" in Section 4008.1 is based on the discussion in Sherman v. Buick, 32 Cal. 242 (1867). It adopts substantially the definition formerly incorporated in Section 1238(6) of the Code of Civil Procedure; however, any restriction in utilization of the property served by the byroad is eliminated.

STREETS & HIGHWAYS CODE § 4120.1

Tentatively approved April 1970  
Revised June 1970

STREET OPENING ACT OF 1903

Streets & Highways Code § 4120.1 (added)

Sec. . Section 4120.1 is added to the Streets and Highways Code, to read:

4120.1. The owner of any property that may be benefited by a proposed improvement may file with the legislative body a request that the improvement be undertaken. Such request may, but need not include the maps, plats, plans, profiles, specifications, and other information referred to in Sections 4120 and 4122, and shall not be denied without a public hearing.

Comment. Section 4120.1 is added to the Street Opening Act of 1903 to expressly authorize initiation of improvement proposals by individual property owners. Similar procedures already exist in many counties and cities. In reviewing a property owner's request, the board of supervisors should consider the necessity for the improvement and the relative hardship to the party whose land is sought to be used for the improvement compared to the one seeking the improvement.

Tentatively approved July 1970

Sec. . Section 254 of the Water Code is repealed.

~~254.--Whenever a part of a parcel of land is to be taken for state dam or water purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state dam or water purposes.~~

Comment. Section 254 is superseded by Sections 420 through 422 of the Comprehensive Statute.

WATER CODE § 8590.1

Tentatively approved July 1970

Sec. . Section 8590.1 of the Water Code is repealed.

~~8590.1.--Wherever-a-part-of-a-parcel-of-land-is-to-be-taken  
for-purposes-as-set-forth-in-Section-8590-of-this-code-and-the  
remainder-is-to-be-left-in-such-shape-or-condition-as-to-be-of  
little-value-to-its-owner,-or-to-give-rise-to-claims-or-litigation  
concerning-encroachment-or-other-damage,-the-board-may-acquire-the  
whole-parcel-and-may-sell-the-remainder-or-may-exchange-the-same  
for-other-property-needed-for-purposes-as-set-forth-in-Section  
8590-of-this-code.~~

Comment. Section 8590.1 is superseded by Sections 420 through 422 of  
the Comprehensive Statute.

WATER CODE § 11575.2

Tentatively approved July 1970

Sec. . Section 11575.2 of the Water Code is repealed.

~~11575.2. . . Whenever a part of a parcel of land is to be taken for state water development purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and shall sell the remainder or shall exchange the same for other property needed for state water development purposes.~~

Comment. Section 11575.2 is superseded by Sections 420 through 422 of the Comprehensive Statute.

WATER CODE § 43533

Tentatively approved July 1970

Sec. . Section 43533 of the Water Code is repealed.

~~43533--Whenever-a-part-of-a-parcel-of-land-is-to-be-acquired pursuant-to-this-article-and-any-portion-of-the-remainder-is-to-be left-in-such-shape-or-condition-as-to-be-of-little-value-to-its owner,-the-board-may-acquire-and-sell-such-portion-or-may-exchange the-same-for-other-property-needed-to-carry-out-the-powers-conferred on-said-board.~~

Comment. Section 43533 is superseded by Sections 420 through 422 of the Comprehensive Statute.