

36.20(1)

4/6/71

Memorandum 71-31

Subject: Study 36.20(1) - Condemnation (The Declared Public Uses)

Summary

This memorandum has been prepared primarily to give you a birds-eye view of the problem involved in repealing Sections 1238-1238.7 of the Code of Civil Procedure when the Comprehensive Statute is proposed for enactment. With respect to most condemnors, the Commission has already made the decisions required.

Significant matters noted in the memorandum are:

(1) The organization and procedure for condemnation for state purposes is now under study at the state level and Commission consideration of the details of this aspect of the right to take should be deferred.

(2) A decision should be made on whether condemnation by private persons for sewer purposes should be retained.

Introduction

The Commission has determined that Sections 1238-1238.7 of the Code of Civil Procedure (which declare certain uses to be "public uses" for which the right of eminent domain may be exercised) will be repealed when the new Eminent Domain Code is enacted.

Before Sections 1238-1238.7 can be repealed, it is necessary to review the present condemnation authority of the state, cities, counties, school districts, special districts, public utilities, nonprofit hospitals, mutual water companies, educational institutions, and private persons and to determine what statutory modifications will be required to preserve the status quo.

The Commission previously has considered this matter and made a number of decisions. However, because a number of Commissioners were not members of the Commission when these decisions were made, this memorandum provides background information that is essential to decision making as well as follow-up information on some matters previously considered by the Commission.

State condemnations

The condemnation authorization conferred by Sections 1238-1238.7 on the state has been totally eclipsed by the expansive condemnation powers conferred in other code provisions upon the Director of the Department of General Services, the State Public Works Board, and the Department of Public Works.

The basic policy question is whether all state agencies (other than the Department of Public Works and possibly the Department of Water Resources) should be required to acquire property under the Property Acquisition Act.

At the April 1970 meeting, the staff was directed to contact the Department of General Services and request the department to review the statutes authorizing condemnation for state purposes in order to suggest what, if any, changes are needed to reflect current practices and to provide desirable procedures for condemnation at the state level. This matter is under active study. See Exhibit I. Accordingly, the staff recommends that we defer further work on this aspect of the right to take until the study by the Department of General Services is completed. It is sufficient now to note that no problem would be created by repealing Sections 1238-1238.7 insofar as condemnations for state purposes are concerned. We have much information on state condemnation authority that we will provide you when we take up this matter in detail after the study now underway at the state level is completed.

Cities and counties

The Commission has already determined that cities and counties should have the authority to condemn any property necessary to carry out any of their powers or functions. Govt. Code §§ 25350.5 (counties), 37350.5 (cities).

School districts

The Commission has already decided to give school districts the power to condemn any property necessary to carry out any of their powers or functions. Educ. Code § 1047.

Special districts

The Commission has approved amending Health and Safety Code Section 8961 and adding Section 13070.1 to the Public Resources Code. (See Comprehensive Statute.) The Commission also directed the staff to review Memorandum 70-16 and to identify those special districts which might possibly be affected by the repeal of Code of Civil Procedure Sections 1238-1238.7 and, when the tentative recommendation relating to the right to take is distributed, to direct attention to this aspect of the recommendation. The overwhelming majority of special districts have, by virtue of their enabling statutes, general authority to condemn any property necessary to carry out any powers of the district and the others either have sufficient condemnation authority for their purposes or should not have condemnation authority. It is the staff's view that, with the amendment and addition referred to above, all special districts that should have the right to condemn will have that right and that the repeal of Sections 1238-1238.7 would not affect the condemnation authority of special districts.

Public utilities

The Commission has already determined that public utilities should have authority to condemn any property necessary to carry out their regulated functions. See Comprehensive Statute adding Sections 610-623 to the Public Utilities Code.

Private persons

The Commission already has determined that certain special classes of "private" persons--nonprofit hospitals, mutual water companies, and nonprofit higher educational institutions--should have a right to condemn property.

The Commission has also determined that no other "private" persons should have condemnation authority, except to make sewer connections, and deferred its decision whether even this limited authority should exist. The staff was directed to determine how the condemnation involved in the Linggi case was ultimately resolved and to advise the Commission so that a decision could be made whether to retain condemnation authority for a private person to condemn for a sewer connection. This information is contained in Exhibit II (yellow) attached.

It is difficult to distinguish the Linggi case from a condemnation of a right of access (byroad). (The Commission has determined a private person should not be permitted to condemn for a byroad.) Perhaps the danger to health present in the sewer connection case is the distinguishing feature. Moreover, it should be noted that the condemnation authority for sewers is more clearly expressed than byroads. Section 1238 provides in subdivision 8 for condemnation for ". . . the connection of private residences and other

buildings, through other property, with the mains of an established sewer system in any such city, city and county, town or village."

Should the authority of a private person to condemn for sewers be continued? If so, the staff will prepare a draft statute for a future meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

DEPARTMENT OF GENERAL SERVICES

15 Capitol Mall, Suite 590
Sacramento, California 95814



May 29, 1970

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Acquisitions by
State Agencies

Dear Mr. DeMouilly:

By letter dated May 4, 1970, you asked as to the extent to which the grant of condemnation powers to individual State agencies has been superseded by the Property Acquisition Law (Section 15850 through 15866, Government Code).

The Property Acquisition Law is administered by the State Public Works Board. The Public Works Board does not need and does not acquire real property for its own uses. Under the Property Acquisition Law, the Public Works Board is authorized to acquire real property for a State agency only when a statute appropriating monies for the acquisition expressly provides that it is to be accomplished pursuant to the Property Acquisition Law (see Section 15853). For example, the Public Works Board acquires property within the boundaries of the State Capitol Plan due to the fact that the statute providing for the State Capitol Plan and appropriating the monies therefor (Chapter 1242 of the Statutes of 1963) expressly provides that these acquisitions shall be accomplished pursuant to the Property Acquisition Law.

Monies appropriated for the acquisition of State beaches and parks out of the State Beach, Park, Recreational and Historical Facilities Fund are subject to the Property Acquisition Law inasmuch as the Beach, Park, Recreational and Historical Facilities Bond Act of 1964 (Section 5096.25, Public Resources Code) expressly provides that such acquisitions shall be accomplished pursuant to the Property Acquisition Law.

Pursuant to express statutory provisions (Section 1348, Fish and Game Code), acquisitions on behalf of the Wildlife Conservation Board, at the option of the Wildlife Board, may be accomplished pursuant to the Property Acquisition Law or by the Department of Fish and Game. (See 23 Ops. Cal. Atty. Gen. 156 regarding the more extensive grant of condemnation powers available under these circumstances if the acquisition is accomplished under the Property Acquisition Law.)

Mr. John H. DeMouilly

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May 29, 1970

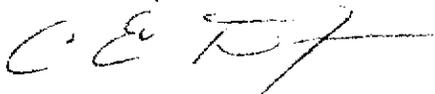
Certain State agencies, such as the Department of Parks and Recreation (non-Bond monies), the Department of Human Resources Development, the Department of the California Highway Patrol, the Department of Conservation and the Department of General Services, obtain funds for the acquisition of real property from appropriations contained in the Capital Outlay Section of the Budget Act which is enacted each year by the State Legislature. These acquisitions are accomplished pursuant to the Property Acquisition Law inasmuch as Section 7 of each Budget Act expressly provides that: "Any acquisition of land or other real property included in any appropriation made herein for capital outlay except appropriations from the California Water Fund or the State Highway Fund . . . shall be subject to the provisions of the Property Acquisition Law." Were the language of Section 7 not to be included in a yearly Budget Act, then a condemnation action by any of the aforementioned State agencies having separate condemnation grants would be accomplished pursuant to those grants. Condemnations for those aforementioned agencies not having separate condemnation grants would be accomplished by the Department of General Services pursuant to Sections 14661 and 14662 of the Government Code.

While the State Reclamation Board obtains its acquisition funds through an appropriation in the Budget Act, its acquisitions are not accomplished under the Property Acquisition Law since the Reclamation Board's appropriation is contained in the Local Assistance section of the yearly Budget Act as to which said Section 7 does not apply.

We have no specific changes to offer at this time as we feel the procedure of going through the Public Works Board satisfies the interest of the State and provides protection for the property owner. We are interested in the California Law Revision Commission and are keeping current with its activities.

Should you have any further questions in regard to the above matter, do not hesitate to call upon us.

Sincerely,



C. E. DIXON
Director

June 29, 1970

Mr. C. E. Dixon, Director
Department of General Services
915 Capitol Mall, Suite 590
Sacramento, California 95814

Dear Mr. Dixon:

Your letter of May 29, 1970, concerning acquisitions by state agencies will be helpful to the Commission in its work on eminent domain.

The staff of the Commission plans to make a number of recommendations concerning revisions of the state law concerning property acquisition:

(1) We plan to recommend that the resolution or declaration of necessity be conclusive on necessity in every case (it is not now conclusive, for example, in the case of certain acquisitions by the Department of Parks and Recreation).

(2) We plan to recommend that all state property acquisitions be under the Property Acquisition Law except acquisitions by the Department of Public Works and by the Department of Water Resources.

What reaction do you have to these two suggestions that the staff plans to submit to the Commission? We do not want to recommend to the Commission anything that would be controversial. However, we do think that it would be desirable to clarify the law along the lines we described. Specifically, do you believe that the acquisitions for the State Reclamation Board should be accomplished under the Property Acquisition Law? Do you believe that acquisitions for the state college system should be accomplished only under the Property Acquisition Law, and would such a requirement reflect existing law?

In the course of drafting our comprehensive eminent domain statute, we hope to simplify and clarify the provisions that grant the power of eminent domain for various purposes. With respect to the state provisions, the suggestions of the staff of the Commission would seem to accomplish these objectives.

Sincerely,

John H. DeMully
Executive Secretary

JHD:aj

DEPARTMENT OF GENERAL SERVICES

SACRAMENTO



September 21, 1970

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University

Dear Mr. DeMouilly:

This is in reply to your letter of June 29, making two suggestions regarding staff proposed recommendations to the Law Revision Commission.

Without commenting on the merits of either of these suggestions, they do contain elements of controversy, and as I note in your letter you are trying to avoid recommendations of a controversial nature.

For your information, I attach a copy of a report by the Office of the Legislative Analyst recommending changes and consolidations in the acquisition, management, and sale of various State properties. Currently we have this study under active consideration. At this time it would seem wiser to me to go a little slow in recommendations to your Commission, particularly as I do not believe the Commission would want to get involved in any of the interagency jurisdictional discussions that are and will be taking place.

As soon as the air is cleared on these matters, we would then look forward to submitting recommendations to the Commission that would implement and make more effective the land acquisition program of State Government.

Sincerely,

A handwritten signature in black ink, appearing to read "C. E. Dixon".

C. E. Dixon
Director

Attachment

Memorandum 71-31

EXHIBIT II

MYERS, PRAETZEL AND PIERCE

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ROBERT P. PRAETZEL
CHARLES W. PIERCE
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August 31, 1970

Mr. Jack I. Horton
Associate Counsel
California Law Revision Committee
School of Law
Stanford University
Stanford, California 94305

RE: Linggi v. Garavatti
45 Cal. (2d) 20 (1955)

Dear Mr. Horton:

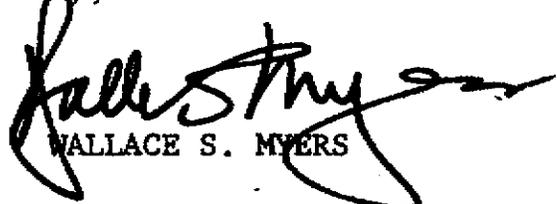
Thank you for your inquiry of August 26, 1970.

The Supreme Court decision in Linggi and the complaint the decision considered reveal all of the substantial facts in the case. During the pendency of the case before the Appellate Courts, we prevailed upon Sanitary District No. 1, responsible for sewage disposal in the area, to commence an action for condemnation against Mrs. Garavatti. The remittitur was issued August 22, 1955, but no further action was taken in this litigation. The question presented was solved in another way.

The view I hold is that Linggi is sound law. Where there is a great need for a way of necessity for sewage disposal, and the public agency responsible will not act, and the recalcitrant neighbor will not deal, then such condemnation, in my opinion, should be available to a private citizen. In such an action a private plaintiff should be required to show a great need and a refusal on the part of the public agency responsible for the service.

With regard to the final question, it has been my experience that public agencies will perform their duties if enough political pressure is applied, as in this case. Good luck!

Sincerely,


WALLACE S. MYERS

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