

#36.65

7/5/72

Memorandum 72-52

Subject: Study 36.65 - Condemnation (Disposition of Existing Statutes--Code of Civil Procedure Sections 1247, 1247a, 1248(5), 1248a, 1251, 1257)

One task in preparing a comprehensive eminent domain statute is to dispose of the provisions of the existing title on eminent domain that deal specifically with public utilities. A background research study on this matter is attached.

The existing title, partly because it is based on earlier statutes dealing with condemnation by railroads, contains some special provisions concerning public utilities. These provisions should not be continued in the new Eminent Domain Law. Most of them can be omitted as unnecessary because the same area is covered either by a comprehensive provision of the new law (such as joint use) or by an existing provision of the Public Utilities Code. Where this is not the case, the substance of the provision should be recodified either as a comprehensive provision of the new law or as a provision of the Public Utilities Code.

The sections to be repealed are Code of Civil Procedure Sections 1247, 1247a, 1248(5), 1248a, 1251, and 1257. The text of these sections appears in the printed text of the eminent domain title of the Code of Civil Procedure previously distributed. See Appendix in your binder containing the Comprehensive Statute. The Comments to these sections appear in Exhibit I attached. Conforming changes are attached as Exhibit II.

In connection with these changes, the staff proposes the addition of a new substitute condemnation provision for utility relocation purposes. This provision is generalized from numerous special district provisions. See Section 1240.325 and Comment, attached as Exhibit III.

Respectfully submitted,

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Legal Counsel

EXHIBIT I

CODE OF CIVIL PROCEDURE § 1247

Staff recommendation July 1972

Code of Civil Procedure § 1247 (repealed)

[See page 55 of Appendix for text.]

Comment. Section 1247 of the Code of Civil Procedure is repealed. The disposition of its provisions is indicated below.

Subdivision 1. The broad jurisdictional grant to the court to regulate and determine the place and manner of making connections and crossings of rights of way (see former Code Civ. Proc. § 1240(6)) is not continued. The Public Utilities Commission has exclusive jurisdiction to determine and regulate connections and crossings of rights of way of public utilities. Section 1260. . See Pub. Util. Code §§ 764 and 765 (railroad connections), 1201 and 1202 (railroad crossings). See Breidert v. Southern Pac. Co., 272 Cal. App.2d 398, 77 Cal. Rptr. 262 (1969). See also City of Union City v. Southern Pac. Co., 261 Cal. App.2d 777, 67 Cal. Rptr. 816 (1968). See also Pub. Util. Code §§ 766 (connection of telephone and telegraph lines of different companies), 767 (order by Public Utilities Commission for joint use of utility facilities). The manner and place of street and highway connections and crossings are normally within the exclusive control of entities concerned. Cf. Sts. & Hwys. Code § 100.2; Code Civ. Proc. § 1240.150 (conclusive effect of resolution of necessity); City of Los Angeles v. Central Trust Co., 173 Cal. 323, 159 P. 1169

(1969); People v. Reed, 139 Cal. App. 258, 33 P.2d 879 (1934). In cases not described above, the court has jurisdiction to determine whether the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. Code Civ. Proc. § 1240.030. This jurisdiction extends to crossings and intersections of rights of way since crossings and intersections of rights of way are familiar examples of common uses. San Bernardino County Flood etc. Dist. v. Superior Court, 269 Cal. App.2d 515, 75 Cal. Rptr. 24 (1969). The power of the court to regulate and determine the place and manner of enjoying common use of rights of way is continued in Article 6 (commencing with Section 1240.510) of Chapter 4 of Title 7 of the Code of Civil Procedure.

Subdivision 2. [Not yet drafted.]

Subdivision 3. The power of the court to determine the respective rights of different parties seeking condemnation of the same property is continued in Code of Civil Procedure Section 1260. .

Code of Civil Procedure § 1247a (repealed)

[See page 56 of Appendix for text.]

Comment. Section 1247a of the Code of Civil Procedure is repealed, and the power granted the court by this section to regulate and determine the place and manner of enjoying common use of property already appropriated to public use (see former Code Civ. Proc. § 1240(3)) and of removing or relocating structures or improvements in connection with such enjoyment is continued in Article 6 (commencing with Section 1240.510) of Chapter 4 of Title 7 of the Code of Civil Procedure. See the Comment to former Section 1247 (discussion of subdivision 1). Cf. San Bernardino County Flood etc. Dist. v. Superior Court, 269 Cal. App.2d 515, 521-522, 75 Cal. Rptr. 24, (1969). The Public Utilities Commission has jurisdiction over the manner of relocation and removal of structures and improvements of a public utility. See Section 1260.

Code of Civil Procedure § 1248 (repealed)

[See pages 56-58 of Appendix for text.]

Comment. Code of Civil Procedure Section 1248 is repealed. The disposition of its provisions or the reason why such provisions are not continued is indicated below.

Subdivision 5. Subdivision 5, specifying that, in case of condemnation for a railroad, the cost of providing fences and crossings must be ascertained and assessed, is omitted as unnecessary.

The duty of a railroad corporation to construct and maintain good and sufficient fences on both sides of its track and property is continued in Public Utilities Code Section 7626 et seq. Where any project, whether or not a railroad, would require the owner of the remainder to construct and maintain fencing to service the highest and best use of the remainder, the cost of such construction and maintenance is part of the damage caused by the project and is assessed accordingly. See, e.g., Butte County v. Boydston, 64 Cal. 110, 29 P. 511 (1883); California So. R.R. v. Southern Pac. R.R., 67 Cal. 59, 7 P. 153 (1885).

The duty of a railroad corporation to construct and maintain private or farm crossings over its tracks is continued in Public Utilities Code Section 7537, subject to the control of the Public Utilities Commission. Where any project, whether or not a railroad, would limit the access of the owner of

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the remainder so as to impair the service of the remainder for its highest and best use, the loss of access is part of the damage caused by the project and is assessed accordingly. See, e.g., People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

Code of Civil Procedure § 1248a (repealed)

[See page 59 of Appendix for text.]

Comment. Section 1248a of the Code of Civil Procedure is repealed. The substance of the portion of the section authorizing the plaintiff to seek relocation or removal of railway tracks in certain cases is continued in Section 7557 of the Public Utilities Code. See also Code Civ. Proc. § 1240.610 (condemnation for more necessary public use). The portion stating the pleading requirements is continued in Section 1260. of the Code of Civil Procedure. The substance of the portion that required compensation for such relocation and removal to be ascertained and assessed as in other cases is continued in Code of Civil Procedure Section {Code Civ. Proc. § 1248(6)}].

Code of Civil Procedure § 1251 (repealed)

[See pages 60-61 of Appendix for text.]

Comment. Section 1251 of the Code of Civil Procedure is repealed. The disposition of its provisions or the reason why such provisions are not continued is indicated below.

Second paragraph. The second paragraph of Section 1251 is not continued. The cost of fences, cattle-guards, and crossings is no longer assessed in an eminent domain proceeding as a separate item of damages. See former Code Civ. Proc. § 1248(5) and Comment thereto.

A railroad corporation has an affirmative duty to fence its tracks and to provide crossings as determined by the Public Utilities Commission. See Pub. Util. Code §§ 7626 and 7537. The railroad is partially absolved from liability for a failure to fence if damages for the lack of a fence were awarded to the owner of adjoining property as part of compensation in an eminent domain proceeding. See Pub. Util. Code § 7627.

Code of Civil Procedure § 1257 (repealed)

[See pages 67-68 of Appendix for text.]

Comment. The first portion of Section 1257, which incorporated the general provisions of the Code of Civil Procedure relating to new trials and appeals, is superseded by Section . The elaborate proviso relating to possession pending appeal or new trial has been deleted because possession pending appeal or new trial is now provided for by Article 3 (commencing with Section 1255.310) of Chapter 7 of Title 7 of the Code of Civil Procedure.

EXHIBIT II

EMINENT DOMAIN LAW § 1260.

Staff recommendation July 1972

§ 1260. . Controversies arising out of the removal or relocation of public utility property

1260. . Notwithstanding any other provision of this title, where the removal or relocation of a work, structure, or improvement of a public utility is required by agreement between the parties or by a court order or judgment in any eminent domain proceeding, if the parties fail to agree upon the manner, character, or location of such removal or relocation, the matter shall be submitted to and determined by the Public Utilities Commission in the manner prescribed in Chapter 6 (commencing with Section 1201) of Part 1 of Division 1 of the Public Utilities Code.

Comment. Section 1260. supersedes and generalizes numerous special provisions that provide the Public Utilities Commission jurisdiction in public utility relocation and removal controversies. See, e.g., Alameda County Flood Control and Water Conservation District Act, § 28 (Cal. Stats. 1949, Ch. 1275); Contra Costa County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1951, Ch. 1617); El Dorado County Water Agency Act, § 20 (Cal. Stats. 1959, Ch. 2139); Kern County Water Agency Act, § 4.9 (Cal. Stats. 1961, Ch. 1003); Lake County Flood Control and Water Conservation District Act (Cal. Stats. 1951, Ch. 1544), § 33 (added Cal. Stats. 1954, 1st Ex. Sess., Ch. 62, § 48); Marin County Flood Control and Water Conservation

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District Act, § 28 (Cal. Stats. 1953, Ch. 666); Napa County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1951, Ch. 1449); Placer County Water Agency Act, § 4.9 (Cal. Stats. 1957, Ch. 1234); Sutter County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 2088); Tuolumne County Water Agency Act, § 20 (Cal. Stats. 1969, Ch. 1236); Yuba County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 788).

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§ 1260. . Controversies relating to railroad crossings

1260. . Notwithstanding any other provision of this title, where the necessity for any railroad crossing, or the place, manner, or conditions thereof, becomes an issue in an eminent domain proceeding, the matter shall be submitted to and determined by the Public Utilities Commission in the manner prescribed in Chapter 6 (commencing with Section 1201) of Part 1 of Division 1 of the Public Utilities Code.

Comment. Section 1260. makes clear that the Public Utilities Commission has exclusive jurisdiction over railroad crossing disputes in eminent domain proceedings. This probably continues prior law. See, e.g., Pub. Util. Code §§ 1201 and 1202 (crossings of roads or tracks over other tracks), 7537 (farm and private crossings); City of Los Angeles v. Central Trust Co., 173 Cal. 323, 159 P. 1169 (1916); Breidert v. Southern Pac. Co., 272 Cal. App.2d 398, 77 Cal. Rptr. 262 (1969). Section 1260. supersedes those portions of former Sections 1247(1) and 1248(5) which purported to grant the court jurisdiction over railroad crossing disputes in eminent domain proceedings.

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Eminent Domain Law § 1260.

1260. . The complaint shall contain all of the following:

* * * * *

(e) Where the removal or relocation of structures or improvements is sought, a prayer therefore, and a description and map of the location and proposed location of such structures or improvements.

Comment. Where the plaintiff is authorized by statute, it may seek the removal or relocation of structures or improvements. See, e.g., Pub. Util. Code § 7557 (removal or relocation of railroad tracks in certain cases). In order to accomplish removal or relocation under such authority, the plaintiff must make specific allegations in the complaint, including a prayer for removal or relocation, an indication of its authority, and appropriate descriptions and maps. This requirement is adapted from former Code of Civil Procedure Section 1248a.

PUBLIC UTILITIES CODE § 7526

Tentatively approved September 1971
Revised July 1972 .

Public Utilities Code § 7526 (amended)

Sec. . Section 7526 of the Public Utilities Code is amended
to read:

7526. Every railroad corporation has all of the following powers:

(a) To make such examination and surveys as are necessary to the selection of the most advantageous route for the railroad. The officers, agents, and employees of the corporation may enter upon the lands or waters of any person, for this purpose, subject to liability for all damages which they do thereto.

(b) To receive, hold, take, and convey, by deed or otherwise, as a natural person, such voluntary grants and donations of real estate and other property as are made to it to aid and encourage the construction, maintenance, and accommodation of the railroad.

(c) To purchase, or by voluntary grants or donations to receive, enter, take possession of, hold, and use all such real estate and other property as is necessary for the construction and maintenance of such railroad, and for all stations, depots, and other purposes necessary to successfully work and conduct the business of the road.

(d) To lay out its road, not exceeding 10 rods wide, and to construct and maintain it, with one or more tracks, and with such appendages and adjuncts as are necessary for the convenient use of the road.

(e) To construct its roads across, along, or upon any stream of water, watercourse, roadstead, bay, navigable stream, street, avenue, or highway, or across any railway, canal, ditch, or flume which the

PUBLIC UTILITIES CODE § 7526

Tentatively approved September 1971
Revised July 1972

route of its road intersects, crosses, or runs along, in such manner as to afford security for life and property. The corporation shall restore the stream or watercourse, road, street, avenue, highway, railroad, canal, ditch, or flume thus intersected to its former state of usefulness as near as may be, or so that the railroad does not necessarily impair its usefulness or injure its franchise.

(f) To cross, intersect, join, or unite its railroad with any other railroad, either before or after construction, at any point upon its route, and upon the grounds of the other railroad corporation, with the necessary turnouts, sidings, and switches, and other conveniences in furtherance of the objects of its connections. Every corporation whose railroad is intersected by any new railroad shall unite with the owners of the new railroad in forming the intersections and connections, and grant facilities therefor. If the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of the crossings, intersections, and connections, such matters shall be ascertained and determined as is provided in Title 7, Part 3 of the Code of Civil Procedure, Part 1 (commencing with Section 201) of Division 1.

(g) To ~~purchase~~ acquire lands, timber, stone, gravel, or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts ~~, or acquire them in the~~

PUBLIC UTILITIES CODE § 7526

Tentatively approved September 1971
Revised July 1972

~~manner provided in Title 7, Part 3 of the Code of Civil Procedure, for the condemnation of lands .~~

(h) To change the line of its road, in whole or in part, whenever a majority of the directors so determine, as provided in Section 7531, but the change shall not vary the general route of the road, as contemplated in its articles of incorporation.

Comment. Subdivision (f) of Section 7526 is amended to substitute a reference to provisions of the Public Utilities Code for the former reference to the eminent domain title of the Code of Civil Procedure. The determination and regulation of the place and manner of railroad connections and crossings is in the exclusive jurisdiction of the Public Utilities Commission. See the Public Utilities Act (Part 1 of Division 1), particularly Sections 764 and 765 (connections), 1201 and 1202 (crossings). Cf. former Code Civ. Proc. § 1247(1) and Comment thereto. The Public Utilities Act also provides for determination and allocation of compensation in such cases. See Pub. Util. Code §§ 764, 765, 1201-1205; see also Pub. Util. Code §§ 1206-1218 (commission determination of just compensation in connection with grade separations; commission jurisdiction here is not exclusive, see Section 1217).

The authority to condemn for lands, timber, stone, gravel, or other materials used in the construction or maintenance of a railroad is deleted from subdivision (g) of Section 7526 because it duplicates and is more restrictive than the general power of railroad corporations to condemn any property necessary for the construction and maintenance of its railroad provided by Section 611.

PUBLIC UTILITIES CODE § 7557

Staff recommendation July 1972

Public Utilities Code § 7557 (added)

Sec. . Section 7557 is added to the Public Utilities Code, to read:

7557. In any eminent domain proceeding, where any railroad, street or interurban railway tracks are situated on, upon, along, or across any lands or rights of way sought to be taken therein, for road, highway, boulevard, street or alley purposes, or for the purposes of a right of way for any public utility to be constructed, completed and maintained by a county, city and county, or any incorporated city or town, or by a municipal water district, the court shall, upon proper application by the plaintiff, if it determines that the plaintiff is entitled to take by eminent domain such lands or right of way for the purposes set forth in the complaint, order the relocation or removal of any railroad, street, or interurban railway tracks thereon.

Comment. Section 7557 continues the substance of former Code of Civil Procedure Section 1248a. For the required allegations in a complaint seeking to compel the removal or relocation of tracks, see Section 1260. of the Code of Civil Procedure.

EXHIBIT III

EMINENT DOMAIN LAW § 1240.325

Staff recommendation July 1972

§ 1240.325. Property necessary to permit condemnor to relocate public use

1240.325. (a) Where necessary property is devoted to public use, a public entity may acquire substitute property in its own name, relocate on such substitute property the public use to which necessary property is devoted, and thereafter convey the substitute property to the owner of the necessary property.

(b) For the purpose stated in subdivision (a), a public entity may acquire by eminent domain substitute property if both of the following are established:

(1) The public entity is required by court order or judgment in an eminent domain action, or by agreement with the owner of the necessary property, to relocate the public use to which the necessary property is devoted and thereafter to convey the property upon which the public use has been relocated to the owner of the necessary property.

(2) The substitute property is necessary for compliance with the court order or judgment or agreement and will be devoted to the same public use by the owner of the necessary property.

(c) The resolution authorizing the taking of property under subdivision (b) and the complaint filed pursuant to such authorization shall specifically refer to this section and shall include a statement that the

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property is necessary for the purpose specified in this section. The determination in the resolution that the taking of the substitute property is necessary has the effect prescribed in Section 1240.150.

Comment. Section 1240.325 provides general authority for substitute condemnation where a public entity is required by a court order or judgment or by agreement to relocate a public use. Unlike Section 1240.320 (which applies where the owner of the necessary property is the one who will relocate the public use), Section 1240.325 applies where the public entity seeks to acquire substitute property in its own name so that it may itself relocate the public use and then convey the property as improved to the owner of the necessary property.

Section 1240.325 supersedes numerous special provisions providing such authority to particular public entities. See, e.g., Alameda County Flood Control and Water Conservation District Act, § 28 (Cal. Stats. 1949, Ch. 1275); Contra Costa County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1951, Ch. 1617); Del Norte County Flood Control District Act, § 30 (Cal. Stats. 1955, Ch. 166); El Dorado County Water Agency Act, § 20 (Cal. Stats. 1959, Ch. 2139); Kern County Water Agency Act, § 4.9 (Cal. Stats. 1961, Ch. 1003); Lake County Flood Control and Water Conservation District Act (Cal. Stats. 1951, Ch. 1544), § 33 (added Cal. Stats. 1944, 1st Ex. Sess., Ch. 62, § 48); Marin County Flood Control and Water Conservation District Act, § 28 (Cal. Stats. 1953, Ch. 666); Napa County Flood Control and Water Conservation

EMINENT DOMAIN LAW § 1240.325

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District Act, § 29 (Cal. Stats. 1951, Ch. 1449); Placer County Water Agency Act, § 4.9 (Cal. Stats. 1957, Ch. 1234); Riverside County Flood Control and Water Conservation District Act, § 35 (Cal. Stats. 1945, Ch. 1122); Sutter County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 2088); Tulare County Flood Control District Act, § 32 (Cal. Stats. 1969, Ch. 1149); Ventura County Flood Control District Act, § 29 (Cal. Stats. 1944, 4th Ex. Sess., Ch. 44); Yuba County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 788).

DISPOSITION OF
PROVISIONS OF EMINENT DOMAIN TITLE RELATING TO PUBLIC UTILITIES

The Code of Civil Procedure presently contains a number of sections which purport to deal with situations involving common uses of property by public utilities which either conflict with or are repetitive of other code sections dealing with these same questions of common usage. In order to provide a more workable procedure for dealing with these problems of common usage a number of changes in the statute would be desirable. This memorandum will deal with the following provisions: Code of Civil Procedure Sections 1247, 1248, 1248a, and 1251.

Code of Civil Procedure Section 1247(1) provides as follows:

1247. The court shall have power:

(1) To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in subdivision (6) of Section 1240.

Subdivision (6) provides:

C.C.P. § 1240

The private property which may be taken under this title includes:

. . .

6. All rights-of-way for any and all the purposes mentioned in Section 1238, and any and all structures and improvements on, over, across or along such rights-of-way, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by or embraced within any other right-of-way or improvements, or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

This section was originally enacted in 1872 and has remained without substantive change since that time. No modification or accommoda-

tion was made when the Public Utility Act (now codified in the Public Utilities Code) was enacted in 1911 although it is clear, as will be pointed out subsequently, that there would appear to be a direct conflict between Code of Civil Procedure Section 1247(1) and provisions establishing the Railway Commission and its successor the Public Utilities Commission as the exclusive forum for determining many of the matters purportedly dealt with in Code of Civil Procedure Section 1247(1).

The portion of Section 1247(1) which would seem to require the court to adjudicate the question of crossings of one railroad by another or of railroad or street railways over roads, streets, and the like, has been given negligible effect. In City of Los Angeles v. Central Trust Co., 173 Cal. 323, 159 P. 1169 (1916), the court was presented the question of the applicability of the provisions of the Public Utilities Act in a fact situation involving the condemnation of a railroad right-of-way for a street crossing. The court considered and questioned the validity of the grant of jurisdiction to the court for deciding crossing matters as set out in Section 1247 and stated as follows:

If Section 1247 were construed to give the superior court power to determine the places where public streets should be allowed to cross existing railroads, and to make regulations governing the manner of making such crossings, it would confer legislative power upon the judicial department of the state. The opening and maintaining of public streets and the regulation of the manner of making crossings of streets and railroads so as to promote the public safety and welfare and legislative functions, and hence it may be doubted if under Article III of the Constitutions of 1849 and 1879, such functions could be given to the superior court by the legislature. . . . Perhaps the power so given extends only to the making of such provisions in the judgment of condemnation as may be appropriate to preserve the right of the respective parties, having reference to the compensation to be made for the taking, and to secure to them the guaranty of the . . . [sixth], subdivision of Section 1240 and of Section 1242, that the property shall be taken in the manner most compatible with the greatest public good and the

least private injury. In doing so the court must comply with existing regulations on the subject made by the legislative department . . .

The Public Utilities Code has, since 1911, contained extensive provisions governing establishment and maintenance of grade-crossings.

Public Utilities Code Sections 1201 and 1202 provide:

§ 1201

No public road, highway, or street shall be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway, or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without having first secured the permission of the commission. This section shall not apply to the replacement of lawfully existing tracks. The commission may refuse its permission or grant it upon such terms and conditions as it prescribes.

§ 1202

The commission has the exclusive power:

(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossings heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporation affected or between such corporations and the state, county, city, or other political subdivision affected.

These provisions would appear to be in direct conflict with the requirement of a court determination set out in Section 1247(1). In Breidert v. Southern Pac. Co., 272 Cal. App. 2d 398, 77 Cal. Rptr. 262 (1969), the court had before it the question of action by the Public Utilities Commission in determining placement of grade crossings. The court in this case clearly pointed out the exclusive jurisdiction provisions of the Public Utilities Commission stating:

Since the year 1911, the Public Utilities Commission has had exclusive jurisdiction to establish or abolish public grade crossings. Such powers were conferred upon the commission in Sections 1201 and 1202 of the Public Utilities Code of the State of California.

The only reasonable conclusion must be that a grade crossing cannot be legally created unless the approval of the Public Utilities Commission has been first secured (City of San Mateo v. Railroad Com., 9 Cal. 2d 1, 3 [68 P. 2d 713])

In City of Union City v. Southern Pac. Co., 261 Cal. App. 2d 777, 67 Ca. Rptr. 816 (1968), it was pointed out that the subject of railroad grade crossing is clearly a matter of statewide concern and that not only is there the positive grant of power to the Public Utilities Commission in this area but that, under Public Utilities Code Section 1759, there is a statutory denial of jurisdiction to all courts of this state, except the Supreme Court, to review, revise, correct, or annul the orders of the Commission.

Although Section 1247(1) would appear, on its fact also to provide for a court determination where crossing of two streets or crossing of streets by highways is involved, it is quite clear that, under existing law, the court does not have jurisdiction to regulate and determine the place and manner of making crossing where condemnation for these purposes is involved. Streets and Highways Code Section 102 provides for condemna-

tion for state highway purposes only after the adoption by the Commission of a resolution declaring that the public interest and necessity require the acquisition of the property and the construction of the improvement. Such resolution of necessity is made conclusive evidence of necessity under § 103. With regard to condemnation for streets by local entities, a number of code sections have made the determination by the local legislative body, i.e., the city council or board of supervisors conclusive. C.C.P. § 1241(2); Sts. & Hwys. Code §§ 489, 6121.

Once a legislative body had made a final determination on the question of necessity, there is a conclusive presumption which may not be attacked in the courts. People v. Chevalier, 52 Cal. 2d 299, 340 P. 2d 598 (1959).

The taking of property for use as a public street or highway is clearly a taking for an established public use. Rindge Co. v. County of Los Angeles, 262 U.S. 700, 706, 43 8 Ct. 689 (1922). Thus under present law the courts do not in fact consider these questions.

It is therefore recommended that Section 1247(1) be amended to delete the provisions giving the court the power to regulate the place and manner of making connections and crossings.

Code of Civil Procedure Sections 1248(5) and 1251 raise several problems requiring legislative solution. Section 1248 provides as follows:

The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceeding, and thereupon must ascertain and assess:

. . .

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences, along the line of such railroad, and the cost of cattle guards, where fences may cross the line of such railroad; and such court, jury or referee

shall also determine the necessity for and designate the number, place and manner of making such farm or private crossings as are reasonably necessary or proper to connect the parcels of land severed by the easement condemned, or for ingress to or egress from the lands remaining after the taking of the part thereof sought to be condemned, and shall ascertain and assess the cost of the construction and maintenance of such crossings;

and Section 1251 in pertinent part states:

In case the use is for railroad purposes, the plaintiff may, at the time of or before payment, elect to build the farm or private crossings, fences and cattle guards; and if he so elect, shall execute to the defendant a bond, with sureties to be approved by the court in double the assessed cost of the same, to build such farm or private crossings, fences and cattle guards within eighteen months from the time the railroad is built on the land taken, and if such bond be given, need not pay the cost of such farm or private crossings, fences and cattle guards. In an action on such bond, the plaintiff may recover reasonable attorney's fees.

The questions to which these sections give rise are whether they establish an obligation on the part of the railroad to erect fences and crossings, and if so, whether the sections belong in the general laws regarding procedure in eminent domain cases.

To the extent that these provisions merely reiterate the right of defendant to collect for diminution of his property value because the taking gives rise to a need for construction of fences or crossings, the provisions are unnecessary and confusing. Such matters clearly are part of normal severance damages to be determined by the judicial process as dealt with under Section 1248(2). See *Butte County v. Boydston*, 64 Cal. 110, 29 Pac. 511 (1883) (cost of fencing upheld, as a proper element of damages); *California Southern R.R. v. Southern Pac. R.R.*, 67 Cal. 59, 7 Pac. 153 (1885).

Sections 1248(5) and 1251 have been treated, however, as giving rise to quite a separate obligation--an obligation of the railroad to

construct fences and crossings even when, without such construction, there is no diminution in the value of defendant's property. In California So. R.R. v. Southern Pac. R.R., 67 Cal. 59, 7 Pac. 123 (1885), the defendant argued that Section 1251 was invalid since article 1, § 14 of the Constitution required compensation to be paid in money prior to the appropriation. The court stated that this would be true to the extent that the cost of construction awarded might be part of the damages for diminution of property value; but since no evidence of such diminution had been introduced, the award for construction arose from a special statutory duty of railroads under Section 1248 and the constitutional provision was inapplicable.

Since Section 1248 is designed to govern procedure generally in eminent domain cases, it is an inappropriate place for the establishment of a special substantive duty which is, strictly speaking, not part of eminent domain law. Such provisions obviously belong in those sections of the Public Utilities Code governing the operation of railroads. Indeed, insofar as crossings are concerned, Section 7537 is a comprehensive provision, giving authority to the Public Utilities Commission as follows:

The owner of any lands along or through which any railroad is constructed or maintained, may have such farm or private crossings over the railroad and railroad right-of-way as are reasonably necessary or convenient for ingress or egress from such lands, or in order to connect such lands with other adjacent lands of the owner. The owner or operator of the railroad shall construct and at all times maintain such farm or private crossing in a good, safe, and passable condition. The commission shall have the authority to determine the necessity for any crossing and the place, manner, and conditions under which the crossing shall be constructed and maintained, and shall fix and assess the cost and expense thereof.

And Sections 7626-31 treat the matter of fencing in detail. Thus Section 7626 provides a general duty to fence in order to protect livestock, and Section 7628 gives the commission power, on application of a livestock

owner, to order a fence to be constructed and maintained. Sections 7626 and 7627 prescribe in detail the sanctions to be applied when a failure to fence results in livestock damage.

Given such comprehensive treatment in the Public Utility Code, those special railroad provisions in Civil Procedure Code §§ 1248(5) and 1251 should be deleted. Even if they remain, it seems clear that they will no longer be considered a source of an absolute, independent right to have fences and crossings built. The widespread comprehensive powers given to the commission strongly imply that it alone should be able to order such construction. See *People v. Lundy*, 238 Cal. App. 2d 354, 47 Cal. Rptr. 694 (1965).

Note that deletion will not in any way eliminate the right of defendant to collect proper severance damages for diminution of value where there are no commission rulings or where commission orders regarding fences or crossings do not restore defendant's property to its prior value. Section 7627 of the Public Utilities Code recognizes the relationship between the right to compensation and the separate obligation to fence as follows:

A railroad corporation that pays to the owner of the land through or along which its road is located an agreed price for making and maintaining a good and sufficient fence, or that pays the cost of such fence with the award of damages allowed for the right-of-way for the railroad, is relieved and exonerated from all claims for damages arising out of the killing or maiming of any animals or persons who thus fail to construct and maintain the fence. . . .

See also *People v. Lundy*, 238 Cal. App. 2d 354, 47 Cal. Rptr. 694 (1965) (suit for compensation due to loss of a license to cross a right-of-way); *People v. Chastain*, 180 Cal. App. 2d 805, 4 Cal. Rptr. 785 (1960).

Note that if the recommended changes are made in §§ 1248 and

1251, a conforming change in § 1257 will be required.

Section 1248a provides as follows:

In any proceeding taken under the provisions of this title, where any railroad, street or interurban railway tracks are situated on, upon, along or across any lands or rights-of-way sought to be taken therein, for road, highway, boulevard, street or alley purposes, or for the purposes of a right-of-way for any public utility to be constructed, completed and maintained by a county, city and county, or any incorporated city or town, or by a municipal water district, the plaintiff shall, if the complaint contains a prayer therefor, and shows the matter herein-after provided, obtain a final judgment of condemnation ordering, in addition to the condemnation of such lands or right-of-way for the purposes set forth in the complaint, the relocation or removal of any railroad, street or interurban railway tracks thereon. Where the removal or relocation of such tracks is sought in any such proceedings, the complaint must contain a description of the location and proposed location of such tracks, and must be accompanied by a map showing such location and the proposed location of such tracks. The compensation to be paid for such relocation or removal of tracks shall be ascertained and assessed in the action, as in other cases, and separately from other sources of damage.

This section was added to the code in 1911 at the same time that Section 1248 was amended to add "6." as follows:

The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

. . .

6. If the removal, alteration or relocation of structures or improvements is sought, the cost of such removal, alteration or relocation and the damages, if any, which will accrue by reason thereof;

. . .

The precise need for Section 1248a is unclear. Except as to the required description of the proposed location, Section 1248(6) seems fully to cover the matter, since railroad tracks certainly qualify as structures or improvements, and there seems no reason why a specific description is necessary under 1248a when it is not under 1248(6). The question of damages

in any such case will, of course, depend on the nature of the relocation sought. No court decision has been based on Section 1248a, and there is no reason whatsoever for its retention. Accordingly it should be repealed.