

No. S289391

IN THE CALIFORNIA SUPREME COURT

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TOWN OF APPLE VALLEY  
*Plaintiff and Appellant,*

vs.

APPLE VALLEY RANCHOS WATER et al.  
*Defendants and Respondents.*

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MOTION FOR JUDICIAL NOTICE IN SUPPORT OF BRIEF OF  
AMICUS CURIAE GOLDEN STATE WATER COMPANY

FILE 2 OF 5, VOLUME 2, PP. 102-244, EXHIBITS 5-14

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Court of Appeal, Fourth Appellate District, Division 2  
No. E078348

San Bernardino County Superior Court No. CIVDS1600180  
The Honorable Donald R. Alvarez

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GOLDEN STATE WATER COMPANY

Section 2821) of Chapter 3 of Part 5 of Division 1 of the Revenue and Taxation Code notwithstanding any provision in such article to the contrary.

1268.430. (a) If the defendant has paid any amount for which, as between the plaintiff and defendant, the plaintiff is liable under this article, the plaintiff shall pay to the defendant a sum equal to such amount.

(b) The amount the defendant is entitled to be paid under this section shall be claimed in the manner provided for claiming costs and at the following times:

(1) If the plaintiff took possession of the property prior to judgment, at the time provided for claiming costs.

(2) If the plaintiff did not take possession of the property prior to judgment, not later than 30 days after the plaintiff took title to the property.

#### Article 6. Abandonment

1268.510. (a) At any time after the filing of the complaint and before the expiration of 30 days after final judgment, the plaintiff may wholly or partially abandon the proceeding by serving on the defendant and filing in court a written notice of such abandonment.

(b) The court may, upon motion made within 30 days after the filing of such notice, set the abandonment aside if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

(c) Upon denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, the court shall, on motion of any party, enter judgment wholly or partially dismissing the proceeding.

#### Article 7. Litigation Expenses and Damages Upon Dismissal or Defeat of Right to Take

1268.610. (a) Subject to subdivision (b), the court shall award the defendant his litigation expenses whenever:

(1) The proceeding is wholly or partly dismissed for any reason; or

(2) Final judgment in the proceeding is that the plaintiff cannot acquire property it sought to acquire in the proceeding.

(b) Where there is a partial dismissal or a final judgment that the plaintiff cannot acquire a portion of the property originally sought to be acquired, or a dismissal of one or more plaintiffs pursuant to Section 1260.020, the court shall award the defendant only those litigation expenses, or portion thereof, that would not have been incurred had the property sought to be acquired following the dismissal or judgment been the property originally sought to be



acquired.

(c) Litigation expenses under this section shall be claimed in and by a cost bill to be prepared, served, filed, and taxed as in a civil action. If the proceeding is dismissed upon motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of judgment.

1268.620. If, after the defendant moves from property in compliance with an order or agreement for possession or in reasonable contemplation of its taking by the plaintiff, the proceeding is dismissed with regard to that property for any reason or there is a final judgment that the plaintiff cannot acquire that property, the court shall:

(a) Order the plaintiff to deliver possession of the property to the persons entitled to it; and

(b) Make such provision as shall be just for the payment of all damages proximately caused by the proceeding and its dismissal as to that property.

#### Article 8. Costs

1268.710. The defendants shall be allowed their costs, including the costs of determining the apportionment of the award made pursuant to subdivision (b) of Section 1260.220, except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.

1268.720. Unless the court otherwise orders, whether or not he is the prevailing party, the defendant in the proceeding shall be allowed his costs on appeal. This section does not apply to an appeal involving issues between defendants.

#### CHAPTER 12. ARBITRATION OF COMPENSATION IN ACQUISITIONS OF PROPERTY FOR PUBLIC USE

1273.010. (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 behalf of the public entity or to compromise or settle a claim arising from the taking or damaging of the entity's property.

1273.020. (a) Notwithstanding Sections 1283.2 and 1284.2, 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 chapter 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.

1273.030. (a) Except as specifically provided in this chapter, agreements authorized by this chapter are subject to Title 9 (commencing with Section 1280) of this part.

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

(c) Notwithstanding Section 1281.4, an agreement authorized by this chapter 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 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 chapter is not defeated or impaired by contention or 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.

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

1273.040. (a) Except as provided in subdivision (b), an agreement authorized by this chapter 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, 1288.2, and 1290.6.

(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.

1273.050. (a) An agreement authorized by this chapter 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 chapter. 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.

SEC. 3. Section 1240.680 is added to the Code of Civil Procedure, to read:

1240.680. (a) Subject to Sections 1240.690 and 1240.700, notwithstanding any other provision of law, property is presumed to have been appropriated for the best and most necessary public use if the property is appropriated to public use as any of the following:

(1) A state, regional, county, or city park, open space, or recreation area.

(2) A wildlife or waterfowl management area established by the Department of Fish and Game pursuant to Section 1525 of the Fish and Game Code.

(3) A historic site included in the National Register of Historic Places or state-registered landmarks.

(4) An ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code.

(b) The presumption established by this section is a presumption



affecting the burden of proof.

SEC. 4. Section 1240.700 is added to the Code of Civil Procedure, to read:

1240.700. (a) When property described in Section 1240.680 is sought to be acquired for city or county road, street, or highway purposes, and such property was dedicated or devoted to regional park, recreational, or open-space purposes prior to the initiation of road, street, or highway route location studies, an action for declaratory relief may be brought in the superior court by the regional park district which operates the park, recreational, or open-space area to determine the question of which public use is the best and most necessary public use for such property.

(b) The action for declaratory relief shall be filed and served within 120 days after the city or county, as the case may be, has published in a newspaper of general circulation pursuant to Section 6061 of the Government Code, and delivered to the regional park district, a written notice that a proposed route or site or an adopted route includes such property.

(c) With respect to property dedicated or devoted to regional park, recreational, or open-space purposes which is sought to be acquired for city or county road, street, or highway purposes:

(1) If an action for declaratory relief is not filed and served within the 120-day period established by subdivision (b), the right to bring such action is waived and the provisions of Section 1240.680 do not apply.

(2) When a declaratory relief action may not be brought pursuant to this section, the provisions of Section 1240.680 do not apply.

SEC. 5. Sections 3 and 4 of this act shall become operative only if Assembly Bill No. 1164 of 1975-76 Regular Session is chaptered and becomes effective January 1, 1976, and in such case Sections 1240.680 and 1240.700, respectively, as added to the Code of Civil Procedure by Section 2 of this act, shall not become operative.

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## CHAPTER 1276

An act to amend Section 2 of, and to repeal Section 23 of, the American River Flood Control District Act (Chapter 808 of the Statutes of 1927), to amend Section 7.5 of Chapter 641 of the Statutes of 1931, to amend Section 3 of the Lassen-Modoc County Flood Control and Water Conservation District Act (Chapter 2127 of the Statutes of 1959), to amend Sections 2 and 16 of, and to repeal Sections 16½, 16¾, and 16¾ of, the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915), to amend Sections 260 and 650 of the Madera County Flood Control and Water Conservation Agency Act (Chapter 916 of the Statutes of 1969), to amend Section 3 of the Mendocino County Flood Control and Water Conservation District Act (Chapter 995 of the Statutes of 1949), to



ASSEMBLY BILL

No. 11

Introduced by Assemblyman McAlister

December 2, 1974

REFERRED TO COMMITTEE ON JUDICIARY

*An act to add Title 7 (commencing with Section 1230.010) to, and to repeal Title 7 (commencing with Section 1237) of, Part 3 of the Code of Civil Procedure, relating to acquisition of property for public use.*

LEGISLATIVE COUNSEL'S DIGEST

AB 11, as introduced, McAlister (Jud.). Eminent domain.

This bill, to be operative July 1, 1977, revises existing statutory provisions relating to eminent domain, to make substantive and clarifying changes, to incorporate recommendations of the California Law Revision Commission, including the following changes:

(1) Under existing law, various public agencies are required to adopt resolutions of public necessity before exercising the power of condemnation.

This bill extends the requirement to all public agencies with a uniform procedure to be followed, except as otherwise provided for specified entities.

(2) Existing law does not prescribe any procedures for the condemnation of property for future use.

This bill makes specific provision for such condemnation.

(3) Under existing law various public agencies are specifically authorized to condemn property in exchange for property needed for public use.

This bill would provide a procedure, applicable to public

agencies generally, to accomplish such condemnation.

(4) Under existing law a condemnor could acquire possession of the property upon deposit of money prior to judgment of condemnation only if the property is to be taken for right-of-way, or reservoir purposes.

This bill would expand such authorization to all public agencies, specify procedures therefor, with various safeguards provided, including restrictions in cases of hardship.

(5) Under existing law a condemnor may, prior to condemnation, enter property for purposes of surveys and tests, subject to damages for injury, including court costs and reasonable attorneys fees.

This bill limits the award of attorneys' fees to cases where the entry is unlawful or if the condemnor acts abusively or lacking in due regard for the owner, or substantially fails to comply with a court order.

This bill, however, expands the recovery in such cases to include recovery for expenses of litigation, as defined.

(6) Existing law contains various provisions relating to the condemnation of property of little market value which remains after a partial condemnation.

This bill provides a general procedure for such condemnation.

(7) Under existing law a procedure is specified to determine priorities in condemnation devoted to a public use.

This bill makes various changes in such procedures, including the requirement of joint use of property sought to be condemned upon various conditions of compatibility.

(8) Under existing law provision is made to provide procedures for the discovery of evidence in eminent domain proceedings.

This bill makes several changes in the procedures, including discovery without court order in certain situations.

(9) Under existing law compensation is awarded on the basis of the value of property at the time of the issuance of summons or, in certain cases, at the date of trial.

This bill substitutes the date of commencement of the action for the date of summons issue as the date at valuation, authorizes a valuation date based on the date of court deposit of probable compensation for the property, makes specific

provision for a valuation date in case of a new trial, and makes other changes.

(10) Under existing law no provision is made to make compensable "business good will" in condemnation awards.

This bill makes provision for such compensation.

(11) Under existing law certain fixed equipment designed for manufacturing or industrial purposes in land to be condemned is included in determining compensation.

This bill would extend the compensation to any facility, machinery or equipment which cannot be removed without a substantial economic loss in value or without substantial damages to the condemned land.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Title 7 (commencing with Section 1237)  
2 of Part 3 of the Code of Civil Procedure is repealed.

3 SEC. 2. Title 7 (commencing with Section 1230.010) is  
4 added to Part 3 of the Code of Civil Procedure, to read:

5  
6 TITLE 7. EMINENT DOMAIN LAW

7  
8 CHAPTER 1. GENERAL PROVISIONS

9  
10 1230.010. This title shall be known and may be cited  
11 as the Eminent Domain Law.

12 1230.020. Except as otherwise specifically provided by  
13 statute, the power of eminent domain may be exercised  
14 only as provided in this title.

15 1230.030. Nothing in this title requires that the power  
16 of eminent domain be exercised to acquire property  
17 necessary for public use. Whether property necessary for  
18 public use is to be acquired by purchase or other means  
19 or by eminent domain is a decision left to the discretion  
20 of the person authorized to acquire the property.

21 1230.040. Except as otherwise provided in this title,  
22 the rules of practice that govern civil actions generally  
23 are the rules of practice for eminent domain proceedings.

AMENDED IN ASSEMBLY APRIL 28, 1975

AMENDED IN ASSEMBLY APRIL 10, 1975

CALIFORNIA LEGISLATURE—1975-76 REGULAR SESSION

**ASSEMBLY BILL**

**No. 11**

Introduced by Assemblyman McAlister

December 2, 1974

REFERRED TO COMMITTEE ON JUDICIARY

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AB 11, as amended, McAlister (Jud.). Eminent domain. This bill, to be operative July 1, 1977, with specified exceptions for actions commenced prior to such date, revises existing statutory provisions relating to eminent domain, to make substantive and clarifying changes, to incorporate recommendations of the California Law Revision Commission, including the following changes:

(1) Under existing law, various public agencies are required to adopt resolutions of public necessity before exercising the power of condemnation.

This bill extends the requirement to all public agencies with a uniform procedure to be followed, except as otherwise provided for specified entities.

(2) Existing law does not prescribe any procedures for the condemnation of property for future use.

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This bill would provide a procedure, applicable to public agencies generally, to accomplish such condemnation.

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(8) Under existing law provision is made to provide procedures for the discovery of evidence in eminent domain proceedings.

This bill makes several changes in the procedures, including discovery without court order in certain situations.

(9) Under existing law compensation is awarded on the basis of the value of property at the time of the issuance of summons or, in certain cases, at the date of trial.

This bill substitutes the date of commencement of the action for the date of summons issue as the date at valuation, authorizes a valuation date based on the date of court deposit of probable compensation for the property, makes specific provision for a valuation date in case of a new trial, and makes other changes.

(10) Under existing law no provision is made to make compensable "business good will" in condemnation awards.

This bill makes provision for such compensation.

(11) Under existing law certain fixed equipment designed for manufacturing or industrial purposes in land to be condemned is included in determining compensation.

This bill would extend the compensation to any facility, machinery or equipment which cannot be removed without a substantial economic loss in value or without substantial damages to the condemned land.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

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8 CHAPTER 1. GENERAL PROVISIONS

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10 1230.010. This title shall be known and may be cited  
11 as the Eminent Domain Law.

12 1230.020. Except as otherwise specifically provided by  
13 statute, the power of eminent domain may be exercised  
14 only as provided in this title.

15 1230.030. Nothing in this title requires that the power  
16 of eminent domain be exercised to acquire property  
17 necessary for public use. Whether property necessary for  
18 public use is to be acquired by purchase or other means  
19 or by eminent domain is a decision left to the discretion



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

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

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

8 *1245.235. (a) The governing body of a local public  
9 entity may adopt a resolution of necessity only after the  
10 governing body has held a hearing at which persons  
11 whose property is to be acquired by eminent domain  
12 have had a reasonable opportunity to appear and be  
13 heard.*

14 *(b) Notice of the hearing shall be sent by first-class  
15 mail to each person whose property is to be acquired by  
16 eminent domain if the name and address of the person  
17 appears on the last equalized county assessment roll  
18 (including the roll of state-assessed property). The notice  
19 shall state the time, place, and subject of the hearing and  
20 shall be mailed at least 15 days prior to the date of the  
21 hearing.*

22 *1245.240. Unless a greater vote is required by statute,  
23 charter, or ordinance, the resolution shall be adopted by  
24 a vote of a majority two-thirds of all the members of the  
25 governing body of the public entity.*

26 *1245.250. (a) Except as otherwise provided by  
27 statute, a resolution of necessity adopted by the  
28 governing body of the public entity pursuant to this  
29 article conclusively establishes the matters referred to in  
30 Section 1240.030.*

31 *(b) If the taking is by a local public entity and the  
32 property described in the resolution is not located  
33 entirely within the boundaries of the local public entity,  
34 the resolution of necessity creates a presumption that the  
35 matters referred to in Section 1240.030 are true. This  
36 presumption is a presumption affecting the burden of  
37 producing evidence.*

38 *(c) For the purposes of subdivision (b), a taking by the  
39 State Reclamation Board for the Sacramento and San  
40 Joaquin Drainage District is not a taking by a local public*

1 entity.

2 *1245.255. A resolution of necessity does not have the  
3 effect prescribed in Section 1245.250 to the extent that its  
4 adoption or contents were influenced or affected by  
5 abuse of discretion or arbitrary or capricious action by the  
6 governing body. Nothing in this section precludes a  
7 public entity from rescinding a resolution of necessity  
8 and adopting a new resolution as to the same property  
9 subject to the same consequences as a conditional  
10 dismissal of the proceeding under Section 1260.120.*

11 *1245.260. (a) If a public entity has adopted a  
12 resolution of necessity but has not commenced an  
13 eminent domain proceeding to acquire the property  
14 within six months after the date of adoption of the  
15 resolution, the property owner may, by an action in  
16 inverse condemnation, do either or both of the following:*

17 *(1) Require the public entity to take the property and  
18 pay compensation therefor.*

19 *(2) Recover damages from the public entity for any  
20 interference with the possession and use of the property  
21 resulting from adoption of the resolution.*

22 *(b) No claim need be presented against a public entity  
23 under Part 3 (commencing with Section 900) of Division  
24 3.6 of Title 1 of the Government Code as a prerequisite  
25 to commencement or maintenance of an action under  
26 subdivision (a), but any such action shall be commenced  
27 within one year and six months after the date the public  
28 entity adopted the resolution of necessity.*

29 *(c) A public entity may commence an eminent  
30 domain proceeding or rescind a resolution of necessity as  
31 a matter of right at any time before the property owner  
32 commences an action under this section. If the public  
33 entity commences an eminent domain proceeding or  
34 rescinds the resolution of necessity before the property  
35 owner commences an action under this section, the  
36 property owner may not thereafter bring an action under  
37 this section.*

38 *(d) After a property owner has commenced an action  
39 under this section, the public entity may rescind the  
40 resolution of necessity and abandon the taking of the*



AMENDED IN SENATE AUGUST 5, 1975  
AMENDED IN ASSEMBLY MAY 22, 1975  
AMENDED IN ASSEMBLY MAY 13, 1975  
AMENDED IN ASSEMBLY APRIL 28, 1975  
AMENDED IN ASSEMBLY APRIL 10, 1975

CALIFORNIA LEGISLATURE—1975-76 REGULAR SESSION

**ASSEMBLY BILL**

**No. 11**

Introduced by Assemblyman McAlister

December 2, 1974

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Title 7 (commencing with Section 1230.010) to, and to repeal Title 7 (commencing with Section 1237) of, Part 3 of the Code of Civil Procedure, relating to acquisition of property for public use.

LEGISLATIVE COUNSEL'S DIGEST

AB 11, as amended, McAlister (Jud.). Eminent domain.

This bill, to be operative July 1, ~~1977~~ 1976, with specified exceptions for actions commenced prior to such date, revises existing statutory provisions relating to eminent domain, to make substantive and clarifying changes, to incorporate recommendations of the California Law Revision Commission, including the following changes:

(1) Under existing law, various public agencies are required to adopt resolutions of public necessity before exercising the power of condemnation.

This bill extends the requirement to all public agencies with



11 - 11

a uniform procedure to be followed, except as otherwise provided for specified entities.

(2) Existing law does not prescribe any procedures for the condemnation of property for future use.

This bill makes specific provision for such condemnation.

(3) Under existing law various public agencies are specifically authorized to condemn property in exchange for property needed for public use.

This bill would provide a procedure, applicable to public agencies generally, to accomplish such condemnation.

(4) Under existing law a condemnor could acquire possession of the property upon deposit of money prior to judgment of condemnation only if the property is to be taken for right-of-way, or reservoir purposes.

This bill would expand such authorization to all public agencies, specify procedures therefor, with various safeguards provided, including restrictions in cases of hardship.

(5) Under existing law a condemnor may, prior to condemnation, enter property for purposes of surveys and tests, subject to damages for injury, including court costs and reasonable attorneys fees.

This bill limits the award of attorneys' fees to cases where the entry is unlawful or if the condemnor acts abusively or lacking in due regard for the owner, or substantially fails to comply with a court order.

This bill, however, expands the recovery in such cases to include recovery for expenses of litigation, as defined.

(6) Existing law contains various provisions relating to the condemnation of property of little market value which remains after a partial condemnation.

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This bill makes various changes in such procedures, including the requirement of joint use of property sought to be condemned upon various conditions of compatibility.

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(9) Under existing law compensation is awarded on the basis of the value of property at the time of the issuance of summons or, in certain cases, at the date of trial.

This bill substitutes the date of commencement of the action for the date of summons issue as the date at valuation, authorizes a valuation date based on the date of court deposit of probable compensation for the property, makes specific provision for a valuation date in case of a new trial, and makes other changes.

(10) Under existing law no provision is made to make compensable "business good will" in condemnation awards.

This bill makes provision for such compensation.

(11) Under existing law certain fixed equipment designed for manufacturing or industrial purposes in land to be condemned is included in determining compensation.

This bill would extend the compensation to any facility, machinery or equipment which cannot be removed without a substantial economic loss in value or without substantial damages to the condemned land.

*This bill would authorize extraterritorial condemnation by local public entities for specified purposes if they are authorized to acquire property by eminent domain for the purposes for which the property is to be acquired.*

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Title 7 (commencing with Section 1237)
- 2 of Part 3 of the Code of Civil Procedure is repealed.
- 3 SEC. 2. Title 7 (commencing with Section 1230.010) is
- 4 added to Part 3 of the Code of Civil Procedure, to read:



1 reasonable identification.

2 (c) A declaration that the governing body of the  
3 public entity has found and determined each of the  
4 following:

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

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

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

12 1245.235. (a) The governing body of ~~a local~~ *the*  
13 public entity may adopt a resolution of necessity only  
14 after the governing body has ~~held a hearing at which~~  
15 ~~persons given each person~~ *whose property is to be*  
16 *acquired by eminent domain have had and whose name*  
17 *and address appears on the last equalized county*  
18 *assessment roll notice and a reasonable opportunity to*  
19 *appear and be heard on the matters referred to in Section*  
20 *1240.030.*

21 ~~(b) Notice of the hearing shall be sent by first-class~~  
22 ~~mail to each person whose property is to be acquired by~~  
23 ~~eminent domain if the name and address of the person~~  
24 ~~appears on the last equalized county assessment roll~~  
25 ~~(including the roll of state/assessed property). The notice~~  
26 ~~shall state the time, place, and subject of the hearing and~~  
27 ~~shall be mailed at least 15 days prior to the date of the~~  
28 ~~hearing.~~

29 *(b) The notice required by subdivision (a) shall be*  
30 *sent by first-class mail to each person described in*  
31 *subdivision (a) and shall state all of the following:*

32 *(1) The intent of the governing body to adopt the*  
33 *resolution.*

34 *(2) The right of such person to appear and be heard on*  
35 *the matters referred to in Section 1240.030.*

36 *(3) Failure to file a written request to appear and be*  
37 *heard within 15 days after the notice was mailed will*  
38 *result in waiver of the right to appear and be heard.*

39 *(c) The governing body shall hold a hearing at which*  
40 *all persons described in subdivision (a) who filed a*

1 *written request within 15 days after the notice prescribed*  
2 *in subdivision (b) was mailed may appear and be heard*  
3 *on the matters referred to in Section 1240.030. The*  
4 *governing body need not give an opportunity to appear*  
5 *and be heard to any person who fails to so file a written*  
6 *request.*

7 *(d) Notwithstanding subdivision (b), the governing*  
8 *body may satisfy the requirements of this section through*  
9 *any other procedure that has given each person*  
10 *described in subdivision (a) reasonable written personal*  
11 *notice and a reasonable opportunity to appear and be*  
12 *heard on the matters referred to in Section 1240.030.*

13 1245.240. Unless a greater vote is required by statute,  
14 charter, or ordinance, the resolution shall be adopted by  
15 a vote of two-thirds of all the members of the governing  
16 body of the public entity.

17 1245.250. (a) Except as otherwise provided by  
18 statute, a resolution of necessity adopted by the  
19 governing body of the public entity pursuant to this  
20 article conclusively establishes the matters referred to in  
21 Section 1240.030.

22 (b) If the taking is by a local public entity and the  
23 property described in the resolution is not located  
24 entirely within the boundaries of the local public entity,  
25 the resolution of necessity creates a presumption that the  
26 matters referred to in Section 1240.030 are true. This  
27 presumption is a presumption affecting the burden of  
28 producing evidence.

29 (c) For the purposes of subdivision (b), a taking by the  
30 State Reclamation Board for the Sacramento and San  
31 Joaquin Drainage District is not a taking by a local public  
32 entity.

33 1245.255. A resolution of necessity does not have the  
34 effect prescribed in Section 1245.250 to the extent that its  
35 adoption or contents were influenced or affected by *gross*  
36 *abuse of discretion or arbitrary or capricious action* by the  
37 governing body. Nothing in this section precludes a  
38 public entity from rescinding a resolution of necessity  
39 and adopting a new resolution as to the same property  
40 subject to the same consequences as a conditional

1 dismissal of the proceeding under Section 1260.120.  
 2 ~~1245.257. Notwithstanding any other provision of law,~~  
 3 ~~a resolution of necessity does not have the effect~~  
 4 ~~prescribed in Section 1245.250 if all or a portion of the~~  
 5 ~~parcel of property sought to be taken by eminent domain~~  
 6 ~~is being taken with a view to selling, leasing or otherwise~~  
 7 ~~transferring it to a private person and the public entity~~  
 8 ~~adopting the resolution plans to retain in public~~  
 9 ~~possession less than 51 percent of the total area of such~~  
 10 ~~parcel; and more than 51 percent of the gross receipts~~  
 11 ~~that will be generated from such parcel and any~~  
 12 ~~improvements thereon will come from that portion of the~~  
 13 ~~parcel which is to be sold, leased or otherwise transferred~~  
 14 ~~to the private person.~~

15 1245.260. (a) If a public entity has adopted a  
 16 resolution of necessity but has not commenced an  
 17 eminent domain proceeding to acquire the property  
 18 within six months after the date of adoption of the  
 19 resolution, the property owner may, by an action in  
 20 inverse condemnation, do either or both of the following:

21 (1) Require the public entity to take the property and  
 22 pay compensation therefor.

23 (2) Recover damages from the public entity for any  
 24 interference with the possession and use of the property  
 25 resulting from adoption of the resolution.

26 (b) No claim need be presented against a public entity  
 27 under Part 3 (commencing with Section 900) of Division  
 28 3.6 of Title 1 of the Government Code as a prerequisite  
 29 to commencement or maintenance of an action under  
 30 subdivision (a), but any such action shall be commenced  
 31 within one year and six months after the date the public  
 32 entity adopted the resolution of necessity.

33 (c) A public entity may commence an eminent  
 34 domain proceeding or rescind a resolution of necessity as  
 35 a matter of right at any time before the property owner  
 36 commences an action under this section. If the public  
 37 entity commences an eminent domain proceeding or  
 38 rescinds the resolution of necessity before the property  
 39 owner commences an action under this section, the  
 40 property owner may not thereafter bring an action under

1 this section.

2 (d) After a property owner has commenced an action  
 3 under this section, the public entity may rescind the  
 4 resolution of necessity and abandon the taking of the  
 5 property only under the same circumstances and subject  
 6 to the same conditions and consequences as  
 7 abandonment of an eminent domain proceeding.

8 (e) Commencement of an action under this section  
 9 does not affect any authority a public entity may have to  
 10 commence an eminent domain proceeding, take  
 11 possession of the property pursuant to Article 3  
 12 (commencing with Section 1255.410) of Chapter 6, or  
 13 abandon the eminent domain proceeding.

14 (f) In lieu of bringing an action under subdivision (a)  
 15 or if the limitations period provided in subdivision (b)  
 16 has run, the property owner may obtain a writ of  
 17 mandate to compel the public entity, within such time as  
 18 the court deems appropriate, to rescind the resolution of  
 19 necessity or to commence an eminent domain  
 20 proceeding to acquire the property.

21 1245.270. (a) A resolution of necessity does not meet  
 22 the requirements of this article if the defendant  
 23 establishes by a preponderance of the evidence both of  
 24 the following:

25 (1) A member of the governing body who voted in  
 26 favor of the resolution received or agreed to receive a  
 27 bribe (as that term is defined in subdivision 6 of Section  
 28 7 of the Penal Code) involving adoption of the resolution.

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

31 (b) Where there has been a prior criminal prosecution  
 32 of the member for the conduct described in paragraph  
 33 (1) of subdivision (a), proof of conviction shall be  
 34 conclusive evidence that the requirement of paragraph  
 35 (1) of subdivision (a) is satisfied, and proof of acquittal or  
 36 other dismissal of the prosecution shall be conclusive  
 37 evidence that the requirement of paragraph (1) of  
 38 subdivision (a) is not satisfied. Where there is a pending  
 39 criminal prosecution of the member for the conduct  
 40 described in paragraph (1) of subdivision (a), the court



Volume 3

# Journal of the Assembly

Legislature of the State of California

1975-76 Regular Session

December 2, 1974, to November 30, 1976



HON. LEO T. McCARTHY  
Speaker

HON. LOUIS J. PAPAN  
Speaker pro Tempore

HON. PAULINE L. DAVIS  
Assistant Speaker pro Tempore

HON. HOWARD L. BERMAN  
Majority Floor Leader

HON. ROBERT G. BEVERLY  
Minority Floor Leader

JAMES D. DRISCOLL  
Chief Clerk of the Assembly



**Senate Bill No. 49**—An act to repeal and add Part 2.5 (commencing with Section 34700) of Division 24 of the Health and Safety Code, relating to housing, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

Bill read third time, and presented by Mr. Lanterman.

**Urgency Clause**

Urgency clause read, and adopted by the following vote:

**AYES—73**

Alatorre	Craven	Keysor	Perino
Arnett	Cullen	Lancaster	Priolo
Badham	Davis	Lanterman	Ralph
Bane	Deddeh	Lewis	Robinson
Bannai	Dixon	Lockyer	Rosenthal
Berman	Duffy	MacDonald	Siegler
Beverly	Egeland	Maddy	Sieroty
Boatwright	Fenton	McAlister	Suitt
Briggs	Foran	McVittie	Thomas, Vincent
Brown	Garamendi	Meade	Thomas, William
Burke	Goggin	Miller	Thurman
Calvo	Greene	Mobley	Vasconcellos
Campbell	Gualco	Montoya	Vicencia
Carpenter	Hart	Mori	Warren
Chappie	Hayden	Murphy	Wilson
Chel	Ingalls	Nestande	Wornum
Chimbole	Kapiloff	Nimmo	Z'berg
Cline	Keene	Papan	Mr. Speaker
Collier			

**NOES—None**

The question being on the passage of the bill.

Bill passed by the following vote:

**AYES—73**

Alatorre	Craven	Keysor	Perino
Arnett	Cullen	Lancaster	Priolo
Badham	Davis	Lanterman	Ralph
Bane	Deddeh	Lewis	Robinson
Bannai	Dixon	Lockyer	Rosenthal
Berman	Duffy	MacDonald	Siegler
Beverly	Egeland	Maddy	Sieroty
Boatwright	Fenton	McAlister	Suitt
Briggs	Foran	McVittie	Thomas, Vincent
Brown	Garamendi	Meade	Thomas, William
Burke	Goggin	Miller	Thurman
Calvo	Greene	Mobley	Vasconcellos
Campbell	Gualco	Montoya	Vicencia
Carpenter	Hart	Mori	Warren
Chappie	Hayden	Murphy	Wilson
Chel	Ingalls	Nestande	Wornum
Chimbole	Kapiloff	Nimmo	Z'berg
Cline	Keene	Papan	Mr. Speaker
Collier			

**NOES—None**

Bill ordered transmitted to the Senate.

**BIRTHDAY GREETINGS EXTENDED TO ASSEMBLYMAN ROBINSON**

Mr. McAlister announced that Saturday was the birthday of Assemblyman Richard Robinson, of the 72nd District, whereupon the Members of the Assembly joined in extending wishes and birthday greetings to Mr. Robinson.

**REQUEST FOR UNANIMOUS CONSENT TO PRINT IN JOURNAL**

Mr. Miller was granted unanimous consent that the following letter of transmittal and report of the Judiciary Committee be printed in the Journal:

Assembly Committee on Judiciary

May 19, 1975

*The Honorable Leo McCarthy*

*Speaker of the Assembly*

*State Capitol, Sacramento, California*

Dear Mr. Speaker: On May 14, 1975, the Assembly Judiciary Committee reported Assembly Bills 11, 124, 125, 126, 127, 128, 129, 130, 131, 266 and 278 to the Assembly with the recommendation "do pass."

The Committee herewith submit the report. The Committee believes this report will prove helpful in understanding the intent of the bills.

Respectfully submitted,

JOHN J. MILLER, Chairman  
Assembly Judiciary Committee

**REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY  
ON ASSEMBLY BILLS**

11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278

In order to indicate more fully its intent with respect to Assembly Bills 11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278, the Assembly Committee on Judiciary makes the following report.

Except for the new and revised comments set out below, the comments contained under various sections of Assembly Bills 11, 266, and 278 as set out in *Recommendation of the California Law Revision Commission Proposing The Eminent Domain Law* (December 1974), 12 CAL. L. REVISION COMM'N REPORTS 1601 (1974), reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Assembly Bills 11, 266, and 278.

Except for the revised comment set out below, the comments contained under various sections of Assembly Bills 124, 125, 126, 127, 128, 129, 130, and 131 as set out in *Tentative Recommendation Relating to Condemnation Law and Procedure—Conforming Changes in Special District Statutes* (January 1974), 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974), as revised and supplemented in *Recommendation of the California Law Revision Commission Proposing The Eminent Domain Law, supra*, on pages 2003–2008, reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Assembly Bills 124, 125, 126, 127, 128, 129, 130, and 131.

The following revised and new comments also reflect the intent of the Assembly Committee on Judiciary in approving Assembly Bills 11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278.

ASSEMBLY BILL 11

§ 1230.040. Rules of practice in eminent domain proceedings

**Comment.** Section 1230.040 supersedes Section 1256 and the first portion of former Section 1257 which incorporated Part 2 of the Code of Civil Procedure relating to civil actions. It continues the general principle that eminent domain proceedings are to be governed by the same rules as civil actions generally. See *Felton Water Co. v. Superior Court*, 82 Cal. App. 382, 256 P. 255 (1927). The advantages of having the practice in different proceedings in the courts as nearly uniform as possible is manifest. See Code Commissioners' Note to former Section 1256.

Generally speaking, the rules of practice that govern civil actions may be found in Part 2 (Sections 307-1062a) of this code. However, additional provisions in other portions of the Code of Civil Procedure and many nonstatutory rules of procedure which apply to civil actions generally may also be applicable to eminent domain proceedings. Such general rules of practice are incorporated by Section 1230.040 unless the Eminent Domain Law expressly provides a different rule or application of the general rule that would be inconsistent with the provisions of this title. Cf. *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15 (1924); *City of Santa Rosa v. Fountain Water Co.*, 138 Cal. 579, 582, 71 P. 1123, 1136 (1903) (dissenting opinion). As a rule, the mere fact that a provision of the Code of Civil Procedure utilizes the term "action" rather than "proceeding," or the fact that a provision has not been applied to other special proceedings, does not preclude its applicability in eminent domain proceedings. See *City of Oakland v. Darbee*, 102 Cal. App.2d 493, 227 P.2d 909 (1951). The intent of Section 1230.040 is to include as many rules of practice as would be consistent with the efficient administration of the provisions of this title.

The following summary indicates for some major areas of civil procedure which rules are incorporated by Section 1230.040 and which are displaced by specific provisions of this title.

**Jurisdiction; venue.** Section 1250.010 states the basic rule that eminent domain proceedings are to be conducted in the superior court. This continues the substance of former Section 1243 and creates an exception to Section 89 which would otherwise give jurisdiction in some cases to the municipal court.

Section 1250.020 provides specific rules relating to the place of commencement of an eminent domain proceeding, but Section 1250.040 makes clear that the change of venue provisions for civil actions generally apply as well to eminent domain proceedings.

**Commencement of the proceeding.** Section 1250.110 provides that an eminent domain proceeding is commenced by the filing of a complaint. This duplicates the provisions of Section 411.10 and supersedes a portion of former Section 1243 which provided that eminent domain proceedings were commenced by filing a complaint "and issuing a summons." The filing of a complaint in the proper court confers subject matter jurisdiction on the court. See *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15 (1924); *Bayle-Lacoste & Co. v. Superior Court*, 46 Cal. App.2d 636, 116 P.2d 458 (1941).

**Summons.** The Code of Civil Procedure provisions relating to the form of summons and manner of service apply generally to eminent domain proceedings. See generally Section 412.10 *et seq.* However, subdivision (b) of Section 1250.120 supplements the rules relating to the form of the summons, and Sections 1250.125, 1250.130, and 1250.140 provide additional rules relating to the manner of service. Service of summons is, of course, essential to confer jurisdiction over any defendant, absent a general appearance or waiver by such person. See Section 410.50 (general appearance); *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15 (1924) (waiver).

**Lis pendens.** The plaintiff in an eminent domain proceeding should file a lis pendens after the proceeding is commenced in order to assure that it acquires full title to the property that it seeks. See Sections 409, 1250.130, 1250.150. See also CIVIL CODE § 1214 (every conveyance is void as against any judgment affecting title unless the conveyance is recorded prior to a lis pendens).

Failure of the plaintiff to record a notice of the pendency of the proceeding pursuant to the provisions of Section 409 does not deprive the court of subject matter jurisdiction but may relieve innocent third parties from the operation of a judgment affecting the property in dispute. See *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, 319 (1859); *Housing Authority v. Forbes*, 51 Cal. App.2d 1, 124 P.2d 194 (1942) (dictum). See also former CODE CIV. PROC. § 1243 (duplicating the requirements of Section 409) and *Roach v. Riverside Water Co.*, 74 Cal. 263, 15 P. 776 (1887) (Section 409 applicable to condemnation proceedings).

**Parties.** Although an eminent domain proceeding is a special proceeding, the terms "plaintiff" and "defendant" are utilized throughout the Eminent Domain Law. This usage is consistent with the generally judicial nature of eminent domain proceedings in California as well as with past practice and custom. See former Section 1244(1), (2) (parties styled "plaintiff" and "defendant") and Sections 1250.210 (naming plaintiffs), 1250.220 (naming defendants), 1250.230 (appearance by named and unnamed defendants). See also Section 1063.

In some situations, it is desirable that an eminent domain proceeding have the attributes of a quiet title action and specific provisions of this title accomplish this end. See Sections 1250.120(b), 1250.130 (service by publication), 1250.220 (naming defendants), 1250.230 (appearance by defendants), 1260.240 (court determination of compensation for deceased and unknown persons).

**Pleadings.** Certain requirements for the contents of the complaint and answer in an eminent domain proceeding are specified by Sections 1250.310 and 1250.320 respectively. In addition, Section 1250.330 provides special rules relating to the signing of pleadings where a party is represented by an attorney. Section 1250.325 provides a special disclaimer provision, Section 1250.340 supplements the liberal rules applicable to amendments provided by Section 473, and Section 1250.345 deals with waiver of objections to the complaint. However, many general statutory or court rules relating to pleadings continue to apply; see, e.g., Sections 426.70 and 428.10(b) (cross-complaints), 430.10 *et seq.* and 1250.350 (demurrers and answers), 1003 *et seq.* (motion orders), 1004 *et seq.* (notices); CAL. R. CT., 201 *et seq.*



*Pretrial activities.* Between the time of pleading and trial, there may be many activities specified in and controlled by the Code of Civil Procedure. Although Chapter 7 (commencing with Section 1258.010) provides certain special rules relating to discovery, including the exchange of valuation data, these rules supplement and do not replace the general discovery procedures. See Section 1258.010. The judge may be subject to disqualification due to financial interest or prejudice. Sections 170 and 170.6. See *John Heinlen Co. v. Superior Court*, 17 Cal. App. 660, 121 P. 293 (1911). Section 1260.010 provides a trial preference for eminent domain proceedings; however, Code of Civil Procedure Section 594, which provides generally for setting and action for trial, is not affected. Section 1260.020 provides certain rules relating to the issues of compatibility and "more necessary" use where separate proceedings are consolidated, but this section does not otherwise limit Section 1048. And, of course, the court has the power to grant a continuance where necessary. See, e.g., Section 594a.

*Trial.* Nothing in this title alters the rule provided by Section 19 of Article I of the California Constitution that the issue of compensation to the owner of property shall be determined by a jury unless a jury trial is waived. However, with respect to the method of determining issues other than compensation involved in an eminent domain proceeding, the courts have looked to the rules applicable in actions generally and have held that Section 592 requires that other issues of fact or of mixed fact and law are to be tried by the court. *People v. Ricciardi*, 23 Cal.2d 390, 402-403, 144 P.2d 799, 805-806 (1943); *Vallejo & N.R.R. v. Reed Orchard Co.*, 169 Cal.545, 555-558, 147 P.283, 243-245 (1915). See also Section 1260.120 (court determination of objections to the right to take). The court may submit such other issues to the jury, but the jury's verdict is only advisory and the court must then make its findings thereon. *Vallejo & N.R.R. v. Reed Orchard Co.*, supra. See *California S.R.R. v. Southern Pac. R.R.*, 67 Cal. 59, 7 P. 123 (1885). In addition to adjudicating the right to take, the court may, for example, also decide any subsidiary issues such as liability for property taxes, the rights of parties under an executory sale contract, claims of adverse interests in the property, and the like. See, e.g., *City of San Gabriel v. Pacific Elec. R.R.*, 129 Cal. App. 460, 18 P.2d 996 (1933) (conflicting claims), and *City of Los Angeles v. Darms*, 92 Cal. App. 501, 268 P. 487 (1928) (title to condemned property). See also Sections 1260.240 (court determination of compensation for deceased and unknown persons), 1268.340 (interest to be assessed by the court), 1268.430 (liability for property taxes), and 1268.610 (fixing of litigation expenses), *Sacramento & San Joaquin Drainage Dist. v. Tru-slow*, 125 Cal. App.2d 478, 499, 270 P.2d 928, 941 (1954) (protection of lienholders), and *City of Los Angeles v. Dawson*, 139 Cal. App. 480, 34 P.2d 236 (1934) (construing assignment of right and interest in award). Contrast *California Pac. R.R. v. Central Pac. R.R.*, 47 Cal. 549, 553-554 (1874), and *Yolo Water & Power Co. v. Edmands*, 50 Cal. App. 444, 450, 195 P. 463, 465 (1920) (denying power of court to determine damage to other property of parties). Cf. Section 1250.230 and *City of Alhambra v. Jacob Bean Realty Co.*, 138 Cal. App. 251, 31 P.2d 1052 (1934) (denying right to intervene by third party alleging consequential damages).

During the trial, the court has all its normal and usual powers, including the authority to sever causes of action, particularly as to separate parcels (Section 1048), to control the number of expert witnesses, and to appoint its own expert. See EVID. CODE §§ 352 and 730. However, special rules regarding the order of proof and argument and the burden of proof are provided by Section 1260.210. Other provisions in this title regarding the burden of proof or burden of producing evidence with regard to right to take issues include: Section 1240.230 (future use), 1240.420 (remnants), 1240.520 (compatible public use), 1240.620 (more necessary public use), 1245.250 (effect of properly adopted resolution of necessity).

The substance of the former statutory requirement of separate assessment of damages (and benefits) is continued by Section 1260.230. Compare former Section 1248. In addition, either party may request that the jury, if there be one, be directed to find a special verdict or to find upon particular questions of fact relating to the issue of compensation. See Section 625. After trial of the eminent domain proceeding, judgment must be rendered and entered as in other civil actions. See, e.g., Sections 632 and 668. *Fountain Water Co. v. Dougherty*, 134 Cal. 376, 66 P. 316 (1901). See also Section 1268.030 (final order of condemnation).

*Attacking judgments.* A judgment in an eminent domain proceeding may be attacked in the same manner as judgments in civil actions generally. Relief from default may be obtained. Section 473. Also, equitable relief from judgment on the basis of fraud may be available. See generally, 5 B. WITKIN, CALIFORNIA PROCEDURE *Attack on Judgment in Trial Court* §§ 175-198 at 3744-3770 (2d ed. 1971).

Civil writs may be available to attack interlocutory orders and judgments of the court. See, e.g., *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); *People v. Rodoni*, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966).

The provisions regulating appeals in civil actions apply generally to eminent domain proceedings. See Sections 901-923; *San Francisco Unified School Dist. v. Hong Mow*, 123 Cal. App.2d 668, 267 P.2d 349 (1954).

*Dismissal.* Sections 1260.120 and 1268.510 provide specific grounds for dismissal. However, these grounds are not the exclusive grounds. Certain provisions of the Code of Civil Procedure relating to dismissal are also applicable in eminent domain proceedings. E.g., Section 581a (failure to timely prosecute); Section 583 (failure to timely bring to trial). See *City of Industry v. Gordon*, 29 Cal. App.3d 90, 105 Cal. Rptr. 206 (1972) (the rule stated in this case with respect to the consequences of such a dismissal is altered by Section 1268.610). See also *Dresser v. Superior Court*, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964); *City of San Jose v. Wilcox*, 62 Cal. App.2d 224, 144 P.2d 636 (1944); *Bayle-Lacoste & Co. v. Superior Court*, 46 Cal. App.2d 636, 116 P.2d 468 (1941).



**§ 1230.065. Operative date**

**Comment.** Subdivision (a) of Section 1230.065 delays the operative date of this title until July 1, 1977, to allow sufficient time for interested persons to become familiar with the new law.

Subdivision (b) adopts the policy that this title is to apply to the fullest extent practicable to pending proceedings except those commenced more than six months before the operative date. In most proceedings commenced within six months before the operative date, except perhaps those in trial or awaiting imminent trial, the immediate application of this title would not delay the parties or court in proceeding to judgment. Immediate application moreover, would prevent inconsistencies of result as between proceedings commenced shortly prior to the operative date and those commenced shortly thereafter. The phrase "to the fullest extent practicable" is intended to give the court discretionary power to adapt the application of the title to the circumstances of individual cases, thereby reducing the possibility that immediate application of these provisions to pending litigation might in special cases cause injustice.

Subdivision (c) excludes from application to pending proceedings provisions dealing with the right to take, precondemnation activities, and pleadings.

Subdivision (d) provides, in the interest of fairness, that any decision of a posttrial motion or appeal pending on the operative date should be based upon the law that was applicable when the action was tried. It would be unfair to hold litigants to a different rule of law in the determination of claimed error than the law which governed at the time the claimed error was committed. If the motion or appeal results in a new trial, however, this title would govern the further proceedings in the action under subdivision (b).

**§ 1240.020. Statutory delegation of condemnation authority required**

**Comment.** Section 1240.020 codifies the prior law that no person may 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.*, *City & County of 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); *Yeshiva Torah Emeth Academy v. University of So. Cal.*, 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962); *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). See also *City of Sierra Madre v. Superior Court*, 191 Cal. App.2d 587, 590, 12 Cal. Rptr. 836, 838 (1961).

If the property authorized to be taken is limited by statutory grant to property of a certain type—*e.g.*, "natural, open" areas or "blighted" areas—an attempt to take property other than the type designated by statute is precluded by Section 1240.020. *Cf.* 7 P. NICHOLS, EMINENT DOMAIN App-309 (3d ed. 1970). Likewise, where the statute grants authority to take only an easement, an attempt to take the fee is precluded by Section 1240.020. See also discussion in the Comment to Section 1240.110.

Under former law, the right of eminent domain was delegated to any person seeking to acquire property for public use. See former CIVIL CODE § 1001; *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955). The Eminent Domain Law does not continue this broad delegation of condemnation authority. Specific statutes continue the condemnation authorization of all presently authorized public entities. Separately enacted provisions also continue the right of some types of quasi-public persons to condemn for certain public uses. Privately owned public utilities may condemn for utility purposes. PUB. UTIL. CODE §§ 610-624; PUB. RES. CODE § 25528. Mutual water companies may condemn to irrigate lands that they service. PUB. UTIL. CODE § 2729. Land chest corporations (HEALTH & SAF. CODE § 35167) and limited dividend housing corporations (HEALTH & SAF. CODE § 34874) may condemn property for their projects. Nonprofit hospitals may condemn property for their purposes. HEALTH & SAF. CODE § 1260. Nonprofit educational institutions of collegiate grade may condemn to carry out their functions. EDUC. CODE § 30051. Nonprofit cemetery authorities may condemn for expansion of existing cemeteries. HEALTH & SAF. CODE § 8501. Private persons may no longer condemn for sewers. Compare *Linggi v. Garovotti*, *supra*. However, a private person may request the appropriate public entity to undertake condemnation on his behalf for a sewer. HEALTH & SAF. CODE § 4967.

**§ 1240.030. Public necessity required**

**Comment.** Section 1240.030 requires that the necessity for the taking be established before property may be taken for a project by eminent domain. The word "project" replaces a variety of terms formerly found in comparable statutes; it is intended to apply to any type of public use regardless whether the use is active (requiring construction of an improvement) or passive (requiring appropriation of property in unimproved condition).

Public entity plaintiffs must adopt a resolution of necessity before condemning property. Section 1240.040. See also Section 1245.220. This resolution conclusively establishes the matters listed in Section 1240.030 if it is adopted by a vote of two-thirds of all the members of the governing body of the public entity. See Sections 1245.240, 1245.250(a). In some cases, a greater vote may be required to adopt the resolution. See, *e.g.*, GOVT. CODE § 67542 (San Francisco Bay Area Transportation Terminal Authority—unanimous vote).

If property sought to be taken by a local public entity is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a presumption affecting the burden of producing evidence that the matters listed in Section 1240.030 are true. Section 1245.250(b). Condemnors other than public entities have the burden of proof on the issue of necessity under Section 1240.030. *But see* PUB. RES. CODE § 25531 (decision of State Energy Resources Conservation and Development Commission conclusive on necessity of certain takings for electrical power plant or transmission facilities).



It should be noted that the prerequisites to condemnation specified in Section 1240.030 are not the only prerequisites for public projects. Notice and a reasonable opportunity to be heard are required before adoption of a resolution of necessity by a local public entity. Section 1245.235. Environmental statements and hearings may be required by statute, relocation plans may be required, or consent of various public agencies may be required. See, e.g., *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1972) (rehearing denied 1972); *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1972). See also *Environmental Defense Fund, Inc. v. Coastside Water Dist.*, 27 Cal. App.3d 695, 104 Cal. Rptr. 197 (1972) (proper relocation program and environmental statement prerequisite to public projects). The public necessity elements of Section 1240.030 supplement but do not replace any other prerequisites to condemnation imposed by any other law.

**Subdivision (a).** Subdivision (a) prevents the taking of property by eminent domain unless the public interest and necessity require the project. "Public interest and necessity" include all aspects of the public good including but not limited to social, economic, environmental, and esthetic considerations. Under prior law, the necessity of the proposed improvement was not subject to judicial review; the decision of the condemnor on the need for the improvement was conclusive. E.g., *City of Pasadena v. Stimson*, 91 Cal. 238, 253, 27 P. 604, 607 (1891).

**Subdivision (b).** Subdivision (b) prevents the taking of property by eminent domain unless the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. This limitation, which involves essentially a comparison between two or more sites, has also been described as "the necessity for adopting a particular plan" for a given public improvement. *People v. Chevalier*, 52 Cal.2d 299, 307, 340 P.2d 598, 603 (1959). See also *City of Pasadena v. Stimson, supra*; *El R. & E. R.R. v. Field*, 67 Cal. 429, 7 P. 814 (1885).

Proper location is based on two factors: public good and private injury. Accordingly, the condemnor's choice is correct or proper unless another site would involve an equal or greater public good and a lesser private injury. A lesser public good can never be counterbalanced by a lesser private injury to equal a more proper location. See *Montebello etc. School Dist. v. Keay*, 55 Cal. App.2d 839, 131 P.2d 384 (1942). Nor can equal public good and equal private injury combine to make the condemnor's choice an improper location. *California Cent. Ry. v. Hooper*, 76 Cal. 404, 412-413, 18 P. 599, 603 (1888).

Subdivision (b) generalizes the plan or location requirement formerly found in Code of Civil Procedure Sections 1242(a) and 1240(6) (acquisition of land or rights of way).

**Subdivision (c).** Subdivision (c) presents the taking of property by eminent domain unless the property or interest therein sought to be acquired is necessary for the proposed project. Cf. Section 1240.110 (right to take any necessary property or right or interest therein) and Section 1240.120 (right to acquire property to make effective the

principal use). This aspect of necessity includes the suitability and usefulness of the property for the public use. See *City of Hawthorne v. Peebles*, 166 Cal. App.2d 758, 763, 333 P.2d 442, 445 (1959) ("necessity does not signify impossibility of constructing the improvement . . . without taking the land in question, but merely requires that the land be reasonably suitable and useful for the improvement"). *Accord, Rialto Irr. Dist. v. Brandon*, 103 Cal. 384, 37 P. 484 (1894). Thus, evidence on the aspect of necessity covered by subdivision (c) is limited to evidence showing whether the particular property will be suitable and desirable for the construction and use of the proposed public project.

Subdivision (c) also requires a showing of the necessity for taking a particular interest in the property. See Section 1235.170 (defining "property" to include any interest therein). Cf. *City of Los Angeles v. Keck*, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971).

Subdivision (c) continues former Code of Civil Procedure Section 1241(2) to the extent that that provision required a showing of necessity for taking the particular property or a particular interest therein.

#### § 1240.250. Acquisition for future use under Federal Aid Highway Act of 1973

**Comment.** Section 1240.250 provides a special rule for acquisitions for future use under the Federal Aid Highway Act of 1973 (P.L. 93-87), which provides a 10-year period for advance acquisition of rights of way. See 23 U.S.C.A. § 108(a) (P.L. 93-87, § 113(a)). Subdivisions (a) and (b) of Section 1240.250 apply notwithstanding Section 1240.220. Subdivision (c) allocates the burden of proof in such a taking in a manner consistent with the general provisions of Section 1240.230.

#### § 1240.320. Substitute condemnation where owner of necessary property authorized to condemn property

**Comment.** Section 1240.320 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 the exchange and 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., former Govt. Code § 15858; former Srs. & Hwys. Code § 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, 10(800)6661967.



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 by some other provision such as Section 1240.330 or 1240.350.

Subdivision (b) specifies an additional requirement for the resolution of necessity and complaint. The second sentence of 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 unless a local public entity is acquiring property outside its territorial limits. See Section 1245.250 and Comment thereto (effect of resolution of necessity). See also *People v. Garden Grove Farms*, *supra*.

**§ 1240.350. Substitute condemnation to provide utility service or access to public road**

**Comment.** Section 1240.350 provides explicit statutory recognition of the right of a public condemnor that acquires property for a public use to condemn such additional property as is necessary to provide utility service or access to property not taken that would otherwise lack utility service or access as a result of the acquisition. The utility service or access road need not be open or available to the general public. Under former law, the right to exercise the power of eminent domain for such purposes 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. 673, 87 A. 917 (1913); *Luke v. Mass. Turnpike Auth.*, 337 Mass. 304, 149 N.E.2d 225 (1958); *North Carolina State Highway Comm'n v. Asheville School, Inc.*, 276 N.C. 556, 173 S.E.2d 909 (1970); *May v. Ohio Turnpike Comm'n*, 172 Ohio St. 555, 178 N.E.2d 920 (1962); *Tracey v. Preston*, 172 Ohio St. 567, 178 N.E.2d 923 (1962).

Section 1240.350 is intended to resolve several different problems. Frequently, where property is acquired for an engineering-oriented project (such as a freeway or irrigation canal), parcels not acquired will be deprived of utility service or access to a public road. To restore these parcels to a useful life and, in doing so, to avoid claims of substantial severance damage, a condemnor is authorized to provide substitute utility service or 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. The owner is not being compensated for property taken; the condemnor is simply minimizing the damage to property retained by the owner. Subdivision (a) of Section 1240.350 requires the condemnor to consider and to minimize the hardship to the owner of both the landlocked parcel and the substitute property.

Proper consideration as a mitigating factor in determining compensation for the damage, if any, to the property not acquired must be given where the condemnor provides utility service or an access road to property to replace lost utility service or access or commits itself to making such provision. See Section 1263.4<sup>50</sup> and the Comment to that section.

Section 1240.350 provides discretionary authority for the condemnor to provide utility service or 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 except as provided in Section 1240.410(c).

**§ 1245.210. "Governing body" defined**

**Comment.** Section 1245.210 defines the term "governing body" as used in this article.

**Subdivision (a).** A local public entity is any public entity other than the state. Section 1235.150. The legislative bodies of such entities are specified by statute. *E.g.*, Govt. CODE §§ 23005 (board of supervisors governs county), 34000 (legislative body of municipal corporation is board of trustees, city council, or other governing body), and 50002 ("legislative body" defined).

**Subdivision (b).** The San Joaquin Drainage District, while by definition a local public entity (Section 1235.150), is comparable in some ways to an agency of the state. Its work is in the interest of the entire state. See *Sacramento & San Joaquin Drainage Dist. v. Riley*, 199 Cal. 668, 251 P. 207 (1926). It is partially funded by the state. See WATER CODE § 8527. Its management and control are vested in a state agency—the Reclamation Board—which is its governing body. See WATER CODE § 8502.

**Subdivision (c).** Takings for all general state purposes (other than by the State Lands Commission or for state highways, toll bridges, aeronautics, state water projects, coastal fishing access, and the University of California) are made by the State Public Works Board under the Property Acquisition Law (Govt. CODE § 15850 *et seq.*). Under former law, there may have been cases where the Department of General Services or other state agencies could condemn on behalf of the state under authority formerly found in Government Code Section 14661 or other provisions (basically where an appropriation was made not subject to the Property Acquisition Law), but this authority is not continued. See Govt. CODE § 15855 and Comment thereto. It should be noted that the Public Works Board may condemn property only with the approval of the agency concerned. Govt. CODE § 15853.

**Subdivision (d).** The Wildlife Conservation Board under Fish and Game Code Section 1348 has the option to authorize condemnation by the Department of Fish and Game in limited situations (access roads and rights of way for coastal fishing).

**Subdivision (e).** Takings for state highway purposes are accomplished on behalf of and in the name of the state by the Department of Transportation. Strs. & Hwys. CODE § 102. The governing body for the Department of Transportation in such takings is the California Highway Commission. This continues a provision formerly found in Streets and Highways Code Section 102.

**Subdivision (f).** Takings for state aeronautics purposes are accomplished on behalf and in the name of the state by the Department of Transportation. See PUB. UTIL. CODE §§ 21007 and 21633.



*Subdivision (g).* Takings for toll bridges and other transportation facilities designated by Streets and Highways Code Section 30100 are accomplished on behalf and in the name of the state by the Department of Transportation. STS. & HWYS. CODE § 30400. The governing body for the Department of Transportation in such takings is the California Toll Bridge Authority. STS. & HWYS. CODE § 30400. See also former STS. & HWYS. CODE § 30404.

*Subdivision (h).* Takings for state water and dam purposes and for the Central Valley Project are accomplished on behalf and in the name of the state by the Department of Water Resources. WATER CODE §§ 250 and 11575. The governing body of the Department of Water Resources is the California Water Commission. This supersedes provisions formerly found in Sections 250 and 11581 of the Water Code that required a declaration of necessity by the Director of Water Resources with the concurrence of the Water Commission.

*Subdivision (i).* The Regents of the University of California, while comparable to an agency of the state, is a separate corporation administering the public trust known as the University of California. The Regents is authorized to condemn property for the university in its own name and is, therefore, the governing body of the university for purposes of Section 1245.220. See CAL. CONST., Art. IX, § 9 and EDUC. CODE § 23151. Cf. EDUC. CODE §§ 23201 and 23204.

*Subdivision (j).* The State Lands Commission has authority to condemn for access to public land for sale (PUB. RES. CODE § 6210.9) and for development and production of oil and gas on state-owned land (PUB. RES. CODE § 6808).

#### § 1245.220. Resolution of necessity required

**Comment.** Section 1245.220 requires that, before a public entity begins condemnation proceedings, its governing body must adopt a resolution of necessity that meets the requirements of Sections 1245.230, 1245.235 (local public entity), and 1245.240. See Section 1240.040 and Comment thereto. See also Section 1245.260 (remedies available to property owner if eminent domain proceedings not commenced within six months after adoption of resolution of necessity).

#### § 1245.235. Hearing and reasonable opportunity to be heard before resolution of necessity adopted by local public entity

**Comment.** Section 1245.235, which requires local public entities to give notice to persons whose property is to be acquired and a reasonable opportunity to appear and be heard, imposes a new requirement in eminent domain proceedings.

#### § 1245.240. Adoption of resolution

**Comment.** Section 1245.240 states the general rule that, to be valid, the resolution of necessity must be adopted by two-thirds of all of the members of the governing body of the entity. Section 1245.240 continues the provision of former Code of Civil Procedure Section 1241(2) that made the resolutions of many local public entities conclusive on necessity if the resolution was adopted by a two-thirds vote. See former Section 1241(2) (city, county, school district, water district,

etc.) and Section 1245.250 (effect of resolution). Section 1245.240 supersedes the majority vote requirement for takings by the state. See, e.g., former GOVT. CODE § 15855 and STS. & HWYS. CODE § 102.

The introductory proviso of Section 1245.240 recognizes that differing vote requirements may be imposed by special statute. See, e.g., GOVT. CODE § 67542 (unanimous vote of board of San Francisco Bay Area Transportation Terminal Authority); STS. & HWYS. CODE § 760 (four-fifths vote required for takings by county for state highway purposes). More stringent requirements may also be imposed locally by charter or ordinance.

#### § 1245.250. Effect of resolution

**Comment.** Section 1245.250 provides a uniform rule governing the effect to be given to a resolution of necessity. It continues the conclusive effect given to the resolution in state takings. See, e.g., former GOVT. CODE § 15855. It supersedes numerous sections of various codes that afforded disparate treatment to the resolution of necessity of various types of local public entities and generalizes the conclusive effect given the resolution of certain local public entities by former Section 1241(2).

*Subdivision (a).* A valid resolution of necessity conclusively establishes the matters of public necessity specified in Section 1240.030 (1) in all takings by local public entities where the property taken is entirely within the boundaries of the condemning entity and (2) in all takings by state entities regardless of the location of the property taken. Giving a conclusive effect to the resolution of necessity has been held constitutionally permissible. *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923), *aff'g County of Los Angeles v. Rindge Co.*, 53 Cal. App. 166, 200 P. 27 (1921); *City of Oakland v. Parker*, 70 Cal. App. 295, 233 P. 68 (1924). Among the matters encompassed in the conclusive resolution are the extent of and interest in necessary property. See Section 1245.230 and Comment thereto.

A valid resolution precludes judicial review only of the matters specified in Section 1240.030; it does not affect in any way the right of a condemnee to challenge a taking on the ground that the project is not an authorized public use or on the ground that the condemnor does not intend to put the property to its declared public purpose. See Sections 1240.010 and 1250.360 and Comments thereto. Likewise, the resolution does not affect the right of a defendant to contest the right to take his property on specific statutory grounds provided in the Eminent Domain Law. See Sections 1240.230 (taking for future use), 1240.340 (condemnation for exchange purposes), 1240.420 (excess condemnation), 1240.520 (taking for compatible use), and 1240.620 (taking for more necessary public use). Cf. Section 1240.050 (extraterritorial condemnation). And, the property owner may attack the validity of the resolution itself pursuant to Section 1245.270 (resolution adopted as a result of bribery). Finally, the condemnor must demonstrate its compliance with any other requirements and regulations governing the institution of public projects. See Section 1245.235 (requirement of notice and hearings by local public entity); cf. Comment to Section 1240.030.

The initial proviso of Section 1245.250 recognizes that there may be exceptions to the uniform conclusive effect given the resolution of necessity. One important exception is in subdivision (b) (extraterritorial acquisitions by local public entity). Another exception is where the resolution was the result of abuse of discretion or arbitrary or capricious action. Section 1245.255. As to the effect of the resolution of necessity where the taking is by a city or county for open space, see Government Code Section 6953.

**Subdivision (b).** Subdivision (b) provides that a resolution of necessity of a local public entity creates a presumption affecting the burden of producing evidence with regard to public necessity if the property described in the resolution is not located entirely within the boundaries of the local public entity. See EVID. CODE § 604.

Subdivision (b) continues the portion of former Section 1241(2) that denied conclusive effect of a resolution to property lying outside the territorial limits of certain local public entities. Under that provision, necessity and proper location were justiciable questions in the condemnation proceeding. See *City of Hawthorne v. Peebles*, 166 Cal. App.2d 758, 333 P.2d 442 (1959); *City of Carlsbad v. Wight*, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963); *City of Los Angeles v. Keck*, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971). Subdivision (b) extends this limitation on the effect of the resolution of necessity to all local public entities condemning property outside their territorial jurisdiction and also makes the question whether the proposed project is necessary a justiciable question in such a condemnation proceeding.

**Subdivision (c).** The limitation contained in subdivision (b) is not applicable to acquisitions for the Sacramento and San Joaquin Drainage District. Acquisitions for this district are undertaken by the State Reclamation Board. See WATER CODE § 8590 and Section 1245.210 and Comment thereto. The conclusive effect given resolutions of the board by former Water Code Section 8595 is continued under subdivisions (a) and (c).

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

**Comment.** Section 1245.255 is new. It permits a collateral attack on the conclusive effect of the resolution of necessity on the same grounds that the validity of the resolution may be directly attacked under the administrative mandamus statute. See Section 1094.5 ("abuse of discretion") and cases thereunder ("arbitrary or capricious action"). Section 1245.255 overrules the case of *People v. Chevaller*, 52 Cal.2d 299, 340 P.2d 598 (1959), insofar as that case precluded a collateral attack on the conclusive effect of the resolution of necessity.

In addition to the collateral attack on the conclusive effect of the resolution permitted by Section 1245.255, the validity of the resolution may be subject to direct attack by administrative mandamus (Section 1094.5) and, in the case of a conflict of interest, under the Political Reform Act of 1974 (GOVT. CODE § 91003(b)). See also Section 1245.270 (resolution adopted as a result of bribery).

#### § 1245.270. Resolution procured by bribery

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

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

#### § 1250.150. Lis pendens

**Comment.** Section 1250.150 supersedes a portion of former Section 1243 that required the plaintiff to file a lis pendens after service of summons. See also Section 1250.130 (lis pendens required where service is by publication). Where a lis pendens is recorded prior to a transfer, the judgment in the proceeding will be binding upon the transferee from a defendant named by his real name who is properly made a party to the proceeding. *Drinkhouse v. Spring Valley Water Works*, 87 Cal. 253, 25 P. 420 (1890).

Failure to file such a notice of pendency of the eminent domain proceeding does not deprive the court of subject matter jurisdiction. See *Housing Authority v. Forbes*, 51 Cal. App.2d 1, 124 P.2d 194 (1942). However, where a lis pendens is not recorded prior to a recorded transfer, the transferee will not be bound by the judgment in the proceeding unless he is properly made a party to the proceeding. See *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, 319 (1859). See also Section 1250.220 (naming defendants).

Section 1250.150 is analogous to Section 409 (obligation to file lis pendens and consequences of failure to do so). See also *Roach v. Riverside Water Co.*, 74 Cal. 263, 15 P. 776 (1887) (Section 409 applicable to condemnation proceedings prior to adoption of former Section 1243).



### § 1250.310. Contents of complaint

**Comment.** Section 1250.310 prescribes the necessary contents of a complaint in an eminent domain proceeding. A complaint that does not contain the elements specified in this section is subject to demurrer. See Sections 430.10 and 430.30. Section 1250.310 is an exclusive listing of the substantive allegations required to be made by the plaintiff. Other substantive allegations may, but need not, be made. See, e.g., *California S.R.R. v. Southern Pac. R.R.*, 67 Cal. 59, 7 P. 123 (1885) (averment of value not required and is surplusage); *County of San Luis Obispo v. Simas*, 1 Cal. App. 175, 81 P. 972 (1905) (averment of manner of construction of proposed improvement not required).

Other necessary procedural elements not specified in this section are required to be incorporated in the complaint, however. These include a caption (Sections 422.30 and 422.40), a request for relief (Section 425.10), and a subscription (Section 446). See also Section 1250.330 (signing of pleadings); PUB. UTIL. CODE § 7557 (additional requirement where complaint seeks relocation or removal of railroad tracks). See generally Section 1230.040 and Comment thereto (rules of practice in eminent domain proceedings).

**Subdivision (a).** The rules for designating parties to an eminent domain proceeding are prescribed in Sections 1250.210 and 1250.220.

**Subdivision (b).** Subdivision (b), which requires a description of the property and interest sought to be taken, supersedes subdivision 5 of former Section 1244. The property described in the complaint may consist of anything from a fee interest in land to water rights, to noise easements, or to franchises. See Sections 1235.170 ("property" defined), 1235.125 ("interest" in property defined), and 1240.110 (right to acquire any necessary interest in property).

The description of the property should be sufficiently certain to enable the parties, and any ministerial officer who may be called upon to enforce the judgment, to know precisely what land is to be taken and paid for. See *California Cent. R. R. v. Hooper*, 76 Cal. 404, 18 P. 599 (1888). See also Section 430.10(g) (demurrer for uncertainty).

Like the former provision, subdivision (b) does not require the complaint to identify the nature of the interests the various parties may have in the property sought to be taken. Specification of the precise interest held by the defendant is left to the defendant. See Section 1250.320 (answer). However, the judgment in an eminent domain proceeding affects only the interests of parties properly joined or appearing. See Sections 1250.220 and 1250.230 and Comments thereto. Where the plaintiff has or claims a preexisting interest in the property sought to be taken, this interest must be described in the complaint. See subdivision (c) and *People v. Shasta Pipe etc. Co.*, 264 Cal. App.2d 520, 70 Cal. Rptr. 618 (1968); cf. *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 P. 585 (1899); *State v. Whittow*, 243 Cal. App.2d 490, 52 Cal. Rptr. 336 (1966).

Unlike former Section 1244, subdivision (b) does not require that the complaint indicate whether the property taken is a part of a larger parcel but requires only a description of the property taken. Contrast *Inglewood v. O. T. Johnson Corp.*, 113 Cal. App.2d 587, 248 P.2d 536 (1952).

**Subdivision (d).** Subdivision (d) supersedes subdivision 3 of former Section 1244 requiring a statement of the right of the plaintiff. Subdivision (d) is intended to provide the owner of the property sought to be taken with an understanding of the purpose for which his property is being taken and the authority on which the taking is based. The requirements of subdivision (d) may be satisfied in any way convenient to the plaintiff as long as they are indicated in the complaint. This might include summarizing the resolution of necessity or attaching the resolution to the complaint and incorporating it by reference. See the Comment to Section 1245.230 for a discussion of the requirements of subdivision (d).

Paragraph (1) requires a general statement of the public use for which the property is being taken. Property may not be taken by eminent domain except for a public use. CAL. CONST., Art. I, § 19; Section 1240.010.

Paragraph (2) requires a description of the public necessity for the taking. The items of public necessity are listed in Section 1240.030 and include (1) public necessity for the project, (2) plan or location of the project compatible with the greatest public good and least private injury, and (3) the necessity of the particular property for the project. This extensive description of the necessity for the taking supplants the general allegation permitted under prior law. See, e.g., *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955). It should be noted that a public entity must first adopt a resolution of necessity before it may proceed to condemn property. Sections 1240.040, 1245.220. Thus, while subdivision (2) requires an extensive statement of the necessity for the acquisition, this statement may be satisfied by incorporation of the resolution containing appropriate findings and declarations. The resolution, under certain conditions, is given conclusive effect in the proceeding. See Section 1245.250. If the resolution is not incorporated, a reference to the resolution should be included which is adequate to identify it so that a copy of the resolution may be obtained. A similar reference to the certificate required by Section 1260 of the Health and Safety Code must be included where applicable. Likewise, a reference to the certification or to the requirement that development rights be acquired must be included if the plaintiff is a utility that relies upon a certification, or a requirement that development rights be acquired, by the State Energy Resources Conservation and Development Commission. See PUB. RES. CODE § 25531.

Paragraph (3) requires a reference to the statute authorizing acquisition of the property by eminent domain. The power of eminent domain may be exercised only by persons authorized by statute for purposes designated by statute. Section 1240.020. Such authorizing statutes may be of several types. The state, the University of California, cities, counties, and school districts, for example, may condemn



any property necessary to carry out any of their powers or functions. See, e.g., EDUC. CODE §§ 1047 (school districts), 23151 (Regents of the University of California); GOVT. CODE §§ 15853 (Public Works Board), 25350.5 (counties), 37350.5 (cities). Many special districts have similar broad authority, but some may condemn only for limited or special purposes. Additionally, if the condemnor is acquiring property under authority of certain general public uses, it must specify that authority. E.g., Sections 1240.220 (taking for future use), 1240.320-1240.350 (condemnation for exchange purposes), 1240.420 (excess condemnation), 1240.510 (taking for compatible use), and 1240.610 (taking for more necessary public use). The requirement of a reference to the authorizing statute makes more precise the general allegation of right to condemn permitted under prior law. See, e.g., *Kern County High School Dist. v. McDonald*, 180 Cal. 7, 179 P. 180 (1919), and *Los Altos School Dist. v. Watson*, 133 Cal. App.2d 447, 284 P.2d 513 (1955). Where the plaintiff may be authorized to take the property on differing and inconsistent grounds, the plaintiff may allege such authority in the alternative.

**Subdivision (e).** Subdivision (e) broadens the requirement formerly found in subdivision 4 of Section 1244 that the complaint be accompanied by a map where the taking was for a right of way. Subdivision (e) requires a map to be attached to the complaint in all cases. The map should be sufficiently detailed and accurate to enable the parties to identify the property and its relation to the project. Where the taking is for a right of way, the map should show its location, general route, and termini with respect to the property sought to be taken. The map need not indicate whether the property sought is a part of a larger parcel. Cf. PUB. UTIL. CODE § 7557 (map required where complaint seeks relocation or removal of railroad tracks). However, the map may show such information, and any other information, if the plaintiff so desires.

#### § 1250.345. Waiver of objections to complaint

**Comment.** Section 1250.345, unlike Section 430.80, provides no exceptions to the rule that failure to object to the complaint results in a waiver of all objections, including objections to the right to take, that the court has no jurisdiction, and that the complaint fails to state a cause of action. See also Section 1250.350 (objections to right to take).

#### § 1250.360. Grounds for objection to right to take where resolution conclusive

**Comment.** Section 1250.360 prescribes the grounds for objection to the right to take that may be raised in any eminent domain proceeding regardless of whether the plaintiff has adopted a resolution of necessity that is given conclusive effect on other issues. See Section 1250.370 for a listing of grounds for objection that may be raised only where there is no conclusive resolution of necessity.

**Subdivision (a).** 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. Section 1240.020.

**Subdivision (b).** The power of eminent domain may be exercised only to acquire property for a public use. Section 1240.010. CAL. CONST., Art I, § 19. U.S. CONST., Amend. XIV.

**Subdivision (c).** This subdivision codifies the classic test for lack of public use: whether the plaintiff *intends* to apply the property to the proposed use. See *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959). Once the acquisition has been found initially proper, the plaintiff may thereafter devote the property to any other use, public or private. See *Arechiga v. Housing Authority*, 159 Cal. App.2d 657, 324 P.2d 973 (1958). See generally *Sterling Return Right for Former Owners of Land Taken by Eminent Domain*, 4 PAC. L.J. 65 (1973).

**Subdivision (d).** This subdivision adds a test for public use new to California law. The plaintiff may not take the property if the defendant is able to demonstrate that there is no reasonable probability that the plaintiff will apply the property to the proposed use (1) within seven years, or (2) within 10 years where the taking is pursuant to the Federal Aid Highway Act of 1973, or (3) within a reasonable period of time. Cf. Sections 1240.220 (future use) and 1240.250 (future use under Federal Aid Highway Act of 1973).

**Subdivision (e).** Condemnation for certain specified purposes is not available in the case of some land. For example, a city may not acquire by eminent domain an existing golf course for golf course purposes. GOVT. CODE § 37353(e). Property appropriated to a public use may not be taken except for more necessary or compatible uses. Sections 1240.510 and 1240.610. Cemetery land may not be taken for rights of way. HEALTH & SAF. CODE §§ 8134, 8560, 8560.5. Certain land in the public domain may not be taken at all. PUB. RES. CODE § 8030. See also Section 1240.010 and Comment thereto (eminent domain only for purposes authorized by statute); cf. subdivision (f) *infra* (more necessary public use).

**Subdivision (f).** Section 1240.410 permits property excess to the needs of the proposed project to be taken only if it would be left as a remainder in such size, shape, or condition as to be of little market value.

Property appropriated to a public use may be taken by eminent domain only if the proposed use is compatible with or more necessary than the existing use. See Sections 1240.510 (compatible use), 1240.610 (more necessary use).

**Subdivision (g).** Section 1240.630 gives the prior user a right to continue a public use as a joint use under certain circumstances where the plaintiff seeks to displace the prior use by a more necessary use.

**Subdivision (h).** While the provisions of Section 1250.360 catalog the objections to the right to take available under the Eminent Domain Law where the resolution is conclusive, there may be other grounds for objection not included in the Eminent Domain Law, e.g., where there exist federal or constitutional grounds for objection or where prerequisites to condemnation are located in other codes. See, for example, Section 1260 of the Health and Safety Code, which im-



poses certain requirements that must be satisfied before a nonprofit hospital may exercise the right of eminent domain. See also various special district laws that require consent of the board of supervisors of the affected county before extraterritorial condemnation authority may be exercised. *E.g.*, HEALTH & SAF. CODE §§ 4741 (county sanitation district), 6514 (sanitary district), 13852(c) (fire protection district); PUB. UTIL. CODE § 98213 (Santa Cruz Metropolitan Transit District); WATER CODE §§ 43532.5 (California water storage district), 60230(8) (water replenishment district), 71694 (municipal water district); Alameda County Flood Control and Water Conservation District Act, § 5(13) (Cal. Stats. 1949, Ch. 1275); Alameda County Water District Act, § 4(d) (Cal. Stats. 1961, Ch. 1942); Alpine County Water Agency Act, § 7 (Cal. Stats. 1961, Ch. 1896); Amador County Water Agency Act, § 3.4 (Cal. Stats. 1959, Ch. 2137); Antelope Valley-East Kern Water Agency Law, § 61(7) (Cal. Stats. 1959, Ch. 2146); Bethel Island Municipal Improvement District Act, § 81 (Cal. Stats. 1960, 1st Ex. Sess., Ch. 22); Castaic Lake Water Agency Act, § 15(7) (Cal. Stats. 1962, 1st Ex. Sess., Ch. 28); Crestline-Lake Arrowhead Water Agency Act, § 11(9) (Cal. Stats. 1962, 1st Ex. Sess., Ch. 40); Embarcadero Municipal Improvement District Act, § 82 (Cal. Stats. 1960, 1st Ex. Sess., Ch. 81); Estero Municipal Improvement District Act, § 82 (Cal. Stats. 1960, 1st Ex. Sess., Ch. 82); Fresno Metropolitan Transit District Act, § 6.3 (Cal. Stats. 1961, Ch. 1932); Guadalupe Valley Municipal Improvement District Act, § 80.5 (Cal. Stats. 1959, Ch. 2037); Kern County Water Agency Act, § 3.4 (Cal. Stats. 1961, Ch. 1003); Lake County Flood Control and Water Conservation District Act, § 5(12) (Cal. Stats. 1951, Ch. 1544); Monterey County Flood Control and Water Conservation District Act, § 4 (Cal. Stats. Ch. 699); Mountain View Shoreline Regional Park Community Act, § 51 (Cal. Stats. 1969, Ch. 1109); Nevada County Water Agency Act, § 7 (Cal. Stats. 1959, Ch. 2122); North Lake Tahoe-Truckee River Sanitation Agency Act, § 146 (Cal. Stats. 1967, Ch. 1503); Placer County Water Agency Act, § 3.4 (Cal. Stats. 1957, Ch. 1234); Plumas County Flood Control and Water Conservation District Act, § 3(f) (Cal. Stats. 1959, Ch. 2114); Sacramento County Water Agency Act, § 3.4 (Cal. Stats. 1952, 1st Ex. Sess., Ch. 10); San Geronio Pass Water Agency Law, § 15(9) (Cal. Stats. 1961, Ch. 1435); Santa Barbara County Flood Control and Water Conservation District Act, § 5.3 (Cal. Stats. 1955, Ch. 1057); Shasta County Water Agency Act, § 65 (Cal. Stats. 1957, Ch. 1512); Sierra County Flood Control and Water Conservation District Act, § 3(f) (Cal. Stats. 1959, Ch. 2123); Yolo County Flood Control and Water Conservation District Act, § 3(f) (Cal. Stats. 1951, Ch. 1657); Yuba-Bear River Basin Authority Act, § 8 (Cal. Stats. 1959, Ch. 2131); Yuba County Water Agency Act, § 3.4 (Cal. Stats. 1959, Ch. 788).

§ 1250.370. **Grounds for objection to right to take where resolution not conclusive**

**Comment.** Section 1250.370 lists the grounds for objection to the right to take that may be raised where there is not a conclusive resolution of necessity. Thus, they may be raised against a nonpublic-entity plaintiff in all cases and against a public-entity plaintiff in cases where it has not adopted a resolution or where the resolution is not conclusive. See Sections 1245.250 and 1245.255 for the effect of the resolution. The introductory clause to Section 1250.370 makes clear that the grounds listed here are in addition to those listed in Section 1250.360. See Section 1250.360 and Comment thereto.

Subdivision (a) applies only to public entities. A public entity may not commence an eminent domain proceeding until after it has passed a resolution of necessity that meets the requirements of Article 2 of Chapter 4. See Sections 1240.040 and 1245.220. A duly adopted resolution must contain all the information required in Section 1245.230, may be adopted by a local public entity only after notice and an opportunity for affected property owners to be heard pursuant to Section 1245.235, and must be adopted by a two-thirds vote of all the members of the governing body of the public entity. See Section 1245.240 and Comment thereto.

Subdivisions (b)-(d) recognize that the power of eminent domain may be exercised to acquire property for a proposed project **only** if (1) the public interest and necessity require the proposed project, (2) the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury, and (3) the property and particular interest sought to be acquired are necessary for the proposed project. Section 1240.030. See Section 1235.170 (property includes any interest in property). *Cf.* PUB. RES. CODE § 25531 (eminent domain proceeding—effect of certification by State Energy Resources Conservation and Development Commission).

§ 1255.410. **Order for possession prior to judgment**

**Comment.** Section 1255.410 states the requirements for an order for possession of property prior to judgment and describes the content of the order. With respect to the relief available from an order for possession prior to judgment, see Sections 1255.420-1255.440.

**Subdivision (a).** Subdivision (a), like subdivision (a) of former Section 1243.5, provides an *ex parte* procedure for obtaining an order for possession prior to judgment.

Subdivision (a) states two prerequisites to issuance of an order for possession:

(1) The plaintiff must be entitled to take the property by eminent domain. This requirement is derived from subdivision (b) of former Section 1243.5. However, under former Section 1243.4, possession prior to judgment was permitted only if the taking was for right of way or reservoir purposes. This limitation is not continued. Likewise, the requirement found in subdivision (b) of former Section 1243.5 that the



plaintiff was authorized to take possession prior to judgment is no longer continued since any person authorized to exercise the power of eminent domain may now take possession prior to judgment in any case in which he is entitled to take by eminent domain. Contrast former Section 1243.4 (right to early possession limited to certain public entities).

(2) The plaintiff must have made the deposit required by Article 1. This requirement is derived from subdivision (b) of former Section 1243.5.

The issue of the plaintiff's need for possession prior to judgment is a matter that is incorporated in the provisions of Section 1255.420. Section 1255.410 does not affect any other prerequisite that may exist for taking possession of property. *Cf. 815 Mission Corp. v. Superior Court*, 22 Cal. App.3d 604, 99 Cal. Rptr. 538 (1971) (provision of relocation assistance is not necessarily prerequisite to an order for possession).

It should be noted that the determination of the plaintiff's right to take the property by eminent domain is preliminary only. The granting of an order for possession does not prejudice the defendant's right to demur to the complaint or to contest the taking. Conversely, the denial of an order for possession does not require a dismissal of the proceeding and does not prejudice the plaintiff's right to fully litigate the issue if raised by the defendant.

Under former statutes, judicial decisions held that an appeal may not be taken from an order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari was held to be the appropriate remedy. 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 Madre 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.2d 668, 267 P.2d 349 (1954). No change is made in these rules as to orders made under Section 1255.410 or Article 3 (commencing with Section 1268.210) of Chapter 11.

**Subdivision (b).** Subdivision (b) describes the contents of an order for possession. The contents are substantially the same as those of subdivision (b) of former Section 1243.5. However, the requirement that the order state the amount of the deposit has been eliminated since Section 1255.020 requires that a notice of the making of a deposit be served on interested parties. The requirement that the order state the purpose of the condemnation has been omitted since possession prior to judgment is now authorized for any public use by an authorized condemnor. And, the requirement that the order describe the "estate or interest" sought to be acquired has been omitted as unnecessary since the term "property" includes interests therein. See Sections 1235.170 (defining "property") and 1235.125 (defining "interest" in property).

Subdivision (b) is limited by the requirement of a 30-day or 90-day period following service of the order before possession can be physically assumed. See Section 1255.450. Subdivision (c), however, permits possession of property on lesser notice where there is an urgent need and the property owner will not be unreasonably affected. See discussion below.

It should be noted that the court may authorize possession of all, or any portion or interest, of the property sought to be taken by eminent domain.

**Subdivision (c).** Subdivision (c) supersedes the portion of former Section 1243.5(c) that permitted the court for good cause to shorten the time for service of an order for possession to a period of not less than three days. Subdivision (c) replaces the "good cause" standard of prior law with the requirements that the plaintiff show urgent need and that the person in possession not be displaced or unreasonably affected.

#### § 1255.450. Service of order

**Comment.** Section 1255.450 is derived from subdivision (c) of former Section 1243.5.

**Subdivision (a).** The definition of "record owner" is broadened to include persons not included under the definition found in subdivision (c) of former Section 1243.5. Under the former provision, "record owner" was defined to include only the persons in whose name the legal title to the fee appeared as of record and the persons in possession of the property under a recorded lease or agreement of purchase.

**Subdivision (b).** The requirement that, in certain instances, service be made not less than 90 days before possession is to be taken conforms to the requirement of Government Code Section 7267.3 (notice under land acquisition guidelines). Under subdivision (c) of former Section 1243.5, only 20 days' notice was required. Former law also provided that the court, for good cause shown, could shorten this time to not less than three days. This provision is continued in Section 1255.410(c) in cases of urgent need for possession where no person in actual possession will be displaced or unreasonably affected.

Because the order is obtained ex parte rather than on noticed motion, the time periods under subdivision (b) are computed from the date of service rather than the date of the order. The plaintiff may, of course, obtain a specific date of possession later than the 90-day or 30-day date in his request for an order for possession.

It should be noted that the time limits prescribed in this section do not apply to possession in emergencies under the police power (see Section 1255.480).

**Subdivision (c).** Subdivision (c) prescribes the time for service where the order for possession is granted under Section 1255.040 (deposit on notice of homeowner), 1255.050 (deposit in case of rental property), or 1255.460 (possession after vacation of property or withdrawal of deposit). No comparable provision was found in former law because the procedures provided by Sections 1255.040, 1255.050, and 1255.460 are new.



*Subdivision (d).* Subdivision (d) requires personal service except in certain limited situations. Paragraphs (1) and (2) of subdivision (d) specify the situations where personal service need not be made. These paragraphs continue provisions of subdivision (c) of former Section 1243.5. The requirement that an affidavit be filed concerning the reason personal service was not made has been eliminated.

*Subdivision (e).* Subdivision (e) continues the substance of a portion of subdivision (c) of former Section 1243.5.

*Subdivision (f).* Subdivision (f) continues the substance of a portion of subdivision (c) of former Section 1243.5. 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.

#### § 1263.110. Date of valuation fixed by deposit

**Comment.** Section 1263.110 permits the plaintiff, by making a deposit, to establish the date of valuation no later than the date the deposit is made. The rule under the language contained in former Section 1249 was to the contrary; neither the making of a deposit nor the taking of possession had any bearing on the date of valuation. See *City of Los Angeles v. Tower*, 90 Cal. App.2d 869, 204 P.2d 395 (1949). The date of valuation may be earlier than the date of the deposit, either because the trial or retrial is within one year of the commencement of the proceeding (see Section 1263.120), or because the court orders an earlier valuation date for retrial (see Sections 1263.140 and 1263.150). In addition, subsequent events may cause such an earlier date of valuation to shift to the date of deposit, either because the trial is not within one year of the commencement of the proceeding (see Section 1263.130), or because a new trial or retrial is not commenced within one year of the commencement of the proceeding (see Sections 1263.140 and 1263.150). But a date of valuation established by a deposit cannot be shifted to a later date by any of the circumstances mentioned in the following sections.

Although the making of a deposit before or after judgment establishes the date of valuation unless an earlier date is applicable, subdivision (b) denies that effect if the amount deposited is determined by the court to be inadequate and is not increased in keeping with the determination. Cf. Section 1255.030(b) (when failure to increase deposit may result in abandonment). See also Section 1268.110(c) (post judgment deposit deemed to be prejudgment deposit if judgment reversed, vacated, or set aside).

#### § 1263.140. New trial

**Comment.** Section 1263.140 deals with the date of valuation where a new trial is ordered. Under the language contained in former Section 1249, the question arose whether the original date of valuation or the date of the new trial should be employed in new trials in eminent domain proceedings. The Supreme Court of California ultimately held that the date of valuation established in the first trial, rather than the date of the new trial, should normally be

55 Cal.2d 1, 357 P.2d 833, 9 Cal. Rptr. 601 (1960). To avoid injustice to the condemnee in a rising market, Section 1263.140 changes the result of that decision. The plaintiff may make a postjudgment deposit that precludes a valuation date later than the date of the deposit. See Section 1263.110. Section 1263.140 applies whether the new trial is granted by the trial court or by an appellate court. However, if a mistrial is declared, further proceedings are not considered a "new trial," and the date of valuation is determined under Section 1263.150 rather than under Section 1263.140.

#### § 1263.150. Mistrial

**Comment.** Section 1263.150 deals with the date of valuation where a mistrial is declared. Under the language contained in former Section 1249, the effect, if any, of a mistrial upon the date of valuation was uncertain. Section 1263.150 clarifies the law by adopting the principle established by Section 1263.140 which governs the date of valuation when a new trial is ordered. A factor the court might consider in determining to grant a date of valuation other than that specified in this section is misconduct of a party. The plaintiff may make a deposit after the mistrial is declared that precludes a valuation date later than the date of the deposit. See Section 1263.110. For the distinction between a retrial following a mistrial and a new trial following an appeal or a motion for new trial granted under Code of Civil Procedure Section 657, see 5 B. WITKIN, CALIFORNIA PROCEDURE *Attack on Judgment in Trial Court* § 54 at 3630-3631 (2d ed. 1971).

#### § 1263.240. Improvements made after service of summons

**Comment.** Section 1263.240 in no way limits the right of the property owner to make improvements on his property following service of summons; it simply states the general rule that the subsequent improvements will not be taken into account in valuing the property and specifies those instances in which subsequent improvements will be considered in valuing the property. It should be noted that, although subsequent improvements may be precluded from consideration in valuing the property under this section, if the improvements were necessary to protect the public from risk of injury or to protect partially installed machinery or equipment from damage, their cost may be recoverable as a separate item of compensation under Section 1263.620.

The introductory portion of Section 1263.240, which adopts the substance of the last sentence of former Section 1249, requires that, as a general rule, subsequent improvements be uncompensated. For exceptions to this rule, see subdivisions (a)-(c) and Section 1263.250 (harvesting and marketing of crops).

Subdivision (a) codifies a judicially recognized exception to the general rule. *Citizen's Util. Co. v. Superior Court*, 59 Cal. 2d 805, 382, P.2d 356, 31 Cal. Rptr. 316 (1963).

Subdivision (b), allowing compensation for subsequent improvements made with the consent of the plaintiff, is new. It permits the parties to work out a reasonable solution rather than forcing them into court and makes clear that the condemnor has authority to make an agreement that will deal with the problem under the circumstances



Subdivision (c) is intended to provide the defendant with the opportunity to make improvements that are demonstrably in good faith and not made to enhance the amount of compensation payable. The subsequent improvements might be compensable under the balancing of hardship test, for example, where an improvement is near completion, the date of public use of the property is distant, and the additional work will permit profitable use of the property during the period prior to the time it is actually taken for public use. The making of a pre-judgment deposit by the condemnor affects neither the right of the defendant to complete a court-ordered improvement nor the authority of the court subsequently to authorize an improvement. The court may, however, limit the extent to which an improvement that it authorizes will be taken into consideration in determining compensation.

#### § 1263.320. Fair market value

**Comment.** Section 1263.320 is new. Subdivision (a) codifies the definition of fair market value that has developed through the case law. See, e.g., *Sacramento etc. R. R. v. Heilbron*, 156 Cal. 408, 409, 104 P. 979, 980 (1909); *Buena Park School Dist. v. Metrim Corp.*, 176 Cal. App.2d 255, 263, 1 Cal Rptr. 250, 255-256 (1959). Although the phrase "the highest price estimated in terms of money" has been utilized in the case law definitions of fair market value, Section 1263.320 omits this phrase because it is confusing.

The phrase "in the open market" has been deleted from the definition of fair market value in subdivision (a), and subdivision (b) has been added to the definition because there may be no relevant market for some types of special purpose properties such as schools, churches, cemeteries, parks, utilities, and similar properties. All properties, special as well as general, are valued subject to the limits of Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code. The Evidence Code provides that, regardless of whether there is a relevant market for property, its fair market value may be determined, where appropriate, by reference to (1) the market data (or comparable sales) approach, (2) the income (or capitalization) method, and (3) the cost analysis (or reproduction less depreciation) formula.

The standard provided in Section 1263.320 is the usual standard normally applied to valuation of property whether for eminent domain or for any other purpose. The evidence admissible to prove fair market value is governed by the provisions of the Evidence Code. See especially EVID. CODE § 810 *et seq.* Where comparable sales are used to determine the fair market value of property, the terms and conditions of such sales may be shown in an appropriate case. See EVID. CODE § 816.

For an adjustment to this basic fair market value standard in case of changes in value prior to the date of valuation, see Section 1263.330.

#### § 1268.030. Final order of condemnation

**Comment.** Section 1260.030 supersedes former Section 1253.

#### § 1268.710. Court costs

**Comment.** Section 1268.710 restates prior law relating to the allowance of costs in the trial court. See Section 1268.720 for costs on appeal. See also Sections 1250.340 (amendment of pleadings), 1250.410 (settlement offers), 1268.610 (litigation expenses on dismissal). Former Section 1255 provided that, in eminent domain proceedings, "costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." See also Section 1032. However, very early, the California Supreme Court held that the power provided by Section 1255 "must be limited by section 14 [now Section 19] of article I of the constitution, which provides that 'private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner.' . . . To require the defendants in [an eminent domain] case to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the plaintiff, would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs." *City & County of San Francisco v. Collins*, 98 Cal. 259, 262, 33 P. 56, 57 (1893). Accordingly, the defendant in an eminent domain proceeding has as a rule been allowed his ordinary court costs. This rule is subject to the procedural limitation that defendants with a single, unified interest may be allowed only a single cost bill. See generally *City of Downey v. Gonzales*, 262 Cal. App.2d 563, 69 Cal. Rptr. 34 (1968). Moreover, the costs of determining title as between two or more defendants has been borne by such defendants. See former Section 1246.1. See also *Housing Authority v. Pirrone*, 68 Cal. App.2d 30, 156 P.2d 39 (1945). This rule is continued.

Subdivision (j) of former Section 1254 provided that, where a defendant obtained a new trial, he had to be successful in increasing the amount originally awarded or the cost of the new trial would be taxed against him. *Los Angeles, Pasadena & Glendale Ry. v. Rumpp*, 104 Cal. 20, 37 P. 859 (1894). Section 1268.710 eliminates this exception.

#### ASSEMBLY BILL 129

##### Desert Water Agency Law, § 15 (Stats. 1961, Ch. 1069) (amended)

**Comment.** The deleted portions of the first part of subdivision 9 of Section 15 are superseded by the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.610 *et seq.* (more necessary public use). The next to last sentence of subdivision 9 of Section 15 is deleted because it is obsolete. Former subdivision 16 was unnecessary. See CODE CIV. PROC. § 1250.210 and Comment thereto.

#### ASSEMBLY BILL 266

##### Education Code § 23151 (amended)

**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 when 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 CODE CIV. PROC. §§ 1235.125, 1235.170, and 1240.110 (right to acquire any necessary right or interest in any type of property). In some cases, a particular statute may expressly grant the Regents of the University of California the power of eminent domain for a particular purpose. *E.g.*, EDUC. CODE § 23582.1. These specific grants of condemnation authority are not to be construed to limit the broad grant of such authority under Section 23151.

The requirement that the Regents adopt by a two-thirds vote a resolution of necessity is continued in Code of Civil Procedure Section 1245.210 *et seq.* See also CODE CIV. PROC. §§ 1240.040 (resolution of necessity required), 1250.310 (contents of complaint).

#### Government Code § 15855 (added)

**Comment.** Section 15855 provides that the Public Works Board is the only agency that may condemn property needed for state purposes subject to the following exceptions:

(1) The Department of Transportation. See PUB. UTIL. CODE § 21633 (aeronautics); STS. & HWYS. CODE §§ 102 (state highway) and 30100 (toll bridges).

(2) The Department of Water Resources. See WATER CODE §§ 250 and 11575 (state dam and water projects).

(3) The State Lands Commission. See PUB. RES. CODE §§ 6210.9 (access) and 6808 (oil and gas production).

(4) The Reclamation Board. See WATER CODE § 8593 (Reclamation Board condemns for Sacramento and San Joaquin Drainage District).

(5) The Regents of the University of California. See EDUC. CODE § 23151 (University of California); CAL. CONST., Art. IX, § 9.

(6) The Department of Fish and Game. See FISH & GAME CODE § 1348 (wildlife conservation law).

Section 15855 supersedes former provisions of numerous codes that granted various agencies of the state independent condemnation authority. *E.g.*, provisions formerly found in GOVT. CODE §§ 14661-14662 (Director of General Services), 54093 (Department of Parks and Recreation); MIL. & VETS. CODE § 437 (Adjutant General); PUB. RES. CODE § 5006 (Department of Parks and Recreation).

#### Public Resources Code § 6808 (amended)

**Comment.** The provision of Section 6808 declaring acquisitions under authority of this section a public use is deleted as unnecessary. See CODE CIV. PROC. § 1240.010.

The provision requiring condemnation under the Code of Civil Procedure is deleted as unnecessary. See CODE CIV. PROC. § 1230.020 (law governing exercise of power of eminent domain).

The requirement of a resolution of necessity and the specification of its effect is superseded by the more general provisions of the Eminent Domain Law. Under those provisions, the resolution adopted by the State Lands Commission is given conclusive effect on the matters formerly referred to in Section 6808. See CODE CIV. PROC. §§ 1240.040 and 1245.210 *et seq.* See especially CODE CIV. PROC. § 1245.250.

#### ASSEMBLY BILL 278

#### Evidence Code § 814 (technical amendment)

**Comment.** Section 814 is amended to delete the listing of particular matters constituting fair market value that an expert may rely on in forming an opinion as to the value of property. This listing is unnecessary. See CODE CIV. PROC. § 1263.320 (fair market value).

It should be noted that the definition of fair market value contained in Section 1263.320(a) omits the phrase "in the open market" since there may be no open market for some types of special purpose properties such as schools, churches, cemeteries, parks, utilities, and similar properties. The fair market value of these properties is covered by Section 1263.320(b). Within the limits of this article, fair market value may be determined by reference to (1) the market data (or comparable sales approach), (2) the income (or capitalization) method, and (3) the cost analysis (or production less depreciation) formula. See the Comment to Section 1263.320.

#### Health & Safety Code § 1260

**Comment.** Section 1260 supersedes former Code of Civil Procedure Section 1238.3.

**Subdivision (a).** The term "nonprofit" has the same meaning under subdivision (a) as under former Code of Civil Procedure Section 1238.3. However, the definition of "hospital" in subdivision (a) has been narrowed to include only those institutions that are licensed as a general acute care hospital or an acute psychiatric hospital. See Section 1250.

**Subdivision (b).** Subdivision (b) grants broader authority to condemn than was provided by Code of Civil Procedure Section 1238.3, for it permits acquisition of property to establish a newly-organized and licensed hospital, dispenses with the requirement that the property be "immediately" adjacent to existing holdings, and no longer requires that the hospital condemnor be engaged in "scientific research or an educational activity." The limitation to property "immediately" adjacent unduly restricted the ability of existing hospitals to acquire one parcel in a large tract needed for expansion or to acquire noncontiguous property. The limitation to hospitals engaged in scientific research or education was both narrow and ineffective and no longer serves a limiting function since nearly all medical institutions conduct some research or education. Also, the limitation to expansion of existing hospitals was undesirable in view of the equal or greater need of new hospitals for the right of eminent domain. The new scheme is intended to aid expansion to meet public needs as determined by authorized agencies. It should be noted that under Section 1260 condemnation may only be for the purposes of the "nonprofit hospital" as defined in subdivision (a). This precludes condemnation, for example, to provide private doctors' offices or uses other than the nonprofit hospitals described in subdivision (a).

Subdivision (b) continues the requirement of former Code of Civil Procedure Section 1238.3 that the Director of Health certify that the acquisition is necessary and requires the certificate to indicate the public interest and necessity for the acquisition. *Cf.* CODE CIV. PROC. § 1240.030.



*Subdivision (c).* Subdivision (c) continues without substantive change the public hearing requirements of former Code of Civil Procedure Section 1238.3.

**Health & Safety Code § 8501 (added)**

**Comment.** Section 8501 is new. It continues the grant of condemnation authority formerly found in subdivision 14 of Section 1238 of the Code of Civil Procedure ("Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof."). Section 8501 limits the condemnation authority to cemeteries not operated for profit (see REV. & TAX. CODE § 23701c) and solely for the purpose of expansion of an existing cemetery. Cemetery authority is defined in Section 7018 ("Cemetery authority" includes cemetery association, corporation sole, or other person owning or controlling cemetery lands or property."). It should be noted that Section 8501 applies to all cemetery authorities notwithstanding the limitations of Section 8250 (application of Part 3).

**Health & Safety Code § 33720 (amended)**

**Comment.** Section 33720 is amended to conform to the Eminent Domain Law. See CODE CIV. PROC. §§ 1240.040 and 1245.210 *et seq.*

**Health & Safety Code § 33721 (repealed)**

**Comment.** Former Section 33721 is superseded by Code of Civil Procedure Section 1245.210 *et seq.*

**Health & Safety Code § 33722 (repealed)**

**Comment.** Former Section 33722 is superseded by Code of Civil Procedure Section 1245.210 *et seq.*

**Health & Safety Code § 33723 (repealed)**

**Comment.** Former Section 33723 is superseded by Code of Civil Procedure Section 1245.210 *et seq.*

**Health & Safety Code § 34875 (amended)**

**Comment.** Section 34875 is amended to conform to the Eminent Domain Law. See CODE CIV. PROC. §§ 1240.040 and 1245.210 *et seq.*

**Health & Safety Code § 34876 (repealed)**

**Comment.** Former Section 34876 is superseded by Code of Civil Procedure Section 1245.210 *et seq.*

**Health & Safety Code § 34877 (repealed)**

**Comment.** Former Section 34877 is superseded by Code of Civil Procedure Section 1245.210 *et seq.*

**Health & Safety Code § 34878 (repealed)**

**Comment.** Former Section 34878 is superseded by Code of Civil Procedure Section 1245.210 *et seq.*

**Health & Safety Code § 35167 (added)**

**Comment.** Section 35167 retains the substance of subdivision 21 of former Code of Civil Procedure Section 1238 insofar as that sub-

division 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").

**CONSIDERATION OF CONSENT CALENDAR**

The Speaker pro Tempore announced that the next roll call would be on the first item on the Consent Calendar.

**CONSENT CALENDAR—ASSEMBLY BILLS**

**Assembly Bill No. 1268—An act to amend Section 21082 of the Public Resources Code, relating to environmental quality.**

Bill read third time, and passed by the following vote:

**AYES—74**

Alatorre	Craven	Lancaster	Perino
Antonovich	Cullen	Lanterman	Priolo
Arnett	Davis	Lewis	Ralph
Badham	Deddeh	Lockyer	Robinson
Bane	Dixon	MacDonald	Rosenthal
Bannai	Duffy	Maddy	Siegler
Berman	Egeland	McAlister	Sieroty
Beverly	Fenton	McLennan	Suitt
Boatwright	Foran	McVittie	Thomas, Vincent
Briggs	Garamendi	Meade	Thomas, William
Brown	Goggin	Miller	Thurman
Burke	Greene	Mobley	Vasconcellos
Calvo	Gualco	Montoya	Vicencia
Campbell	Hart	Mori	Warren
Carpenter	Hayden	Murphy	Wilson
Chappie	Ingalls	Nestande	Wornum
Chel	Kapiloff	Nimmo	Z'berg
Chimbole	Keene	Papan	Mr. Speaker
Cline	Keysor		

**NOES—None**

Bill ordered transmitted to the Senate.

**Assembly Bill No. 1078—An act to add Section 25275.5 to the Vehicle Code, relating to vehicles.**

Bill read third time, and passed by the following vote:

**AYES—74**

Alatorre	Craven	Lancaster	Perino
Antonovich	Cullen	Lanterman	Priolo
Arnett	Davis	Lewis	Ralph
Badham	Deddeh	Lockyer	Robinson
Bane	Dixon	MacDonald	Rosenthal
Bannai	Duffy	Maddy	Siegler
Berman	Egeland	McAlister	Sieroty
Beverly	Fenton	McLennan	Suitt
Boatwright	Foran	McVittie	Thomas, Vincent
Briggs	Garamendi	Meade	Thomas, William
Brown	Goggin	Miller	Thurman
Burke	Greene	Mobley	Vasconcellos
Calvo	Gualco	Montoya	Vicencia
Campbell	Hart	Mori	Warren
Carpenter	Hayden	Murphy	Wilson
Chappie	Ingalls	Nestande	
Chel	Kapiloff	Nimmo	Z'berg
Chimbole	Keene	Papan	Mr. Speaker
Cline	Keysor		

**NOES—None**

Bill ordered transmitted to the Senate.



Volume 4

# Journal of the Senate

Legislature of the State of California  
1975-1976 Regular Session



HON. MERVYN M. DYMALLY  
President of the Senate

HON. JAMES R. MILLS  
President pro Tempore

DARRYL R. WHITE  
Secretary of the Senate



**Amendment 3**

On page 2, line 32, strike out "second", and insert "next".

**Amendment 4**

On page 2, line 32, strike out "such year", and insert "taxes".

The roll was called, and the Senate concurred in Assembly amendments to Senate Bill 723 by the following vote:

AYES—Senators Alquist, Ayala, Behr, Beilenson, Berryhill, Carpenter, Cusanovich, Deukmejian, Garcia, Greene, Gregorio, Holden, Marks, Mills, Nejedly, Petris, Presley, Richardson, Robbins, Roberti, Rodda, Russell, Smith, Song, Stevens, Stull, Way, Wedworth, and Zenovich—29.

NOES—None.

Above bill ordered enrolled.

**Senate Bill 841**—An act to amend Section 11251 of the Education Code, relating to public schools.

The question being: Shall the Senate concur in the following Assembly amendments to Senate Bill 841?

**First Set of Amendments****Amendment 1**

On page 2, line 21, of the printed bill, as amended in Senate May 20, 1975, after the period, insert "The school district shall ensure that the components of each individual study program for each individual pupil shall be set out in writing."

**Second Set of Amendments****Amendment 1**

On page 2, line 22, of the printed bill, as amended in Assembly June 25, 1975, strike out "individual", and insert "independent".

**Amendment 2**

On page 2, line 26, strike out "a full-time"; strike out line 27; and in line 28, strike out "requirements set forth in Section 11052", and insert "enrolled in a high school program for which Section 11052 provides for the minimum schoolday".

The roll was called, and the Senate concurred in Assembly amendments to Senate Bill 841 by the following vote:

AYES—Senators Alquist, Ayala, Behr, Beilenson, Berryhill, Carpenter, Cusanovich, Deukmejian, Garcia, Greene, Gregorio, Holden, Marks, Mills, Nejedly, Petris, Presley, Richardson, Robbins, Roberti, Rodda, Russell, Smith, Song, Stevens, Stull, Way, Wedworth, and Zenovich—29.

NOES—None.

Above bill ordered enrolled.

**Senate Bill 911**—An act to amend Section 30131 of the Education Code, relating to private educational institutions.

The question being: Shall the Senate concur in the following Assembly amendment to Senate Bill 911?

**Amendment 1**

On page 2, of the printed bill, as amended in Senate May 19, 1975, between lines 15 and 16, insert

"SEC. 2. The amendment to Section 30131 of the Education Code made by Section 1 of this act is declaratory of existing law insofar as it specifies that a contract entered into pursuant to that section cannot result in attendance used to compute apportionments from the State School Fund unless such a contract also meets the requirements of Section 30133 of the Education Code."

The roll was called, and the Senate concurred in Assembly amendments to Senate Bill 911 by the following vote:

AYES—Senators Alquist, Ayala, Behr, Beilenson, Berryhill, Carpenter, Cusanovich, Deukmejian, Garcia, Greene, Gregorio, Holden, Marks, Mills, Nejedly, Petris, Presley, Richardson, Robbins, Roberti, Rodda, Russell, Smith, Song, Stevens, Stull, Way, Wedworth, and Zenovich—29.

NOES—None.

Above bill ordered enrolled.

**MOTION TO PRINT IN JOURNAL**

Senator Song moved that the following report be printed in the Journal.

Motion carried.

**REPORT OF SENATE COMMITTEE ON JUDICIARY  
ON ASSEMBLY BILLS****11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278**

In order to indicate more fully its intent with respect to Assembly Bills 11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278, the Senate Committee on Judiciary makes the following report.

Except for the new and revised comments set out below, the comments contained under various sections of Assembly Bills 11, 266, and 278 as set out in *Recommendation of the California Law Revision Commission Proposing The Eminent Domain Law* (December 1974), 12 Cal. L. Revision Comm'n Reports 1601 (1974), as revised and supplemented in the Report of Assembly Committee on Judiciary, *Assembly Journal* 5183-5212 (May 19, 1975), reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Assembly Bills 11, 266, and 278.

Except for the revised comments set out below, the comments contained under various sections of Assembly Bills 124, 125, 126, 127, 128,



129, 130, and 131 as set out in *Tentative Recommendation Relating to Condemnation Law and Procedure—Conforming Changes in Special District Statutes* (January 1974), 12 Cal. L. Revision Comm'n Reports 1101 (1974), as revised and supplemented in *Recommendation of the California Law Revision Commission Proposing The Eminent Domain Law, supra*, on pages 2003–2008, and as revised in the Report of Assembly Committee on Judiciary, *Assembly Journal* 5183, 5209 (May 19, 1975), reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Assembly Bills 124, 125, 126, 127, 128, 129, 130, and 131.

The following revised and new comments also reflect the intent of the Senate Committee on Judiciary in approving Assembly Bills 11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278.

#### ASSEMBLY BILL 11

##### § 1230.065. Operative date

**Comment.** Subdivision (a) of Section 1230.065 delays the operative date of this title until July 1, 1976, to allow sufficient time for interested persons to become familiar with the new law.

Subdivision (b) adopts the policy that this title is to apply to the fullest extent practicable to pending proceedings except those commenced more than six months before the operative date. In most proceedings commenced within six months before the operative date, except perhaps those in trial or awaiting imminent trial, the immediate application of this title would not delay the parties or court in proceeding to judgment. Immediate application moreover, would prevent inconsistencies of result as between proceedings commenced shortly prior to the operative date and those commenced shortly thereafter. The phrase "to the fullest extent practicable" is intended to give the court discretionary power to adapt the application of the title to the circumstances of individual cases, thereby reducing the possibility that immediate application of these provisions to pending litigation might in special cases cause injustice.

Subdivision (c) excludes from application to pending proceedings provisions dealing with the right to take, precondemnation activities, and pleadings.

Subdivision (d) provides, in the interest of fairness, that any decision of a posttrial motion or appeal pending on the operative date should be based upon the law that was applicable where the action was tried. It would be unfair to hold litigants to a different rule of law in the determination of claimed error than the law which governed at the time the claimed error was committed. If the motion or appeal results in a new trial, however, this title would govern the further proceedings in the action under subdivision (b).

##### § 1240.030. Public necessity required

**Comment.** Section 1240.030 requires that the necessity for the taking be established before property may be taken for a project by eminent domain. The word "project" replaces a variety of terms formerly found in comparable statutes; it is intended to apply to any

type of public use regardless whether the use is active (requiring construction of an improvement) or passive (requiring appropriation of property in unimproved condition).

Public entity plaintiffs must adopt a resolution of necessity before condemning property, Section 1240.040. See also Section 1245.220. This resolution conclusively establishes the matters listed in Section 1240.030 if it is adopted by a vote of two-thirds of all the members of the governing body of the public entity. See Sections 1245.240, 1245.250(a). In some cases, a greater vote may be required to adopt the resolution. See, e.g., Govt. CODE § 67542 (San Francisco Bay Area Transportation Terminal Authority—unanimous vote).

If property sought to be taken by a local public entity is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a presumption affecting the burden of producing evidence that the matters listed in Section 1240.030 are true. Section 1245.250(b). Condemnors other than public entities have the burden of proof on the issue of necessity under Section 1240.030. *But see* PUB. RES. CODE § 25531 (decision of State Energy Resources Conservation and Development Commission conclusive on necessity of certain takings for electrical power plant or transmission facilities).

It should be noted that the prerequisites to condemnation specified in Section 1240.030 are not the only prerequisites for public projects. Notice and a reasonable opportunity to be heard are required before adoption of a resolution of necessity by a public entity. Section 1245.235. Environmental statements and hearings may be required by statute, relocation plans may be required, or consent of various public agencies may be required. See, e.g., *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1972) (*rehearing denied* 1972); *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1972). See also *Environmental Defense Fund, Inc. v. Coastside Water Dist.*, 27 Cal. App.3d 695, 104 Cal. Rptr. 197 (1972) (proper relocation program and environmental statement prerequisite to public projects). The public necessity elements of Section 1240.030 supplement but do not replace any other prerequisites to condemnation imposed by any other law.

**Subdivision (a).** Subdivision (a) prevents the taking of property by eminent domain unless the public interest and necessity require the project. "Public interest and necessity" include all aspects of the public good including but not limited to social, economic, environmental, and esthetic considerations. Under prior law, the necessity of the proposed improvement was not subject to judicial review; the decision of the condemnor on the need for the improvement was conclusive. *E.g.*, *City of Pasadena v. Stimson*, 91 Cal. 238, 253, 27 P. 604, 607 (1891).

**Subdivision (b).** Subdivision (b) prevents the taking of property by eminent domain unless the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. This limitation, which involves essentially a comparison between two or more sites, has also been described as "the necessity for adopting a particular plan" for a given public improvement. *People v. Chevalier*, 52 Cal.2d 299, 307, 340 P.2d 598, 603 (1959). See also *City of Pasadena v. Stimson, supra*; *Eel R. & E. R. R. v. Hill*, 67 Cal. 429, 7 P. 814 (1885).



Proper location is based on two factors: public good and private injury. Accordingly, the condemnor's choice is correct or proper unless another site would involve an equal or greater public good and a lesser private injury. A lesser public good can never be counterbalanced by a lesser private injury to equal a more proper location. See *Montebello etc. School Dist. v. Keay*, 55 Cal. App.2d 839, 131 P.2d 384 (1942). Nor can equal public good and equal private injury combine to make the condemnor's choice an improper location. *California Cent. Ry. v. Hooper*, 76 Cal. 404, 412-413, 18 P. 599, 603 (1888).

Subdivision (b) generalizes the plan or location requirement formerly found in Code of Civil Procedure Sections 1242(a) and 1240(6) (acquisition of land or rights of way).

Subdivision (c). Subdivision (c) prevents the taking of property by eminent domain unless the property or interest therein sought to be acquired is necessary for the proposed project. Cf. Section 1240.110 (right to take any necessary property or right or interest therein) and Section 1240.120 (right to acquire property to make effective the principal use). This aspect of necessity includes the suitability and usefulness of the property for the public use. See *City of Hawthorne v. Peebles*, 166 Cal. App.2d 758, 763, 333 P.2d 442, 445 (1959) ("necessity does not signify impossibility of constructing the improvement . . . without taking the land in question, but merely requires that the land be reasonably suitable and useful for the improvement"). *Accord, Rialto Irr. Dist. v. Brandon*, 103 Cal. 384, 37 P. 484 (1894). Thus, evidence on the aspect of necessity covered by subdivision (c) is limited to evidence showing whether the particular property will be suitable and desirable for the construction and use of the proposed public project.

Subdivision (c) also requires a showing of the necessity for taking a particular interest in the property. See Section 1235.170 (defining "property" to include any interest therein). Cf. *City of Los Angeles v. Keck*, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971).

Subdivision (c) continues former Code of Civil Procedure Section 1241(2) to the extent that that provision required a showing of necessity for taking the particular property or a particular interest therein.

#### § 1240.050. Extraterritorial condemnation

**Comment.** Section 1240.050 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, 703 (1920); *McBean*

*v. City of Fresno*, 112 Cal. 159, 44 P. 358 (1896). Furnishing sewage facilities and supply 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, 291 (1958). Compare *City of Carlsbad v. Wight*, supra.

There are a number of statutes that expressly authorize extraterritorial condemnation, *E.g.*, Section 1240.125; 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 condemnation is that the resolution of necessity of a local public entity is not conclusive where the property to be taken is outside its boundaries. Section 1245.250(b). See *City of Hawthorne v. Peebles*, supra; *City of Los Angeles v. Keck*, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971). See also *Orange County Water Dist. v. Bennett*, 156 Cal. App.2d 745, 750, 320 P.2d 536, 539 (1958); *Los Angeles County Flood Control Dist. v. Jan.* 154 Cal. App.2d 389, 394, 316 P.2d 25, 28 (1957). 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.

#### § 1240.125. Right to acquire property outside territorial limits

**Comment.** Section 1240.125 is new. It makes clear that a local public entity authorized to condemn for utility purposes is expressly authorized to condemn property outside its territorial limits for such purposes, thus avoiding the need to imply such authority under some other statute. Under Section 1240.125, a local public entity authorized to condemn for water supply purposes, for example, may condemn outside its boundaries for water supply purposes. As used in this section, "utility supply purposes" includes collection, generation, storage, and distribution. As used in this section, "water supply" includes irrigation purposes.

It should be noted that the extraterritorial condemnation authority granted in Section 1240.125 does not apply where a statute restricts the condemnation authority of a particular local public entity to property within its boundaries and is limited by statutes requiring the consent of the governing body of the jurisdiction in which the property to be taken is located. See, *e.g.*, Harb. & Nav. Code § 7147 (small craft harbor district may acquire extraterritorial property only with consent of governing body); Pub. Util. Code § 30503 (Southern California Rapid Transit District may acquire property only within its boundaries).



Section 1240.125 does not affect implied extraterritorial condemnation authority for other purposes under other statutes as authorized by Section 1240.050.

**§ 1240.640. Use by state presumed more necessary than other uses**

**Comment.** Section 1240.640 supersedes the general rule stated under former Code of Civil Procedure Section 1240(3) and former Government Code Section 15856 (Property Acquisition Law). Section 1240(3) provided a state priority over private ownership and Section 15856 provided an absolute priority for all acquisitions under that statute. See, e.g., *State v. City of Los Angeles*, 256 Cal. App.2d 930, 64 Cal. Rptr. 476 (1967). Section 1240.640 not only embraces state acquisitions under the Property Acquisition Law but also under any other authority, most notably by the Department of Water Resources and the Department of Transportation. See also WATER CODE § 252 (authority of the Department of Water Resources to take park lands). However, unlike prior law, the presumptions of this section are made rebuttable rather than absolute.

Specific exemptions or qualifications to the rule of state supremacy may be stated elsewhere. E.g., Section 1240.680 (park use presumed "more necessary" than highway use); STS. & HWYS. CODE §§ 155 (Department of Transportation may not take for memorials without county consent); 103.5, 210.1 (Department of Transportation may condemn parks but shall avoid doing so wherever possible). Also, property appropriated to public use by the state may be taken for common use where compatible pursuant to Section 1240.510 *et seq.* and the prior user may, under appropriate circumstances, be permitted under Section 1240.630 to continue his use jointly with the more necessary state use.

**§ 1240.660. Property appropriated to the public use of local public entities**

**Comment.** Section 1240.660 supersedes former Sections 1240(3) and 1241(3) of the Code of Civil Procedure. Section 1240.660, like its predecessors, protects property appropriated to a public use by or to the use of one local public entity from displacement by any other local public entity. However, unlike its predecessors, Section 1240.660 creates a rebuttable, rather than a conclusive, presumption. It should be noted that this presumption is only for purposes of displacement of one user by another. Any local public entity may take property of any other local public entity for joint use where compatible under Section 1240.510. See, e.g., *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 152, 287 P. 496 (1930), and *Turlock Irr. Dist. v. Sierra etc. Power Co.*, 69 Cal. App. 150, 230 P. 671 (1924).

Section 1240.660 expands the number of local public entities given the benefit of the presumption. 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, 405 P.2d 377, 46 Cal. Rptr. 465 (1965); *County of Marin v. Superior Co.*, 526, 2 Cal. Rptr. 758 (1960).

The term "appropriated to public use" is defined by Section 1235.180. See Section 1235.180 and Comment thereto. Former Sections 1240(3) and 1241(3) prohibited takings "while such property is so appropriated and used for the public purposes for which it has been so 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. City of Lodi*, 120 Cal. App. 740, 750, 8 P.2d 532, 536 (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 1240.660 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 F. 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 omitted.

**§ 1245.220. Resolution of necessity required**

**Comment.** Section 1245.220 requires that, before a public entity begins condemnation proceedings, its governing body must adopt a resolution of necessity that meets the requirements of Sections 1245.230, 1245.235, and 1245.240. See Section 1240.040 and Comment thereto. See also Section 1245.260 (remedies available to property owner if eminent domain proceedings not commenced within six months after adoption of resolution of necessity).

**§ 1245.235. Hearing prior to adoption of resolution of necessity by public entity**

**Comment.** Section 1245.235, which requires public entities to give notice to persons whose property is to be acquired and a reasonable opportunity to appear and be heard, imposes a new requirement in eminent domain proceedings.

Subdivision (a) makes clear that the hearing must precede adoption of the resolution of necessity. However, under subdivision (d), this requirement may be satisfied by any adequate procedure followed by the public entity, for example, through hearings under a local improvement act. Moreover, subdivision (d) permits the public entity to combine the required notice and hearing with other administrative procedures, for example, those relating to relocation assistance or to environmental impact reports.

Subdivision (a) makes clear that notice need be given only to persons whose property is being taken by eminent domain if their names appear on the last equalized county assessment roll. The



"last equalized county assessment roll" means the entire assessment roll and includes the roll of state-assessed property. See Rev. & Tax. Code §§ 109, 2050, 2051.

Subdivision (c) permits the public entity to require the property owner to make an affirmative and a timely request to appear and be heard before it is obligated to hold the hearing. The hearing must be open to all property owners requesting it. If no property owner makes a request, the hearing need not be held.

#### § 1245.250. Effect of resolution

**Comment.** Section 1245.250 provides a uniform rule governing the effect to be given to a resolution of necessity. It continues the conclusive effect given to the resolution in state takings. See, e.g., former GOVT. CODE § 15855. It supersedes numerous sections of various codes that afforded disparate treatment to the resolution of necessity of various types of local public entities and generalizes the conclusive effect given the resolution of certain local public entities by former Section 1241(2).

**Subdivision (a).** A valid resolution of necessity conclusively establishes the matters of public necessity specified in Section 1240.030 (1) in all takings by local public entities where the property taken is entirely within the boundaries of the condemning entity and (2) in all takings by state entities regardless of the location of the property taken. Giving a conclusive effect to the resolution of necessity has been held constitutionally permissible. *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923), *aff'g County of Los Angeles v. Rindge Co.*, 53 Cal. App. 166, 200 P. 27 (1921); *City of Oakland v. Parker*, 70 Cal. App. 295, 233 P. 68 (1924). Among the matters encompassed in the conclusive resolution are the extent of and interest in necessary property. See Section 1245.230 and Comment thereto.

A valid resolution precludes judicial review only of the matters specified in Section 1240.030; it does not affect in any way the right of a condemnee to challenge a taking on the ground that the project is not an authorized public use or on the ground that the condemnor does not intend to put the property to its declared public purpose. See Sections 1240.010 and 1250.360 and Comments thereto. Likewise, the resolution does not affect the right of a defendant to contest the right to take his property on specific statutory grounds provided in the Eminent Domain Law. See Sections 1240.230 (taking for future use), 1240.420 (excess condemnation), 1240.520 (taking for compatible use), and 1240.620 (taking for more necessary public use). *Cf.* Section 1240.050 (extraterritorial condemnation). And, the property owner may attack the validity of the resolution itself pursuant to Section 1245.270 (resolution adopted as a result of bribery). Finally, the condemnor must demonstrate its compliance with any other requirements and regulations governing the institution of public projects. See Section 1245.235 (requirement of notice and opportunity to be heard); *cf.* Comment to Section 1240.030.

The initial proviso of Section 1245.250 recognizes that there may be exceptions to the uniform conclusive effect given the resolution of necessity. One important exception is in subdivision (b) (extraterritorial acquisitions by local public entity). Another exception is where the resolution was the result of gross abuse of discretion. Section 1245.255.

**Subdivision (b).** Subdivision (b) provides that a resolution of necessity of a local public entity creates a presumption affecting the burden of producing evidence with regard to public necessity if the property described in the resolution is not located entirely within the boundaries of the local public entity. See EVID. CODE § 604.

Subdivision (b) continues the portion of former Section 1241(2) that denied conclusive effect of a resolution to property lying outside the territorial limits of certain local public entities. Under that provision, necessity and proper location were justiciable questions in the condemnation proceeding. See *City of Hawthorne v. Peebles*, 166 Cal. App.2d 758, 333 P.2d 442 (1959); *City of Carlsbad v. Wight*, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963); *City of Los Angeles v. Keck*, 14 Cal. App.3d 920, 92 Cal. Repr. 599 (1971). Subdivision (b) extends this limitation on the effect of the resolution of necessity to all local public entities condemning property outside their territorial jurisdiction and also makes the question whether the proposed project is necessary a justiciable question in such a condemnation proceeding.

**Subdivision (c).** The limitation contained in subdivision (b) is not applicable to acquisitions for the Sacramento and San Joaquin Drainage District. Acquisitions for this district are undertaken by the State Reclamation Board. See WATER CODE § 8590 and Section 1245.210 and Comment thereto. The conclusive effect given resolutions of the board by former Water Code Section 8595 is continued under subdivisions (a) and (c).

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

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

In addition to the collateral attack on the conclusive effect of the resolution permitted by Section 1245.255, the validity of the resolution may be subject to direct attack by administrative mandamus (Section 1094.5) and, in the case of a conflict of interest, under the Political Reform Act of 1974 (GOVT. CODE § 91003(b)). See also Section 1245.270 (resolution adopted as a result of bribery).

Because Section 1245.255 permits collateral attack on the conclusiveness of the resolution, the standard for attack is a stricter standard than under the administrative mandamus statute. Compare Section 1245.255 ("gross abuse of discretion") with Section 1094.5 ("abuse of discretion"). Moreover, the scope of the court's review is limited



to a determination of whether the resolution is supported by substantial evidence. Contrast *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal.3d 28, 520 P.2d 29, 112 Cal. Repr. 805 (1974) (in certain types of cases, the court must exercise its independent judgment on the evidence in finding an abuse of discretion under Section 1094.5).

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

#### § 1245.270. Resolution procured by bribery

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

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

#### § 1245.310. "Legislative body" defined

**Comment.** See Comment to Section 1245.330.

#### § 1245.320. "Quasi-public entity" defined

**Comment.** See Comment to Section 1245.330.

#### § 1245.330. Resolution required

**Comment.** Sections 1245.310 to 1245.390 are new. They require consent of the appropriate local public entities before a quasi-public entity may condemn property. The quasi-public entities include only those private condemnors defined in Section 1245.320 and do not include privately owned public utilities (Pub. Util. Code §§ 610-624) or other private persons (who are no longer permitted to condemn—see former Civil Code § 1001 and former Prop. § 1238 and Comments thereto).

The quasi-public entity must obtain the consent of the legislative body of each city in which it seeks to condemn property and, where property is not within city limits, of the county in which such property is located. Section 1245.310.

The resolution required by Section 1245.330 must contain not only information and determinations generally required of resolutions of necessity (Section 1245.230), but also a finding of hardship to the condemnor that outweighs the hardship to the property owner. Section 1245.340(c)(4). The resolution does not, however, excuse the condemnor from compliance with any other laws governing condemnation, including the requirement that the condemnor make a showing of public necessity in the eminent domain proceeding. See Section 1245.380.

The legislative body of the local public entity may decline, without a hearing, to adopt a resolution under this article on behalf of a quasi-public entity. Section 1245.350(a). The decision of the legislative body on this matter is final and is not subject to appeal.

#### § 1245.340. Contents of resolution

**Comment.** See Comment to Section 1245.330.

#### § 1245.350. Hearing on resolution

**Comment.** See Comment to Section 1245.330.

#### § 1245.360. Vote required

**Comment.** See Comment to Section 1245.330.

#### § 1245.370. Costs of legislative body

**Comment.** See Comment to Section 1245.330.

#### § 1245.380. Other requirements not affected

**Comment.** See Comment to Section 1245.330.

#### § 1245.390. Legislative body not liable

**Comment.** See Comment to Section 1245.330.

#### § 1250.210. Naming plaintiffs

**Comment.** Section 1250.210 requires that each condemnor be named as a plaintiff. This information may be relevant to the issue of the right to exercise the power of eminent domain. For example, if a joint and cooperative eminent domain proceeding is brought by agreement between different agencies (see Section 1240.140), each condemnor must be named as a plaintiff unless the proceeding is brought by a separate legal entity created pursuant to a joint powers agreement. See Govt. Code § 6508.

The plaintiff must be a person authorized by statute to exercise the power of eminent domain to acquire the property sought for the purpose listed in the complaint. See Section 1240.020. A proceeding may not be maintained in the name of any other person. See *People v. Superior Court*, 10 Cal.2d 288, 73 P.2d 1221 (1937); *City of Sierra Madre v. Superior Court*, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961); *Black Rock etc. Dist. v. Summit etc. Co.*, 56 Cal. App.2d 513,

133 P.2d 58 (1943). Cf. *City of Oakland v. Parker*, 70 Cal. App. 295, 233 P. 68 (1924) (objection that real party in interest was a private person rejected).

#### § 1250.230. Appearance by named and unnamed defendants

**Comment.** Section 1250.230 reenacts without substantive change the second sentence of the second paragraph of former Section 1245.3 and the second paragraph of former Section 1246. It makes clear that all interested persons may participate in an eminent domain proceeding.

An eminent domain judgment is generally binding only on persons, including "unknown persons," named in the complaint and properly served. See Sections 1250.150 (*lis pendens*), 1250.220 (naming defendants); *Wilson v. Beville*, 47 Cal.2d 852, 306 P.2d 789 (1957) (failure to join interest holder leaves his interest unimpaired). However, any person who has an interest in the property even if he is not named and served may, if he chooses, participate. See *Bayle-Lacoste & Co. v. Superior Court*, 46 Cal. App.2d 636, 116 P.2d 458 (1941); *Stratford Irr. Dist. v. Empire Water Co.*, 44 Cal. App.2d 61, 111 P.2d 957 (1941) (*dictum*) (persons not defendants who claim any interest may appear and defend). If he does participate by making a general appearance in the proceeding, he will, of course, be bound by the judgment *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15 (1924); *Bayle-Lacoste & Co. v. Superior Court*, *supra*.

In order to participate, a person must have a legal or equitable interest in the property described in the complaint. For examples of interest holders who have been permitted to participate, see *Harrington v. Superior Court*, *supra* (named defendant holding fee interest not served but appeared voluntarily); *County of San Benito v. Copper Mtn. Min. Co.*, 7 Cal. App.2d 82, 45 P.2d 428 (1935) (successor in interest to fee holder); *Bayle-Lacoste & Co. v. Superior Court*, *supra* (lessee); *City of Vallejo v. Superior Court*, 199 Cal. 408, 249 P. 1084 (1926) ("owner and holder" of deed of trust); *City of Los Angeles v. Dawson*, 139 Cal. App. 480, 34 P.2d 236 (1934) (assignee of eminent domain proceeds).

Section 1250.230 does not authorize the participation of a person who fails to show that he has an interest in the property sought to be taken. Thus, third parties who would not be affected by the adjudication of either title or compensation in the eminent domain proceeding have been denied the right to participate in the proceeding. See *San Joaquin etc. Irr. Co. v. Stevinson*, 164 Cal. 221, 235-237; 240-242, 128 P. 924, 930, 932 (1912) (upstream riparian owners); *City of Alhambra v. Jacob Bean Realty Co.*, 138 Cal. App. 251, 31 P.2d 1052 (1934) (owners of abutting property who might suffer consequential damages from the project for which the property is being acquired). See also *City of Riverside v. Malloch*, 226 Cal. App.2d 204, 37 Cal. Rptr. 862 (1964) (shareholder in company from which property sought to be acquired not permitted to participate). However, what constitutes "property" is subject to both legislative and judicial change. See Section 1265.410 (contingent future interests); *Southern Cal. Edison Co. v. Bourgerie*, 9 Cal.3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973).

Section 1250.230 is intended to be flexible enough to accommodate such changes and to permit participation by any person with a recognizable interest.

In *San Bernardino etc. Water Dist. v. Gage Canal Co.*, 226 Cal. App.2d 206, 37 Cal. Rptr. 856 (1964), it was suggested in *dictum* that a person who sought to acquire by eminent domain the same property involved in a pending eminent domain proceeding could appear in such proceeding under former Section 1246. However, under the Eminent Domain Law, his proper remedy is to commence another proceeding and move to consolidate the proceedings. See Section 1048. See also Section 1260.020 (procedure where separate proceedings consolidated).

#### § 1250.310. Contents of complaint

**Comment.** Section 1250.310 prescribes the necessary contents of a complaint in an eminent domain proceeding. A complaint that does not contain the elements specified in this section is subject to demurrer. See Sections 430.10 and 430.30. Section 1250.310 is an exclusive listing of the substantive allegations required to be made by the plaintiff. Other substantive allegations may, but need not, be made. See, e.g., *California S.R.R. v. Southern Pac. R.R.*, 67 Cal. 59, 7 P. 123 (1885) (averment of value not required and is surplusage); *County of San Luis Obispo v. Simis*, 1 Cal. App. 175, 81 P. 972 (1905) (averment of manner of construction of proposed improvement not required).

Other necessary procedural elements not specified in this section are required to be incorporated in the complaint, however. These include a caption (Sections 422.30 and 422.40), a request for relief (Section 425.10), and a subscription (Section 446). See also Section 1250.330 (signing of pleadings); PUB. UTIL. CODE § 7557 (additional requirement where complaint seeks relocation or removal of railroad tracks). See generally Section 1230.040 and Comment thereto (rules of practice in eminent domain proceedings).

*Subdivision (a).* The rules for designating parties to an eminent domain proceeding are prescribed in Sections 1250.210 and 1250.220.

*Subdivision (b).* Subdivision (b), which requires a description of the property and interest sought to be taken, supersedes subdivision 5 of former Section 1244. The property described in the complaint may consist of anything from a fee interest in land to water rights, to noise easements, or to franchises. See Sections 1235.170 ("property" defined), 1235.125 ("interest" in property defined), and 1240.110 (right to acquire any necessary interest in property).

The description of the property should be sufficiently certain to enable the parties, and any ministerial officer who may be called upon to enforce the judgment, to know precisely what land is to be taken and paid for. See *California Cent. R. R. v. Hooper*, 76 Cal. 404, 18 P. 599 (1888). See also Section 430.10(g) (demurrer for uncertainty).

Like the former provision, subdivision (b) does not require the complaint to identify the nature of the interests the various parties may have in the property sought to be taken. Specification of the precise interest held by the defendant is left to the defendant. See Section



1250.320 (answer). However, the judgment in an eminent domain proceeding affects only the interests of parties properly joined or appearing. See Sections 1250.220 and 1250.230 and Comments thereto. Where the plaintiff has or claims a preexisting interest in the property sought to be taken, this interest must be described in the complaint. See subdivision (c) and *People v. Shasta Pipe etc. Co.*, 264 Cal. App.2d 520, 70 Cal. Rptr. 618 (1968); cf. *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 P. 585 (1899); *State v. Whitlow*, 243 Cal. App.2d 490, 52 Cal. Rptr. 336 (1966).

Unlike former Section 1244, subdivision (b) does not require that the complaint indicate whether the property taken is a part of a larger parcel but requires only a description of the property taken. Contrast *Inglewood v. O. T. Johnson Corp.*, 113 Cal. App.2d 587, 248 P.2d 536 (1952).

*Subdivision (d)*. Subdivision (d) supersedes subdivision 3 of former Section 1244 requiring a statement of the right of the plaintiff. Subdivision (d) is intended to provide the owner of the property sought to be taken with an understanding of the purpose for which his property is being taken and the authority on which the taking is based. The requirements of subdivision (d) may be satisfied in any way convenient to the plaintiff as long as they are indicated in the complaint. This might include summarizing the resolution of necessity or attaching the resolution to the complaint and incorporating it by reference. See the Comment to Section 1245.230 for a discussion of the requirements of subdivision (d).

Paragraph (1) requires a general statement of the public use for which the property is being taken. Property may not be taken by eminent domain except for a public use. CAL. CONST., Art. I, § 19; Section 1240.010.

Paragraph (2) requires a description of the public necessity for the taking. The items of public necessity are listed in Section 1240.030 and include (1) public necessity for the project, (2) plan or location of the project compatible with the greatest public good and least private injury, and (3) the necessity of the particular property for the project. This extensive description of the necessity for the taking supplants the general allegation permitted under prior law. See, e.g., *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955). It should be noted that a public entity must first adopt a resolution of necessity before it may proceed to condemn property. Sections 1240.040, 1245.220. Thus, while subdivision (2) requires an extensive statement of the necessity for the acquisition, this statement may be satisfied by incorporation of the resolution containing appropriate findings and declarations. The resolution, under certain conditions, is given conclusive effect in the proceeding. See Section 1245.250. If the resolution is not incorporated, a reference to the resolution should be included which is adequate to identify it so that a copy of the resolution may be obtained.

Where the condemnor is a nonprofit hospital, college, or cemetery, or a limited dividend housing corporation, a land chest corporation, or mutual water company, a reference must be made to the resolution of the local public entity consenting to the acquisition. See Section

1245.330. A similar reference to the certificate required by Section 1260 of the Health and Safety Code must be included where applicable. Likewise, a reference to the certification or to the requirement that development rights be acquired must be included if the plaintiff is a utility that relies upon a certification, or a requirement that development rights be acquired, by the State Energy Resources Conservation and Development Commission. See PUB. RES. CODE § 25531.

Paragraph (3) requires a reference to the statute authorizing acquisition of the property by eminent domain. The power of eminent domain may be exercised only by persons authorized by statute for purposes designated by statute. Section 1240.020. Such authorizing statutes may be of several types. The state, the University of California, cities, counties, and school districts, for example, may condemn any property necessary to carry out any of their powers or functions. See, e.g., EDUC. CODE §§ 1047 (school districts), 23151 (Regents of the University of California); GOVT. CODE §§ 15853 (Public Works Board), 25350.5 (counties), 37350.5 (cities). Many special districts have similar broad authority, but some may condemn only for limited or special purposes. Additionally, if the condemnor is acquiring property under authority of certain general public uses, it must specify that authority. E.g., Sections 1240.220 (taking for future use), 1240.320-1240.350 (condemnation for exchange purposes), 1240.420 (excess condemnation), 1240.510 (taking for compatible use), and 1240.610 (taking for more necessary public use). The requirement of a reference to the authorizing statute makes more precise the general allegation of right to condemn permitted under prior law. See e.g., *Kern County High School Dist. v. McDonald*, 180 Cal. 7, 179 P. 180 (1919), and *Los Altos School Dist. v. Watson*, 133 Cal. App.2d 447, 284 P.2d 513 (1955). Where the plaintiff may be authorized to take the property on differing and inconsistent grounds, the plaintiff may allege such authority in the alternative.

*Subdivision (e)*. Subdivision (e) broadens the requirement formerly found in subdivision 4 of Section 1244 that the complaint be accompanied by a map where the taking was for a right of way. Subdivision (e) requires a map to be attached to the complaint in all cases. The map should be sufficiently detailed and accurate to enable the parties to identify the property and its relation to the project. Where the taking is for a right of way, the map should show its location, general route, and termini with respect to the property sought to be taken. The map need not indicate whether the property sought is a part of a larger parcel. Cf. PUB. UTIL. CODE § 7557 (map required where complaint seeks relocation or removal of railroad tracks). However, the map may show such information, and any other information, if the plaintiff so desires.

#### § 1250.320. Contents of answer

**Comment.** Section 1250.320 continues the requirement of former Section 1246 that the answer include a statement of the defendant's claimed interest in the property. Unlike former Section 1246, which Section 1250.320 supersedes, Section 1250.320 does not require a defendant to specify the compensation he claims for the proposed taking



(except to the extent provided in subdivision (b)); the defendant's claims relating to compensation are revealed by discovery and other pretrial procedures.

The allegations of the answer are deemed denied as in civil actions generally. See Section 431.20(b). Amendments to the answer are made as in civil actions generally. See Sections 472 and 473. See also Section 1250.340.

Defenses that the defendant has to the taking may be alleged in the answer or, where appropriate, may be raised by demurrer. See Section 1250.350. See also Sections 1250.360 and 1250.370 (grounds for objecting to right to take). The rules governing demurrers to the complaint are the same as in civil actions generally. See Section 1230.040 (rules of practice in eminent domain proceedings). See generally Sections 430.10, 430.30-430.80. See also Section 1250.345 (waiver of objections to complaint).

As to the use of a cross-complaint in an eminent domain proceeding, see Sections 426.70 (compulsory cross-complaints) and 428.10 (when cross-complaint permitted) and the Comments to those sections.

#### § 1250.370. Grounds for objection to right to take where resolution not conclusive

**Comment.** Section 1250.370 lists the grounds for objection to the right to take that may be raised where there is not a conclusive resolution of necessity. Thus, they may be raised against a nonpublic-entity plaintiff in all cases and against a public-entity plaintiff in cases where it has not adopted a resolution or where the resolution is not conclusive. See Sections 1245.250 and 1245.255 for the effect of the resolution. The introductory clause to Section 1250.370 makes clear that the grounds listed here are in addition to those listed in Section 1250.360. See Section 1250.360 and Comment thereto.

Subdivision (a) applies only to public entities. A public entity may not commence an eminent domain proceeding until after it has passed a resolution of necessity that meets the requirements of Article 2 of Chapter 4. See Sections 1240.040 and 1245.220. A duly adopted resolution must contain all the information required in Section 1245.230, may be adopted by a public entity only after notice and an opportunity for affected property owners to be heard pursuant to Section 1245.235, and must be adopted by a two-thirds vote of all the members of the governing body of the public entity. See Section 1245.240 and Comment thereto.

Subdivisions (b)-(d) recognize that the power of eminent domain may be exercised to acquire property for a proposed project only if (1) the public interest and necessity require the proposed project, (2) the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury, and (3) the property and particular interest sought to be acquired are necessary for the proposed project. Section 1240.030. See Section 1235.170 (property includes any interest in property). *Cf.* PUB. RES. CODE § 25531 (eminent domain proceeding—effect of certification by State Energy Resources Conservation and Development Commission).

Subdivision (c) applies only to certain nonpublic condemners. Section 1245.330 requires nonprofit hospitals, colleges, and cemeteries, limited dividend housing corporations, land chest corporations, and mutual water companies to obtain the consent of the relevant local public entities prior to commencing an eminent domain proceeding.

#### § 1250.410. Pretrial settlement offers

**Comment.** Section 1250.410 continues the substance of former Section 1249.3, making clear that the offer and demand are to cover all of the compensation in the proceeding, including injury to the remainder, if any, and not merely the value of the part taken. Section 1250.410 also requires the court to consider the evidence produced at trial in making its determination whether the offer of the plaintiff was reasonable and the demand of the defendant was unreasonable. For the definition of "litigation expenses," see Section 1235.140.

#### § 1255.230. Objections to withdrawal

**Comment.** Section 1255.230 continues portions of subdivisions (c), (d), (e), and (f) of former Section 1243.7. Unlike the provisions on which it is based, Section 1255.230 does not forbid withdrawal of the deposit if notice of the application cannot be personally served upon all parties; it authorizes the court to exercise its discretion to limit the amount to be withdrawn in such cases and to require security for the withdrawal. See Section 1255.240. This change implements the constitutional requirement of "prompt release" of the deposit to the owner. Cal. Const., Art. I, § 19.

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.

#### § 1263.205. Improvements pertaining to the realty

**Comment.** The definition of improvements pertaining to the realty in Section 1263.205 is not inclusive; it makes clear that certain machinery and equipment are deemed improvements but does not affect buildings, structures, and other fixtures which may also be improvements pertaining to the realty for the purposes of this article.

Section 1263.205 supersedes the provisions of former Section 1248b which applied only to equipment designed for manufacturing or industrial purposes. Section 1263.205 applies to machinery as well as to equipment and applies whether or not they are used for manufacturing or industrial purposes. Equipment includes, for example, but is not limited to, furniture of a motel or restaurant where such furniture cannot be removed without a substantial economic loss.

One effect of classification of property as improvements pertaining to the realty is that such property, if located on the property taken, must also be taken and paid for by the condemnor of the realty. As a consequence, the condemnor acquires title to the improvements rather than merely paying for loss of value on removal and has the right to realize any salvage value the improvements may have and must bear the resultant burden. Where such improvements are located on the remainder, they may receive severance damages. See, e.g., *City of Los Angeles*, 83 Cal. App.3d 973, 83 Cal. Rptr. 898 (1970).



The owner of improvements pertaining to the realty may remove the improvements with the consent of the condemner and recover their reasonable removal and relocation cost. Section 1263.260. Improvements that are so removed are not taken into account in determining compensation. Section 1263.230.

Losses on personal property that is not an improvement pertaining to the realty may be recoverable under the relocation assistance provisions of the Government Code. See, e.g., Govt. Code § 7262.

#### § 1263.320. Fair market value

**Comment.** Section 1263.320 is new. Subdivision (a) codifies the definition of fair market value that has developed through the case law. See, e.g., *Sacramento etc. R. R. v. Heilbron*, 156 Cal. 408, 409, 104 P. 979, 980 (1909); *Buena Park School Dist. v. Mctrim Corp.*, 176 Cal. App.2d 255, 263, 1 Cal. Rptr. 250, 255-256 (1959). Although the phrase "estimated in terms of money" has been utilized in the case law definitions of fair market value, Section 1263.320 omits this phrase because it is confusing.

The phrase "in the open market" has been deleted from the definition of fair market value in subdivision (a), and subdivision (b) has been added to the definition because there may be no relevant market for some types of special purpose properties such as schools, churches, cemeteries, parks, utilities, and similar properties. All properties, special as well as general, are valued subject to the limits of Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code. The Evidence Code provides that, regardless of whether there is a relevant market for property, its fair market value may be determined by reference to matters of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property including where appropriate, but not limited to: (1) the market data (or comparable sales) approach, (2) the income (or capitalization) method, and (3) the cost analysis (or reproduction less depreciation) formula.

The standard provided in Section 1263.320 is the usual standard normally applied to valuation of property whether for eminent domain or for any other purpose. The evidence admissible to prove fair market value is governed by the provisions of the Evidence Code. See especially Evid. Code § 810 *et seq.* Where comparable sales are used to determine the fair market value of property, the terms and conditions of such sales may be shown in an appropriate case. See Evid. Code § 816.

For an adjustment to this basic fair market value standard in case of changes in value prior to the date of valuation, see Section 1263.330.

#### § 1263.520. State tax returns of business

**Comment.** Section 1263.520 is comparable to a portion of Government Code Section 7262(c). The state tax returns remain confidential under this section and may not be introduced in evidence in the case. See, e.g., Rev. & Tax. Code §§ 19282 (personal income tax), 22451 (bank and corporation tax).

#### § 1263.530. Temporary business losses

**Comment.** Section 1263.530 makes clear that this article is not intended to affect the rules relating to compensation for temporary business losses. This matter is left to continuing case development.

#### § 1265.010. Scope of chapter

**Comment.** Section 1265.010 makes clear that this chapter is intended to deal only with particular aspects of compensation for divided interests and is not intended to deal with the subject in a comprehensive manner. The law generally applicable to compensation for particular interests under California Constitution, Article I, Section 19 and Section 1263.010 (owner of property entitled to compensation) remains unaffected absent a specific provision in this chapter giving greater rights. Thus, for example, compensation for such interests in property as easements and restrictive covenants remains unaffected by this chapter. See, e.g., *Southern Cal. Edison Co. v. Bourgerie*, 9 Cal.3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973) (restrictive covenants). Likewise, the right to compensation for unexercised options to purchase property is unaffected by this chapter. See, e.g., *County of San Diego v. Miller*, 13 Cal.3d 684, 532 P.2d 139, 199 Cal. Rptr. 491 (1975).

#### ASSEMBLY BILL 128

##### Water Code § 31043. County water district

**Comment.** Section 31043 is unnecessary. See Code Civ. Proc. § 1240.010 (use as public use). See also Section 31040 (grant of authority to acquire property necessary to carry out the business of the district).

#### ASSEMBLY BILL 130

##### Sacramento River West Side Levee District Art, § 5 (Stats. 1915, Ch. 361)

**Comment.** The deleted portions of Section 5 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.610 *et seq.* (more necessary public use), 1240.110 (right to acquire any property or any interest or right in property). See also Code Civ. Proc. §§ 1235.170 ("property" defined), 1240.130 (acquisition by means other than condemnation); *cf.* Code Civ. Proc. § 1230.030.

#### ASSEMBLY BILL 131

##### Orange County Flood Control Act (Stats. 1927, Ch. 723), § 16.1 (added Stats. 1957, Ch. 1036, § 1) (repealed)

**Comment.** Section 16.1 is superseded by Code of Civil Procedure Sections 1240.350 and 1240.410 *et seq.*

##### Riverside County Flood Control and Water Conservation District Act (Stats. 1945, Ch. 1122), § 9.2 (added Stats. 1967, Ch. 1112, § 5) (repealed)

**Comment.** Section 9.2 is superseded by Code of Civil Procedure Sections 1240.350 and 1240.410 *et seq.*



Floor Statement AB 11

Assembly Bill 11 is part of a package of bills for a comprehensive reform of California eminent domain law based on recommendations of the California Law Revision Commission developed over a period of years working with the State Bar and the Commissioners on Uniform State Laws. The basic statute governing condemnation law and procedure is contained in AB 11; conforming changes in the codified statutes are found in AB 278; conforming changes in the uncodified statutes are found in AB 124-131; and conforming changes relating to the condemnation authority of the state are found in AB 266.

Although some important changes in existing law are proposed, the bill package is basically a reorganization and restatement of existing California law with numerous minor changes of a technical or corrective nature. A major purpose of the bills is to supply a complete, well organized compilation of the law that will replace the duplicative, inconsistent, and special provisions of existing law relating to condemnation.

AB 11, together with AB 278, eliminates the detailed listing of specific public uses from the eminent domain statute, but the right of public entities and public utilities to condemn property for those uses is continued. The right of cities, counties, and school districts to condemn property for their purposes is made clear, and cities and counties are authorized to condemn property to preserve open space (with limitations to prevent abuse). The right of private persons to condemn property is abolished, and the right of nonprofit hospitals, nonprofit educational institutions of collegiate grade, certain nonprofit housing corporations, and mutual water companies is made subject to



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review by both local public agencies and the courts.

### Public Use and Necessity

AB 11 makes changes in several important aspects of public use and necessity. It requires that every public entity adopt a resolution of necessity as a prerequisite to condemnation by a two-thirds vote of all the members of the governing body, following advice to the property owner and an opportunity to be heard. The resolution will be conclusive on matters of public necessity for acquisitions within the boundaries of the public entity except where the property owner shows that the resolution is the result of abuse of discretion or arbitrary or capricious action. Superseded by these general provisions will be numerous provisions of existing law that provide a variety of different rules governing the necessity for, adoption of, and effect of, the resolution of necessity.

Acquisition of property by a condemnor for use in the future is permitted if the property will be used within a reasonable period. If the use will be within seven years, it is deemed reasonable; if the use will not be within seven years (or, in the case of a taking for federal-aid highways, 10 years), the burden of proof is on the condemnor to show that the actual period is reasonable.

The authority of a public entity to condemn a remnant left by a partial taking is continued, provided the remnant is of little market value. If the property owner contests the taking, the public entity must establish that the remnant meets this criterion. Taking the remnant is not permitted if the contesting property owner establishes that the condemnor can provide a reasonable, practicable, and economically sound "physical solution" to the problem.



The statutory hierarchy of more necessary public uses is retained for the condemnation of property already appropriated to public use. AB 11, however, precludes a more necessary public use from displacing a less necessary public use upon objection of the less necessary user if joint use is possible. Likewise, it permits a less necessary user to condemn for joint use with a more necessary use if the uses will be compatible.

#### Possession Prior to Judgment

Major changes are proposed in the procedure by which a condemnor may obtain possession of property following commencement of an eminent domain proceeding but prior to entry of judgment. AB 11 authorizes all condemnors to obtain possession prior to judgment; however, it imposes procedural safeguards by providing the property owner a statement or summary of the deposit appraisal, the right to have an inadequate deposit increased, 90 days' notice prior to dispossession, and the right to obtain a stay of possession in case of hardship. It also enables the condemnor to obtain prompt possession in cases of urgent need. In addition, homeowners and owners of rental property may require the condemnor to make a prejudgment deposit, with appropriate sanctions for failure to do so.

#### Compensation

The basic California compensation scheme (awarding the value of the part taken plus the difference, if any, between damages and benefits to the remainder) is continued. However, AB 11 incorporates important changes in several aspects of the computations. Neither party is assigned the burden of proof on the issue of compensation.



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Permission for the plaintiff to establish a fixed valuation date regardless of subsequent occurrences by making a deposit is superimposed on the existing date of valuation scheme. Where a new trial is held, absent a deposit by the plaintiff, the date of valuation normally will be the date of the new trial rather than the date used in the previous trial.

Provision is made for compensation for the loss of goodwill of a business on the property taken or on the remainder. Also, the rule that manufacturing or industrial equipment is part of the realty for purposes of compensation is broadened to cover any facility, machinery, or equipment which cannot be removed without a substantial loss in value or without substantial damage to the property on which it is installed.

In partial taking cases, the rule of People v. Symons (that the damage-causing portion of the project must be located on the part taken in order to be compensable) is abrogated. AB 11 provides that damage caused by a project to a remainder is compensable regardless of the location of the damage-causing portion of the project; the equivalent rule as to offsetting benefits is also codified.

#### Divided Interests

AB 11 continues the procedure permitting the plaintiff in an eminent domain proceeding to elect to have compensation determined in a lump sum against all defendants with a second-stage apportionment among the defendants. However, significant changes are made in the substantive rules for compensating particular interests. Where there is a partial taking of property subject to a lease, provision is made for the pro rata reduction of rent or, if the purpose of the lease is frustrated,



for the termination of the lease, absent a governing provision in the lease. The right to compensation of an option holder or a person owning a contingent future interest is recognized.

Postjudgment Procedure

The various postjudgment procedures peculiar to eminent domain proceedings are retained. The provisions for payment of a judgment and for deposit pending appeal are consolidated to provide one uniform deposit procedure, thereby enabling uniform provisions for withdrawal of the award and for obtaining possession after judgment. The one-year delay in payment of a judgment afforded certain public entities is eliminated in favor of a uniform 30-day period. Case law relating to costs is clarified and codified; the substance of the provisions relating to abandonment and litigation expenses on abandonment and dismissal for other reasons is continued and expanded to apply to a case where the proceeding is dismissed for failure to prosecute.



CALIFORNIA LEGISLATURE  
AT SACRAMENTO  
1975-76 REGULAR SESSION

ASSEMBLY FINAL HISTORY

SYNOPSIS OF  
ASSEMBLY BILLS, CONSTITUTIONAL AMENDMENTS, CONCURRENT  
AND JOINT RESOLUTIONS

Assembly Convened December 2, 1974  
Recessed December 4, 1974                      Reconvened January 6, 1975  
Recessed March 20, 1975                      Reconvened March 31, 1975  
Recessed June 27, 1975                      Reconvened August 1, 1975  
Recessed September 12, 1975              Reconvened January 5, 1976  
Recessed April 8, 1976                      Reconvened April 19, 1976  
Recessed July 1, 1976                      Reconvened August 2, 1976  
Adjourned August 31, 1976  
Adjourned Sine Die November 30, 1976  
Legislative Days..... 256

HON. LEO T. McCARTHY  
*Speaker*

HON. JOHN T. KNOX  
*Speaker pro Tempore*

HON. PAULINE L. DAVIS  
*Assistant Speaker pro Tempore*

HON. HOWARD L. BERMAN  
*Majority Floor Leader*

HON. PAUL PRIOLO  
*Minority Floor Leader*

*Compiled Under the Direction of*  
JAMES D. DRISCOLL  
*Chief Clerk*

GUNVOR ENGLE  
*History Clerk*



## A.B. No. 11—McAlister.

An act to add Sections 1240.680 and 1240.700 to, to add Title 7 (commencing with Section 1230.010) to, and to repeal Title 7 (commencing with Section 1237) of, Part 3 of the Code of Civil Procedure, relating to acquisition of property for public use.

1974

- Dec. 2—Read first time.  
 Dec. 3—Referred to Com. on JUD. To print.  
 Dec. 5—From printer. May be heard in committee January 4.

1975

- April 10—From committee chairman, with author's amendments: Amend, and re-refer to Com. on JUD. Read second time and amended.  
 April 14—Re-referred to Com. on JUD.  
 April 23—From committee chairman, with author's amendments: Amend, and re-refer to Com. on JUD. Read second time and amended.  
 May 1—Re-referred to Com. on JUD.  
 May 12—From committee: Amend, and do pass as amended, and re-refer to Com. on W. & M. (Ayes 5. Noes 0.)  
 May 13—Read second time and amended.  
 May 15—Re-referred to Com. on W. & M.  
 May 22—From committee chairman, with author's amendments: Amend, and re-refer to Com. on W. & M. Read second time and amended.  
 May 27—Re-referred to Com. on W. & M.  
 June 13—From committee: Do pass. (Ayes 12. Noes 1.)  
 June 16—Read second time. To third reading.  
 June 24—Read third time, passed, and to Senate. (Ayes 51. Noes 15. Page 7369.)  
 June 25—In Senate. Read first time.  
 June 26—Referred to Com. on JUD.  
 Aug. 5—From committee chairman, with author's amendments: Amend, and re-refer to committee. Read second time, amended, and re-referred to Com. on JUD.  
 Aug. 14—From committee: Amend, and do pass as amended, and re-refer to Com. on FIN. (Ayes 8. Noes 0.)  
 Aug. 15—Read second time, amended, and re-referred to Com. on FIN.  
 Aug. 27—From committee: Amend, and do pass as amended. (Ayes 8. Noes 2.)  
 Aug. 28—Read second time, amended, and to third reading.  
 Aug. 29—Read third time, amended, and returned to third reading.  
 Sept. 2—Read third time, passed, and to Assembly. (Ayes 22. Noes 1. Page 7563.)  
 Sept. 2—In Assembly. Concurrence in Senate amendments pending.  
 Sept. 12—Senate amendments concurred in. To enrollment. (Ayes 51. Noes 13. Page 10357.)  
 Sept. 19—Enrolled and to the Governor at 10 a.m.  
 Oct. 1—Approved by the Governor.  
 Oct. 1—Chaptered by Secretary of State—Chapter 1275.



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MEMBER, SUBCOMMITTEE ON HEALTH  
AND WELFARE  
SELECT COMMITTEE ON  
REVISION OF THE  
CORPORATIONS CODE  
CALIFORNIA LAW REVISION  
COMMISSION

# Assembly California Legislature

ALISTER MCALISTER  
ASSEMBLYMAN, TWENTY-FIFTH DISTRICT  
CHAIRMAN  
FINANCE, INSURANCE, AND COMMERCE

September 12, 1975

Honorable Edmund G. Brown, Jr.  
Governor of California  
State Capitol

Dear Governor Brown:

Assembly Bills 11, 124-131, 266, and 278 have passed the Legislature and have been sent to you for your approval. I previously wrote you a letter concerning Assembly Bills 124, 125, 126, 128, 129 and 130.

AB 11 will provide a comprehensive revision of California eminent domain law and the other bills make necessary conforming changes in related statutes. These companion bills will delete hundreds of sections and somewhere between 25,00 and 30,000 of words of obsolete, duplicating, or inconsistent language from existing codified and uncodified statutes. The subject matter of each bill is noted briefly below:

- AB 11 Comprehensive Eminent Domain Law
- AB 124-131 Conforming changes in special district laws
- AB 266 Conforming changes in state condemnation authority
- AB 278 Conforming changes in general codified statutes

These bills embody the recommendations of the California Law Revision Commission and are supported by the California State Bar, the California Real Estate Association and many lawyers and appraisers whose practice includes eminent domain cases.

The bills are the first comprehensive revision of the eminent domain law in more than 100 years. The Law

LEGISLATIVE INTENT SERVICE (800) 666-1917

Honorable Edmund G. Brown, Jr.  
September 12, 1975  
Page 2

Revision Commission's study spanned 10 years and drew upon eminent domain reform efforts in a number of other states and countries, including the Uniform Eminent Domain Code adopted in late 1974 by the National Conference of Commissioners on Uniform State Laws. The Law Revision Commission was aided in its task by five expert consultants and a special committee appointed by the California State Bar. Hundreds of lawyers and appraisers who practice in this field also contributed to the development of the bills by providing information and comments on these proposals when they were in tentative form. Representatives of state and local public entities regularly attended Commission meetings and provided valuable information and constructive comments which were taken into account in developing the bills.

The Legislature has also devoted substantial time and effort to these important bills. The Assembly Committee on Judiciary devoted three hearing sessions to the bills and made significant amendments directed to procedural aspects of the commencement of eminent domain proceedings. The Senate Committee on Judiciary created a Subcommittee on Eminent Domain which devoted two full days to resolving problems in the bills; the report of the Subcommittee is enclosed for your information. The Subcommittee report summarizes the major objections made to AB 11 and the Subcommittee's recommendations concerning each such objection. The Chairman of the Subcommittee was Senator Song. The other members were Senator's Deukmejian and Roberti. The Subcommittee unanimously recommended approval of the bill with amendments that have been incorporated into the bill.

An analysis of each of the bills in the form in which they passed the Legislature is enclosed. The bills as introduced are explained in the Law Revision Commission's recommendation proposing the Eminent Domain Law (copy enclosed) and in the Commission's tentative recommendation of conforming changes in the special district statutes (copy also enclosed). The Commission Comments to the sections of the bills should be consulted for a precise indication of the changes in law the sections make and for other information relating to the operation and effect of the sections. Also for your assistance in analyzing the

Honorable Edmund G. Brown, Jr.  
September 12, 1975  
Page 3

bills, I am enclosing the following materials:

Report of Assembly Committee on Judiciary  
(revises Law Revision Commission Comments  
to reflect amendments made in Assembly)

Report of Senate Committee on Judiciary  
(revises Law Revision Commission Comments  
to reflect amendments made in Senate)

Cost Implications of AB 11 (analysis prepared  
by staff of Law Revision Commission)

If you require any additional information concerning the bills or have any questions concerning them, please contact John H. DeMouilly, Executive Secretary of the Law Revision Commission. His business telephone number is (415) 497-1731. His home telephone number is (415) 948-1578. Please feel free to call him at any time.

Sincerely yours,

ALISTER McALISTER

AM:egb  
Enclosures



STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

*relating to*

Condemnation Law and Procedure

The Eminent Domain Law

January 1974

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford University  
Stanford, California 94305



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## NOTE

This pamphlet begins on page 1. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 12 of the Commission's *Reports, Recommendations, and Studies*.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.



STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

*relating to*

Condemnation Law and Procedure

The Eminent Domain Law

January 1974

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford University  
Stanford, California 94305





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## CALIFORNIA LAW REVISION COMMISSION

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*Ex Officio*

November 30, 1973

To: THE HONORABLE RONALD REAGAN  
*Governor of California* and  
 THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether condemnation law and procedure should be revised "to safeguard the property rights of private citizens." Subsequently this direction was broadened by Resolution Chapter 130 of the Statutes of 1965 to direct a revision of condemnation law and procedure in the form of a comprehensive statute "that will safeguard the rights of all parties to such proceedings."

Pursuant to these directions, the Commission has previously submitted recommendations concerning the following eminent domain problems, selected because they were in need of immediate attention:

Recommendation	Action by Legislature
<i>Evidence in Eminent Domain Proceedings</i> , 3 CAL. L. REVISION COMM'N REPORTS at A-1 (1961)	Not enacted. But see EVID. CODE § 810 <i>et seq.</i> enacting substance of recommendation.
<i>Taking Possession and Passage of Title in Eminent Domain Proceedings</i> , 3 CAL. L. REVISION COMM'N REPORTS at B-1 (1961)	Enacted. Cal. Stats. 1961, Chs. 1612, 1613
<i>Reimbursement for Moving Expenses When Property Is Acquired for Public Use</i> , 3 CAL. L. REVISION COMM'N REPORTS at C-1 (1961)	Not enacted. But see GOVT. CODE § 7260 <i>et seq.</i> enacting substance of recommendation.
<i>Discovery in Eminent Domain Proceedings</i> , 4 CAL. L. REVISION COMM'N REPORTS 701 (1963); 8 CAL. L. REVISION COMM'N REPORTS 19 (1967)	Enacted. Cal Stats. 1967, Ch. 1104



<i>Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding</i> , 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967)	Enacted. Cal. Stats. 1968, Ch. 133
<i>Arbitration of Just Compensation</i> , 9 CAL. L. REVISION COMM'N REPORTS 123 (1969)	Enacted. Cal. Stats. 1970, Ch. 417
<i>Revisions of Governmental Liability Act</i> , 9 CAL. L. REVISION COMM'N REPORTS 801 (1969) (entry on property for survey and tests)	Enacted in part: Cal. Stats. 1970, Chs. 662 (entry on property for survey and tests), 1099

Since 1965, the Commission has also been engaged in preparing a comprehensive revision of condemnation law and procedure and herewith submits a preliminary report containing its tentative recommendation for a comprehensive Eminent Domain Law. This report is one of four related reports. The other three are:

*Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts* (January 1974), to be reprinted in 12 CAL. L. REVISION COMM'N REPORTS 1001 (1974)

*Tentative Recommendation Relating to Condemnation Law and Procedure: Condemnation Authority of State Agencies* (January 1974), to be reprinted in 12 CAL. L. REVISION COMM'N REPORTS 1051 (1974)

*Tentative Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Special District Statutes* (January 1974), to be reprinted in 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974)

This report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and to send comments to the Commission. The comments will be considered by the Commission in formulating its final recommendation which the Commission plans to submit to the 1975 Legislature. Communications concerning the tentative recommendation should be addressed to the California Law Revision Commission, School of Law, Stanford, California 94305.

In formulating its tentative recommendation, the Commission has been aided in its task by consultants retained to provide expert assistance and by a special committee of the State Bar appointed primarily to assist the Commission. In addition, the Commission has had the assistance of numerous persons throughout the state who attended Commission meetings, commented on various aspects of the study, and responded to inquiries or questionnaires, thereby providing the Commission with a wealth of empirical data and contributing materially to the quality of the product. The Commission's indebtedness to these persons is recorded in the list of acknowledgments that follows.

Respectfully submitted,  
JOHN D. MILLER  
*Chairman*



# ACKNOWLEDGMENTS

## Former Commissioners

A number of former members of the Law Revision Commission participated at the early stages in the formulation of this recommendation: Roger Arnebergh, F. James Bear, Hon. James A. Cobey, James R. Edwards, G. Bruce Gourley, Richard H. Keatinge, John R. McDonough, Hon. Carlos J. Moorhead, Sho Sato, Herman F. Selvin, Hon. Joseph T. Sneed, Hon. Alfred H. Song, Lewis K. Uhler, Richard H. Wolford, and Hon. William A. Yale. While the contribution of these former members is acknowledged, the present members of the Commission necessarily must assume the sole responsibility for the content of this tentative recommendation.

## Expert Consultants

The Commission retained a number of expert consultants who provided background research reports or expert advice that was useful in formulating this tentative recommendation: Professor Douglas Ayer, Stanford; Thomas M. Dankert, Ventura attorney; Fadem and Kanner, Los Angeles law firm; Hill, Farrer & Burrill, Los Angeles law firm; Maurice A. Garbell, Maurice A. Garbell, Inc., San Francisco; Norman E. Matteoni, Deputy Counsel, Santa Clara County; Hon. Paul E. Overton, San Diego; Professor Arvo Van Alstyne, University of Utah. The Commission is especially indebted to Gideon Kanner, of Fadem and Kanner, who regularly attended Commission meetings and was of great assistance to the Commission. Useful background research reports also were prepared by Clarence B. Taylor, a former member of the Commission's staff.

The Commission is also grateful to representatives of public agencies who attended the meetings of the Commission and provided factual information and expert assistance. Particularly helpful were: Robert F. Carlson, Department of Transportation; Norval Fairman, Department of Transportation; Lloyd Hinkleman, Office of Attorney General; James Markle, Department of Water Resources; John M. Morrison, Office of Attorney General; Kenneth G. Nellis, Department of Transportation; Anthony J. Ruffolo, Department of Transportation; Willard A. Shank, Office of Attorney General; Terry C. Smith, County of Los Angeles; Charles E. Spencer, Department of Transportation; Gerald J. Thompson, County of Santa Clara.



## State Bar Committee on Governmental Liability and Condemnation

The State Bar Committee on Governmental Liability and Condemnation was established in 1962. (Prior to June 1968, this committee was known as the Committee on Condemnation Law and Procedure.) Since 1965, a primary task of this committee has been to review and comment on preliminary drafts of this and related recommendations. The committee has also reviewed recommendations submitted by the Commission to the 1967, 1968, and 1970 sessions of the Legislature. The present members and those former members who served at any time between 1965–1973 are listed below.

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San Francisco

### Individuals

During the period since 1965, numerous other persons also have aided the Commission in its task by providing information and advice at Commission meetings, responding to questionnaires or inquiries, or providing the Commission with information or with critical evaluations of all or a portion of its tentative proposals. These persons are listed below; the Commission regrets any inadvertent errors or omissions that may have been made in the compilation of this list.

William W. Abelmann  
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# PREFACE

## The Eminent Domain Reports

This report is one of a series published concurrently by the California Law Revision Commission relating to condemnation law and procedure. It contains the comprehensive Eminent Domain Law tentatively recommended by the Commission to replace the existing eminent domain title of the Code of Civil Procedure. The text of the existing eminent domain title is set out in the Appendix to this report; the disposition of each section in the Appendix is noted in the Comment following that section. This report also contains additions, amendments, and repeals of sections of other statutes that will be required upon enactment of the Eminent Domain Law.

Separately published reports in this series indicate the needed revisions in the statutes relating to acquisition of property for state purposes and statutes relating to special districts. See *Tentative Recommendation Relating to Condemnation Law and Procedure: Condemnation Authority of State Agencies*, 12 CAL. L. REVISION COMM'N REPORTS 1051 (1974) and *Tentative Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Special District Statutes*, 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974). These tentative recommendations are dependent upon enactment of the Eminent Domain Law. Also separately published is a recommendation proposing to eliminate special condemnation provisions from the statutes relating to special assessments for improvements. See *Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts*, 12 CAL. L. REVISION COMM'N REPORTS 1001 (1974). The latter recommendation (which will be submitted to the 1974 Legislature) is not dependent upon enactment of the Eminent Domain Law.

The reports described above are part of a series that must be viewed as a whole. The statutes and the Comments to them are drafted as if the entire series were enacted. Thus, when reference is made to a statute by another statute or a Comment, the reference is to the statute as it would be if the entire series were enacted. So that one can determine whether a particular statute to which reference is made is affected by any of the reports in the series, this report contains a table of sections affected by the whole series. It is important to refer to this table because in some cases a statute referred to in one report may



be affected by a statute contained in another report in the series.



## SUMMARY OF REPORT

This tentative recommendation proposes the enactment of a new comprehensive statute governing condemnation law and procedure—the Eminent Domain Law. Although some important changes in existing law are proposed, the Eminent Domain Law is basically a reorganization and restatement of existing California law with numerous minor changes of a technical or corrective nature. A major purpose of the proposed statute is to supply a complete, well organized compilation of the law that will replace the duplicative, inconsistent, and special provisions of existing law relating to condemnation.

The proposed Eminent Domain Law is composed of 12 chapters that follow generally the sequence of events in an eminent domain proceeding. The basic content of the statute and the more important changes in the law it embodies are summarized below.

### Scope of Statute

All eminent domain proceedings will be conducted under the Eminent Domain Law; numerous special provisions will be eliminated from codified and uncodified statutes. However, the jurisdiction of the Public Utilities Commission is unaffected, and the provisions relating to arbitration of compensation are reenacted without change.

### Delegation of Condemnation Authority

The rule that only persons authorized by statute may condemn property is continued. The detailed listing of specific public uses is eliminated from the eminent domain statute, but the right of public entities and public utilities to condemn property for those uses is continued. The right of cities, counties, and school districts to condemn property for their purposes is made clear, and cities and counties are authorized to condemn property to preserve open space (with limitations to prevent abuse). The right of private persons to condemn property is abolished, but the right of nonprofit hospitals to condemn is broadened (with limitations to prevent abuse), and the right of nonprofit educational institutions of collegiate grade, certain nonprofit housing corporations, and mutual water companies is continued and clarified.

The new statute makes clear that, unless otherwise limited by statute, a delegation of condemnation authority carries with it the right to acquire the fee or any lesser right or interest in



property of any type and the right to take any property necessary for the protection and efficient use of the project. It also makes clear that a local public entity may condemn property only within its boundaries unless extraterritorial condemnation is expressly or impliedly authorized by statute. The existing provisions relating to preliminary surveys and tests by the condemnor to determine the suitability of property for public use are continued in the new statute, but the award of attorney's fees in an action to recover damages resulting from the entry—mandatory under existing law—is permitted only where such an award is in the interests of justice.

### **Public Use and Necessity**

The Eminent Domain Law reiterates the constitutional public use requirement and the statutory public necessity requirement but makes changes in several important aspects of public use and necessity.

The new statute requires that every public entity adopt a resolution of necessity as a prerequisite to condemnation. Generally, a majority vote of all the members of the governing body is required to adopt the resolution. The resolution will be conclusive on matters of public necessity for acquisitions within the boundaries of the public entity. Superseded by these general provisions will be numerous provisions of existing law that provide a variety of different rules governing the necessity for, adoption of, and effect of, the resolution of necessity.

Acquisition of property by a condemnor for use in the future is permitted if the property will be used within a reasonable period. If the use will be within seven years, it is deemed reasonable; if the use will not be within seven years, the burden of proof is on the condemnor to show that the actual period is reasonable.

The authority of a public entity to condemn a remnant left by a partial taking is continued, provided the remnant is of little market value. If the property owner contests the taking, the public entity must establish that the remnant meets this criterion. Taking the remnant is not permitted if the contesting property owner establishes that the condemnor can provide a reasonable, practicable, and economically sound "physical solution" to the problem.

The statutory hierarchy of more necessary public uses is retained for the condemnation of property already appropriated to public use. The Eminent Domain Law, however, precludes a more necessary public use from



displacing a less necessary public use upon objection of the less necessary user if joint use is possible. Likewise, it permits a less necessary user to condemn for joint use with a more necessary use if the uses will be compatible.

The authority of public entities to condemn property to exchange for property needed for public use is continued and clarified.

### **Commencement of Proceeding**

The principle that eminent domain proceedings should be governed by the same general rules as civil actions is continued, but the general rules are supplemented with special rules that are required by the unique nature of an eminent domain proceeding. Existing special rules relating to jurisdiction and venue, service, recordation of a lis pendens, parties, and joinder are retained with minor modifications. The pleadings will be simplified by eliminating the requirements that the complaint indicate whether the part taken is part of a larger parcel and that the answer set forth the amount claimed as compensation.

### **Possession Prior to Judgment**

Major changes are proposed in the procedure by which a condemnor may obtain possession of property following commencement of an eminent domain proceeding but prior to entry of judgment. The Eminent Domain Law authorizes all condemnors to obtain possession prior to judgment; however, it imposes procedural safeguards by giving the property owner the right to obtain a copy of the deposit appraisal, to have an inadequate deposit increased, to receive 90 days' notice prior to dispossession, and to obtain a stay of possession in case of hardship. In addition, homeowners and owners of rental property may require the condemnor to make a prejudgment deposit, with appropriate sanctions for failure to do so.

### **Discovery**

The existing provisions for exchange of valuation data are reenacted with modifications designed to permit follow-up discovery. The time for a demand to be made is advanced, the provision for a cross-demand is eliminated, and the exchange date made 40 days prior to trial. Subsequent discovery without requirement of court order is permitted to within 20 days before trial.

## Procedures for Determining Right to Take and Compensation

The eminent domain trial preference is retained and early disposition of right to take issues encouraged. The order of proof and argument is unchanged, but neither party is assigned the burden of proof on the issue of compensation.

### Compensation

The basic California compensation scheme (awarding the value of the part taken plus the difference, if any, between damages and benefits to the remainder) is continued. However, the Eminent Domain Law incorporates important changes in several aspects of the computations.

Permission for the plaintiff to establish a fixed valuation date regardless of subsequent occurrences by making a deposit is superimposed on the existing date of valuation scheme. Where a new trial is held, absent a deposit by the plaintiff, the date of valuation will be the date of the new trial rather than the date used in the previous trial. Where there have been fluctuations in the market value of the property prior to the date of valuation that were caused by the imminence of the project, the Eminent Domain Law makes clear that the property is to be valued as if the project for which it is taken had not been planned.

Provision is made for compensation for the goodwill of a business taken or damaged. Also, the rule that manufacturing or industrial equipment is part of the realty for purposes of compensation is broadened to cover any business equipment which cannot be removed without a substantial loss in value.

In partial taking cases, the rule of *People v. Symons* (that the damage-causing portion of the project must be located on the part taken in order to be compensable) is abrogated. The statute provides that damage caused by a project to a remainder is compensable regardless of the location of the damage-causing portion of the project; the equivalent rule as to offsetting benefits is also codified.

### Divided Interests

The Eminent Domain Law continues the procedure permitting the plaintiff in an eminent domain proceeding to elect to have compensation determined in a lump sum against all defendants with a second-stage apportionment among the defendants. However, significant changes are made in the substantive rules for compensating particular interests. Where there is a partial taking of property subject to a lease, provision

is made for the pro rata reduction of rent or, if the purpose of the lease is frustrated, for the termination of the lease, absent a governing provision in the lease. The right to compensation of an option holder or a person owning a contingent future interest is recognized.

### **Postjudgment Procedure**

The various postjudgment procedures peculiar to eminent domain proceedings are retained. The provisions for payment of a judgment and for deposit pending appeal are consolidated to provide one uniform deposit procedure, thereby enabling uniform provisions for withdrawal of the award and for obtaining possession after judgment. The one-year delay in payment of a judgment afforded certain public entities is eliminated in favor of a uniform 30-day period. The provisions relating to interest on the judgment and proration of property taxes are retained unchanged. Case law relating to costs is clarified and codified; the substance of the provisions relating to abandonment and litigation expenses on abandonment and dismissal for other reasons is continued and expanded to apply to a case where the proceeding is dismissed for failure to prosecute.





# TENTATIVE RECOMMENDATION

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## INTRODUCTION

Pursuant to a 1965 legislative directive,<sup>1</sup> the California Law Revision Commission presents in this report its tentative recommendation for a comprehensive Eminent Domain Law,<sup>2</sup> along with necessary conforming changes.<sup>3</sup> The proposed comprehensive statute is the culmination of the Commission's exhaustive study of condemnation law and procedure that has

<sup>1</sup> The Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study condemnation law and procedure with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings. This was an expansion of an earlier direction to make such a study with a view to recommending revisions "to safeguard the property rights of private citizens." See Cal. Stats. 1956, Res. Ch. 42, at 263.

<sup>2</sup> The Eminent Domain Law is intended to supply rules for eminent domain proceedings. No recommendation is made as to whether any of its provisions should also be applicable in inverse condemnation actions. This determination is at this time left to judicial development.

<sup>3</sup> This report proposes conforming changes in general statutes relating to eminent domain. For conforming changes in statutes relating to the exercise of eminent domain by the state, see *Tentative Recommendation Relating to Condemnation Law and Procedure: Condemnation Authority of State Agencies*, 12 CAL. L. REVISION COMM'N REPORTS 1051 (1974); for conforming changes in statutes relating to exercise of eminent domain by special districts, see *Tentative Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Special District Statutes*, 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974). Also related is *Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts*, 12 CAL. L. REVISION COMM'N REPORTS 1001 (1974).



previously resulted in the enactment of legislation on several major aspects of eminent domain law.<sup>4</sup>

Although Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure purports to be a comprehensive and systematic statement of the law of eminent domain, in fact it falls far short of that. Enacted over 100 years ago, its draftsmanship does not meet the standards of modern California statutes. There are duplicating and inconsistent provisions. There are long and complex sentences that are difficult to read and more difficult to understand. There are sections that are obsolete and inoperative. There is a total lack of statutory guidance in certain critically important areas of the law, and there are other areas that are treated in the most cursory fashion. Nor is Title 7 the exclusive statutory source of eminent domain law. There are hundreds of provisions in other statutes, both codified and uncoded, that duplicate provisions of the general eminent domain statute or that are unnecessarily or undesirably inconsistent with it.

These deficiencies call for a thorough revision and recodification of the California law of eminent domain. In formulating the comprehensive Eminent Domain Law, the Commission has looked to reform efforts in a number of other jurisdictions<sup>5</sup> and has reviewed the eminent domain law of every jurisdiction in the United States.<sup>6</sup> The Commission has examined the draft of the Model Eminent Domain Code<sup>7</sup> and has followed the development of a Uniform Eminent Domain Code by the National Conference of Commissioners on Uniform State Laws.<sup>8</sup> The Commission has drawn upon all these

<sup>4</sup> See CONDEMNATION PRACTICE IN CALIFORNIA xii (Cal. Cont. Ed. Bar 1973):

In dealing with trends and developments in eminent domain law, the major role played by the California Law Revision Commission for more than a decade should be considered. Commission studies and recommendations have led to many statutory changes, *e.g.*, exchange of valuation data, evidence in condemnation cases, immediate possession, possession pending appeal, abandonment, voluntary arbitration, and governmental liability.

For a complete listing of Commission recommendations in this field and the legislative action on the recommendations, see the letter of transmittal accompanying this report.

<sup>5</sup> Recent reports received by the Commission include NEW YORK STATE COMMISSION ON EMINENT DOMAIN, REPORT (1971, 1972); VIRGINIA ADVISORY LEGISLATIVE COUNCIL, LAWS RELATING TO EMINENT DOMAIN (1972); IOWA EMINENT DOMAIN STUDY COMMITTEE, FINAL REPORT (1971); LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON EXPROPRIATION (1971).

<sup>6</sup> Among the many contemporary revisions of the law of eminent domain, the 1964 Pennsylvania Eminent Domain Code is particularly noteworthy. See PENNSYLVANIA JOINT STATE GOVERNMENT COMMISSION, EMINENT DOMAIN CODE, AS AMENDED WITH COMMENTS AND NOTES (1972).

<sup>7</sup> See *Draft of Model Eminent Domain Code*, 2 REAL PROPERTY, PROBATE & TRUST J. 365 (1967).

<sup>8</sup> A special committee is drafting the Uniform Eminent Domain Code. The Reporter-Draftsman for the special committee is Professor Arvo Van Alstyne, University of



sources in producing a modern Eminent Domain Law within the existing California statutory framework.

The comprehensive Eminent Domain Law proposed in this report will replace the existing general eminent domain title of the Code of Civil Procedure.<sup>9</sup> Its major purpose is to cover, in a comprehensive manner, all aspects of condemnation law and procedure.<sup>10</sup> It will constitute a complete and well organized compilation of the law and will provide one uniform statute applicable to all condemnors and all condemnation proceedings.<sup>11</sup> Its enactment will permit the repeal of approximately 825 sections and the amendment of approximately 180 sections to delete unnecessary language.<sup>12</sup>

While the Eminent Domain Law requires that all condemnors follow its provisions, it imposes no new mandatory costs on local public agencies. A public agency is not required to exercise the power of eminent domain in pursuance of its property acquisition program; the statute provides that any agency authorized to exercise the power of eminent domain to acquire property for a particular purpose may also acquire the property by grant, purchase, lease, gift, devise, contract, or other means. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is left to the discretion of the agency authorized to acquire the property.

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Utah College of Law, who has served as a consultant to the California Law Revision Commission on a number of topics. The Commission has provided Professor Van Alstyne with preliminary drafts of this tentative recommendation and plans to review the Uniform Eminent Domain Code as soon as a tentative draft has been approved by the special committee.

<sup>9</sup> The Commission considered various locations for the Eminent Domain Law, including enactment of a separate code. However, due to the relatively narrow scope of the subject when considered with reference to the California codes and to the adoption of the general principle that eminent domain proceedings should be governed by the same rules as civil actions generally (see discussion under "Condemnation Procedure" *infra*), the Commission recommends that the Eminent Domain Law should simply be substituted for the present Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure.

<sup>10</sup> There are some areas of the law purposely left to judicial development. Moreover, the Eminent Domain Law cannot limit any provisions of the California or United States Constitutions.

It should also be noted that there are some statutes applicable to property acquisition generally and not limited to eminent domain proceedings. See, e.g., GOV. CODE §§ 7260-7274 (relocation assistance and fair acquisition policies). Such statutes are not affected by the Eminent Domain Law and continue to remain applicable when property is acquired by eminent domain.

<sup>11</sup> The special provisions relating to valuation of public utility property by the Public Utilities Commission pursuant to California Constitution, Article XII, Section 23a and Public Utilities Code Sections 1401-1421 will not be affected.

<sup>12</sup> See "Table of Sections Affected" *infra*.



While the Eminent Domain Law will make a number of important changes in existing law, to a large extent it restates that law, corrects technical defects, eliminates obsolete and inconsistent provisions, and fills gaps in the law. The more important changes made by the Eminent Domain Law are discussed below. Other changes of less importance are noted in the Comments that follow the text of the proposed legislation.

## THE RIGHT TO TAKE

### Delegation of Eminent Domain Power

#### Basic Statutory Scheme

The power of eminent domain may only be exercised in aid of a recognized public use by a person authorized by statute to exercise such power.<sup>13</sup> In California, the statutory delegation of the power of eminent domain appears to be exceedingly broad. Section 1001 of the Civil Code states in part: "Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure" by exercise of the power of eminent domain.

When enacted in 1872, Code of Civil Procedure Section 1238 listed a great number of uses as "public uses," and it has been amended many times since then to list additional uses. Despite the amendments, many recognized public uses are not listed in the section, and the inclusion of a use in the listing is no guarantee that the use is in fact a public use.<sup>14</sup> Moreover, Civil Code Section 1001, although unchanged since its enactment in 1872 and purporting to authorize the exercise of eminent domain power by "any person," has been narrowly construed by the courts when a person other than a public entity or privately owned public utility has sought to condemn property.<sup>15</sup>

To a considerable extent, the listing of uses in Code of Civil Procedure Section 1238 is surplusage since the Legislature has generally ignored the statutory scheme established by Civil Code Section 1001 and Code of Civil Procedure Section 1238 in delegating the power of eminent domain. The Legislature has instead enacted numerous other codified and uncoded sections that authorize condemnation for particular public uses.

<sup>13</sup> *People v. Superior Court*, 10 Cal.2d 288, 295-296, 73 P.2d 1221, 1225 (1937).

<sup>14</sup> The question whether a particular use is a public use is always subject to judicial review. See discussion *infra* under "Public Use."

<sup>15</sup> See discussion *infra* under "Quasi-public entities and private persons."



In fact, there are hundreds of statutes that grant the power of eminent domain to particular persons for particular purposes.

The Commission recommends that clear statements of the extent of eminent domain authority of public entities, public utilities, and others be substituted for the statutory scheme established by Civil Code Section 1001 and Code of Civil Procedure Section 1238. In addition, where a statute grants the power of eminent domain to a particular entity for a particular use, this grant should be treated as a legislative declaration that a taking by that entity for that use is a taking for a public use; it should not be necessary to add to the statute the superfluous statement that the taking is for a public use.

The adoption of this approach will eliminate the need for a separate listing of public uses in the general eminent domain law. It will eliminate the need for frequent amendments to list public uses that merely duplicate grants of eminent domain authority made by other statutes. It will eliminate the existing uncertainty concerning the extent to which private persons may exercise the power of eminent domain and will insure that the power of eminent domain will be construed to extend only to those private persons intended to have such power.

The effect of this approach is to recognize the long-standing legislative practice of delegating the power of eminent domain by specific statute despite the listing of public uses in Section 1238. Nonetheless, to assure that no public entity will be deprived of any right it now has to exercise the power of eminent domain, clear statements of condemnation authority should be enacted to cover those few cases where such authority is now based on Sections 1001 and 1238 and is not otherwise specifically provided. Likewise, clear statements of the condemnation authority of privately owned public utilities should be added to the Public Utilities Code. The extent to which other private individuals and corporations should be authorized to exercise the right of eminent domain is discussed later in this recommendation.<sup>16</sup>

### Persons Authorized to Exercise Power

**State agencies.** In a separate publication,<sup>17</sup> the Commission has made the following recommendations with respect to the delegation of condemnation authority to state agencies:

<sup>16</sup> *Id.*

<sup>17</sup> See *Tentative Recommendation Relating to Condemnation Law and Procedure: Condemnation Authority of State Agencies* (January 1974), to be reprinted in 12 CAL. L. REVISION COMM'N REPORTS 1051 (1974). This tentative recommendation also indicates the amendments, additions, and repeals needed to conform the state eminent domain provisions to the Eminent Domain Law.



(1) The Department of Transportation, Department of Water Resources, Regents of the University of California, and the Reclamation Board (on behalf of the Sacramento and San Joaquin Drainage District) should continue to be authorized by statute to condemn for their purposes.

(2) Condemnation of property for all other state purposes should be a responsibility of the Public Works Board under the Property Acquisition Law.<sup>18</sup> This recommendation will eliminate the delegation of eminent domain authority to those agencies that now have but do not now exercise such authority: the Adjutant General, Department of Aeronautics, Trustees of the California State University and Colleges, Department of Fish and Game, Department of General Services, State Lands Commission, and Department of Parks and Recreation.

**Special districts.** The great majority of special districts have, by virtue of their enabling statutes, general authority to condemn any property necessary to carry out any of their objects or purposes. Thus, approximately 160 different types of special districts, totaling more than 2,000 individual districts, have general condemnation authority.<sup>19</sup> With respect to these districts, there is no need to rely on Section 1001 of the Civil Code and Section 1238 of the Code of Civil Procedure as the source of condemnation authority, and the repeal of those sections will have no effect on the condemnation authority of these districts.

Approximately 30 different types of districts either are not authorized by their enabling statutes to exercise the power of eminent domain, or the grant of eminent domain power in their enabling statutes is not sufficiently broad to permit condemnation of property for some of the district's authorized functions. The Commission has reviewed these enabling statutes and has concluded, with two exceptions noted below, that no revision of these statutes is needed. Some of these districts have no power to acquire or hold property. Others have no corporate power. In some cases, the acquisition of necessary property for the district by eminent domain is accomplished by the county or a city. The omission of a grant in other statutes appears to be a conscious legislative decision. Accordingly, absent any experience that demonstrates a need to grant the power of eminent domain to any of these special

<sup>18</sup> GOVT. CODE §§ 15850–15866.

<sup>19</sup> For a listing, see CONDEMNATION PRACTICE IN CALIFORNIA, Appendix A: Tables ID and IE (Cal. Cont. Ed. Bar 1973).



districts, the Commission proposes no change in their enabling statutes.

Public cemetery districts and resort improvement districts<sup>20</sup> derive their power of eminent domain from Civil Code Section 1001 and Code of Civil Procedure Section 1238. In order that the repeal of these sections will not adversely affect these types of districts, the statutes governing these districts should be revised to preserve their condemnation authority.<sup>21</sup>

**Cities and counties.** A great number of statutes authorize cities and counties to condemn property for essentially all of their activities.<sup>22</sup> This broad condemnation authority is justified. Accordingly, for purposes of clarification, cities and counties should be specifically authorized to condemn property to carry out any of their powers or functions just as special districts are now authorized to condemn for all their functions. Specific restrictions on the power of cities and counties to condemn property for particular purposes<sup>23</sup> would not be affected by such authorization.

**School districts.** Section 1001 of the Civil Code and Section 1238 of the Code of Civil Procedure are the primary bases for the condemnation authority of school districts. Since these sections will not be continued, a provision should be added to the Education Code to preserve the authority of school districts to exercise the power of eminent domain to acquire property necessary for school purposes.

<sup>20</sup> Although no new resort improvement districts can be formed after May 19, 1965 (see PUB. RES. CODE § 13003), the authority of existing districts should be preserved.

<sup>21</sup> For the amendments, additions, and repeals needed to conform the special district statutes to the Eminent Domain Law, see *Tentative Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Special District Statutes* (January 1974), to be reprinted in 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974).

<sup>22</sup> For a listing, see CONDEMNATION PRACTICE IN CALIFORNIA, Appendix A: Table IC (Cal. Cont. Ed. Bar 1973). The one possible exception to this generalization is acquisition of property for open space purposes. See GOVT. CODE §§ 6950-6954. Compare Note, *Property Taxation of Agricultural and Open Space Land*, 8 HARV. J. LEGIS. 158 & n.1 (1970) (implying condemnation authorized) with California Legislative Counsel, Opinion No. 17885 (Eminent Domain) (Oct. 24, 1969) (concluding condemnation not authorized). The Commission recommends that the authority of cities and counties to condemn property for open space purposes be made clear with appropriate limitations to prevent any abuse of the power.

<sup>23</sup> E.g., GOVT. CODE §§ 37353(c) (existing golf course may not be condemned by city for golf course purposes), 50701 (local agency may not condemn for golf course, marina, or small craft harbor under revenue bond act), 54341 (local agency may not condemn publicly owned property under Revenue Bond Law of 1941 without consent of owner).

**Public utilities.** Section 1001 of the Civil Code and various subdivisions of Section 1238 of the Code of Civil Procedure are also the primary source of the condemnation authority of privately owned public utilities. In order that the repeal of these sections will not adversely affect the condemnation authority of public utilities, provisions should be added to the Public Utilities Code to preserve and clarify the authority of public utilities to exercise the power of eminent domain to acquire property necessary to carry out their regulated activities.

**Quasi-public entities and private persons.** The right to exercise the power of eminent domain in California is not limited to governmental entities and public utilities. Section 1001 of the Civil Code literally authorizes a private person to condemn property for any of the uses listed in Section 1238 of the Code of Civil Procedure. Other statutes have expressly granted the power of eminent domain to certain private entities which are engaged in quasi-public activities.

In *Linggi v. Garovotti*,<sup>24</sup> the California Supreme Court held that the owner of an apartment building could condemn a necessary easement for a sewer across his neighbor's property to connect the apartment building to the mains of an established sewer system. The extent to which private persons can condemn for other uses listed in Section 1238 is unclear. The *Linggi* case is an exceptional one; the courts generally have not permitted a private person to condemn property unless he is engaged in a quasi-public activity.<sup>25</sup>

Having considered the various uses listed in Section 1238 and the judicial decisions involving attempts by private persons to exercise the power of eminent domain, the Commission recommends that condemnation by private persons be abolished<sup>26</sup> except in the following cases:

<sup>24</sup> 45 Cal.2d 20, 286 P.2d 15 (1955).

<sup>25</sup> *Lorenz v. Jacob*, 63 Cal. 73 (1883) (supplying mines with water); *Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 676, 32 P. 802 (1893) (supplying farming neighborhoods with water); *People v. Elk River Mill & Lumber Co.*, 107 Cal. 221, 40 P. 531 (1895) (floating logs on nonnavigable streams); *General Petroleum Corp. v. Hobson*, 23 F.2d 349 (S.D. Cal. 1927) (byroad to prospect for oil).

<sup>26</sup> In addition to the repeal of Section 1001 of the Civil Code and Section 1238 of the Code of Civil Procedure, the Commission recommends the repeal of Streets and Highways Code Sections 1050–1054 (special private byroad statute) and Water Code Sections 7020–7026 (private ways for canals) and the amendment of Harbors and Navigation Code Section 4009 (private wharves, chutes, and piers). The Commission recommends no change in Health and Safety Code Section 8715 (alteration, vacation, or replatting of public and private cemetery drives and parks an exercise of eminent domain).

In this connection, the last sentence of Section 14 of Article I of the California Constitution, which declares certain logging and lumbering railroads to be "public uses" and specifies that the takings of property for such purposes constitutes the taker a common carrier, should be deleted. Takings for this purpose are authorized



(1) The condemnation authority of nonprofit educational institutions of collegiate grade should be continued without change.<sup>27</sup>

(2) The existing condemnation authority of nonprofit hospitals<sup>28</sup> should be liberalized to permit condemnation not only to expand existing hospitals but also to establish a newly organized and licensed hospital and to permit the acquisition of property whether or not “immediately adjacent” to existing holdings. At the same time, no acquisition should be permitted unless it has been reviewed and approved by appropriate local authorities and by the Director of Health and, if objection to the taking is made, by the court in the eminent domain proceeding. This would expand the condemnation power but, at the same time, would provide appropriate limitations to prevent its abuse.

(3) The condemnation authority of certain nonprofit housing corporations which provide housing for low income families should be continued and clarified.<sup>29</sup>

(4) The condemnation authority of mutual water companies should be continued without change.<sup>30</sup>

### Joint Exercise of Power

Two or more public entities should be authorized to enter into an agreement under the Joint Powers Agreement Act<sup>31</sup> 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. This authority already exists where a school district is a party to the joint powers agreement<sup>32</sup>

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by existing legislation, and the constitutional provision is obsolete since it applies only to “a railroad run by steam or electric power.” Such railroads have been largely replaced for logging purposes by diesel powered locomotives and trucks. Moreover, the sentence adds little, if anything, to decisional law (some of which is based on the Constitution of the United States) relative to takings for such purposes or to the status and obligations of “common carriers.”

<sup>27</sup> The condemnation authority of these institutions, now found in subdivision 2 of Section 1238 of the Code of Civil Procedure, should be continued by a provision added to the Education Code.

<sup>28</sup> CODE CIV. PROC. § 1238.3. Section 1238.3 should be repealed and provision made for condemnation by nonprofit hospitals in the Health and Safety Code.

<sup>29</sup> See HEALTH & SAF. CODE §§ 34874–34879 (limited dividend housing corporations). Provisions comparable to the sections relating to the exercise of condemnation authority by limited dividend housing corporations should be added to the statute relating to land chest corporations in the Health and Safety Code. Land chest corporations, if they now have condemnation authority, must base such authority on Section 1001 of the Civil Code and subdivision 21 of Section 1238 of the Code of Civil Procedure.

<sup>30</sup> The substance of subdivision 4 of Section 1238 of the Code of Civil Procedure should be continued by a provision added to the Public Utilities Code.

<sup>31</sup> GOVT. CODE §§ 6500–6583.

<sup>32</sup> EDUC. CODE § 15007.5.



and should be extended to permit exercise of such authority by public entities whether or not a school district is a party to the joint powers agreement.

## Property Subject to Condemnation

### Property Interest That May Be Acquired

The grants of condemnation authority to various public entities differ widely in their description of the types of property and rights or interests therein that may be acquired by eminent domain. Some grants are restricted to “real property”;<sup>33</sup> some grants broadly allow condemnation of “real or personal property”<sup>34</sup> or permit condemnation of “property” without limitation;<sup>35</sup> other grants contain an extensive listing of the various types of property and rights and interests in property that may be taken.<sup>36</sup>

A general provision should be enacted that, except to the extent otherwise limited by statute,<sup>37</sup> will permit the condemnation of any type of property and any right, title, or interest therein necessary for the public use for which it is acquired. Further, the existing judicially developed rule that a grant of condemnation authority includes the authority to acquire any property necessary to carry out and make effective

<sup>33</sup> State condemnation authority under the Property Acquisition Law is limited, for example, to any interest in real property. See GOVT. CODE § 15853. The Commission does not recommend that the Property Acquisition Law be broadened to cover acquisition of “personal property” since other statutes provide for state acquisition of personal property. See also, *e.g.*, HEALTH & SAF. CODE § 34325 (housing authority).

<sup>34</sup> *E.g.*, PUB. RES. CODE § 5006 (Department of Parks and Recreation), PUB. UTIL. CODE § 30503 (Southern California Rapid Transit District).

<sup>35</sup> *E.g.*, HARB. & NAV. CODE §§ 5900.4 (harbor improvement districts), 6076 (harbor districts), 6296 (port districts); PUB. UTIL. CODE §§ 12703 (municipal utility districts), 16404 (public utility districts), 28953 (San Francisco Bay Area Rapid Transit District). The vast majority of condemnation grants authorize the taking of any necessary “property.”

<sup>36</sup> *E.g.*, Alameda County Flood Control and Water Conservation District Act § 5 (“real and personal property of every kind, including lands, structures, buildings, rights-of-way, easements, and privileges” and “all lands and water and water rights and other property necessary or convenient for [district purposes]”).

<sup>37</sup> The Commission recommends no change in the statutory provisions which exempt certain types of property from condemnation. See, *e.g.*, FISH & GAME CODE § 1349 (farm lands exempt except by specific authorization of Legislature); HEALTH & SAF. CODE §§ 8134, 8560, 8560.5 (cemetery land not subject to condemnation for rights of way); PUB. RES. CODE § 5006.2 (property within Aptos Forest not subject to eminent domain except by permission of Legislature); PUB. UTIL. CODE § 21632 (Department of Aeronautics cannot take existing airport owned by local public entity without consent of entity). See also *Emery v. San Francisco Gas Co.*, 28 Cal. 345 (1865) (money not subject to eminent domain). The substance of Code of Civil Procedure Section 1240(2) (16th and 36th sections of certain public domain land not subject to condemnation) should be continued.



the principal purpose involved should be codified,<sup>38</sup> and duplicating and inconsistent provisions should be repealed.<sup>39</sup> The resolution of necessity should, as it generally is now, be conclusive on the issue of the necessity for acquiring any right or interest in property to be devoted to public use.<sup>40</sup>

### Property Already Appropriated to Public Use

Existing law permits to a limited extent the acquisition by eminent domain of property already appropriated to public use.<sup>41</sup> The Commission believes, however, that joint use of property appropriated to public use should be encouraged in the interest of the fullest utilization of public land and the least imposition on private ownership. To this end, it recommends that any authorized condemnor be permitted to acquire, for use in common, property already devoted to public use if the joint uses are compatible or can be made compatible without substantial alteration of the preexisting public use.

Only where the two uses are not compatible and cannot be made compatible should a condemnor be permitted to take for its exclusive use property already appropriated to public use. In such a case, taking of the property should be permitted only for a more necessary public use than the use to which the property is already appropriated.<sup>42</sup>

The resolution of necessity of a public entity should not be conclusive on the question whether a use is compatible with or more necessary than another public use.<sup>43</sup> It should be noted,

<sup>38</sup> Inherent in the power to condemn property for a particular purpose is the power to condemn additional property to effectuate that purpose. See, e.g., *City of Santa Barbara v. Cloer*, 216 Cal. App.2d 127, 30 Cal. Rptr. 743 (1963), and *Monterey Flood Control & Water Conservation Dist. v. Hughes*, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962).

<sup>39</sup> Numerous statutes, as well as a constitutional provision, provide a variety of tests to determine to what extent additional property may be acquired. See, e.g., CAL. CONST., Art. I, § 14½ (memorial grounds, streets, squares, parkways, reservations to 150 feet); CODE CIV. PROC. § 1238(18) (trees along highways to 300 feet); STS. & HWYS. CODE § 104.3 (protect and preserve highways to 150 feet); WATER CODE § 256 (protect and preserve dams and water facilities to 500 feet). The Commission recommends that, in place of this multiplicity, there be substituted a uniform and comprehensive authorization to acquire all property necessary to carry out and make effective the principal purpose involved.

<sup>40</sup> See Taylor, *The Right to Take—The Right to Take a Fee or Any Lesser Interest*, 1 PAC. L.J. 555 (1970).

<sup>41</sup> See CODE CIV. PROC. §§ 1240(3), (4), (6), 1241(3) (acquisition of property devoted to public use for “consistent” and more necessary public uses).

<sup>42</sup> This scheme should also apply where two or more persons seek to condemn the same property and the proceedings have been consolidated. In this case, condemnation should be allowed for joint use among the condemnors. Where the various uses are not compatible, condemnation should be allowed for the more necessary public use and the proceeding dismissed as to the others.

<sup>43</sup> See discussion *infra* under “Public Necessity.”

however, that there is a statutory hierarchy of more necessary users—state,<sup>44</sup> local public entities,<sup>45</sup> private persons—as well as specific statutory more necessary use presumptions such as those afforded certain park property and property kept in its natural condition.<sup>46</sup> No change in this scheme is recommended. The Commission does, however, solicit comments on whether the substance of Sections 1240(3) and 1241(3) of the Code of Civil Procedure (property appropriated to public use by certain local public entities may not be taken by another such entity) should be retained as proposed in Section 1240.660 of the Eminent Domain Law.

### Extraterritorial Condemnation

Case law establishes that a local public entity—such as a city, county, or special district—may condemn only property within its territorial limits except where the power to condemn property outside its limits is expressly granted by statute or is necessarily implied as an incident to one of its other statutory powers.<sup>47</sup> This rule should be codified. Unaffected by this codification would be statutes that expressly authorize extraterritorial condemnation<sup>48</sup> and statutes—such as those authorizing the furnishing of sewage facilities or the supplying of water—under which the power of extraterritorial condemnation may be implied.<sup>49</sup>

## Public Use and Necessity

### Public Use

**Constitutional requirement.** Article I, Section 14, of the California Constitution prohibits the exercise of eminent domain except for a “public use.”<sup>50</sup> Whether a particular

<sup>44</sup> GOVT. CODE § 15856.

<sup>45</sup> CODE CIV. PROC. §§ 1240(3) and 1241(3).

<sup>46</sup> CODE CIV. PROC. §§ 1241.7 and 1241.9.

<sup>47</sup> 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).

<sup>48</sup> *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*, 166 Cal. App.2d 758, 333 P.2d 442 (1959); *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, 72 Cal. App.2d 638, 165 P.2d 741 (1946).

<sup>49</sup> *City of Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604 (1891) (sewage) (dictum); *City of No. Sacramento v. Citizens Util. Co.*, 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961) (water). *Cf. Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 718, 329 P.2d 289, 291 (1958). Compare *City of Carlsbad v. Wight*, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963).

<sup>50</sup> *City & County of San Francisco v. Ross*, 44 Cal.2d 52, 279 P. 529 (1955).



purpose is a public use is an issue that is always justiciable in an eminent domain proceeding.<sup>51</sup> Ordinarily, however, a taking by a public entity or public utility does not present a public use issue. The property sought to be taken will be devoted to a purpose that is declared to be a public use by statute, and history indicates that there is little likelihood that the court will declare the use not to be a public use. There are, however, some situations that may present a significant public use issue. These situations are discussed below.

**Acquisition for future use.** It is well established that statutory grants of general condemnation power carry with them the right to condemn property in anticipation of the condemnor's future needs, provided there is a reasonable probability of use of the property within a reasonable period of time.<sup>52</sup> This standard should be codified. The question whether there is such a probability should always be justiciable; however, any use of property within seven years after the commencement of an eminent domain proceeding should be deemed "reasonable."<sup>53</sup>

**Acquisition of physical and financial remnants.** The acquisition of part of a larger parcel of property for public use will on occasion leave the remainder in such size, shape, or condition as to be of little market value. The elimination of such remnants may be of substantial benefit to the community at large as well as to the owners of such property. Generally speaking, California's condemnors with any substantial need therefor have been granted specific statutory authority to condemn the excess for the purpose of remnant elimination.<sup>54</sup> Some of these statutes are so broadly drawn that they literally authorize exercise of the power of eminent domain to acquire remnants in circumstances not constitutionally permitted.<sup>55</sup>

<sup>51</sup> *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959).

<sup>52</sup> See, e.g., *Central Pac. Ry. v. Feldman*, 152 Cal. 303, 92 P. 849 (1907); *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 P. 585 (1899); *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961).

<sup>53</sup> Seven years is within sound planning limits and is the period from the date of advancement of funds for the purchase of a right of way within which actual construction must commence under the Federal Aid Highway Act of 1968. 23 U.S.C. § 108.

<sup>54</sup> E.g., CODE CIV. PROC. § 1266 (city and county highway authorities); STS. & HWYS. CODE § 104.1 (Department of Transportation); WATER CODE §§ 254 (Department of Water Resources), 43533 (water districts). These statutes, however, vary from agency to agency, often with little or no apparent reason for the difference.

<sup>55</sup> See *People v. Superior Court*, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).



The Commission has concluded that all public entities should be granted the authority to condemn excess property for the purpose of remnant elimination,<sup>56</sup> whether the remnant be physical or financial, provided it is of little market value. Such remnants should be subject to acquisition by both voluntary means and by condemnation but, to safeguard against the abuse of such authority, the property owner should always be able to contest whether the remainder will be of “little market value.” The property owner should also be permitted to show that the condemnor has available a reasonable and economically feasible means to avoid leaving a remnant; if he is successful in demonstrating such a “physical solution,” condemnation of the excess should not be allowed.

**Acquisition for exchange purposes.** A number of California condemnors are authorized to acquire property of a third party for the purpose of exchange with the owner of property that is needed for public use.<sup>57</sup> This authority to acquire “substitute property” to be exchanged for the “necessary property” should be extended to all public entities; but, in order to safeguard the rights of the third party, the authority should be restricted to the following situations.

Where the necessary property is devoted by its owner to a public use and he could exercise the power of eminent domain to acquire substitute property for the same public use from a third party, the public entity should be permitted to acquire substitute property by eminent domain for the owner of the necessary property. This authority will avoid the need for two condemnation proceedings. To protect against possible abuses, a substitute taking on these grounds should be allowed only where the owner of the necessary property has agreed to the exchange and it is clear that the substitute property will be devoted to the same public use as the necessary property.

In exceedingly rare cases, justice may require that the detriment to the owner of the necessary property be avoided in whole or in part by providing substitute facilities on land of a third party. The most frequently encountered situation of this sort is where the acquisition of the necessary property would leave other property in such condition as to be deprived of utility service or access to a public road. In such a case, substitute condemnation could provide a quite simple physical

<sup>56</sup> Nongovernmental condemnors have no statutory authority to acquire excess property. No change in this regard is recommended.

<sup>57</sup> See, e.g., GOVT. CODE § 15858 (state); STS. & HWYS. CODE §§ 104(b), 104.2 (Department of Transportation); WATER CODE § 253(b) (Department of Water Resources).

solution to what otherwise would be a case of severely damaged property. Accordingly, a public entity should be authorized to condemn such property as appears reasonably necessary and appropriate to supply utility service or access after taking into account any hardship to the owner of the substitute property. In cases other than utility or access cases, the public entity should be authorized to acquire substitute property for exchange purposes only if (a) the owner of the necessary property has agreed to the exchange, (b) the substitute property is in the same general vicinity as the necessary property, and (c) taking into account the relative hardship to both owners, the exchange would not be unjust to the owner of the substitute property.

The propriety of a taking for the purpose of exchange should always be subject to challenge, and the public entity should have the burden of proof that its taking of substitute property will satisfy these criteria.

### Public Necessity

**Statutory requirement.** The necessity for a taking must be established before property may be acquired by eminent domain.<sup>58</sup> The Commission believes that this statutory requirement is a sound one and recommends that no person be permitted to exercise the power of eminent domain unless:

(a) The public interest and necessity require the proposed project;

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

(c) The property and interest therein sought to be acquired are necessary for the proposed project.

**Resolution of necessity.** Some, but not all, public entities must adopt a resolution of necessity to acquire property by eminent domain before such a proceeding may be commenced.<sup>59</sup> Among those public entities required to adopt a resolution of necessity, the vote requirement for most is a simple majority.<sup>60</sup> The Commission believes that the requirement of the adoption of the resolution of necessity is a salutary one: In addition to informing the property owner of the authority for the proposed acquisition, it helps to insure that the

<sup>58</sup> See, e.g., CODE CIV. PROC. §§ 1240(6), 1241(2), and 1242.

<sup>59</sup> Compare, e.g., CODE CIV. PROC. § 1241(2) (resolution may be adopted) *with* WATER CODE § 8594 and GOVT. CODE § 15855 (resolution required).

<sup>60</sup> See, e.g., GOVT. CODE § 15855 and STS. & HWYS. CODE § 102.



public entity makes a considered decision of both the need for the property as well as for the proposed project itself. Accordingly, the Commission recommends that all public entities be required to adopt a resolution of necessity for the acquisition of any property by eminent domain. The adoption should be by a majority vote of all the members of the governing body of the public entity<sup>61</sup> since a majority vote is normally required for the decision to undertake the proposed project itself.<sup>62</sup> The resolution should describe the proposed project and refer to the statutory authority for the project; it should describe the property needed for the project and its use in the project; it should declare that the public entity has found and determined that the public interest and necessity require the proposed project, that the proposed project is planned or located in the manner that will be most compatible with the greatest public good and least private injury, and that the property sought to be taken is necessary for the proposed project.

In the great majority of cases, the resolution of necessity of a public entity establishes a conclusive presumption of public necessity.<sup>63</sup> The Commission has weighed the need for court review of necessity questions against the economic and procedural burdens such review would entail and against the policy that entrusts to the legislative branch of government basic political and planning decisions concerning the need for and design and location of public projects. The Commission has concluded that the policy to provide conclusive effect to the resolution of necessity of a public entity is a sound one and should be continued. Where the condemnor is a public utility or other private entity, however, the issue of public necessity should always be subject to court determination.

There are certain situations where the necessity of the taking by a public entity should be subject to court review. The resolution of necessity should not have a conclusive effect for

<sup>61</sup> This rule should not apply to the Regents of the University of California. See EDUC. CODE § 23151 (two-thirds vote required for taking by Regents of the University of California).

<sup>62</sup> Thus, the majority requirement should not apply to acquisition of property by a county for state highway purposes since the decision to undertake such a project requires a greater than majority vote. See STS. & HWYS. CODE § 760 (four-fifths vote of supervisors required for project as well as for condemnation).

<sup>63</sup> See, e.g., GOVT. CODE § 15855 (Public Works Board); STS. & HWYS. CODE § 103 (Department of Transportation); WATER CODE § 251 (Department of Water Resources); CODE CIV. PROC. § 1241(2) (city, county, school district). The resolution is given conclusive effect even if its passage is obtained through fraud, bad faith, corruption, or gross abuse of discretion. *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959).



acquisitions outside the territorial limits of the public entity.<sup>64</sup> In addition, it should be made clear that the resolution of necessity has no effect on the justiciability of such “public use” issues as takings for exchange purposes, taking of remnants, and some takings for future use.<sup>65</sup>

## COMPENSATION

### Basic Compensation Scheme

Existing law provides that compensation shall be paid for property taken by eminent domain and, if the property is part of a larger parcel, for damage to the remainder caused by its severance from the part taken and by construction and use of the project for which it is taken.<sup>66</sup> If benefits are conferred by the project, the benefits may be offset against compensation for damage to the remainder but not against compensation for the part taken.<sup>67</sup>

Most states use the same general compensation scheme as California.<sup>68</sup> Nevertheless, the Commission has considered the compensation approaches adopted in the remaining states. The most popular alternative is the “before and after” rule under which the value of the property before the taking and the value of the remainder after the taking are determined and the difference, if any, is awarded to the property owner. Despite the apparent fairness and simplicity of operation of the before and after rule, the Commission has determined not to

<sup>64</sup> Judicial review of necessity in extraterritorial condemnation cases is desirable since the political process may operate to deny extraterritorial property owners an effective voice in the affairs and decision-making of the local public entity. *Cf.* *Scott v. City of Indian Wells*, 6 Cal.3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972). For this reason, when extraterritorial condemnation is undertaken, a local public entity is denied a conclusive presumption as to the public necessity of its acquisition. See, e.g., CODE CIV. PROC. § 1241(2); *City of Los Angeles v. Keck*, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971).

<sup>65</sup> These public use issues have previously been discussed. See discussion *supra* under “Public Use.”

<sup>66</sup> The basic compensation scheme appears in Code of Civil Procedure Section 1248(1)–(3).

<sup>67</sup> The language of the first sentence of Section 14 of Article I of the California Constitution requires that, in certain cases, compensation be made “irrespective of any benefits from any improvement proposed by such corporation.” The phrase applies only to “corporations other than municipal” and, oddly, only to takings for right of way or reservoir purposes. The language may be inoperative under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. See *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1083 (1902). In any event, the complex question of the offsetting of benefits in cases of partial takings should be left to the Legislature; hence, the Commission recommends that this language be deleted from the Constitution.

<sup>68</sup> See, e.g., 4A P. NICHOLS, EMINENT DOMAIN § 14.23 *et seq.* (rev. 3d ed. 1971) (including a discussion of the numerous variations).

recommend any change in the general California compensation scheme because there appears to be no general consensus in California that adoption of a different scheme would be desirable.<sup>69</sup>

Although the Commission has concluded that the basic method of measuring compensation in California should be retained, there are a number of defects or deficiencies that need correction, and there are some losses suffered by property owners that are not now compensated but should be. The revisions of existing law recommended by the Commission are outlined below.

### Accrual of Right to Compensation

Code of Civil Procedure Section 1249 provides that, for the purpose of assessing compensation and damages, the right thereto accrues as of the date of issuance of summons. This date is an arbitrary one since summons may not be issued at the time the complaint is filed and, even if issued, may not be served immediately. The filing of the complaint commences the eminent domain proceeding and serves to vest the court with jurisdiction;<sup>70</sup> hence, the date the complaint is filed is a more appropriate date for accrual of the right to compensation.

### Date of Valuation

Since 1872, Code of Civil Procedure Section 1249 has required that the property taken be valued as of the date the summons is issued. In an attempt to improve the position of the property owner and to compel the condemnor to expedite the

<sup>69</sup> The Commission notes that the California scheme of valuing the part taken, computing damages to the remainder, and offsetting benefits against the damages to the remainder has undergone a continuing process of judicial development. Court decisions have limited compensable items of damage, for example, to those that amount to more than "mere inconvenience" and that are peculiar to the particular property. See, *e.g.*, *Eachus v. Los Angeles Consol. Elec. Ry.*, 103 Cal. 614, 37 P. 750 (1894), and *City of Berkeley v. Von Adelung*, 214 Cal. App.2d 791, 29 Cal. Rptr. 802 (1963). Recent cases, however, indicate that particular items of damage may be compensable in any case where the property owner is required to bear more than his "fair share" of the burden of the public improvement. See, *e.g.*, *People v. Volunteers of America*, 21 Cal. App.3d 111, 98 Cal. Rptr. 423 (1971). A similar development has taken place in the determination of what items of benefit may be offset against damages; traditionally only "special" benefits might be offset, but recent cases have found special benefits in areas not previously included. Compare *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1083 (1902), with *People v. Giumarra Farms, Inc.*, 22 Cal. App.3d 98, 99 Cal. Rptr. 272 (1971).

In light of this continuing judicial development and improvement under the California scheme, the Commission recommends no codification of particular elements of damage and benefits.

<sup>70</sup> See CODE CIV. PROC. §§ 411.10 and 1243; *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15 (1924).



proceeding, a provision was added in 1911 specifying that, if a case is not brought to trial within one year and the delay is not caused by the defendant, the date of valuation is the date of trial. Neither the taking of possession nor the depositing of probable compensation has any bearing in determining the date of valuation. In cases in which the issue of compensation is once tried and a new trial is necessary, the Supreme Court of California has held that the date of valuation remains the same date used for that purpose in the original trial.<sup>71</sup>

The Commission has considered the oft-made proposal that the date of valuation be, in all cases, the date of trial. Much can be said in favor of that change. Unless the condemnor deposits probable compensation and takes possession of the property at that time, the date the proceedings are begun is not an entirely logical date of valuation. It would seem more appropriate to ascertain the level of the general market and the value of the particular property in that market at the time the exchange of the property for "just compensation" actually takes place. Also, in a rapidly rising market, property values may have increased so much that the property owner cannot purchase equivalent property when he eventually receives the award. In other states in which the power of eminent domain is exercised through judicial proceedings, the majority rule is to fix the date of trial as the date of valuation.<sup>72</sup> Nonetheless, the existing California rules appear to have worked equitably in most cases. The alternative rule might provide an undesirable incentive to condemnees to delay the proceedings to obtain the latest possible date of valuation. And, as a matter of convenience, there is merit in fixing the date of valuation as of a date certain, rather than by reference to the uncertain date that the trial may begin. The Commission therefore recommends retention of the existing rules with the modifications described below.

### **Deposit to Establish Date**

The condemnor should be permitted to establish an early date of valuation by depositing the probable amount of compensation for withdrawal by the property owner. In addition to providing a needed incentive to condemnors to deposit approximate compensation, the rule would accord with the view that the property should be valued as of the time payment is made. For convenience, the date of valuation should be the date the deposit is made unless an earlier date is made

<sup>71</sup> See *People v. Murata*, 55 Cal.2d 1, 357 P.2d 833, 9 Cal. Rptr. 601 (1960).

<sup>72</sup> See 3 P. NICHOLS, *EMINENT DOMAIN* § 8.5(2) at 38-39 (rev. 3d ed. 1965).



applicable by the existing rules. A date of valuation thus established should not be subject to change by any subsequent development in the proceeding.

### **Date in Case of New Trial**

In case of a new trial, the date of the new trial, rather than the date used in the original trial, should be the date of valuation unless the condemnor deposits the amount awarded in the original trial within a reasonably brief period after entry of judgment in the original trial. Unless such a deposit has been made, the date used in the original trial is of no practical or economic significance. To clarify existing law, a similar rule should be provided for a "retrial" following a mistrial except that the amount to be deposited should be determined in the same manner as a deposit made to obtain possession before judgment.

### **Date Based on Commencement of Proceeding**

As a technical matter, provisions respecting the date of valuation should be changed to compute that date from the commencement of the proceeding (filing of the complaint) rather than from the issuance of summons since the date of commencement of the proceeding marks the inception of the court's jurisdiction over the property.

### **Enhancement and Blight**

It is generally recognized that announcement of a public improvement may cause property values to fluctuate before eminent domain proceedings are begun. Existing California statutes do not deal with this problem.<sup>73</sup> Case law establishes, however, that any increase in the value of the property before the time it becomes reasonably certain that the property will be taken for the project is to be included in arriving at the compensation to be made for the property; any increases thereafter attributable to the project itself are excluded.<sup>74</sup>

<sup>73</sup> Recently enacted Government Code Section 7267.2 requires condemnors to make an offer to acquire property in the amount of their determination of probable compensation. The section also provides that, for the purpose of this offer:

Any decrease or increase in the fair market value of real property to be acquired prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner or occupant, will be disregarded in determining the compensation for the property.

<sup>74</sup> See *Merced Irr. Dist. v. Woolstenhulme*, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971).



The law as to the treatment of any decrease in value is uncertain; demands by property owners that alleged decreases in value be excluded have frequently been denied. The reason commonly given is that any attempt to determine the existence or amount of such a decrease would be to engage in speculation. As recognized by recent cases, however, the injustice to the property owner is clear if general knowledge of the proposed improvement has actually depreciated the market value of the property prior to the date of valuation.<sup>75</sup> Such influence can be shown by expert testimony and by direct evidence as to the general condition of the property and its surroundings as well where the value is depressed as where the value is enhanced.

Equitably, the amount awarded to the owner should be equivalent to what the market value of the property would have been on the date of valuation but for the proposed improvement's influence on the market. Accordingly, a uniform rule should be established by statute to provide that the value of the property taken on the date of valuation may not include any increase or decrease in such value resulting from (1) the project for which the property is taken, (2) the eminent domain proceeding itself, or (3) any preliminary actions on the part of the condemnor related to the taking or damaging of the property.<sup>76</sup> In the case of a partial taking, this rule should also apply in valuing the remainder in the "before" condition.

### Divided Interests

At the time property acquired by eminent domain is taken, it is not always held by a single owner in fee simple; frequently, there are coowners, liens and encumbrances, deed restrictions, leases, and the like. The Commission has reviewed the statutory and case law relating to compensating and apportioning the award among divided interests and recommends the following changes in existing law.

### Leaseholds

Under existing law, where property subject to a lease is partially taken, the lessee's obligation to pay rent under the terms of the lease for the property taken continues unabated, and the lessor's compensation for the property is given in part to the lessee to be paid back to the lessor as a part of the rental installments.<sup>77</sup> This rule, which in effect makes the lessee a

<sup>75</sup> *Cf.* *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

<sup>76</sup> The recommended rule is consistent with Government Code Section 7267.2.

<sup>77</sup> *City of Pasadena v. Porter*, 201 Cal. 381, 257 P. 526 (1927).



trustee for the lessor's compensation, has been widely criticized.<sup>78</sup> The lessor should be compensated immediately for the property taken, and the lessee should not be required to make payments on property no longer subject to the lease. Unless the lease otherwise provides, a partial taking of property subject to a leasehold should work a pro rata reduction of the rental obligation; and, if the taking is so great that it operates as a frustration of the whole lease, the court should, on motion of any party, terminate the lease.

### Options

Existing law denies compensation to the holder of an unexercised option to acquire property.<sup>79</sup> An option may be a valuable interest for which substantial consideration was given. An option holder should receive compensation for the fair market value of the option.<sup>80</sup>

### Future Interests

When property subject to a life tenancy is taken by eminent domain, the life tenant's portion of the award may be inadequate for investment to provide the life tenant with the same income or comparable living conditions as the original life tenancy. In this situation, the court should have authority to defer distribution of the eminent domain award pending termination of the life tenancy and meanwhile to permit investment of the funds or their devotion to such purposes as would be equitable under the circumstances. The grant of such authority would codify existing case law.<sup>81</sup>

Contingent future interests in property such as rights of reentry and possibilities of reverter are denied compensation under existing law.<sup>82</sup> Such future interests may have substantial market value, particularly where the reentry or reverter is imminent at the time of the taking. If the transformation of the future interest to a present interest was reasonably imminent at the time the eminent domain proceeding was commenced, the future interest should be compensated at its fair market value. Additionally, where the occurrence was not reasonably

<sup>78</sup> See, e.g., Horgan & Edgar, *Leasehold Valuation Problem in Eminent Domain*, 4 U.S.F. L. REV. 1 (1969).

<sup>79</sup> See, e.g., *People v. Ocean Shore R.R.*, 90 Cal. App.2d 464, 203 P.2d 579 (1949).

<sup>80</sup> This is consistent with the general rule that unexercised options to purchase or lease property are considered in determining the value of a lease. See, e.g., *People v. Gianni*, 29 Cal. App.3d 151, 105 Cal. Rptr. 248 (1972).

<sup>81</sup> *Estate of Giacometos*, 192 Cal. App.2d 244, 13 Cal. Rptr. 245 (1961).

<sup>82</sup> See, e.g., *Romero v. Dep't of Public Works*, 17 Cal.2d 189, 109 P.2d 662 (1941).

imminent but the future interest was appurtenant to some property that is damaged by the acquisition, the owner should be compensated for that damage.<sup>83</sup> And, where the occurrence was not reasonably imminent but the future interest restricted the use of the property to charitable or public purposes, the award should be devoted to the same purposes subject to the continued future interest.

### Improvements

A condemnor must take and pay for all improvements pertaining to the realty that it acquires by eminent domain.<sup>84</sup> Discussed below are several problem areas in the application of this rule.

#### Business Equipment

Whether certain types of business equipment are improvements pertaining to the realty has been a continuing source of litigation.<sup>85</sup> In 1957, Code of Civil Procedure Section 1248b was enacted to provide that equipment designed for manufacturing or industrial purposes and installed for use in a fixed location is deemed a part of the realty regardless of the manner of installation. Nevertheless, this did not completely resolve the issue. It is sometimes difficult to determine whether particular equipment falls within the language of Section 1248b. Moreover, some types of business equipment—particularly equipment used in a commercial enterprise—are clearly *not* covered by the section. The Commission recommends that improvements pertaining to the realty include all types of business equipment installed on the property to be taken or damaged except equipment that can be removed without a substantial loss in value. This will assure that equipment having special in-place value will be taken and compensated as part of the realty.

#### Removal of Improvements

While improvements pertaining to the realty must be taken and paid for by the condemnor, there may be situations where the condemnor does not require improvements that the owner desires to keep. In such situations, the owner should be

<sup>83</sup> See, e.g., *City of Santa Monica v. Jones*, 104 Cal. App.2d 463, 232 P.2d 55 (1951), for a situation in which the use restriction served to benefit appurtenant property.

<sup>84</sup> See, e.g., CODE CIV. PROC. §§ 1248 and 1249.1.

<sup>85</sup> See, e.g., *People v. Texaco, Inc.*, 25 Cal. App.3d 514, 101 Cal. Rptr. 923 (1972); *City of Los Angeles v. Klinker*, 219 Cal. 198, 25 P.2d 826 (1933).

expressly authorized to remove the improvements and to receive compensation for their removal and relocation cost, provided that such cost does not exceed the value of the improvements.

Where improvements pertaining to the realty are removed or destroyed before transfer of title or possession, the improvements are not taken into account in determining compensation.<sup>86</sup> Hence, where there is a dispute whether the improvements pertain to the realty, the owner of the improvements may wish to protect them from vandalism or destruction pending resolution of the issue. A procedure should be provided to enable the owner to remove and store the improvements, absent opposition from the condemnor. Thus, if the improvements are ultimately held to pertain to the realty, they will be returned to the condemnor; if they are held to be personalty, the owner will retain them in good condition.

Where the removal of improvements will damage property to which they are attached, a procedure should also be provided to enable the owner to remove the improvements without being charged with such damage, absent opposition from the condemnor.

### Subsequent Improvements

As a general rule, improvements placed on the property after service of summons are not included in the determination of compensation.<sup>87</sup> Where the improvement is in the process of construction at the time of service of summons, this rule can cause the owner serious difficulties. For example, the partially completed improvement may present the risk of injury to the public or may be exposed to destruction by vandalism or by the elements. In such a situation, if the property owner continues with additional construction after service of summons with the written consent of the condemnor, compensation should be determined on the basis of the improvement with the additional construction. Such consent may well be forthcoming if the condemnor anticipates a lengthy delay in the time of acquisition and wishes to avoid payment of damages for such delay.<sup>88</sup>

<sup>86</sup> CODE CIV. PROC. § 1249.1.

<sup>87</sup> CODE CIV. PROC. § 1249. This rule is subject to the judicially recognized exception that improvements required to be made by a public utility to its utility system following service of summons are compensable. *Citizens Util. Co. v. Superior Court*, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963).

<sup>88</sup> See, *e.g.*, *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 31 Cal. Rptr. 316 (1972) (inverse condemnation).



Absent the condemnor's written consent, the property owner in the process of construction should, at least, be authorized to recover the cost of making additional improvements designed to protect the public from the risk of injury from the partially completed improvement whether or not the additional work adds to the value of the improvement. In addition, such an owner should be authorized to obtain a court order allowing compensation for the property to include the value added by subsequent improvements upon a showing that the hardship to the condemnor of permitting the subsequent improvements is outweighed by the hardship to the property owner of leaving the construction incomplete. No such order should be permitted after the condemnor has deposited the probable compensation with the court.

### Harvesting and Marketing of Crops

Where a condemnor takes possession of property at a time that prevents the owner from harvesting and marketing crops growing on the property, the value of the crops is included in the compensation.<sup>89</sup> However, because the value of growing crops is speculative, depending upon climatic and other natural conditions as well as upon economic conditions that may fluctuate rapidly, the imprecise standard of the value of the crops should not be used. Rather the property owner should be awarded the reasonable value of material and labor reasonably expended in connection with the crops up to the time the condemnor is authorized to take possession of the property.

### Compensation for Injury to Remainder

The Commission recommends no change in the basic rules relating to compensation for injury to the remainder in the case of a partial taking. However, features of these basic rules that require improvement include (1) the rule of *People v. Symons*<sup>90</sup> and (2) the computation of damages and benefits that will accrue in the future.

### Rule of *People v. Symons*

The *Symons* case held that a property owner may not recover severance damages in eminent domain unless the portion of the project that cause the damage is located on property taken from the owner. Subsequent cases cast doubt on the continued vitality of the *Symons* rule,<sup>91</sup> and the present state of the law is not clear.

<sup>89</sup> CODE CIV. PROC. § 1249.2.

<sup>90</sup> 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960).

<sup>91</sup> See, e.g., *People v. Ramos*, 1 Cal.3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969).



A property owner whose remaining property is injured by the project for which a portion of his property was taken may suffer substantial losses whether the damage-causing portion of the project is located on or off the property taken. Accordingly, the rule of *Symons* should be abrogated by statute and should be replaced by the general rule that severance damages are awarded whether or not the damage is caused by a portion of the project located on the part taken.

By parity of reasoning, it should be made clear that benefits created by the project should be offset against severance damages whether or not the benefits are caused by a portion of the project located on the part taken. This would continue existing law.<sup>92</sup>

### Computation of Future Damages and Benefits

Existing law requires compensation for severance damage to be computed on the assumption that the project is completed as of the date compensation is assessed.<sup>93</sup> This requirement may work a hardship on the property owner where present damages are offset against benefits to be conferred by the project at some time in the future, thereby postponing compensation for the damage. To alleviate this problem, both damages and benefits should be assessed on the basis of the proposed schedule for completion of the improvement rather than on the assumption that the improvement is completed and in operation. Should the project not be completed as anticipated, damages would be recoverable by the property owner as at present.<sup>94</sup>

### Compensation for Loss of Goodwill

Eminent domain frequently works a severe hardship on owners of businesses affected by public projects. As a rule, business losses have not been compensated.<sup>95</sup> This rule of noncompensability has been widely criticized,<sup>96</sup> and the

<sup>92</sup> See *People v. Hurd*, 205 Cal. App.2d 16, 23 Cal. Rptr. 67 (1962).

<sup>93</sup> See, e.g., *People v. Schultz Co.*, 123 Cal. App.2d 925, 268 P.2d 117 (1954).

<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., *City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 P. 705 (1915). Government Code Section 7262, enacted Cal. Stats. 1971, Ch. 1574, provides for limited business losses in the form of relocation or in-lieu payments not to exceed \$10,000 where relocation is not possible without a substantial loss of patronage.

<sup>96</sup> See, e.g., Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. WEST. L. REV. 57 (1969); Note, *The Unsoundness of California's Noncompensability Rule as Applied to Business Losses in Condemnation Cases*, 20 HASTINGS L.J. 675 (1969); see also Aloi & Goldberg, *A Reexamination of Value, Good Will and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604



Commission believes that some step should be taken to compensate the owner of a business taken or damaged in an eminent domain proceeding for losses he suffers. But, in order to assure that the losses are certain and measurable for the purposes of compensation, recovery should be allowed only for the loss of goodwill<sup>97</sup> and only to the extent that such loss is caused by the acquisition of the property or the injury to the remainder and cannot reasonably be prevented by a relocation of the business and by taking those steps and adopting those procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

### Work to Reduce Compensation

There may be several practical ways by which the condemnor can reduce the damages to the property owner. For instance, if there are structures on the property that the owner desires to keep, it may be relatively inexpensive for the condemnor to relocate the structures for the owner while the project equipment is on the site. Likewise, the condemnor may be able to reduce severance damages substantially by constructing fences, sidewalks, driveways, retaining walls, drainage works, and the like on the owner's remaining property at the time work on the project is in progress. Public entities should be authorized to enter into agreements with the property owner to perform such work when it will result in an overall savings.<sup>98</sup>

### Prohibition Against Double Recovery

There are situations where there may be an overlap of two statutes granting compensation for the same loss in an eminent domain proceeding. For example, the provisions recommended by the Commission for compensation for loss of goodwill of a business might in some situations duplicate to a limited extent the payment under Government Code Section 7262(d) to the business in lieu of a relocation allowance. To avoid the possibility of double recovery in this and other situations, the law should clearly state that a person may recover only once for the same loss.

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(1968); Note, *"Just Compensation" for the Small Businessman*, 2 COLUM. J.L. & SOC. PROB. 144 (1966); Comment, *An Act to Provide Compensation for Loss of Goodwill Resulting From Eminent Domain Proceedings*, 3 HARV. J. LEGIS. 445 (1966).

<sup>97</sup> See BUS. & PROF. CODE § 14100 (goodwill defined as expectation of continued public patronage).

<sup>98</sup> This concept is an expansion of existing authority in Streets and Highways Code Section 970 (certain types of work in connection with an acquisition for opening or widening a county road).

## CONDEMNATION PROCEDURE

It has long been the California rule that eminent domain proceedings are governed by the same procedures as civil actions generally.<sup>99</sup> These procedures are supplemented where appropriate by provisions specially applicable to eminent domain proceedings, but such provisions are relatively few in number. Generally speaking, there has been little criticism of this procedural scheme, and the Commission recommends few major changes in it. However, the provisions relating to possession and deposits prior to judgment have been under continuing Commission study for a number of years,<sup>100</sup> and major changes in these provisions are recommended.

### Pleadings

The special nature of an eminent domain proceeding has required special rules relating to pleadings; the Commission believes that such special treatment is necessary.

### Contents of Pleadings

The complaint should include an adequate description of the property sought to be taken, as under existing law,<sup>101</sup> and should include a map indicating generally the property described in the complaint and its relation to the project for which it is being taken. Presently, a map is required only where a right of way is sought.<sup>102</sup>

The existing requirements that the complaint indicate (1) the nature and extent of the interests of the defendants in the property and (2) whether the property sought to be taken is part of a "larger parcel" should be eliminated. The first issue is one that should be pleaded by the defendants; the second is one more appropriately raised and resolved at a later point in the proceedings.

Existing law also requires that the complaint contain "a statement of the right of the plaintiff" to take the property.<sup>103</sup> To enable the defendant to have a better understanding of the ground for the proceeding and to prepare more adequately for

<sup>99</sup> See, e.g., CODE CIV. PROC. §§ 1256, 1257, 1262.

<sup>100</sup> The Commission previously published and distributed for comment a tentative recommendation and background study on this subject. See *Tentative Recommendation and a Study Relating to Condemnation Law and Procedure: Number 1—Possession Prior to Final Judgment and Related Problems*, 8 CAL. L. REVISION COMM'N REPORTS 1101 (1967). The comments received on that tentative recommendation have been taken into account in preparing this report.

<sup>101</sup> CODE CIV. PROC. § 1244(5).

<sup>102</sup> CODE CIV. PROC. § 1244(4).

<sup>103</sup> CODE CIV. PROC. § 1244(3).



his response, the statement of the plaintiff's right should be more detailed. The complaint should include a description of the purpose for which the property is sought to be taken, an allegation of "public necessity" for the taking (including references where appropriate to the resolution of necessity), and references to the specific statutes authorizing the plaintiff to exercise the power of eminent domain for the purpose alleged. Failure to comply with these requirements should subject the complaint to attack by way of demurrer.

Existing law requires that the defendant set forth in his answer both a statement of his right, title, or interest in the property taken and the amount of compensation he claims for the taking.<sup>104</sup> The second requirement should be eliminated; it serves little purpose at the initial stage of the proceeding and generally represents at best an ill-informed guess of what will be the compensation for the taking.

The existing requirement that a defendant file a claim with a public entity as a condition to bringing a cross-complaint in an eminent domain proceeding,<sup>105</sup> should not be continued. The cause of action is necessarily related to the pending eminent domain proceeding;<sup>106</sup> hence, no useful purpose is served by presentation of the claim to the public entity prior to filing the cross-complaint.

### Verification

A public entity need not verify its pleadings but, where a public entity is the plaintiff, the defendant must verify his answer.<sup>107</sup> The Commission recommends a new scheme for eminent domain pleadings. In place of verification, the pleading of a party (including a public entity) who is represented by an attorney should be signed by his attorney. The signature of the attorney should constitute a certification that he has read the pleading, that to the best of his knowledge, information, and belief there is ground to support its contents, and that it is not interposed for delay. If the pleading is not signed or is signed with intent to defeat the purposes of the signature requirement, it should be subject to being stricken as sham. These provisions would be substantively the same as those of the Federal Rules of Civil Procedure.<sup>108</sup> Under this scheme, verification will not

<sup>104</sup> CODE CIV. PROC. § 1246.

<sup>105</sup> *County of San Luis Obispo v. Ranchita Cattle Co.*, 16 Cal. App.3d 383, 94 Cal. Rptr. 73 (1971); see GOVT. CODE §§ 905 and 905.2.

<sup>106</sup> See CODE CIV. PROC. § 428.10 and Comment thereto.

<sup>107</sup> CODE CIV. PROC. § 446. If the defendant is also a public entity, it need not verify its answer.

<sup>108</sup> See FED. R. CIV. PROC. 11.

be required where an attorney represents a party, but the requirement of signature and the sanctions for noncompliance will apply to both plaintiff and defendant.

### Amendment

The liberal rules generally applicable to the amendment of pleadings<sup>109</sup> are also desirable in an eminent domain proceeding. It should be made clear, however, that a court may, where justice so requires, impose such terms and conditions to an amendment as a change in the date of valuation or awarding costs and fees. Where an amendment would add property to that covered by the complaint of a public entity, adoption of a resolution of necessity for the additional property should be a prerequisite. And, where an amendment would delete property from the complaint, the plaintiff should follow the procedures and pay the price for a partial abandonment.<sup>110</sup>

### Summons

Existing law requires that the summons duplicate such items contained in the complaint as the description of the property and the statement of the plaintiff's right to condemn.<sup>111</sup> This duplication should not be required in the ordinary case since the defendant may refer to the complaint for this information. However, where service of summons is by publication, the summons should describe the property to be taken in a manner reasonably calculated to give a person with an interest in the property notice of the proceeding.

Existing law requires that the summons be served in the same manner as in civil actions generally.<sup>112</sup> This requirement should be continued except that, where service is by publication, the plaintiff should also post copies of the summons on the property taken and record a notice of the pendency of the proceeding in the office of the county recorder of the county where the property is located.<sup>113</sup> These additional requirements will not be burdensome and will increase the likelihood that interested persons receive actual notice of the proceeding.

<sup>109</sup> CODE CIV. PROC. § 473.

<sup>110</sup> See discussion *infra* under "Abandonment and Dismissal."

<sup>111</sup> CODE CIV. PROC. § 1245.

<sup>112</sup> *Id.*

<sup>113</sup> It should be noted that filing of a *lis pendens* at the commencement of a proceeding is required by Code of Civil Procedure Section 1243, but the plaintiff's failure to do so is not a jurisdictional defect. This requirement should be revised to make clear that such filing is not mandatory except in the case recommended by the Commission.

Where the state is a defendant, existing law requires service of summons on the Governor, Attorney General, Director of General Services, and State Lands Commission.<sup>114</sup> The Commission recommends that *only* the Attorney General be served; he can notify the proper state agency of the proceeding. The Commission is advised that this would work no substantial change in present practice.

## Possession Prior to Judgment

### Extension of Right to Obtain Early Possession

Section 14 of Article I of the California Constitution authorizes the state and local public entities<sup>115</sup> to take possession of the property to be condemned immediately upon commencement of an eminent domain proceeding, or at any time thereafter, if the condemnation is for any "right of way" or "lands to be used for reservoir purposes." Except to this limited extent, the condemnor may not obtain possession prior to entry of judgment unless the owner consents.<sup>116</sup>

The narrow limits of the authorization for early possession in Section 14 reflect a fairly general impression that the best interests of the property owner always lie in postponing the inevitable relinquishment of possession as long as possible. There is some justification for this impression because the California Constitution and statutes for many years failed to provide adequate procedural safeguards for the property owner.<sup>117</sup> Improvements were made in 1957 and, in 1961, the Legislature enacted legislation recommended by the Commission that partially systematized the law on this subject.<sup>118</sup> Nevertheless, careful analysis reveals that broader provisions for early possession, with appropriate safeguards for both parties, would benefit both condemnors and property owners.

<sup>114</sup> CODE CIV. PROC. §§ 1240(8) and 1245.4.

<sup>115</sup> The authorization extends to "a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation." See also CODE CIV. PROC. § 1243.4.

<sup>116</sup> Code of Civil Procedure Section 1254 provides a procedure whereby any condemnor may obtain possession "at any time after trial and judgment entered or pending an appeal from the judgment."

<sup>117</sup> Before 1957, there were no provisions for withdrawal of the required deposit. Further, no period of notice to the property owner was specified, and the order for possession could be made effective when granted. These pre-1957 rules afforded at least the possibility of serious inconvenience to the property owner.

<sup>118</sup> See *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings*, 3 CAL. L. REVISION COMM'N REPORTS at B-1 (1961). See also Cal. Stats. 1961, Ch. 1613, amending or adding CODE CIV. PROC. §§ 1243.4, 1243.5, 1243.6, 1243.7, 1249, 1249.1, 1253, 1254, 1255a, and 1255b.



To the condemnor, an assurance of timely possession facilitates an orderly program of property acquisition. In acquiring property for public use, it is frequently essential that there be a definite future date as of which all property needed for the public improvement will be available. An undue delay in acquiring even one essential parcel can prevent construction of a vitally needed public improvement and can complicate financial and contractual arrangements for the entire project. To avoid such a delay, the condemnor may be forced to pay the owner of that parcel more than its fair value and more than the owners of similar property received. In general, the need of the condemnor is not for haste but for certainty in the date of acquisition. The variable conditions of court calendars and the unpredictable period required for the trial of the issue of compensation preclude any certainty in the date of acquisition if that date is determined solely by entry of judgment in the proceeding. Lack of the right to obtain possession prior to entry of judgment thus may lead to precipitate filing of proceedings and premature acquisition of property.

From the property owner's point of view, if reasonable notice is given before dispossession and if prompt receipt of the probable compensation for the property is assured, possession prior to judgment frequently will be advantageous. Upon the commencement of the eminent domain proceeding, the landowner loses many of the valuable incidents of ownership. He is practically precluded from selling or financing the property and is legally deprived of any further increase in the value of the property. He is denied compensation for improvements made after service of the summons in the proceeding. As a practical matter, he usually must find and purchase other property prior to termination of the litigation. He must also defray the expenses of the litigation. It is possible that these difficulties will force him to settle for an amount less than he would eventually have received in the eminent domain proceeding. In contrast, the taking of possession and payment of approximate compensation prior to judgment permit the landowner to meet these problems and expenses while proceeding with the trial on the issue of compensation. Even if he has no urgent need for prompt payment, he may invest in other property the amount he receives as approximate compensation or he may leave it on deposit and receive interest at the legal rate of seven percent.

The desirability of determining the condemnor's right to take the property before transfer of possession does not preclude broadened provisions for exchanging probable compensation for possession prior to judgment. While the limiting doctrines of "public use" and "public necessity" once played important roles in condemnation cases, now the only substantial question to be determined in nearly all condemnation proceedings is the amount of compensation. And, because the question of the condemnor's right to take the property is decided by the court—rather than by the jury—that question can be expeditiously determined in the cases in which it arises.

The existing constitutional authorization for immediate possession in takings for rights of way applies to most acquisitions for highway, freeway, and street purposes. As expansively interpreted, the authorization for such possession in takings of lands for reservoir purposes applies to most acquisitions of property needed to develop and conserve water resources. It has become apparent, however, that these two classes are neither entirely logical nor sufficiently inclusive. For example, a local government—but not a public utility serving the same needs—may obtain possession of the rights of way for an electric system; and neither may obtain possession of the site for the power plant.

The development of highways, and especially freeways, sometimes necessitates the taking of property outside the right of way. Even though the acquisition is by the state, no authorization exists for early possession of property outside the boundaries of the right of way. Similarly, many acquisitions in which possession prior to judgment would be appropriate are excluded both by the limitation as to entities and by the limitation as to the public purpose for which the property is being acquired. As an example, an assured date of possession is not available for the acquisition of a school site however great the need and whatever the size or responsibility of the school district.

The Commission accordingly recommends that any person authorized to acquire property by eminent domain should also be authorized to obtain possession of that property prior to judgment.<sup>119</sup> This recommendation would extend the right of prejudgment possession to public utilities which, at present, do not have the right.<sup>120</sup>

<sup>119</sup> Section 14 of Article I of the California Constitution should be revised to permit the Legislature to specify the purposes for which and the persons by whom possession may be taken prior to judgment. The revision should also provide explicitly that a property owner will be compensated concurrently with the transfer of possession.

<sup>120</sup> A few quasi-public entities also would be authorized to take possession prior to

### Improvement of Prejudgment Possession Procedure

In order to protect the rights of owners and occupants of property of which possession prior to judgment is taken, the Commission recommends that the substance of the existing procedure for making and withdrawing deposits and for taking possession prior to judgment be modified in several important ways.

**Amount of deposit.** Under existing law, the court fixes the amount of the deposit on *ex parte* application of the condemnor.<sup>121</sup> The amount fixed is almost always the amount suggested by the condemnor. Although existing law gives the property owner the right to have the court redetermine the amount of the deposit,<sup>122</sup> experience has demonstrated that the court, having once made an order fixing the amount of the deposit, is reluctant to reconsider that decision even though the initial order was made on *ex parte* application.

Before making a deposit, the condemnor should be required to have an appraisal made by an expert appraiser. The amount deposited should be the amount determined by the appraiser to be the probable amount of compensation that will be awarded in the proceeding. The condemnor should be required to notify interested parties of the making of the deposit and to make available a statement of the valuation data upon which the amount of the deposit is based. The amount deposited should be subject to review and change by the court on motion of any interested party.

The recommended procedure would simplify existing practice by eliminating the need for an *ex parte* application to the court in every case. It would, however, provide the interested parties with information as to the valuation data on which the amount of the deposit is based and, if any party is dissatisfied with the amount of the deposit, he will have a factual basis for applying to the court for an increase in the deposit.

**Procedure for making deposits.** Existing law provides for the deposit of approximate compensation only in connection with an order for possession.<sup>123</sup> However, any condemnor, whether or not it seeks possession prior to judgment, should be authorized to make a deposit of the probable amount of

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judgment. See discussion *supra* under "Quasi-public entities and private persons." Under the Commission's recommendation, private persons would not have the right of prejudgment possession because they would no longer exercise the power of eminent domain.

<sup>121</sup> CODE CIV. PROC. § 1243.5(a).

<sup>122</sup> CODE CIV. PROC. § 1243.5(d).

<sup>123</sup> CODE CIV. PROC. § 1243.5(a).



compensation that will be awarded in the proceeding. After a deposit is made, the condemnor should be entitled to an order for possession, effective 30 days after the making of the order, if the property owner either (a) expresses in writing his willingness to surrender possession of the property on or after a stated date or (b) withdraws the deposit.

The recommended procedure would provide a method by which the parties could effect a transfer of the right to possession in exchange for substantial compensation without prejudice to their rights to litigate the issue of compensation. It would benefit both parties to the proceeding. The property owner could withdraw the deposit and thus finance the acquisition of other property and defray other expenses incident to the taking. The withdrawal would benefit the condemnor; the property owner would, as under existing law, thereby waive all defenses to the proceeding except the claim to greater compensation, and withdrawal would also permit the condemnor to obtain possession without regard to the uncertain date that the trial and possible appeals may be concluded.

**Withdrawal of deposit.** The existing system for withdrawing the deposit should be streamlined to eliminate obstacles and delays. Under existing practice, where a party makes application to withdraw a deposit and the plaintiff objects to the withdrawal, such withdrawal is not permitted unless the plaintiff is able to make personal service of notice of the application upon all parties.<sup>124</sup> Two changes in the withdrawal procedure are recommended:

(1) The existing absolute prohibition of withdrawal absent personal service on all parties should be eliminated.<sup>125</sup> Quite often, “defendants” in eminent domain proceedings can easily be shown to have no compensable interest in the property. The courts can protect the rights of persons upon whom it is not possible to make service by requiring a bond or limiting the amount withdrawn in any case where it appears that the party not served actually has a compensable interest in the property.<sup>126</sup>

(2) The plaintiff should be permitted to serve the notice of the application by mail on the other parties and their attorneys, if any, in all cases in which the other party has appeared or been served with the complaint and summons.

<sup>124</sup> CODE CIV. PROC. § 1243.7(e).

<sup>125</sup> *Id.*

<sup>126</sup> *Cf.* CODE CIV. PROC. § 1243.7(f).



**Cost of withdrawal bonds.** Existing law requires the condemnor to reimburse the cost of bond premiums where the need for the bond arises from the defendant's efforts to withdraw an amount greater than that originally deposited.<sup>127</sup> Reimbursement is not required under existing law if the bond is required because of completing claims among defendants.<sup>128</sup> However, conflicting claims to a deposit usually result from the need to allocate the award among owners of separate interests in the property. In such a case, the need for the allocation—as well as for the bond—arises from the eminent domain proceeding rather than from any act or omission of the defendants. Accordingly, the condemnor should be required to reimburse the cost of the bond in all cases except where the need for the bond arises primarily due to an issue as to title between the claimants.<sup>129</sup>

**Possession.** The present requirement of 20 days' notice to the owners and occupants of property before the condemnor takes possession<sup>130</sup> should be extended to 90 days in the case of property occupied by a dwelling, business, or farm and to 30 days in all other cases. The present 20 days' notice can result in serious hardship and inconvenience. The longer notice requirements will not only serve to reduce the possibility of hardship and inconvenience but will also make possible the actual disbursement to the property owner of the required deposit before he is obligated to relinquish possession.<sup>131</sup>

In addition to a lengthened notice period, the owner or occupant of property should be able to obtain relief from the order for possession prior to judgment if the hardship to him will be substantial and the condemnor does not need possession or will suffer insignificant hardship by having possession delayed. So long as an order for possession is in effect, however, the condemnor should be entitled to enforcement of the order as a matter of right.

### **Prejudgment Deposit on Demand of Property Owner**

The Commission has considered statutes of other states that permit the property owner, in all cases, to demand deposit of approximate compensation at the beginning of the

<sup>127</sup> CODE CIV. PROC. § 1243.7(b).

<sup>128</sup> CODE CIV. PROC. § 1243.7(f).

<sup>129</sup> Cf. CODE CIV. PROC. § 1246.1 (costs of determining issue as to title among defendants are borne by defendants).

<sup>130</sup> CODE CIV. PROC. § 1243.5(c).

<sup>131</sup> The lengthened time periods are also in accord with Government Code Section 7267.3, requiring 90 days' written notice before possession of occupied property.

proceedings.<sup>132</sup> Under these statutes, the condemnor usually is given the right to possession upon complying with the demand of the condemnee. Although these statutes have merit, integration of such a requirement into California condemnation procedure does not appear feasible at this time. Nonetheless, a greater incentive should be provided to the condemnor to deposit approximate compensation in certain classes of hardship cases.

One such class of cases is where a residence is being taken. The common need to purchase another home before receipt of the final award places a particularly onerous burden upon the property owner. The property owner should have a right to demand that a deposit be made if the property being taken is residential property having not more than two dwelling units and he resides thereon. If the deposit is not made, interest at the legal rate of seven percent should be allowed on the amount of the eventual award from the date that the deposit should have been made.

Another class of "hardship case" is where rental property becomes subject to a high vacancy rate due to the condemnation proceeding. The owner of this type of property should be permitted to demand a prejudgment deposit and, absent compliance with the demand, be entitled to recover his rental losses caused by the eminent domain proceeding.<sup>133</sup>

### Procedures for Determining Right to Take

Where objections to the right to take are raised, the practice has been to hear and determine such objections prior to the trial of compensation issues. This priority should be continued and reflected in statutory form.

Where the court determines that the plaintiff does not have the right to acquire by eminent domain any property described in the complaint, it should be authorized to order, in lieu of immediate dismissal, conditional dismissal as to that property unless such corrective action as the court may direct has been taken within the time directed. The court should impose such limitations and conditions as are just under the circumstances of the particular case including the requirement that the plaintiff pay to the defendant all or a part of the reasonable litigation expenses necessarily incurred by the defendant

<sup>132</sup> See, e.g., PA. STAT. ANN., Tit. 26, § 1-407 (Supp. 1965).

<sup>133</sup> This recommendation would supplement the recovery for lost rents occasioned by precondemnation publicity as provided in *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).



because of the plaintiff's failure or omission which constituted the basis of the objection to the right to take.

## Procedures for Determining Compensation

### Pretrial Exchange of Valuation Data

The existing California scheme for pretrial exchange of valuation data among the parties to an eminent domain proceeding calls for a demand by a party no later than 50 days prior to trial and the opportunity to make a cross-demand no later than 40 days prior to trial, with the actual exchange of data occurring 20 days prior to trial.<sup>134</sup> While this scheme permits the exchange of basic valuation data, it does not permit sufficient time for follow-up discovery<sup>135</sup> and therefore is not as effective as it ought to be. To remedy this defect, the Commission recommends that the demand and exchange occur earlier in the proceeding<sup>136</sup> with an opportunity for the parties thereafter to undertake subsequent discovery to within 20 days before trial. This recommendation would preserve the mutuality of the exchange scheme without imposing additional burdens on the parties.

### Burden of Proof of Compensation

Existing law places the burden of proof on the issue of compensation on the defendant.<sup>137</sup> This burden is inappropriate in an eminent domain proceeding since the task of the trier of fact is to sift through the conflicting opinions of value and supporting data and fix a value based on the weight it gives to them. Neither party should be made to bear a greater burden of persuasion than the other.

<sup>134</sup> CODE CIV. PROC. § 1272.01.

<sup>135</sup> See CAL. R. CT. 222 (limiting discovery undertaken within 30 days of trial).

<sup>136</sup> The demand should occur no later than 10 days following the date on which a trial date is selected. This will enable an earlier cutoff of demands while preserving adequate notice to the parties when the cutoff will occur. In this connection, the provision for a cross-demand should be eliminated. It is of marginal utility, the parties having ample opportunity to submit any necessary demands prior to the cutoff date. Elimination of the cross-demand will also serve to allay the misimpression that has arisen in some cases that a party who serves a demand need not exchange his own data unless a cross-demand has been served on him. The exchange of data should occur 40 days prior to trial unless the parties agree to another date.

<sup>137</sup> See, e.g., *City & County of San Francisco v. Tillman Estate Co.*, 205 Cal. 651, 272 P. 585 (1928).



## Valuation Evidence

Evidence of the value of property in an eminent domain proceeding must relate to the fair market value of the property.<sup>138</sup> Although fair market value is normally determined by reference to “open market” transactions,<sup>139</sup> there may be some types of property for which there is no open market.<sup>140</sup> To assure that the basic evidentiary standard of fair market value is applicable to such special purpose properties, the phrase “in the open market” should be deleted from the definition of fair market value.<sup>141</sup> This change will have no effect on the valuation of other properties for which there is an open market.

The value of property may be shown only by opinions of expert witnesses and the property owner.<sup>142</sup> Where the owner of the property is a corporation, however, a corporate representative may not testify unless he is otherwise qualified as an expert.<sup>143</sup> This rule should be changed. Where there is a corporate owner of property, an officer or employee designated by the corporation should be permitted to give an opinion of the value of the property if the designee is knowledgeable as to the character and use of the property. This will enable the small corporation to give adequate testimony as to the value of its property in cases where it might not be able to afford the cost of an expert.

Where an expert witness relies on comparable sales as a basis for his opinion of value,<sup>144</sup> the Commission recommends that he be permitted a wide discretion in his selection of the sales, for it is better to have all relevant evidence available to the trier of fact than to have insufficient evidence. Any errors of excess can be cured by motions to strike and proper instructions to the jury.

While it may be proper to rely on comparable sales, it is not proper to give an opinion as to the value of property other than that being valued.<sup>145</sup> To this end, it should be made clear by

<sup>138</sup> See EVID. CODE § 814.

<sup>139</sup> *Id.*; see also *Sacramento S.R.R. v. Heilbron*, 156 Cal. 408, 409, 104 P. 979, 980 (1909).

<sup>140</sup> Examples of such special purpose properties are schools, churches, cemeteries, parks, and utilities.

<sup>141</sup> Application of the fair market value standard to special purpose properties is consistent with other provisions dealing expressly with valuation of particular properties. See, e.g., GOVT. CODE § 51295 (valuation of property under contract under California Land Conservation Act of 1965) and PUB. RES. CODE § 5407.2 (valuation of park land).

<sup>142</sup> EVID. CODE § 813.

<sup>143</sup> See, e.g., *City of Pleasant Hill v. First Baptist Church*, 1 Cal. App.3d 384, 411–412, 82 Cal. Rptr. 1, 19 (1969).

<sup>144</sup> See EVID. CODE § 816.

<sup>145</sup> EVID. CODE § 822(d).



express provision that transactions involving the trade or exchange of any property are not a proper basis for an opinion as to the value of property.

### **Limitation on Valuation Experts**

The number of valuation experts who may testify for a party in an eminent domain proceeding is presently limited to two, subject to a showing of good cause for additional witnesses.<sup>146</sup> This special provision is unnecessary and should be repealed. Its repeal would not affect the general authority of the court to control the number of expert witnesses.<sup>147</sup>

### **Compensation of Court-Appointed Appraisers**

The court may appoint appraisers, referees, commissioners, or other such persons to fix the value of property taken.<sup>148</sup> The fees fixed by the court for such persons may not exceed “similar fees for similar services in the community where such services are rendered.”<sup>149</sup> This restriction on the amount of compensation is unwarranted and may preclude effective use of court-appointed appraisers and the like in communities with comparatively low fee scales. The court, in fixing the fees for services, should be limited only by the requirement that they be reasonable in the circumstances of the case.

### **Possession After Judgment**

The provisions for deposit, withdrawal, and possession of property following judgment but prior to the time the judgment becomes final are unnecessarily restrictive. Specific changes to improve the procedures are recommended below.

### **Deposit of Award**

Under existing law, the defendant receives notice that a deposit has been made on the award only when he is served with an order for possession.<sup>150</sup> Since interest ceases to accrue when such a deposit is made<sup>151</sup> and since the defendant may need the money for a short-notice move, he should receive notice of the deposit in all situations. Accordingly, the plaintiff at the time of making a postjudgment deposit should be required to serve a notice that the deposit has been made on all

<sup>146</sup> CODE CIV. PROC. § 1267.

<sup>147</sup> CODE CIV. PROC. § 723.

<sup>148</sup> CODE CIV. PROC. § 1266.2.

<sup>149</sup> *Id.*

<sup>150</sup> CODE CIV. PROC. § 1254.

<sup>151</sup> CODE CIV. PROC. § 1255b(c).



the parties who have appeared in the proceeding and who claim an interest in the property taken. This will parallel the prejudgment deposit requirement.

In case the judgment is reversed, vacated, or set aside, it should be made clear that there is no judgment for deposit and withdrawal purposes or for obtaining possession after judgment. Prejudgment procedures should be used, and any amounts deposited should be deemed prejudgment deposits for the purposes of these procedures.

### **Withdrawal of Award**

Existing law provides the opportunity for one of several defendants to withdraw a deposit after entry of judgment without notice to the other defendants.<sup>152</sup> This provision creates a race to withdraw among parties laying claim to the award that could result in prejudice to parties who have had no opportunity to protect their interests. In order to protect all parties, a defendant seeking to withdraw any part of the award following judgment but prior to the time the award has been apportioned should serve a notice of application for withdrawal on all other parties who have appeared and are interested in the award. After the award has been apportioned, an applicant for withdrawal should be required to give notice only as the court may require.

The court should be authorized to require, in its discretion, that the defendant provide an undertaking to secure repayment of any excessive withdrawal made after entry of judgment. This will permit the courts to protect the condemnor in cases where it appears that the final judgment may be less than the amount withdrawn. For example, the court might require an undertaking in a case where the condemnor has made a motion for a new trial or has appealed from the judgment and the court believes that there is a substantial possibility that the judgment will be vacated, reversed, or set aside and a new trial granted.

Where there is a delay between entry of judgment and the time of apportionment of the award and the defendants are unable to agree to the withdrawal of an amount deposited for them, such amount should be deposited in an interest-bearing account for their benefit upon motion of any defendant having an interest in the award. This will assure that the defendants will not lose interest earned on the deposit pending resolution of their dispute.

<sup>152</sup> CODE CIV. PROC. § 1254(f).



### Possession After Judgment

The 10-day notice period before which possession may be taken by the condemnor pursuant to an order for possession obtained after entry of judgment<sup>153</sup> is unduly short in the case of occupied property. This period should be extended to 30 days in cases where the property is occupied by a dwelling, business, or farm.

### Satisfaction of Judgment

Under existing law, unnecessary confusion has arisen from the purely theoretical distinction between a payment into court to satisfy the judgment<sup>154</sup> and a deposit made pending appeal or motion for new trial.<sup>155</sup> One uniform procedure should be provided for paying the amount of the award into court after entry of judgment, and for withdrawing the amount so paid, whether or not either party plans to appeal or move for a new trial.

Existing law requires that the condemnor satisfy the judgment no later than 30 days after it becomes final except that, where the condemnor is the state or a public corporation, it may delay payment up to a year in order to market bonds to enable it to pay the judgment.<sup>156</sup> This delay provision should be eliminated; a property owner suffers many hardships in the course of the planning and execution of a public project without the added hardship of a year's delay before he receives payment for his property.

In the event that the 30-day period elapses without satisfaction of the judgment, existing law requires the property owner to seek execution before he is entitled to have the proceeding dismissed.<sup>157</sup> The property owner should be permitted to seek dismissal of the eminent domain proceeding upon nonpayment without having to make an expensive, time-consuming, and futile attempt to execute. To protect the condemnor in such a case from dismissal for an inadvertent failure to pay, the property owner should give notice of intent to seek dismissal and should have a right to obtain the dismissal if the condemnor fails to pay within 20 days thereafter.

At present, it is not clear whether the final order of condemnation may be obtained after satisfaction of judgment alone or whether the judgment must first become final;<sup>158</sup>

<sup>153</sup> See CODE CIV. PROC. § 1254(c).

<sup>154</sup> CODE CIV. PROC. § 1252.

<sup>155</sup> CODE CIV. PROC. § 1254.

<sup>156</sup> CODE CIV. PROC. § 1251.

<sup>157</sup> CODE CIV. PROC. § 1252.

<sup>158</sup> See CODE CIV. PROC. § 1253; *cf. Arechiga v. Housing Authority*, 183 Cal. App.2d 835, 7 Cal. Rptr. 338 (1960).



for the protection of all parties concerned, the law should be made clear that a final order of condemnation may be issued only after final judgment.

### Costs

Code of Civil Procedure Section 1255 states that, in eminent domain proceedings “costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or, adverse sides, in the discretion of the court.” However, very early the California Supreme Court held that Section 1255 “must be limited by section 14 of article I of the constitution. . . . To require the defendants in [an eminent domain] case to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the plaintiff, would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs.”<sup>159</sup> Thus, despite the language of Section 1255, the cases have generally allowed the defendant in an eminent domain proceeding his ordinary court costs<sup>160</sup> except that the costs of determining title as between two or more defendants is borne by the defendants.<sup>161</sup> The statutes should be revised to conform with existing law on costs.

In case of an appeal by the plaintiff, the defendant has normally been allowed his costs on appeal whether or not he is the prevailing party.<sup>162</sup> Where the defendant appeals and prevails, he is always allowed his costs.<sup>163</sup> However, the law is not clear whether the defendant who takes an appeal but does not prevail is entitled to costs.<sup>164</sup> A general rule should be provided that the defendant is entitled to his costs on appeal in all eminent domain cases except where the Judicial Council, by court rule, provides limitations specifically applicable to eminent domain.

If the defendant obtains a new trial and subsequently fails to obtain an increased award, the cost of the new trial is taxed against him.<sup>165</sup> This rule is unduly harsh and should be

<sup>159</sup> *City & County of San Francisco v. Collins*, 98 Cal. 259, 262, 33 P. 56, 57 (1893).

<sup>160</sup> See, e.g., *Decoto School Dist. v. M. & S. Tile Co.*, 225 Cal. App.2d 310, 315, 37 Cal. Rptr. 225, 229 (1964).

<sup>161</sup> CODE CIV. PROC. § 1246.1.

<sup>162</sup> See, e.g., *Sacramento & San Joaquin Drainage Dist. v. Reed*, 217 Cal. App.2d 611, 31 Cal. Rptr. 754 (1963).

<sup>163</sup> See, e.g., *Regents of Univ. of Cal. v. Morris*, 12 Cal. App.3d 679, 90 Cal. Rptr. 816 (1970).

<sup>164</sup> Compare, e.g., *City of Baldwin Park v. Stoskus*, 8 Cal.3d 563, 571, 503 P.2d 1333, 1338, 105 Cal. Rptr. 325, 330 (1972), with *City of Oakland v. Pacific Coast Lumber & Mill Co.*, 172 Cal. 332, 156 P. 468 (1916).

<sup>165</sup> CODE CIV. PROC. § 1254(k). See, e.g., *Los Angeles, P. & G. Ry. v. Rumpp*, 104 Cal. 20, 37 P. 859 (1894).



eliminated; a defendant should not be required to pay the cost of obtaining a proper and error-free trial.

## Litigation Expenses

### Entry for Examination

Where a condemnor enters upon property to determine the suitability of the property for public use, it must compensate the owner for any damages caused by the entry and by any tests made and must pay the owner for his court costs and reasonable attorney's fees expended in obtaining such compensation.<sup>166</sup> The provision for award of attorney's fees should not be automatically applied but should be limited to those cases where the interests of justice require such an award.

### Abandonment and Dismissal

Litigation expenses, including reasonable attorney's fees, appraisal fees, and fees for the services of other experts, are awarded to the defendant where the plaintiff abandons the proceeding<sup>167</sup> or the defendant defeats a public entity plaintiff's right to take the property by eminent domain.<sup>168</sup> This rule should be expanded to allow litigation expenses against all plaintiffs in any case where the eminent domain proceeding is dismissed, including dismissal for failure to prosecute (a situation where litigation expenses are denied by the existing law).<sup>169</sup>

### Rights of Former Owner in Property Taken

The Law Revision Commission considered in depth the possibility of permitting the former owner of property taken by eminent domain to repurchase that property should it become surplus to the needs of the condemnor.<sup>170</sup> The Commission has concluded, however, that a general repurchase right would create practical problems of administration that far outweigh its potential social benefits and accordingly recommends against adoption of the repurchase right as a statutory requirement.<sup>171</sup>

<sup>166</sup> CODE CIV. PROC. § 1242.5(e).

<sup>167</sup> CODE CIV. PROC. § 1255a.

<sup>168</sup> CODE CIV. PROC. § 1246.4.

<sup>169</sup> See, e.g., *City of Industry v. Gordon*, 29 Cal. App.3d 90, 105 Cal. Rptr. 206 (1972).

<sup>170</sup> For a background study prepared for the Commission on this subject, see Sterling, *Former Owner's Right to Repurchase Land Taken for Public Use*, 4 PAC. L.J. 65 (1973).

<sup>171</sup> For a similar conclusion, see LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON EXPROPRIATION 118-121 (1971).





# PROPOSED LEGISLATION

## TITLE 7. EMINENT DOMAIN LAW

(This title is to be added to Part 3 of the Code of Civil Procedure)

### CHAPTER 1. GENERAL PROVISIONS

- § 1230.010. Short title
- § 1230.020. Law governing exercise of eminent domain power
- § 1230.030. Exercise of eminent domain power discretionary
- § 1230.040. Rules of practice in eminent domain proceedings
- § 1230.050. Court may enforce right to possession
- § 1230.060. Public Utilities Commission jurisdiction preserved
- § 1230.070. Effect of enactment of title on prior proceedings

### CHAPTER 2. PRINCIPLES OF CONSTRUCTION; DEFINITIONS

#### Article 1. Construction

- § 1235.010. Construction of title
- § 1235.020. Effect of headings
- § 1235.030. References to statutes
- § 1235.040. "Chapter," "article," "section," "subdivision," and "paragraph"
- § 1235.050. Construction of tenses
- § 1235.060. "Shall" and "may"
- § 1235.070. Constitutionality

#### Article 2. Words and Phrases Defined

- § 1235.110. Application of definitions
- § 1235.120. Final judgment
- § 1235.130. Judgment
- § 1235.140. [Reserved for expansion]
- § 1235.150. Local public entity
- § 1235.160. Person
- § 1235.170. Property
- § 1235.180. Property appropriated to public use
- § 1235.190. Public entity
- § 1235.200. State
- § 1235.210. Statute

### CHAPTER 3. THE RIGHT TO TAKE

#### Article 1. General Limitations on Exercise of Power of Eminent Domain

- § 1240.010. Public use limitation
- § 1240.020. Statutory delegation of condemnation authority required
- § 1240.030. Public necessity required
- § 1240.040. Resolution of necessity required
- § 1240.050. Extraterritorial condemnation

#### Article 2. Rights Included in Grant of Eminent Domain Authority

- § 1240.110. Right to acquire any necessary right or interest in any type of property
- § 1240.120. Right to acquire property to make effective the principal use
- § 1240.130. Acquisition by gift, purchase, lease, or other means
- § 1240.140. Joint exercise of condemnation power pursuant to Joint Powers Agreements Act



- § 1240.150. Acquisition of all or portion of remainder with owner's consent
- § 1240.160. Interpretation of grants of eminent domain authority; separate authorizations

#### Article 3. Future Use

- § 1240.210. "Date of use" defined
- § 1240.220. Acquisitions for future use
- § 1240.230. Burden of proof

#### Article 4. Substitute Condemnation

- § 1240.310. Definitions
- § 1240.320. Substitute condemnation where owner of necessary property authorized to condemn property
- § 1240.330. Substitute condemnation to permit condemnor to relocate public use
- § 1240.340. Substitute condemnation where owner of necessary property lacks power to condemn property
- § 1240.350. Substitute condemnation to provide utility service or access to public road

#### Article 5. Excess Condemnation

- § 1240.410. Condemnation of remnants
- § 1240.420. Resolution of necessity and complaint
- § 1240.430. Disposal of acquired remnants

#### Article 6. Condemnation for Compatible Use

- § 1240.510. Property appropriated to public use may be taken for compatible public use
- § 1240.520. Burden of proof
- § 1240.530. Terms and conditions of joint use

#### Article 7. Condemnation for More Necessary Public Use

- § 1240.610. Property appropriated to public use may be taken for more necessary public use
- § 1240.620. Burden of proof
- § 1240.630. Right of prior user to joint use
- § 1240.640. Use by state more necessary than other uses
- § 1240.650. Use by public entity more necessary than use by other persons
- § 1240.660. Property appropriated to the public use of cities, counties, or certain special districts
- § 1240.670. Property preserved in its natural condition by nonprofit organization
- § 1240.680. Property appropriated to park or similar uses
- § 1240.690. Declaratory relief where acquisition for state highway purposes.
- § 1240.700. Declaratory relief where regional park to be acquired for city or county street purposes

### CHAPTER 4. PRECONDEMNATION ACTIVITIES

#### Article 1. Preliminary Location, Survey, and Tests

- § 1245.010. Right to make examinations and tests
- § 1245.020. Liability for damages
- § 1245.030. Consent or court order required in certain cases
- § 1245.040. Court order permitting entry; deposit of probable compensation
- § 1245.050. Modification of court order



- § 1245.060. Management of amount deposited
- § 1245.070. Recovery of damages and expenses

#### Article 2. Resolution of Necessity

- § 1245.210. "Governing body" defined
- § 1245.220. Resolution of necessity required
- § 1245.230. Contents of resolution
- § 1245.240. Adoption of resolution
- § 1245.250. Effect of resolution
- § 1245.260. Failure to initiate eminent domain proceeding within six months  
from adoption of resolution

### CHAPTER 5. COMMENCEMENT OF PROCEEDING

#### Article 1. Jurisdiction and Venue

- § 1250.010. Jurisdiction in superior court
- § 1250.020. Place of commencement
- § 1250.030. Place of trial
- § 1250.040. Change of place of trial generally

#### Article 2. Commencement of Proceeding Generally

- § 1250.110. Complaint commences proceeding
- § 1250.120. Contents of summons
- § 1250.130. Additional requirements where service is by publication
- § 1250.140. Attorney General served where state is a defendant
- § 1250.150. Lis pendens

#### Article 3. Parties; Joinder of Property

- § 1250.210. Identification of parties
- § 1250.220. Naming defendants
- § 1250.230. Appearance by named and unnamed defendants
- § 1250.240. Joinder of property

#### Article 4. Pleadings

- § 1250.310. Contents of complaint
- § 1250.320. Contents of answer
- § 1250.330. Signing of pleadings by attorney
- § 1250.340. Amendment of pleadings
- § 1250.350. Pleading objections to right to take
- § 1250.360. Grounds for objection to right to take where resolution  
conclusive
- § 1250.370. Grounds for objection to right to take where resolution not  
conclusive

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Civil Code § 1001 (repealed)

**DISQUALIFICATION OF JUDGES**

Code of Civil Procedure § 170 (technical amendment)

**CROSS-COMPLAINTS**

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 § 426.70 (added)  
 § 428.10 (technical amendment)

**ACTION TO ENJOIN DIVERSION OF WATER**

Code of Civil Procedure § 534 (technical amendment)

**REFEREES**

Code of Civil Procedure § 640 (amended)

**GARNISHMENT OF DEBT OWED BY PUBLIC ENTITY**

Code of Civil Procedure § 710 (technical amendment)

**LITIGATION EXPENSES IN INVERSE CONDEMNATION PROCEEDINGS**

Code of Civil Procedure § 1036 (added)

**GENERAL CONDEMNATION STATUTE**

Code of Civil Procedure §§ 1237–1273.06 (repealed)



**SCHOOL DISTRICTS****Education Code**

- § 1047.5 (added)
- § 1048 (added)
- § 15007.5 (repealed)
- § 15009 (amended)
- § 16003 (repealed)

**NONPROFIT EDUCATIONAL INSTITUTIONS OF COLLEGIATE GRADE**

**Education Code § 30051 (added)**

**EVIDENCE****Evidence Code**

- § 811 (technical amendment)
- § 812 (technical amendment)
- § 813 (amended)
- § 814 (technical amendment)
- § 816 (amended)
- § 817 (technical amendment)
- § 822 (amended)

**GENERAL CONDEMNATION AUTHORIZATION**

**Government Code § 184 (repealed)**

**PROTECTIVE CONDEMNATION**

**Government Code §§ 190–196 (repealed)**

**LIABILITY OF PUBLIC ENTITIES**

**Government Code § 816 (technical amendment)**

**ACQUISITION OF PROPERTY BY COUNTY OR CITY FOR OPEN SPACE****Government Code**

- Heading for Chapter 12 (commencing with Section 6950) (amended)
- § 6950 (amended)
- § 6952 (amended)
- § 6953 (amended)
- § 6955 (added)
- § 6956 (added)

**ACQUISITION PRICE PUBLIC INFORMATION**

**Government Code § 7275 (added)**

**RESTORATION OF DESTROYED STATE RECORDS**

**Government Code § 14770 (added)**

**CONDEMNATION DEPOSITS FUND****Government Code**

- § 16429.1 (added)
- § 16429.2 (added)
- § 16429.3 (added)



**COUNTIES**

Government Code § 25350.5 (added)

**MOBILIZATION, TRAINING, AND SUPPLY STATIONS**

Government Code § 25431 (technical amendment)

**CITIES**

Government Code § 37350.5 (added)

**CITY REVOLVING FUND**

Government Code § 43424 (technical amendment)

**PROPERTY TO BE USED FOR FEDERAL PURPOSES**

Government Code § 50366 (technical amendment)

**AIRPORT HAZARDS**

Government Code

§ 50485.2 (amended)

§ 50485.13 (repealed)

**AGRICULTURAL PRESERVES**

Government Code § 51291 (technical amendment)

**RESTORATION OF DESTROYED LOCAL PUBLIC RECORDS**

Government Code § 53040 (added)

**INTEREST ON DEPOSITS**

Government Code § 53844 (technical amendment)

**JOINT SANITATION PROJECTS**

Government Code § 55003 (technical amendment)

**WHARVES, CHUTES, AND PIERS**

Harbors & Navigation Code § 4009 (amended)

**NONPROFIT HOSPITALS**

Health & Safety Code

§ 438.4 (amended)

§ 1427 (added)

**SEWER CONSTRUCTION**

Health & Safety Code § 4967 (added)

**COMMUNITY REDEVELOPMENT LAW**

Health & Safety Code § 33398 (technical amendment)



**RENEWAL AREA AGENCY****Health & Safety Code**

- § 33720 (amended)
- § 33721 (amended)
- § 33723 (amended)

**HOUSING AUTHORITY**

**Health & Safety Code § 34325 (amended)**

**LIMITED DIVIDEND HOUSING CORPORATIONS****Health & Safety Code**

- § 34875 (amended)
- § 34876 (amended)
- § 34878 (amended)

**LAND CHEST CORPORATIONS****Health & Safety Code**

- § 35167 (added)
- § 35168 (added)
- § 35169 (added)
- § 35170 (added)
- § 35171 (added)

**HOUSING AUTHORITY**

**Health & Safety Code § 36059 (technical amendment)**

**PREVENTION OF SUBSIDENCE IN OIL OR GAS PRODUCTION AREA****Public Resources Code**

- § 3320.1 (technical amendment)
- § 3341 (technical amendment)

**RECREATIONAL TRAILS**

**Public Resources Code § 5077.1 (repealed)**

**PARKS AND BOULEVARDS**

**Public Resources Code § 5301 (technical amendment)**

**LANDS EXEMPT FROM CONDEMNATION**

**Public Resources Code § 8030 (added)**

**NATIONAL PARKS**

**Public Resources Code § 8402 (technical amendment)**

**PRIVATELY OWNED PUBLIC UTILITIES****Public Utilities Code**

- § 610 (added)
- § 611 (added)
- § 612 (added)
- § 613 (added)
- § 614 (added)



- § 615 (added)
- § 616 (added)
- § 617 (added)
- § 618 (added)
- § 619 (added)
- § 620 (added)
- § 621 (added)
- § 622 (added)
- § 623 (added)
- § 624 (added)

#### **CONTROVERSIES CONCERNING RELOCATION OF UTILITY IMPROVEMENTS**

Public Utilities Code § 861 (added)

#### **EXTENSION OF SERVICE INTO AREAS SERVED BY PRIVATE UTILITY**

Public Utilities Code § 1503 (technical amendment)

#### **MUTUAL WATER COMPANIES**

Public Utilities Code § 2729 (added)

#### **RAILROADS**

Public Utilities Code

- § 7526 (technical amendment)
- § 7557 (added)

#### **AIRPORT HAZARDS**

Public Utilities Code § 21634 (repealed)

#### **AIRCRAFT HAZARD OR DISTURBANCE ELIMINATION**

Public Utilities Code

- § 21652 (added)
- § 21653 (added)

#### **COUNTY—ACQUISITIONS FOR STATE HIGHWAY PURPOSES**

Streets & Highways Code § 760 (technical amendment)

#### **CHANGE OF GRADE**

Streets & Highways Code § 858 (technical amendment)

#### **BOUNDARIES OF HIGHWAYS**

Streets & Highways Code § 869 (technical amendment)

#### **COUNTY ROADS AND HIGHWAYS**

Streets & Highways Code

- § 943 (amended)
- § 943.1 (repealed)
- § 943.2 (repealed)
- § 943.4 (repealed)



**WORK TO REDUCE COMPENSATION**

Streets & Highways Code § 970 (repealed)

**PRIVATE BYROADS**

Streets & Highways Code §§ 1050–1054 (repealed)

**IMPROVEMENT ACT OF 1911**

Streets & Highways Code

§ 5100 (technical amendment)

§ 5101 (technical amendment)

§ 5104 (technical amendment)

§ 5661 (technical amendment)

**MUNICIPAL IMPROVEMENT ACT OF 1913**

Streets & Highways Code § 10100.1 (technical amendment)

**PEDESTRIAN MALL LAW OF 1960**

Streets & Highways Code § 11400 (amended)

**PRIVATE WAYS FOR CANALS**

Water Codes §§ 7020–7026 (repealed)

**CONSTITUTIONAL AMENDMENTS****CALIFORNIA CONSTITUTION****Article I**

§ 14 (amended)

§ 14½ (repealed)



## TITLE 7. EMINENT DOMAIN LAW

### CHAPTER 1. GENERAL PROVISIONS

#### § 1230.010. Short title

1230.010. This title shall be known and may be cited as the Eminent Domain Law.

**Comment.** Section 1230.010 is similar to comparable sections in recently enacted California laws. *E.g.*, CIVIL CODE § 4000 (The Family Law Act).

#### § 1230.020. Law governing exercise of eminent domain power

1230.020. Except as otherwise specifically provided by statute, the power of eminent domain may be exercised only as provided in this title.

**Comment.** Section 1230.020 is the same in substance as the second sentence of former Section 1237. See also former Section 1258. The provisions of the Eminent Domain Law govern all acquisitions by eminent domain except to the extent that specific provision is otherwise made by statute. Instances of specific provisions otherwise are (1) where the Public Utilities Commission may determine just compensation (see PUB. UTIL. CODE §§ 1206–1218 and 1401–1421) and (2) where the state has expressly provided that federal law controls (see, *e.g.*, *County of Marin v. Superior Court*, 53 Cal.2d 633, 349 P.2d 526, 2 Cal. Rptr. 758 (1960)).

The provisions of the Eminent Domain Law are intended to supply rules for eminent domain proceedings. Whether any of its provisions may also be applicable in inverse condemnation actions is a matter not determined by statute but is left to judicial development. *Cf.* Section 1263.010 and Comment thereto (right to compensation).

#### § 1230.030. Exercise of eminent domain power discretionary

1230.030. Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.



## CHAPTER 4. PRECONDEMNATION ACTIVITIES

### Article 1. Preliminary Location, Survey, and Tests

#### § 1245.010. Right to make examinations and tests

1245.010. Subject to requirements of this article, any person authorized to acquire property for a particular use by eminent domain may enter upon property to make studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.

**Comment.** Section 1245.010 continues without substantive change the provisions of subdivision (b) of former Section 1242.

#### § 1245.020. Liability for damages

1245.020. (a) The liability, if any, of a public entity for damages to property that arise from the entry and activities mentioned in Section 1245.010 is determined by Section 816 of the Government Code.

(b) Any person, other than a public entity, authorized to acquire property for a particular use by eminent domain is liable for damages to property that arise from the entry and activities mentioned in Section 1245.010 to the same extent that a public entity is liable for such damages under Section 816 of the Government Code.

**Comment.** Section 1245.020 continues without substantive change the provisions of subdivisions (c) and (d) of former Section 1242.

#### § 1245.030. Consent or court order required in certain cases

1245.030. In any case in which the entry and activities mentioned in Section 1245.010 will subject the person having the power of eminent domain to liability under Section 1245.020, 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 1245.040.

**Comment.** Except as noted in the Comment to Section 1245.070, Sections 1245.030–1245.070 continue without substantive change the provisions of former Section 1242.5.

**§ 1245.040. Court order permitting entry; deposit of probable compensation**

1245.040. (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 with the court the probable amount of compensation.

**Comment.** See the Comment to Section 1245.030.

**§ 1245.050. Modification of court order**

1245.050. At any time after an order has been made pursuant to Section 1245.040, 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 1245.030.

**§ 1245.060. Management of amount deposited**

1245.060. The court shall retain the amount deposited under this article 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 10 (commencing with Section 16429.1) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code.

**Comment.** See the Comment to Section 1245.030.

**§ 1245.070. Recovery of damages and expenses**

1245.070. (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 article. 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 article, 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 1245.070 continues without substantive change the provisions of subdivision (e) of former Section 1242.5 except that Section 1245.070 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.



## Article 2. Resolution of Necessity

### § 1245.210. “Governing body” defined

1245.210. As used in this article, “governing body” means:

(a) In the case of a taking by a local public entity, the governing body of the local public entity.

(b) In the case of a taking by the Sacramento and San Joaquin Drainage District, the State Reclamation Board.

(c) In the case of a taking by the State Public Works Board pursuant to the Property Acquisition Law, Part 11 (commencing with Section 15850) of Division 3 of Title 2 of the Government Code, the State Public Works Board.

(d) In the case of a taking by the Department of Transportation (other than a taking pursuant to Section 30100 of the Streets and Highways Code), the California Highway Commission.

(e) In the case of a taking by the Department of Transportation pursuant to Section 30100 of the Streets and Highways Code, the California Toll Bridge Authority.

(f) In the case of a taking by the Department of Water Resources, the California Water Commission.

(g) In the case of a taking for the University of California, the Regents of the University of California.

**Comment.** Section 1245.210 defines the term “governing body” as used in this article.

*Subdivision (a).* A local public entity is any public entity other than the state. Section 1235.150. The governing bodies of such entities are specified by statute. *E.g.*, GOVT. CODE §§ 23005 (board of supervisors governs county) and 34000 (legislative body of municipal corporation is board of trustees, city council, or other governing body).

*Subdivision (b).* The San Joaquin Drainage District, while by definition a local public entity (Section 1235.150), is comparable in some ways to an agency of the state. Its work is in the interest of the entire state. See *Sacramento & San Joaquin Drainage Dist. v. Riley*, 199 Cal. 668, 251 P. 207 (1926). It is partially funded by the state. See WATER CODE § 8527. Its management and control are vested in a state agency—the Reclamation Board—which is its governing body. See WATER CODE § 8502.



*Subdivision (c).* Takings for all general state purposes (other than state highways, toll bridges, state water projects, and the University of California) are made by the State Public Works Board under the Property Acquisition Law (GOVT. CODE § 15850 *et seq.*). Under former law, there may have been cases where the Department of General Services or other state agencies could condemn on behalf of the state under authority formerly found in Government Code Section 14661 or other provisions (basically where an appropriation was made not subject to the Property Acquisition Law), but this authority is not continued. See GOVT. CODE § 15855 and Comment thereto. It should be noted that the Public Works Board may condemn property only with the approval of the agency concerned. GOVT. CODE § 15853.

*Subdivision (d).* Takings for state highway purposes are accomplished on behalf of and in the name of the state by the Department of Transportation. STS. & HWYS. CODE § 102. The governing body for the Department of Transportation in such takings is the California Highway Commission. This continues a provision formerly found in Streets and Highways Code Section 102.

*Subdivision (e).* Takings for toll bridges and other transportation facilities designated by Streets and Highways Code Section 30100 are accomplished on behalf and in the name of the state by the Department of Transportation. STS. & HWYS. CODE § 30400. The governing body for the Department of Transportation in such takings is the California Toll Bridge Authority. STS. & HWYS. CODE § 30400. See also former STS. & HWYS. CODE § 30404.

*Subdivision (f).* Takings for state water and dam purposes and for the Central Valley Project are accomplished on behalf and in the name of the state by the Department of Water Resources. WATER CODE §§ 250 and 11575. The governing body of the Department of Water Resources is the California Water Commission. This supersedes provisions formerly found in Sections 250 and 11581 of the Water Code that required a declaration of necessity by the Director of Water Resources with the concurrence of the Water Commission.

*Subdivision (g).* The Regents of the University of California, while comparable to an agency of the state, is a separate corporation administering the public trust known as the University of California. The Regents is authorized to condemn property for the university in its own name and is, therefore, the governing body of the university for purposes of



Section 1245.220. See CAL. CONST., Art. IX, § 9 and EDUC. CODE § 23151. *Cf.* EDUC. CODE §§ 23201 and 23204.

### § 1245.220. Resolution of necessity required

1245.220. A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article.

**Comment.** Before a public entity begins condemnation proceedings, its governing body must adopt a resolution of necessity that meets the requirements of Sections 1245.230 and 1245.240. See Section 1240.040 and Comment thereto.

It should be noted that failure to commence an eminent domain proceeding within six months after adoption of a resolution of necessity constitutes a cause of action for inverse condemnation. Section 1245.260.

### § 1245.230. Contents of resolution

1245.230. The resolution of necessity shall contain all of the following:

(a) A general description of the proposed project with a reference to the specific statute or statutes authorizing the public entity to acquire property for such project.

(b) A description of the property to be acquired for the proposed project and its use in the proposed project.

(c) A declaration that the governing body of the 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 that 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 proposed project.

**Comment.** Section 1245.230 prescribes the contents of the resolution of necessity by a public entity. The resolution is an administrative determination that the statutory prerequisites for taking particular property have been met. Section 1245.230 supersedes various provisions that required a resolution of necessity by different public entities.

*Subdivision (a).* The resolution of necessity must contain a general description of the proposed project. A statement, for example, that the project is an “elementary school and grounds” or “right of way for a freeway” would satisfy this requirement.

The resolution also must make reference to the specific statute or statutes authorizing the exercise of the power of eminent domain for the project. Only persons authorized by statute to condemn for a particular public use can condemn for that use. Section 1240.020. Such authorizing statutes may be of several types. The state, the University of California, cities, counties, and school districts, for example, may condemn any property necessary to carry out any of their powers or functions. See, e.g., EDUC. CODE §§ 1047 (school districts), 23151 (Regents of the University of California); GOVT. CODE §§ 15853 (Public Works Board), 25350.5 (counties), 37350.5 (cities). Many special districts have similar broad authority, but some may condemn only for limited or special purposes. Additionally, if the condemnor is acquiring property under authority of certain general public uses, it must specify that authority. *E.g.*, Sections 1240.220 (taking for future use), 1240.320–1240.350 (condemnation for exchange purposes), 1240.420 (excess condemnation), 1240.510 (taking for compatible use), and 1240.610 (taking for more necessary public use).

*Subdivision (b).* The resolution of necessity must contain a description of the property, right, or interest to be taken. See Section 1235.170 (“property” defined). The description must be sufficiently precise to enable the owner to determine the physical extent of the taking and the interest sought. The resolution must also indicate in what way the property will be used for the proposed project.

*Subdivision (c).* The resolution of necessity must contain a declaration that the governing body of the public entity has found and determined the existence of each of the three elements of public necessity required by Section 1240.030 to be established for a taking. See Section 1240.030 and Comment thereto. This provision is modeled after similar provisions formerly applicable to various condemnors. See, e.g., former CODE CIV. PROC. § 1241 (2), former STS. & HWYS. CODE § 25052, former WATER CODE § 8595.

**STATE OF CALIFORNIA**  
Supreme Court of California

**PROOF OF SERVICE**

**STATE OF CALIFORNIA**  
Supreme Court of California

Case Name: **TOWN OF APPLE VALLEY v. APPLE VALLEY RANCHOS  
WATER**

Case Number: **S289391**

Lower Court Case Number: **E078348**

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MOTION	Motion for Judicial Ntc ISO Amicus Curiae Golden State (Vol. 3 of 5)
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1/21/2026

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Date

/s/Joanna McCallum

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Signature

McCallum, Joanna (187093)

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Last Name, First Name (PNum)

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