

EMINENT DOMAIN LAW

**with
Conforming Changes in Codified Sections
and
Official Comments**

December 1975

**California Law Revision Commission
Stanford Law School
Stanford, California 94305**

**Published in Cooperation With
California Continuing Education of the Bar**

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NOTE

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. This pamphlet will appear in Volume 13 of the Commission's *Reports, Recommendations, and Studies*.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

The Eminent Domain Law
with
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PREFACE

This pamphlet contains the Eminent Domain Law and related revisions of codified sections. The official Law Revision Commission or Legislative Committee Comment is set out following each statute section. The Eminent Domain Law was enacted by Chapter 1275 of the Statutes of 1975. The amendments, repeals, and additions of codified statutes were made by a series of bills. The source of the session law chapter that amended, repealed, or added a particular codified section is indicated in the Table which begins on page 1479.

The 1975 eminent domain legislation was the result of the following recommendations of the California Law Revision Commission:

(1) *Recommendation Proposing the Eminent Domain Law*, 12 CAL. L. REVISION COMM'N REPORTS 1601 (1974);

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

For earlier tentative recommendations, see *Tentative Recommendations Relating to Condemnation Law and Procedure: The Eminent Domain Law and Condemnation Authority of State Agencies*, 12 CAL. L. REVISION COMM'N REPORTS 1 & 1051 (1974).

Eleven bills were introduced at the 1975 Regular Session to effectuate the Commission's eminent domain recommendations. All were enacted. Cal. Stats. 1975, Chs. 1275 (Eminent Domain Law), 1239 (conforming changes—state agency condemnation), 1240 (conforming changes—codified sections), and 581, 582, 584, 585, 586, 587, 1176, and 1276 (conforming changes—special district statutes). See also Cal. Stats. 1976, Ch. 22 (operative date—urgency measure).

The official Comment that follows each section is taken from the pertinent Law Revision Commission recommendation or from the special report adopted by the Assembly Committee on Judiciary or the Senate Committee on Judiciary providing a new or revised Comment for the particular section. See *Report of Assembly Committee on Judiciary*, ASSEMBLY J. (May 19, 1975) at 5183-5212; *Report of Senate Committee on Judiciary*, SENATE J. (Aug. 14, 1975) at 6537-6563.

Also included in this pamphlet are two recommendations relating to eminent domain which the Law Revision Commission submitted to the 1976 session of the California Legislature. *Recommendation Relating to Relocation Assistance by Private*

Condemnors (October 1975), beginning on page 1465 of this pamphlet, and *Recommendation Relating to Condemnation for Byroads and Utility Easements* (October 1975), beginning on page 1471 of this pamphlet. At the time this publication was sent to the printer, the legislation introduced to effectuate these recommendations was pending in the Legislature.

This pamphlet does not contain a table showing the source in prior law for the sections in the new eminent domain title, nor does this pamphlet contain a table showing the disposition of the sections of the prior eminent domain title. However, the Comment to each section of the new eminent domain title indicates the provisions of prior law from which the section was derived. The Appendix, beginning on page 1361 of this pamphlet, contains a Comment to each section of the prior eminent domain title showing the disposition of that section.

The California Continuing Education of the Bar (CEB) paid the cost of publishing this Commission pamphlet. The Commission is pleased to assist CEB in its effort to inform lawyers, appraisers, judges, and others concerning the new eminent domain law. The pamphlet also will aid the Commission in its continuing study of eminent domain law.

Any defect believed to exist in the legislation contained in this pamphlet should be brought to the attention of the Law Revision Commission so that the Commission can study the matter and present any necessary corrections for legislative consideration. The Commission also solicits suggestions for revision of other statutes relating to eminent domain, such as the Evidence Code provisions relating to evidence in eminent domain and inverse condemnation actions. The address is: California Law Revision Commission, Stanford Law School, Stanford, California 94305.

JOHN H. DEMOULLY
Executive Secretary

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CALIFORNIA LAW REVISION COMMISSION RECOMMENDATION

proposing

THE EMINENT DOMAIN LAW

(Revised to Reflect Changes Made by Legislature)

Editorial Note. The material that follows is taken from the Law Revision Commission's *Recommendation Proposing the Eminent Domain Law*, 12 CAL. L. REVISION COMM'N REPORTS 1625-1671 (1974). The material has been revised to reflect the changes made by the Legislature after the Commission recommended legislation was introduced. Although these revisions were made by the Commission's legal staff, the revised material does not necessarily represent the views of the Commission. For official sources of legislative intent, see the discussion in the Preface to this pamphlet.

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INTRODUCTION

Pursuant to a 1965 legislative directive,¹ the California Law Revision Commission presents in this report its recommendation for a comprehensive Eminent Domain Law,² along with necessary conforming changes.³ The proposed comprehensive statute is the culmination of the Commission's exhaustive study

¹ 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.

² The Eminent Domain Law is intended to supply rules for eminent domain proceedings. The law of inverse condemnation is left for determination by judicial development. Although the Commission has been authorized to study the subject of inverse condemnation, it has not yet completed its study, nor has it formulated recommendations with respect to the subject. For a progress report, see the Commission's Annual Report (December 1974), 12 CAL. L. REVISION COMM'N REPORTS 501 (1974).

³ This report proposes conforming changes in general statutes relating to eminent domain and in the statutes relating to condemnation for state purposes. 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). See also 12 CAL. L. REVISION COMM'N REPORTS at 2004-2008 (1974).

of condemnation law and procedure that has previously resulted in the enactment of legislation on several major aspects of eminent domain law.⁴

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 uncodified, 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 jurisdictions⁵ and has reviewed the eminent domain law of every jurisdiction in the United States.⁶ The Commission has examined the draft of the Model Eminent Domain Code⁷ and the Uniform Eminent Domain Code.⁸ The Commission has drawn upon all

⁴ 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 12 CAL. L. REVISION COMM'N REPORTS at 517 n. 3 (1974).

⁵ 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).

⁶ 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).

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

⁸ The Reporter-Draftsman for the Uniform Eminent Domain Code is Professor Arvo Van Alstyne, University of Utah College of Law. The Commission has provided Professor Van Alstyne with preliminary drafts of this recommendation and has reviewed the Uniform Eminent Domain Code with the assistance of Professor Van Alstyne as a consultant.

these 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.⁹ Its major purpose is to cover, in a comprehensive manner, all aspects of condemnation law and procedure.¹⁰ 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.¹¹ Its enactment will permit the repeal of approximately 125 sections and the amendment of approximately 150 sections to delete more than 28,000 words of unnecessary language.¹²

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.

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

⁹ 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.

¹⁰ 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.*, GOVT. 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. See further discussion under "Relocation Assistance," *infra*.

¹¹ 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.

¹² See "Table of Sections Affected," 12 CAL. L. REVISION COMM'N REPORTS at 2113 (1974).

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 operative date of the Eminent Domain Law is deferred until July 1, 1976, to allow interested persons sufficient time to become familiar with its contents. The Eminent Domain Law does not govern any proceeding commenced prior to January 1, 1976. On the operative date, however, the law is made applicable to other pending proceedings to the fullest extent practicable so that the transition will be swift and the benefits of the law will be immediately available to all persons.

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.¹³ 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.¹⁴ 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.¹⁵

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

¹³ *People v. Superior Court*, 10 Cal.2d 288, 295–296, 73 P.2d 1221, 1225 (1937).

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

¹⁵ See discussion *infra* under "Quasi-public entities and private persons."

instead enacted numerous other codified and uncodified sections that authorize condemnation for particular public uses. 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.¹⁶

Persons Authorized to Exercise Power

State agencies. Eleven state agencies are authorized by statute to exercise the power of eminent domain.¹⁷

¹⁶ *Id.*

¹⁷ The agencies authorized to condemn are the Adjutant General (MIL. & VET. CODE § 437), Trustees of the California State University and Colleges (EDUC. CODE § 24503), Department of Fish and Game (FISH & GAME CODE §§ 1348–1349), Department of General Services (GOVT. CODE §§ 14661–14662), State Lands Commission (PUB. RES. CODE § 6808), Department of Parks and Recreation (GOVT. CODE § 54093; PUB. RES. CODE §§ 5006, 5006.2; STS. & HWYS. CODE § 887.2), Department of Transportation (PUB. UTIL. CODE §§ 21633–21635; STS. & HWYS. CODE §§ 102, 103.5, 104–104.4, 104.6, 30400–30413; WATER CODE § 8304), Public Works

Nevertheless, the acquisition of necessary property for many of these agencies is in fact accomplished by the Public Works Board through the Property Acquisition Law.¹⁸

During recent years, there has been extensive study of the state property acquisition program and, specifically, of the extent to which property acquisition should be accomplished exclusively through the Property Acquisition Law rather than by individual state agencies.¹⁹ The question whether an individual state agency should itself acquire the property it needs for its activities or should acquire such property only through the Property Acquisition Law is one that the Commission has not undertaken to resolve. The Commission has, however, in the course of its study of eminent domain law reviewed all the statutes relating to condemnation of property for state purposes.

The Commission has determined that the statutes granting condemnation authority to state agencies should be revised to eliminate the grants of condemnation authority to state agencies that do not now exercise such authority. This will restrict such grants to those agencies now actually engaged in the property acquisition function and will leave the policy decision as to which agencies should continue to engage in this function for later legislative decision. Specifically, the Commission makes the following recommendations:

(1) The Department of Transportation, Department of Water Resources, Regents of the University of California, and Reclamation Board (on behalf of the Sacramento and San Joaquin Drainage District) should continue to be authorized by statute to condemn for their purposes. The Department of Fish and Game should continue to be authorized to condemn for the Wildlife Conservation Board in those situations in which condemnation is presently authorized. At the request of the Commission, the Legislature amended the recommended legislation to continue the existing condemnation authority of the State Lands Commission. The Legislature added Hastings College of the Law as an agency authorized to condemn for its own purposes.

(2) Condemnation of property for all other state purposes should be a responsibility of the Public Works Board under the Property Acquisition Law. This recommendation will eliminate

Board (GOVT. CODE § 15854), Reclamation Board (WATER CODE §§ 8590, 8593-8595), Regents of the University of California (EDUC. CODE § 23151), and Department of Water Resources (WATER CODE §§ 250-256, 258-259, 345-346, 11575-11592).

¹⁸ GOVT. CODE §§ 15850-15866.

¹⁹ *E.g.*, CALIFORNIA LEGISLATIVE ANALYST, A SURVEY OF LAND ACQUISITION AND DISPOSAL BY STATE AGENCIES (1969).

the delegation of eminent domain authority to those agencies that do not now exercise such authority: the Adjutant General, Trustees of the California State University and Colleges, Department of General Services, and Department of Parks and Recreation.

(3) The statutes relating to the exercise of the power of eminent domain by state agencies should be revised to conform to the proposed general legislation relating to eminent domain. The general eminent domain provisions have been carefully drafted to cover in a comprehensive manner all aspects of condemnation law and procedure. The object of providing one comprehensive eminent domain law will be defeated, however, unless inconsistent and duplicating provisions are deleted from the statutes governing condemnation of property for state purposes.²⁰ If these conforming revisions are not made, there will be continuing confusion over the extent to which the inconsistent provisions remain in effect or are impliedly repealed.

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.²¹ 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

²⁰ The provisions of the general legislation that supersede repealed sections or deleted portions of sections are indicated in the Comments that follow the sections of the legislation as enacted.

²¹ For a listing, see CONDEMNATION PRACTICE IN CALIFORNIA, Appendix A: Tables ID and IE (Cal. Cont. Ed. Bar 1973).

conscious legislative decision. Accordingly, absent any experience that demonstrates a need to grant the power of eminent domain to any of these special districts, the Commission proposes no change in their enabling statutes.

Public cemetery districts and resort improvement districts²² 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.

There are a large number of codified and uncodified statutes relating to special districts that contain provisions that are inconsistent with or duplicate the general provisions of the Eminent Domain Law. The general eminent domain provisions have been carefully drafted to cover in a comprehensive manner all aspects of condemnation law and procedure. The objective of providing one comprehensive eminent domain law will be defeated, however, unless inconsistent and duplicating provisions are deleted from the statutes governing special districts.²³ If these conforming adjustments are not made, there

²² 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.

²³ Examples of the types of conforming revisions recommended include the following:

(1) Language that the right of eminent domain is to be exercised by the district in the manner provided by law for the condemnation of private property for public use, with the same rights, powers, and privileges as a city, county, or municipal corporation, may be deleted with the enactment of the comprehensive eminent domain legislation providing generally that the power of eminent domain may be exercised only in accordance with its provisions.

(2) Statements that a particular use by a district is a public use may be repealed with the enactment of the comprehensive eminent domain legislation providing that statutory authorization to condemn for a particular purpose constitutes a legislative declaration that that purpose is a public use.

(3) Detailed listings of particular types of property that may be acquired by a district for public use may be eliminated with the enactment of the comprehensive eminent domain legislation providing that a person authorized to condemn for a particular use may exercise the power of eminent domain to condemn property of any character necessary for that use.

(4) The requirement that the district proceed in the name of the district may be repealed with the enactment of the comprehensive eminent domain legislation providing for prosecution of the proceeding by the person seeking to acquire the property.

(5) The comprehensive eminent domain legislation provides for all of the following matters, thereby enabling repeal of provisions covering the same matters for each district:

(a) Requirement of adoption of a resolution of necessity and specification of the effect to be given the resolution.

(b) Acquisition of property for the purposes of remnant elimination (excess condemnation).

(c) Acquisition of property already devoted to public use for more necessary and compatible public uses.

(d) Acquisition of property for exchange purposes.

(e) Entry upon property to locate public improvements.

will be continuing confusion over the extent to which the inconsistent provisions remain in effect or are impliedly repealed. Therefore, the Commission recommends that the special district statutes be adjusted to conform to the proposed general legislation relating to eminent domain.²⁴

Cities and counties. A great number of statutes authorize cities and counties to condemn property for essentially all of their activities.²⁵ 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 purposes²⁶ 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.

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

²⁴ 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). For changes from the tentative recommendation in the Commission's final recommendation with respect to the special district statutes, see 12 CAL. L. REVISION COMM'N REPORTS at 2004 (1974).

²⁵ 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. During the legislative process, the Commission recommended that the provisions relating to condemnation for open space purposes be deleted, with the result that the legislation as enacted contains no special provisions relating to condemnation for open space.

²⁶ 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).

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*,²⁷ 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.²⁸

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 abolished²⁹ except in the following cases:

(1) The condemnation authority of nonprofit educational institutions of collegiate grade should be continued without change.³⁰

(2) The existing condemnation authority of nonprofit

²⁷ 45 Cal.2d 20, 286 P.2d 15 (1955).

²⁸ *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).

²⁹ 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).

³⁰ 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.

hospitals³¹ 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. The Legislature modified this recommendation to require that the property to be acquired be “adjacent” to other property used or to be used for hospital purposes.

(3) The condemnation authority of certain nonprofit housing corporations which provide housing for low income families should be continued and clarified.³²

(4) The condemnation authority of mutual water companies should be continued without change.³³

(5) During the legislative process, at the request of the Commission, provisions were added to make clear that any cemetery authority which is described in Section 23701c of the Revenue and Taxation Code or which is a corporation sole may condemn property necessary to enlarge its existing cemetery.

Resolution of public entity consenting to eminent domain proceeding by quasi-public entity. The Legislature added a new requirement that must be satisfied before an eminent domain proceeding may be commenced by a quasi-public entity (a nonprofit educational institution of collegiate grade, nonprofit hospital, cemetery authority, nonprofit housing corporation, or mutual water company). Such a quasi-public entity may not commence an eminent domain proceeding until a resolution consenting to the acquisition has been adopted by the legislative body of (1) each city within which any of the property to be taken is located and (2) the county if any of the property is not located within city boundaries. The city or county may refuse to consent to the acquisition with or without a hearing, but it may adopt the resolution only after a hearing at which persons whose property is to be acquired by eminent domain have had a reasonable opportunity to appear and be heard. Notice of the hearing is given by first-class mail to each person whose property is to be taken and whose name and address appear on the last equalized county assessment roll. The resolution must be

³¹ 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.

³² 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.

³³ 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.

adopted by a vote of two-thirds of all the members of the legislative body. The city or county may require the person seeking the resolution to pay in advance all costs in connection with the proceedings to obtain the resolution. The resolution requirement is in addition to any other requirements imposed by law and does not relieve the quasi-public condemnor from the requirement that public necessity for the taking be established in the eminent domain proceeding itself.

Joint Exercise of Power

Two or more public entities should be authorized to enter into an agreement under the Joint Powers Agreement Act³⁴ 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 agreement³⁵ 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”;³⁶ some grants broadly allow condemnation of “real or personal property”³⁷ or permit condemnation of “property” without limitation;³⁸ other grants contain an extensive listing of the various types of property and rights and interests in property that may be taken.³⁹

³⁴ GOVT. CODE §§ 6500–6583.

³⁵ EDUC. CODE § 15007.5.

³⁶ 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).

³⁷ *E.g.*, PUB. RES. CODE § 5006 (Department of Parks and Recreation), PUB. UTIL. CODE § 30503 (Southern California Rapid Transit District).

³⁸ *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.”

³⁹ *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]”).

A general provision should be enacted that, except to the extent otherwise limited by statute,⁴⁰ 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 the principal purpose involved should be codified,⁴¹ and duplicating and inconsistent provisions should be repealed.⁴² 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.⁴³

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.⁴⁴ 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.

⁴⁰ 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 Transportation 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.

⁴¹ 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).

⁴² Numerous statutes provide a variety of tests to determine to what extent additional property may be acquired. See, e.g., 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.

⁴³ See Taylor, *The Right to Take—The Right to Take a Fee or Any Lesser Interest*, 1 PAC. L.J. 555 (1970). Under some circumstances, the resolution of necessity is not conclusive. See discussion *infra* under "Resolution of Necessity."

⁴⁴ See CODE CIV. PROC. §§ 1240(3), (4), (6), 1241(3) (acquisition of property devoted to public use for "consistent" and more necessary public uses).

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.⁴⁵

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.⁴⁶ It should be noted, however, that there is a statutory hierarchy of more necessary users—state,⁴⁷ local public entities,⁴⁸ 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.⁴⁹ No change in this scheme was recommended by the Commission. The Commission did, however, recommend that 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) be repealed and all public entities be subject to the compatible and more necessary use scheme described above. The Legislature modified this recommendation to provide that use by the state is presumed to be more necessary than use by a local public entity, and an existing use by a local public entity is presumed to be more necessary than use by another local public entity. Use by a public entity is a more necessary use than a use by a person other than a public entity.

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.⁵⁰ This rule should be codified. Unaffected by this codification would be statutes that expressly authorize

⁴⁵ 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.

⁴⁶ See discussion *infra* under “Public Necessity.”

⁴⁷ GOVT. CODE § 15856.

⁴⁸ CODE CIV. PROC. §§ 1240(3) and 1241(3).

⁴⁹ CODE CIV. PROC. §§ 1241.7 and 1241.9.

⁵⁰ 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).

extraterritorial condemnation⁵¹ 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.⁵² The Legislature added an express grant to local public entities of extraterritorial condemnation authority for water, gas, or electric supply purposes or for airports, drainage, or sewer purposes.

Public Use and Necessity

Constitutional Requirement of Public Use

Article I, Section 19, of the California Constitution prohibits the exercise of eminent domain except for a “public use.”⁵³ Whether a particular purpose is a public use is an issue that is always justiciable in an eminent domain proceeding.⁵⁴ 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.⁵⁵ 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.” During the legislative process, the legislation was amended at the Commission’s request to provide that use within 10 years after

⁵¹ *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).

⁵² *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).

⁵³ *City & County of San Francisco v. Ross*, 44 Cal.2d 52, 279 P. 529 (1955).

⁵⁴ *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959).

⁵⁵ 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).

commencement of the proceeding is deemed “reasonable” where the property is taken pursuant to the Federal Aid Highway Act of 1973.

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.⁵⁶ 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.⁵⁷

The Commission has concluded that all public entities should be granted the authority to condemn excess property for the purpose of remnant elimination,⁵⁸ whether the remnant be physical or financial. Under existing law, a public entity may acquire a remainder if the acquisition would be justified to avoid “excessive” severance or consequential damages to the remainder.⁵⁹ The Commission recommends that a more meaningful test be used to determine whether the remainder may be taken—that it be left in such size, shape, or condition as to be of little market value. Under this test, for example, if the taking of part of a larger parcel of property would leave a remainder, regardless of size, in such a condition that it is landlocked and no physical solution will be practical, the taking of the remainder would be authorized.⁶⁰

⁵⁶ *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.

⁵⁷ See *People v. Superior Court*, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

⁵⁸ Nongovernmental condemnors have no statutory authority to acquire excess property. No change in this regard is recommended.

⁵⁹ *People v. Superior Court*, 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

⁶⁰ This was the situation in *People v. Superior Court*, *supra*. Other situations where the taking of the remainder would be permitted include cases where the remainder (1) will be reduced below the minimum zoning limits for building purposes and it is not reasonably probable that there will be a zoning change, (2) will be of significant value to only one or few persons (such as adjoining landowners), or (3) will be landlocked and have primarily a speculative value dependent upon access being provided when adjacent land is developed and the time when the adjacent land will be developed is a matter of speculation.

On the other hand, a usable and generally salable remainder could not be taken even though its highest and best use has been downgraded by its severance or a serious controversy exists as to its best use and value after severance. Likewise, the remainder could not be taken (1) to avoid the cost and inconvenience of litigating the issue of damages, (2) to preclude the payment of damages, including damages substantial in amount in appropriate cases, (3) to coerce the condemnee to accept

Remainders that are of little market value 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 of little market value; 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.⁶¹ 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 solution to what otherwise would be a case of severely damaged property.

whatever price the condemnor offers for the property actually needed for the public project, or (4) to afford the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public project.

⁶¹ 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).

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 Commission recommended that 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; but the Legislature deleted the provision designed to effectuate this recommendation before the legislation was enacted.

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.

Statutory Requirement of Public Necessity

The necessity for a taking must be established before property may be acquired by eminent domain.⁶² 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.⁶³ Among those public entities required to adopt a resolution of necessity, the vote requirement for most is a simple majority.⁶⁴ 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 public entity makes a considered decision of both the need for

⁶² See, e.g., CODE CIV. PROC. §§ 1240(6), 1241(2), and 1242.

⁶³ Compare, e.g., CODE CIV. PROC. § 1241(2) (resolution may be adopted) with WATER CODE § 8594 and GOVT. CODE § 15855 (resolution required).

⁶⁴ See, e.g., GOVT. CODE § 15855 and STS. & HWYS. CODE § 102.

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 Legislature added a requirement that a resolution of necessity may be adopted only after the governing body has given each property owner whose property is to be acquired by eminent domain notice and a reasonable opportunity to appear and be heard on the issue of necessity. The notice is given by first-class mail to those property owners whose names and addresses appear on the last equalized county assessment roll. Failure to file a written request to appear and be heard within 15 days after the notice is mailed results in a waiver of the right to appear and be heard. Public agencies are authorized to satisfy the hearing requirement through any other procedure that provides the property owner with equivalent protection.

The Commission recommended that adoption of the resolution of necessity should be by a majority vote of all the members of the governing body of the public entity⁶⁵ since a majority vote is normally required for the decision to undertake the proposed project itself.⁶⁶ The Legislature modified this recommendation to require that the resolution be adopted by a vote of two-thirds of all the members of the governing body.

The resolution should describe the public use and refer to the statutory authority for the taking; it should describe the property needed for 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.⁶⁷ The Commission has weighed the need for court

⁶⁵ 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). Nor would it apply to the San Francisco Bay Area Transportation Terminal Authority. See GOVT. CODE § 67542 (unanimous vote of board required).

⁶⁶ 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).

⁶⁷ 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).

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.⁶⁸

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 acquisitions outside the territorial limits of the public entity.⁶⁹ In addition, it should be made clear that the resolution of necessity has no effect on the justiciability of such "public use" issues as taking of remnants and some takings for future use.⁷⁰

The Legislature made two significant changes in this aspect of the legislation before it was enacted. Provisions were added to make the resolution of necessity not conclusive to the extent that its adoption or contents were influenced or affected by a gross abuse of discretion by the governing body. In addition, a provision was added making the resolution of necessity ineffective to authorize the condemnation proceeding where, but for bribery of a member of the governing body, the resolution would not otherwise have been adopted.

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

⁶⁸ For an exception to this rule, see PUB. RES. CODE § 25528 (finding of necessity by State Energy Resources Conservation and Development Commission conclusive on public necessity of condemnation by utility). This exception should be continued, and a similar exception should be made for nonprofit hospitals on certification of necessity by the Director of Health. The Legislature modified the recommended legislation so that no such exception is made for nonprofit hospitals.

⁶⁹ 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).

⁷⁰ These public use issues have previously been discussed. See discussion *supra* under "Public Use and Necessity."

severance from the part taken and by construction and use of the project for which it is taken. 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.⁷¹

Most states use the same general compensation scheme as California.⁷² 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 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.⁷³

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

⁷¹ The basic compensation scheme appears in Code of Civil Procedure Section 1248(1)–(3).

⁷² See, e.g., 4A P. NICHOLS, EMINENT DOMAIN § 14.23 *et seq.* (rev. 3d ed. 1971) (including a discussion of the numerous variations).

⁷³ 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.

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;⁷⁴ 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 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.⁷⁵

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.⁷⁶ 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

⁷⁴ See CODE CIV. PROC. §§ 411.10 and 1243; *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15 (1924).

⁷⁵ See *People v. Murata*, 55 Cal.2d 1, 357 P.2d 833, 9 Cal. Rptr. 601 (1960).

⁷⁶ See 3 P. NICHOLS, EMINENT DOMAIN § 8.5(2) at 38-39 (rev. 3d ed. 1965).

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 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 since the date used in the original trial is of no practical or economic significance. The court should have discretion, however, to specify another date where to do so would be appropriate, *e.g.*, where a new trial was necessitated by misconduct of a party. To clarify existing law, a similar rule should be provided for a “retrial” following a mistrial.

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.⁷⁷ Case law establishes,

⁷⁷ 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.

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.⁷⁸

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.⁷⁹ 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.⁸⁰ 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

⁷⁸ See *Merced Irr. Dist. v. Woolstenhulme*, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971).

⁷⁹ *Cf. Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

⁸⁰ The recommended rule is consistent with Government Code Section 7267.2.

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.⁸¹ This rule, which in effect makes the lessee a trustee for the lessor's compensation, has been widely criticized.⁸² 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.

Liens

Case law provides that, where there is a lien on property taken by eminent domain, in the case of a partial taking, the lienholder is entitled to share in the award only to the extent of the impairment of his security.⁸³ This rule should be codified, with permission for the parties to make a subsequent agreement allowing the lienholder a greater share of the compensation.

Options

Existing law denies compensation to the holder of an unexercised option to acquire property.⁸⁴ 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.⁸⁵ A provision to give effect to this recommendation was deleted from the legislation at the request of the Commission; the provision was considered unnecessary in view of a subsequently decided California Supreme Court case holding an unexercised option to be a compensable interest.^{85a}

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

⁸¹ *City of Pasadena v. Porter*, 201 Cal. 381, 257 P. 526 (1927).

⁸² See, e.g., Horgan & Edgar, *Leasehold Valuation Problem in Eminent Domain*, 4 U.S.F. L. REV. 1 (1969).

⁸³ See, e.g., *Milstein v. Security Pac. Nat'l Bank*, 27 Cal. App. 3d 482, 103 Cal. Rptr. 16 (1972).

⁸⁴ See, e.g., *People v. Ocean Shore R.R.*, 90 Cal. App.2d 464, 203 P.2d 579 (1949).

⁸⁵ 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).

^{85a} See *County of San Diego v. Miller*, 13 Cal. 3d 684, 532 P. 2d 139, 199 Cal. Rptr. 491 (1975).

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.⁸⁶

Contingent future interests in property such as rights of reentry and possibilities of reverter are denied compensation under existing law.⁸⁷ 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 imminent but the future interest was appurtenant to some property that is damaged by the acquisition, the owner should be compensated for that damage.⁸⁸ 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.⁸⁹ Discussed below are several problem areas in the application of this rule.

Classification of Improvements

Whether certain types of business equipment are improvements pertaining to the realty has been a continuing source of litigation.⁹⁰ 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

⁸⁶ Estate of Giacomelos, 192 Cal. App.2d 244, 13 Cal. Rptr. 245 (1961).

⁸⁷ See, e.g., Romero v. Dep't of Public Works, 17 Cal.2d 189, 109 P.2d 662 (1941).

⁸⁸ 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.

⁸⁹ See, e.g., CODE CIV. PROC. §§ 1248 and 1249.1.

⁹⁰ 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).

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 any facility, machinery, or equipment installed on the property to be taken or on the remainder, regardless of the method of installation, that cannot be removed without a substantial loss in value or without substantial damage to the property on which it is installed. This will assure that such property having special in-place value will be taken and compensated as part of the realty. The Legislature revised this provision so that the legislation covers only “machinery or equipment” and does not include “any facility” as recommended by the Commission.

In case of a dispute over whether property is an improvement pertaining to the realty, the parties should be able to obtain an early determination prior to transfer of possession of the property.

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 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 the removal of the improvements will damage property to which they are attached, the owner should not be charged with the damage. The condemnor should always have the right to oppose removal and pay the value of the property as improved.

On occasion, a taking of property will require the taking of only part of an improvement. In such a situation, the improvement may be substantially destroyed or require a disproportionate expense for shoring and the like. Where justice so requires, either plaintiff or defendant should be allowed to require a taking of and payment for the whole improvement even though it is not required for public use and is located only partially on property taken.

Subsequent Improvements

As a general rule, improvements placed on the property after service of summons are not included in the determination of

compensation.⁹¹ 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.⁹²

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 or to protect partially installed machinery or equipment from damage, deterioration, or vandalism, whether or not the additional work adds to the value of the improvement, provided notice is given to the plaintiff and the additional work is reasonable. 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; during the legislative process, at the request of the Commission, this provision was deleted and replaced by one that permits the court to make an order limiting the extent to which an improvement made under the hardship exception shall be taken into account in determining compensation.

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.⁹³ Where the condemnor plans to take possession at a time that will preclude harvest of a crop not planted at the

⁹¹ 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).

⁹² See, e.g., *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 31 Cal. Rptr. 316 (1972) (inverse condemnation).

⁹³ CODE CIV. PROC. § 1249.2.

time of service of summons, it should be authorized to obtain a court order preventing the planting. In such a case, the property owner should recover for the loss of use of his 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*⁹⁴ 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 causes the damage is located on property taken from the owner. Subsequent cases cast doubt on the continued vitality of the *Symons* rule,⁹⁵ and the present state of the law is not clear.

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.⁹⁶

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.⁹⁷ 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

⁹⁴ 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960).

⁹⁵ See, e.g., *People v. Ramos*, 1 Cal.3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969).

⁹⁶ See *People v. Hurd*, 205 Cal. App.2d 16, 23 Cal. Rptr. 67 (1962).

⁹⁷ See, e.g., *People v. Schultz Co.*, 123 Cal. App.2d 925, 268 P.2d 117 (1954).

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.⁹⁸

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.⁹⁹ This rule of noncompensability has been widely criticized,¹⁰⁰ and the 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 proved by the property owner 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.

The Legislature added a requirement that a business seeking compensation for loss of goodwill provide the court with the state tax returns of the business and that such returns be made available to the condemnor upon such terms and conditions as will preserve their confidentiality.

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

⁹⁸ *Id.*

⁹⁹ 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. *Cf. Community Redevelopment Agency v. Abrams* (hearing granted by Supreme Court 1974) (compensation for goodwill constitutionally required).

¹⁰⁰ 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 Aloï & Goldberg, *A Reexamination of Value, Good Will and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604 (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).

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.¹⁰¹

Relocation Assistance

The relocation assistance provisions of Government Code Section 7260 *et seq.* should not be made a part of the eminent domain statute. The relocation assistance provisions are applicable to acquisitions of property by public entities by any means, including eminent domain. They provide compensation for losses of a different character than those covered by the eminent domain statute. The Eminent Domain Law is so drafted that it does not duplicate any item of compensation provided by the relocation assistance provisions. Rather, it covers areas not covered by the relocation assistance provisions; in cases of possible overlap, compensation is paid only once.¹⁰²

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.

CONDEMNATION PROCEDURE

It has long been the California rule that eminent domain proceedings are governed by the same procedures as civil actions generally.¹⁰³ 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

¹⁰¹ 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).

¹⁰² See discussion under "Prohibition Against Double Recovery" *infra*.

¹⁰³ See, e.g., CODE CIV. PROC. §§ 1256, 1257, 1262.

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, 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,¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ To enable the defendant to have a better understanding of the ground for the proceeding and to prepare more adequately for his response, the statement of the plaintiff’s right should be more detailed. The complaint should include a description of the public use 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 a reference to the statute authorizing the plaintiff to acquire the property by eminent domain. Failure to comply with these requirements should subject the complaint to attack by way of demurrer. The Legislature added a requirement that, in the case of a quasi-public condemnor, the complaint include a reference to the resolution of the local public entity consenting to the acquisition and that reference be made to certain other approvals or requirements of public officers or public bodies.

Existing law requires that the defendant set forth in his answer

¹⁰⁴ CODE CIV. PROC. § 1244(5).

¹⁰⁵ CODE CIV. PROC. § 1244(4).

¹⁰⁶ CODE CIV. PROC. § 1244(3).

both a statement of his right, title, or interest in the property taken and the amount of compensation he claims for the taking.¹⁰⁷ 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. A special pleading for disclaimer of any interest by a defendant should be provided for by statute. The Legislature added a requirement that the answer state that the defendant claims compensation for loss of goodwill where he seeks compensation for such loss. The amount of such compensation need not be specified.

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 proceeding¹⁰⁸ should not be continued. The cause of action is necessarily related to the pending eminent domain proceeding;¹⁰⁹ 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.¹¹⁰ 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. 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. These provisions would be substantively the same as those of the Federal Rules of Civil Procedure.¹¹¹ Under this scheme, verification will not 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 pleadings¹¹² are also desirable in an eminent domain

¹⁰⁷ CODE CIV. PROC. § 1246.

¹⁰⁸ *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.

¹⁰⁹ See CODE CIV. PROC. § 428.10 and Comment thereto.

¹¹⁰ CODE CIV. PROC. § 446. If the defendant is also a public entity, it need not verify its answer.

¹¹¹ See FED. R. CIV. PROC. 11.

¹¹² CODE CIV. PROC. § 473.

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.¹¹³

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.¹¹⁴ 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.¹¹⁵ 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. A notice of the pendency of the proceeding should be recorded in the office of the county recorder of the county where the property is located.¹¹⁶ These additional requirements will not be burdensome and will increase the likelihood that interested persons receive actual notice of the proceeding.

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.¹¹⁷ 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.

¹¹³ See discussion *infra* under "Abandonment and Dismissal."

¹¹⁴ CODE CIV. PROC. § 1245.

¹¹⁵ *Id.*

¹¹⁶ 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. The Commission's original proposal that the statute make clear that such filing is not mandatory was deleted from the legislation at the request of the Commission.

¹¹⁷ CODE CIV. PROC. §§ 1240(8) and 1245.4.

Possession Prior to Judgment

Extension of Right to Obtain Early Possession

Section 14 of Article I of the California Constitution, which authorized the state and local public entities¹¹⁸ 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,” has been replaced by Section 19 of Article I which was approved by the voters at the 1974 General Election. Section 19 provides in part: “The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.” Section 19 is consistent with prior recommendations by the Law Revision Commission that the California Constitution be amended to permit the Legislature to broaden the provisions authorizing early possession.¹¹⁹

The narrow limits of the authorization for early possession¹²⁰ in Section 14 reflected 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.¹²¹ Improvements were made in 1957 and, in 1961, the Legislature enacted legislation recommended by the Commission that partially systematized the law on this subject.¹²² Nevertheless,

¹¹⁸ The authorization extended 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.

¹¹⁹ 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, 1107–1110, 1167–1170 (1967); *Tentative Recommendation Relating to Condemnation Law and Procedure: The Eminent Domain Law*, 12 CAL. L. REVISION COMM’N REPORTS 1, 364–369 (1974).

¹²⁰ 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.”

¹²¹ 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.

¹²² 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.

careful analysis reveals that broader provisions for early possession, with appropriate safeguards for both parties, would benefit both condemnors and property owners.

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 statutory authorization for possession prior to judgment is stated in Section 1243.4 of the Code of Civil Procedure, which provides:

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

The authorization for possession prior to judgment 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. This recommendation would extend the right of prejudgment possession to public utilities which, at present, do not have the right.¹²³

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.¹²⁴ 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,¹²⁵ 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 supply a statement or summary of the appraisal 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 appraisal 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

¹²³ A few quasi-public entities also would be authorized to take possession prior to 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.

¹²⁴ CODE CIV. PROC. § 1243.5(a).

¹²⁵ CODE CIV. PROC. § 1243.5(d).

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.¹²⁶ However, any condemnor, whether or not it seeks possession prior to judgment, should be authorized to make a deposit of the probable amount of 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 deposit would assure the condemnor an early date of valuation. The property owner could withdraw the deposit and thus finance the acquisition of other property and defray other expenses incident to the taking. If there are several parties unable to agree on the withdrawal, a party would be able, in an appropriate case, to obtain a court order requiring investment of the deposit for the benefit of the defendants. 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.¹²⁷ Two changes in the withdrawal procedure are recommended:

(1) The existing absolute prohibition of withdrawal absent personal service on all parties should be eliminated.¹²⁸ 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

¹²⁶ CODE CIV. PROC. § 1243.5(a).

¹²⁷ CODE CIV. PROC. § 1243.7(c).

¹²⁸ *Id.*

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.¹²⁹

(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.

Use of evidence of deposit or withdrawal in valuation trial. Existing law precludes use of the amount of the deposit or the amount withdrawn and supporting data in the trial on the issue of compensation.¹³⁰ This is a salutary rule because it encourages the plaintiff to make adequate deposits. Case law enables defendants to defeat the spirit of the rule by calling the plaintiff's appraiser as their own witness.¹³¹ This loophole should be closed by statute.

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.¹³² Reimbursement is not required under existing law if the bond is required because of conflicting claims among defendants.¹³³ 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.¹³⁴

Possession. The present requirement of 20 days' notice to the owners and occupants of property before the condemnor takes possession¹³⁵ 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

¹²⁹ Cf. CODE CIV. PROC. § 1243.7(f).

¹³⁰ CODE CIV. PROC. § 1243.5(e).

¹³¹ *People v. Cowan*, 1 Cal. App.3d 1001, 81 Cal. Rptr. 713 (1969); *People v. Douglas*, 15 Cal. App.3d 814, 96 Cal. Rptr. 644 (1971).

¹³² CODE CIV. PROC. § 1243.7(b).

¹³³ CODE CIV. PROC. § 1243.7(f).

¹³⁴ Cf. CODE CIV. PROC. § 1246.1 (costs of determining issue as to title among defendants are borne by defendants).

¹³⁵ CODE CIV. PROC. § 1243.5(c).

inconvenience but will also make possible the actual disbursement to the property owner of the required deposit before he is obligated to relinquish possession.¹³⁶ However, where the plaintiff can show its urgent need for possession of unoccupied property, the court should be authorized to allow the plaintiff to take possession on such notice as the court deems proper under the circumstances of the case. During the legislative process, at the request of the Commission, the legislation was revised so that this provision is not limited to unoccupied property; it applies to any property the taking of possession of which will not displace or unreasonably affect any person in actual and lawful possession.

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 proceedings.¹³⁷ 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

¹³⁶ The lengthened time periods are also in accord with Government Code Section 7267.3, requiring 90 days' written notice before possession of occupied property.

¹³⁷ See, e.g., PA. STAT. ANN., Tit. 26, § 1-407 (Supp. 1965).

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, likewise be entitled to recover interest, less his net rental profits.¹³⁸

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 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.¹³⁹ While this scheme permits the exchange of basic valuation data, it does not permit sufficient time for follow-up discovery¹⁴⁰ 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 proceeding¹⁴¹ with an opportunity for the parties thereafter to

¹³⁸ 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).

¹³⁹ CODE CIV. PROC. § 1272.01.

¹⁴⁰ See CAL. R. CT. 222 (limiting discovery undertaken within 30 days of trial).

¹⁴¹ 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

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.¹⁴² 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.

Valuation Evidence

Evidence of the value of property in an eminent domain proceeding must relate to the fair market value of the property.¹⁴³ Although fair market value is normally determined by reference to “open market” transactions,¹⁴⁴ there may be some types of property for which there is no open market.¹⁴⁵ 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.¹⁴⁶ This change will have no effect on the valuation of other properties for which there is an open market. During the legislative process, at the request of the Commission, a provision was added that the fair market value of property for which there is no relevant market is its value as determined by any method of valuation that is just and equitable.

The Commission plans to review at a future time the provisions of the Evidence Code—Sections 810–822—relating to evidence in eminent domain and inverse condemnation proceedings.

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.

¹⁴² See, e.g., *City & County of San Francisco v. Tillman Estate Co.*, 205 Cal. 651, 272 P. 585 (1928).

¹⁴³ See EVID. CODE § 814.

¹⁴⁴ *Id.*; see also *Sacramento S.R.R. v. Heilbron*, 156 Cal. 408, 409, 104 P. 979, 980 (1909).

¹⁴⁵ Examples of such special purpose properties are schools, churches, cemeteries, parks, and utilities.

¹⁴⁶ 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).

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.¹⁴⁷ 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.¹⁴⁸

Compensation of Court-Appointed Appraisers

The court may appoint appraisers, referees, commissioners, or other such persons to fix the value of property taken.¹⁴⁹ 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.”¹⁵⁰ 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 general rules governing compensation of court-appointed third parties are sufficient.

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.¹⁵¹ Since interest ceases to accrue when such a deposit is made¹⁵² 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 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.

¹⁴⁷ CODE CIV. PROC. § 1267.

¹⁴⁸ CODE CIV. PROC. § 723.

¹⁴⁹ CODE CIV. PROC. § 1266.2.

¹⁵⁰ *Id.*

¹⁵¹ CODE CIV. PROC. § 1254.

¹⁵² CODE CIV. PROC. § 1255b(c).

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.¹⁵³ 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 court 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.

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 judgment¹⁵⁴ 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.

¹⁵³ CODE CIV. PROC. § 1254(f).

¹⁵⁴ See CODE CIV. PROC. § 1254(c).

Satisfaction of Judgment

Under existing law, unnecessary confusion has arisen from the purely theoretical distinction between a payment into court to satisfy the judgment¹⁵⁵ and a deposit made pending appeal or motion for new trial.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ 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.

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 [now Section 19] 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

¹⁵⁵ CODE CIV. PROC. § 1252.

¹⁵⁶ CODE CIV. PROC. § 1254.

¹⁵⁷ CODE CIV. PROC. § 1251.

¹⁵⁸ CODE CIV. PROC. § 1252.

¹⁵⁹ (footnote deleted)

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.”¹⁶⁰ Thus, despite the language of Section 1255, the cases have generally allowed the defendant in an eminent domain proceeding his ordinary court costs¹⁶¹ except that the costs of determining title as between two or more defendants is borne by the defendants.¹⁶² 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.¹⁶³ Where the defendant appeals and prevails, he is always allowed his costs.¹⁶⁴ However, the law is not clear whether the defendant who takes an appeal but does not prevail is entitled to costs.¹⁶⁵ A general rule should be provided that the defendant is entitled to his costs on appeal in all eminent domain cases except where the court rules otherwise.

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.¹⁶⁶ This rule is unduly harsh and should be 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.¹⁶⁷ The provision for award of attorney's fees should be extended to include all litigation expenses, but such litigation expenses should be recoverable only where the condemnor acts unlawfully or abusively.

¹⁶⁰ *City & County of San Francisco v. Collins*, 98 Cal. 259, 262, 33 P. 56, 57 (1893).

¹⁶¹ See, e.g., *Decoto School Dist. v. M. & S. Tile Co.*, 225 Cal. App.2d 310, 315, 37 Cal. Rptr. 225, 229 (1964).

¹⁶² CODE CIV. PROC. § 1246.1.

¹⁶³ See, e.g., *Sacramento & San Joaquin Drainage Dist. v. Reed*, 217 Cal. App.2d 611, 31 Cal. Rptr. 754 (1963).

¹⁶⁴ See, e.g., *Regents of Univ. of Cal. v. Morris*, 12 Cal. App.3d 679, 90 Cal. Rptr. 816 (1970).

¹⁶⁵ 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).

¹⁶⁶ CODE CIV. PROC. § 1254(k). See, e.g., *Los Angeles, P. & G. Ry. v. Rumpp*, 104 Cal. 20, 37 P. 859 (1894).

¹⁶⁷ CODE CIV. PROC. § 1242.5(e).

Pretrial Settlement Offers

The substance of the newly enacted statute¹⁶⁸ requiring the parties to make final settlement offers prior to trial and awarding the defendant his litigation expenses where his offer was reasonable and the plaintiff's offer was unreasonable should be retained. During the legislative process, at the request of the Commission, the legislation was revised to permit the court to consider the evidence admitted as well as the compensation awarded in determining the reasonableness of the final settlement offers.

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 proceeding¹⁶⁹ or the defendant defeats a public entity plaintiff's right to take the property by eminent domain.¹⁷⁰ 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).¹⁷¹ In addition, where the plaintiff abandons the property after having taken possession, it should pay all damages proximately caused by the proceeding; this would permit compensation for loss of goodwill, temporary interference with business, and the like, which might not otherwise be compensable under existing law.¹⁷²

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 condemner.¹⁷³ 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.¹⁷⁴

¹⁶⁸ CODE CIV. PROC. § 1249.3.

¹⁶⁹ CODE CIV. PROC. § 1255a.

¹⁷⁰ CODE CIV. PROC. § 1246.4.

¹⁷¹ See, e.g., *City of Industry v. Gordon*, 29 Cal. App.3d 90, 105 Cal. Rptr. 206 (1972).

¹⁷² Code of Civil Procedure Section 1255a(d) provides only for damages arising out of the "taking and use" of the property and any "loss or impairment of value" suffered by the land and improvements.

¹⁷³ 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).

¹⁷⁴ For a similar conclusion, see LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON EXPROPRIATION 118-121 (1971).

TITLE 7. EMINENT DOMAIN LAW

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- § 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
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- § 1230.070. Effect of enactment of title on prior proceedings

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- § 1235.010. Construction of title
- § 1235.020. Effect of headings
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CHAPTER 3. THE RIGHT TO TAKE

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- § 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
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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.

Law Revision Commission Comment

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.

Law Revision Commission Comment

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)). In addition, there may be specific provisions in other statutes that are preserved even though they may impose restrictions beyond those of the Eminent Domain Law. See, *e.g.*, FISH & GAME CODE § 1348 (condemnation only with consent of board of supervisors in county where property is situated); PUB. RES. CODE § 5542 (limitations on acquisition of property already appropriated to public use).

The provisions of the Eminent Domain Law are intended to supply rules only for eminent domain proceedings. The law of inverse condemnation is left for determination by 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.

Law Revision Commission Comment

Comment. Section 1230.030 makes clear that whether property is to be acquired by purchase or other means, or by exercise of the power of eminent domain, is a discretionary decision. Nothing in this title requires that the power of eminent domain be exercised; but, if the decision is that the power of eminent domain is to be used to acquire property for public use, the provisions of this title apply except as otherwise specifically provided by statute. See Section 1230.020. Compare GOVT. CODE § 15854 (property acquired pursuant to Property Acquisition Law).

§ 1230.040. Rules of practice in eminent domain proceedings

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

Legislative Committee Comment—Assembly

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 and orders), 1010 *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 to 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 458 (1941).

§ 1230.050. Court may enforce right to possession

1230.050. The court in which a proceeding in eminent domain is brought has the power to:

- (a) Determine the right to possession of the property, as between the plaintiff and the defendant, in accordance with this title.
- (b) Enforce any of its orders for possession by appropriate process. The plaintiff is entitled to enforcement of an order for possession as a matter of right.

Law Revision Commission Comment

Comment. Section 1230.050 is new. In general, the section codifies judicial decisions which hold that, after an eminent domain proceeding is begun, the court in which that proceeding is pending has the exclusive power to determine the respective rights of the plaintiff and of the defendant to possession and to enforce its determinations. See, e.g., *Neale v. Superior Court*, 77 Cal. 28, 18 P. 790 (1888); *In re Bryan*, 65 Cal. 375, 4 P. 304 (1884); *San Bernardino Valley Municipal Water Dist. v. Gage Canal Co.*, 226 Cal. App.2d 206, 37 Cal. Rptr. 856 (1964). In addition to the writs of possession or writs of assistance which the court may issue and enforce in exercise of its general jurisdiction (see *Marblehead Land Co. v. County of Los Angeles*, 276 Fed. 305 (S.D. Cal. 1921); 3 B. WITKIN, CALIFORNIA PROCEDURE

Enforcement of Judgment § 64 (1954)), orders for possession contemplated by the section include those made under Article 3 (commencing with Section 1255.410) of Chapter 6 and Article 3 (commencing with Section 1268.210) of Chapter 11.

§ 1230.060. Public Utilities Commission jurisdiction preserved

1230.060. Nothing in this title affects any other statute granting jurisdiction over any issue in eminent domain proceedings to the Public Utilities Commission.

Law Revision Commission Comment

Comment. Section 1230.060 preserves such jurisdiction as the Public Utilities Commission may have over issues in eminent domain proceedings. It supersedes the portion of former Section 1243 of the Code of Civil Procedure which provided that the jurisdiction of the Public Utilities Commission to ascertain just compensation was not affected by eminent domain law.

The Public Utilities Commission has concurrent jurisdiction over certain eminent domain proceedings. See, *e.g.*, PUB. UTIL. CODE § 1401 *et seq.* (local public entities may petition Public Utilities Commission to acquire public utility property by eminent domain) and PUB. UTIL. CODE § 1351 (Public Utilities Commission may ascertain value of public utility property in such proceeding). *Cf.* CAL. CONST., Art. XII, § 23a (legislative power to grant Public Utilities Commission jurisdiction to ascertain just compensation).

The Public Utilities Commission has exclusive jurisdiction over railroad crossings. See, *e.g.*, PUB. UTIL. CODE § 1201 *et seq.* and *Northwestern Pac. R.R. v. Superior Court*, 34 Cal.2d 454, 211 P.2d 571 (1949) (Public Utilities Commission jurisdiction over crossings extends to eminent domain proceedings in superior court); *cf.* CAL. CONST., Art. XII, § 23 (legislative power to grant Public Utilities Commission control of public utilities) and PUB. UTIL. CODE § 7537 (farm and private crossings). In addition, there may be specific grants of jurisdiction to the Public Utilities Commission over certain issues involved in particular eminent domain acquisitions. See, *e.g.*, PUB. UTIL. CODE §§ 861 (Public Utilities Commission jurisdiction over controversies concerning relocation of utility improvements), 30503 (Public Utilities Commission review of acquisition of railroad property by Southern California Rapid Transit District), and 102243 (Public Utilities Commission jurisdiction in proceedings of Sacramento Regional Transit District). Whether the Public Utilities Commission has jurisdiction over the place and manner of

relocation of utility property generally is not clear. *Compare* PUB. UTIL. CODE § 851 (Public Utilities Commission approval required before utility property may be disposed of) *with* *People v. City of Fresno*, 254 Cal. App.2d 76, 62 Cal. Rptr. 79 (1967) (Section 851 not applicable in condemnation of public utility property). See also GOVT. CODE §§ 55300–55367 (joint project for construction of conduit or line).

§ 1230.065. Operative date

1230.065. (a) This title becomes operative July 1, 1976.

(b) This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976. Subject to subdivisions (c) and (d), in the case of an eminent domain proceeding which is commenced on or after January 1, 1976, but prior to the operative date, this title upon the operative date applies to the proceeding to the fullest extent practicable with respect to issues to be tried or retried.

(c) Chapter 3 (commencing with Section 1240.010), Chapter 4 (commencing with Section 1245.010), and Chapter 5 (commencing with Section 1250.010) do not apply to a proceeding commenced prior to the operative date.

(d) If, on the operative date, an appeal, motion to modify or vacate the verdict or judgment, or motion for new trial is pending, the law applicable thereto prior to the operative date governs the determination of the appeal or motion.

Legislative Committee Comment—Senate

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).

§ 1230.070. Effect of enactment of title on prior proceedings

1230.070. No judgment rendered prior to the operative date of this title in a proceeding to enforce the right of eminent domain is affected by the enactment of this title and the repeal of former Title 7 of this part.

Law Revision Commission Comment

Comment. Section 1230.070 is new. It makes clear that the repeal of the former eminent domain title of this code and the enactment of new provisions of the Eminent Domain Law in no way affect the validity of judgments rendered prior thereto.

CHAPTER 2. PRINCIPLES OF CONSTRUCTION; DEFINITIONS

Article 1. Construction

§ 1235.010. Construction of title

1235.010. Unless the provision or context otherwise requires, these preliminary provisions and rules of construction shall govern the construction of this title.

Law Revision Commission Comment

Comment. Section 1235.010 is a standard provision in the various California codes. *E.g.*, EVID. CODE § 4; VEH. CODE § 6. Unless otherwise provided in this title, the preliminary provisions of the Code of Civil Procedure are applicable. See, *e.g.*, CODE CIV. PROC. § 17 (“words used in the masculine gender include the feminine and neuter; the singular number includes the plural and the plural the singular”). See also CODE CIV. PROC. § 5 (construction of provisions as continuation of existing statutes). See also GOVT. CODE § 9604.

§ 1235.020. Effect of headings

1235.020. Chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this title.

Law Revision Commission Comment

Comment. Provisions similar to Section 1235.020 appear in almost all of the existing California codes. *E.g.*, EVID. CODE § 5; VEH. CODE § 7.

§ 1235.030. References to statutes

1235.030. Whenever any reference is made to any portion of this title or to any other statute, such reference shall apply to all amendments and additions heretofore or hereafter made.

Law Revision Commission Comment

Comment. Section 1235.030 is a standard provision in various California codes. *E.g.*, EVID. CODE § 6; VEH. CODE § 10.

§ 1235.040. “Chapter,” “article,” “section,” “subdivision,” and “paragraph”

1235.040. Unless otherwise expressly stated:

- (a) “Chapter” means a chapter of this title.
- (b) “Article” means an article of the chapter in which that term occurs.

- (c) "Section" means a section of this code.
- (d) "Subdivision" means a subdivision of the section in which that term occurs.
- (e) "Paragraph" means a paragraph of the subdivision in which that term occurs.

Law Revision Commission Comment

Comment. Section 1235.040 is similar to Evidence Code Section 7. Compare CODE CIV. PROC. § 17(8).

§ 1235.050. Construction of tenses

1235.050. The present tense includes the past and future tenses; and the future, the present.

Law Revision Commission Comment

Comment. Section 1235.050 is a standard provision in various California codes. *E.g.*, EVID. CODE § 8; VEH. CODE § 12. Compare CODE CIV. PROC. § 17.

§ 1235.060. "Shall" and "may"

1235.060. "Shall" is mandatory and "may" is permissive.

Law Revision Commission Comment

Comment. Section 1235.060 is a standard provision in various California codes. *E.g.*, EVID. CODE § 11; VEH. CODE § 15.

§ 1235.070. Constitutionality

1235.070. If any provision or clause of this title or application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the title that can be given effect without the invalid provision or application, and to this end the provisions of this title are severable.

Law Revision Commission Comment

Comment. Section 1235.070 is the same in substance as Section 3 of the Evidence Code and Section 1108 of the Commercial Code.

Article 2. Words and Phrases Defined

§ 1235.110. Application of definitions

1235.110. Unless the provision or context otherwise requires, these definitions govern the construction of this title.

Law Revision Commission Comment

Comment. Section 1235.110 is a standard provision found in the definitional portion of recently enacted California codes. See,

e.g., EVID. CODE § 100; VEH. CODE § 100. Unless otherwise provided in this title, the definitions in the preliminary portion of the Code of Civil Procedure are applicable. See, *e.g.*, CODE CIV. PROC. § 17.

§ 1235.120. Final judgment

1235.120. “Final judgment” means a judgment with respect to which all possibility of direct attack by way of appeal, motion for a new trial, or motion under Section 663 to vacate the judgment has been exhausted.

Law Revision Commission Comment

Comment. Section 1235.120 continues the substance of the second sentence of former Section 1264.7. Unlike the former section, Section 1235.120 makes clear that the motion to vacate must be one made under Section 663, thus excluding, for example, a motion for relief from a default under Section 473. This clarification is consistent with the construction given the language of the former section by the courts. *E.g.*, *Southern Pac. Util. Dist. v. Silva*, 47 Cal.2d 163, 301 P.2d 841 (1956).

§ 1235.125. Interest in property

1235.125. When used with reference to property, “interest” includes any right, title, or estate in property.

Law Revision Commission Comment

Comment. Section 1235.125 defines the term “interest” as used with relation to property and not as used with relation to the rate of return on money. It is broadly defined to include all interests in property of whatever character or extent.

§ 1235.130. Judgment

1235.130. “Judgment” means the judgment determining the right to take the property by eminent domain and fixing the amount of compensation to be paid by the plaintiff.

Law Revision Commission Comment

Comment. Section 1235.130 continues the substance of the first sentence of former Section 1264.7.

§ 1235.140. Litigation expenses

1235.140. “Litigation expenses” includes both of the following:

(a) All expenses reasonably and necessarily incurred in the proceeding in preparing for trial, during trial, and in any subsequent judicial proceedings.

(b) Reasonable attorney’s fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and

necessarily incurred to protect the defendant's interests in the proceeding in preparing for trial, during trial, and in any subsequent judicial proceedings whether such fees were incurred for services rendered before or after the filing of the complaint.

Law Revision Commission Comment

Comment. The definition provided in Section 1235.140 is the same in substance as the second sentence of former Section 1255a(c). It is used in Sections 1245.060 (entry for survey or examination), 1250.325 (disclaimer), 1250.340 (amendment of pleadings), 1250.410 (settlement offers), 1255.030 (increase or decrease in amount of deposit), 1258.290 (exchange of valuation data), 1260.120 (conditional dismissal on objection to right to take), and 1268.610 (expenses on dismissal or defeat of right to take).

§ 1235.150. **Local public entity**

1235.150. "Local public entity" means any public entity other than the state.

§ 1235.160. **Person**

1235.160. "Person" includes any public entity, individual, association, organization, partnership, trust, or corporation.

Law Revision Commission Comment

Comment. Section 1235.160 provides a broad definition of "person." Compare CODE CIV. PROC. § 17.

§ 1235.165. **Proceeding**

1235.165. "Proceeding" means an eminent domain proceeding under this title.

Law Revision Commission Comment

Comment. Section 1235.165 makes clear that, where the term "proceeding" is used in this title, it refers only to proceedings under the Eminent Domain Law and not, for example, to eminent domain matters before the Public Utilities Commission.

§ 1235.170. **Property**

1235.170. "Property" includes real and personal property and any interest therein.

Law Revision Commission Comment

Comment. Section 1235.170 is intended to provide the broadest possible definition of property and to include any type of right, title, or interest in property that may be required for public use. See Section 1235.125 ("interest" defined). If the

property authorized to be taken is limited by the statutory grant of condemnation authority to property of a certain type, an attempt to take property other than the type designated in the grant of condemnation authority is precluded by Section 1240.020. See Section 1240.020 and Comment thereto.

Section 1235.170 eliminates the need for duplicative listings of property types and interests subject to condemnation. *Cf., e.g.*, former Section 1240 (real property, tide and submerged lands, franchises for any public utility, rights of way and any and all structures and improvements thereon) and former Section 1238(3) (“ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other character of property necessary” for certain purposes). For the authority of an authorized condemnor to acquire property of any type necessary for public use, see Section 1240.110 (right to acquire any necessary interest in property).

§ 1235.180. Property appropriated to public use

1235.180. “Property appropriated to public use” means property either already in use for a public purpose or set aside for a specific public purpose with the intention of using it for such purpose within a reasonable time.

Law Revision Commission Comment

Comment. Section 1235.180 defines “property appropriated to public use” in accordance with prior California decisions. See *East Bay Mun. Util. Dist. v. Lodi*, 120 Cal. App. 740, 750–758, 8 P.2d 532, 536–539 (1932). The general concept of “public use” is discussed in connection with Section 1240.010. See Section 1240.010 and Comment thereto.

It should be noted that appropriation to a public use does not require actual physical use, but may be satisfied by formal dedication or facts indicating a reasonable prospect of use within a reasonable time. See, *e.g.*, *Woodland School Dist. v. Woodland Cemetery Ass’n*, 174 Cal. App.2d 243, 344 P.2d 326 (1959) (property formally dedicated but not yet used by corporation for cemetery purposes); *City of Los Angeles v. Los Angeles Pac. Co.*, 31 Cal. App. 100, 159 P. 992 (1916) (property assembled by electric railway for planned subway). Moreover, property may be appropriated to public use even though it is owned by a private individual or corporation. *E.g.*, *Woodland School Dist. v. Woodland Cemetery Ass’n*, *supra*; *City of Los Angeles v. Los Angeles Pac. Co.*, *supra*. Conversely, property may be owned by a public entity but not be appropriated to

public use. *Deseret Water, Oil & Irr. Co. v. State*, 167 Cal. 147, 138 P. 981 (1914), *rev'd on other grounds*, 243 U.S. 415, and 176 Cal. 745, 171 P. 287 (1917).

The term defined in Section 1235.180 is used primarily in Article 6 (commencing with Section 1240.510) and Article 7 (commencing with Section 1240.610) of Chapter 3. These articles relate to a taking for a compatible use or for a more necessary public use.

§ 1235.190. Public entity

1235.190. "Public entity" includes the state, a county, city, district, public authority, public agency, and any other political subdivision in the state.

§ 1235.195. Resolution

1235.195. "Resolution" includes ordinance.

Law Revision Commission Comment

Comment. Section 1235.195, which applies primarily to the resolution of necessity, is intended to cover the situation of particular local public entities which act by ordinance rather than by resolution.

§ 1235.200. State

1235.200. "State" means the State of California and includes the Regents of the University of California.

§ 1235.210. Statute

1235.210. "Statute" means a constitutional provision or statute, but does not include a charter provision or ordinance.

CHAPTER 3. THE RIGHT TO TAKE

Article 1. General Limitations on Exercise of Power of Eminent Domain

§ 1240.010. Public use limitation

1240.010. The power of eminent domain may be exercised to acquire property only for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration by the Legislature that such use, purpose, object, or function is a public use.

Law Revision Commission Comment

Comment. The first sentence of Section 1240.010 reiterates the basic constitutional limitation that property may be acquired by eminent domain only for “public use.” CAL. CONST., Art. I, § 19; U.S. CONST., Amend. XIV.

The second sentence is included in Section 1240.010 to avoid the need to state in each condemnation authorization statute that the taking by eminent domain under that statute is a taking for public use. For example, Section 104 of the Streets and Highways Code authorizes the acquisition of property by eminent domain for state highway purposes. Section 1240.010 provides that such legislative action is also deemed to be a legislative declaration that use for state highway purposes constitutes a public use. Section 1240.010 supersedes former Section 1238 of the Code of Civil Procedure, which purported to declare the public uses for which property might be taken by eminent domain.

The scheme of the Eminent Domain Law renders a listing of public uses in the general condemnation statute, as under former Section 1238, unnecessary. Under this scheme, every public entity that would be authorized to condemn for a use listed in former Section 1238 may still condemn for that use. The state (GOVT. CODE § 15853), cities (GOVT. CODE § 37350.5), counties (GOVT. CODE § 25350.5), and school districts (EDUC. CODE § 1047) may exercise the power of eminent domain to acquire property necessary for any of their powers or functions. These general authorizations to condemn for proper state, city, county, and school district functions often overlap more specific authorizations to condemn or simply to acquire property for particular public uses. On occasion, a statute authorizes a public entity to undertake a public use but specifically denies the right of eminent domain for that use. See, *e.g.*, GOVT. CODE § 37353(c)

(existing golf course may not be acquired by city by eminent domain). In such a case, the specific provision controls over the general authorization. Special districts may condemn only for those specific public uses for which they have expressly been granted the power of eminent domain. The great majority of special districts have, by virtue of their enabling statutes, general authority to condemn all property necessary to carry out any powers of the district. A few districts, such as soil conservation districts (PUB. RES. CODE §§ 9074-9953) and the City of Marysville Levee District (Cal. Stats. 1875-76, Ch. 134), have limited condemnation authority or none at all.

The fact that Section 1240.010 declares that a particular use for which the power of eminent domain may be exercised is a public use does not preclude judicial review to determine whether the proposed use in the particular case is actually a public use. *E.g.*, *City & County of San Francisco v. Ross*, 44 Cal.2d 52, 279 P.2d 529 (1955). Nevertheless, the Legislature's declaration that the particular use is a public use will be accepted as controlling unless clearly erroneous and without reasonable foundation. *E.g.*, *People v. Superior Court*, 68 Cal.2d 206, 210, 436 P.2d 342, 345, 65 Cal. Rptr. 342, 345 (1968); *Housing Authority v. Dockweiler*, 14 Cal.2d 437, 449-450, 94 P.2d 794, 801 (1939); *County of Los Angeles v. Anthony*, 224 Cal. App.2d 103, 36 Cal. Rptr. 308, *cert. denied*, 376 U.S. 963 (1964); *Redevelopment Agency v. Hayes*, 122 Cal. App.2d 777, 266 P.2d 105, *cert. denied*, 348 U.S. 897 (1954). Doubts are resolved in favor of the legislative declaration. *University of So. Cal. v. Robbins*, 1 Cal. App.2d 523, 525-526, 37 P.2d 163, 164 (1934). A legislatively authorized taking will be upheld if the taking is for a "use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government." *Bauer v. County of Ventura*, 45 Cal.2d 276, 284, 289 P.2d 1, 6 (1955).

§ 1240.020. Statutory delegation of condemnation authority required

1240.020. The power of eminent domain may be exercised to acquire property for a particular use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use.

Legislative Committee Comment—Assembly

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

1240.030. The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:

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

Legislative Committee Comment—Senate

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 es-

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*; *Ecl 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) 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.

§ 1240.040. Resolution of necessity required

1240.040. A public entity may exercise the power of eminent domain only if it has adopted a resolution of necessity that meets the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4.

Law Revision Commission Comment

Comment. A public entity may not take property by eminent domain unless its governing body has adopted a resolution of

necessity that meets the requirements of Section 1245.210 *et seq.* If the public entity fails to adopt such a resolution, or adopts a defective resolution, it may not condemn property.

Section 1240.040 generalizes the provision, previously applicable to some but not all public entities, that a resolution of necessity is a condition precedent to condemnation. See, *e.g.*, former WATER CODE § 8594 and former GOVT. CODE § 15855 (resolution required).

As to the effect of the resolution of necessity on matters of proof in eminent domain proceedings, see Section 1245.250 and Comment thereto.

§ 1240.050. Extraterritorial condemnation

1240.050. A local public entity may acquire by eminent domain only property within its territorial limits except where the power to acquire by eminent domain property outside its limits is expressly granted by statute or necessarily implied as an incident of one of its other statutory powers.

Legislative Committee Comment—Senate

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*.

Article 2. Rights Included in Grant of Eminent Domain Authority

§ 1240.110. Right to acquire any necessary interest in property

1240.110. (a) Except to the extent limited by statute, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire any interest in property necessary for that use including, but not limited to, submerged lands, rights of any nature in water, subsurface rights, airspace rights, flowage or flooding easements, aircraft noise or operation easements, right of temporary occupancy, public utility facilities and franchises, and franchises to collect tolls on a bridge or highway.

(b) Where a statute authorizes the acquisition by eminent domain only of specified interests in or types of property, this section does not expand the scope of the authority so granted.

Law Revision Commission Comment

Comment. Section 1240.110 is both an authorization and a limitation on the power of condemnation. It provides that a person authorized to condemn may take any type of property and any interest in such property but limits this grant only to property that is necessary for the purpose for which the condemnation is authorized. See Sections 1235.170 (“property” includes any interest in property) and 1240.030 (necessity to acquire particular property must be established). It should be noted that the resolution of necessity of a public entity may be conclusive evidence of the necessity for the acquisition of the particular property and interest therein. See Section 1245.250 and Comment thereto.

The authorization to take any interest is generally consistent with the former law that permitted a public entity to take a fee rather than merely an easement. See former CODE CIV. PROC.

§ 1239(4) (local public entities). However, under former law, most privately owned public utilities and some local public entities were permitted to acquire only an easement except in certain circumstances. See former CODE CIV. PROC. § 1239. Moreover, under former law, the distinction generally made was between taking a fee or an easement. See generally Taylor, *The Right to Take—The Right to Take a Fee or Any Lesser Interest*, 1 PAC. L.J. 555 (1970). Section 1240.110 permits taking of the fee or any other interest in property. See Sections 1235.125 (defining “interest”) and 1235.170 (defining “property”).

Subdivision (b) of Section 1240.110 recognizes that, if the interest in property authorized to be taken is limited by the statutory grant (as, for example, where the statute authorizes acquisition of only an easement), an attempt to take an interest in the property other than that permitted by the statute is precluded. Also, if the statutory grant to the particular entity is specifically limited to “real property,” Section 1240.110 does not extend that grant to include personal property. On the other hand, if the statutory grant of condemnation authority is to acquire any “property” necessary for a particular use, Section 1240.110 makes clear that this includes authority to condemn both real and personal property of any type.

The authorization to take any interest in property necessary for a particular use supersedes former Code of Civil Procedure Section 1240 which attempted to list the various types of property interests that might be taken. The broad authorization in Section 1240.110 codifies cases holding that inherent in the right to condemn property is the right to take all interests and all rights appurtenant. See, e.g., *City of Los Angeles v. Hughes*, 202 Cal. 731, 262 P. 737 (1927) (nursery plants and trees); *People v. Superior Court*, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962) (dredger tailings); *County of Kern v. Galatas*, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962) (oil, gas, mineral rights); *Northern Light etc. Co. v. Stacher*, 13 Cal. App. 404, 109 P. 896 (1910) (water). It should be noted, however, that money is not subject to the power of eminent domain. *Emery v. San Francisco Gas Co.*, 28 Cal. 346 (1865).

The initial proviso to subdivision (a) recognizes that other statutes may make certain property exempt from condemnation. For example, an existing golf course may not be acquired by a city for golf course purposes. GOVT. CODE § 37353(c). Cemetery land may not be taken for rights of way. HEALTH & SAF. CODE §§ 8134, 8560, 8560.5; see *Eden Memorial Park Ass'n v. Superior Court*, 189 Cal. App.2d 421, 11 Cal. Rptr. 189 (1961). Property within the Aptos Forest is not subject to eminent domain except

by specific permission of the Legislature. PUB. RES. CODE § 5006.2. Certain land in the public domain may not be taken at all. PUB. RES. CODE § 8030. An existing airport owned by a local entity cannot be taken by the Department of Transportation without consent. PUB. UTIL. CODE § 21632. See generally Article 6 (commencing with Section 1240.510) and Article 7 (commencing with Section 1240.610) (limitations on the acquisition of property appropriated to public use).

It should be noted that the listing of types of property or property interests in subdivision (a) is intended for the sole purpose of illustrating the breadth of scope of a condemnor's acquisition authority. The illustrative listing is not intended as complete; a condemnor may acquire, for example, rights to limit the use or development of property in order to preserve land in an open or natural condition. Nor is the listing intended to create compensable interests in inverse condemnation actions that are not otherwise compensable under Article I, Section 19, of the Constitution.

§ 1240.120. Right to acquire property to make effective the principal use

1240.120. (a) Subject to any other statute relating to the acquisition of property, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire property necessary to carry out and make effective the principal purpose involved including but not limited to property to be used for the protection or preservation of the attractiveness, safety, and usefulness of the project.

(b) Subject to any applicable procedures governing the disposition of property, a person may acquire property under subdivision (a) with the intent to sell, lease, exchange, or otherwise dispose of the property, or an interest therein, subject to such reservations or restrictions as are necessary to protect or preserve the attractiveness, safety, and usefulness of the project.

Law Revision Commission Comment

Comment. Subdivision (a) of Section 1240.120 codifies the rule that, absent any express limitation imposed by the Legislature, the power to condemn property for a particular purpose includes the power to condemn property necessary to carry out and make effective the principal purpose involved. See *City of Santa Barbara v. Cloer*, 216 Cal. App.2d 127, 30 Cal. Rptr. 743 (1963). See also *University of So. Cal. v. Robbins*, 1 Cal. App.2d 523, 37 P.2d 163 (1934). Cf. *Flood Control & Water Conservation Dist. v. Hughes*, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962).

Section 1240.120 permits a condemnor to protect the attractiveness, safety, or usefulness of a public work or improvement from deleterious conditions or uses by condemning a fee or any lesser interest necessary for protective purposes. See Section 1235.170 (defining "property" to include any interest). A taking for this purpose is a public use. *E.g.*, *People v. Lagiss*, 223 Cal. App.2d 23, 35 Cal. Rptr. 554 (1963); *Flood Control & Water Conservation Dist. v. Hughes*, *supra*. See also *United States v. Bowman*, 367 F.2d 768, 770 (1966). See Capron, *Excess Condemnation in California—A Further Expansion of the Right to Take*, 20 HASTINGS L.J. 571, 589–591 (1969).

Where it is necessary to protect a public work or improvement from detrimental uses on adjoining property, the condemnor has the option either (1) to acquire an easement-like interest in the adjoining property that will preclude the detrimental use or (2) to acquire the fee or some other interest and then—if the condemnor desires—lease, sell, exchange, or otherwise dispose of the property to some other public entity or a private person subject to carefully specified permitted uses.

If a condemnor has the power of eminent domain to condemn property for a particular improvement, Section 1240.120 is sufficient authority to condemn such additional property as is necessary to preserve or protect the attractiveness, safety, and usefulness of the improvement. No additional statutory authority is required, and some of the former specific grants of protective condemnation authority have been repealed as unnecessary. *E.g.*, former CODE CIV. PROC. § 1238(18) (trees along highways). Not all such specific authorizations have been repealed. *E.g.*, STS. & HWYS. CODE § 104(f) (trees along highways), (g) (highway drainage), (h) (maintenance of unobstructed view along highway). Except to the extent that these specific authorizations contain restrictions on protective condemnation for particular types of projects (see GOVT. CODE §§ 7000–7001), they do not limit the general protective condemnation authority granted by Section 1240.120.

In the case of a public entity, the resolution of necessity is conclusive on the necessity of taking the property or interest therein for protective purposes. See Section 1245.250 and Comment thereto. However, the resolution does not preclude the condemnee from raising the question whether the condemnor actually intends to use the property for protective purposes. If the property is claimed to be needed for protective purposes but is not actually to be used for that purpose, the taking can be defeated on that ground. See Section 1250.360 and

Comment thereto. See *People v. Lagiss*, 223 Cal. App.2d 23, 33-44, 35 Cal. Rptr. 554, 560-567 (1963).

Section 1240.120 is derived from and supersedes former Government Code Sections 190-196, Streets and Highways Code Section 104.3, and Water Code Section 256.

§ 1240.125. Right to acquire property outside territorial limits

1240.125. Except as otherwise expressly provided by statute and subject to any limitations imposed by statute, a local public entity may acquire property by eminent domain outside its territorial limits for water, gas, or electric supply purposes or for airports, drainage or sewer purposes if it is authorized to acquire property by eminent domain for the purposes for which the property is to be acquired.

Legislative Committee Comment—Senate

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.

§ 1240.130. Acquisition by gift, purchase, lease, or other means

1240.130. Subject to any other statute relating to the acquisition of property, any public entity authorized to acquire property for a particular use by eminent domain may also acquire such property for such use by grant, purchase, lease, gift, devise, contract, or other means.

Law Revision Commission Comment

Comment. Section 1240.130 makes clear that a public entity is authorized to acquire property by negotiation or other means in any case in which it may condemn property. See also GOVT. CODE § 7267.1(a) (public entity shall make every reasonable effort to acquire real property by negotiation). This general authority is, of course, subject to any limitations that may be imposed by statute. See, *e.g.*, GOVT. CODE § 15854 (acquisition under the Property Acquisition Law must be by condemnation except in certain circumstances).

Section 1240.130 makes unnecessary the detailed listing of various types of property that may be acquired under specific statutes authorizing acquisition by eminent domain and other means. See Sections 1235.170 (“property” defined), 1235.125 (“interest” in property defined), and 1240.110 (right to acquire any necessary property or interest therein). Section 1240.130 supersedes former Code of Civil Procedure Section 1266.1 (gift or purchase authorized for certain purposes).

§ 1240.140. Joint exercise of condemnation power pursuant to Joint Powers Agreements Act

1240.140. (a) As used in this section, “public agencies” includes all those agencies included within the definition of “public agency” in Section 6500 of the Government Code.

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

Law Revision Commission Comment

Comment. Section 1240.140 authorizes several public agencies to acquire a particular parcel under the Joint Powers Agreements Act, not only where the particular parcel is needed for a joint project but also where each of the agencies requires a portion of the parcel for its own purposes. The section is based on former Education Code Section 15007.5. Section 15007.5, however, applied only where a school district was a party to the joint powers agreement, and Section 1240.140 is not so restricted. As to how title is to be held, see GOVT. CODE § 6508. *Cf.* GOVT. CODE § 55004 (joint sanitation projects).

§ 1240.150. Acquisition of all or portion of remainder with owner's consent

1240.150. Whenever a part of a larger parcel of property is to be acquired by a public entity for public use and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little value to its owner or to give rise to a claim for severance or other damages, the public entity may acquire the remainder, or portion of the remainder, by any means (including eminent domain) expressly consented to by the owner.

Law Revision Commission Comment

Comment. Section 1240.150 provides a broad authorization for public entities to acquire remainders of property by a voluntary transaction or a condemnation proceeding initiated with the consent of the owner. *Cf.* GOVT. CODE § 7267.7 (“If the acquisition of only a portion of a property would leave the remaining portion in such a shape or condition as to constitute an uneconomic remnant, the public entity shall offer to and may acquire the entire property if the owner so desires.”). See also former CODE CIV. PROC. § 1266.1 (cities and counties may acquire excess property by purchase or gift). Compare Article 5 (commencing with Section 1240.410) and the Comments to the sections in that article (condemnation of remnants). *Cf.* Section 1240.240 (acquisition for future use with owner's consent).

The language of Section 1240.150 is similar to that contained in former Sections 104.1 and 943.1 of the Streets and Highways Code and former Sections 254, 8590.1, 11575.2, and 43533 of the Water Code. Inasmuch as exercise of the authority conferred by this section depends upon the consent and concurrence of the property owner, the language of the section is broadly drawn to authorize acquisition whenever the remainder would have little value to its owner (rather than little market value or value to another owner). Compare *Dep't of Public Works v. Superior Court*, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); *La Mesa v. Tweed & Gambrell Planing Mill*, 146 Cal. App.2d 762, 304 P.2d 803 (1956).

Where property is needed for public use and a structure is located partly on the property to be acquired and partly on other property, Section 1240.150 permits the public entity to acquire the entire structure by agreement with the owner or by a condemnation proceeding initiated with the consent of the owner. Where a structure is located partly on property needed for a public use and partly on other property, there are a number of alternatives available to the parties which may be less costly

or more convenient than taking only part of the structure and paying severance damages on this basis. In some cases, severance may so destroy a structure that total demolition in one operation is the only economically or practically feasible alternative. Pursuant to Section 1240.150, the parties may agree that the public entity will acquire the entire structure and demolish it, leaving the property owner with the remainder in a cleared condition. Section 1240.150 also permits the parties to agree that the public entity will purchase the structure to relocate it. For authority to condemn the structure where the parties are unable to agree, see Section 1263.270 (court order that entire improvement be acquired). For other possibilities, see Section 1263.610 (condemnor may relocate structure or perform other work for owner); Section 1240.410 (excess condemnation). See also the Comments to the cited sections.

§ 1240.160. Interpretation of grants of eminent domain authority; separate authorizations

1240.160. (a) None of the provisions of this article is intended to limit, or shall limit, any other provision of this article, each of which is a distinct and separate authorization.

(b) None of the provisions of Article 2 (commencing with Section 1240.110), Article 3 (commencing with Section 1240.210), Article 4 (commencing with Section 1240.310), Article 5 (commencing with Section 1240.410), Article 6 (commencing with Section 1240.510), or Article 7 (commencing with Section 1240.610) is intended to limit, or shall limit, the provisions of any other of the articles, each of which articles is a distinct and separate authorization.

Law Revision Commission Comment

Comment. Section 1240.160 makes clear that the various articles contained in this chapter are distinct and separate authorizations. For example, the authority granted by Article 6 (condemnation for compatible use) is independent of the authority contained in Article 7 (more necessary public use) and is not limited in any way by the rules set forth therein. Likewise, condemnation of property appropriated to a public use may be accomplished under Article 7 independently of any authority stated in Article 6. Section 1240.160 is based on former Section 104.7 of the Streets and Highways Code.

Article 3. Future Use

§ 1240.210. “Date of use” defined

1240.210. For the purposes of this article, the “date of use” of property taken for public use is the date when the property is

devoted to that use or when construction is started on the project for which the property is taken with the intent to complete the project within a reasonable time. In determining the "date of use," periods of delay caused by extraordinary litigation or by failure to obtain from any public entity any agreement or permit necessary for construction shall not be included.

Law Revision Commission Comment

Comment. See the Comment to Section 1240.220.

§ 1240.220. Acquisitions for future use

1240.220. (a) Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire property to be used in the future for that use, but property may be taken for future use only if there is a reasonable probability that its date of use will be within seven years from the date the complaint is filed or within such longer period as is reasonable.

(b) Unless the plaintiff plans that the date of use of property taken will be within seven years from the date the complaint is filed, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section and shall state the estimated date of use.

Law Revision Commission Comment

Comment. Section 1240.220 continues prior case law and makes clear that statutory grants of condemnation power carry with them the power to condemn property in anticipation of the condemnor's future needs. See, e.g., *Central Pac. Ry. v. Feldman*, 152 Cal. 303, 309, 92 P. 849, 852 (1907); *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 616, 57 P. 585, 591 (1899); *Pacific Gas & Elec. Co. v. Parachini*, 29 Cal. App.3d 159, 105 Cal. Rptr. 477 (1972); *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App.2d 472, 480-481, 14 Cal. Rptr. 899, 904-905 (1961). Section 1240.220 may be duplicated in part by specific statutory grants of the power to condemn for future use. See, e.g., STS. & HWYS. CODE § 104.6 (Department of Transportation authorized to acquire real property for future highway needs); WATER CODE § 258 (Department of Water Resources authorized to acquire real property for future state dam and water purposes). These specific statutory grants are subject to the general provisions of Section 1240.220.

The basic substantive test that determines when condemnation for future needs is permitted is stated in subdivision (a). If the date of use of property will be within seven years from the date the complaint is filed, the taking is permitted. (The date of use is that date when property is actually devoted

to the use for which taken or when construction on the project is commenced in good faith. See Section 1240.210.) If the date of use will not be within the seven-year period, the taking is permitted only if there is a reasonable probability that the date of use will be within a "reasonable time." What constitutes a reasonable time depends upon all the circumstances of the particular case: Is there a reasonable probability that funds for the construction of the project will become available? Have plans been drawn and adopted? Is the project a logical extension of existing improvements? Is future growth likely, and should the condemnor anticipate and provide for that growth? However, it should be noted that periods of delay caused by litigation (other than the normal resolution of valuation issues) or by difficulty in obtaining an agreement or permit necessary for construction from a public entity (such as freeway route agreements from local public entities) are not to be included in determining date of use. See Section 1240.210.

Subdivision (b) specifies an additional requirement for the complaint and, if the plaintiff is a public entity, for the resolution of necessity. If the plaintiff does not plan to use the property for the public use within seven years from the date the complaint is filed, it must so state in the complaint and resolution. The required information in the complaint will put the defendant on notice that there is a potential issue whether the plaintiff is authorized to take the property under this section.

§ 1240.230. Burden of proof

1240.230. (a) If the defendant objects to a taking for future use, the burden of proof is as prescribed in this section.

(b) Unless the complaint states an estimated date of use that is not within seven years from the date the complaint is filed, the defendant has the burden of proof that there is no reasonable probability that the date of use will be within seven years from the date the complaint is filed.

(c) If the defendant proves that there is no reasonable probability that the date of use will be within seven years from the date the complaint is filed, or if the complaint states an estimated date of use that is not within seven years from the date the complaint is filed, the plaintiff has the burden of proof that a taking for future use satisfies the requirements of this article.

Law Revision Commission Comment

Comment. Section 1240.230 states the rules governing the burden of proof where the defendant objects to a taking for future use. A defendant who desires to contest the taking of his property on the ground that the taking is for a future use and is

not authorized under Section 1240.220 must plead this defense. See Sections 430.30, 1250.350, and 1250.360.

If the defendant does contest the taking, the court must first find that there is no reasonable probability that date of use will be within the seven-year period. Unless the court so finds, the taking cannot be defeated on the ground that it is not authorized under Section 1240.220. Except where the complaint indicates that the date of use will not be within the seven-year period, the defendant has the burden of proof to establish that there is no reasonable probability that his property will be used for the public use within that period. When the plaintiff estimates that the date of use will not be within the seven-year period or when it is established by proof that there is no reasonable probability that the property will be used for the designated use within such period, the burden shifts to the plaintiff to prove that there is a reasonable probability that the property will actually be devoted to the public use within a “reasonable time.” See discussion in Comment to Section 1240.220.

Section 1240.230 makes a significant change in former practice. Under prior law, as under Section 1240.230, condemnation for future use was permitted only if there was a reasonable probability that the property would be devoted to the public use within a reasonable time. See, e.g., *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App.2d 472, 480–481, 14 Cal. Rptr. 899, 904–905 (1961). See also *East Bay Mun. Util. Dist. v. City of Lodi*, 120 Cal. App. 740, 750–755, 8 P.2d 532, 536–538 (1932). However, under prior law, this issue—whether there was a reasonable probability of use within a reasonable time—was ordinarily nonjusticiable. The issue was regarded as an issue of necessity. The resolution of necessity was conclusive on issues of necessity in the great majority of takings; hence, the issue could be raised only in those few cases where the resolution was not conclusive. Compare *Anaheim Union High School Dist. v. Vieira*, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966) (resolution conclusive), and *County of San Mateo v. Bartole*, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960) (resolution conclusive), with *San Diego Gas & Elec. Co. v. Lux Land Co.*, *supra* (justiciable issue). This aspect of the prior law has not been continued. The resolution of necessity is not conclusive on the issue of whether a taking is authorized under this article. *But see* PUB. RES. CODE § 25531 (decision of State Energy Resources Conservation and Development Commission conclusive on issue whether property will be devoted to the public use within a “reasonable time”).

§ 1240.240. Acquisition for future use with owner's consent

1240.240. Notwithstanding any other provision of this article, any public entity authorized to acquire property for a particular use by eminent domain may acquire property to be used in the future for that use by any means (including eminent domain) expressly consented to by its owner.

Law Revision Commission Comment

Comment. Section 1240.240 makes clear that a public entity may take property for future use, regardless of the restrictions on takings for future use imposed by this article, in any case where the owner of the property consents to the taking.

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

1240.250. Notwithstanding any other provision of this article, where property is taken pursuant to the Federal Aid Highway Act of 1973:

(a) A date of use within 10 years from the date the complaint is filed shall be deemed reasonable.

(b) The resolution of necessity and the complaint shall indicate that the taking is pursuant to the Federal Aid Highway Act of 1973 and shall state the estimated date of use.

(c) If the defendant objects to the taking, the defendant has the burden of proof that there is no reasonable probability that the date of use will be within 10 years from the date the complaint is filed. If the defendant proves that there is no reasonable probability that the date of use will be within 10 years from the date the complaint is filed, the plaintiff has the burden of proof that the taking satisfies the requirements of this article.

Legislative Committee Comment—Assembly

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.

Article 4. Substitute Condemnation

§ 1240.310. Definitions

1240.310. As used in this article:

(a) "Necessary property" means property to be used for a public

use for which the public entity is authorized to acquire property by eminent domain.

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

Law Revision Commission Comment

Comment. Section 1240.310 provides definitions useful in applying the "substitute condemnation" provisions contained in this chapter. Briefly stated, "substitute condemnation" involves the following type of situation: The potential condemnor determines that it needs certain property (the "necessary property") for its use. It agrees to compensate the owner of the necessary property in whole or in part by other property (the "substitute property") rather than money. It then condemns the "substitute property" and exchanges it for the "necessary property." See generally Note, *Substitute Condemnation*, 54 CAL. L. REV. 1097 (1966).

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

1240.320. (a) Any public entity authorized to exercise the power of eminent domain to acquire property for a particular use may exercise the power of eminent domain to acquire for that use substitute property if all of the following are established:

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

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

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

(b) Where property is sought to be acquired pursuant to this section, the resolution of necessity and the complaint filed pursuant to such resolution shall specifically refer to this section and shall include a statement that the property is necessary for the purpose specified in this section. The determination in the resolution that the taking of the substitute property is necessary has the effect prescribed in Section 1245.250.

Legislative Committee Comment—Assembly

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 GOV'T. CODE § 15858; former STS. & 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, 1099-1100 (1966).

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

§ 1240.330. Substitute condemnation to permit condemnor to relocate public use

1240.330. (a) Where necessary property is devoted to public use, any public entity authorized to exercise the power of eminent domain to acquire such property for a particular use may exercise the power of eminent domain to acquire substitute property in its own name, relocate on such substitute property the public use to which necessary property is devoted, and thereafter convey the substitute property to the owner of the necessary property if all of the following are established:

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

(2) The substitute property is necessary for compliance with the court order or judgment or agreement.

(3) The owner of the necessary property will devote the substitute property to the public use being displaced from the necessary property.

(b) Where property is sought to be acquired pursuant to this section, the resolution of necessity and the complaint filed pursuant

to such resolution shall specifically refer to this section and shall include a statement that the property is necessary for the purpose specified in this section. The determination in the resolution that the taking of the substitute property is necessary has the effect prescribed in Section 1245.250.

Law Revision Commission Comment

Comment. Section 1240.330 provides general authority for substitute condemnation where a public entity is required by a court order or judgment or by agreement to relocate a public use. It should be noted that condemnation of property devoted to public use may be accomplished only in certain circumstances and the relocation of improvements in an eminent domain proceeding may be ordered only upon express statutory authority. See, *e.g.*, Section 1240.530 (compatible use); PUB. UTIL. CODE § 7557; Orange County Water District Act, § 39 (Cal. Stats. 1933, Ch. 924); San Bernardino County Flood Control District Act, § 25 (Cal. Stats. 1939, Ch. 73); Ventura County Flood Control District Act, § 29 (Cal. Stats. 1944, 4th Ex. Sess., Ch. 44). Unlike Section 1240.320 (which applies where the owner of the necessary property is the one who will relocate the public use), Section 1240.330 applies where the public entity seeks to acquire substitute property in its own name so that it may itself relocate the public use and then convey the property as improved to the owner of the necessary property. 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 is necessary for the purposes of this section 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).

Section 1240.330 is derived from and supersedes numerous special provisions providing such authority to particular public entities. See, *e.g.*, Alameda County Flood Control and Water Conservation District Act, § 28 (Cal. Stats. 1949, Ch. 1275); Alpine County Water Agency Act, § 19 (Cal. Stats. 1961, Ch. 1896); Amador County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 2137); Contra Costa County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1951, Ch. 1617); Del Norte County Flood Control District Act, § 30 (Cal. Stats. 1955, Ch. 166); El Dorado County Water Agency Act, § 20 (Cal. Stats. 1959, Ch. 2139); Humboldt County Flood Control District Act, § 30 (Cal. Stats. 1945, Ch. 939); Kern County Water Agency Act, § 4.9 (Cal. Stats. 1961, Ch. 1003); Lake County Flood Control and

Water Conservation District Act (Cal. Stats. 1951, Ch. 1544), § 33 (added Cal. Stats. 1954, 1st Ex. Sess., Ch. 62, § 48); Madera County Flood Control and Water Conservation Agency Act, § 651 (Cal. Stats. 1969, Ch. 916); Marin County Flood Control and Water Conservation District Act, § 28 (Cal. Stats. 1953, Ch. 666); Mariposa County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 2036); Monterey County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1947, Ch. 699); Napa County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1951, Ch. 1449); Nevada County Water Agency Act, § 19 (Cal. Stats. 1959, Ch. 2122); Orange County Water District Act, § 39 (Cal. Stats. 1933, Ch. 924); Placer County Water Agency Act, § 4.9 (Cal. Stats. 1957, Ch. 1234); Riverside County Flood Control and Water Conservation District Act, § 35 (Cal. Stats. 1945, Ch. 1122); Sacramento County Water Agency Act, § 4.9 (Cal. Stats. 1952, 1st Ex. Sess., Ch. 10); San Benito County Water Conservation and Flood Control District Act, § 33 (Cal. Stats. 1953, Ch. 1598); San Bernardino County Flood Control District Act, § 25 (Cal. Stats. 1939, Ch. 73); San Diego Flood Control District Act, § 39 (Cal. Stats. 1966, 1st Ex. Sess., Ch. 55); San Joaquin County Flood Control and Water Conservation District Act, § 33 (Cal. Stats. 1956, 1st Ex. Sess., Ch. 46); San Luis Obispo County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1945, Ch. 1294); San Mateo County Flood Control District Act, § 31 (Cal. Stats. 1959, Ch. 2108); Santa Barbara County Flood Control and Water Conservation District Act, § 30 (Cal. Stats. 1955, Ch. 1057); Santa Barbara County Water Agency Act, § 4.9 (Cal. Stats. 1945, Ch. 1501); Santa Clara Valley Water District Act, § 29 (Cal. Stats. 1951, Ch. 1405); Shasta County Water Agency Act, § 58 (Cal. Stats. 1957, Ch. 1512); Solano County Flood Control and Water Conservation District Act, § 4.8 (Cal. Stats. 1951, Ch. 1656); Sutter County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 2088); Tulare County Flood Control District Act, § 32 (Cal. Stats. 1969, Ch. 1149); Tuolumne County Water Agency Act, § 20 (Cal. Stats. 1969, Ch. 1236); Ventura County Flood Control District Act, § 29 (Cal. Stats. 1944, 4th Ex. Sess., Ch. 44); Yuba-Bear River Basin Authority Act, § 19 (Cal. Stats. 1959, Ch. 2131); Yuba County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 788).

Public Utilities Code Section 861 grants the Public Utilities Commission jurisdiction in certain controversies that may arise under Section 1240.330 where the public entity is a special law water district.

It should be noted that property may be acquired for the purpose specified in Section 1240.330 by gift, purchase, or other means. See Section 1240.130.

§ 1240.340. [Reserved for expansion]

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

1240.350. (a) Whenever a public entity acquires property for a public use and exercises or could have exercised the power of eminent domain to acquire such property for such use, the public entity may exercise the power of eminent domain to acquire such additional property as appears reasonably necessary and appropriate (after taking into account any hardship to the owner of the additional property) to provide utility service to, or access to a public road from, any property that is not acquired for such public use but which is cut off from utility service or access to a public road as a result of the acquisition by the public entity.

(b) Where property is sought to be acquired pursuant to this section, the resolution of necessity and the complaint filed pursuant to such resolution shall specifically refer to this section and shall include a statement that the property is necessary for the purpose specified in this section. The determination in the resolution that the taking of the substitute property is necessary has the effect prescribed in Section 1245.250.

Legislative Committee Comment—Assembly

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 1263.450 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).

Article 5. Excess Condemnation

§ 1240.410. Condemnation of remnants

1240.410. (a) As used in this section, “remnant” means a remainder or portion thereof that will be left in such size, shape, or condition as to be of little market value.

(b) Whenever the acquisition by a public entity by eminent domain of part of a larger parcel of property will leave a remnant, the public entity may exercise the power of eminent domain to acquire the remnant in accordance with this article.

(c) Property may not be acquired under this section if the defendant proves that the public entity has a reasonable, practicable, and economically sound means to prevent the property from becoming a remnant.

Law Revision Commission Comment

Comment. Section 1240.410 states the test to be applied by the court in determining whether a remainder or portion thereof is a remnant that may be taken by eminent domain. With respect to physical remnants, see *Kern County High School Dist. v. McDonald*, 180 Cal. 7, 179 P. 180 (1919); *People v. Thomas*, 108 Cal. App.2d 832, 239 P.2d 914 (1952). As to the concept of “financial remnants,” see *Dep’t of Public Works v. Superior Court*, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

The test is essentially that stated in *Dep’t of Public Works v. Superior Court*, *supra*, except that the confusing concept of “excessive” damages is not used. The remainder or a portion thereof may be taken if it would be left in “such size, shape, or condition as to be of little market value.” The “of little market value” concept is a flexible one; whether the excess property may be taken is to be determined in light of the circumstances of the

particular case. Thus, the project may result in the excess property having relatively little market value in situations such as, for example, where (1) it will be totally “landlocked” and no physical solution will be practical, (2) it will be reduced below the minimum zoning limits for building purposes and it is not reasonably probable that there will be a zoning change, (3) it will be of significant value to only one or few persons (such as adjoining landowners), or (4) it will be landlocked and have primarily a speculative value dependent upon access being provided when adjacent land is developed and the time when the adjacent land will be developed is a matter of speculation. See, e.g., *Dep’t of Public Works v. Superior Court*, *supra*; *State v. Buck*, 94 N.J.S. 84, 226 A.2d 840 (1967). The test is the objective one of marketability and market value generally of the excess property. Compare Section 1240.150 (purchase of remnants). Cf. GOVT. CODE § 7267.7 (“If the acquisition of only a portion of a property would leave the remaining portion in such a shape or condition as to constitute an uneconomic remnant, the public entity shall offer to and may acquire the entire property if the owner so desires.”).

On the other hand, a usable and generally salable piece of property is neither a physical nor financial remnant even though its “highest and best use” has been downgraded by its severance or a serious controversy exists as to its best use and value after severance. See, e.g., *La Mesa v. Tweed & Gambrell Planing Mill*, 146 Cal. App.2d 762, 304 P.2d 803 (1956); *State Highway Comm’n v. Chapman*, 152 Mont. 79, 446 P.2d 709 (1968). Likewise, Section 1240.410 does not authorize a taking of excess property (1) to avoid the cost and inconvenience of litigating the issue of damages, (2) to preclude the payment of damages, including damages substantial in amount in appropriate cases, (3) to coerce the condemnee to accept whatever price the condemnor offers for the property actually needed for the public project, or (4) to afford the condemnor an opportunity to “recoup” damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public project. See *Dep’t of Public Works v. Superior Court*, *supra*.

A remnant may be a portion of a remainder where the taking affecting a parcel leaves more than one piece (e.g., the severance of a ranch by a highway so as to leave pieces on both sides of the highway). In certain cases, only one piece might be a remnant.

Subdivision (c) permits the condemnee to contest a taking under Section 1240.410 upon the ground that a “physical solution” could be provided by the condemnor as an alternative to either a total taking or a partial taking that would leave an

unusable or unmarketable remainder. The condemnee may be able to demonstrate that, given construction of the public improvement in the manner proposed, the public entity is able to provide substitute access or take other steps that would be equitable under the circumstances of the particular case. If he can do so, subdivision (c) prevents acquisition of the excess property. In most cases, some physical solution would be possible; but subdivision (c) requires that the solution also be “reasonable, practicable, and economically sound.” To be “economically sound,” the proposed solution must, at a minimum, reduce the overall cost to the condemnor of the taking. Thus, the total of the cost of the solution, the compensation paid for the part taken, and the damages to the remainder must be less than the amount that would be required to be paid if the entire parcel were taken. The court should, moreover, consider questions of maintenance, hardship to third persons, potential dangers, risk of tort liability, and similar matters in determining whether the solution is also “reasonable and practicable.” If the physical solution might interfere with or impair the public project, it would not be “reasonable.”

If the court determines that a taking is not permitted under Section 1240.410 because a physical solution is “reasonable, practicable, and economically sound,” the damages to the remainder must be computed taking into account the extent to which any physical solution that will be provided avoids or reduces such damages. See Section 1263.450 and the Comment thereto.

Section 1240.410 supersedes Section 1266 of the Code of Civil Procedure, Sections 100130.5 and 102241 of the Public Utilities Code, Sections 104.1 and 943.1 of the Streets and Highways Code, Sections 254, 8590.1, 11575.2, and 43533 of the Water Code, and various provisions of uncodified special district acts.

§ 1240.420. Resolution of necessity and complaint

1240.420. When property is sought to be acquired pursuant to Section 1240.410, the resolution of necessity and the complaint filed pursuant to such resolution shall specifically refer to that section. It shall be presumed from the adoption of the resolution that the taking of the property is authorized under Section 1240.410. This presumption is a presumption affecting the burden of producing evidence.

Law Revision Commission Comment

Comment. Section 1240.420 requires a specific reference in both the resolution and the complaint to the section that is the statutory basis for the proposed taking; it does not require either

the recitation or the pleading of the facts that may bring the case within the purview of the section. See *People v. Jarvis*, 274 Cal. App.2d 217, 79 Cal. Rptr. 175 (1969). A resolution that refers to Section 1240.410 gives rise to a presumption that the taking is authorized under that section. Thus, in the absence of a contest of that issue, Section 1240.420 permits a finding and judgment that the “excess” property may be taken. However, the presumption is specified to be one affecting the burden of producing evidence (see EVID. CODE §§ 603, 604) rather than one affecting the burden of proof (see EVID. CODE §§ 605, 606). Accordingly, the burden of proving the facts that bring the case within Section 1240.410 is on the plaintiff. See *People v. Van Gorden*, 226 Cal. App.2d 634, 38 Cal. Rptr. 265 (1964); *People v. O’Connell Bros.*, 204 Cal. App.2d 34, 21 Cal. Rptr. 890 (1962). In this respect, Section 1240.420 eliminates any greater effect that might be attributed to the resolution (compare *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959)) or that might be drawn from a legislative (see *County of Los Angeles v. Anthony*, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964)) or administrative (see *County of San Mateo v. Bartole*, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960)) determination or declaration as to “public use.” Compare former Section 1266.

As to the manner of raising the issue whether a taking is authorized under Section 1240.410, see Sections 1250.350 and 1250.360(f).

§ 1240.430. Disposal of acquired remnants

1240.430. A public entity may sell, lease, exchange, or otherwise dispose of property taken under this article and may credit the proceeds to the fund or funds available for acquisition of the property being acquired for the public work or improvement. Nothing in this section relieves a public entity from complying with any applicable statutory procedures governing the disposition of property.

Law Revision Commission Comment

Comment. Section 1240.430 authorizes the entity to dispose of property acquired under this article.

Article 6. Condemnation for Compatible Use

§ 1240.510. Property appropriated to public use may be taken for compatible public use

1240.510. Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to

public use if the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future. Where property is sought to be acquired pursuant to this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.

Law Revision Commission Comment

Comment. Section 1240.510 makes clear that the authority to condemn property includes the general authority to condemn for compatible joint use property already devoted to public use. See Section 1235.180 (“property appropriated to public use” defined). Section 1240.510 does not contemplate displacement of the existing use by the second use; rather it authorizes common enjoyment of the property where the second use does not unreasonably interfere with the existing use.

The authority granted by Section 1240.510 is independent of the authority contained in Article 7 (“more necessary public use”) and is not limited in any way by the rules set forth therein. Likewise, condemnation of property appropriated to a public use may be accomplished under Article 7 independent of any authority stated in Article 6. See Section 1240.160. It should be noted, however, that, where property is taken under more necessary use authority, the defendant may be entitled to continue joint use of the property. See Section 1240.630.

The requirement that the proposed use be compatible with the existing use continues prior law that permitted condemnation for consistent uses. See former CODE CIV. PROC. § 1240(3), (4), (6). The term “consistent” was necessarily imprecise because of the variety of circumstances it embraced. See, e.g., *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 152, 287 P. 496 (1930), *cert. denied*, 282 U.S. 863 (1930) (abundant water for use of both parties) (alternate holding); *Reclamation Dist. No. 551 v. Superior Court*, 151 Cal. 263, 90 P. 545 (1907) (railroad right of way sought on top of reclamation district levee); *City of Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604 (1891) (sewer line in highway right of way); *City of Los Angeles v. Los Angeles Pac. Co.*, 31 Cal. App. 100, 159 P. 992 (1916) (railway company’s electric transmission lines and subway on property taken for city park).

Section 1240.510 continues the basic principle of consistency by requiring that the proposed use not unreasonably interfere with or impair the continuance of the existing use or such future use as may reasonably be anticipated for the purpose for which the property is already appropriated. See *San Bernardino County*

Flood Control Dist. v. Superior Court, 269 Cal. App.2d 514, 75 Cal. Rptr. 24 (1969); *Reclamation Dist. No. 551 v. Superior Court*, *supra*. See generally 1 P. NICHOLS, EMINENT DOMAIN § 2.2[8], at 235–238 (3d ed. 1964). Section 1240.510 does not grant authority to displace or interfere substantially with a prior use; the power to displace an existing use is dealt with in Article 7 (commencing with Section 1240.610).

Section 1240.510 authorizes any condemnor able to satisfy the requirement that its proposed use will be compatible with the existing one to condemn the property of any person. Former law was uncertain. See *San Bernardino County Flood Control Dist. v. Superior Court*, 269 Cal. App.2d 514, 523–524 n.10, 75 Cal. Rptr. 24, 32 n.10 (1969). Subdivision 3 of former Code of Civil Procedure Section 1240 referred only to property “appropriated to a public use or purpose, by any person, firm or private corporation,” thereby implying that property appropriated to public use by a public entity could not be subjected to imposition of a consistent use. Subdivision 4 of former Section 1240 also dealt with joint use, but the subdivision was limited to property appropriated to public use by an irrigation district. However, subdivision 6 of former Section 1240 authorized the imposition of “rights of way” on property appropriated to public use with no limitation as to the person who had appropriated the property to public use. In view of the limited nature of the authority granted and the desirability of encouraging common use, Section 1240.510 adopts the latter approach and is applicable to all condemnors and all condemnees.

It should be noted that Section 1240.510 has no effect on the respective rights of the owner of the underlying fee and any easement holders to compensation for the additional burdens imposed by a condemnor exercising the authority granted by this section. In such a situation, if the plaintiff does not make the owner of the underlying fee or easement holder a party to the eminent domain proceeding, the owner or easement holder may either appear as a defendant in the eminent domain proceeding or bring a separate inverse action. See Section 1250.230 (appearance as defendant in eminent domain proceeding) and *People v. Schultz Co.*, 123 Cal. App.2d 925, 268 P.2d 117 (1954) (possibility of subsequent action).

Section 1240.510 requires the plaintiff to refer specifically to this section in its complaint where it seeks to exercise the authority granted here. If the plaintiff is a public entity, it also must refer to this section in its resolution of necessity.

In certain situations, a plaintiff may be uncertain of its authority to condemn under Article 7 and may, therefore,

proceed under both that article and Section 1240.510. Such inconsistent allegations are proper. See Section 1250.310 and Comment thereto.

The authority granted by Section 1240.510 does not permit condemnation of property made exempt from condemnation by statute. See Section 1240.110 and Comment thereto.

§ 1240.520. Burden of proof

1240.520. If the defendant objects to a taking under Section 1240.510, the defendant has the burden of proof that his property is appropriated to public use. If it is established that the property is appropriated to public use, the plaintiff has the burden of proof that its proposed use satisfies the requirements of Section 1240.510.

Law Revision Commission Comment

Comment. Section 1240.520 states the rules governing the burden of proof where the defendant objects to a taking for compatible use. As to the manner of raising the objection that a taking is not authorized under Section 1240.510 because the proposed use will be incompatible with the public use to which the property is appropriated, see Sections 1250.350 and 1250.360(f). If the taking is contested, the court must first determine whether the property is in fact already appropriated to a public use, and the defendant bears the burden of proof on this issue. *Cf. City of Los Angeles v. Los Angeles Pac. Co.*, 31 Cal. App. 100, 159 P. 992 (1916). Where this fact is established, the plaintiff must then show that the taking is authorized under this article.

§ 1240.530. Terms and conditions of joint use

1240.530. (a) Where property is taken under Section 1240.510, the parties shall make an agreement determining the terms and conditions upon which the property is taken and the manner and extent of its use by each of the parties. Except as otherwise provided by statute, if the parties are unable to agree, the court shall fix the terms and conditions upon which the property is taken and the manner and extent of its use by each of the parties.

(b) If the court determines that the use in the manner proposed by the plaintiff would not satisfy the requirements of Section 1240.510, the court shall further determine whether the requirements of Section 1240.510 could be satisfied by fixing terms and conditions upon which the property may be taken. If the court determines that the requirements of Section 1240.510 could be so satisfied, the court shall permit the plaintiff to take the property upon such terms and conditions and shall prescribe the manner and extent of its use by each of the parties.

(c) Where property is taken under this article, the court may order any necessary removal or relocation of structures or improvements if such removal or relocation would not require any significant alteration of the use to which the property is appropriated. Unless otherwise provided by statute, all costs and damages that result from the relocation or removal shall be paid by the plaintiff.

Law Revision Commission Comment

Comment. Subdivision (a) of Section 1240.530 requires that, in granting the plaintiff the right to use property appropriated to public use, the court may regulate the manner in which the proposed and prior uses will be enjoyed. This continues the substance of portions of former Code of Civil Procedure Sections 1240(3), 1247(1), 1247a.

The introductory clause of the second sentence of subdivision (a) recognizes that exceptions to its provisions may be found in other statutes. *E.g.*, the Public Utilities Commission has exclusive jurisdiction to determine and regulate crossings involving railroads (PUB. UTIL. CODE §§ 1201 and 1202), and issues involving street and highway crossings may not be subject to judicial review. (*Cf.* STS. & HWYS. CODE § 100.2.)

If the parties agree as to the terms and conditions upon which the property is taken and the manner and extent of its use by each of the parties, the agreement avoids the need for the court to act under subdivisions (a) and (b).

The terms and conditions referred to in subdivision (a) would include a provision specifying how any liability arising out of the compatible use is to be borne.

Subdivision (b) requires that, before a court refuses to allow a taking for joint use because the taking does not satisfy the requirements of Section 1240.510, the court must determine whether terms and conditions could be imposed on the proposed taking so that it would satisfy the requirements of Section 1240.510. If the court refuses to approve the joint use as proposed because of a particular feature of the joint use, the court must specify in what respect the joint use as proposed fails to satisfy the requirements of Section 1240.510 and, where possible, specify the modifications in the use as proposed that are necessary in order to satisfy the requirements of Section 1240.510. Under prior law, decisions could be found which implied that the court could not review the proposed joint use or indicate what changes would be required in the proposed joint use so that the taking would be permitted. *E.g.*, *San Bernardino County Flood Control Dist. v. Superior Court*, 269 Cal. App.2d 514, 75 Cal. Rptr. 24 (1969).

Under subdivision (c), the court may require any necessary removal or relocation of structures or improvements if such removal or relocation would not require any significant alteration of the existing use. A similar provision was found in former Code of Civil Procedure Sections 1240(3) and 1247a. See *County of Marin v. Superior Court*, 53 Cal.2d 633, 349 P.2d 526, 2 Cal. Rptr. 758 (1960). Subdivision (c) provides that the plaintiff will normally bear the cost of such relocation although, in some cases, specific statutory provisions may allocate all or part of such cost otherwise. For a listing and discussion of statutes dealing with the cost of relocation of facilities of franchise holders, see *A Study Relating to Sovereign Immunity*, 5 CAL. L. REVISION COMM'N REPORTS 1, 186-190 (1963); *California Inverse Condemnation Law*, 10 CAL. L. REVISION COMM'N REPORTS 1, 353-358 (1971). See also Note, *Cost Allocation in Public Utility Relocation in California*, 23 HASTINGS L.J. 848 (1972).

Article 7. Condemnation for More Necessary Public Use

§ 1240.610. Property appropriated to public use may be taken for more necessary public use

1240.610. Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated. Where property is sought to be acquired pursuant to this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.

Law Revision Commission Comment

Comment. Section 1240.610 permits a plaintiff to exercise the power of eminent domain to displace an existing public use. (For the definition of "property appropriated to public use," see Section 1235.180.) The plaintiff may do so only if the proposed use is "more necessary" than the existing use. It should be noted, however, that the defendant may be permitted to continue joint use of the property under authority granted in Section 1240.630.

The authority to take property appropriated to public use for a more necessary use continues prior law. See former Code of Civil Procedure Sections 1240(3), (5) and 1241(3) and numerous repetitions of the rule in other provisions. The authority to take property for a "more necessary" public use makes unnecessary the authority formerly granted to a number of condemnors to

take property “whether the property is already devoted to the same use or otherwise.” See, *e.g.*, HARB. & NAV. CODE § 6296; PUB. RES. CODE § 5542; PUB. UTIL. CODE § 16404; STS. & HWYS. CODE § 27166; WATER CODE § 71693. The meaning of “more necessary public use” is given greater specificity in the succeeding sections in this article as well as numerous provisions in other codes. See, *e.g.*, STS. & HWYS. CODE §§ 30402 (use by Toll Bridge Authority a more necessary use than any other use except railroad uses), 31001 (use by Folsom Lake Bridge Authority a more necessary use than any other use), 31201 (use by El Dorado County Toll Tunnel Authority a more necessary use than any other use).

Prior law apparently required a plaintiff seeking to condemn property already appropriated to a public use to allege facts showing that its proposed use was a more necessary public use than that to which the property was already appropriated. See *Woodland School Dist. v. Woodland Cemetery Ass'n*, 174 Cal. App.2d 243, 344 P.2d 326 (1959). Section 1240.610 eliminates this pleading requirement, but Section 1240.620 continues the rule that the condemnor has the burden of proving that the proposed use is a more necessary public use.

The authority granted by Section 1240.610 does not permit condemnation of property made exempt from condemnation by statute. See Section 1240.110 and Comment thereto.

§ 1240.620. Burden of proof

1240.620. If the defendant objects to a taking under Section 1240.610, the defendant has the burden of proof that his property is appropriated to public use. If it is established that the property is appropriated to public use, the plaintiff has the burden of proof that its use satisfies the requirements of Section 1240.610.

Law Revision Commission Comment

Comment. Section 1240.620 states the rules governing the burden of proof where the defendant objects to a taking for a more necessary public use. As to the manner of raising the objection that a taking is not authorized under Section 1240.610 because the proposed use is not more necessary than the public use to which the property is appropriated, see Sections 1250.350 and 1250.360(f). If the taking is contested, the court must first determine whether the property is in fact already appropriated to public use, the defendant bearing the burden of proof on this issue. *Cf. City of Los Angeles v. Los Angeles Pac. Co.*, 31 Cal. App. 100, 159 P. 992 (1916). Where this fact is proved or otherwise established, the plaintiff must then show that its use is a more necessary public use than the existing use.

§ 1240.630. Right of prior user to joint use

1240.630. (a) Where property is sought to be taken under Section 1240.610, the defendant is entitled to continue the public use to which the property is appropriated if the continuance of such use will not unreasonably interfere with or impair, or require a significant alteration of, the more necessary public use as it is then planned or exists or may reasonably be expected to exist in the future.

(b) If the defendant objects to a taking under this article on the ground that he is entitled under subdivision (a) to continue the public use to which the property is appropriated, upon motion of either party, the court shall determine whether the defendant is entitled under subdivision (a) to continue the use to which the property is appropriated; and, if the court determines that the defendant is so entitled, the parties shall make an agreement determining the terms and conditions upon which the defendant may continue the public use to which the property is appropriated, the terms and conditions upon which the property taken by the plaintiff is acquired, and the manner and extent of the use of the property by each of the parties. Except as otherwise provided by statute, if the parties are unable to agree, the court shall fix such terms and conditions and the manner and extent of the use of the property by each of the parties.

Law Revision Commission Comment

Comment. Section 1240.630 provides a right new to California law; where property appropriated to public use is taken for a more necessary public use, the prior user may continue his use jointly with the more necessary use if the continuance will not unreasonably interfere with or impair, or require a significant alteration of, the more necessary use.

Subdivision (a). The test for whether the defendant may continue to jointly use the property is comparable to that defining compatible uses. *Cf.* Sections 1240.510 and 1240.530 and Comments thereto.

Subdivision (b). In order to have a determination of the right to joint use under subdivision (a), the defendant must raise the issue. As to the manner of raising the issue, see Sections 1250.350 and 1250.360(g).

If the defendant objects to the taking on the ground that he is entitled under subdivision (a) to continue the prior use as a joint use, the court must determine whether the defendant is entitled to continue use of the property and must consider possible alterations that would enable joint use and, at the same time, not require significant alteration of the more necessary use or unreasonably impair or interfere with it.

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

1240.640. (a) Where property has been appropriated to public use by any person other than the state, the use thereof by the state for the same use or any other public use is presumed to be a more necessary use than the use to which such property has already been appropriated.

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

(c) The presumptions established by this section are presumptions affecting the burden of proof.

Legislative Committee Comment—Senate

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, *c.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.

§ 1240.650. Use by public entity more necessary than use by other persons

1240.650. (a) Where property has been appropriated to public use by any person other than a public entity, the use thereof by a public entity for the same use or any other public use is a more necessary use than the use to which such property has already been appropriated.

(b) Where property has been appropriated to public use by a public entity, the use thereof by the public entity is a more necessary

use than any use to which such property might be put by any person other than a public entity.

Law Revision Commission Comment

Comment. Section 1240.650 is similar in substance to former Code of Civil Procedure Section 1240(3) except that Section 1240.650 embraces all public entities. Thus, for example, Section 1240.650 includes school districts which formerly were not included.

The preference under Section 1240.650 is not merely one of public ownership over private ownership for the same use but includes any use. Thus, for example, a public entity may condemn the easement of a privately owned public utility not merely to perpetuate the utility use in public ownership but also to provide some separate and distinct use. Specific exceptions to the rule of public supremacy may be legislatively declared elsewhere.

Property appropriated to public use by a public entity may always be taken for common use by any other person where compatible pursuant to Section 1240.510 *et seq.*

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

1240.660. Where property has been appropriated to public use by a local public entity, the use thereof by the local public entity is presumed to be a more necessary use than any use to which such property might be put by any other local public entity. The presumption established by this section is a presumption affecting the burden of proof.

Legislative Committee Comment—Senate

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, *c.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 Court*, 53 Cal.2d 633, 349 P.2d 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.

§ 1240.670. Property preserved in its natural condition by nonprofit organization

1240.670. (a) Subject to Section 1240.690, notwithstanding any other provision of law, property is presumed to have been appropriated for the best and most necessary public use if all of the following are established:

(1) The property is owned by a nonprofit organization contributions to which are deductible for state and federal income tax purposes under the laws of this state and of the United States and having the primary purpose of preserving areas in their natural condition.

(2) The property is open to the public subject to reasonable restrictions and is appropriated, and used exclusively, for the preservation of native plants or native animals including, but not limited to, mammals, birds, and marine life, or biotic communities, or geological or geographical formations of scientific or educational interest.

(3) The property is irrevocably dedicated to such uses so that, upon liquidation, dissolution, or abandonment of or by the owner, such property will be distributed only to a fund, foundation, or corporation whose property is likewise irrevocably dedicated to such uses, or to a governmental agency holding land for such uses.

(b) The presumption established by this section is a presumption affecting the burden of proof.

Law Revision Commission Comment

Comment. Section 1240.670 continues without substantive change the provisions of subdivision (a) of former Section 1241.9 of the Code of Civil Procedure. For special procedural limitations where the property described is sought to be taken for state highway purposes, see Section 1240.690.

§ 1240.680. Property appropriated to park or similar uses

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 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.

Law Revision Commission Comment

Comment. Section 1240.680 continues without substantive change the provisions of subdivision (a) of former Section 1241.7 of the Code of Civil Procedure and subdivision (a) of former Section 5542.5 of the Public Resources Code. The portion of Section 5542.5(a) which described the property (“whether owned in fee or lesser title interest, leased, or operated under a license, management agreement, or otherwise”) has been omitted in view of the broad definition of “property” in Section 1235.170. See also Section 1235.180 (defining “property appropriated to public use”).

For special procedural limitations where the property described is sought to be taken for state highway purposes, see Section 1240.690. For special procedural limitations where the property described is sought to be taken for city or county road, street, or highway purposes, see Section 1240.700.

§ 1240.690. Declaratory relief where acquisition for state highway purposes

1240.690. (a) When property described in Section 1240.670 or Section 1240.680 is sought to be acquired for state highway purposes,

and such property was dedicated or devoted to a use described in those sections prior to the initiation of highway route location studies, an action for declaratory relief may be brought by the public entity or nonprofit organization owning such property in the superior court 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 California Highway Commission has published in a newspaper of general circulation pursuant to Section 6061 of the Government Code, and delivered to the public entity or nonprofit organization owning such property, a written notice that a proposed route or an adopted route includes such property. In the case of nonprofit organizations, the written notice need only be given to nonprofit organizations that are on file with the Registrar of Charitable Trusts of this state.

(c) In the declaratory relief action, the resolution of the California Highway Commission is not conclusive evidence of the matters set forth in Section 1240.030.

(d) With respect to property described in Section 1240.670 or Section 1240.680 which is sought to be acquired for state 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 Sections 1240.670 and 1240.680 do not apply.

(2) When a declaratory relief action may not be brought pursuant to this section, the provisions of Sections 1240.670 and 1240.680 do not apply.

Law Revision Commission Comment

Comment. Section 1240.690 continues without substantive change the provisions of subdivision (b) of former Sections 1241.7 and 1241.9 of the Code of Civil Procedure except for portions that have been omitted as unnecessary. The portion of subdivision (b) that related to trial preference duplicates Code of Civil Procedure Section 1062a (trial preference for declaratory relief actions generally). The portions of former Section 1241.7 relating to takings for public utility purposes are unnecessary because use by a public entity is more necessary than use by a public utility. See Section 1240.650.

§ 1240.700. Declaratory relief where regional park to be acquired for city or county street purposes

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 or recreational 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 or recreational 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 or recreational 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.

Law Revision Commission Comment

Comment. Section 1240.700 continues without substantive change the provisions of subdivision (b) of former Section 5542.5 of the Public Resources Code except that the portion of Section 5542.5 relating to trial preference has been omitted as unnecessary. See CODE CIV. PROC. § 1062a (trial preference for declaratory relief actions generally).

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 photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.

Law Revision Commission Comment

Comment. Section 1245.010 continues without substantive change the provisions of subdivision (b) of former Section 1242.

No time limitation upon entry is prescribed. Although appraisal and suitability studies generally precede the commencement of the eminent domain proceeding, Section 1245.010 does not preclude such studies after the proceeding to acquire the property has been commenced.

§ 1245.020. Consent or court order required in certain cases

1245.020. 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 1245.060, 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 1245.030.

Law Revision Commission Comment

Comment. Section 1245.020 continues without substantive change the provisions of subdivision (a) of former Section 1242.5.

Section 1245.020 requires a person desiring to make an entry upon property to secure either the permission of the landowner or an order of the court before making an entry that would subject it to liability under subdivision (a) of Section 1245.060. In many cases, the entry and activities upon the property will involve no more than trivial injuries to the property and inconsequential interference with the owner's possession and use. In such cases, neither the owner's permission nor the court order is required. See Comment to Section 1245.060. However, where there will be compensable damage, Section 1245.020 applies.

§ 1245.030. Court order permitting entry; deposit of probable compensation

1245.030. (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.

Law Revision Commission Comment

Comment. Section 1245.030 continues without substantive change the provisions of subdivision (b) of former Section 1242.5.

Under Section 1245.030, the court should examine the purpose of the entry and determine the nature and scope of the activities reasonably necessary to accomplish the purpose. Its order should provide suitable limitations by way of time, area, and type of activity to strike the best possible balance between the needs of the condemnor and the interests of the property owner. The order also must require the condemnor to deposit an amount sufficient to reimburse the owner for the probable damage to his property and interference with its use.

§ 1245.040. Modification of order

1245.040. (a) The court, after notice and hearing, may modify any of the provisions of an order made under Section 1245.030.

(b) If the amount required to be deposited is increased by an order of modification, the court shall specify the time within which the additional amount shall be deposited and may direct that any further entry or that specified activities under the order as modified be stayed until the additional amount has been deposited.

Law Revision Commission Comment

Comment. Section 1245.040 is derived from Section 304 of the Uniform Eminent Domain Code.

If it appears after an order has been made that the activities must either be extended to accomplish the purpose or curtailed to prevent unwarranted damage or interference, or that greater

or lesser damage to the property will occur, the owner or the condemnor may apply to the court for a redetermination and appropriate changes in the previous order.

To insure the effectiveness of the deposit requirement, a stay of proceedings may be imposed until the additional amount is deposited. The stay, however, is not automatic but is discretionary with the court in light of the circumstances. For example, if the condemnor is solvent, or if the probable damages up to the date for the additional deposit are covered by the amount of the original deposit, or if crews and equipment on the property pursuant to the original order would have to be withdrawn under a stay order, a stay might not be appropriate.

In some circumstances, a modification order may properly decrease the amount of the required deposit; in such an event, the court (pursuant to subdivision (a) of Section 1245.050) can order that the excess be disbursed at once to the person who made the deposit.

Subdivision (a) of Section 1245.040 continues the substance of subdivision (c) of former Section 1242.5. Subdivision (b) of Section 1245.040 is new to California.

§ 1245.050. Management of amount deposited

1245.050. (a) Unless sooner disbursed by court order, the amount deposited under this article shall be retained on deposit for six months following the termination of the entry. The period of retention may be extended by the court for good cause.

(b) The deposit shall be made in the Condemnation Deposits Fund in the State Treasury or, upon written request of the plaintiff filed with the deposit, in the county treasury. If made in the State Treasury, the deposit shall be held, invested, deposited, and disbursed in accordance with Article 10 (commencing with Section 16429) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code.

Law Revision Commission Comment

Comment. Section 1245.050 continues the substance of subdivision (d) of former Section 1242.5. Unlike the former provision, Section 1245.050 provides that the period of retention may be extended by the court for good cause.

§ 1245.060. Recovery of damages and litigation expenses

1245.060. (a) If the entry and activities upon property cause actual damage to or substantial interference with the possession or use of the property, whether or not a claim has been presented in compliance with Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code, the owner may recover for

such damage or interference in a civil action or by application to the court under subdivision (c).

(b) The prevailing claimant in an action or proceeding under this section shall be awarded his costs and, if the court finds that any of the following occurred, his litigation expenses incurred in proceedings under this article:

(1) The entry was unlawful.

(2) The entry was lawful but the activities upon the property were abusive or lacking in due regard for the interests of the owner.

(3) There was a failure substantially to comply with the terms of an order made under Section 1245.030 or 1245.040.

(c) If funds are on deposit under this article, upon application of the owner, the court shall determine and award the amount the owner is entitled to recover under this section and shall order such amount paid out of the funds on deposit. If the funds on deposit are insufficient to pay the full amount of the award, the court shall enter judgment for the unpaid portion.

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

Law Revision Commission Comment

Comment. Section 1245.060 is derived from Section 305 of the Uniform Eminent Domain Code.

Subdivision (a) provides the substantive basis for the condemnor's liability for damages arising out of an entry to make suitability studies. Damages provided by this subdivision do not depend upon the issuance of a court order; there may also be liability for a lawful entry made without judicial assistance under Section 1245.010 as well as for an unlawful entry. No claim need be filed against the state or a local public entity under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code. *Cf.* CODE CIV. PROC. § 426.70.

The terms "actual damages" and "substantial interference" under subdivision (a) require a common sense interpretation. See, e.g., *Onorato Bros. v. Massachusetts Turnpike Authority*, 336 Mass. 54, 142 N.E.2d 389 (1957); *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So.2d 546 (1962). The term "actual damages," for example, is intended to preclude recovery of merely nominal or "constructive" damages not based on physical injury to property. Similarly, the term "substantial interference" excludes liability for minimal annoyance or interference that does not seriously impinge upon or impair possession and use of the property. See *Jacobsen v. Superior Court*, 192 Cal. 319, 219 P. 986 (1923). The standard of liability stated in subdivision (a) continues the substance of subdivisions (c) and (d) of former Code of Civil Procedure Section 1242 and of former Government Code Section 816.

It is important to note that, if an eminent domain proceeding eventually is filed to take the property, or a portion of it, a defendant in the eminent domain proceeding may recover only by a cross-complaint in the eminent domain proceeding. See CODE CIV. PROC. § 426.70 and Comment thereto.

Subdivision (b) requires the court to award costs to the prevailing claimant in an action or proceeding for damages under this section. In addition, this subdivision requires an award of litigation expenses incurred in the proceedings under this article if the condemnor entered unlawfully, abused the right of lawful entry, or violated the terms of an order permitting entry. The prospect of such an award is an inducement to condemnors to adhere to the requirements of this article. "Litigation expenses" is defined in Section 1235.140 to include not only a reasonable attorney's fee but also any appraisal and engineering fees necessarily incurred by the claimant. Under subdivision (e) of former Section 1242.5, reasonable attorney's fees—but not other litigation expenses—were required to be awarded in any case where the owner recovered judgment.

Subdivision (c) provides a simple and expeditious method, in lieu of a civil action, for adjudication of a claim for damages and expenses where a deposit has been made and the funds deposited have not been disbursed. Similar provision was made in subdivision (e) of former Section 1242.5.

Subdivision (d), which is not included in the Uniform Code section, continues the last sentence of former Section 1242.5.

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 legislative 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 Fish and Game pursuant to Section 1348 of the Fish and Game Code, the Wildlife Conservation Board.
- (e) In the case of a taking by the Department of Transportation (other than a taking pursuant to Section 21633 of the Public Utilities Code or Section 30100 of the Streets and Highways Code), the California Highway Commission.

(f) In the case of a taking by the Department of Transportation pursuant to Section 21633 of the Public Utilities Code, the California Aeronautics Board.

(g) 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.

(h) In the case of a taking by the Department of Water Resources, the California Water Commission.

(i) In the case of a taking for the University of California, the Regents of the University of California.

(j) In the case of a taking by the State Lands Commission, the State Lands Commission.

(k) In the case of a taking by Hasting's College of Law, the board of directors of that college.

Legislative Committee Comment—Assembly

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. 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 (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

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.

Legislative Committee Comment—Senate

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).

§ 1245.230. Contents of resolution

1245.230. In addition to other requirements imposed by law, the resolution of necessity shall contain all of the following:

(a) A general statement of the public use for which the property is to be taken and a reference to the statute that authorizes the public entity to acquire the property by eminent domain.

(b) A description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification.

(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.

Law Revision Commission Comment

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 statement of the public use. A statement, for example, that the public use is an “elementary school and grounds” or “right of way for a freeway” or “open space to be maintained in its natural condition” would satisfy this requirement.

The resolution also must make reference to the statute authorizing the acquisition of the property by eminent domain. 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 condemner 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 to be taken. The description must be sufficiently precise to enable the owner to determine the physical extent of the taking and the interest sought. See Sections 1235.170 (defining “property”) and 1235.125 (defining “interest” in property).

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.

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

1245.235. (a) The governing body of the public entity may adopt a resolution of necessity only after the governing body has given each person whose property is to be acquired by eminent domain and whose name and address appears on the last equalized county assessment roll notice and a reasonable opportunity to appear and be heard on the matters referred to in Section 1240.030.

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

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

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

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

(c) The governing body shall hold a hearing at which all persons described in subdivision (a) who filed a written request within 15 days after the notice prescribed in subdivision (b) was mailed may appear and be heard on the matters referred to in Section 1240.030. The governing body need not give an opportunity to appear and be heard to any person who fails to so file a written request.

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

Legislative Committee Comment—Senate

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 and addresses 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.

§ 1245.240. Adoption of resolution

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

Legislative Committee Comment—Assembly

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

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

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

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

Legislative Committee Comment—Senate

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

1245.255. A resolution of necessity does not have the effect prescribed in Section 1245.250 to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body. Nothing in this section precludes a public entity from rescinding a resolution of necessity and adopting a new resolution as to the same property subject to the same consequences as a conditional dismissal of the proceeding under Section 1260.120.

Legislative Committee Comment—Senate

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).

§ 1245.260. Remedies if eminent domain proceeding not commenced within six months from adoption of resolution

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

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

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

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

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

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

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

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

Law Revision Commission Comment

Comment. Section 1245.260 continues the substance of former Section 1243.1 but makes a number of clarifying changes:

(1) Subdivision (a) of Section 1245.260 makes clear that the owner of the property may bring an inverse condemnation action seeking the various types of relief specified. In addition, subdivision (f) provides for relief by way of a writ of mandate as an alternative to bringing an inverse condemnation action. Former Section 1243.1 was unclear as to the nature of the relief that might be obtained in an inverse condemnation action and did not contain any provision relating to relief by way of a writ of mandate.

(2) Subdivision (b) eliminates the claims presentation requirement and specifies a statute of limitations that is comparable to the time within which a claim would have had to be presented to the public entity, assuming that the cause of action accrued upon the expiration of six months from the adoption of the resolution of necessity. See GOVT. CODE §§ 901 (date of accrual of cause of action), 911.2 (time for presentation of claims). Under former Section 1243.1, it was not clear whether a claim was required to be presented to the public entity.

It should be noted that the statute of limitations provided in subdivision (b) applies only to commencement of an inverse condemnation action under subdivision (a). The provision for a writ of mandate in subdivision (f) remains operative despite the expiration of the limitations period.

(3) Subdivision (c) makes clear that the public entity can commence an eminent domain proceeding or rescind the resolution of necessity at any time prior to the commencement

of the action and thereby avoid liability under subdivision (a). This provision does not, however, affect the owner's right to bring an inverse condemnation action based on Article I, Section 19, of the California Constitution. See *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). Former Section 1243.1 was silent on the consequences of the public entity's commencing an eminent domain proceeding or rescinding the resolution.

(4) Subdivision (d) makes clear that the public entity may rescind the resolution and abandon the taking after commencement of an action under this section only under the circumstances and subject to the same conditions and consequences as abandonment of an eminent domain proceeding. For the circumstances under which a plaintiff may abandon, see Section 1268.510. For conditions and consequences of abandonment, see also Sections 1268.610 and 1268.620. Former Section 1243.1 did not deal with these matters.

§ 1245.270. Resolution procured by bribery

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

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

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

(b) Where there has been a prior criminal prosecution of the member for the conduct described in paragraph (1) of subdivision (a), proof of conviction shall be conclusive evidence that the requirement of paragraph (1) of subdivision (a) is satisfied, and proof of acquittal or other dismissal of the prosecution shall be conclusive evidence that the requirement of paragraph (1) of subdivision (a) is not satisfied. Where there is a pending criminal prosecution of the member for the conduct described in paragraph (1) of subdivision (a), the court may take such action as is just under the circumstances of the case.

(c) Nothing in this section precludes a public entity from rescinding a resolution of necessity and adopting a new resolution as to the same property, subject to the same consequences as a conditional dismissal of the proceeding under Section 1260.120.

Legislative Committee Comment—Senate

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.

Article 3. Resolution Consenting to Eminent Domain Proceeding by Quasi-Public Entity

§ 1245.310. “Legislative body” defined

1245.310. As used in this article, “legislative body” means both of the following:

(a) The legislative body of each city within whose boundaries property sought to be taken by the quasi-public entity by eminent domain is located.

(b) If property sought to be taken by the quasi-public entity is not located within city boundaries, the legislative body of each county within whose boundaries such property is located.

Legislative Committee Comment—Senate

Comment. See Comment to Section 1245.330.

§ 1245.320. “Quasi-public entity” defined

1245.320. As used in this article, “quasi-public entity” means:

(a) An educational institution of collegiate grade not conducted for profit that seeks to take property by eminent domain under Section 30051 of the Education Code.

(b) A nonprofit hospital that seeks to take property by eminent domain under Section 1260 of the Health and Safety Code.

(c) A cemetery authority that seeks to take property by eminent domain under Section 8501 of the Health and Safety Code.

(d) A limited-dividend housing corporation that seeks to take property by eminent domain under Section 34874 of the Health and Safety Code.

(e) A land-chest corporation that seeks to take property by eminent domain under Section 35167 of the Health and Safety Code.

(f) A mutual water company that seeks to take property by eminent domain under Section 2729 of the Public Utilities Code.

Legislative Committee Comment—Senate

Comment. See Comment to Section 1245.330.

§ 1245.330. Resolution required

1245.330. Notwithstanding any other provision of law, a quasi-public entity may not commence an eminent domain proceeding to acquire any property until the legislative body has adopted a resolution consenting to the acquisition of such property by eminent domain.

Legislative Committee Comment—Senate

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 Code Civ. Proc. § 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(e)(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

1245.340. The resolution required by this article shall contain all of the following:

(a) A general statement of the public use for which the property is to be taken and a reference to the statute that authorizes the quasi-public entity to acquire the property by eminent domain.

(b) A description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification.

(c) A declaration that the legislative body 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 good and least private injury.

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

(4) The hardship to the quasi-public entity if the acquisition of the property by eminent domain is not permitted outweighs any hardship to the owners of such property.

Legislative Committee Comment—Senate

Comment. See Comment to Section 1245.330.

§ 1245.350. Hearing on resolution

1245.350. (a) The legislative body may refuse to consent to the acquisition with or without a hearing, but it may adopt the resolution required by this article only after the legislative body has held a hearing at which persons whose property is to be acquired by eminent domain have had a reasonable opportunity to appear and be heard.

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

Legislative Committee Comment—Senate

Comment. See Comment to Section 1245.330.

§ 1245.360. Vote required

1245.360. The resolution required by this article shall be adopted by a vote of two-thirds of all the members of the legislative body.

Legislative Committee Comment—Senate

Comment. See Comment to Section 1245.330.

§ 1245.370. Costs of legislative body

1245.370. The legislative body may require that the quasi-public entity pay all of the costs reasonably incurred by the legislative body under this article. The legislative body may require that such costs be secured by payment or deposit or other satisfactory security in advance of any action by the legislative body under this article.

Legislative Committee Comment—Senate

Comment. See Comment to Section 1245.330.

§ 1245.380. Other requirements not affected

1245.380. The requirement of this article is in addition to any other requirements imposed by law. Nothing in this article relieves the quasi-public entity from satisfying the requirements of Section 1240.030 or any other requirements imposed by law.

Legislative Committee Comment—Senate

Comment. See Comment to Section 1245.330.

§ 1245.390. Legislative body not liable

1245.390. The adoption of a resolution pursuant to this article does not make the city or county liable for any damages caused by the acquisition of the property or by the project for which it is acquired.

Legislative Committee Comment—Senate

Comment. See Comment to Section 1245.330.

CHAPTER 5. COMMENCEMENT OF PROCEEDING

Article 1. Jurisdiction and Venue

§ 1250.010. Jurisdiction in superior court

1250.010. Except as otherwise provided in Section 1230.060 and in Chapter 12 (commencing with Section 1273.010), all eminent domain proceedings shall be commenced and prosecuted in the superior court.

Law Revision Commission Comment

Comment. Section 1250.010 declares the basic rule that eminent domain proceedings are to be conducted in the superior court. This declaration continues prior law. See former Section 1243. For demurrer based on lack of jurisdiction, see Section 430.10.

However, the jurisdiction of the superior court is not exclusive. The issue of just compensation may be submitted to arbitration. See Chapter 12. Moreover, Section 1230.060 preserves such jurisdiction as the Public Utilities Commission may have over issues in eminent domain proceedings. See Section 1230.060 and Comment thereto.

§ 1250.020. Place of commencement

1250.020. (a) Except as provided in subdivision (b), the proceeding shall be commenced in the county in which the property sought to be taken is located.

(b) When property sought to be taken is situated in more than one county, the plaintiff may commence the proceeding in any one of such counties.

Law Revision Commission Comment

Comment. Section 1250.020 specifies where an eminent domain proceeding must be brought. Failure to bring the proceeding in the proper county is a failure to vest the necessary jurisdiction in the court. For provisions authorizing transfer of the proceedings for trial, see Section 1250.040. For demurrer on ground of lack of jurisdiction, see Section 430.10. See also Section 1250.345 (waiver of objections to complaint).

Section 1250.020 does not authorize a condemnor to condemn property beyond its territorial limits. *Cf.* Section 1240.050 and Comment thereto. For authority to separate property in a complaint for trial, see Section 1048.

Section 1250.020 recodifies the substance of the venue provisions of former Section 1243.

Subdivision (a). Generally speaking, the only place an eminent domain proceeding may be brought is the county in which the property sought to be acquired lies.

Subdivision (b). Where property straddles a county line, the plaintiff has the option to bring suit on either side of the line, and the county so chosen is the proper place of trial for all the property even though a portion is not located in the county. See Section 1250.030. Under former law, where property situated in more than one county was sought to be acquired, the plaintiff could elect to bring separate proceedings relating to separate portions of the property in the county where such portion was situated. See former Section 1243. Subdivision (b), however, requires the plaintiff in this situation to make an election and bring the proceeding in one of the counties in which the tract is situated. In certain situations, relief from the plaintiff's choice of county may be obtained pursuant to Section 1250.040. See Section 1250.040 and Comment thereto.

§ 1250.030. Place of trial

1250.030. (a) Except as provided in subdivision (b), the county in which the proceeding is commenced pursuant to Section 1250.020 is the proper county for trial of the proceeding.

(b) Where the court changes the place of trial pursuant to Section 1250.040, the county to which the proceeding is transferred is the proper county for trial of the proceeding.

Law Revision Commission Comment

Comment. Section 1250.030 continues the substance of a portion of former Section 1243.

§ 1250.040. Change of place of trial generally

1250.040. The provisions of the Code of Civil Procedure for the change of place of trial of actions apply to eminent domain proceedings.

Law Revision Commission Comment

Comment. Section 1250.040 makes clear that the rules of practice for civil actions generally govern venue change in eminent domain proceedings. This continues prior law. See former Section 1243 and *City of Long Beach v. Lakewood Park*, 118 Cal. App.2d 596, 258 P.2d 538 (1953). See also Section 1230.040 and *Yolo Water & Power Co. v. Superior Court*, 28 Cal. App. 589, 153 P. 394 (1915). Contrast *City of Santa Rosa v. Fountain Water Co.*, 138 Cal. 579, 581, 71 P. 1123, 1124 (1903).

Included in the provisions incorporated by Section 1250.040 is Section 394. Under the applicable portions of Section 394, if a

local public entity commences an eminent domain proceeding in a county in which it is situated against a defendant who is not situated, doing business, or residing in such county, either party may move to have the proceeding transferred for trial to another county. Alternatively, if a local public entity commences an eminent domain proceeding in a county in which it is not situated, either the entity or any defendant who is not situated, doing business, or residing in such county may move to have the proceeding transferred for trial to another county. Upon such motion, the court is obligated to transfer the trial to as nearly a neutral county as possible. The county to which the proceeding may be transferred includes the county (1) upon which the parties agree, (2) in which, as nearly as possible, no party is situated, doing business, or residing, or (3) in which, as nearly as possible, all parties are situated, doing business, or residing. Where the property is located in a neutral county to begin with, the court need not transfer the proceeding even though a motion to transfer would be authorized under Section 394. See *City of Stockton v. Wilson*, 79 Cal. App. 422, 249 P. 835 (1926). See also *City of Los Angeles v. Pacific Tel. & Tel. Co.*, 164 Cal. App.2d 253, 330 P.2d 888 (1958).

Section 394 applies to proceedings commenced by any public entity other than the state. See Section 394(3). See also *People v. Spring Valley Co.*, 109 Cal. App.2d 656, 241 P.2d 1069 (1952) (Section 394 not applicable in action by state); *Riverside etc. Dist. v. Joseph W. Wolfskill Co.*, 147 Cal. App.2d 714, 306 P.2d 22 (1957) (Section 394 not applicable in action by state agency); *Georgetown Divide Pub. Util. Dist. v. Bacchi*, 204 Cal. App.2d 194, 22 Cal. Rptr. 27 (1962) (Section 394 applicable in action by special district having status of local public entity); *Garrett v. Superior Court*, 11 Cal.3d 245, 520 P.2d 968, 113 Cal. Rptr. 152 (1974) (Section 394 applicable in action by flood control district).

Section 394 applies to any defendant regardless of the interest the defendant claims in the property sought to be taken. See *Georgetown Divide Pub. Util. Dist. v. Bacchi*, *supra* (joint owners may take advantage of Section 394); *City of Oakland v. Darbee*, 102 Cal. App.2d 493, 227 P.2d 909 (1951) (separate owners may take advantage of Section 394); *City of Long Beach v. Lakewood Park*, *supra* (owners of oil exploration and development rights may take advantage of Section 394). The mere fact that the proceeding is a "mixed action," one in which only some of the defendants fall within the terms of this section, does not preclude its applicability. See *Georgetown Divide Pub. Util. Dist. v. Bacchi*, *supra*; 1 J. CHADBOURN, H. GROSSMAN, A. VAN ALSTYNE, CALIFORNIA PLEADING § 367 (1961). See also

People v. Ocean Shore R.R., 24 Cal. App.2d 420, 75 P.2d 560 (1938) (order changing venue on motion by but one of several defendants on grounds of impossibility of impartial trial affirmed).

The term “doing business” as used in Section 394 is intended to mean conducting some substantial activity, *e.g.*, holding one’s self out to others as engaged in the selling of goods or services. See *City of Los Angeles v. Pacific Tel. & Tel. Co.*, *supra*.

Article 2. Commencement of Proceeding Generally

§ 1250.110. Complaint commences proceeding

1250.110. An eminent domain proceeding is commenced by filing a complaint with the court.

Law Revision Commission Comment

Comment. Section 1250.110 supersedes a portion of former Section 1243 which provided that eminent domain proceedings were commenced by filing a complaint and issuing summons. Section 1250.110 makes clear that the filing of a complaint alone is sufficient to commence an eminent domain proceeding and 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).

Section 1250.110 is comparable to Section 411.10 which provides that “a civil action is commenced by filing a complaint with the court.”

§ 1250.120. Contents of summons

1250.120. (a) Except as provided in subdivision (b), the form and contents of the summons shall be as in civil actions generally.

(b) Where process is served by publication, in addition to the summons, the publication shall describe the property sought to be taken in a manner reasonably calculated to give persons with an interest in the property actual notice of the pending proceeding.

Law Revision Commission Comment

Comment. Section 1250.120, which prescribes the contents of the summons, supersedes former Section 1245. Sections 412.20 and 412.30 specify the matters to be included in the summons.

Since the summons does not contain a description of the property (which formerly was required), the defendant must refer to the complaint for this information. However, where service of the summons is by publication, a copy of the complaint is not published. To assure that a person served by publication will be able to determine if he has an interest in the property,

subdivision (b) requires the publication to contain a description of the property where process is served by publication. *Cf.* Section 413.10 (service required in a manner “reasonably calculated to give actual notice”).

§ 1250.125. Publication as to certain defendants

1250.125. (a) Where summons is served by publication, the publication may name only the defendants to be served thereby and describe only the property in which the defendants to be served thereby have or claim interests.

(b) Judgment based on failure to appear and answer following service under this section shall be conclusive against the defendants named in respect only to property described in the publication.

Law Revision Commission Comment

Comment. Section 1250.125 continues the substance of former Section 1245.2.

§ 1250.130. Additional requirements where service is by publication

1250.130. Where the court orders service by publication, it shall also order the plaintiff (1) to post a copy of the summons and complaint on the property sought to be taken and (2), if not already recorded, to record a notice of the pendency of the proceeding in the manner provided by Section 1250.150. Such posting and recording shall be done not later than 10 days after the date the order is made.

Law Revision Commission Comment

Comment. Section 1250.130 provides additional requirements where service is by publication. The manner of service generally in an eminent domain proceeding is provided by Sections 415.10–415.50. See Section 1230.040 (rules of practice in eminent domain proceeding).

Due process requires that the rights of a person may be adjudicated only if that person is served with process in a manner reasonably calculated to give him actual notice and an opportunity to be heard. See, *e.g.*, *Milliken v. Meyer*, 311 U.S. 457 (1940); *Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 P. 356 (1906). If a person cannot, after reasonable diligence, be served personally or by mail, the court may order service by publication. Section 415.50. This may occur either because the whereabouts of a named defendant are unknown or because the identity of the defendant is unknown (as where there are heirs and devisees or all persons unknown are named as defendants pursuant to Section 1250.220). However, where service by publication is ordered pursuant to Section 415.50,

Section 1250.130 requires that the court also order the plaintiff to post a copy of the summons and complaint on the property and record a *lis pendens* within 10 days after the making of the order. This provision is designed to increase the likelihood that interested parties will receive actual notice of the proceeding. *Cf. Title & Document Restoration Co. v. Kerrigan, supra*. The court should by order also give appropriate directions as to the manner of posting, *e.g.*, location and number of copies. See Section 413.30.

Section 1250.130 supersedes a portion of the second sentence of former Section 1245.3 relating to service on heirs and devisees, persons unknown, and others. Section 1250.130 extends the posting requirement to the case where any defendant is served by publication. As to the requirement of recording, compare Sections 749, 749.1 (*lis pendens* must be filed in quiet title action against unknown claimants).

Although generally service statutes are liberally construed (*cf.* Sections 4 and 187), the due process considerations involved in service by publication demand strict compliance with the statute. See *Stanford v. Worn*, 27 Cal. 171 (1865). See also *City of Los Angeles v. Glassell*, 203 Cal. 44, 262 P. 1084 (1928).

§ 1250.140. Attorney General served where state is a defendant

1250.140. Where the state is a defendant, the summons and the complaint shall be served on the Attorney General.

Law Revision Commission Comment

Comment. Section 1250.140 requires service on the Attorney General when property belonging to the state is sought to be taken. This continues a requirement of subdivision 8 of former Section 1240 which also required service on the Governor and the State Lands Commission. In a special provision relating to the condemnation of a “square,” former Section 1245.4 required service on the Director of General Services. These additional service requirements are eliminated. The Attorney General is charged with the responsibility for seeing that the proper agency of the state receives notice of the proceeding.

§ 1250.150. Lis pendens

1250.150. The plaintiff, at the time of the commencement of the proceeding, shall record a notice of the pendency of the proceeding in the office of the county recorder of any county in which property described in the complaint is located.

Legislative Committee Comment—Assembly

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).

Article 3. Parties; Joinder of Property**§ 1250.210. Naming plaintiffs**

1250.210. Each person seeking to take property by eminent domain shall be named as a plaintiff.

Legislative Committee Comment—Senate

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).

§ 1250.220. Naming defendants

1250.220. (a) The plaintiff shall name as defendants, by their real names, those persons who appear of record or are known by the plaintiff to have or claim an interest in the property described in the complaint.

(b) If a person described in subdivision (a) is dead and the plaintiff knows of a duly qualified and acting personal representative of the estate of such person, the plaintiff shall name such personal representative as a defendant. If a person described in subdivision (a) is dead or is believed by the plaintiff to be dead and if plaintiff knows of no duly qualified and acting personal representative of the estate of such person and states these facts in an affidavit filed with the complaint, plaintiff may name as defendants “the heirs and devisees of _____ (naming such deceased person), deceased, and all persons claiming by, through, or under said decedent,” naming them in that manner and, where it is stated in the affidavit that such person is believed by the plaintiff to be dead, such person also may be named as a defendant.

(c) In addition to those persons described in subdivision (a), the plaintiff may name as defendants “all persons unknown claiming an interest in the property,” naming them in that manner.

(d) A judgment rendered in a proceeding under this title is binding and conclusive upon all persons named as defendants as provided in this section and properly served.

Law Revision Commission Comment

Comment. Section 1250.220 supersedes portions of former Sections 1244 and 1245.3. Subdivision (a) is substantively the same as paragraph 2 of former Section 1244. Subdivisions (b) and (c) are substantively the same as the first sentence of former Section 1245.3. See also paragraph 2 of former Section 1244. Subdivision (d) is substantively the same as the last paragraph of former Section 1245.3. See also Section 1250.130 and Comment thereto (posting where service is by publication).

The naming of defendants is basically within the control of the plaintiff—*People v. Shasta Pipe etc. Co.*, 264 Cal. App.2d 520, 537, 70 Cal. Rptr. 618, 629 (1968)—but failure to join a proper party to the proceeding leaves his interest unimpaired. *Wilson v. Beville*, 47 Cal.2d 852, 306 P.2d 789 (1957). Nevertheless, a person not named as a defendant who claims an interest in the property sought to be acquired may participate in the proceeding. Section 1250.230.

Subdivision (a). Subdivision (a) reenacts the requirement found in paragraph 2 of former Section 1244 that the names of all owners and claimants of the property must be listed in the complaint. This includes occupants of the property who claim a

possessory interest in the property. The form of subdivision (a) has been adapted from former Section 1245.3.

Subdivision (b). Subdivision (b) specifies the requirements for naming defendants where one of the claimants to the property is deceased. The basic rule is that the personal representative of the estate of the decedent must be named as defendant in the decedent's place. This codifies prior law. See *Monterey County v. Cushing*, 83 Cal. 507, 23 P. 700 (1890) (decided under former Code of Civil Procedure Section 1582, predecessor of Probate Code Section 573).

Where there is no duly qualified and acting personal representative known to the plaintiff, the plaintiff need not await the appointment and qualification of one but may proceed with the suit naming as defendants the heirs and devisees of the deceased person and, if such person is believed to be but not known to be dead, the plaintiff may also name such person as a defendant.

Subdivision (c). Subdivision (c) enables the plaintiff to name unknown holders of interests in the property. A plaintiff may also proceed pursuant to Section 474 by fictitiously naming defendants who claim an interest but whose names are not known. See *Bayle-Lacoste & Co. v. Superior Court*, 46 Cal. App.2d 636, 116 P.2d 458 (1941). When the fictitiously named party's real name is discovered, the pleading must be amended accordingly. *Alameda County v. Crocker*, 125 Cal. 101, 57 P. 766 (1899).

Subdivision (d). Subdivision (d) assures that persons properly named under this section and served in compliance with the general provisions governing service—Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2—and the requirements for service provided by this title (Sections 1250.120 and 1250.130) are bound by the judgment in the proceeding.

§ 1250.230. Appearance by named and unnamed defendants

1250.230. Any person who claims a legal or equitable interest in the property described in the complaint may appear in the proceeding. Whether or not such person is named as a defendant in the complaint, he shall appear as a defendant.

Legislative Committee Comment—Senate

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).

§ 1250.240. Joinder of property

1250.240. The plaintiff may join in one complaint all property located within the same county which is sought to be acquired for the same project.

Law Revision Commission Comment

Comment. Section 1250.240, which reenacts the substance of a portion of subdivision 5 of former Section 1244, permits the plaintiff at his option to join an unlimited number of parcels belonging to different defendants in the same eminent domain proceeding provided that the property joined lies wholly or partially in the same county (see Section 1250.020) and it is to be used for the same project. See *County of Sacramento v. Glann*, 14 Cal. App. 780, 788–790, 113 P. 360, 363–364 (1910). The contents of the complaint must, of course, be complete as to all property joined. See Section 1250.310 and Comment thereto.

Section 1250.240 provides simply for joinder in the initial pleading; it in no way limits the authority of the court to order separate trials where appropriate. See Section 1048.

Article 4. Pleadings**Law Revision Commission Comment**

Comment. The rules of pleading provided in this article are special rules peculiar to eminent domain proceedings. They supplement the general rules of civil procedure governing pleadings and replace only those general rules that may be inconsistent with them. See generally Section 1230.040 and Comment thereto (rules of practice in eminent domain proceedings).

§ 1250.310. Contents of complaint

1250.310. The complaint shall contain all of the following:

- (a) The names of all plaintiffs and defendants.
- (b) A description of the property sought to be taken. The description may, but is not required to, indicate the nature or extent of the interest of the defendant in the property.
- (c) If the plaintiff claims an interest in the property sought to be taken, the nature and extent of such interest.
- (d) A statement of the right of the plaintiff to take by eminent domain the property described in the complaint. The statement shall include:
 - (1) A general statement of the public use for which the property is to be taken.
 - (2) An allegation of the necessity for the taking as required by Section 1240.030; where the plaintiff is a public entity, a reference to

its resolution of necessity; where the plaintiff is a quasi-public entity within the meaning of Section 1245.320, a reference to the resolution adopted pursuant to Article 3 (commencing with Section 1245.310) of Chapter 4; where the plaintiff is a nonprofit hospital, a reference to the certificate required by Section 1260 of the Health and Safety Code; where the plaintiff is a public utility and relies on a certification of the State Energy Resources Conservation and Development Commission or a requirement of that commission that development rights be acquired, a reference to such certification or requirement.

(3) A reference to the statute that authorizes the plaintiff to acquire the property by eminent domain. Specification of the statutory authority may be in the alternative and may be inconsistent.

(e) A map or diagram portraying as far as practicable the property described in the complaint and showing its location in relation to the project for which it is to be taken.

Legislative Committee Comment—Senate

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

1250.320. (a) The answer shall include a statement of the nature and extent of the interest the defendant claims in the property described in the complaint.

(b) Where the defendant seeks compensation provided in Article 6 (commencing with Section 1263.510) (goodwill) of Chapter 9, the answer shall include a statement that the defendant claims compensation under Section 1263.510, but the answer need not specify the amount of such compensation.

Legislative Committee Comment—Senate

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.

§ 1250.325. Disclaimer

1250.325. (a) A defendant may file a disclaimer at any time, whether or not he is in default, and the disclaimer supersedes an answer previously filed by the defendant. The disclaimer need not be in any particular form. It shall contain a statement that the defendant claims no interest in the property or in the compensation that may be awarded. Notwithstanding Section 1250.330, the disclaimer shall be signed by the defendant.

(b) Subject to subdivision (c), a defendant who has filed a disclaimer has no right to participate in further proceedings or to share in the compensation awarded.

(c) The court may implement the disclaimer by appropriate orders including, where justified, awarding costs and litigation expenses.

Law Revision Commission Comment

Comment. Section 1250.325 provides a simplified method for a defendant to disclaim any interest in the property or

compensation awarded in the proceeding. The disclaimer may be an informal document which merely states that the defendant claims no interest in either the property or the award. A defendant wishing to make only a partial disclaimer may do so by filing an answer describing only the limited interest claimed by him. See Section 1250.320. A disclaimer to be filed "at any time," even after an answer has been filed or after the defendant's right to respond has been terminated by his default. The disclaimer supersedes any earlier response.

The disclaimer, in effect, removes the defendant from the proceeding and may result in a dismissal as to him. The power to implement a disclaimer, as provided in subdivision (c), is intended to assure that the court has full authority to enter a dismissal, with award of costs and litigation expenses where appropriate or to enter other implementing orders calculated to facilitate use of the disclaimer as an aid to settlement. See Section 1235.140 (defining "litigation expenses"). Adequate flexibility in this regard may be particularly useful, for example, in disposing of claims having relatively slight value.

§ 1250.330. Signing of pleadings by attorney

1250.330. Where a party is represented by an attorney, his pleading need not be verified but shall be signed by the attorney for the party. The signature of the attorney constitutes a certificate by him that he has read the pleading and that to the best of his knowledge, information, and belief there is ground to support it. If the pleading is not signed or is signed with intent to defeat the purposes of this section, it may be stricken.

Law Revision Commission Comment

Comment. Section 1250.330 requires all pleadings to be signed by the attorney where the party in an eminent domain proceeding is represented by an attorney. The effect of signature by the attorney is substantially the same as that under Rule 11 of the Federal Rules of Civil Procedure. For a willful violation of this section, an attorney is subject to appropriate disciplinary action. See Rules 1, 13, 17 of the Rules of Professional Conduct of the State Bar of California. See also BUS. & PROF. CODE § 6076.

It should be noted that Section 1250.330 requires both the attorney for the plaintiff and the attorney for the defendant to sign their respective pleadings. The plaintiff may also verify, if it chooses, but such verification will not require verification by the defendant if he is represented by an attorney. Compare Section 446 (verification by defendant generally required where plaintiff is a public entity or where complaint is verified).

§ 1250.340. Amendment of pleadings

1250.340. (a) Subject to subdivisions (b) and (c), the court may allow upon such terms and conditions as may be just an amendment or supplement to any pleading. In the case of an amendment or supplement to the complaint, such terms and conditions may include a change in the applicable date of valuation for the proceeding and an award of costs and litigation expenses which would not have been incurred had the proceeding as originally commenced been the same as the proceeding following such amendment or supplement.

(b) A public entity may add to the property sought to be taken only if it has adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4 for the property to be added.

(c) Property previously sought to be taken may be deleted from the complaint only if the plaintiff has followed the procedure for partial abandonment of the proceeding as to that property.

Law Revision Commission Comment

Comment. Section 1250.340 supplements the liberal rules applicable to amendments and supplements provided by Sections 464 and 473. Subdivision (a) makes clear that the terms and conditions which may be imposed by the court include a change in the date of valuation for either all or a portion of the property sought to be taken in the proceeding and payment of costs and litigation expenses which would not have been incurred but for the amendment. See Section 1235.140 (“litigation expenses” defined).

Subdivision (b) makes clear that, in order to add property to the complaint, a public entity must adopt a valid resolution of necessity for the property to be added.

Subdivision (c) makes clear that, in order to delete property from the complaint, the plaintiff must follow the procedures and pay the price for abandonment. See Sections 1268.510, 1268.610–1268.620. This provision continues prior law as to “partial abandonment”. See, *e.g.*, *County of Kern v. Galatas*, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962); *Metropolitan Water Dist. v. Adams*, 23 Cal.2d 770, 147 P.2d 6 (1944); *Merced Irr. Dist. v. Woolstenhulme*, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971).

§ 1250.345. Waiver of objections to complaint

1250.345. Subject to the power of the court to permit an amendment of the answer, if the defendant fails to object to the complaint, either by demurrer or answer, he is deemed to have waived the objection.

Legislative Committee Comment—Assembly

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).

Article 5. Objections to Right to Take**§ 1250.350. Pleading objections to right to take**

1250.350. A defendant may object to the plaintiff's right to take, by demurrer or answer as provided in Section 430.30, on any ground authorized by Section 1250.360 or Section 1250.370. The demurrer or answer shall state the specific ground upon which the objection is taken and, if the objection is taken by answer, the specific facts upon which the objection is based. An objection may be taken on more than one ground, and the grounds may be inconsistent.

Law Revision Commission Comment

Comment. Section 1250.350 makes clear the rules governing the pleading of objections to the right to take. See Sections 1250.360 and 1250.370 (listing grounds upon which objection may be taken). The general rules that determine whether the objection may be taken by demurrer or answer (see Section 430.30) apply to pleading an objection to the right to take.

The facts supporting each objection to the right to take must be specifically stated in the answer. This requirement is generally consistent with former law that, for example, required the defendant to allege specific facts indicating an abuse of discretion such as an intention not to use the property as resolved. See, e.g., *County of San Mateo v. Bartole*, 184 Cal. App.2d 422, 433, 7 Cal. Rptr. 569, 576 (1960). See also *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959); *People v. Nahabedian*, 171 Cal. App.2d 302, 340 P.2d 1053 (1959); *People v. Olsen*, 109 Cal. App. 523, 293 P. 645 (1930).

Section 1250.345, relating to waiver of objections to the complaint, applies to objections to the right to take.

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

1250.360. Grounds for objection to the right to take, regardless of whether the plaintiff has adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4, include:

(a) The plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint.

(b) The stated purpose is not a public use.

(c) The plaintiff does not intend to devote the property described in the complaint to the stated purpose.

(d) There is no reasonable probability that the plaintiff will devote the described property to the stated purpose within (1) seven years, or (2) 10 years where the property is taken pursuant to the Federal Aid Highway Act of 1973, or (3) such longer period as is reasonable.

(e) The described property is not subject to acquisition by the power of eminent domain for the stated purpose.

(f) The described property is sought to be acquired pursuant to Section 1240.410 (excess condemnation), 1240.510 (condemnation for compatible use), or 1240.610 (condemnation for more necessary public use), but the acquisition does not satisfy the requirements of those provisions.

(g) The described property is sought to be acquired pursuant to Section 1240.610 (condemnation for more necessary public use), but the defendant has the right under Section 1240.630 to continue the public use to which the property is appropriated as a joint use.

(h) Any other ground provided by law.

Legislative Committee Comment—Assembly

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 *Arcehiga 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 imposes 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(e) (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

1250.370. In addition to the grounds listed in Section 1250.360, grounds for objection to the right to take where the plaintiff has not adopted a resolution of necessity that conclusively establishes the matters referred to in Section 1240.030 include:

(a) The plaintiff is a public entity and has not adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4.

(b) The public interest and necessity do not require the proposed project.

(c) The proposed project is not planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(d) The property described in the complaint is not necessary for the proposed project.

(e) The plaintiff is a quasi-public entity within the meaning of Section 1245.320 and has not satisfied the requirements of Article 3 (commencing with Section 1245.310) of Chapter 4.

Legislative Committee Comment—Senate

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 (e) 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.

Article 6. Settlement Offers

§ 1250.410. Pretrial settlement offers

1250.410. (a) At least 30 days prior to the date of trial, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff his final demand for compensation in the proceeding. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses. In determining the amount of such litigation expenses, the court shall consider any written revised or superseded offers and demands filed and served prior to or during trial.

Legislative Committee Comment—Senate

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.

CHAPTER 6. DEPOSIT AND WITHDRAWAL OF PROBABLE COMPENSATION; POSSESSION PRIOR TO JUDGMENT

Article 1. Deposit of Probable Compensation

§ 1255.010. Deposit of probable compensation

1255.010. (a) At any time before entry of judgment, the plaintiff may deposit with the court the probable amount of compensation, based on an appraisal, that will be awarded in the proceeding. The appraisal upon which the deposit is based shall be one that satisfies the requirements of subdivision (b). The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

(b) Before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property and (2) prepare a written statement of, or summary of the basis for, the appraisal.

(c) On noticed motion, or upon ex parte application in an emergency, the court may permit the plaintiff to make a deposit without prior compliance with subdivision (b) if the plaintiff presents facts by affidavit showing that (1) good cause exists for permitting an immediate deposit to be made, (2) an adequate appraisal has not been completed and cannot reasonably be prepared before making the deposit, and (3) the amount of the deposit to be made is not less than the probable amount of compensation that the plaintiff, in good faith, estimates will be awarded in the proceeding. In its order, the court shall require that the plaintiff comply with subdivision (b) within a reasonable time, to be specified in the order, and also that any additional amount of compensation shown by the appraisal required by subdivision (b) be deposited within that time.

Law Revision Commission Comment

Comment. Section 1255.010 is new. In contrast with subdivision (a) of former Section 1243.5, (1) the deposit may be made without obtaining the court's order therefor and without regard to an order for possession and (2) the amount of the initial deposit is determined by an appraisal obtained by the plaintiff rather than by the court upon ex parte application of the plaintiff. Under Section 1255.030, however, the amount deposited may be determined or redetermined by the court on motion of any interested party.

Under subdivision (a), where there are several properties joined in the proceeding (see Section 1250.240), the plaintiff may

make a deposit as to any of the properties and need not make a deposit as to all the properties.

The appraisal and the statement or summary required by subdivision (b) may be made either by a member of the condemnor's appraisal staff or by an independent appraiser. The statement or summary is necessary to enable the plaintiff to comply with Section 1255.020 which requires the notice of the deposit to be accompanied by the statement or summary which justifies the amount of the deposit.

The making of a deposit by the plaintiff, and any subsequent possession of the property by the plaintiff, does not waive its right to appeal in the proceeding. See Sections 1255.080 and 1255.470. *Cf.* Section 1268.170.

Under emergency circumstances, it may be possible to make only a rough, preliminary estimate of the probable amount of compensation that will be awarded in the proceeding. In such cases, subdivision (c) permits the court to make an order allowing the plaintiff to make a deposit without prior compliance with subdivision (b).

Upon entry of judgment, a deposit made pursuant to this article is deemed to be a deposit made pursuant to Section 1268.110 (postjudgment deposit of award). See Section 1268.010.

§ 1255.020. Notice of deposit

1255.020. (a) On making a deposit pursuant to Section 1255.010, the plaintiff shall serve a notice of deposit on all parties who have appeared in the proceeding. The plaintiff shall so serve parties who appear thereafter on their appearance. The notice of deposit shall state that a deposit has been made and the date and the amount of the deposit. Service of the notice of deposit shall be made in the manner provided in Section 1255.450 for service of an order for possession.

(b) The notice of deposit shall be accompanied by a written statement or summary of the basis for the appraisal referred to in Section 1255.010.

(c) If the plaintiff has obtained an order under Section 1255.010 deferring completion of the written statement or summary, the plaintiff:

(1) On making the deposit, shall comply with subdivision (a) and include with the notice a copy of all affidavits on which the order was based.

(2) Upon completion of the written statement or summary, shall comply with subdivision (b).

Law Revision Commission Comment

Comment. Section 1255.020 is new. It requires that notice of the deposit be given in all cases to facilitate motions to change

the amount of the deposit (Section 1255.030) or applications to withdraw the funds deposited (Section 1255.210 *et seq.*).

§ 1255.030. Increase or decrease in amount of deposit

1255.030. (a) At any time after a deposit has been made pursuant to this article, the court shall, upon motion of the plaintiff or of any party having an interest in the property for which the deposit was made, determine or redetermine whether the amount deposited is the probable amount of compensation that will be awarded in the proceeding.

(b) If the plaintiff has not taken possession of the property and the court determines that the probable amount of compensation exceeds the amount deposited, the court may order the plaintiff to increase the deposit or may deny the plaintiff possession of the property until the amount deposited has been increased to the amount specified in the order.

(c) If the plaintiff has taken possession of the property and the court determines that the probable amount of compensation exceeds the amount deposited, the court shall order the amount deposited to be increased to the amount determined to be the probable amount of compensation. If the amount on deposit is not increased accordingly within 30 days from the date of the court's order, or such longer time as the court may have allowed at the time of making the order, the defendant may serve on the plaintiff a notice of election to treat such failure as an abandonment of the proceeding. If the plaintiff does not cure its failure within 10 days after receipt of such notice, the court shall, upon motion of the defendant, enter judgment dismissing the proceeding and awarding the defendant his litigation expenses and damages as provided in Sections 1268.610 and 1268.620.

(d) After any amount deposited pursuant to this article has been withdrawn by a defendant, the court may not determine or redetermine the probable amount of compensation to be less than the total amount already withdrawn. Nothing in this subdivision precludes the court from making a determination or redetermination that probable compensation is greater than the amount withdrawn.

(e) If the court determines that the amount deposited exceeds the probable amount of compensation, it may permit the plaintiff to withdraw the excess not already withdrawn by the defendant.

(f) The plaintiff may at any time increase the amount deposited without making a motion under this section. In such case, notice of the increase shall be served as provided in subdivision (a) of Section 1255.020.

Law Revision Commission Comment

Comment. Section 1255.030 is new. It supersedes subdivision (d) of former Section 1243.5, which provided for redetermination of the amount of probable compensation.

Subdivisions (b) and (c) require that the plaintiff increase the amount of the deposit in accordance with the court's order. Failure to so increase the deposit while in possession may result in an abandonment with attendant litigation expenses and damages. See Sections 1268.610 and 1268.620. *Cf.* Section 1263.110 (effect on date of valuation of failure to increase deposit).

Section 1255.280 provides for recovery of any excessive withdrawal after final determination of amounts in the eminent domain proceeding. No provision is made for recovery, prior to such final determination, of any amount withdrawn. Accordingly, subdivision (d) prevents determination or redetermination of the amount of probable compensation to be less than the total sum withdrawn.

Subdivision (f) is included to make clear that the deposit may be increased without the need for a court determination under this section.

§ 1255.040. Deposit on notice of homeowner

1255.040. (a) Where the plaintiff has not made a deposit that satisfies the requirements of this article and the property includes a dwelling containing not more than two residential units and the dwelling or one of its units is occupied as his residence by a defendant, such defendant may serve notice on the plaintiff requiring a deposit of the probable amount of compensation that will be awarded in the proceeding. The notice shall specify the date by which the defendant desires the deposit to be made. Such date shall not be earlier than 30 days after the date of service of the notice and may be any later date.

(b) If the plaintiff deposits the probable amount of compensation, determined or redetermined as provided in this article, on or before the date specified by the defendant, the plaintiff may, upon *ex parte* application to the court, obtain an order for possession that authorizes the plaintiff to take possession of the property 30 days after the date for the deposit specified by the defendant or such later date as the plaintiff may request.

(c) Notwithstanding Section 1268.310, if the deposit is not made on or before the date specified by the defendant or such later date as the court specifies on motion and good cause shown by the plaintiff, the compensation awarded to the defendant in the proceeding shall draw legal interest from that date. The defendant is entitled to the full amount of such interest without offset for rents or other income received by him or the value of his continued possession of the property.

(d) If the proceeding is abandoned by the plaintiff, the interest under subdivision (c) may be recovered as costs in the proceeding in the manner provided for the recovery of litigation expenses under Section 1268.610. If, in the proceeding, the court or a jury verdict

eventually determines the compensation that would have been awarded to the defendant, then such interest shall be computed on the amount of such award. If no such determination is ever made, then such interest shall be computed on the probable amount of compensation as determined by the court.

(e) The serving of a notice pursuant to this section constitutes a waiver by operation of law, conditioned upon subsequent deposit by the plaintiff of the probable amount of compensation, of all claims and defenses in favor of the defendant except his claim for greater compensation.

(f) Notice of a deposit made under this section shall be served as provided by subdivision (a) of Section 1255.020. The defendant may withdraw the deposit as provided in Article 2 (commencing with Section 1255.210).

(g) No notice may be served by a defendant under subdivision (a) after entry of judgment unless the judgment is reversed, vacated, or set aside and no other judgment has been entered at the time the notice is served.

Law Revision Commission Comment

Comment. Section 1255.040 is new. Section 1255.040 makes available a procedure by which a homeowner can demand that a deposit be made and specifies the consequences if the deposit is not made.

Except as provided in Sections 1255.040 and 1255.050, the depositing of probable compensation pursuant to this article or the taking of possession pursuant to this chapter is optional with the plaintiff; if a deposit is not made and possession is not taken, a defendant is not entitled to be paid until 30 days after final judgment. Section 1268.010.

Subdivision (a) limits the application of Section 1255.040 to an owner-occupied dwelling containing no more than two residential units.

Subdivision (b) provides that the timely making of a deposit under this section entitles the plaintiff to an order for possession effective 30 days after the date for the making of the deposit specified in the notice served by the defendant.

Subdivision (c) provides a special rule governing the time interest commences to accrue. If the required deposit is made on or before the date specified by the defendant, interest on the amount deposited does not accrue. If the deposit is not made on or before the date specified by the defendant or by the court on motion and showing of good cause by the plaintiff, interest commences to accrue on that date. If a deposit is thereafter made, subdivision (a) of Section 1268.320 provides that interest ceases to accrue on the date such amount is withdrawn by the person entitled thereto.

Under subdivision (d), abandonment by the plaintiff entitles the defendant to recover interest in the manner provided for recovery of litigation expenses upon abandonment. The plaintiff may not abandon, however, if the defendant, to his detriment, has substantially changed his position in justifiable reliance upon the proceeding. Section 1268.510.

§ 1255.050. Deposit on notice of owner of rental property

1255.050. If the property to be taken is subject to a leasehold interest and the plaintiff has not made a deposit that satisfies the requirements of this article, the lessor may serve notice on the plaintiff requiring a deposit of the probable amount of compensation that will be awarded in the proceeding in the same manner and subject to the same procedures and conditions as a motion pursuant to Section 1255.040 except that, if the plaintiff fails to make the deposit, the interest awarded shall be offset by the lessor's net rental profits on the property.

Law Revision Commission Comment

Comment. Section 1255.050 is new to California law. Section 1255.050 provides for recovery of damages (interest less net rental profits) only where the lessor has required a deposit prior to judgment and the plaintiff fails to comply. Only damages after the date specified in the notice for depositing the probable compensation are recoverable under Section 1255.050. Compare *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972) (rental losses may be recovered in cases of unreasonable delay in instituting the eminent domain proceeding or other unreasonable conduct by plaintiff). Nothing in Section 1255.050 limits the application of *Klopping*.

Section 1255.050 incorporates the procedures and conditions of the deposit under Section 1255.040 (deposit for homeowner). Under the latter section, the sanction for failure to comply is accrual of interest; Section 1255.050 incorporates this sanction but provides for offset of net rental profits in case of failure to comply.

§ 1255.060. Limitations on use of evidence in connection with deposit

1255.060. (a) The amount deposited or withdrawn pursuant to this chapter shall not be given in evidence or referred to in the trial of the issue of compensation.

(b) In the trial of the issue of compensation, a witness may not be impeached by reference to any appraisal report, written statement and summary of an appraisal, or other statements made in connection with a deposit or withdrawal pursuant to this chapter, nor

shall such a report or statement and summary be considered to be an admission of any party.

(c) Upon objection of the party at whose request an appraisal report, written statement and summary of the appraisal, or other statement was made in connection with a deposit or withdrawal pursuant to this chapter, the person who made such report or statement and summary or other statement may not be called at the trial on the issue of compensation by any other party to give an opinion as to compensation.

Law Revision Commission Comment

Comment. Subdivision (a) of Section 1255.060 restates the substance of subdivision (e) of former Section 1243.5. Subdivisions (b) and (c) are new. Like subdivision (a), the purpose of subdivisions (b) and (c) is to encourage the plaintiff to make an adequate deposit by protecting the plaintiff from the defendant's use of the evidence upon which the deposit is based in the trial on the issue of compensation. If such evidence could be so used, it is likely that the plaintiff would make an inadequate deposit in order to protect itself against the use at the trial of evidence submitted in connection with the deposit. Subdivisions (b) and (c) apply, of course, to witnesses for the defendants as well as to those for the plaintiff. Subdivision (b) precludes impeachment of a witness at the trial by reference to appraisal reports, written statement or summary of the appraisal, or other statements made in connection with the deposit and notice thereof and proceedings to determine or redetermine the amount of the deposit. The subdivision also precludes such reports or statements being considered to be admissions of the party on whose behalf they were made. See Evidence Code Sections 813 and 822. Subdivision (c) is intended to prevent a party from circumventing subdivision (b) by calling another party's appraiser as his own witness. It thus expressly overrules *People v. Cowan*, 1 Cal. App.3d 1001, 81 Cal. Rptr. 713 (1969), and *People v. Douglas*, 15 Cal. App.3d 814, 96 Cal. Rptr. 644 (1971).

§ 1255.070. Deposit in State Treasury unless otherwise required

1255.070. When money is deposited as provided in this article, the court shall order the money to be deposited in the State Treasury or, upon written request of the plaintiff filed with the deposit, in the county treasury. If money is deposited in the State Treasury pursuant to this section, it shall be held, invested, deposited, and disbursed in the manner specified in Article 10 (commencing with Section 16429) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner

specified in that article. As between the parties to the proceeding, money deposited pursuant to this article shall remain at the risk of the plaintiff until paid or made payable to the defendant by order of the court.

Law Revision Commission Comment

Comment. The first two sentences of Section 1255.070 are the same in substance as former Section 1243.6. The last sentence is based on the first two sentences of subdivision (h) of former Section 1254. For a comparable provision, see Section 1268.150.

§ 1255.075. Investment of deposit

1255.075. (a) Prior to entry of judgment, a defendant who has an interest in the property for which a deposit has been made under this chapter may, upon notice to the other parties to the proceeding, move the court to have all of such deposit invested for the benefit of the defendants.

(b) At the hearing on the motion, the court shall consider the interests of the parties and the effect that investment would have upon them. The court may, in its discretion, if it finds that the interests of justice will be served, grant the motion subject to such terms and conditions as are appropriate under the circumstances of the case.

(c) An investment under this section shall be specified by the court and shall be limited to United States government obligations or interest-bearing accounts in an institution whose accounts are insured by an agency of the federal government.

(d) The investment of the deposit has the same consequences as if the deposit has been withdrawn under this chapter.

Law Revision Commission Comment

Comment. Section 1255.075 provides a method whereby a defendant may have a prejudgment deposit invested for the benefit of all defendants. For a comparable postjudgment provision, see Section 1268.150. The primary use for this section is to supply an expeditious means for the defendants to obtain interest on the deposit in cases where the plaintiff has not taken possession or to obtain a higher rate of interest than the legal rate in cases where the plaintiff has taken possession without the need for a hearing on the respective rights of the parties.

Under subdivision (a), one defendant may require the whole deposit invested. The return on the investment, however, is for the benefit of all defendants and will be apportioned according to their interests as finally determined in the eminent domain proceeding.

Subdivision (b) makes clear that the granting of a motion under this section is in the discretion of the court. The court

should determine whether any of the parties would be prejudiced by the investment. Factors that might be taken into consideration include the interest of a defendant who is an occupant of the property because investment of the deposit will subject him to dispossession under Section 1255.460, or the interest of a defendant who has a bona fide objection to the right to take that would be waived under Section 1255.260.

Under subdivision (b), the court must tailor its order for investment to fit the circumstances of the particular case. Factors the court might take into consideration in making its order include length of commitment of investment, *e.g.*, in certificates of deposit in anticipation of either lengthy or speedy conclusion of trial, or provision for withdrawal by individual defendants from the lump-sum investment where necessary for relocation, and the like. Likewise, the court may impose the risk of loss on the defendant requesting the investment in an appropriate case.

Under subdivision (c), the lump sum may be invested in amounts greater than are insured by an agency of the federal government so long as the institution in which it is invested does carry such insured accounts.

Subdivision (d) makes clear that investment under this section carries with it the same consequences as a withdrawal of a prejudgment deposit. Among these consequences are waiver of defenses (Section 1255.260), subjection to possession (Section 1255.460), and cessation of interest (Section 1268.320).

§ 1255.080. Deposit does not affect other rights

1255.080. By depositing the probable compensation pursuant to this article, the plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial.

Law Revision Commission Comment

Comment. Section 1255.080 is new. For comparable provisions, see Sections 1255.470 (possession prior to judgment) and 1268.170 (deposit of amount of award after judgment).

Article 2. Withdrawal of Deposit

§ 1255.210. Application for withdrawal of deposit

1255.210. Prior to entry of judgment, any defendant may apply to the court for the withdrawal of all or any portion of the amount deposited. The application shall be verified, set forth the applicant's interest in the property, and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff.

Law Revision Commission Comment

Comment. Section 1255.210 is derived from subdivisions (a) and (c) of former Section 1243.7. After entry of judgment, deposits made under this chapter may be withdrawn pursuant to Section 1268.140. See Section 1268.010 (upon entry of judgment deposit made pursuant to this chapter deemed to be deposit made pursuant to Section 1268.110).

§ 1255.220. **Order permitting withdrawal**

1255.220. Subject to the requirements of this article, the court shall order the amount requested in the application, or such portion of that amount as the applicant is entitled to receive, to be paid to the applicant.

Law Revision Commission Comment

Comment. Section 1255.220 continues the substance of the second sentence of subdivision (a) of former Section 1243.7.

§ 1255.230. **Objections to withdrawal**

1255.230. (a) No withdrawal may be ordered until 20 days after service on the plaintiff of a copy of the application or until the time for all objections has expired, whichever is later.

(b) Within the 20-day period, the plaintiff may file objections to withdrawal on any one or more of the following grounds:

(1) Other parties to the proceeding are known or believed to have interests in the property.

(2) An undertaking should be filed by the applicant as provided in Section 1255.240 or 1255.250.

(3) The amount of an undertaking filed by the applicant under this chapter or the sureties thereon are insufficient.

(c) If an objection is filed on the ground that other parties are known or believed to have interests in the property, the plaintiff shall serve or attempt to serve on such other parties a notice that they may appear within 10 days after such service and object to the withdrawal. The notice shall advise such parties that their failure to object will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn. The notice shall be served in the manner provided in Section 1255.450 for service of an order for possession. The plaintiff shall file, and serve on the applicant, a report setting forth (1) the names of the parties upon whom the notice was served and the dates of service and (2) the names and last known addresses of the other parties who are known or believed to have interests in the property but who were not so served. The applicant may serve parties whom the plaintiff has been unable to serve. Parties served in the manner provided in Section 1255.450 shall have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants. The plaintiff shall remain liable

to parties having an interest of record who are not so served but, if such liability is enforced, the plaintiff shall be subrogated to the rights of such parties under Section 1255.280.

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

Legislative Committee Comment—Senate

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.

§ 1255.240. Security where conflicting claims to amount withdrawn

1255.240. (a) If the court determines that an applicant is entitled to withdraw any portion of a deposit that another party claims or to which another person may be entitled, the court may require the applicant, before withdrawing such portion, to file an undertaking. The undertaking shall secure payment to such party or person of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the proceeding, together with interest as provided in Section 1255.280. If withdrawal is permitted notwithstanding the lack of personal service of the application for withdrawal upon any party to the proceeding, the court may also require that the undertaking indemnify the plaintiff against any liability it may incur under Section 1255.230. The undertaking shall be in such amount as is fixed by the court, but if executed by an admitted surety insurer the amount shall not exceed the portion claimed by the adverse claimant or appearing to belong to another person. The undertaking may be executed by two or more sufficient sureties approved by the court, and in such case the amount shall not exceed double such portion.

(b) Unless the undertaking is required primarily because of an issue as to title between the applicant and another party or person, if the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking is entitled to recover the premium reasonably paid for the undertaking as a part of the recoverable costs in the eminent domain proceeding.

Law Revision Commission Comment

Comment. Section 1255.240 continues the substance of subdivision (f) of former Section 1243.7. Subdivision (a) of Section 1255.240 permits the court to exercise its discretion whether to require an undertaking in cases where there are conflicting claims to the amount to be withdrawn.

Subdivision (b) permits recovery of the bond premium as costs in the proceeding unless the necessity for the undertaking arises primarily from an issue of title. For use of the same distinction in assessing the costs of apportionment proceedings, see Section 1268.710 and *People v. Nogarr*, 181 Cal. App.2d 312, 5 Cal. Rptr. 247 (1960).

§ 1255.250. Security when amount in excess of original deposit is withdrawn

1255.250. (a) If the amount originally deposited is increased pursuant to Section 1255.030 and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicant, or each applicant if there are two or more, shall file an undertaking. The undertaking shall be in favor of the plaintiff and shall secure repayment of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with interest as provided in Section 1255.280. If the undertaking is executed by an admitted surety insurer, the undertaking shall be in the amount by which the total amount to be withdrawn exceeds the amount originally deposited. The undertaking may be executed by two or more sufficient sureties approved by the court, and in such case the undertaking shall be in double such amount, but the maximum amount that may be recovered from such sureties is the amount by which the total amount to be withdrawn exceeds the amount originally deposited.

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

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

(d) If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking may recover the premium reasonably paid for the undertaking as a part of the costs in the eminent domain proceeding.

Law Revision Commission Comment

Comment. Section 1255.250 is the same in substance as subdivision (b) of former Code of Civil Procedure Section 1243.7 except that the former two-percent limitation of the amount recoverable for a premium on an undertaking has been replaced

by the “reasonably paid” limitation. Withdrawal by one or more defendants of an amount in excess of the original deposit is possible if the deposit has been increased as provided for by Section 1255.030.

§ 1255.260. Withdrawal waives all defenses except claim to greater compensation

1255.260. If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation.

Law Revision Commission Comment

Comment. Section 1255.260 restates the substance of subdivision (g) of former Section 1243.7. In addition to the defendant’s waiving claims and defenses other than the claim to greater compensation, withdrawal of the deposit may also entitle the plaintiff to an order for possession. See Section 1255.460. *Cf. People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962). Any amount withdrawn is credited upon the judgment in the eminent domain proceeding. See Section 1268.010.

§ 1255.270. [Reserved for expansion]

§ 1255.280. Repayment of amount of excess withdrawal

1255.280. (a) Any amount withdrawn by a party pursuant to this article in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the parties entitled thereto. The court shall enter judgment accordingly.

(b) The judgment so entered shall not include interest except in the following cases:

(1) Any amount that is to be paid to a defendant shall include legal interest from the date of its withdrawal by another defendant.

(2) If the amount originally deposited by a plaintiff was increased pursuant to Section 1255.030 on motion of a party obligated to pay under this section, any amount that is attributable to such increase and that is to be repaid to the plaintiff shall include legal interest from the date of its withdrawal.

(c) If the judgment so entered is not paid within 30 days after its entry, the court may, on motion, enter judgment against the sureties, if any, for the amount of such judgment.

(d) The court may, in its discretion and with such security, if any, as it deems appropriate, grant a party obligated to pay under this section a stay of execution for any amount to be paid to a plaintiff. Such stay of execution shall not exceed one year following entry of judgment under this section.

Law Revision Commission Comment

Comment. Section 1255.280 supersedes subdivision (h) of former Section 1243.7. Unlike former Section 1243.7, which required the payment of interest upon the return of excess amounts withdrawn, Section 1255.280 requires payment of interest only where the excess is to be redistributed among defendants or where the excess is to be repaid to a plaintiff to the extent the excess was procured upon motion for increased deposit by a defendant.

Section 1255.280 also provides for a stay of execution on the return of the excess for a period of up to one year. See subdivision (d). The stay may be conditioned upon appropriate security, which may be simply recordation of an abstract of judgment. It should be noted, however, that the stay is available only as against amounts to be repaid to a plaintiff. Moreover, because execution has been stayed, interest will accrue during the period of the stay regardless of the means by which the excess was obtained. *Cf. Bellflower City School Dist. v. Skaggs*, 52 Cal.2d 278, 282, 339 P.2d 848, 851 (1959).

Section 1255.280 requires repayment of excess amounts withdrawn only after the judgment in an eminent domain proceeding is final. See also Section 1255.030(d) (court may not redetermine probable compensation to be less than amount withdrawn). For a comparable provision, see Section 1268.160.

Article 3. Possession Prior to Judgment

§ 1255.410. Order for possession prior to judgment

1255.410. (a) At the time of filing the complaint or at any time after filing the complaint and prior to entry of judgment, the plaintiff may apply ex parte to the court for an order for possession under this article, and the court shall make an order authorizing the plaintiff to take possession of the property if the plaintiff is entitled to take the property by eminent domain and has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article.

(b) The order for possession shall describe the property of which the plaintiff is authorized to take possession, which description may be by reference to the complaint, and shall state the date after which the plaintiff is authorized to take possession of the property.

(c) Notwithstanding the time limits for notice prescribed by Section 1255.450, if the court finds that the plaintiff has an urgent need for possession of property and that possession will not displace or unreasonably affect any person in actual and lawful possession of the property to be taken or the larger parcel of which it is a part, the

court may make an order for possession of such property upon such notice, not less than three days, as the court deems appropriate under the circumstances of the case.

Legislative Committee Comment—Assembly

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 (e), 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.

§ 1255.420. Stay of order for hardship

1255.420. Not later than 30 days after service of an order authorizing the plaintiff to take possession of property under Section 1255.410, any defendant or occupant of the property may move for relief from the order if the hardship to him of having possession taken at the time specified in the order is substantial. If the court determines that the hardship to the defendant or occupant is substantial, the court may stay the order until a date certain or impose terms and conditions limiting its operation unless, upon considering all relevant facts (including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to such schedule or plan), the court further determines (a) that the plaintiff needs possession of the property within the time specified in the order for possession and (b) that the hardship the plaintiff would suffer as a result of a stay or limitation of the order would be substantial.

Law Revision Commission Comment

Comment. Section 1255.420 is new. It permits the court to stay an order for possession issued *ex parte* under Section 1255.410 or to limit the operation of the order by fixing terms and conditions of the plaintiff's possession. The court may do this only after making a dual finding of fact. The court must first find that having possession of the property specified in the order taken at the time specified in the order would be a substantial hardship to the defendant. If the court finds this fact, it next looks to the plaintiff's interest in early possession of the property. If it finds both that the plaintiff needs possession of the property at the time specified and that the plaintiff would suffer substantial (as distinguished from trivial) injury from a stay or other limitation of the order, the court may not stay or limit the order.

Section 1255.420 gives the court broad authority to draft an order that is appropriate to the circumstances. The court may, for example, impose limitations on the order that will permit the plaintiff and defendant to have possession of portions of the property or to use the property jointly.

§ 1255.430. Stay of order where right to take contested

1255.430. If the plaintiff has been authorized to take possession of property under Section 1255.410 and the defendant has objected to the plaintiff's right to take the property by eminent domain, the court, if it finds there is a reasonable probability the defendant will prevail, shall stay the order for possession until it has ruled on the defendant's objections.

Law Revision Commission Comment

Comment. Section 1255.430 is new. It is intended to permit the court to mitigate the effect of an order for possession pending resolution of the defendant's objections in a case where the court believes there is merit to the objections. Because objections to the right to take are expeditiously resolved in the normal course of events (see Article 2 (commencing with Section 1260.110) of Chapter 8), a stay will not be necessary unless the objections are not finally resolved by the date of possession specified in the order.

§ 1255.440. Vacating order for possession

1255.440. If an order has been made under Section 1255.410 authorizing the plaintiff to take possession of property and the court subsequently determines that the conditions specified in Section 1255.410 for issuance of the order are not satisfied, the court shall vacate the order.

Law Revision Commission Comment

Comment. Because the order for possession is issued following an ex parte application by the plaintiff, Section 1255.440 expressly authorizes the court to vacate the order for possession if it subsequently determines, whether upon motion of the defendant or upon its own motion, that the requirements of Section 1255.410 are not satisfied.

§ 1255.450. Service of order

1255.450. (a) As used in this section, “record owner” means the owner of the legal or equitable title to the fee or any lesser interest in property as shown by recorded deeds or other recorded instruments.

(b) The plaintiff shall serve a copy of the order for possession issued under Section 1255.410 on the record owner of the property and on the occupants, if any. If the property is lawfully occupied by a person dwelling thereon or by a farm or business operation, service shall be made not less than 90 days prior to the time possession is to be taken pursuant to the order. In all other cases, service shall be made not less than 30 days prior to the time possession is to be taken pursuant to the order. Service may be made with or following service of summons.

(c) At least 30 days prior to the time possession is taken pursuant to an order for possession made pursuant to Section 1255.040, 1255.050, or 1255.460, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any.

(d) Service of the order shall be made by personal service except that:

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

(2) If the person on whom service is to be made resides out of the state, or has departed from the state or cannot with due diligence be found within the state, service of the order may be made by registered or certified mail addressed to such person at his last known address.

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

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

Legislative Committee Comment—Assembly

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.

§ 1255.460. **Right of plaintiff to take possession after defendant’s consent or withdrawal of deposit**

1255.460. (a) Upon *ex parte* application, the court shall make an order authorizing the plaintiff to take possession of the property if the court determines that the plaintiff has deposited probable

compensation pursuant to Article 1 (commencing with Section 1255.010) and that each of the defendants entitled to possession has done either of the following:

(1) Expressed in writing his willingness to surrender possession of the property on or after a stated date.

(2) Withdrawn any portion of the deposit.

(b) The order for possession shall:

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

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

(3) State the date after which plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be the date stated by the defendant or, if a portion of the deposit is withdrawn, the earliest date on which the plaintiff would be entitled to take possession of the property under subdivision (c) of Section 1255.450.

Law Revision Commission Comment

Comment. Section 1255.460 is new. Article 1 (commencing with Section 1255.010) permits the plaintiff to deposit probable compensation whether or not it obtains an order for possession. This section makes applicable to withdrawal of a deposit made prior to judgment the analogous rule that applies when a deposit made after judgment is withdrawn. *Cf. People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962). It also permits the plaintiff to take possession of the property after each of the defendants entitled to possession has in writing expressed his willingness to surrender it on or after a date certain. Service of the order for possession is required by subdivision (c) of Section 1255.450.

§ 1255.470. Taking possession does not affect other rights

1255.470. By taking possession pursuant to this chapter, the plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial.

Law Revision Commission Comment

Comment. Section 1255.470 is the same in substance as subdivision (f) of former Section 1243.5. The language has been changed to preclude implied waiver of appeal, right to move to abandon, or right to new trial by taking possession pursuant to any order obtained under this chapter, including orders under Sections 1255.040 and 1255.050. Under Section 1255.260, the defendant also retains his right to appeal or to request a new trial upon the issue of compensation even though he withdraws the deposit made by the plaintiff. However, such withdrawal does

waive all claims and defenses other than the claim to compensation. For a comparable provision, see Section 1268.230.

§ 1255.480. Police power not affected

1255.480. Nothing in this article limits the right of a public entity to exercise its police power in emergency situations.

Law Revision Commission Comment

Comment. Section 1255.480 is new. It makes clear that the requirements of this article—such as obtaining and serving an order for possession—do not limit the exercise of the police power. See *Surocco v. Geary*, 3 Cal. 69 (1853). See generally Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968), reprinted in Van Alstyne, *California Inverse Condemnation Law*, 10 CAL. L. REVISION COMM'N REPORTS 111 (1971). For a comparable provision, see Section 1268.240.

CHAPTER 7. DISCOVERY; EXCHANGE OF VALUATION DATA

Article 1. Discovery

§ 1258.010. Use of discovery procedures

1258.010. The provisions of this chapter supplement but do not replace, restrict, or prevent the use of discovery procedures or limit the matters that are discoverable in eminent domain proceedings.

Law Revision Commission Comment

Comment. Section 1258.010 supersedes former Section 1272.08 and makes clear that the special provisions of this chapter relating to exchange of valuation data (Article 2) and further discovery following exchange (Section 1258.020) do not limit the availability of discovery generally in eminent domain. See Section 1230.040 and Comment thereto (rules of practice in eminent domain proceedings).

§ 1258.020. Discovery following exchange of valuation data

1258.020. (a) Notwithstanding Section 2016 or any court rule relating to discovery, proceedings pursuant to subdivision (b) may be had without requirement of court order and may proceed until not later than 20 days prior to the day set for trial of the issue of compensation.

(b) A party to an exchange of lists of expert witnesses and statements of valuation data pursuant to Article 2 (commencing with Section 1258.210) or pursuant to court rule as provided in Section 1258.300 may after the time of the exchange obtain discovery from the other party to the exchange and from any person listed by him as an expert witness.

(c) The court, upon noticed motion by the person subjected to discovery pursuant to subdivision (b), may make any order that justice requires to protect such person from annoyance, embarrassment, or oppression.

Law Revision Commission Comment

Comment. Section 1258.020 is new. It permits discovery of experts who will testify at trial, notwithstanding any implications to the contrary in the “work product” exception of Section 2016, without requirement of a court order. The section, however, provides for court relief of any person to protect him from annoyance, embarrassment, or oppression. Section 1258.020 permits discovery proceedings to within 20 days prior to trial despite the general provision of Rule 222 of the California Rules

of Court limiting discovery within 30 days of trial. The liberal discovery provisions of Section 1258.020 apply only after an exchange pursuant to Article 2 or a comparable exchange of valuation data and lists of experts has taken place. Section 1258.020 does not, however, preclude use of the ordinary discovery procedures prior to the exchange. See Section 1258.010.

The expenses of an expert deposed under this section may be compensable. See GOVT. CODE § 68092.5.

§ 1258.030. Admissibility of evidence

1258.030. Nothing in this chapter makes admissible any evidence that is not otherwise admissible or permits a witness to base an opinion on any matter that is not a proper basis for such an opinion.

Law Revision Commission Comment

Comment. Section 1258.030 is the same as former Section 1272.09 but makes clear that not only the exchange provisions of Article 2 but also the discovery provisions of Article 1 do not affect or alter the rules on admissibility of evidence. The admission of evidence in eminent domain proceedings is governed by the Evidence Code.

Article 2. Exchange of Valuation Data

§ 1258.210. Demand for exchange

1258.210. (a) Not later than the 10th day after the trial date is selected, any party may file and serve on any other party a demand to exchange lists of expert witnesses and statements of valuation data. Thereafter, the court may, upon noticed motion and a showing of good cause, permit any party to serve such a demand upon any other party.

(b) The demand shall:

(1) Describe the property to which it relates, which description may be by reference to the complaint.

(2) Include a statement in substantially the following form: “You are required to serve and deposit with the clerk of court a list of expert witnesses and statements of valuation data in compliance with Article 2 (commencing with Section 1258.210) of Chapter 7 of Title 7 of Part 3 of the Code of Civil Procedure not later than the date of exchange to be set in accordance with that article. Except as otherwise provided in that article, your failure to do so will constitute a waiver of your right to call unlisted expert witnesses during your case in chief and of your right to introduce on direct examination during your case in chief any matter that is required to be, but is not, set forth in your statements of valuation data.”

Law Revision Commission Comment

Comment. Section 1258.210 supersedes subdivisions (a)–(c)

of former Section 1272.01. The simplified procedure provided by this article for exchanging valuation information is not mandatory in all cases; it applies only if invoked by a party to the proceeding. Moreover, the procedure provided by this article is not applicable in counties which provide an adequate substitute. See Section 1258.300.

Subdivision (a) of Section 1258.210 changes the time for making a demand to exchange from 50 days prior to trial to not later than the tenth day after the date at which a trial date is selected with provision for a later demand where good cause is shown. This change will enable an earlier exchange, thereby permitting additional discovery, if necessary, based on information exchanged. See Section 1258.020 (further discovery following exchange). It will also remove the uncertainty of the 50-day time limit prior to trial in cases where the trial date is known only 30 days prior to trial.

Where a party makes a demand to exchange data, that party must himself provide his own data to the party on whom the demand was served. See Section 1258.230(a).

Subdivision (b) of Section 1258.210 is the same in substance as former Section 1272.01(c).

Subdivision (b) of the former section—permitting cross-demands within 40 days prior to trial—is deleted because it gave rise to confusion that a person serving a demand need not exchange his own data unless a cross-demand is served on him. The deleted provision is unnecessary in light of the provision in subdivision (a) for relief from the time limits for serving a demand upon a showing of good cause.

§ 1258.220. Date of exchange

1258.220. For the purposes of this article, the “date of exchange” is the date agreed to for the exchange of their lists of expert witnesses and statements of valuation data by the party who served a demand and the party on whom the demand was served or, failing such agreement, a date 40 days prior to commencement of the trial on the issue of compensation or the date set by the court on noticed motion of either party establishing good cause therefor.

Law Revision Commission Comment

Comment. Section 1258.220, defining the date of exchange, supersedes the exchange date—20 days prior to trial—prescribed by former Section 1272.01(d). The exchange date is to be the date selected by the parties to the exchange or, failing agreement, either 40 days prior to trial or such other date selected by the court. This earlier exchange date will enable subsequent discovery. See Section 1258.020 (further discovery following exchange).

§ 1258.230. Exchange of lists and statements

1258.230. (a) Not later than the date of exchange:

(1) Each party who served a demand and each party upon whom a demand was served shall deposit with the clerk of the court a list of expert witnesses and statements of valuation data.

(2) A party who served a demand shall serve his list and statements upon each party on whom he served his demand.

(3) Each party on whom a demand was served shall serve his list and statements upon the party who served the demand.

(b) The clerk of the court shall make an entry in the register of actions for each list of expert witnesses and statement of valuation data deposited with him pursuant to this article. The lists and statements shall not be filed in the proceeding, but the clerk shall make them available to the court at the commencement of the trial for the limited purpose of enabling the court to apply the provisions of this article. Unless the court otherwise orders, the clerk shall, at the conclusion of the trial, return all lists and statements to the attorneys for the parties who deposited them. Lists or statements ordered by the court to be retained may thereafter be destroyed or otherwise disposed of in accordance with the provisions of law governing the destruction or disposition of exhibits introduced in the trial.

Law Revision Commission Comment

Comment. Section 1258.230 is the same in substance as former Section 1272.01 (d)–(e).

Subdivision (b) requires that deposits with the clerk of lists and statements be entered in the register of actions. With respect to maintenance of the register, see GOVT. CODE § 69845. Such entries will permit the court to determine whether a list and statements have been deposited in compliance with this article. However, the statements or appraisal reports used as statements (see Section 1258.260) will not necessarily be in the form prescribed by court rules for papers to be filed. Also, the copies deposited with the clerk serve the limited purpose of enabling the trial court to rule under Section 1258.280. Hence, the subdivision does not require or permit the filing of lists and statements but instead requires the clerk to maintain custody of them and make them available to the trial court at the commencement of the trial. In the usual case, the copies furnished to the court will have served their only purpose at the conclusion of evidence. The subdivision therefore permits them to be returned to the attorneys. For those instances in which the copies might be of significance in connection with an appeal or posttrial motion, the court, on its own initiative or on request of a party, may order them retained. In this event, the copies

retained may thereafter be disposed of in the manner of exhibits introduced in the trial.

§ 1258.240. Contents of list of expert witnesses

1258.240. The list of expert witnesses shall include the name, business or residence address, and business, occupation, or profession of each person intended to be called as an expert witness by the party and a statement of the subject matter to which his testimony relates.

Law Revision Commission Comment

Comment. Section 1258.240 is the same as former Section 1272.03. It requires inclusion of all persons to be called as experts, not merely those to be called as valuation experts. See EVID. CODE §§ 813(b), 814. In addition to naming each proposed expert witness, the list must identify the subject matter of his testimony, *e.g.*, “valuation testimony,” “existence of oil on subject property,” and the like. This further information is necessary to apprise the adverse party of the range and general nature of the expert testimony to be presented at the trial.

Unlike Section 1258.260 (contents of statement of valuation data), this section does not require that the particulars of the expert opinion be stated or that the supporting factual data be set forth. In such case, normal discovery techniques can be used to obtain the particulars of the opinion and supporting factual data. See Section 1258.020 (further discovery after exchange) and Government Code Section 68092.5 (costs of deposition of expert witness). See also Section 1258.010 (use of discovery procedures).

§ 1258.250. Persons for whom statements of valuation data must be exchanged

1258.250. A statement of valuation data shall be exchanged for each person the party intends to call as a witness to testify to his opinion as to any of the following matters:

- (a) The value of the property being taken.
- (b) The amount of the damage, if any, to the remainder of the larger parcel from which such property is taken.
- (c) The amount of the benefit, if any, to the remainder of the larger parcel from which such property is taken.
- (d) The amount of any other compensation required to be paid by Chapter 9 (commencing with Section 1263.010) or Chapter 10 (commencing with Section 1265.010).

Law Revision Commission Comment

Comment. Section 1258.250 is the same in substance as subdivision (a) of former Section 1272.02 with conforming

changes made to reflect the compensation provisions of Chapters 9 (commencing with Section 1263.010) and 10 (commencing with Section 1265.010).

Section 1258.250 requires that a statement of valuation data be provided for each person who is to testify to his opinion as to one or more of the matters listed in the section whether or not that person is to qualify as an expert. For example, a statement must be provided for the owner of the property if he is to testify concerning value, damages, benefits, or other items of compensation.

§ 1258.260. Contents of statement of valuation data

1258.260. (a) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in Section 1258.250 and, as to each such matter upon which he will give an opinion, what that opinion is and the following items to the extent that the opinion on such matter is based thereon:

- (1) The interest being valued.
- (2) The date of valuation used by the witness.
- (3) The highest and best use of the property.
- (4) The applicable zoning and the opinion of the witness as to the probability of any change in such zoning.
- (5) The sales, contracts to sell and purchase, and leases supporting the opinion.
- (6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or obsolescence the improvements have suffered, and the method of calculation used to determine depreciation.
- (7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements thereon, and the estimated gross rental income and deductions therefrom upon which such reasonable net rental value is computed; the rate of capitalization used; and the value indicated by such capitalization.

(8) If the property is a portion of a larger parcel, a description of the larger parcel and its value.

(b) With respect to each sale, contract, or lease listed under paragraph (5) of subdivision (a), the statement of valuation data shall give:

- (1) The names and business or residence addresses, if known, of the parties to the transaction.
- (2) The location of the property subject to the transaction.
- (3) The date of the transaction.
- (4) If recorded, the date of recording and the volume and page or other identification of the record of the transaction.
- (5) The price and other terms and circumstances of the

transaction. In lieu of stating the terms contained in any contract, lease, or other document, the statement may, if the document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

(c) If any opinion referred to in Section 1258.250 is based in whole or in substantial part upon the opinion of another person, the statement of valuation data shall include the name and business or residence address of such other person, his business, occupation, or profession, and a statement as to the subject matter to which his opinion relates.

(d) Except when an appraisal report is used as a statement of valuation data as permitted by subdivision (e), the statement of valuation data shall include a statement, signed by the witness, that the witness has read the statement of valuation data and that it fairly and correctly states his opinions and knowledge as to the matters therein stated.

(e) An appraisal report that has been prepared by the witness which includes the information required to be included in a statement of valuation data may be used as a statement of valuation data under this article.

Law Revision Commission Comment

Comment. Section 1258.260 is the same in substance as former Section 1272.02(b)–(f).

Subdivision (a) requires the setting forth of the specified data to the extent that any opinion is based thereon. *Cf.* EVID. CODE §§ 814–821. It does not require that the specified data be set forth if the witness' opinion is not based thereon even though such data may have been compiled or ascertained by the witness. Also, the supporting data required by subdivision (a) commonly will pertain to the witness' opinion as to value, and the same data will be considered by the witness to support his opinion as to damages and benefits. In this case, the statement or appraisal report may simply recite that the opinion as to damages or benefits is supported by the same data as the opinion as to value. Where the required information, however, is not identical with respect to all opinions of the witness, subdivision (a) requires that the item of supporting data be separately stated with respect to each opinion of the witness.

Subdivision (c) requires that each valuation statement give information regarding any person who will not be called as a witness but upon whose opinion the testimony of the valuation witness will be based in whole or substantial part. This information is needed by the adverse party not only for the general purpose of properly preparing for trial but also to enable him to utilize his right under Section 804 of the Evidence Code to call the other expert and examine him as an adverse witness

concerning his opinion. The subdivision also requires a statement of the subject matter of the supporting opinion. As to this requirement, and the parallel requirement under Section 1258.240, see the Comment to Section 1258.240.

§ 1258.270. Supplementation of lists and statements

1258.270. (a) A party who is required to exchange lists of expert witnesses and statements of valuation data shall diligently give notice to the parties upon whom his list and statements were served if, after service of his list and statements, he:

(1) Determines to call an expert witness not included in his list of expert witnesses to testify on direct examination during his case in chief;

(2) Determines to have a witness called by him testify on direct examination during his case in chief to any opinion or data required to be listed in the statement of valuation data for that witness but which was not so listed; or

(3) Discovers any data required to be listed in a statement of valuation data but which was not so listed.

(b) The notice required by subdivision (a) shall include the information specified in Sections 1258.240 and 1258.260 and shall be in writing; but such notice is not required to be in writing if it is given after the commencement of the trial.

Law Revision Commission Comment

Comment. Section 1258.270 is the same in substance as former Section 1272.04. Although Section 1258.270 requires supplementation of lists and statements exchanged, compliance with the section does not insure that the party will be permitted to call the witness or have a witness testify as to the opinion or data. See Sections 1258.280 and 1258.290.

§ 1258.280. Limitations upon calling witnesses and testimony by witnesses

1258.280. Except as provided in Section 1258.290, upon objection of a party who has served his list of expert witnesses and statements of valuation data in compliance with Section 1258.230:

(a) No party required to serve a list of expert witnesses on the objecting party may call an expert witness to testify on direct examination during his case in chief unless the information required by Section 1258.240 for such witness is included in the list served.

(b) No party required to serve statements of valuation data on the objecting party may call a witness to testify on direct examination during his case in chief to his opinion on any matter listed in Section 1258.250 unless a statement of valuation data for such witness was served.

(c) No witness called by a party required to serve statements of valuation data on the objecting party may testify on direct

examination during the case in chief of the party who called him to any opinion or data required to be listed in the statement of valuation data for such witness unless such opinion or data is listed in the statement served except that testimony that is merely an explanation or elaboration of data so listed is not inadmissible under this subdivision.

Law Revision Commission Comment

Comment. Section 1258.280 is the same in substance as former Section 1272.05. Section 1258.280 provides a sanction calculated to insure that the parties make a good faith exchange of lists of expert witnesses and essential valuation data. For applications of the same sanction to other required pretrial disclosures, see Sections 454 (copies of accounts) and 2032 (physicians' statements). Although the furnishing of a list of expert witnesses and statements of valuation data is analogous to responding to interrogatories or a request for admissions, the consequences specified by Section 2034 for failure or refusal to make discovery are not made applicable to a failure to comply with the requirements of this article. Existence of the sanction provided by Section 1258.280 does not, of course, prevent those consequences from attaching to a failure to make discovery when regular discovery techniques are invoked in the proceeding. The sanction for failure to exchange valuation data applies to all persons intended to be called as valuation witnesses, including the owner of the property. See Section 1258.250 and Comment thereto (persons for whom statements of valuation data must be exchanged).

Under exceptional circumstances, the court is authorized to permit the use of a witness or of valuation data not included in the list or statements. See Section 1258.290 and the Comment to that section.

Section 1258.280 limits only the calling of a witness, or the presentation of testimony, during the case in chief of the party calling the witness or presenting the testimony. The section does not preclude a party from calling a witness in rebuttal or having a witness give rebuttal testimony that is otherwise proper. See *City & County of San Francisco v. Tillman Estate Co.*, 205 Cal. 651, 272 P. 585 (1928); *State v. Loop*, 127 Cal. App.2d 786, 274 P.2d 885 (1954). The section also does not preclude a party from bringing out additional data on redirect examination where it is necessary to meet matters brought out on the cross-examination of his witness. However, the court should take care to confine a party's rebuttal case and his redirect examination of his witnesses to their purpose of meeting matters brought out during the

adverse party's case or cross-examination of his witnesses. A party should not be permitted to defeat the purpose of this article by reserving witnesses and valuation data for use in rebuttal where such witnesses should have been called and such valuation data presented on the direct examination during the case in chief.

Application of the concept of "case in chief" to the presentation of evidence by the plaintiff requires particular attention. The defendant presents his case in chief first in the order of the trial. Therefore, the following presentation by the plaintiff may include evidence of two kinds; *i.e.*, evidence comprising the case in chief of the plaintiff and evidence in rebuttal of evidence previously presented by the defendants. If the evidence offered in rebuttal is proper as such, this section does not prevent its presentation at that time.

§ 1258.290. Relief from limitations on calling witness or testimony by witness

1258.290. (a) The court may, upon such terms as may be just (including but not limited to continuing the trial for a reasonable period of time and awarding costs and litigation expenses), permit a party to call a witness, or permit a witness called by a party to testify to an opinion or data on direct examination, during the party's case in chief where such witness, opinion, or data is required to be, but is not, included in such party's list of expert witnesses or statements of valuation data if the court finds that such party has made a good faith effort to comply with Sections 1258.210 to 1258.260, inclusive, that he has complied with Section 1258.270, and that by the date of exchange he:

(1) Would not in the exercise of reasonable diligence have determined to call such witness or discovered or listed such opinion or data; or

(2) Failed to determine to call such witness or to discover or list such opinion or data through mistake, inadvertence, surprise, or excusable neglect.

(b) In making a determination under this section, the court shall take into account the extent to which the opposing party has relied upon the list of expert witnesses and statements of valuation data and will be prejudiced if the witness is called or the testimony concerning such opinion or data is given.

Law Revision Commission Comment

Comment. Section 1258.290 is the same in substance as former Section 1272.06 and allows the court to permit a party who has made a good faith effort to comply with this article to call a witness or use valuation data that was not included in his list of expert witnesses or statements of valuation data. The standards set out in Section 1258.290 are similar to those applied

under Section 657 (granting a new trial upon newly discovered evidence) and Section 473 (relieving a party from default). The court should apply the same standards in making determinations under this section. The consideration listed in subdivision (b) is important but is not necessarily the only consideration to be taken into account in making determinations under this section. See Section 1235.140 for the definition of "litigation expenses."

§ 1258.300. Applicability of article

1258.300. The superior court in any county may provide by court rule a procedure for the exchange of valuation data which shall be used in lieu of the procedure provided by this article if the Judicial Council finds that such procedure serves the same purpose and is an adequate substitute for the procedure provided by this article.

Law Revision Commission Comment

Comment. Section 1258.300 supersedes former Section 1272.07, which provided that the statutory exchange provisions did not apply to an eminent domain proceeding in Los Angeles County. Section 1258.300 supplants the special provision relating to Los Angeles County by the general principle that any county that has adopted adequate rules that are approved by the Judicial Council is exempt from the provisions of this article. Under this general standard, a system for disclosing valuation data under judicial supervision such as that in Los Angeles County would qualify for approval by the Judicial Council. See Policy Memorandum, Eminent Domain (Including Inverse Condemnation), Superior Court, County of Los Angeles (dated February 7, 1973); *Swartzman v. Superior Court*, 231 Cal. App.2d 195, 41 Cal. Rptr. 721 (1964).

CHAPTER 8. PROCEDURES FOR DETERMINING RIGHT TO TAKE AND COMPENSATION

Article 1. General Provisions

§ 1260.010. Trial preference

1260.010. Proceedings under this title take precedence over all other civil actions in the matter of setting the same for hearing or trial in order that such proceedings shall be quickly heard and determined.

Law Revision Commission Comment

Comment. Section 1260.010 reenacts the substance of former Section 1264.

§ 1260.020. Determination of compatibility and more necessary public use where separate proceedings are consolidated

1260.020. (a) If proceedings to acquire the same property are consolidated, the court shall first determine whether the public uses for which the property is sought are compatible within the meaning of Article 6 (commencing with Section 1240.510) of Chapter 3. If the court determines that the uses are compatible, it shall permit the proceeding to continue with the plaintiffs acting jointly. The court shall apportion the obligation to pay any award in the proceeding in proportion to the use, damage, and benefits attributable to each plaintiff.

(b) If the court determines pursuant to subdivision (a) that the uses are not all compatible, it shall further determine which of the uses is the more necessary public use within the meaning of Article 7 (commencing with Section 1240.610) of Chapter 3. The court shall permit the plaintiff alleging the more necessary public use, along with any other plaintiffs alleging compatible public uses under subdivision (a), to continue the proceeding. The court shall dismiss the proceeding as to the other plaintiffs.

Law Revision Commission Comment

Comment. Section 1260.020 deals with the issues of compatibility and more necessary public use where two proceedings to acquire the same property are consolidated pursuant to Section 1048. Section 1260.020 does not deal with whether consolidation is proper; that is a matter dealt with by Section 1048. Moreover, nothing in this section is intended to limit the authority of the court to consolidate proceedings or sever issues for trial under the latter section. However, where consolidation of two proceedings to acquire the same property is ordered, subdivision (a) requires the court to determine first

whether the public uses for which the property is sought are compatible and, if so, to take the action indicated. Under subdivision (b), if the public uses are not all compatible, the court must determine which are “more necessary” and again take the appropriate action. For reimbursement of expenses and damages on dismissal, see Sections 1268.610 and 1268.620.

§ 1260.030. Determination of character of improvements where parties are unable to agree

1260.030. (a) If there is a dispute between plaintiff and defendant whether particular property is an improvement pertaining to the realty, either party may, not later than 30 days prior to the date specified in an order for possession of the property, move the court for a determination whether the property is an improvement pertaining to the realty.

(b) A motion under this section shall be heard not sooner than 10 days and not later than 20 days after service of notice of the motion. At the hearing, the court may consider any relevant evidence, including a view of the premises and property, in making its determinations.

Law Revision Commission Comment

Comment. Section 1260.030 is new; it is designed to enable the parties to obtain a prompt resolution of disputes concerning the character of improvements so that, when possession is transferred, the parties will know their rights with respect to the property. See Section 1263.205 *et seq.* (improvements).

Article 2. Contesting Right to Take

§ 1260.110. Priority for hearing

1260.110. (a) Where objections to the right to take are raised, unless the court orders otherwise, they shall be heard and determined prior to the determination of the issue of compensation.

(b) The court may, on motion of any party, after notice and hearing, specially set such objections for trial.

Law Revision Commission Comment

Comment. Section 1260.110 makes provision for bringing to trial the objections, if any, that have been raised against the plaintiff's right to take. See Sections 1250.350–1250.370. Under subdivision (a), disposition of the right to take is generally a prerequisite to trial of the issue of just compensation. However, this does not preclude such activities as depositions and other discovery, and the court may order a different order of trial. See also Section 1048. *Cf. City of Los Angeles v. Keck*, 14 Cal. App.3d 920, 92 Cal. Rptr. 599 (1971) (parties stipulated to determination

of compensation and tried only issues of public use and necessity).

Subdivision (b) makes clear that the determination of the objections to the right to take may be specially set for trial. See Rule 225 of the California Rules of Court and *Swartzman v. Superior Court*, 231 Cal. App.2d 195, 198–199, 41 Cal. Rptr. 721, 724–725 (1964).

§ 1260.120. Disposition of defendant's objections to right to take

1260.120. (a) The court shall hear and determine all objections to the right to take.

(b) If the court determines that the plaintiff has the right to acquire by eminent domain the property described in the complaint, the court shall so order.

(c) If the court determines that the plaintiff does not have the right to acquire by eminent domain any property described in the complaint, it shall order either of the following:

(1) Immediate dismissal of the proceeding as to that property.

(2) Conditional dismissal of the proceeding as to that property unless such corrective and remedial action as the court may prescribe has been taken within the period prescribed by the court in the order. An order made under this paragraph may impose such limitations and conditions as the court determines to be just under the circumstances of the particular case including the requirement that the plaintiff pay to the defendant all or part of the reasonable litigation expenses necessarily incurred by the defendant because of the plaintiff's failure or omission which constituted the basis of the objection to the right to take.

Law Revision Commission Comment

Comment. Subdivision (a) of Section 1260.120 provides for a court determination of right to take issues (see Sections 1250.350–1250.370). This is consistent with the California Constitution and with prior law. See Comment to Section 1230.040 (rules of practice in eminent domain proceedings: trial).

The form of review of a determination that the plaintiff may condemn the defendant's property is governed by the rules of procedure generally. See Section 904.1 (appeal); *Harden v. Superior Court*, 44 Cal.2d 630, 284 P.2d 9 (1955) (review by writ).

A determination that the plaintiff has no right to condemn the defendant's property ordinarily requires an order of dismissal. Paragraph (1) of subdivision (c). However, where the complaint alleges alternative grounds for condemnation, a finding which would require dismissal as to one ground does not preclude a finding of right to take on another ground, and the proceeding may continue to be prosecuted on that basis. As to whether an

order of dismissal is appealable, see Section 904.1. See also *People v. Rodoni*, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966). As to the recovery of litigation expenses following dismissal, see Section 1268.610.

Paragraph (2) of subdivision (c) is designed to ameliorate the all-or-nothing effect of paragraph (1). The court is authorized in its discretion to dispose of an objection in a just and equitable manner. This authority does not permit the court to create a right to acquire where none exists, but it does authorize the court to grant leave to the plaintiff to amend pleadings or take other corrective action that is just in light of all of the circumstances of the case. The court may frame its order in whatever manner may be desirable, and subdivision (c) makes clear that the order may include the awarding of reasonable litigation expenses to the defendant. See Section 1235.140 (defining "litigation expenses"). For example, if the resolution of necessity was not properly adopted, the court may, where appropriate, order that such a resolution be properly adopted within such time as is specified by the court and that, if a proper resolution has not been adopted within the time specified, the proceeding is dismissed. The plaintiff is not required to comply with an order made under paragraph (2), but a failure to comply results in a dismissal of the proceeding as to that property which the court has determined the plaintiff lacks the right to acquire.

Article 3. Procedures Relating to Determination of Compensation

§ 1260.210. Order of proof and argument; burden of proof

1260.210. (a) The defendant shall present his evidence on the issue of compensation first and shall commence and conclude the argument.

(b) Except as otherwise provided by statute, neither the plaintiff nor the defendant has the burden of proof on the issue of compensation.

Law Revision Commission Comment

Comment. Subdivision (a) of Section 1260.210 requires the defendant to present his evidence on the issue of compensation first and to commence and conclude the argument. This continues former law. See former Section 1256.1 ("the defendant shall commence and conclude the argument"); *City & County of San Francisco v. Tillman Estate Co.*, 205 Cal. 651, 272 P. 585 (1928) (order of proof).

The rule as to burden of proof provided by subdivision (b) changes former law. Compare *City & County of San Francisco v. Tillman Estate Co.*, *supra*. Assignment of the burden of proof in the context of an eminent domain proceeding is not appropriate. The trier of fact generally is presented with conflicting opinions of value and supporting data and is required to fix value based on the weight it gives to the opinions and supporting data. See, e.g., *City of Pleasant Hill v. First Baptist Church*, 1 Cal. App.3d 384, 408–410, 82 Cal. Rptr. 1, 16–18 (1969); *People v. Jarvis*, 274 Cal. App.2d 217, 79 Cal. Rptr. 175 (1969). See also *State v. 45,621 Square Feet of Land*, 475 P.2d 553 (Alaska 1970); *State v. Amunsis*, 61 Wash.2d 160, 377 P.2d 462 (1963). Absent the production of evidence by one party, the trier of fact will determine compensation solely from the other party's evidence, but neither party should be made to appear to bear some greater burden of persuasion than the other. Subdivision (b) therefore so provides.

For an exception to the rule stated in subdivision (b), see Section 1263.510 (loss of goodwill).

§ 1260.220. Procedure where there are divided interests

1260.220. (a) Except as provided in subdivision (b), where there are divided interests in property acquired by eminent domain, the value of each interest and the injury, if any, to the remainder of such interest shall be separately assessed and compensation awarded therefor.

(b) The plaintiff may require that the amount of compensation be first determined as between plaintiff and all defendants claiming an interest in the property. Thereafter, in the same proceeding, the trier of fact shall determine the respective rights of the defendants in and to the amount of compensation awarded and shall apportion the award accordingly. Nothing in this subdivision limits the right of a defendant to present during the first stage of the proceeding evidence of the value of, or injury to, his interest in the property; and the right of a defendant to present evidence during the second stage of the proceeding is not affected by his failure to exercise his right to present evidence during the first stage of the proceeding.

Law Revision Commission Comment

Comment. Section 1260.220 retains the existing California scheme of permitting a plaintiff the option of having the interests in property valued separately or as a whole. Subdivision (a) retains the procedure formerly provided by Section 1248(1)–(3). Subdivision (b) retains the procedure formerly provided by the first sentence of Section 1246.1. It is intended as procedural only. It does not, for example, affect the rule that, where the plaintiff

elects the two-stage proceeding, the value of the property includes any enhanced value created by the existence of a favorable lease on the property. See *People v. Lynbar, Inc.*, 253 Cal. App.2d 870, 62 Cal. Rptr. 320 (1967). See also Section 1263.310 (compensation for property taken).

The last sentence of subdivision (b) is an elaboration of the introductory clause of former Section 1248.

§ 1260.230. Separate assessment of elements of compensation

1260.230. As far as practicable, the trier of fact shall assess separately each of the following:

(a) Compensation for the property taken as required by Article 4 (commencing with Section 1263.310) of Chapter 9.

(b) Where the property acquired is part of a larger parcel:

(1) The amount of the damage, if any, to the remainder as required by Article 5 (commencing with Section 1263.410) of Chapter 9.

(2) The amount of the benefit, if any, to the remainder as required by Article 5 (commencing with Section 1263.410) of Chapter 9.

(c) Compensation for loss of goodwill, if any, as required by Article 6 (commencing with Section 1263.510) of Chapter 9.

Law Revision Commission Comment

Comment. Section 1260.230 continues the separate assessment requirement of subdivisions 1–3 and 7 of former Section 1248. The section does not affect the right of a party to request special interrogatories to the jury on these issues or on any other issues, including those where a separate finding on an element of compensation not listed in Section 1260.230 would be useful. For example, a party may desire a special finding on the amount of compensation required under Section 1263.620 for performance of work to protect the public from injury from a partially completed improvement.

§ 1260.240. Court determination of compensation for deceased and unknown persons

1260.240. Where any persons unknown or any deceased persons or the heirs and devisees of any deceased persons have been properly joined as defendants but have not appeared either personally or by a personal representative, the court shall determine the extent of the interests of such defendants in the property taken or in the remainder if the property taken is part of a larger parcel and the compensation to be awarded for such interests. The court may determine the extent and value of the interests of all such defendants in the aggregate without apportionment between the respective defendants. In any event, in the case of deceased persons, the court

shall determine only the extent and value of the interest of the decedent and shall not determine the extent and value of the separate interests of the heirs and devisees in such decedent's interest.

Law Revision Commission Comment

Comment. Section 1260.240 is based on a portion of former Section 1245.3 which provided for the court determination of the compensation to be awarded deceased and unknown persons; however, Section 1260.240 authorizes the court to make a lump sum award where such persons have not appeared. Former law was not clear on this point. For provisions authorizing joinder of deceased persons and persons unknown, see Section 1250.220.

CHAPTER 9. COMPENSATION

Article 1. General Provisions

§ 1263.010. Right to compensation

1263.010. (a) The owner of property acquired by eminent domain is entitled to compensation as provided in this chapter.

(b) Nothing in this chapter affects any rights the owner of property acquired by eminent domain may have under any other statute. In any case where two or more statutes provide compensation for the same loss, the person entitled to compensation may be paid only once for that loss.

Law Revision Commission Comment

Comment. This chapter, relating to compensation, supersedes various provisions formerly found in the eminent domain title of the Code of Civil Procedure. The elements of compensation provided in this chapter include compensation for property taken (Section 1263.310), injury to the remainder (Section 1263.410), and loss of goodwill (Section 1263.510). In connection with compensation, see also Chapter 10 (commencing with Section 1265.010) (divided interests), Section 1268.610 (litigation expenses). See also Section 1235.170 (defining “property” to include any interest in property), Section 1235.125 (defining “interest” in property), and Section 1235.140 (defining “litigation expenses”). For related provisions, see Article 1 (commencing with Section 1245.010) of Chapter 4 (damages from preliminary location, survey, and tests) and Section 1268.620 (damages caused by possession when proceeding dismissed or right to take defeated). See also Section 1250.410 (pretrial settlement offers).

Subdivision (b) of Section 1263.010 makes clear that this chapter does not affect any statute providing for additional compensation such as compensation for relocation of public utility facilities. See discussion in *A Study Relating to Sovereign Immunity*, 5 CAL. L. REVISION COMM’N REPORTS 1, 78–96 (1963). See also GOVT. CODE § 7260 *et seq.* (relocation assistance).

Likewise, this chapter in no way limits compensation that may be required by Article I, Section 19, the “just compensation” clause of the California Constitution. On the other hand, the “just compensation” clause does not limit the compensation required by this chapter. This chapter is intended to provide rules of compensation for eminent domain proceedings; the law of inverse condemnation is left for determination by judicial

development. See Section 1230.020 and Comment thereto (law governing exercise of eminent domain power).

The second sentence of subdivision (b), prohibiting double payment for the same loss, applies only to statutes that purport to compensate for the same loss. Thus, for example, a person who suffers a business loss would not be entitled to compensation for that loss under both Section 1263.510 (loss of goodwill) and Government Code Section 7262(c) (relocation or in-lieu payment). This prohibition on double recovery in no way limits compensation under different statutes for separate and distinct losses such as the fair market value of property taken, injury to the remainder, moving expense, court costs, and the like.

§ 1263.020. Accrual of right to compensation

1263.020. Except as otherwise provided by law, the right to compensation shall be deemed to have accrued at the date of filing the complaint.

Law Revision Commission Comment

Comment. Section 1263.020 continues the substance of a portion of former Section 1249, but the date of filing the complaint rather than the date of issuance of summons is used to determine the accrual of the right to compensation since the filing of the complaint is the factor that establishes the jurisdiction of the court over the property. See Section 1250.110 and Comment thereto (complaint commences proceeding).

The rule stated in Section 1263.020 is subject to exceptions created by statutory or decisional law. Thus, for example, if an interest in existence at the time of filing the complaint (such as a lease) is extinguished or partially dissipated before entry of judgment (such as by expiration or partial expiration of the term of the lease), the owner of the interest may not have a right to compensation to the extent of such extinction or dissipation. See, e.g., *People v. Hartley*, 214 Cal. App.2d 378, 29 Cal. Rptr. 502 (1963); but see *People v. Simon Newman Co.*, 37 Cal. App. 3d 398, 112 Cal. Rptr. 298 (1974) (subsequent sale of property does not affect determination of ownership, larger parcel, damages or benefits). And, the right of the owner of an interest may accrue even if a complaint is never filed. See, e.g., *Concrete Service Co. v. State*, 274 Cal. App.2d 142, 78 Cal. Rptr. 923 (1969) (lessee entitled to compensation for fixtures where public entity acquired lessor's interest and terminated lease). See also *Redevelopment Agency v. Diamond Properties*, 271 Cal. App.2d 315, 76 Cal. Rptr. 269 (1969).

Article 2. Date of Valuation

Law Revision Commission Comment

Comment. Article 2 (commencing with Section 1263.110) supersedes those portions of former Section 1249 that specified two alternative dates of valuation. Article 2 provides a date of valuation for all eminent domain proceedings other than certain proceedings by political subdivisions to take property of public utilities. See PUB. UTIL. CODE § 1411 (date of valuation is date of filing petition); *cf. Citizen's Util. Co. v. Superior Court*, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963); *Marin Municipal Water Dist. v. Marin Water & Power Co.*, 178 Cal. 308, 173 P. 469 (1918).

§ 1263.110. Date of valuation fixed by deposit

1263.110. (a) Unless an earlier date of valuation is applicable under this article, if the plaintiff deposits the probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6 or the amount of the award in accordance with Article 2 (commencing with Section 1268.110) of Chapter 11, the date of valuation is the date on which the deposit is made.

(b) Whether or not the plaintiff has taken possession of the property or obtained an order for possession, if the court determines pursuant to Section 1255.030 that the probable amount of compensation exceeds the amount previously deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 and the amount on deposit is not increased accordingly within the time allowed under Section 1255.030, no deposit shall be deemed to have been made for the purpose of this section.

Legislative Committee Comment—Assembly

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).

§ 1263.120. Trial within one year

1263.120. If the issue of compensation is brought to trial within one year after commencement of the proceeding, the date of valuation is the date of commencement of the proceeding.

Law Revision Commission Comment

Comment. Section 1263.120 continues the substance of the rule provided in former Section 1249, but the date of commencement of the proceeding—rather than the date of the issuance of summons—is used in determining the date of valuation. See Sections 411.10 and 1250.110 (filing of complaint commences proceeding). Ordinarily, the dates are the same, but this is not always the case. See *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15 (1924). As the issuance of summons is not essential to establish the court's jurisdiction over the property (see *Harrington v. Superior Court*, *supra*, and *Dresser v. Superior Court*, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964)), the date of commencement of the proceeding is a more appropriate date.

§ 1263.130. Trial not within one year

1263.130. Subject to Section 1263.110, if the issue of compensation is not brought to trial within one year after commencement of the proceeding, the date of valuation is the date of the commencement of the trial unless the delay is caused by the defendant, in which case the date of valuation is the date of commencement of the proceeding.

Law Revision Commission Comment

Comment. Section 1263.130 establishes the date of valuation where that date is not established by an earlier deposit (Section 1263.110) or by the commencement of the proceeding (Section 1263.120). See Sections 411.10 and 1250.110 (filing of complaint commences proceeding). Section 1263.130, which continues in effect a proviso contained in former Section 1249, retains the date specified in Section 1263.120 as the date of valuation in any case in which the delay in reaching trial is caused by the defendant.

With respect to the date that a trial is commenced, see Evidence Code Section 12 and the Comment to that section.

If a new trial is ordered or a mistrial is declared and the new trial or retrial is not commenced within one year after the filing of the complaint, the date of valuation is determined under Section 1263.140 or Section 1263.150 rather than Section 1263.130. However, if the new trial or retrial is commenced within one year after commencement of the proceeding, the date of valuation is determined by Section 1263.120.

§ 1263.140. New trial

1263.140. Subject to Section 1263.110, if a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the commencement of the proceeding, the date of valuation is the date of the commencement of such new trial unless, in the interest of justice, the court ordering the new trial orders a different date of valuation.

Legislative Committee Comment—Assembly

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 used. See *People v. Murata*, 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

1263.150. Subject to Section 1263.110, if a mistrial is declared and the retrial is not commenced within one year after the commencement of the proceeding, the date of valuation is the date of the commencement of the retrial of the case unless, in the interest of justice, the court declaring the mistrial orders a different date of valuation.

Legislative Committee Comment—Assembly

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).

Article 3. Compensation for Improvements

§ 1263.205. Improvements pertaining to the realty

1263.205. (a) As used in this article, "improvements pertaining to the realty" include any machinery or equipment installed for use on property taken by eminent domain, or on the remainder if such property is part of a larger parcel, that cannot be removed without a substantial economic loss or without substantial damage to the property on which it is installed, regardless of the method of installation.

(b) In determining whether particular property can be removed "without a substantial economic loss" within the meaning of this section, the value of the property in place considered as a part of the realty should be compared with its value if it were removed and sold.

Legislative Committee Comment—Senate

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 v. Sabatasso*, 3 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 condemnor 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.

§ 1263.210. Compensation for improvements pertaining to the realty

1263.210. (a) Except as otherwise provided by statute, all improvements pertaining to the realty shall be taken into account in determining compensation.

(b) Subdivision (a) applies notwithstanding the right or obligation of a tenant, as against the owner of any other interest in real property, to remove such improvement at the expiration of his term.

Law Revision Commission Comment

Comment. Section 1263.210 continues the substance of portions of former Sections 1248(1) (compensation shall be awarded for the property taken “and all improvements thereon pertaining to the realty”) and 1249.1 (“All improvements pertaining to the realty that are on the property at the time of the service of summons and which affect its value shall be considered in the assessment of compensation . . .”). For exceptions to the rule provided in Section 1263.210, see Sections 1263.230 (improvements removed or destroyed) and 1263.240 (improvements made after service of summons). *Cf.* Section 1263.250 (growing crops).

Subdivision (a) requires that the property taken by eminent domain be valued as it stands improved. If the improvements serve to enhance the value of the property over its unimproved condition, the property receives the enhanced value; if the improvements serve to decrease the value of the property below its unimproved condition, the property suffers the decreased value. See, e.g., *City of Los Angeles v. Sabatasso*, 3 Cal. App.3d 973, 83 Cal. Rptr. 898 (1970) (lessee may recover severance damages for reduction in value of equipment used in place on remainder).

Subdivision (b) of Section 1263.210, which adopts the language of Section 302(b) (1) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4652(b) (1) (1971), continues prior California law. See *People v. Klopstock*, 24 Cal.2d 897, 151 P.2d 641 (1944); *Concrete Service Co. v. State*, 274 Cal. App.2d 142, 78 Cal. Rptr. 923 (1969). *Cf.* *City of Los Angeles v. Klinker*, 219 Cal. 198, 25 P.2d 826 (1933).

§ 1263.220. [Reserved for expansion]

§ 1263.230. Improvements removed or destroyed

1263.230. (a) Improvements pertaining to the realty shall not be taken into account in determining compensation to the extent that they are removed or destroyed before the earliest of the following times:

- (1) The time the plaintiff takes title to the property.
- (2) The time the plaintiff takes possession of the property.
- (3) If the defendant moves from the property in compliance with an order for possession, the date specified in the order; except that, if the defendant so moves prior to such date and gives the plaintiff written notice thereof, the date 24 hours after such notice is received by the plaintiff.

(b) Where improvements pertaining to the realty are removed or destroyed by the defendant at any time, such improvements shall not be taken into account in determining compensation. Where such removal or destruction damages the remaining property, such damage shall be taken into account in determining compensation to the extent it reduces the value of the remaining property.

Law Revision Commission Comment

Comment. Subdivision (a) of Section 1263.230 continues the substance of former Section 1249.1. See also *Redevelopment Agency v. Maxwell*, 193 Cal. App.2d 414, 14 Cal. Rptr. 170 (1961). See also Section 1268.030 (title to property acquired by eminent domain passes upon the date that a certified copy of the final order of condemnation is recorded). *Cf. Klopping v. City of Whittier*, 8 Cal.3d 39, 46, 500 P.2d 1345, 1351, 104 Cal. Rptr. 1, 7 (1972) (dictum) (risk of loss in inverse condemnation). Subdivision (a) also provides that, where a defendant moves from property in compliance with an order for possession prior to the date specified in the order, he may shift the risk of loss to the plaintiff by serving notice that he has moved; such notice may be served prior to the time he moves. The risk of loss does not shift to the plaintiff until 24 hours after the plaintiff receives such notice. As to the authority of the Department of Transportation to secure fire insurance in cases in which property acquired is leased to the former owner, see Government Code Section 11007.1. If removal or destruction serves to decrease the value of the property below its improved condition, the property is valued accordingly; if removal or destruction serves to increase the value of the property over its improved condition, the property receives the increased value.

Subdivision (b) makes clear that, where the defendant

removes or destroys improvements even after the time the risk of loss shifts to the plaintiff, compensation is not awarded for the improvements. Subdivision (b) does not authorize the defendant to remove property or preclude the plaintiff from bringing an independent action against the defendant for conversion where such removal or destruction occurs after valuation of the property.

Where removal or destruction of improvements damages the remaining property, such as a structure in which the improvements were installed, subdivision (b) makes clear that such damage is included in the determination of property value. It should be noted that the defendant may be able to remove improvements without suffering the damage to the structure caused by the removal under Section 1263.260.

§ 1263.240. Improvements made after service of summons

1263.240. Improvements pertaining to the realty made subsequent to the date of service of summons shall not be taken into account in determining compensation unless one of the following is established:

(a) The improvement is one required to be made by a public utility to its utility system.

(b) The improvement is one made with the written consent of the plaintiff.

(c) The improvement is one authorized to be made by a court order issued after a noticed hearing and upon a finding by the court that the hardship to the defendant of not permitting the improvement outweighs the hardship to the plaintiff of permitting the improvement. The court may, at the time it makes an order under this subdivision authorizing the improvement to be made, limit the extent to which the improvement shall be taken into account in determining compensation.

Legislative Committee Comment—Assembly

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 excep-

tions to this rule, see subdivisions (a)–(e) 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 of the particular case.

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.

§ 1263.250. Harvesting and marketing of crops

1263.250. (a) The acquisition of property by eminent domain shall not prevent the defendant from harvesting and marketing crops planted before or after the service of summons. If the plaintiff takes possession of the property at a time that prevents the defendant from harvesting and marketing the crops, the fair market value of the crops in place at the date the plaintiff is authorized to take possession of the property shall be included in the compensation awarded for the property taken.

(b) Notwithstanding subdivision (a), the plaintiff may obtain a court order precluding the defendant from planting crops after service of summons, in which case the compensation awarded for the property taken shall include an amount sufficient to compensate for loss caused by the limitation on the defendant's right to use the property.

Law Revision Commission Comment

Comment. Section 1263.250 supersedes former Section 1249.2. Despite the contrary implication of former Section 1249.2, subdivision (a) makes clear that the defendant has the right to grow and harvest crops and to retain the profit for his own benefit up to the time the property is actually taken. Where possession is taken and the defendant is prevented from realizing the value of his crops, he is entitled to the fair market value of

the crops as of the date the plaintiff is authorized to take possession. The plaintiff may preclude the defendant from planting after service of summons but must pay the loss of use value. Subdivision (b).

§ 1263.260. Removal of improvements pertaining to realty

1263.260. Notwithstanding Section 1263.210, the owner of improvements pertaining to the realty may elect to remove any or all such improvements by serving on the plaintiff within 60 days after service of summons written notice of such election. If the plaintiff fails within 30 days thereafter to serve on the owner written notice of refusal to allow removal of such improvements, the owner may remove such improvements and shall be compensated for their reasonable removal and relocation cost not to exceed the market value of the improvements. Where such removal will cause damage to the structure in which the improvements are located, the defendant shall cause no more damage to the structure than is reasonably necessary in removing the improvements, and the structure shall be valued as if the removal had caused no damage to the structure.

Law Revision Commission Comment

Comment. Section 1263.260 is new. It provides a means whereby the defendant may convert improvements pertaining to the realty to personalty and receive the moving cost for such personalty. *Cf.* GOVT. CODE § 7262 (moving expense of personal property). Where the owner of improvements pertaining to the realty makes the election provided in this section, compensation is not awarded for the property removed. See Section 1263.230 (improvements removed or destroyed). For a comparable provision, see Pennsylvania Eminent Domain Code § 1-607 (1964).

§ 1263.270. Improvements located partially on part taken

1263.270. Where an improvement pertaining to the realty is located in part upon property taken and in part upon property not taken, the court may, on motion of any party and a determination that justice so requires, direct the plaintiff to acquire the entire improvement, including the part located on property not taken, together with an easement or other interest reasonably necessary for the demolition, removal, or relocation of the improvement.

Law Revision Commission Comment

Comment. Section 1263.270 is comparable to Section 1011 of the Uniform Eminent Domain Code and supersedes Section 16³/₄ of the Los Angeles County Flood Control Act (Cal. Stats. 1915, Ch. 755). It authorizes the court, on motion, to direct the plaintiff

to take and pay compensation for improvements located in part on property not taken in the proceeding. *Cf.* Section 1240.150 (acquisition of all or portion of remainder with owner's consent). See the Comment to Section 1240.150.

Article 4. Measure of Compensation for Property Taken

§ 1263.310. Compensation for property taken

1263.310. Compensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken.

Law Revision Commission Comment

Comment. Section 1263.310 provides the basic rule that compensation for property taken by eminent domain is the fair market value of the property. Compensation for the property taken, however, is only one element of the damages to which a property owner may be entitled under this chapter. See Section 1263.010 and the Comment thereto (right to compensation). See also Section 1263.410 (injury to remainder) and Section 1263.510 (goodwill).

§ 1263.320. Fair market value

1263.320. (a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

(b) The fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

Legislative Committee Comment—Senate

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 “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.

§ 1263.330. Changes in property value due to imminence of project

1263.330. The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following:

- (a) The project for which the property is taken.
- (b) The eminent domain proceeding in which the property is taken.
- (c) Any preliminary actions of the plaintiff relating to the taking of the property.

Law Revision Commission Comment

Comment. Section 1263.330 is an adjustment to the basic definition of fair market value in Section 1263.320 and requires that the compensation for property taken by eminent domain be determined as if there had been no enhancement or diminution in the value of property due to the imminence of the eminent domain proceeding or the project for which the property is taken. For related provisions of state and federal law that apply to offers for voluntary acquisition of property, see Government Code Section 7267.2 and Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4651 (3) (1971) (excluding from consideration the effect of the "public improvement" for which the property is acquired).

Prior case law held that, in general, increases in the value of the property caused by the project may not be included in the compensation. See, *e.g.*, *County of San Luis Obispo v. Bailey*, 4

Cal.3d 518, 483 P.2d 27, 93 Cal. Rptr. 859 (1971). The effect of Section 1263.330(a) is to codify this rule. It should be noted that *Merced Irr. Dist. v. Woolstenhulme*, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971), stated an exception to the rule of exclusion of enhancement from market value where the property was not originally included within the scope of the project; this exception is discussed below under the “scope of the project” rule.

Prior case law was uncertain respecting the treatment of any decrease in value due to such factors as general knowledge of the pendency of the public project. Several decisions indicated that the rules respecting enhancement and diminution were not parallel and that value was to be determined as of the date of valuation notwithstanding that such value reflects a decrease due to general knowledge of the pendency of the public project. See *City of Oakland v. Partridge*, 214 Cal. App.2d 196, 29 Cal. Rptr. 388 (1963); *People v. Lucas*, 155 Cal. App.2d 1, 317 P.2d 104 (1957); and *Atchison, T. & S.F. R.R. v. Southern Pac. Co.*, 13 Cal. App.2d 505, 57 P.2d 575 (1936). Seemingly to the contrary were *People v. Lillard*, 219 Cal. App.2d 368, 33 Cal. Rptr. 189 (1963), and *Buena Park School Dist. v. Metrim Corp.*, 176 Cal. App.2d 255, 1 Cal. Rptr. 250 (1959). The Supreme Court case of *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972), cited the *Lillard* and *Metrim* approach while disapproving the *Partridge*, *Lucas*, and *Atchison* approach in the inverse condemnation context. The *Klopping* case, however, does not make clear the approach the court would take in a direct condemnation case. See 8 Cal.3d at 45 n.1, 51 n.3, 500 P.2d at 1350 n.1, 1354 n.3, 104 Cal. Rptr. at 6 n.1, 10 n.3; cf. *Merced Irr. Dist. v. Woolstenhulme*, 4 Cal.3d at 483 n.1, 483 P.2d at 3 n.1, 93 Cal. Rptr. at 835 n.1. Section 1263.330(a) is intended to make the rules respecting appreciation and depreciation parallel by codifying the views expressed in the *Lillard* and *Metrim* decisions. See Anderson, *Consequences of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor?*, 5 SANTA CLARA LAWYER 35 (1964).

Subdivision (a) of Section 1263.330 is also intended to codify the proposition that any increase or decrease in value resulting from the use which the condemnor is to make of the property must be eliminated in determining compensable market value. See *Merced Irr. Dist. v. Woolstenhulme*, 4 Cal.3d at 490–491, 483 P.2d at 12–14, 93 Cal. Rptr. at 841–842. If, however, the condemnor’s proposed use is one of the highest and best uses of the property, the adaptability of the property for that purpose may be shown by the property owner. See *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 20 P. 372 (1888).

While Section 1263.330(a) provides that changes in value caused by the project for which the property is taken may not be included in the compensation, this exclusionary provision is not intended to apply to value changes that are beyond the scope of the "project." Thus, where changes in value are caused by a project other than the one for which the property is taken, even though the two projects may be related, the property owner may enjoy the benefit or suffer the detriment caused by the other project. See, e.g., *People v. Cramer*, 14 Cal. App.3d 513, 92 Cal. Rptr. 401 (1971). Likewise, if property is affected by a project but is not to be taken for that project and subsequently the scope of the project is changed or expanded and the property is acquired for the changed or expanded project, the property should be valued as affected by the original project up to the change in scope. See, e.g., *People v. Miller*, 21 Cal. App.3d 467, 98 Cal. Rptr. 539 (1971), and *Merced Irr. Dist. v. Woolstenhulme*, *supra* ("increases in value, attributable to a project but reflecting a reasonable expectation that property will not be taken for the improvement, should properly be considered in determining 'just compensation.'" [4 Cal.3d at 495, 483 P.2d at 12, 93 Cal. Rptr. at 844]); cf. *United States v. Miller*, 317 U.S. 369 (1943), and Annot., 14 A.L.R. Fed. 806 (1973).

Subdivision (b) of Section 1263.330 requires that value changes caused by the fact that the property will be taken by eminent domain must be excluded from fair market value. Changes based on conjecture of a favorable or unfavorable award are not a proper element of compensation. See *Merced Irr. Dist. v. Woolstenhulme*, 4 Cal.3d at 491–492, 483 P.2d at 9, 93 Cal. Rptr. at 841–842.

Subdivision (c) of Section 1263.330 requires that preliminary actions on the part of the condemnor related to the taking of the property should not be allowed to affect the compensation. See *Buena Park School Dist. v. Metrim Corp.*, *supra*.

Article 5. Compensation for Injury to Remainder

§ 1263.410. Compensation for injury to remainder

1263.410. (a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.

(b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no

compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.

Law Revision Commission Comment

Comment. Section 1263.410 provides the measure of compensation for injury to the remainder in a partial taking. It supersedes subdivisions 2 and 3 of former Section 1248. The phrase “damage to the remainder” is defined in Section 1263.420; “benefit to the remainder” is defined in Section 1263.430.

It should be noted that the term “larger parcel” is not defined in the Eminent Domain Law, just as it was not defined in the former eminent domain provisions of the Code of Civil Procedure. The legal definition of the larger parcel is in the process of judicial development. See, e.g., *City of Los Angeles v. Wolfe*, 6 Cal.3d 326, 491 P.2d 813, 99 Cal. Rptr. 21 (1971) (contiguity not essential). Leaving the larger parcel definition uncodified permits continued judicial development of the concept.

§ 1263.420. Damage to remainder

1263.420. Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:

- (a) The severance of the remainder from the part taken.
- (b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken.

Law Revision Commission Comment

Comment. Section 1263.420 continues prior law as to the damage to the remainder compensable in an eminent domain proceeding. See former Section 1248(2). Section 1263.420 does not abrogate any court-developed rules relating to the compensability of specific elements of damage, nor does it impair the ability of the courts to continue to develop the law in this area. See *Eachus v. Los Angeles Consol. Elec. Ry.*, 103 Cal. 614, 37 P. 750 (1894) (damage that causes “mere inconvenience” not compensable); *City of Berkeley v. Von Adelung*, 214 Cal. App.2d 791, 29 Cal. Rptr. 802 (1963) (“general” damage not compensable); *People v. Volunteers of America*, 21 Cal. App.3d 111, 98 Cal. Rptr. 423 (1971) (test of compensability is whether

the condemnee is obligated to bear more than his "proper share" of the burden of the public improvement).

Prior law was not clear whether damage to the remainder caused by the construction and use of the project were recoverable if the damage-causing portion of the project was not located on the property from which the remainder was severed. Compare *People v. Symons*, 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960), with *People v. Ramos*, 1 Cal.3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969), and *People v. Volunteers of America*, 21 Cal. App.3d 111, 98 Cal. Rptr. 423 (1971). Subdivision (b) abrogates the rule in *Symons* by allowing recovery for damages to the remainder caused by the project regardless of the precise location of the damage-causing portion of the project if the damages are otherwise compensable.

It should be noted that the cost to cure may be a proper measure of severance damages in appropriate cases. See discussion in CONDEMNATION PRACTICE IN CALIFORNIA, Matteoni, *Severance Damages* § 5.11 (Cal. Cont. Ed. Bar 1973).

§ 1263.430. Benefit to remainder

1263.430. Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken.

Law Revision Commission Comment

Comment. Section 1263.430 codifies prior law by defining the benefit to the remainder that may be offset against damage to the remainder in an eminent domain proceeding. See former Section 1248(3). Section 1263.430 does not abrogate any court-developed rules relating to the offset of benefits nor does it impair the ability of the courts to continue to develop the law in this area. See *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1083 (1902) (only "special" benefits may be offset); *People v. Giumarra Farms, Inc.*, 22 Cal. App.3d 98, 99 Cal. Rptr. 272 (1971) (increased traffic a special benefit); but see *People v. Ayon*, 54 Cal.2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960) (increased or decreased traffic not a proper item of damage).

As with damage to the remainder (Section 1263.420 and Comment thereto), benefits created by the construction and use of the project need not be derived from the portion of the project located on property from which the remainder was severed. This continues existing law. See *People v. Hurd*, 205 Cal. App.2d 16, 23 Cal. Rptr. 67 (1962).

§ 1263.440. Computing damage and benefit to remainder

1263.440. (a) The amount of any damage to the remainder and any benefit to the remainder shall reflect any delay in the time when the damage or benefit caused by the construction and use of the project in the manner proposed by the plaintiff will actually be realized.

(b) The value of the remainder on the date of valuation, excluding prior changes in value as prescribed in Section 1263.330, shall serve as the base from which the amount of any damage and the amount of any benefit to the remainder shall be determined.

Law Revision Commission Comment

Comment. Section 1263.440 embodies two rules for computing the damage and benefit to the remainder that represent departures from prior law. It has been held that damage and benefit must be based on the assumption that the improvement is completed. See, *e.g.*, *People v. Schultz Co.*, 123 Cal. App.2d 925, 268 P.2d 117 (1954). Subdivision (a) alters this rule and requires that compensation for damage to the remainder (and the amount of benefit offset) be computed in a manner that will take into account any delay in the accrual of the damage and benefit under the project as proposed. If there is a subsequent change in plans so that the damage and benefit do not occur as the plaintiff proposed, the property owner may recover any additional damage in a subsequent action. See *People v. Adamson*, 118 Cal. App.2d 714, 722, 258 P.2d 1020, 1025 (1953).

Whether changes in the value of the remainder caused by imminence of the project prior to the date of valuation should be included in the computation of damage and benefit to the remainder was unclear under prior law. Subdivision (b) adopts the position that it is the value of the remainder in the before condition, unaffected by any enhancement or blight, that is to be used as the basis in computing damages and benefits that will be caused by the project. See Section 1263.330 and the Comment thereto.

§ 1263.450. Compensation to reflect project as proposed

1263.450. Compensation for injury to the remainder shall be based on the project as proposed. Any features of the project which mitigate the damage or provide benefit to the remainder, including but not limited to easements, crossings, underpasses, access roads, fencing, drainage facilities, and cattle guards, shall be taken into account in determining the compensation for injury to the remainder.

Law Revision Commission Comment

Comment. Section 1263.450 makes clear that any “physical solutions” provided by the plaintiff to mitigate damages are to be considered in the assessment of damages.

Section 1263.450 supersedes former Section 1248(5), relating to the cost of fencing, cattle guards, and crossings. The cost of fencing, cattle guards, and crossings is an element of damage only if lack of fencing, cattle guards, or crossings would damage the remainder; if the fencing, cattle guards, or crossings are to be supplied by the plaintiff as part of its project as designed, this fact should be taken into consideration in determining the damage, if any, to the remainder. *Cf.* former Section 1251 (plaintiff may elect to build fencing, cattle guards, and crossings in lieu of payment of damages).

If the plaintiff has no specific proposal for the manner of construction and use of the project, damages will be assessed on the basis of the most injurious lawful use reasonably possible. *People v. Schultz Co.*, 123 Cal. App.2d 925, 268 P.2d 117 (1954).

Article 6. Compensation for Loss of Goodwill

§ 1263.510. Compensation for loss of goodwill

1263.510. (a) The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:

(1) The loss is caused by the taking of the property or the injury to the remainder.

(2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

(3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code.

(4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

(b) Within the meaning of this article, “goodwill” consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

Law Revision Commission Comment

Comment. Section 1263.510, which is the same in substance as Section 1016 of the Uniform Eminent Domain Code, is new to

California eminent domain law. Under prior court decisions, compensation for business losses in eminent domain was not allowed. See, e.g., *City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 P. 705 (1915); *but see Community Redevelopment Agency v. Abrams*, (hearing granted by Supreme Court 1974). Section 1263.510 provides compensation for loss of goodwill in both a whole or a partial taking. Goodwill loss is recoverable under Section 1263.510 only to the extent it cannot reasonably be prevented by relocation or other efforts by the owner to mitigate.

The determination of loss of goodwill is governed by the rules of evidence generally applicable to such a determination and not by the special rules relating to valuation in eminent domain contained in Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code. See EVID. CODE § 811 and Comment thereto. Thus, the provisions of Evidence Code Sections 817 and 819 that restrict admissibility of income from a business for the determination of value, damage, and benefit in no way limit admissibility of income from a business for the determination of loss of goodwill. Notwithstanding Section 1260.210, the burden of proof is on the property owner under this section.

Section 1263.510 compensates for goodwill loss only to the extent such loss is not compensated by Government Code Section 7262 (moving expense and moving losses for relocated business or farm operations; in-lieu payments for business or farm operation that cannot be relocated without a substantial loss of patronage). See also Sections 1263.010 (no double recovery), 1263.410 (offset against benefits to remainder).

§ 1263.520. State tax returns of business

1263.520. The owner of a business who claims compensation under this article shall make available to the court, and the court shall, upon such terms and conditions as will preserve their confidentiality, make available to the plaintiff, the state tax returns of the business for audit for confidential use solely for the purpose of determining the amount of compensation under this article. Nothing in this section affects any right a party may otherwise have to discovery or to require the production of documents, papers, books, and accounts.

Legislative Committee Comment—Senate

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

1263.530. Nothing in this article is intended to deal with compensation for inverse condemnation claims for temporary interference with or interruption of business.

Legislative Committee Comment—Senate

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.

Article 7. Miscellaneous Provisions

§ 1263.610. Performance of work to reduce compensation

1263.610. A public entity and the owner of property to be acquired for public use may make an agreement that the public entity will:

(a) Relocate for the owner any structure if such relocation is likely to reduce the amount of compensation otherwise payable to the owner by an amount equal to or greater than the cost of such relocation.

(b) Carry out for the owner any work on property not taken, including work on any structure, if the performance of the work is likely to reduce the amount of compensation otherwise payable to the owner by an amount equal to or greater than the cost of the work.

Law Revision Commission Comment

Comment. Section 1263.610 generalizes former Section 970 of the Streets and Highways Code, which related to certain types of work in connection with an acquisition for opening or widening a county highway. As to the authority of the Department of Transportation to contract for relocation of structures outside the State Contract Act (GOVT. CODE §§ 14250–14424), see STS. & HWYS. CODE §§ 135 and 136.5.

The phrase “any work” is used without qualification so as to have the broadest possible meaning. It would include any physical or structural operation whatsoever. Thus, it would cover such things as screening off roads or canals or soundproofing buildings adjacent to highways as well as constructing rights of way, fences, driveways, sidewalks, retaining walls, and drainage or utility connections, all of which latter operations were specifically listed in former Section 970.

Nothing in Section 1263.610 precludes the public entity from including features in the design of the public project that will have the effect of mitigating damages. See Section 1263.450.

§ 1263.620. Partially completed or installed improvements; performance of work to protect public from injury

1263.620. (a) Where summons is served during construction of an improvement or installation of machinery or equipment on the property taken or on the remainder if such property is part of a larger parcel, and the owner of the property ceases the construction or installation due to such service, the owner shall be compensated for his expenses reasonably incurred for work necessary for either of the following purposes:

(1) To protect against the risk of injury to persons or to other property created by the uncompleted improvement.

(2) To protect the partially installed machinery or equipment from damage, deterioration, or vandalism.

(b) The compensation provided in this section is recoverable only if the work was preceded by notice to the plaintiff except in the case of an emergency. The plaintiff may agree with the owner (1) that the plaintiff will perform work necessary for the purposes of this section or (2) as to the amount of compensation payable under this section.

Law Revision Commission Comment

Comment. Section 1263.620 provides compensation for expenses “reasonably incurred” for work necessary to protect the public or partially installed machinery or equipment from injury. It is available only if the work is preceded by notice to the plaintiff unless emergency conditions preclude prior notice. Should the plaintiff, upon receipt of notice, object to the necessity or reasonableness of the expenses to be incurred, this fact should be taken into consideration by the court in determining the amount of compensation to be awarded under this section. On the other hand, the failure of the plaintiff to object does not prejudice its right subsequently to show that the work was not necessary or that the expense was not reasonable.

The amount, if any, by which the work performed enhances the value of the property is not the measure of value and is not considered in determining compensation under Section 1263.620. If compensation is sought on the basis of the enhanced value of the property, the improvement must be one that may be taken into account under Section 1263.240.

CHAPTER 10. DIVIDED INTERESTS

Article 1. General Provisions

§ 1265.010. Scope of chapter

1265.010. Although this chapter provides rules governing compensation for particular interests in property, it does not otherwise limit or affect the right to compensation for any other interest in property.

Legislative Committee Comment—Senate

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).

Article 2. Leases

§ 1265.110. Termination of lease in whole taking

1265.110. Where all the property subject to a lease is acquired for public use, the lease terminates.

Law Revision Commission Comment

Comment. Section 1265.110 codifies the rule that the taking of the entire demised premises for public use by eminent domain or agreement operates to release the tenant from liability for subsequently accruing rent. See *City of Pasadena v. Porter*, 201 Cal. 381, 387, 257 P. 526, 528 (1927); *Carlstrom v. Lyon Van & Storage Co.*, 152 Cal. App.2d 625, 313 P.2d 645 (1957). This section does not affect the right of a lessee, if any, to compensation for the impairment of his leasehold interest. See Section 1265.150. Nor does this section apply where there is a valid provision to the contrary in the lease. See Section 1265.160.

§ 1265.120. Partial termination of lease in partial taking

1265.120. Except as provided in Section 1265.130, where part of the property subject to a lease is acquired for public use, the lease terminates as to the part taken and remains in force as to the

remainder, and the rent reserved in the lease that is allocable to the part taken is extinguished.

Law Revision Commission Comment

Comment. Section 1265.120 abrogates the rule in *City of Pasadena v. Porter*, 201 Cal. 381, 257 P. 526 (1927), and numerous cases following it that required continuation of the lessee's full rental obligation for the duration of the lease in cases of a partial taking of property subject to a lease. Section 1265.120 requires a pro rata abatement of the rental obligation. For a comparable provision, see W. VA. CODE § 37-6-29 (1966). The requirements of Section 1265.120 do not apply where there is a valid provision to the contrary in the lease. See Section 1265.160. Nor does this section affect the right of a lessee, if any, to compensation for the impairment of his leasehold interest. See Section 1265.150.

§ 1265.130. Termination of lease in partial taking

1265.130. Where part of the property subject to a lease is acquired for public use, the court may, upon petition of any party to the lease, terminate the lease if the court determines that an essential part of the property subject to the lease is taken or that the remainder of the property subject to the lease is no longer suitable for the purposes of the lease.

Law Revision Commission Comment

Comment. Section 1265.130 is new to California law. It provides for termination of a lease in a partial taking case where the taking in effect destroys the value or utility of the lease for either of the parties. Section 1265.130 is not applicable in cases where there is a valid provision in the lease covering the situation. See Section 1265.160.

§ 1265.140. Time of termination or partial termination

1265.140. The termination or partial termination of a lease pursuant to this article shall be at the earlier of the following times:

(a) The time title to the property is taken by the person who will put it to the public use.

(b) The time the plaintiff is authorized to take possession of the property as stated in an order for possession.

Law Revision Commission Comment

Comment. Section 1265.140 makes clear the time of partial termination (Section 1265.120) or termination (Sections 1265.110 and 1265.130) of a lease.

§ 1265.150. Remedies of parties not affected

1265.150. Nothing in this article affects or impairs any right a lessee may have to compensation for the taking of his lease in whole or in part or for the taking of any other property in which he has an interest.

Law Revision Commission Comment

Comment. Section 1265.150 is added to assure that partial termination or termination of a lease pursuant to this article does not preclude a lessee's recovery of compensation for the value of his leasehold interest, if any, and any of his property taken in the eminent domain proceeding. See Sections 1263.010 (right of owner of property to compensation), 1263.210 (improvements pertaining to realty), and 1263.510 (compensation for loss of goodwill); *cf.* Section 1265.220 (procedure where there are divided interests).

§ 1265.160. Rights under lease not affected

1265.160. Nothing in this article affects or impairs the rights and obligations of the parties to a lease to the extent that the lease provides for such rights and obligations in the event of the acquisition of all or a portion of the property for public use.

Law Revision Commission Comment

Comment. While this article provides rules that govern the rights of parties to a lease of property taken by eminent domain, Section 1265.160 makes clear that these rules apply only absent a valid provision in the lease covering the situation.

Article 3. Encumbrances

§ 1265.210. "Lien" defined

1265.210. As used in this article, "lien" means a mortgage, deed of trust, or other security interest in property whether arising from contract, statute, common law, or equity.

Law Revision Commission Comment

Comment. The definition of "lien" provided in Section 1265.210 is new. It is intended to include security interests of all types, not merely types similar to the specifically mentioned mortgage and deed of trust. As used in this article, the definition of "lien" thus may expand the coverage of former Sections 1248(8), 1248(9), and 1246.2, which are continued as Sections 1265.220–1265.240. The former provisions may have been limited to a mortgage, deed of trust, contract of sale, and liens similar thereto.

§ 1265.220. **Acquisition of property subject to encumbrances**

1265.220. Where property acquired by eminent domain is encumbered by a lien and the indebtedness secured thereby is not due at the time of the entry of judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment and the lien shall be continued until such indebtedness is paid; but the amount for which, as between the plaintiff and the defendant, the plaintiff is liable under Article 5 (commencing with Section 1268.410) of Chapter 11 may not be deducted from the judgment.

Law Revision Commission Comment

Comment. Section 1265.220 is the same in substance as former Section 1248(8). *But see* the Comment to Section 1265.210 (defining “lien”).

§ 1265.225. **Allocation of award between encumbrancer and owner in partial taking**

1265.225. (a) Where there is a partial taking of property encumbered by a lien, the lienholder may share in the award only to the extent determined by the court to be necessary to prevent an impairment of the security, and the lien shall continue upon the part of the property not taken as security for the unpaid portion of the indebtedness.

(b) Notwithstanding subdivision (a), the lienholder and the property owner may at any time after commencement of the proceeding agree that some or all of the award shall be apportioned to the lienholder on the indebtedness.

Law Revision Commission Comment

Comment. Section 1265.225 is new; it codifies the case law principle that a lienholder is entitled to share in the award only to the extent of the impairment of his security notwithstanding any agreement to the contrary entered into at the time of the creation of the indebtedness on which the lien is based. See, *e.g.*, *Milstein v. Security Pac. Nat'l Bank*, 27 Cal. App.3d 482, 103 Cal. Rptr. 16 (1972); *Sacramento & San Joaquin Drainage Dist. v. Truslow*, 125 Cal. App.2d 478, 270 P.2d 928 (1954). Subdivision (b) makes clear, however, that the parties may by subsequent agreement provide that the lienholder is to take a specified portion of the award even if there is no impairment of security. This may be advantageous, for example, in situations where the award will be sufficient to discharge the indebtedness on which the lien is based.

Section 1265.225 determines the amount of the award that will be available to the lienholders. For allocation of that amount among junior and senior lienholders, see Section 1265.230.

§ 1265.230. Allocation of award among encumbrancers in partial taking

1265.230. (a) This section applies only where there is a partial taking of property encumbered by a lien and the part taken or some portion of it is also encumbered by a junior lien that extends to only a portion of the property encumbered by the senior lien. This section provides only for allocation of the portion of the award, if any, that will be available for payment to the junior and senior lienholders and does not provide for determination of the amount of such portion.

(b) As used in this section, "impairment of security" means the security of the lienholder remaining after the taking, if any, is of less value in proportion to the remaining indebtedness than the value of the security before the taking was in proportion to the indebtedness secured thereby.

(c) The portion of the award that will be available for payment to the senior and junior lienholders shall be allocated first to the senior lien up to the full amount of the indebtedness secured thereby and the remainder, if any, to the junior lien.

(d) If the allocation under subdivision (c) would result in an impairment of the junior lienholder's security, the allocation to the junior lien shall be adjusted so as to preserve the junior lienholder's security to the extent that the remaining amount allocated to the senior lien, if paid to the senior lienholder, would not result in an impairment of the senior lienholder's security.

(e) The amounts allocated to the senior and junior liens by this section are the amounts of indebtedness owing to such senior and junior lienholders that are secured by their respective liens on the property taken, and any other indebtedness owing to the senior or junior lienholders shall not be considered as secured by the property taken. If the plaintiff makes the election provided in Section 1265.220, the indebtedness that is deducted from the judgment is the indebtedness so determined, and the lien shall continue until that amount of indebtedness is paid.

Law Revision Commission Comment

Comment. Section 1265.230 continues the substance of former Section 1248(9) which was designed to meet the problems that arise when a parcel is encumbered with a first trust deed, or other senior lien, and a portion is encumbered with a subordinate lien as well. In this situation, condemnation of all or part of the smaller portion may result in an award inadequate to satisfy both liens. Section 1265.230 prescribes a procedure for allocating eminent domain awards between senior and junior

lienholders of condemned property. The scope of former Section 1248(9) may be somewhat expanded by the broad definition of “lien” in Section 1265.210. See the Comment to that section.

The allocation procedure of Section 1265.230 is designed to allow adjustment of the portion of the condemnation award available to the lienholders so that both the senior and junior lienholders will retain security interests proportionate to those existing before the taking. If the amount is not sufficient to pay both in full, it will be initially allocated to pay the full amount of the senior lien with any balance to the junior. At that time, the court will determine the adequacy of the remaining property to secure the junior lien. If it determines that the junior lienholder’s security is disproportionately low, the court may make adjustments as to the initial allocation to place the junior in the same relative position as before the taking. The adjustment, made by reducing the allocation to the senior and adding to that of the junior, is permissible only if it preserves the proportional security of the senior lienholder.

Section 1265.230 is not intended to affect the rule precluding recovery by a lienholder of any part of the award where there is no impairment of security. See Section 1265.225. Section 1265.230 merely specifies rules for apportionment of the amount allocated to lienholders under Section 1265.225.

§ 1265.240. Prepayment penalty

1265.240. Where the property acquired for public use is encumbered by a lien, the amount payable to the lienholder shall not include any penalty for prepayment.

Law Revision Commission Comment

Comment. Section 1265.240 continues the substance of former Section 1246.2. Section 1265.240 is intended to apply to penalties for prepayment of liens of all kinds (see Section 1265.210 defining “lien”) including but not limited to prepayment penalties under mortgages, deeds of trust, contracts of sale, and redemption premiums under Streets and Highways Code Sections 6447 and 6464.

Article 4. Future Interests

§ 1265.410. Contingent future interests

1265.410. (a) Where the acquisition of property for public use violates a use restriction coupled with a contingent future interest granting a right to possession of the property upon violation of the use restriction:

(1) If violation of the use restriction was otherwise reasonably imminent, the owner of the contingent future interest is entitled to compensation for its value, if any.

(2) If violation of the use restriction was not otherwise reasonably imminent but the benefit of the use restriction was appurtenant to other property, the owner of the contingent future interest is entitled to compensation to the extent that the failure to comply with the use restriction damages the dominant premises to which the restriction was appurtenant and of which he was the owner.

(b) Where the acquisition of property for public use violates a use restriction coupled with a contingent future interest granting a right to possession of the property upon violation of the use restriction but the contingent future interest is not compensable under subdivision (a), if the use restriction is that the property be devoted to a particular charitable or public use, the compensation for the property shall be devoted to the same or similar use coupled with the same contingent future interest.

Law Revision Commission Comment

Comment. Section 1265.410 makes clear that, where there are contingent future interests in property acquired by eminent domain, such interests may be entitled to compensation despite any implications to the contrary in such cases as *Romero v. Department of Public Works*, 17 Cal.2d 189, 109 P.2d 662 (1941); *People v. City of Fresno*, 210 Cal. App.2d 500, 26 Cal. Rptr. 853 (1962); *People v. City of Los Angeles*, 179 Cal. App.2d 558, 4 Cal. Rptr. 531 (1960); *City of Santa Monica v. Jones*, 104 Cal. App.2d 463, 232 P.2d 55 (1951). Since the value of the fee owner's interest in the property is diminished to the extent of the value of the contingent future interest, the award for the value of the property must be so apportioned. See Section 1260.220 (procedure where there are divided interests).

The test stated in subdivision (a)—“reasonably imminent”—is derived from 1 RESTATEMENT OF PROPERTY § 53(c) (1936). The reference to “public use” in subdivision (b) is intended to include all uses, including public utility purposes, for which the power of eminent domain might be exercised. See Section 1240.010 (public use limitation).

§ 1265.420. Property subject to life tenancy

1265.420. Where property acquired for public use is subject to a life tenancy, upon petition of the life tenant or any other person having an interest in the property, the court may order any of the following:

(a) An apportionment and distribution of the award based on the value of the interest of life tenant and remainderman.

(b) The compensation to be used to purchase comparable

property to be held subject to the life tenancy.

(c) The compensation to be held in trust and invested and the income (and, to the extent the instrument that created the life tenancy permits, principal) to be distributed to the life tenant for the remainder of the tenancy.

(d) Such other arrangement as will be equitable under the circumstances.

Law Revision Commission Comment

Comment. Section 1265.420 provides the court express statutory authority to devise an equitable solution where property subject to a life tenancy is taken and an outright division of the award would not result in substantial justice under the circumstances of the particular case. See *Estate of Giacomelos*, 192 Cal. App.2d 244, 13 Cal. Rptr. 245 (1961) (trust imposed on proceeds).

CHAPTER 11. POSTJUDGMENT PROCEDURE

Article 1. Payment of Judgment; Final Order of Condemnation

§ 1268.010. Payment of judgment

1268.010. (a) Not later than 30 days after final judgment, the plaintiff shall pay the full amount required by the judgment.

(b) Payment shall be made by either or both of the following methods:

(1) Payment of money directly to the defendant. Any amount which the defendant has previously withdrawn pursuant to Article 2 (commencing with Section 1255.210) of Chapter 6 shall be credited as a payment to him on the judgment.

(2) Deposit of money with the court pursuant to Section 1268.110. Upon entry of judgment, a deposit made pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 is deemed to be a deposit made pursuant to Section 1268.110 if the full amount required by the judgment is deposited or paid.

Law Revision Commission Comment

Comment. Section 1268.010 retains the rule under former Section 1251 that the plaintiff must pay the full amount of the judgment not later than 30 days after final judgment. See Section 1235.120 (defining “final judgment”). See also Section 1268.110 (deposit of full amount of award, together with interest then due thereon, less amounts previously paid or deposited). Section 1268.010 omits the provision of former Section 1251 that extended the 30-day time by one year where necessary to permit bonds to be issued and sold.

Subdivision (b) of Section 1268.010 specifies the manner in which payment may be made and supersedes the first sentence of former Section 1252. The payment can be made directly to the defendant or defendants, or the plaintiff may pay the money into court as provided in Article 2 (commencing with Section 1268.110). See the Comment to Section 1268.110. The provision that amounts previously withdrawn are credited as payment is derived from former Section 1243.7(g).

§ 1268.020. Remedies of defendant if judgment not paid

1268.020. (a) If the plaintiff fails to pay the full amount required by the judgment within the time specified in Section 1268.010, the defendant may have execution as in a civil case.

(b) Upon noticed motion of the defendant, the court shall enter judgment dismissing the eminent domain proceeding if all of the following are established:

(1) The plaintiff failed to pay the full amount required by the judgment within the time specified in Section 1268.010.

(2) The defendant has filed in court and served upon the plaintiff, by registered or certified mail, a written notice of the plaintiff's failure to pay the full amount required by the judgment within the time specified in Section 1268.010.

(3) The plaintiff has failed for 20 days after service of the notice under paragraph (2) to pay the full amount required by the judgment in the manner provided in subdivision (b) of Section 1268.010.

(c) The defendant may elect to exercise the remedy provided by subdivision (b) without attempting to use the remedy provided by subdivision (a).

Law Revision Commission Comment

Comment. Section 1268.020, which generally continues the substance of portions of former Sections 1252 and 1255a, provides remedies for the defendant if the plaintiff does not pay the judgment as required; the defendant may enforce the plaintiff's obligation to pay by execution or, at the defendant's election, may obtain a dismissal of the proceeding with its attendant award of litigation expenses. See Section 1268.610. Under former Section 1252, these remedies were provided, but the section required that the defendant resort first to execution and, if unsuccessful, he could have the proceeding dismissed. However, former Section 1255a, a later enactment, provided that failure to pay the judgment within the required time constituted an implied abandonment of the proceeding. The two sections were construed together to give the defendant the option of resorting to execution or to having the proceeding dismissed as impliedly abandoned. See, *e.g.*, *County of Los Angeles v. Bartlett*, 223 Cal. App.2d 353, 36 Cal. Rptr. 193 (1963). Under the former law, it was possible that an inadvertent failure to pay the judgment within the time specified might result in an implied abandonment even though the plaintiff did not intend to abandon the proceeding. See, *e.g.*, *County of Los Angeles v. Bartlett*, *supra*. To protect the plaintiff against this possibility, Section 1268.020 requires that notice of the failure to pay the judgment within the time specified be given to the plaintiff and that he be given 20 days to pay the judgment before the proceeding can be dismissed upon motion of the defendant.

§ 1268.030. Final order of condemnation

1268.030. (a) Upon application of any party, the court shall make a final order of condemnation if the full amount of the judgment has been paid as required by Section 1268.010 or satisfied pursuant to Section 1268.020.

(b) The final order of condemnation shall describe the property taken and identify the judgment authorizing the taking.

(c) The party upon whose application the order was made shall serve notice of the making of the order on all other parties affected thereby. Any party affected by the order may thereafter record a certified copy of the order in the office of the recorder of the county in which the property is located and shall serve notice of recordation upon all other parties affected thereby. Title to the property vests in the plaintiff upon the date of recordation.

Legislative Committee Comment—Assembly

Comment. Section 1260.030 supersedes former Section 1253.

Article 2. Deposit and Withdrawal of Award

§ 1268.110. Deposit after judgment

1268.110. (a) Except as provided in subdivision (b), the plaintiff may, at any time after entry of judgment, deposit with the court for the persons entitled thereto the full amount of the award, together with interest then due thereon, less any amounts previously paid directly to the defendants or deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6.

(b) A deposit may be made under this section notwithstanding an appeal, a motion for a new trial, or a motion to vacate or set aside the judgment but may not be made after the judgment has been reversed, vacated, or set aside.

(c) Any amount deposited pursuant to this article on a judgment that is later reversed, vacated, or set aside shall be deemed to be an amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6.

Law Revision Commission Comment

Comment. This article (commencing with Section 1268.110) provides a uniform scheme for postjudgment deposits, superseding portions of former Sections 1245.3, 1252, and 1254.

Subdivision (a) of Section 1268.110 is similar to subdivision (a) of former Section 1254. However, the deposit provided for in this subdivision consists only of the amount of the judgment and accrued interest (less amounts previously deposited or paid to defendants); the former provision for an additional sum to secure payment of further compensation and costs is superseded by Section 1268.130. In addition, a deposit may be made under this section without regard to whether an order for possession is sought.

In case the judgment is reversed, vacated, or set aside, there is no longer a judgment for deposit and possession purposes; subsequent proceedings are under the provisions relating to

deposit and possession prior to judgment. See Chapter 6 (commencing with Section 1255.010). Any amount deposited under Section 1268.110 or Section 1268.130 is deemed to be an amount deposited under Chapter 6 if the judgment is reversed, vacated, or set aside; after the judgment is reversed, vacated, or set aside, the procedure for increasing or decreasing the amount of the deposit and withdrawal of the deposit is governed by the provisions of Chapter 6. See subdivision (c) and Section 1268.140(d).

§ 1268.120. Notice of deposit

1268.120. If the deposit is made under Section 1268.110 prior to apportionment of the award, the plaintiff shall serve a notice that the deposit has been made on all of the parties who have appeared in the proceeding. If the deposit is made after apportionment of the award, the plaintiff shall serve a notice that the deposit has been made on all of the parties to the proceeding determined by the order apportioning the award to have an interest in the money deposited. The notice of deposit shall state that a deposit has been made and the date and the amount of the deposit. Service of the notice shall be made in the manner provided in Section 1268.220 for the service of an order for possession. Service of an order for possession under Section 1268.220 is sufficient compliance with this section.

Law Revision Commission Comment

Comment. Section 1268.120 is new. In requiring that notice of the deposit be given, it parallels Section 1255.020 which requires that notice of a prejudgment deposit be sent to the parties having an interest in the property for which the deposit is made. Under former Section 1254, the defendant received notice that the deposit had been made only when served with an order for possession.

§ 1268.130. Increase or decrease in amount of deposit

1268.130. At any time after the plaintiff has made a deposit upon the award pursuant to Section 1268.110, the court may, upon motion of any defendant, order the plaintiff to deposit such additional amount as the court determines to be necessary to secure payment of any further compensation, costs, or interest that may be recovered in the proceeding. After the making of such an order, the court may, on motion of any party, order an increase or a decrease in such additional amount. A defendant may withdraw the amount deposited under this section or a portion thereof only if it is determined that he is entitled to recover such amount in the proceeding.

Law Revision Commission Comment

Comment. Section 1268.130 supersedes subdivisions (a) and (d) of former Section 1254. The additional amount referred to in Section 1268.130 is the amount determined by the court to be necessary, in addition to the amount of the judgment and the interest then due thereon, to secure payment of any further compensation, costs, or interest that may be recovered in the proceeding. Deposit of the amount of the award itself after entry of judgment is provided for by Section 1268.110.

Former Section 1254 was construed to make the amount, if any, to be deposited in addition to the award discretionary with the trial court. *Orange County Water Dist. v. Bennett*, 156 Cal. App.2d 745, 320 P.2d 536 (1958). This construction is continued under Section 1268.130.

§ 1268.140. Withdrawal of deposit

1268.140. (a) After entry of judgment, any defendant who has an interest in the property for which a deposit has been made may apply for and obtain a court order that he be paid from the deposit the amount to which he is entitled upon his filing either of the following:

(1) A satisfaction of the judgment.

(2) A receipt for the money which shall constitute a waiver by operation of law of all claims and defenses except a claim for greater compensation.

(b) If the award has not been apportioned at the time the application is made, the applicant shall give notice of the application to all the other defendants who have appeared in the proceeding and who have an interest in the property. If the award has been apportioned at the time the application is made, the applicant shall give such notice to the other defendants as the court may require.

(c) Upon objection to the withdrawal made by any party to the proceeding, the court, in its discretion, may require the applicant to file an undertaking in the same manner and upon the conditions prescribed in Section 1255.240 for withdrawal of a deposit prior to entry of judgment.

(d) If the judgment is reversed, vacated, or set aside, a defendant may withdraw a deposit only pursuant to Article 2 (commencing with Section 1255.210) of Chapter 6.

Law Revision Commission Comment

Comment. Section 1268.140 is based on subdivision (f) of former Section 1254 but provides notice requirements to protect the other defendants where money is to be withdrawn. Section 1268.140 is the only provision for withdrawal of a deposit after entry of judgment regardless whether the deposit was made before or after judgment.

Former Section 1254 was construed to permit the defendant to withdraw any amount paid into court upon the judgment whether or not the plaintiff applied for or obtained an order for possession. See *People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962); *San Francisco Bay Area Rapid Transit Dist. v. Fremont Meadows, Inc.*, 20 Cal. App.3d 797, 97 Cal. Rptr. 898 (1971). That construction is continued in effect by Section 1268.140.

For purposes of withdrawal of deposits, a judgment that is reversed, vacated, or set aside has no effect; withdrawal may be made only under the procedures provided for withdrawing deposits prior to entry of judgment. This is made clear by subdivision (d).

Under Section 1268.140, the defendant may retain his right to appeal or to request a new trial upon the issue of compensation even though he withdraws the deposit. This may be accomplished by filing a receipt which constitutes a waiver of all claims and defenses except the claim to greater compensation. See subdivision (a). *Cf. People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

§ 1268.150. Deposit in State Treasury unless otherwise required

1268.150. (a) Except as provided in subdivision (b), when money is deposited as provided in this article, the court shall order the money to be deposited in the State Treasury or, upon written request of the plaintiff filed with the deposit, in the county treasury. If the money is deposited in the State Treasury pursuant to this subdivision, it shall be held, invested, deposited, and disbursed in the manner specified in Article 10 (commencing with Section 16429) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that article. As between the parties to the proceeding, money deposited pursuant to this subdivision shall remain at the risk of the plaintiff until paid or made payable to the defendant by order of the court.

(b) If after entry of judgment but prior to apportionment of the award the defendants are unable to agree as to the withdrawal of all or a portion of any amount deposited, the court shall upon motion of any defendant order that the amount deposited be invested in United States government obligations or interest-bearing accounts in an institution whose accounts are insured by an agency of the federal government for the benefit of the defendants who shall be entitled to the interest earned on the investments in proportion to the amount of the award they receive when the award is apportioned.

Law Revision Commission Comment

Comment. Subdivision (a) of Section 1268.150 is the same in substance as former Section 1243.6 and a portion of subdivision (h) of former Section 1254. For a comparable section, see Section 1255.070.

Subdivision (b) is new. It provides a means whereby a defendant may avoid the loss of interest earnings on amounts held on deposit pending resolution of an apportionment dispute. *Cf.* Section 1268.320 (interest ceases to accrue on judgment upon deposit). Subdivision (b) does not preclude a voluntary agreement among all defendants to draw down the award and place it in an interest-bearing trust fund pending resolution of apportionment issues. It should be noted that subdivision (b) permits investments in amounts in excess of insurance coverage. For a comparable provision, see Section 1255.075 (investment of deposit).

§ 1268.160. Repayment of excess withdrawal

1268.160. (a) Any amount withdrawn by a party pursuant to this article in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the parties entitled thereto. The court shall enter judgment accordingly.

(b) The judgment so entered shall not include interest except that any amount that is to be paid to a defendant shall include legal interest from the date of its withdrawal by another defendant.

(c) If the judgment so entered is not paid within 30 days after its entry, the court may, on motion, enter judgment against the sureties, if any, for the amount of such judgment.

(d) The court may, in its discretion and with such security as it deems appropriate, grant a party obligated to pay under this section a stay of execution for any amount to be paid to a plaintiff. Such stay of execution shall not exceed one year following entry of judgment under this section.

Law Revision Commission Comment

Comment. Section 1268.160 supersedes subdivision (g) of former Section 1254. Unlike Section 1254, which did not require the payment of interest where excess amounts were withdrawn, Section 1268.160 requires payment of interest where the excess is to be redistributed among defendants but not where the excess is to be paid to the plaintiff. For a comparable provision, see Section 1255.280. It should be noted, however, that, where execution is stayed under subdivision (d), interest will accrue during the stay.

§ 1268.170. Making deposit does not affect other rights

1268.170. By making a deposit pursuant to this article, the plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial.

Law Revision Commission Comment

Comment. Section 1268.170 continues the substance of a portion of subdivision (e) of former Section 1254. For a comparable provision permitting the defendant to withdraw the deposit without waiving his right to seek greater compensation, see Section 1268.140(a).

Article 3. Possession After Judgment**§ 1268.210. Order for possession**

1268.210. (a) If the plaintiff is not in possession of the property to be taken, the plaintiff may, at any time after entry of judgment, apply ex parte to the court for an order for possession, and the court shall authorize the plaintiff to take possession of the property pending conclusion of the litigation if:

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

(2) The plaintiff has paid to or deposited for the defendants, pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 or Article 2 (commencing with Section 1268.110), an amount not less than the amount of the award, together with the interest then due thereon.

(b) The court's order shall state the date after which the plaintiff is authorized to take possession of the property. Where deposit is made, the order shall state such fact and the date and the amount of the deposit.

(c) Where the judgment is reversed, vacated, or set aside, the plaintiff may obtain possession of the property only pursuant to Article 3 (commencing with Section 1255.410) of Chapter 6.

Law Revision Commission Comment

Comment. Section 1268.210 restates the substance of portions of subdivisions (a) and (b) of former Section 1254. Where the requirements of subdivision (a) are satisfied, the court must grant the order of possession. See *Pacific Gas & Elec. Co. v. Superior Court*, 33 Cal. App.3d 321, 109 Cal. Rptr. 10 (1973). The time for possession is lengthened, however, from 10 to 30 days after the order for possession where the property is occupied. See Section 1268.220. For purposes of possession, a judgment that is reversed, vacated, or set aside has no effect; the plaintiff must utilize procedures for obtaining possession prior to entry of judgment.

§ 1268.220. Service of order

1268.220. (a) The plaintiff shall serve a copy of the order for possession upon each defendant and his attorney, either personally or by mail:

(1) At least 30 days prior to the date possession is to be taken of property lawfully occupied by a person dwelling thereon or by a farm or business operation.

(2) At least 10 days prior to the date possession is to be taken in any case not covered by paragraph (1).

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

Law Revision Commission Comment

Comment. Section 1268.220 is the same in substance as subdivisions (b) and (c) of former Section 1254 except that the 10-day notice period is lengthened to 30 days where the property is occupied. With respect to subdivision (b), see the Comment to Section 1255.450.

§ 1268.230. Taking possession does not affect other rights

1268.230. By taking possession pursuant to this article, the plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial.

Law Revision Commission Comment

Comment. Section 1268.230 is the same in substance as a portion of subdivision (e) of former Section 1254. For a comparable provision, see Section 1255.470.

§ 1268.240. Police power not affected

1268.240. Nothing in this article limits the right of a public entity to exercise its police power in emergency situations.

Law Revision Commission Comment

Comment. Section 1268.240 is new. It makes clear that the requirements of this article—such as obtaining and serving an order for possession—do not limit the exercise of the police power. See *Surocco v. Geary*, 3 Cal. 69 (1853). See generally Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968), reprinted in Van Alstyne, *California Inverse Condemnation Law*, 10 CAL. L. REVISION COMM'N REPORTS 111 (1971). See also Section 1255.480.

Article 4. Interest

§ 1268.310. Date interest commences to accrue

1268.310. The compensation awarded in the proceeding shall draw legal interest from the earliest of the following dates:

- (a) The date of entry of judgment.
- (b) The date the plaintiff takes possession of the property.
- (c) The date after which the plaintiff is authorized to take possession of the property as stated in an order for possession.

Law Revision Commission Comment

Comment. Section 1268.310 is the same in substance as subdivision (a) of former Section 1255b except that the phrase “or damage [to the property] occurs” has been deleted from subdivision (2). The deleted phrase was inadvertently included in the 1961 revision of Section 1255b. See *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings*, 3 CAL. L. REVISION COMM’N REPORTS B-1, B-9, B-20 (1961). The 1961 revision was not intended to and has not been construed to require computation of interest on severance damages from a date prior to the earliest date stated in Section 1268.310. The deletion of this phrase is not intended to affect any rules relating to the time of accrual of interest on a cause of action based on inverse condemnation, whether raised in a separate action or by cross-complaint in the eminent domain proceeding. See, e.g., *Youngblood v. Los Angeles County Flood Control Dist.*, 56 Cal.2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); *Heimann v. City of Los Angeles*, 30 Cal.2d 746, 185 P.2d 597 (1947). For exceptions to the rules stated in Section 1268.310, see Sections 1255.040 and 1255.050 (deposit on notice of certain defendants).

§ 1268.320. Date interest ceases to accrue

1268.320. The compensation awarded in the proceeding shall cease to draw interest at the earliest of the following dates:

- (a) As to any amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 (deposit of probable compensation prior to judgment), the date such amount is withdrawn by the person entitled thereto.
- (b) As to the amount deposited in accordance with Article 2 (commencing with Section 1268.110) (deposit of amount of award), the date of such deposit.
- (c) As to any amount paid to the person entitled thereto, the date of such payment.

Law Revision Commission Comment

Comment. Section 1268.320 continues the substance of subdivision (c) of former Section 1255b. For an exception to the rule stated in subdivision (a), see Sections 1255.040 and 1255.050 (deposit on notice of certain defendants). Subdivision (b) of Section 1268.320 supersedes paragraphs (2) and (4) of subdivision (c) of former Section 1255b. Unlike the former law, there is now only one procedure for payments into court after entry of judgment. See Section 1268.110 and Comment thereto.

It should be noted that, if a prejudgment deposit is made and the deposit is not withdrawn, interest does not cease to accrue upon entry of judgment unless the amount of the deposit is in the full amount required by the judgment. See subdivision (b) and Section 1268.010(b) (2) (such a deposit deemed a postjudgment deposit on entry of judgment). Where the amount of the prejudgment deposit is not in the full amount required by the judgment, interest does not cease to accrue until an amount sufficient to bring it up to the full amount of the judgment is added. See subdivision (b) and Section 1268.110(a) (postjudgment deposit must be in full amount of judgment less amounts previously deposited).

§ 1268.330. Offsets against interest

1268.330. If, after the date that interest begins to accrue, the defendant:

(a) Continues in actual possession of the property, the value of such possession shall be offset against the interest. For the purpose of this section, the value of possession of the property shall be presumed to be the legal rate of interest on the compensation awarded. This presumption is one affecting the burden of proof.

(b) Receives rents or other income from the property attributable to the period after interest begins to accrue, the net amount of such rents and other income shall be offset against the interest.

Law Revision Commission Comment

Comment. Section 1268.330 supersedes subdivision (b) of former Section 1255b. Revisions have been made to clarify the meaning of the former language. See also GOVT. CODE § 7267.4 (“If the public entity permits an owner or tenant to occupy the real property acquired on a rental basis for a short term, or for a period subject to termination by the public entity on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.”). For an exception to the rule stated in Section 1268.330, see Section 1255.040 (deposit on notice of homeowner). See also Section

1255.050 (deposit on notice of owner of rental property).

§ 1268.340. Interest to be assessed by court

1268.340. Interest, including interest accrued due to possession of property by the plaintiff prior to judgment, and any offset against interest as provided in Section 1268.330, shall be assessed by the court rather than by jury.

Law Revision Commission Comment

Comment. Section 1268.340 is new. It clarifies former law by specifying that the court, rather than the jury, shall assess interest, including interest required to satisfy the defendant's constitutional right to compensation for possession of his property prior to conclusion of the eminent domain proceeding. See *Metropolitan Water Dist. v. Adams*, 16 Cal.2d 676, 107 P.2d 618 (1940); *People v. Johnson*, 203 Cal. App.2d 712, 22 Cal. Rptr. 149 (1962); *City of San Rafael v. Wood*, 144 Cal. App.2d 604, 301 P.2d 421 (1956). Section 1268.340 also resolves a further uncertainty by specifying that the amount of the offset against interest provided by Section 1268.330 is likewise assessed by the court, thus requiring that any evidence on that issue is to be heard by the court rather than the jury. Compare *People v. McCoy*, 248 Cal. App.2d 27, 56 Cal. Rptr. 352 (1967), with *People v. Giumarra Vineyards Corp.*, 245 Cal. App.2d 309, 53 Cal. Rptr. 902 (1966).

Article 5. Proration of Property Taxes

§ 1268.410. Liability for taxes

1268.410. As between the plaintiff and defendant, the plaintiff is liable for any ad valorem taxes, penalties, and costs upon property acquired by eminent domain that would be subject to cancellation under Chapter 4 (commencing with Section 4986) of Part 9 of Division 1 of the Revenue and Taxation Code if the plaintiff were a public entity and if such taxes, penalties, and costs had not been paid, whether or not the plaintiff is a public entity.

Law Revision Commission Comment

Comment. Section 1268.410 is the same in substance as the first paragraph of former Section 1252.1.

§ 1268.420. Application for separate valuation of property

1268.420. If property acquired by eminent domain does not have a separate valuation on the assessment roll, any party to the eminent domain proceeding may, at any time after the taxes on such property are subject to cancellation pursuant to Section 4986 of the Revenue and Taxation Code, apply to the tax collector for a separate valuation

of such property in accordance with Article 3 (commencing with 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.

Law Revision Commission Comment

Comment. Section 1268.420 is the same in substance as former Section 1252.2.

§ 1268.430. Reimbursement for taxes

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.

Law Revision Commission Comment

Comment. Section 1268.430 is the same in substance as the final two paragraphs of former Section 1252.1.

Article 6. Abandonment

§ 1268.510. 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.

Law Revision Commission Comment

Comment. Section 1268.510 is the same in substance as portions of former Section 1255a: subdivision (a) is the same in

substance as the first sentence of former Section 1255a; subdivision (b) is the same in substance as subdivision (b) of former Section 1255a; subdivision (c) is the same in substance as the first sentence of subdivision (c) of former Section 1255a. For recovery of litigation expenses and damages on dismissal, see Sections 1268.610 and 1268.620.

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

§ 1268.610. Litigation expenses

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.

Law Revision Commission Comment

Comment. Section 1268.610 deals with the litigation expenses that a defendant may recover when an eminent domain proceeding is dismissed for any reason or there is a final judgment that the plaintiff does not have the right to take. The section is based primarily on former Section 1255a but expands the scope of protection afforded the defendant to cover dismissal for any reason. Compare *Alta Bates Hosp. v. Mertle*, 31 Cal. App.3d 349, 107 Cal. Rptr. 277 (1973).

To a large extent, Section 1268.610 continues provisions of former Section 1255a. Thus, as formerly was the rule under Section 1255a, the plaintiff must reimburse the defendant:

(1) When the plaintiff voluntarily abandons the proceeding. See also Section 1268.510.

(2) When there is an implied abandonment of the proceeding such as abandonment resulting from failure to pay the judgment. See Section 1268.020. See *County of Los Angeles v. Bartlett*, 223

Cal. App.2d 353, 36 Cal. Rptr. 193 (1963); *Capistrano Union High School Dist. v. Capistrano Beach Acreage Co.*, 188 Cal. App.2d 612, 10 Cal. Rptr. 750 (1961).

(3) When there is a “partial abandonment” of the proceeding (see Section 1250.340) by an amendment of the complaint to significantly reduce the property or property interest being taken. (Reimbursement of defendant’s litigation expenses when the complaint is amended to add additional property is not covered by Section 1268.610; this is covered by Section 1250.340.)

Section 1268.610 also continues the rule under former Section 1246.4 that public-entity plaintiffs must reimburse the defendant when there is a final judgment that the plaintiff does not have a right to take the property sought to be acquired and expands this rule to apply to nonpublic-entity plaintiffs. See also federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654 (1971).

Section 1268.610 also changes prior law to require reimbursement of the defendant where the eminent domain proceeding is dismissed for failure to prosecute. Under prior law, the defendant was not entitled to reimbursement upon such failure. See *City of Industry v. Gordon*, 29 Cal. App.3d 90, 105 Cal. Rptr. 206 (1972); *Bell v. American States Water Service Co.*, 10 Cal. App.2d 604, 52 P.2d 503 (1935). *But see Alta Bates Hosp. v. Mertle, supra.*

The term “litigation expenses” used in subdivision (a) is defined in Section 1235.140.

The “partial dismissal” provision of subdivision (b) continues the rule that litigation expenses do not include any items that would have been incurred notwithstanding a partial abandonment. See the third sentence of former Section 1255a(c). Subdivision (b) expands this rule to make it applicable where a final judgment determines that the plaintiff does not have the right to take a portion of the property it originally sought to acquire in the eminent domain proceeding and where there is a dismissal of one or more plaintiffs pursuant to Section 1260.020 (determination of more necessary public use where separate proceedings are consolidated).

Subdivision (c) is the same in substance as the fourth and fifth sentences of former Section 1255a(c).

§ 1268.620. Damages caused by dispossession

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.

Law Revision Commission Comment

Comment. Section 1268.620 provides for restoration of possession of the property and damages where the defendant was dispossessed from property prior to a dismissal or a final judgment that the plaintiff cannot acquire the property. Section 1268.620 is not intended to limit any remedies the defendant may have on an inverse condemnation theory for damage to the property during litigation.

The provision on restoration of possession of the property supersedes the final portion of the second sentence of former Section 1252 and a portion of subdivision (d) of former Section 1255a. Whereas the prior provisions required possession to be restored to the defendants when the plaintiff failed to deposit the award in a condemnation proceeding, abandoned the proceeding, or because the right to take was defeated, Section 1268.620 requires restoration in any case where the proceeding is dismissed or there is a final judgment that the plaintiff cannot take the property, thus covering, for example, a case where the proceeding is dismissed for delay in bringing it to trial.

The provision relating to the payment of damages supersedes subdivision (d) of former Section 1255a. Whereas the prior provision required payment of damages when the plaintiff abandoned or the right to take was defeated, subdivision (b) makes clear that this rule applies as well where the proceeding is dismissed, *e.g.*, because the plaintiff fails to prosecute.

In addition, subdivision (b) requires payment of all damages proximately caused by the proceeding. Such damages would include, for example, damages for temporary interference with the operation of a business even though such damages might not have been compensable had the proceeding not been abandoned. *Compare People v. Ayon*, 54 Cal.2d 217, 228, 5 Cal. Rptr. 151, 157 (1960) (general inconvenience and annoyance not compensable), *with Heimann v. City of Los Angeles*, 30 Cal.2d 746, 754, 185 P.2d 597, 603 (1947) (substantial unnecessary interference compensable). Where there is a partial dismissal, only those damages allocable to the property subject to the dismissal may be recovered.

Article 8. Costs

§ 1268.710. Court 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.

Legislative Committee Comment—Assembly

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.

§ 1268.720. Costs on appeal

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.

Law Revision Commission Comment

Comment. Section 1268.720 states the basic rule that the defendant is allowed his costs on appeal in an eminent domain case. This basic rule is an exception to the rule that the prevailing party is entitled to his costs on appeal. Compare CAL. R. CT. 26 (costs on appeal). The basic rule continues case law that the general constitutional principle of “just compensation” requires that the plaintiff-condemnor bear the costs of all parties to the action in case of an appeal. See, e.g., *Sacramento & San Joaquin Drainage Dist. v. Reed*, 217 Cal. App.2d 611, 31 Cal. Rptr. 754 (1963) (defendant entitled to costs on plaintiff’s appeal even if the plaintiff prevails); *Regents of Univ. of Cal. v. Morris*, 12 Cal. App.3d 679, 90 Cal. Rptr. 816 (1970) (defendant entitled to costs on defendant’s appeal where defendant prevails).

Where the defendant is the appellant and loses, the former law was not clear. The trend in recent years was to award the defendant-appellant his costs whether or not he prevailed. See *City of Baldwin Park v. Stoskus*, 8 Cal.3d 563, 743a, 503 P.2d 1333, 1338, 105 Cal. Rptr. 325, 330 (1972); *Klopping v. City of Whittier*, 8 Cal.3d 39, 59, 500 P.2d 1345, 1360, 104 Cal. Rptr. 1, 16 (1972); *People v. International Tel. & Tel. Corp.*, 26 Cal. App.3d 549, 103 Cal. Rptr. 63 (1972). See also *In re Redevelopment Plan for Bunker Hill*, 61 Cal.2d 21, 68–71, 389 P.2d 538, 568–570, 37 Cal. Rptr. 74, 104–106 (1964). However, such action apparently was discretionary with the reviewing court. See *City of Oakland v. Pacific Coast Lumber & Mill Co.*, 172 Cal. 332, 156 P. 468 (1916) (not unconstitutional to award costs to plaintiff-respondent where he is the prevailing party). See also *Stafford v. County of Los Angeles*, 219 Cal. App.2d 770, 33 Cal. Rptr. 475 (1963) (plaintiff in inverse condemnation case taxed costs for frivolous appeal). Moreover, the defendant was not entitled to costs where the issue involved title as between two or more defendants. See former Section 1246.1; Section 1268.710(b) and Comment thereto.

Section 1268.720 preserves the rule allowing defendant costs and makes clear that this rule applies in the event of an appeal by the defendant that fails. The section authorizes the court to deviate from this principle.

It should be noted that Section 1268.720 is limited to an appeal involving the plaintiff. Where the appeal is between defendants, whether or not an issue of title is involved, the general rules governing costs on appeal prevail.

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

Law Revision Commission Comment

Comment. Chapter 12 (commencing with Section 1273.010) continues without substantive change the provisions of former Chapter 3 (commencing with Section 1273.01) of Title 7 of Part 3 of the Code of Civil Procedure. For background, see *Recommendation Relating to Arbitration of Just Compensation*, 9 CAL. L. REVISION COMM'N REPORTS 123 (1969). Nothing in this chapter precludes the defendants from entering into an agreement to arbitrate any issue between themselves under the general arbitration statute. See Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

§ 1273.010. Arbitration of amount of compensation authorized

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.

Law Revision Commission Comment

Comment. Section 1273.010, which supersedes former Section 1273.02, authorizes arbitration in connection with the acquisition of property for public use.

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

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

The enactment of this chapter does not imply that public entities authorized to purchase, but not to condemn, property are not authorized to agree to arbitration. See Section 1273.030(d).

This chapter contains no provisions comparable to Sections 1250.220, 1250.230, and 1260.220, which require that *all* persons having an interest in the property be named as defendants in the condemnation complaint, permit any unnamed interest holder to appear as a defendant in the proceeding, and provide for allocation of the award among holders of various interests. The chapter assumes that prudence on the part of the acquiring agency will assure that it agrees to arbitrate with the person who owns the interest it seeks to acquire. Also, the interests of persons other than parties to the arbitration would be unaffected by the arbitration agreement or the carrying out of that agreement. In short, an arbitration agreement and award operates only as a contract and conveyance between the parties to the particular agreement.

Subdivision (a). Subdivision (a) authorizes any acquirer of property for public use to agree to arbitrate the question of compensation and to act in accordance with the agreement. The subdivision does not imply that the public entity must have complied with the formalities (such as the adoption of a formal condemnation resolution) prescribed as conditions precedent to the commencement of an eminent domain proceeding. Rather, the subdivision contemplates that the question of compensation may be submitted to arbitration whenever acquisition has been authorized in the manner required of the particular entity or agency. As the arbitration agreement ordinarily would commit the public entity to purchase the property at the amount of the award (see Section 1273.040), the agreement should be approved and executed in the same manner as a contract to purchase property. *Cf. Santa Monica Unified School Dist. v. Persh*, 5 Cal. App.3d 945, 85 Cal. Rptr. 463 (1970).

Subdivision (b). Subdivision (b) authorizes “persons” who own, hold, or control public property that may be taken by eminent domain proceedings to agree to arbitrate the amount of compensation. Public property may be taken by eminent domain proceedings whether or not it is already “appropriated to a public use” (see Sections 1240.510 and 1240.610), and condemnation by one public entity of property already devoted to a public use by another public entity is a fairly common occurrence.

§ 1273.020. Expenses of arbitration

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.

Law Revision Commission Comment

Comment. Section 1273.020 supersedes former Section 1273.03. Subdivision (a) of Section 1273.020 is consistent with the rule applicable to eminent domain proceedings that the condemnee is entitled to recover all "court costs." See Section 1268.710 and Comment thereto. Subdivision (a) precludes the parties by agreement from imposing costs of this nature on the party from whom the property is being acquired.

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

§ 1273.030. Effect and enforceability of agreements

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.

Law Revision Commission Comment

Comment. Section 1273.030 supersedes former Section 1273.04. Although Section 1273.030 provides that arbitration under this chapter is governed by the general arbitration statute (Sections 1280–1294.2), a few minor modifications in the procedure provided by the general statute are desirable when arbitration is used to determine the compensation for property acquired for public use.

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

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

Subdivision (c). Subdivision (c) makes clear that an eminent domain proceeding may be begun and prosecuted notwithstanding an agreement to arbitrate the question of compensation and that such an agreement does not impair the condemnor's power to take possession prior to judgment. There is, of course, nothing to preclude the parties from including a provision in the arbitration agreement that prohibits the condemnor from taking possession of the property prior to the award in the arbitration proceeding. Subdivision (c) also provides for staying the determination of compensation in an eminent domain proceeding pending an agreed arbitration—a practice provided for as to other arbitrations by Section 1281.4.

Subdivision (d). Subdivision (d) makes clear that an agreement to arbitrate and to purchase and sell at the amount of the award does not require, and is not impaired by the acquirer's lack of, power to take the property by eminent domain.

Subdivision (e). Subdivision (e) requires that petitions relating to arbitration be filed in the county in which the property lies. The venue provided by this subdivision corresponds with the rule as to venue for eminent domain proceedings. See Section 1250.020.

§ 1273.040. Abandonment of acquisition

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.

Law Revision Commission Comment

Comment. Subdivision (a) of Section 1273.040 supersedes former Section 1273.05. It permits the parties to the agreement to provide whether and under what conditions the acquirer may abandon the acquisition. If the agreement does not so provide, the party who was to have acquired the property may abandon the acquisition within the time within which a petition or response to vacate an arbitration award may be filed and served. This period is generally 100 days after service of the award

(Sections 1288–1288.2) but is further limited by Section 1290.6 which limits the time for response to a petition. See *Coordinated Constr., Inc. v. Canoga Big “A,” Inc.*, 238 Cal. App.2d 313, 47 Cal. Rptr. 749 (1965).

Subdivision (b) makes clear that the *right* of the “condemnee” to recover certain expenses in the event of abandonment is not subject to modification under the arbitration agreement but the *amount* of such expenses is to be determined by arbitration unless the agreement otherwise provides. This subdivision is consistent with Section 1268.610 (rules governing litigation expenses upon dismissal of judicial condemnation proceeding).

§ 1273.050. Recordation of agreements

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.

Law Revision Commission Comment

Comment. Section 1273.050 supersedes former Section 1273.06. Section 1273.050 permits an agreement authorized by this chapter, or a memorandum thereof, to be acknowledged and recorded to afford “constructive notice” to subsequent purchasers and lienors. Arbitration rules may provide for the escrowing of an instrument of transfer (see, *e.g.*, Sections 1, 44, and 45 of the Eminent Domain Arbitration Rules of the American Arbitration Association (June 1, 1968)), but such an escrow would not, of itself, protect the “condemnor” against subsequent transferees. Section 1273.050 provides a means for obtaining such protection (see Civil Code Sections 1213–1220) and is calculated to make unnecessary the filing of an eminent domain proceeding solely to obtain the effect of a *lis pendens*.

CONFORMING REVISIONS

DELEGATION OF CONDEMNATION AUTHORITY

Civil Code § 1001 (repealed)

DISQUALIFICATION OF JUDGES

Code of Civil Procedure § 170 (technical amendment)

CROSS-COMPLAINTS

Code of Civil Procedure

§ 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)

SCHOOL DISTRICTS

Education Code

§ 1047.5 (added)

§ 1048 (added)

§ 15007.5 (repealed)

§ 15009 (amended)

§ 16003 (repealed)

UNIVERSITY OF CALIFORNIA

Education Code

§ 23151 (amended)

§ 23152 (repealed)

CALIFORNIA STATE UNIVERSITY AND COLLEGES

Education Code § 24503 (amended)

NONPROFIT EDUCATIONAL INSTITUTIONS OF COLLEGIATE GRADE

Education Code § 30051 (added)

EVIDENCE

Evidence Code

§ 811 (technical amendment)

§ 812 (technical amendment)

§ 814 (technical amendment)

DEPARTMENT OF FISH AND GAME

Fish & Game Code § 1348 (technical amendment)

DISTRICT AGRICULTURAL ASSOCIATIONS

Food & Agricultural Code § 4054 (amended)

GENERAL CONDEMNATION AUTHORIZATION

Government Code § 184 (repealed)

PROTECTIVE CONDEMNATION

Government Code §§ 190–196 (repealed)

LIABILITY OF PUBLIC ENTITIES

Government Code § 816 (repealed)

ACQUISITION PRICE PUBLIC INFORMATION

Government Code § 7275 (added)

**DEPARTMENT OF COMMERCE—CALIFORNIA INDUSTRY AND
WORLD TRADE**

Government Code § 8324 (amended)

DIRECTOR OF GENERAL SERVICES

Government Code

§ 14661 (repealed)

§ 14662 (amended)

STATE ESTABLISHMENTS IN NAPA COUNTY

Government Code § 14715 (amended)

RESTORATION OF DESTROYED STATE RECORDS

Government Code § 14770 (added)

PROPERTY ACQUISITION LAW

Government Code

§ 15853 (amended)

§ 15854 (technical amendment)

§ 15854.1 (repealed)

§ 15855 (repealed)

§ 15855 (added)

§ 15856 (repealed)

§ 15858 (repealed)

§ 15859 (repealed)

CONDEMNATION DEPOSITS FUND

Government Code § 16429 (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)****DEPARTMENT OF PARKS AND RECREATION****Government Code § 54093 (amended)****JOINT SANITATION PROJECTS****Government Code § 55003 (technical amendment)****COMMUNITY SERVICES DISTRICT****Government Code § 61610 (amended)****SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT
COMMISSION****Government Code § 66657 (amended)****SAN FRANCISCO BAY AREA TRANSPORTATION TERMINAL
AUTHORITY****Government Code § 67542 (technical amendment)****WHARVES, CHUTES, AND PIERS****Harbors & Navigation Code § 4009 (amended)****HARBOR IMPROVEMENT DISTRICT****Harbors & Navigation Code § 5900.4 (amended)****HARBOR DISTRICT****Harbors & Navigation Code § 6076 (amended)****PORT DISTRICT****Harbors & Navigation Code § 6296 (amended)****RIVER PORT DISTRICT****Harbors & Navigation Code § 6896 (amended)****SMALL CRAFT HARBOR DISTRICT****Harbors & Navigation Code § 7147 (amended)****NONPROFIT HOSPITALS****Health & Safety Code § 1260 (added)****SEWER CONSTRUCTION****Health & Safety Code § 4967 (added)**

CEMETERY AUTHORITY

Health & Safety Code § 8501 (added)

PUBLIC CEMETERY DISTRICT

Health & Safety Code § 8961 (amended)

COMMUNITY REDEVELOPMENT LAW

Health & Safety Code § 33398 (technical amendment)

RENEWAL AREA AGENCY

Health & Safety Code

§ 33720 (amended)

§ 33721 (repealed)

§ 33722 (repealed)

§ 33723 (repealed)

HOUSING AUTHORITY

Health & Safety Code § 34325 (amended)

LIMITED DIVIDEND HOUSING CORPORATIONS

Health & Safety Code

§ 34875 (amended)

§ 34876 (repealed)

§ 34877 (repealed)

§ 34878 (repealed)

LAND CHEST CORPORATIONS

Health & Safety Code § 35167 (added)

HOUSING AUTHORITY

Health & Safety Code § 36059 (technical amendment)

ADJUTANT GENERAL

Military & Veterans Code

§ 437 (amended)

§ 438 (repealed)

PREVENTION OF SUBSIDENCE IN OIL OR GAS PRODUCTION AREA

Public Resources Code

§ 3320.1 (technical amendment)

§ 3341 (technical amendment)

DEPARTMENT OF PARKS AND RECREATION

Public Resources Code

§ 5006 (amended)

§ 5006.1 (repealed)

PARKS AND BOULEVARDS

Public Resources Code § 5301 (technical amendment)

REGIONAL PARK DISTRICT

Public Resources Code

§ 5542 (amended)

§ 5542.5 (repealed)

§ 5566 (repealed)

STATE LANDS COMMISSION**Public Resources Code § 6808 (amended)****LANDS EXEMPT FROM CONDEMNATION****Public Resources Code § 8030 (added)****NATIONAL PARKS****Public Resources Code § 8402 (technical amendment)****RESORT IMPROVEMENT DISTRICT****Public Resources Code § 13070.1 (added)****STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION****Public Resources Code**

§ 25528 (amended)

§ 25531 (amended)

PRIVATELY OWNED PUBLIC UTILITIES**Public Utilities Code**

§ 221 (amended)

§ 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)

MUNICIPAL UTILITY DISTRICT**Public Utilities Code § 12703 (amended)**

PUBLIC UTILITY DISTRICT**Public Utilities Code**

- § 16404 (amended)
- § 16405 (repealed)

DEPARTMENT OF TRANSPORTATION—AERONAUTICS**Public Utilities Code**

- § 21633 (amended)
- § 21634 (repealed)
- § 21635 (repealed)

AIRCRAFT HAZARD OR DISTURBANCE ELIMINATION**Public Utilities Code**

- § 21652 (added)
- § 21653 (added)

TRANSIT DISTRICT—ALAMEDA OR CONTRA COSTA COUNTY

Public Utilities Code § 25703 (amended)

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT**Public Utilities Code**

- § 28953 (amended)
- § 28954 (repealed)

SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT**Public Utilities Code**

- § 30503 (amended)
- § 30504 (repealed)

ORANGE COUNTY TRANSIT DISTRICT

Public Utilities Code § 40162 (amended)

STOCKTON METROPOLITAN TRANSIT DISTRICT

Public Utilities Code § 50162 (amended)

TRANSIT DISTRICT—MARIN COUNTY

Public Utilities Code § 70162 (amended)

SAN DIEGO COUNTY TRANSIT DISTRICT

Public Utilities Code § 90402 (amended)

SANTA BARBARA METROPOLITAN TRANSIT DISTRICT

Public Utilities Code § 96002 (amended)

SANTA CRUZ METROPOLITAN TRANSIT DISTRICT

Public Utilities Code § 98212 (amended)

SANTA CLARA COUNTY TRANSIT DISTRICT**Public Utilities Code**

- § 100130.5 (repealed)
- § 100131 (amended)

GOLDEN EMPIRE METROPOLITAN TRANSIT DISTRICT

Public Utilities Code § 101177 (amended)

SACRAMENTO REGIONAL TRANSIT DISTRICT**Public Utilities Code**

- § 102241 (repealed)
- § 102242 (amended)

SAN MATEO COUNTY TRANSIT DISTRICT**Public Utilities Code**

- § 103241 (repealed)
- § 103242 (amended)

DEPARTMENT OF TRANSPORTATION—HIGHWAYS**Streets & Highways Code**

- § 102 (amended)
- § 103 (repealed)
- § 103.5 (amended)
- § 104.1 (repealed)
- § 104.2 (repealed)
- § 104.3 (repealed)
- § 104.7 (repealed)
- § 104.15 (amended)
- § 135 (amended)
- § 146.5 (amended)

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)

DEPARTMENT OF PARKS AND RECREATION

Streets & Highways Code § 887.2 (amended)

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)

JOINT HIGHWAY DISTRICT

Streets & Highways Code

§ 25052 (repealed)

§ 25280 (amended)

BRIDGE AND HIGHWAY DISTRICT

Streets & Highways Code § 27166 (amended)

DEPARTMENT OF TRANSPORTATION—TOLL BRIDGES

Streets & Highways Code

§ 30401 (amended)

§ 30402 (amended)

§ 30403 (repealed)

§ 30404 (repealed)

§ 30405 (repealed)

GOLD RUSH PARKWAY AUTHORITY

Streets & Highways Code

§ 31001 (amended)

§ 31002 (repealed)

§ 31003 (repealed)

§ 31004 (repealed)

EL DORADO COUNTY TOLL TUNNEL AUTHORITY

Streets & Highways Code

§ 31201 (amended)

§ 31202 (repealed)

§ 31203 (repealed)

§ 31204 (repealed)

DEPARTMENT OF WATER RESOURCES

Water Code

§ 250 (amended)

§ 251 (repealed)

§ 251.1 (repealed)

§ 252 (amended)

§ 254 (repealed)

§ 255 (repealed)

§ 256 (repealed)

PRIVATE WAYS FOR CANALS

Water Code §§ 7020–7026 (repealed)

STATE FLOOD CONTROL

Water Code § 8304 (amended)

SACRAMENTO AND SAN JOAQUIN DRAINAGE DISTRICT

Water Code

§ 8590 (amended)

§ 8590.1 (repealed)

§ 8593 (amended)

§ 8594 (repealed)

§ 8595 (repealed)

CENTRAL VALLEY PROJECT**Water Code**

- § 11575.1 (repealed)
- § 11575.2 (repealed)

DEPARTMENT OF WATER RESOURCES**Water Code**

- § 11580 (amended)
- § 11581 (repealed)
- § 11582 (repealed)
- § 11583 (repealed)
- § 11587 (repealed)

IRRIGATION DISTRICT**Water Code**

- § 22229 (repealed)
- § 22425 (amended)
- § 22455 (repealed)
- § 22456 (amended)

COUNTY WATER DISTRICT**Water Code**

- § 31040 (amended)
- § 31043 (repealed)
- § 31044 (repealed)

CALIFORNIA WATER DISTRICT**Water Code**

- § 35625 (repealed)
- § 35626 (repealed)

CALIFORNIA WATER STORAGE DISTRICT**Water Code**

- § 39061 (repealed)
- § 43531 (repealed)
- § 43532 (repealed)
- § 43532.5 (amended)
- § 43533 (repealed)

WATER REPLENISHMENT DISTRICT

Water Code § 60230 (amended)

MUNICIPAL WATER DISTRICT**Water Code**

- § 71693 (amended)
- § 71694 (amended)

WATER CONSERVATION DISTRICT**Water Code**

- § 74553 (amended)
- § 74555 (repealed)

CONFORMING REVISIONS

Delegation of Condemnation Authority

Civil Code § 1001 (repealed)

Law Revision Commission Comment

Comment. Section 1001 and Section 1238 of the Code of Civil Procedure to which it refers are superseded by Code of Civil Procedure Sections 1240.010 (public use limitation) and 1240.020 (statutory delegation of condemnation authority required) and by specific statements of the condemnation authority of particular persons for particular public uses which are found in the various codes. See Comment to CODE CIV. PROC. § 1240.020 and the Comment to former CODE CIV. PROC. § 1238.

Disqualification of Judges

Code of Civil Procedure § 170 (technical amendment)

170. No justice or judge shall sit or act as such in any action or proceeding:

1. To which he is a party; or in which he is interested other than as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation;

2. In which he is interested as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation;

3. When he is related to either party, or to an officer of a corporation, which is a party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity within the third degree computed according to the rules of law, or when he is indebted, through money borrowed as a loan, to either party, or to an attorney, counsel or partner of either party, or when he is so indebted to an officer of a corporation or unincorporated association which is a party; provided, however, that if the parties appearing in the action and not then in default, or the petitioner in any probate proceeding, or the executor, or administrator of the estate, or the guardian of the minor or incompetent person, or the commissioner, or the referee, or the attorney for any of the above named, or the party or his attorney in all other or special proceedings, shall sign and file in the action or matter, a stipulation in writing waiving the disqualification mentioned in this subdivision or in subdivision 2 or 4 hereof, the judge or court may proceed with the trial or hearing and the performance of all other duties connected therewith with the same legal effect as if no such disqualification existed;

4. When, in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for any party; or when he has given advice to any party upon any matter involved in the action or proceeding; or when he has been retained or employed as attorney or counsel for any party within two years prior to the commencement of the action or proceeding;

5. When it is made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had before him.

Whenever a judge or justice shall have knowledge of any fact or facts, which, under the provisions of this section, disqualify him to sit or act as such in any action or proceeding pending before him, it shall be his duty to declare the same in open court and cause a memorandum thereof to be entered in the minutes or docket. It shall thereupon be the duty of the clerk, or the judge if there be no clerk, to transmit forthwith a copy of such memorandum to each party, or his attorney, who shall have appeared in such action or proceeding, except such party or parties as shall be present in person or by attorney when the declaration shall be made.

In justice courts when, before the trial, either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before the judge before which the action is pending, by reason of the interest, prejudice or bias of the judge, the court may order the transfer of the action, and the provisions of Section 398 shall apply to such transfer.

Whenever a judge of a court of record who shall be disqualified under the provisions of this section, to sit or act as such in any action or proceeding pending before him, neglects or fails to declare his disqualification in the manner hereinbefore provided, any party to such action or proceeding who has appeared therein may present to the court and file with the clerk a written statement objecting to the hearing of such matter or the trial of any issue of fact or law in such action or proceeding before such judge, and setting forth the fact or facts constituting the ground of the disqualification of such judge. Copies of such written statement shall forthwith be served by the presenting party on each party, or his attorney, who has appeared in the action or proceeding and on the judge alleged in such statement to be disqualified.

Within 10 days after the filing of any such statement, or 10 days after the service of such statement as above provided, whichever is later in time, the judge alleged therein to be disqualified may file with the clerk his consent in writing that the action or proceeding be tried before another judge, or may file with the clerk his written answer admitting or denying any or all of the allegations contained in such statement and setting forth any additional fact or facts material or relevant to the question of his disqualifications. The clerk shall forthwith transmit a copy of the judge's consent or answer to each party or his attorney who shall have appeared in such action or

proceeding. Every such statement and every such answer shall be verified by oath in the manner prescribed by Section 446 for the verification of pleadings. The statement of a party objecting to the judge on the ground of his disqualification, shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge.

No judge of a court of record, who shall deny his disqualification, shall hear or pass upon the question of his own disqualification; but in every such case, the question of the judge's disqualification shall be heard and determined by some other judge agreed upon by the parties who shall have appeared in the action or proceeding, or, in the event of their failing to agree, by a judge assigned to act by the Chairman of the Judicial Council, and, if the parties fail to agree upon a judge to determine the question of the disqualification, within five days after the expiration of the time allowed herein for the judge to answer, it shall be the duty of the clerk then to notify the Chairman of the Judicial Council of that fact; and it shall be the duty of the Chairman of the Judicial Council forthwith, upon receipt of notice from the clerk, to assign some other judge, not disqualified, to hear and determine the question.

If such judge admits his disqualification, or files his written consent that the action or proceeding be tried before another judge, or fails to file his answer within the 10 days herein allowed, or if it shall be determined after hearing that he is disqualified, the action or proceeding shall be heard and determined by another judge or justice not disqualified, who shall be agreed upon by the parties, or, in the event of their failing to agree, assigned by the Chairman of the Judicial Council; provided, however, that when there are two or more judges of the same court, one of whom is disqualified, the action or proceeding may be transferred to a judge who is not disqualified.

A judge who is disqualified may, notwithstanding his disqualification, request another judge, who has been agreed upon by the parties, to sit and act in his place.

6. In an action or proceeding brought in any court by or against the Reclamation Board of the State of California, or any irrigation, reclamation, levee, swampland or drainage district, or trustee, officer or employee thereof, affecting or relating to any real property, or an easement or right-of-way, levee, embankment, canal, or any work provided for or approved by the Reclamation Board of the State of California, a judge of the superior court of the county, or a judge of the municipal court or justice court of the judicial district, in which such real property, or any part thereof, or such easement or right-of-way, levee, embankment, canal or work, or any part thereof is situated shall be disqualified to sit or act, and such action shall be heard and tried by some other judge assigned to sit therein by the Chairman of the Judicial Council, unless the parties to the action shall sign and file in the action or proceeding a stipulation in writing,

waiving the disqualification in this subdivision of this section provided, in which case such judge may proceed with the trial or hearing with the same legal effect as if no such legal disqualification existed. If, however, the parties to the action shall sign and file a stipulation, agreeing upon some other judge to sit or act in place of the judge disqualified under the provisions of this subdivision, the judge agreed upon shall be called by the judge so disqualified to hear and try such action or proceeding; provided, that nothing herein contained shall be construed as preventing the judge of the superior court of such county, or of the municipal court of such judicial district, from issuing a temporary injunction or restraining order, which shall, if granted, remain in force until vacated or modified by the judge designated as herein provided.

7. When, as a judge of a court of record, by reason of permanent or temporary physical impairment, he is unable to properly perceive the evidence or properly conduct the proceedings.

8. Notwithstanding anything contained in subdivision 6 of this section, a judge of the superior court or a judge of the municipal court or justice court of the judicial district, in which any real property is located, shall not be disqualified to hear or determine any matter in which the opposing party shall have failed to appear within the time allowed by law, or as to such of the opposing parties who shall have failed to appear within the time allowed by law, and as to which matter or parties the same shall constitute purely a default hearing; provided, that nothing in this section contained shall be construed as preventing the judge of the superior court of such county from issuing an order for possession prior to judgment in proceedings in eminent domain.

Nothing in this section contained shall affect a party's right to a change of the place of trial in the cases provided for in Title 4 (commencing with Section 392) of Part 2 of this code.

Law Revision Commission Comment

Comment. Section 170 is amended to conform to the terminology of the Eminent Domain Law. See Article 3 (commencing with Section 1255.410) of Chapter 6 of Title 7 of Part 3 of the Code of Civil Procedure. The reference to the judge of the municipal court is deleted because eminent domain proceedings may be brought only in the superior court. See CODE CIV. PROC. § 1250.010.

Cross-Complaints

Code of Civil Procedure § 426.70 (added)

426.70. (a) Notwithstanding subdivision (a) of Section 426.60, this article applies to eminent domain proceedings.

(b) The related cause of action may be asserted by cross-complaint in an eminent domain proceeding whether or not

the party asserting such cause of action has presented a claim in compliance with Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code to the plaintiff in the original eminent domain proceeding.

Law Revision Commission Comment

Comment. Subdivision (a) of Section 426.70—by making this article applicable to eminent domain proceedings—codifies the principle that a related cause of action must be asserted against the plaintiff in an eminent domain action or it is barred. *Klopping v. City of Whittier*, 8 Cal.3d 39, 58, 500 P.2d 1345, 1360, 104 Cal. Rptr. 1, 16 (1972) (damages caused by precondemnation announcements). The related cause must be asserted as a cross-complaint. See Section 426.30.

Subdivision (b) of Section 426.70 dispenses with the requirement that a claim be presented to a public entity as a condition to bringing a compulsory cross-complaint against the public entity in an eminent domain proceeding. Compare GOVT. CODE §§ 905, 905.2; *County of San Luis Obispo v. Ranchita Cattle Co.*, 16 Cal. App.3d 383, 94 Cal. Rptr. 73 (1971). Accordingly, the cause of action is not barred by mere failure to present the claim within the time specified in the public entity claims statute, and the cause may be asserted by cross-complaint in the eminent domain action whether or not a claim has been presented to the public entity. However, subdivision (b) eliminates the requirement only as against the plaintiff. Actions against third parties are not affected, nor are any relevant statutes of limitations.

Code of Civil Procedure § 428.10 (technical amendment)

428.10. A party against whom a cause of action has been asserted in a complaint or cross-complaint may file a cross-complaint setting forth either or both of the following:

(a) Any cause of action he has against any of the parties who filed the complaint or cross-complaint against him. Nothing in this subdivision authorizes the filing of a cross-complaint against the plaintiff in an action commenced under Title 7 (commencing with Section 1230.010) of Part 3.

(b) Any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against him.

Law Revision Commission Comment

Comment. Section 428.10 is amended to conform to the numbering of the Eminent Domain Law.

Action to Enjoin Diversion of Water

Code of Civil Procedure § 534 (technical amendment)

534. In any action brought by a riparian owner to enjoin the diversion of water appropriated or proposed to be appropriated, or the use thereof, against any person or persons appropriating or proposing to appropriate such waters, the defendant may set up in his answer that the water diverted or proposed to be diverted is for the irrigation of land or other public use, and, in such case, he shall also in such answer set forth the quantity of water desired to be taken and necessary to such irrigation of land or the public use, the nature of such use, the place where the same is used or proposed to be used, the duration and extent of the diversion or the proposed diversion, including the stages of the flow of the stream at and during the time in which the water is to be diverted, and that the same may be diverted without interfering with the actual and necessary beneficial uses of the plaintiff, and that such defendant so answering desires that the court shall ascertain and fix the damages, if any, that will result to the plaintiff or to his riparian lands from the appropriation of the water so appropriated or intended to be appropriated by defendant.

The plaintiff may serve and file a reply to the defendant's answer stating plaintiff's rights to the water and the damage plaintiff will suffer by the defendant's taking of the water, and plaintiff may implead as parties to the action all persons necessary to a full determination of the rights of plaintiff to the water and the damages plaintiff will suffer by the proposed taking by defendant, and the court shall have jurisdiction to hear and determine all the rights to water of the plaintiff and other parties to the action, and said parties shall have a right to state and prove their rights, and shall be bound by the judgment rendered the same as though made parties plaintiff at the commencement of the action.

Upon the trial of the case the court shall receive and hear evidence on behalf of the respective parties, and if the court finds that the allegations of such answer are true as to the aforesaid matters, and that the appropriation and diversion of such waters is for irrigation of land or other public use and that, after allowing sufficient water for the actual and necessary beneficial uses of the plaintiff and other parties, there is water available to be beneficially appropriated by such defendant so answering, the court shall fix the time and manner and extent of such appropriation and the actual damages, if any, resulting to the plaintiff or other parties on account of the same, and in fixing such damages the court shall be guided by Article 5 (commencing with Section 1263.410) of Chapter 9 of Title 7 of Part 3, and if, upon the ascertainment and fixing of such damages the defendant, within the time allowed in Section 1268.010 for the payment of damages in proceedings in eminent domain, shall pay into court the amount of damages fixed and the costs adjudged to be paid by such defendant, or give a good and sufficient bond to pay the

same upon the final settlement of the case, the injunction prayed for by the plaintiff shall be denied to the extent of the amount the defendant is permitted to appropriate, as aforesaid, and the temporary injunction, if any has been granted, shall be vacated to the extent aforesaid; provided, that any of the parties may appeal from such judgment as in other cases; and provided, further, that if such judgment is in favor of the defendant and if he upon and pending such appeal shall keep on deposit with the clerk of said court the amount of such damages and costs, or the bond, if it be given, so awarded to be paid to the plaintiff or other parties in the event such judgment shall be affirmed, no injunction against the appropriation of the amount the defendant is permitted to appropriate as aforesaid shall be granted or enforced pending such appeal, and, upon the acceptance by the plaintiff or other parties of such amount so awarded or upon the affirmation of such decision on appeal so that such judgment shall become final, the defendant shall have the right to divert and appropriate from such stream, against such plaintiff or other parties and his successors in interest, the quantity of water therein adjudged and allowed. Upon the filing of such answer as is herein provided for, the parties plaintiff or other parties and defendant shall be entitled to a jury trial upon the issues as to damages so raised, as provided in Title 7 (commencing with Section 1230.010) of Part 3, applying to proceedings in eminent domain.

Law Revision Commission Comment

Comment. Section 534 is amended to replace the references to former Sections 1248 and 1251 with references to the statutory provisions that supersede those sections.

Referees

Code of Civil Procedure § 640 (amended)

640. A reference may be ordered to the person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection, or the reference may be made to a court commissioner of the county where the cause is pending.

Law Revision Commission Comment

Comment. The portion of Section 640 relating to the residence of referees in eminent domain proceedings is deleted because it serves no useful purpose and tends unnecessarily to complicate eminent domain law. The last sentence is deleted as unnecessary. See CAL. CONST., Art. XII, § 23a and PUB. UTIL. CODE §§ 1401-1421.

Garnishment of Debt Owed By Public Entity

Code of Civil Procedure § 710 (technical amendment)

710. (a) Whenever a judgment for the payment of money is rendered by any court of this state against a defendant to whom money is owing and unpaid by this state or by any county, city and county, city or municipality, quasi-municipality, district or public corporation, the judgment creditor may file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

1. If such money, wages or salary is owing and unpaid by this state to such judgment debtor, said judgment creditor shall file said abstract or transcript and affidavit with the state department, board, office or commission owing such money, wages or salary to said judgment debtor prior to the time such state department, board, office or commission presents the claim of such judgment debtor therefor to the State Controller. Said state department, board, office or commission in presenting such claim of such judgment debtor to said State Controller shall note thereunder the fact of the filing of such abstract or transcript and affidavit and state the amount unpaid on said judgment as shown by said affidavit and shall also note any amounts advanced to the judgment debtor by, or which the judgment debtor owes to, the State of California by reason of advances for expenses or for any other purpose. Thereupon the State Controller, to discharge such claim of such judgment debtor, shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due such judgment debtor on such claim, after deducting from such claim an amount sufficient to reimburse the state department, board, office or commission for any amounts advanced to said judgment debtor or by him owed to the State of California, and after deducting therefrom an amount equal to one-half or such greater portion as is allowed by statute of the United States, of the earnings owing to the judgment debtor for his personal services to the state rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof; if any, to the judgment debtor.

2. If such money, wages or salary is owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi-municipality, district or public corporation, said judgment creditor shall file said abstract or transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality, district or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to discharge

such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, less an amount equal to one-half or such greater portion as is allowed by statute of the United States, of the earnings of the debtor owing by the county, city and county, city, municipality, quasi-municipality, district or public corporation to the judgment debtor for his personal services to such public body rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

(b) The judgment creditor upon filing such abstract or transcript and affidavit shall pay a fee of two dollars and fifty cents (\$2.50) to the person or agency with whom the same is filed.

(c) Whenever a court receives any money hereunder, it shall pay as much thereof as is not exempt from execution under this code to the judgment creditor and the balance thereof, if any, to the judgment debtor. The procedure for determining the claim of exemption shall be governed by the procedure set forth in Section 690.50 of this code, and the court rendering the judgment shall be considered the levying officer for the purpose of that section.

(d) In the event the moneys owing to a judgment debtor by any governmental agency mentioned in this section are owing by reason of an award made in a condemnation proceeding brought by the governmental agency, such governmental agency may pay the amount of the award to the clerk of the court in which such condemnation proceeding was tried, and shall file therewith the abstract or transcript of judgment and the affidavit filed with it by the judgment creditor. Such payment into court shall constitute payment of the condemnation award within the meaning of Section 1268.010. Upon such payment into court and the filing with the county clerk of such abstract or transcript of judgment and affidavit, the county clerk shall notify by mail, through their attorneys, if any, all parties interested in said award of the time and place at which the court which tried the condemnation proceeding will determine the conflicting claims to said award. At said time and place the court shall make such determination and order the distribution of the money held by the county clerk in accordance therewith.

(e) The judgment creditor may state in the affidavit any fact or facts tending to establish the identity of the judgment debtor. No public officer or employee shall be liable for failure to perform any duty imposed by this section unless sufficient information is furnished by the abstract or transcript together with the affidavit to enable him in the exercise of reasonable diligence to ascertain such identity therefrom and from the papers and records on file in the office in which he works. The word "office" as used herein does not include any branch or subordinate office located in a different city.

(f) Nothing in this section shall authorize the filing of any abstract or transcript and affidavit against: (1) any wages, or salary owing to

the Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, and Attorney General, or (2) any overpayment of tax, penalty or interest, or interest allowable with respect to such overpayment, under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code.

(g) Any fees received by a state agency under this section shall be deposited to the credit of the fund from which payments were, or would be, made on account of a garnishment under this section. For the purpose of this paragraph, payments from the State Pay Roll Revolving Fund shall be deemed payments made from the fund out of which moneys to meet such payments were transferred to said revolving fund.

(h) (1) In the event the moneys owing to a judgment debtor by any governmental agency mentioned in this section are for wages or salary, the judgment creditor shall mail under a separate cover at the time of filing the affidavit with the governmental agency, in an envelope marked "Personal and Confidential", a copy of the affidavit and a Notice to Judgment Debtor as provided in paragraph (2) of this subdivision, addressed to the judgment debtor at his place of employment.

(2) The Notice to Judgment Debtor shall be in 10-point bold type, and in substantially the following form:

You may be entitled to file a claim exempting your salary or wages from execution. You may seek the advice of any attorney or may, within 10 days from the date your salary or wages were levied upon, deliver an affidavit to the court rendering the judgment to exempt such salary or wages, as provided in Section 690.50 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. Section 710 is amended to substitute in subdivision (d) a reference to the statutory provision that replaced former Section 1251.

Litigation Expenses in Inverse Condemnation Proceedings

Code of Civil Procedure § 1036 (added)

1036. In any inverse condemnation proceeding brought for the taking of any interest in real property, the court rendering judgment for the plaintiff by awarding compensation for such taking, or the attorney representing the public entity who effects a settlement of such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or such attorney, reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

Law Revision Commission Comment

Comment. Section 1036 continues former Code of Civil Procedure Section 1246.3 without change.

School Districts

Education Code § 1047.5 (added)

1047.5. The governing board of any school district may acquire by eminent domain any property necessary to carry out any of the powers or functions of the district.

Law Revision Commission Comment

Comment. Section 1047.5 grants a school district (defined in Section 41) the power of eminent domain to acquire any property necessary to carry out any of the powers or functions of the district. The section supersedes the grant of condemnation authority formerly contained in subdivision 3 of Section 1238 of the Code of Civil Procedure (condemnation authorized for “public buildings and grounds for the use . . . of any . . . school district”). It continues the prior authority of school districts to condemn for school purposes. *E.g., Hayward Union High School Dist. v. Madrid*, 234 Cal. App.2d 100, 121, 44 Cal. Rptr. 268, 281 (1965) (“The district had the right to condemn for any school purpose and on acquisition, to change to some other school purpose any time during its ownership of the property.”); *Kern County High School Dist. v. McDonald*, 180 Cal. 7, 179 P. 180 (1919). See also *Anaheim Union High School Dist. v. Vieira*, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966) (future use); *Hayward Union High School Dist. v. Madrid, supra* (temporary use for school purposes with resale to follow within several years); *Woodland School Dist. v. Woodland Cemetery Ass’n*, 174 Cal. App.2d 243, 344 P.2d 326 (1959) (school purposes may be a more necessary public use than private cemetery). *Cf.* CODE CIV. PROC. § 1240.010 (authorization of eminent domain for any purpose or function is a declaration that the purpose or function is a public use).

The authority granted by Section 1047.5 is subject to specific limitations that may be imposed on the exercise of the power of eminent domain. See EDUC. CODE § 1048.

In some cases, a particular statute may expressly grant school districts the power of eminent domain for a particular purpose. *E.g.,* EDUC. CODE § 6726 (operation of a technical, agricultural, and natural resource conservation school). These specific grants of condemnation authority are not to be construed to limit the broad grant of such authority under Section 1047.5.

Private schools which are not of the collegiate grade may not exercise the power of eminent domain. *Yeshiva Torath Emeth Academy v. University of So. Cal.*, 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962). Likewise, a private citizen may not acquire property by eminent domain for the operation of a public school. *People v. Oken*, 159 Cal. App.2d 456, 324 P.2d 58 (1958).

Education Code § 1048 (added)

1048. The governing board of a school district may lease property in an adjoining school district for garage, warehouse, or other utility purposes or may purchase property in an adjoining school district for such purposes and may dispose of such property in the same manner as property within the boundary of the district is purchased and disposed of.

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

Law Revision Commission Comment

Comment. Section 1048 continues the substance of former Education Code Section 16003.

Education Code § 15007.5 (repealed)

Law Revision Commission Comment

Comment. Section 15007.5 is superseded by Code of Civil Procedure Section 1240.140.

Education Code § 15009 (amended)

15009. The governing board of a school district may acquire a site for a school building contiguous to the boundaries of the district and upon the acquisition of such site it shall become a part of the district. The site shall not be acquired until the county committee on school district organization of the county or of each of the counties concerned has received the proposal for acquisition of the site and reported its recommendations thereon to the governing boards of the districts concerned and to each county superintendent of schools concerned. The report of the county committee shall be made within 60 days from the time the proposal for acquisition of the site was submitted to it. The power of eminent domain may be used for the purposes of this section.

A school site is contiguous for the purpose of this section although separated from the boundaries of the district by a road, street, stream, or other natural or artificial barrier or right-of-way.

Law Revision Commission Comment

Comment. Section 15009 is amended to make clear that the power of eminent domain may be used to acquire a school site on property contiguous to the district. See CODE CIV. PROC.

§ 1240.050 (extraterritorial condemnation). *Cf.* EDUC. CODE § 1048 (power of eminent domain may not be used to acquire property outside district for use as a garage or warehouse or for other utility purpose).

Education Code § 16003 (repealed)

Law Revision Commission Comment

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

University of California

Education Code § 23151 (amended)

23151. The Regents of the University of California may acquire by eminent domain any property necessary to carry out any of the powers or functions of the University of California.

Legislative Committee Comment—Assembly

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 even though the property is to be acquired for a project that does not clearly fall within the former language “public buildings and grounds of the University of California.” See 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).

Education Code § 23152 (repealed)

Law Revision Commission Comment

Comment. Section 23152, specifying the effect given to the resolution of necessity of the Regents of the University of California, is superseded by Code of Civil Procedure Section 1245.250.

California State University and Colleges

Education Code § 24503 (amended)

24503. The board, for the purposes of this article (commencing with Section 24501), has power and is hereby authorized, in addition

to and amplification of all other powers conferred upon said board by the Constitution of the State of California or by any statute of the State of California:

(a) To acquire subject to the Property Acquisition Law, Part 11 (commencing with Section 15850) of Division 3 of Title 2 of the Government Code, by grant, purchase, gift, devise, or lease, and to hold and use any real or personal property necessary or convenient or useful for the carrying on of any of its powers pursuant to the provisions of this article (commencing with Section 24501).

(b) To construct, operate and control any project.

(c) To fix rates, rents or other charges for the use of any project acquired, constructed, equipped, furnished, operated or maintained by the board, or for services rendered in connection therewith, and to alter, change or modify the same at its pleasure, subject to any contractual obligation which may be entered into by the board with respect to the fixing of such rates, rents or charges.

(d) To enter into covenants to increase rates or charges from time to time as may be necessary pursuant to any such contract or agreement with the holders of any bonds of the board.

(e) At any time and from time to time, with the approval of the State Board of Control, to issue revenue bonds in order to raise funds for the purpose of establishing any project or of acquiring lands for any project, or of acquiring, constructing, improving, equipping or furnishing any project, or of refinancing any project, including payment of principal and interest on revenue bond anticipation notes, or for any combination of such purposes, which bonds may be secured as hereinafter provided.

(f) At any time and from time to time, with the approval of the State Board of Control, to issue revenue bond anticipation notes pursuant to Section 24503.1.

(g) To adopt such rules and regulations as may be necessary to enable the board to exercise the powers and to perform the duties conferred or imposed upon the board by this article (commencing with Section 24501).

(h) Nothing contained in this section or elsewhere in this article shall be construed directly or by implication to be in anywise in derogation of or in limitation of powers conferred upon or existing in the board by virtue of provisions of the Constitution or statutes of this state.

Law Revision Commission Comment

Comment. Section 24503 is amended to delete the reference to the power of eminent domain since the Trustees of the California State University and Colleges have no independent condemnation authority. The Public Works Board may condemn property for state college purposes with the consent of the trustees. GOVT. CODE §§ 15853–15855. *Cf.* EDUC. CODE §§ 23752, 23752.4, 24503 (acquisition of property for specified purposes pursuant to Property Acquisition Law).

Nonprofit Educational Institutions of Collegiate Grade Education Code § 30051 (added)

CHAPTER 3. EMINENT DOMAIN

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

Legislative Committee Comment—Senate

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

The condemnation authority granted by this section is subject to consent of the relevant local public entities under Sections 1245.310–1245.390 of the Code of Civil Procedure.

Evidence

Evidence Code § 811 (technical amendment)

811. As used in this article, “value of property” means the amount of “just compensation” to be ascertained under Section 19 of Article I of the State Constitution and the amount of value, damage, and benefits to be ascertained under Articles 4 (commencing with Section 1263.310) and 5 (commencing with Section 1263.410) of Chapter 9 of Title 7 of Part 3 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. Section 811 is amended to conform to the numbering of the Eminent Domain Law.

Section 811 makes clear that this article as applied to eminent domain proceedings governs only evidence relating to the determination of property value and damages and benefits to the remainder. This article does not govern evidence relating to the determination of loss of goodwill (CODE CIV. PROC. § 1263.510). The evidence admissible to prove loss of goodwill is governed by the general provisions of the Evidence Code. Hence, nothing in this article should be deemed a limitation on the admissibility of evidence to prove loss of goodwill if such evidence is otherwise admissible.

Evidence Code § 812 (technical amendment)

812. This article is not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting “just compensation” as used in Section 19 of Article I of the State Constitution or the terms “fair market value,” “damage,” or “benefit” as used in Articles 4 (commencing with Section 1263.310) and 5 (commencing with Section 1263.410) of Chapter 9 of Title 7 of Part 3 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. Section 812 is amended to conform to the numbering and terminology of the Eminent Domain Law.

Evidence Code § 814 (technical amendment)

814. The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for his opinion.

Legislative Committee Comment—Senate

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 matters of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property including, but not limited 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.

Department of Fish and Game

Fish & Game Code § 1348 (technical amendment)

1348. The board shall authorize the acquisition of such lands, rights in land, water, or water rights as may be necessary to carry out the purposes of this chapter. The board may authorize such acquisition by the department, but the department shall not acquire any of such property by eminent domain proceedings except such

property as may be necessary to provide access roads or rights-of-way to areas to be used for fishing the coastal waters of the Pacific Ocean, and then only if the board of supervisors of the affected county has agreed by resolution to such proceedings for each parcel of land and has further agreed by resolution to maintain the road or right-of-way. The board may authorize such acquisition by the State Public Works Board, which is hereby empowered to effect such acquisitions pursuant to the Property Acquisition Law, Part 11 (commencing with Section 15850) of Division 3 of Title 2 of the Government Code.

Law Revision Commission Comment

Comment. Section 1348 is amended to insert a reference to the part of the Government Code that constitutes the Property Acquisition Law.

District Agricultural Associations

Food & Agricultural Code § 4054 (amended)

4054. If the board of an association, by resolution adopted by vote of two-thirds of all its members, finds and determines that the public interest and necessity require the acquisition of any building or improvement which is situated on property that is owned by the association, in trust or otherwise, or of any outstanding rights to such property, with the approval of the department and the association, such building, improvement, or outstanding rights may be acquired by eminent domain pursuant to the Property Acquisition Law, Part 11 (commencing with Section 15850) of Division 3 of Title 2 of the Government Code.

The use by the association of its property shall be considered a more necessary public use than the use of the property by any grantee, lessee, or licensee for the purposes which are specified in Section 4051 of this chapter.

Notwithstanding any provision of Sections 14256 and 14792 of the Government Code, the board of an association, by resolution adopted by vote of two-thirds of all its members, may purchase materials and lease equipment for not in excess of twenty thousand dollars (\$20,000) when such purchase or lease is made in conjunction with donated labor construction improvements on the grounds of the association.

Law Revision Commission Comment

Comment. Section 4054 is amended to conform to the policy expressed in Section 15855 of the Government Code that a district agricultural association has no independent condemnation authority. The Public Works Board may condemn property needed by the association. GOVT. CODE §§ 15853–15855. See also FOOD & AGRI. CODE § 4051(b) (property acquisitions subject to Property Acquisition Law).

General Condemnation Authorization

Government Code § 184 (repealed)

Law Revision Commission Comment

Comment. Section 184 is superseded by Code of Civil Procedure Sections 1240.010 (public use limitation), 1240.020 (statutory delegation of condemnation authority required).

Protective Condemnation

Government Code §§ 190–196 (repealed)

Law Revision Commission Comment

Comment. Sections 190–196 of the Government Code, relating to protective condemnation, are superseded by Code of Civil Procedure Section 1240.120 (right to acquire property to make effective the principal use). Restrictions on the disposition of surplus property are continued in other statutes and in local ordinances and charters. See, *e.g.*, Charter of the City and County of San Francisco § 7.401 (1971).

Liability of Public Entities

Government Code § 816 (repealed)

Law Revision Commission Comment

Comment. Section 816 is superseded by subdivision (a) of Section 1245.060 of the Code of Civil Procedure.

Acquisition Price Public Information

Government Code § 7275 (added)

7275. Whenever any public entity acquires real property by eminent domain, purchase, or exchange, the purchase price and other consideration paid by such entity is public information and shall be made available upon request from the entity concerned.

Law Revision Commission Comment

Comment. Section 7275 continues the substance of former Code of Civil Procedure Section 1265.

Department of Commerce—California Industry and World Trade

Government Code § 8324 (amended)

8324. The Department of Commerce may do any or all things which it may deem necessary, useful, or convenient in carrying out

the objects and purposes of this chapter. The power of eminent domain may not be exercised nor may bonds of any nature be issued to carry out the objects and purposes of this chapter.

Law Revision Commission Comment

Comment. Section 8324 is amended to make clear that the power of eminent domain may not be exercised to carry out the objects and purposes of this chapter. Absent this amendment, it could be argued that property could be taken by eminent domain for such objects and purposes under the Property Acquisition Law (Section 15850 *et seq.*).

Director of General Services

Government Code § 14661 (repealed)

Legislative Committee Comment—Senate

Comment. Section 14661 is obsolete because condemnation of real property for state agencies is to be accomplished by the Public Works Board under the Property Acquisition Law (Section 15850 *et seq.*) with the exception of condemnation by those agencies that have been specifically authorized to condemn property under independent statutory grants. Agencies of the state, other than the Public Works Board, that may condemn property are the Department of Transportation (PUB. UTIL. CODE § 21633, STS. & HWYS. CODE §§ 102 and 30400), the Department of Water Resources (WATER CODE §§ 250 and 11575), the State Lands Commission (Pub. Res. Code §§ 6210.9 and 6808), the Regents of the University of California (EDUC. CODE § 23151), the Department of Fish and Game (FISH & GAME CODE § 1348), and the Reclamation Board (Sacramento and San Joaquin Drainage District) (WATER CODE § 8593).

Government Code § 14662 (amended)

14662. The Director of General Services may acquire any easements or rights-of-way which he determines to be necessary for the proper utilization of real property owned or being acquired by the state.

This section does not apply to land, easements, or rights-of-way to be acquired by the Department of Transportation.

Law Revision Commission Comment

Comment. Section 14662 is amended to delete the reference to the power of eminent domain because the Director of General Services has no independent condemnation authority. All acquisitions by eminent domain for the state are accomplished by the Public Works Board with limited exceptions. See GOVT. CODE §§ 15853–15855. Contracts for the acquisition of real property by state agencies require approval of the Director of General Services. See GOVT. CODE § 11005.

State Establishments in Napa County

Government Code § 14715 (amended)

14715. The Veterans' Home of California, for all purposes including irrigation and domestic, shall have the first and prior right to all available water stored in Rector Dam on state property in Napa County. Said right shall be prior to any allocation of said waters for the use of any other state institutions, including the State Game Farm and the Napa State Hospital. In the event that there is more water available than necessary to meet the requirements of the Veterans' Home of California, the department may take and conduct from the dam such quantity of surplus water as may be determined by the Department of Water Resources to be necessary for the use of the Napa State Hospital and other state establishments located in the County of Napa, including the State Game Farm, and rights-of-way may be acquired, pursuant to the Property Acquisition Law, Part 11 (commencing with Section 15850) of Division 3 of Title 2, by purchase, lease, or condemnation for that purpose.

Law Revision Commission Comment

Comment. Section 14715 is amended to conform to the policy expressed in Section 15855 that condemnation of property for state purposes generally be accomplished by the Public Works Board under the Property Acquisition Law (Section 15850 *et seq.*).

Restoration of Destroyed State Records

Government Code § 14770 (added)

Article 7. Restoration of Records Destroyed by Public Calamity

14770. (a) As used in this section:

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

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

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

Law Revision Commission Comment

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

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

For comparable authority for local public entities, see GOVT. CODE § 53040.

Property Acquisition Law

Government Code § 15853 (amended)

15853. (a) The board is authorized to select and acquire, in the name of and on behalf of the state, with the consent of the state agency concerned, the fee or any lesser right or interest in any real property necessary for any state purpose or function.

(b) Where moneys are appropriated by the Budget Act for any fiscal year or by any other act for the acquisition of land or other real property, either (1) subject to the provisions of the Property Acquisition Law or (2) for any state agency for whom property is acquired by the board, such moneys and acquisitions shall be subject to the provisions of this part and such moneys shall be expended in accordance with the provisions of this part, notwithstanding any other provisions of law.

(c) The board may acquire furnishings which the owner thereof agrees to sell and which are contained within improvements acquired by the board. Cost of acquisition of such furnishings shall be charged to the appropriation available for acquisition of the real property.

Law Revision Commission Comment

Comment. Section 15853 is amended to make clear that the Public Works Board may acquire property for any public use by the state. With some significant exceptions, the Public Works Board is the agency that condemns property needed for the use of the state. See Section 15855.

Property may be acquired only with the approval of the agency for which the board undertakes the acquisition. This generalizes a comparable restriction formerly found in Section 15854.1. See also Sections 14730 (index or record of title of lands owned or acquired by the state), 15791 (purchase of improved property in lieu of construction).

The broad authority granted by Section 15853 is not limited by other specific grants of condemnation authority.

Government Code § 15854 (technical amendment)

15854. Property shall be acquired pursuant to this part by condemnation in the manner provided for in Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure, and all money paid from any appropriation made pursuant to this part shall be expended only in accordance with a judgment in condemnation or with a verdict of the jury or determination by the trial court fixing the amount of compensation to be paid. This requirement shall not apply to any of the following:

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

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

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

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

(e) Any acquisition as to which the owner and the State Public Works Board have agreed to arbitrate the amount of the compensation to be paid in accordance with Chapter 12 (commencing with Section 1273.010) of Title 7 of Part 3 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. Section 15854 is amended to conform the references in the introductory clause and in subdivision (e) to the numbering of the new eminent domain statute.

Government Code § 15854.1 (repealed)

Law Revision Commission Comment

Comment. Section 15854.1 is superseded by the general requirement that the Public Works Board may acquire property only with the consent of the agency concerned. See Section 15853.

Government Code § 15855 (repealed)

Law Revision Commission Comment

Comment. Section 15855 is superseded by the more general provisions of the Eminent Domain Law. See CODE CIV. PROC. §§ 1240.040 and 1245.210 *et seq.*

Government Code § 15855 (added)

15855. (a) Notwithstanding any other provision of law, except as provided in subdivision (b), the State Public Works Board is the only state agency that may exercise the power of eminent domain to acquire property needed by any state agency for any state purpose or function.

(b) Subdivision (a) does not affect or limit the right of the Department of Transportation, Department of Water Resources, State Lands Commission, State Reclamation Board, Hastings College of the Law, or the Regents of the University of California to exercise the power of eminent domain. Subdivision (a) does not affect or limit the exercise of the power of eminent domain by the Department of Fish and Game pursuant to Section 1348 of the Fish and Game Code.

Legislative Committee Comment—Assembly

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).

Government Code § 15856 (repealed)

Law Revision Commission Comment

Comment. Section 15856 is superseded by Code of Civil Procedure Section 1240.640.

Government Code § 15858 (repealed)

Law Revision Commission Comment

Comment. Section 15858 is superseded by Code of Civil Procedure Section 1240.310 *et seq.* See especially CODE CIV. PROC. § 1240.320 and Comment thereto.

Government Code § 15859 (repealed)**Law Revision Commission Comment**

Comment. Section 15859 is superseded by Code of Civil Procedure Section 1268.510 (right to abandon eminent domain proceeding). See also CODE CIV. PROC. §§ 1268.610 and 1268.620 (litigation expenses and damages upon dismissal).

Condemnation Deposits Fund**Government Code § 16429 (added)****Article 10. Condemnation Deposits Fund**

16429. (a) The Condemnation Deposits Fund in the State Treasury is continued in existence. The fund consists of all money deposited in the State Treasury pursuant to Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure and all interest earned or other increment derived from its investment. The State Treasurer shall receive all such moneys, duly receipt for, and safely keep the same in the fund, and for such duty he is liable upon his official bond.

(b) Money in the Condemnation Deposits Fund shall be invested under the provisions of Article 4 (commencing with Section 16470) of Chapter 3.

(c) The State Controller shall apportion as of June 30th and December 31st of each year the interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

Law Revision Commission Comment

Comment. Section 16429 continues the substance of a portion of subdivision (h) and all of subdivision (i) of former Code of Civil Procedure Section 1254.

Counties**Government Code § 25350.5 (added)**

25350.5. The board of supervisors of any county may acquire by eminent domain any property necessary to carry out any of the powers or functions of the county.

Law Revision Commission Comment

Comment. Section 25350.5 supersedes the grant of condemnation authority formerly contained in various subdivisions of Section 1238 of the Code of Civil Procedure and supplements the specific grants of such authority contained in this and other codes. *E.g.*, GOVT. CODE § 26020 (airports); STS. & HWYS. CODE § 943 (highways). Its purpose is to give a county adequate authority to carry out its functions. *Cf.* CODE CIV. PROC. § 1240.010 (authorization of eminent domain for any purpose or function is a declaration that the purpose or function is a public use).

Specific limitations may be imposed on the exercise of the power of eminent domain. See PENAL CODE § 4106 (no industrial farm may be established on land outside county without consent of the affected county). On the other hand, where a statute authorizes the acquisition of property by means not specifically including eminent domain, such authorization does not preclude the use of eminent domain under this section. See, *e.g.*, PUB. RES. CODE § 5157 (county may acquire land for public park).

Mobilization, Training, and Supply Stations

Government Code § 25431 (technical amendment)

25431. Any county may exercise the right of eminent domain to acquire any property necessary or convenient for carrying out the provisions of this article.

Law Revision Commission Comment

Comment. The provisions deleted from Section 25431 are unnecessary. See CODE CIV. PROC. §§ 1230.020 (law governing exercise of eminent domain power), 1240.010 (declaration of public use unnecessary), 1240.110 (right to acquire any right or interest in any type of property).

Cities

Government Code § 37350.5 (added)

37350.5. A city may acquire by eminent domain any property necessary to carry out any of its powers or functions.

Law Revision Commission Comment

Comment. Section 37350.5 supersedes the grant of condemnation authority formerly contained in various subdivisions of Section 1238 of the Code of Civil Procedure and supplements the specific grants of such authority contained in this and other codes. *E.g.*, GOVT. CODE § 37501 (public assembly

or convention halls); STS. & HWYS. CODE § 4090 (streets, walks, parking places). Its purpose is to give a city adequate authority to carry out its municipal functions. *Cf.* CODE CIV. PROC. § 1240.010 (authorization of eminent domain for any purpose or function is a declaration that the purpose or function is a public use). The powers and functions of a city may be determined by reference to a city charter as well as to a statute.

Specific limitations may, of course, be imposed on the exercise of the power of eminent domain under some circumstances. See GOVT. CODE § 37353(c) (no existing golf course may be acquired by eminent domain for golf course purposes). On the other hand, where a statute authorizes the acquisition of property by means not specifically including eminent domain, such authorization does not preclude the use of eminent domain under this section. See Comment to Section 25350.5 (authority of county to condemn for county functions).

City Revolving Fund

Government Code § 43424 (technical amendment)

43424. It may advance money from the revolving fund as a deposit pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 of, or Article 2 (commencing with Section 1268.110) of Chapter 11 of, Title 7 of Part 3 of the Code of Civil Procedure in any eminent domain proceeding to acquire any property necessary in establishing, laying out, opening, widening, extending, or straightening any street or other public way.

Law Revision Commission Comment

Comment. Section 43424 is amended to conform to the numbering of the Eminent Domain Law. The reference to “lands, rights of way, or other property” is deleted as unnecessary. See CODE CIV. PROC. §§ 1235.070 (“property” defined) and 1240.110 (right to acquire any necessary right or interest in any type of property).

Property To Be Used For Federal Purposes

Government Code § 50366 (technical amendment)

50366. A local agency may exercise the right of eminent domain to acquire any property necessary or convenient to carry out this article.

Law Revision Commission Comment

Comment. The provision deleted from Section 50366 is unnecessary. See CODE CIV. PROC. § 1240.010 (declaration of public use unnecessary).

Airport Hazards

Government Code § 50485.2 (amended)

50485.2. It is hereby found that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of the aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein. Accordingly, it is hereby declared: (a) that the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question; and (b) that it is therefore necessary in the interest of the public health, public safety, and general welfare that the creation or establishment of airport hazards be prevented by appropriate exercise of the police power or the authority conferred by Article 2.6 (commencing with Section 21652) of Part 1 of Division 9 of the Public Utilities Code. It is further declared that both the prevention of the creation or establishment of airport hazards and the elimination, removal, alteration, mitigation, or marking and lighting of existing airport hazards are public purposes for which a city or county may raise and expend public funds and acquire land or property interests therein.

Law Revision Commission Comment

Comment. Section 50485.2 is amended to preserve the broad discretion of local governments in selecting the means employed in acquiring airport approach protection. See former Section 50485.13 and Public Utilities Code Sections 21652 and 21653 (acquisitions for airport approach protection).

Government Code § 50485.13 (repealed)

Law Revision Commission Comment

Comment. Section 50485.13, granting cities and counties the power of eminent domain to eliminate airport hazards, is superseded by other sections.

The power to condemn for the elimination of airport hazards is continued in Public Utilities Code Section 21652. To the extent that entities were limited in their exercise of eminent domain under Section 50485.13 to situations in which zoning would have been inadvisable or unconstitutional, the limitation is not continued. Any entity authorized to condemn for airports may condemn to eliminate airport hazards without limitation under Public Utilities Code Section 21652. It should be noted that cities and counties may achieve this end by appropriate use of its police or eminent domain power. GOVT. CODE § 50485.2.

The requirement that cities and counties pay the cost of relocation of structures when acquiring property to eliminate airport hazards is continued in Public Utilities Code Section 21653.

The authority of cities and counties to condemn property outside their boundaries for airport purposes is retained in Government Code Section 50470.

Agricultural Preserves

Government Code § 51291 (technical amendment)

51291. (a) As used in this section, Section 51292, and Section 51295 “public agency” means the state, or any department or agency thereof, and any county, city, school district, or other local public district, agency, or entity; and “person” means any person authorized to acquire property by eminent domain.

(b) Whenever it appears that land within an agricultural preserve may be required by a public agency or person for a public use, the public agency or person shall advise the Director of Food and Agriculture and the local governing body responsible for the administration of the preserve of the intention to consider the location of a public improvement within the preserve.

Within 30 days thereafter the Director of Food and Agriculture and the local governing body shall forward to the public agency or person concerned their comments with respect to the effect of the location of the public improvement on the land within the agricultural preserve and such comments shall be considered by the public agency or person. Failure of any public agency or person to comply with the requirements of this section shall not invalidate any action by such agency or person to locate a public improvement within an agricultural preserve. However, such failure by any person or any public agency other than a state agency shall be admissible in evidence in any litigation for the acquisition of such land or involving the allocation of funds or the construction of the public improvement. This subdivision does not apply to the erection, construction, alteration or maintenance of gas, electric, water, or communication utility facilities within an agricultural preserve if that preserve was established after submission of the location of such facilities to the city or county for review or approval.

Law Revision Commission Comment

Comment. Section 51291 is amended to delete the reference to former Civil Code Section 1001 (repealed). See CODE CIV. PROC. § 1240.020 (statutory delegation of condemnation authority required).

Restoration of Destroyed Local Public Records

Government Code § 53040 (added)

Article 2.6. Restoration of Records Destroyed by Public Calamity

53040. (a) As used in this section:

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

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

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

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

Law Revision Commission Comment

Comment. Section 53040 is derived from and reflects the same policy as subdivision 15 of former Code of Civil Procedure Section 1238. However, the provision is broadened to cover all local public entities and is limited to acquiring the "right to reproduce" such records and does not permit permanent acquisition of the public records plant itself.

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

For comparable authority for state agencies, see GOVT. CODE § 14770.

Interest on Deposits

Government Code § 53844 (technical amendment)

53844. In any county which qualifies as set forth in Section 53840 to use the foregoing procedure for short-term financing, all interest payments on the loans may, in the discretion of the board of supervisors, be charged to the general fund of any district or fund for which loans have been made. All interest earned on funds in the county treasury shall be credited to said general fund of the county,

excepting therefrom the interest on deposits of school districts which shall accrue to the general funds of the respective school districts, the interest earned on specific investments of a local agency as authorized by Section 53601 of this code or by Section 5007 of the Education Code, and moneys on deposit in court in eminent domain actions pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 of, or Article 2 (commencing with Section 1268.110) of Chapter 11 of, Title 7 of Part 3 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. Section 53844 is amended to conform to the provisions of the Eminent Domain Law.

Department of Parks and Recreation

Government Code § 54093 (amended)

54093. The Department of Parks and Recreation, on behalf of the state, may acquire by appropriate means easements in property owned, operated or controlled by any city, county or other local agency in order to provide free public access to any public beach. However, any such easement shall terminate if the property is developed by the city, county or other public agency in a manner which would not be compatible with the use of such easement for access purposes and if the city, county or other public agency refunds to the state the amount of money the state paid for such easement.

Law Revision Commission Comment

Comment. Section 54093 is amended to delete the reference to the power of eminent domain since the Department of Parks and Recreation has no independent condemnation authority. Any condemnation of property for the Department of Parks and Recreation is to be accomplished by the Public Works Board. See GOVT. CODE §§ 15853–15855. The state's right to condemn property owned by local public entities is expressed more generally in Code of Civil Procedure Sections 1240.510 *et seq.* and 1240.610 *et seq.* (acquisition of property appropriated to public use).

Joint Sanitation Projects

Government Code § 55003 (technical amendment)

55003. When it is necessary to acquire property in the construction of any outfall sewer or conduit pursuant to this chapter, the property may be acquired by eminent domain.

Law Revision Commission Comment

Comment. Section 55003 is amended to conform to the terminology of the Eminent Domain Law.

Community Services District

Government Code § 61610 (amended)

61610. A district may acquire real or personal property of every kind within or without the district by grant, purchase, gift, devise, lease, or eminent domain. The district, in exercising such power, shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, wires, cables or poles of any public utility which is required to be removed to a new location.

Law Revision Commission Comment

Comment. Section 61610 is amended to delete unnecessary language. See Code Civ. Proc. § 1230.020 (uniform procedure).

San Francisco Bay Conservation and Development Commission

Government Code § 66657 (amended)

66657. In eminent domain or inverse condemnation proceedings for any property within the area of the commission's jurisdiction, in determining "just compensation," as used in Section 19 of Article I of the California Constitution, or the compensation provided in Chapter 9 (commencing with Section 1263.010) and Chapter 10 (commencing with Section 1265.010) of Title 7 of Part 3 of the Code of Civil Procedure, the influence of the San Francisco Bay Plan, in effect at the time of the taking or damaging of the property, upon the value of the property or the interest being valued shall be inadmissible as evidence and not a proper basis for an opinion as to the value of the property.

Law Revision Commission Comment

Comment. Section 66657 is amended to substitute a correct reference for the former reference to repealed Code of Civil Procedure Section 1248.

San Francisco Bay Area Transportation Terminal Authority

Government Code § 67542 (technical amendment)

67542. The authority shall not commence any eminent domain proceedings unless the board first adopts by unanimous vote a resolution that meets the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4 of Title 7 of the Code of Civil Procedure.

Legislative Committee Comment—Senate

Comment. Section 67542 is amended to delete provisions superseded by the more general provisions of the Eminent Domain Law.

See CODE CIV. PROC. §§ 1230.020 (uniform procedure), 1245.230 (contents of resolution), 1245.250 (effect of resolution).

Wharves, Chutes, and Piers

Harbors & Navigation Code § 4009 (amended)

4009. After authority to construct a wharf or chute has been granted, until the grantee has procured from the owner the right-of-way and other necessary incidental uses of any lands necessary for the wharf or chute, there is no authority to construct a wharf or chute or to take tolls thereon.

Law Revision Commission Comment

Comment. Section 4009 is amended to delete the grant of the right to exercise the power of eminent domain. The right of a wharfinger to condemn property is continued by Public Utilities Code Section 619 to the extent that the wharfinger is a public utility. Insofar as Section 4009 might have been construed to authorize private persons to exercise the power of eminent domain, such authority is not continued.

Harbor Improvement District

Harbors & Navigation Code § 5900.4 (amended)

5900.4. The board may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers conferred by this part.

Law Revision Commission Comment

Comment. Section 5900.4 is amended to delete unnecessary language. See Code Civ. Proc. § 1230.020 (uniform procedure).

Harbor District

Harbors & Navigation Code § 6076 (amended)

6076. It may exercise the right of eminent domain to take any property necessary or convenient to the exercise of its powers.

Law Revision Commission Comment

Comment. Section 6076 is amended to delete unnecessary language. See Code Civ. Proc. § 1230.020 (uniform procedure).

Port District

Harbors & Navigation Code § 6296 (amended)

6296. It may exercise the right of eminent domain to take any property necessary to carry out any of the objects or purposes of the district.

Law Revision Commission Comment

Comment. Section 6296 is amended to delete unnecessary language. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.610 *et seq.* (more necessary public use). See also Code Civ. Proc. § 1240.510 *et seq.* (compatible use).

River Port District**Harbors & Navigation Code § 6896 (amended)**

6896. It may exercise the right of eminent domain to take any property necessary or convenient to carry out any of its purposes.

Law Revision Commission Comment

Comment. Section 6896 is amended to delete unnecessary language. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.610 *et seq.* (more necessary public use). See also Code Civ. Proc. §§ 1240.510 *et seq.* (compatible use) and 1250.210 and Comment thereto (identification of plaintiff).

Small Craft Harbor District**Harbors & Navigation Code § 7147 (amended)**

7147. The district may acquire by eminent domain any property necessary, convenient or useful to the exercise of its powers, but may exercise the power to acquire property outside the district by eminent domain only with the consent of the governing body of the county, or city if any, in which the property is located.

Law Revision Commission Comment

Comment. Section 7147 is amended to delete unnecessary language. See Code Civ. Proc. § 1230.020 (uniform procedure). See also Code Civ. Proc. § 1235.170 (defining “property”).

Nonprofit Hospitals**Health & Safety Code § 1260 (added)**

1260. (a) As used in this section, “nonprofit hospital” means a general acute care hospital, or an acute psychiatric hospital, owned and operated by a fund, foundation, or corporation, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(b) A nonprofit hospital may exercise the right of eminent domain to acquire property necessary for the establishment, operation, or expansion of the nonprofit hospital if both of the following requirements are satisfied:

(1) The property to be acquired by eminent domain is adjacent to other property used or to be used for the establishment, operation, or expansion of the nonprofit hospital.

(2) The Director of Health has certified, after the public hearing required by subdivision (c), that (i) the acquisition of the property sought to be condemned is necessary for the establishment, operation, or expansion of the nonprofit hospital, (ii) the public interest and necessity require the proposed project, and (iii) 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.

(c) The Director of Health shall adopt reasonable regulations which will provide for a public hearing to be conducted by a hearing officer in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code in the area where the hospital is located to determine the necessity of the proposed project and of any acquisition of property for the project. Written notice of the hearing shall be given to the voluntary area health planning agency, if one exists, in the area where the hospital is located. The voluntary area health planning agency so notified shall make its recommendations to the hearing officer within 90 days from the receipt of notice. No hearing shall be held prior to the expiration of such 90-day period unless the hearing officer has received the recommendations of the voluntary area health planning agency. At the public hearing, the hearing officer shall insure that the hearing, in part at least, considers the impact of the proposed project upon the delivery of health care services in the community and upon the environment, as gathered from an environmental impact report. The applicant and all interested parties to the acquisition, including the voluntary area health planning agency, have the right to representation by counsel, the right to present oral and written evidence, and the right to confront and cross-examine opposing witnesses. A transcript of the public hearing shall with the State Department of Health as a public record.

Legislative Committee Comment—Senate

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 noncon-

tiguous 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. The condemnation authority granted by this section is subject to consent of the relevant local public entities under Sections 1245.310-1245.390 of the Code of Civil Procedure.

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

Sewer Construction

Health & Safety Code § 4967 (added)

4967. The owner of property that may be benefited by the acquisition, construction, extension, or operation of the works referred to in this chapter may file with the district a request that a particular work be undertaken. The request may, but need not, include the descriptions and estimates referred to in Section 4966 and shall not be denied without a public hearing.

Law Revision Commission Comment

Comment. Section 4967 is added to the Health and Safety Code to expressly authorize initiation of sewerage construction and extension proposals by individual property owners. The request may be made of any city, county, city and county, or any municipal or public corporation or district which is authorized to acquire, construct, own, or operate a sewer system. See Section 4951. In reviewing a property owner's request, the district should consider both the necessity for the requested action and its relative hardship on any party whose land is sought to be used compared with the benefit to the requester.

Under prior law, private individuals under certain circumstances were authorized to condemn property for a sewer easement. *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955). Private individuals no longer have a right to condemn property

for this purpose. See the Comment to subdivision 8 of former Code of Civil Procedure Section 1238. Instead, Section 4967 provides a procedure whereby the property owner can initiate proceedings to have the public entity acquire a sewer easement or any other necessary property. The public entity is authorized to acquire the necessary property by gift, purchase, condemnation, or otherwise. See Sections 5000, 5001.

Cemetery Authorities

Health & Safety Code § 8501 (added)

8501. Any cemetery authority which is described in Section 23701c of the Revenue and Taxation Code or is a corporation sole may acquire by eminent domain any property necessary to enlarge and add to an existing cemetery for the burial of the dead and the grounds thereof.

Legislative Committee Comment—Senate

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). The condemnation authority granted by this section is subject to the consent of the relevant local public entities under Sections 1245.310–1245.390 of the Code of Civil Procedure.

Public Cemetery District

Health & Safety Code § 8961 (amended)

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

Law Revision Commission Comment

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

Community Redevelopment Law**Health & Safety Code § 33398 (technical amendment)**

33398. Section 1245.260 of the Code of Civil Procedure shall not apply to any resolution or ordinance adopting, approving, amending, or approving the amendment of a redevelopment project or plan. Section 1245.260 of the Code of Civil Procedure shall apply to a resolution adopted by a redevelopment agency pursuant to Section 1245.220 of the Code of Civil Procedure with respect to a particular parcel or parcels of real property.

Law Revision Commission Comment

Comment. Section 33398 is amended to refer to the relevant sections of the Eminent Domain Law.

Renewal Area Agency**Health & Safety Code § 33720 (amended)**

33720. The power of eminent domain shall not be exercised by the renewal area agency unless the legislative body has adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4 of Title 7 of Part 3 of the Code of Civil Procedure.

Legislative Committee Comment—Assembly

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)**Legislative Committee Comment—Assembly**

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

Health & Safety Code § 33722 (repealed)**Legislative Committee Comment—Assembly**

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

Health & Safety Code § 33723 (repealed)

Legislative Committee Comment—Assembly

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

Housing Authority

Health & Safety Code § 34325 (amended)

34325. An authority may acquire by eminent domain any real property which it deems necessary for its purposes under this chapter. Real property belonging to the city, the county, the state, or any of its political subdivisions shall not be acquired without its consent.

Law Revision Commission Comment

Comment. The provisions deleted from Section 34325 are unnecessary. See CODE CIV. PROC. §§ 1230.020 (law governing exercise of eminent domain power), 1245.210 *et seq.* (resolution of necessity), 1240.510 (compatible use), 1240.610 (more necessary public use).

Limited Dividend Housing Corporations

Health & Safety Code § 34875 (amended)

34875. The power of eminent domain shall not be exercised by a corporation unless the commission has adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4 of Title 7 of Part 3 of the Code of Civil Procedure.

Legislative Committee Comment—Senate

Comment. Section 34875 is amended to conform to the Eminent Domain Law. See CODE CIV. PROC. §§ 1240.040 and 1245.210 *et seq.* The condemnation authority of a limited dividend housing corporation is subject to the consent of the relevant local public entities under Sections 1245.310–1245.390 of the Code of Civil Procedure.

Health & Safety Code § 34876 (repealed)

Legislative Committee Comment—Assembly

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

Health & Safety Code § 34877 (repealed)

Legislative Committee Comment—Assembly

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

Health & Safety Code § 34878 (repealed)

Legislative Committee Comment—Assembly

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

Land Chest Corporations

Health & Safety Code § 35167 (added)

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

Legislative Committee Comment—Senate

Comment. Section 35167 retains the substance of subdivision 21 of former Code of Civil Procedure Section 1238 insofar as that subdivision may have applied to land chest corporations (nonprofit corporations formed for the purpose of providing “housing in rural and suburban areas for families of low income”). The condemnation authority granted by this section is subject to the consent of the relevant local public entities under Sections 1245.310–1245.390 of the Code of Civil Procedure.

Housing Authority

Health & Safety Code § 36059 (technical amendment)

36059. Within its area of operation, and with reference to farm labor centers, a housing authority may:

- (a) Own, hold, and improve real or personal property.
- (b) Purchase, lease, obtain options upon, acquire by gift, bequest, devise, or otherwise, any real or personal property or any interest therein.
- (c) Accept grants from any person or agency, public or private.
- (d) Borrow money and pledge any property, real or personal, as security.
- (e) Contract with any person or agency, public or private, with regard to operation of the farm labor centers.
- (f) Sell, lease, exchange, transfer, assign, purchase, or dispose of any real or personal property or interest therein.
- (g) Insure or provide for the insurance of any real or personal property or operations of any farm labor centers against any risks or hazards.
- (h) Employ such officers and employees, permanent and temporary, as may be required, determine their qualifications, duties and compensation, and delegate to one or more of them such powers or duties as may be necessary for the acquisition of any farm labor center.
- (i) Acquire any real property by eminent domain necessary for the purposes of the housing authority.

(j) Lease or rent any dwellings, accommodations, lands, buildings, structures, or facilities embraced in any farm labor center, and, subject to the requirements for occupancy contained in this part, establish the rents and charges therefor.

Law Revision Commission Comment

Comment. The provision deleted from Section 36059 is continued in Code of Civil Procedure Section 1240.040.

Adjutant General

Military & Veterans Code § 437 (amended)

437. The Adjutant General, in the name of the people of the State of California, with the approval of the Department of General Services, may acquire any property necessary for armory purposes.

Law Revision Commission Comment

Comment. Section 437 is amended to delete the authority of the Adjutant General to exercise the power of eminent domain since the Adjutant General no longer has this power. The Public Works Board is the only state agency that may condemn property needed for armory purposes. See GOVT. CODE §§ 15853–15855.

The last sentence of Section 437, declaring armories a public use, is deleted as unnecessary. See CODE CIV. PROC. § 1240.010.

Military & Veterans Code § 438 (repealed)

Law Revision Commission Comment

Comment. Section 438 is superseded by the more general provisions of the Eminent Domain Law. See CODE CIV. PROC. §§ 1240.040 and 1245.210 *et seq.*

Prevention of Subsidence in Oil or Gas Production Area Public Resources Code § 3320.1 (technical amendment)

3320.1. (a) An agreement for the management, development and operation of two or more tracts in a pool or pools, or portions thereof, in a field as a unit without regard to separate ownerships for the production of oil and gas, including repressuring operations therein, and for the allocation of benefits and costs on a basis set forth in such agreement, shall be valid and binding upon those who consent thereto and may be filed with the supervisor for approval.

Any agreement for the cooperative management, development and operation of two or more tracts in a pool or pools, or portions thereof, in a field for the production of oil or gas, including repressuring operations therein, shall be valid and binding upon those who consent thereto and may be filed with the supervisor for approval.

If in the judgment of the supervisor a unit agreement or cooperative agreement filed for approval is not detrimental to the intent and purposes of this article to arrest or ameliorate subsidence, or otherwise unlawful, the supervisor may approve the same. No such agreement approved by the supervisor hereunder or heretofore approved pursuant to applicable law prior to the enactment of this article shall be held to violate any of the statutes of this state prohibiting monopolies or acts, arrangements, agreements, contracts, combinations or conspiracies in restraint of trade or commerce.

(b) In the event that at the time of the approval by the supervisor of a unit or cooperative agreement under subdivision (a) of this section, the supervisor makes written findings that:

1. A primary purpose of the unit or cooperative agreement is the initiation and conduct of repressuring operations in the area covered thereby for the purpose of arresting or ameliorating subsidence; and

2. The initiation and conduct of repressuring operations in the area covered by the unit or cooperative agreement are feasible and compatible with the purposes of this article; and

3. The persons who are entitled to 75 percent of the proceeds of production of oil and gas within the area covered by the unit or cooperative agreement (measured by the production of oil and gas therein in the last calendar year preceding the date of such approval) have become parties to such agreement by signing or ratifying it; and

4. It is necessary, in order to initiate and conduct such repressuring operations, that the properties of nonconsenting persons who own working interests or royalty interests in lands within the area covered by the unit or cooperative agreement become subject to such agreement; and

5. The agreement is fair and reasonable, and contains appropriate provisions to protect and safeguard the rights of all persons having an interest in oil and gas production in the area covered thereby; then the supervisor shall make and enter an order which shall provide that unless such nonconsenting persons shall, with 30 days after service upon such persons of the order in the manner specified by the supervisor, become parties to the agreement by signing or ratifying the same, the right of eminent domain may be exercised as provided in subdivision (c) for the purpose of acquiring the properties of such nonconsenting persons which are found by the supervisor to be necessary for the initiation and conduct of such repressuring operations.

In the event the supervisor shall make findings in accordance with the foregoing, such findings shall be prima facie evidence (1) of the public necessity of the development and operation of the said properties in accordance with the unit or cooperative agreement and of the repressuring operations to be initiated and conducted pursuant to such agreement; and (2) that the acquisition of the properties of the nonconsenting persons which are designated by the supervisor is necessary therefor; and (3) that the repressuring and

other operations to be initiated and conducted pursuant to such agreement, and the improvements to be made in connection therewith are planned or located in the manner which will be most compatible with the greatest public good and the least private injury.

The acquisition and use of land, including oil and gas rights therein, and personal property used in the production of oil and gas within a subsidence area for the purposes and by the persons mentioned in this section under the circumstances herein specified, are public uses on behalf of which the right of eminent domain may be exercised.

(c) Subject to the provisions of subdivision (b), the right of eminent domain for the purposes therein mentioned may be exercised by any city, county, or city and county, which has agreed to commit the properties to be acquired to such unit or cooperative agreement, or which has agreed to convey all or a portion of said properties upon acquisition, for a price not less than the cost of acquiring the same, to working interest owners who are parties to such unit or cooperative agreement and who have agreed to commit such properties to said agreement.

Except as otherwise provided in subdivisions (b) and (c), any condemnation action brought hereunder shall be governed by the provisions of Title 7 (commencing at Section 1230.010) of Part 3 of the Code of Civil Procedure.

If a condemnation action or actions to acquire the properties of the nonconsenting persons are promptly commenced and diligently prosecuted to final judgment by which such properties are acquired, no compulsory unit order affecting the area covered by such agreement shall be made by the supervisor under Section 3321 of this article with respect to such area.

Law Revision Commission Comment

Comment. Section 3320.1 is amended to conform to the numbering of the Eminent Domain Law.

Public Resources Code § 3341 (technical amendment)

3341. At the termination of oil and gas production from a unit area established or approved pursuant to this article and the abandonment of attempts to obtain production therefrom, any interested municipal corporation or other public agency may acquire by eminent domain, in the manner provided by law for the condemnation of property for public use by the state, municipal corporation or other public agency, such oil production properties or facilities within the unit area as such municipal corporation or other public agency may deem necessary or essential to the maintenance of such pressures as will continue to arrest or ameliorate subsidence.

Law Revision Commission Comment

Comment. The last sentence of Section 3341 is deleted as unnecessary. See CODE CIV. PROC. §§ 1230.020 (law governing

exercise of eminent domain power), 1240.010 (declaration of public use unnecessary).

Department of Parks and Recreation

Public Resources Code § 5006 (amended)

5006. The department, with the consent of the Department of Finance, may acquire title to or any interest in real and personal property which the department deems necessary or proper for the extension, improvement, or development of the state park system.

Law Revision Commission Comment

Comment. Section 5006 is amended to delete the authority of the Department of Parks and Recreation to exercise the power of eminent domain since the Department of Parks and Recreation no longer has this power. Acquisitions by eminent domain for the state parks are made by the Public Works Board. GOVT. CODE §§ 15853–15855.

The last sentence of the first paragraph has been omitted as unnecessary in view of later enacted Government Code Section 7267.1.

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

The requirement that the Director of Parks and Recreation declare the public interest, necessity, and propriety of the acquisition for the state park system is superseded by the more general provisions of the Eminent Domain Law. See CODE CIV. PROC. §§ 1240.040 and 1245.210 *et seq.*

Public Resources Code § 5006.1 (repealed)

Law Revision Commission Comment

Comment. Section 5006.1, specifying the effect given a declaration of necessity of the Director of Parks and Recreation, is superseded by provisions of the Eminent Domain Law. Under these provisions, the Public Works Board adopts a resolution of necessity for property required by the department and that resolution is given conclusive effect on the issues formerly mentioned in this section. See CODE CIV. PROC. §§ 1240.040 and 1245.210 *et seq.* See especially CODE CIV. PROC. § 1245.250. See also GOVT. CODE §§ 15853–15855.

Parks and Boulevards

Public Resources Code § 5301 (technical amendment)

5301. Any city or city and county may acquire and hold land for

public parks, or public boulevards, or both, by purchase, or by condemnation.

Law Revision Commission Comment

Comment. The provision deleted from Section 5301 is unnecessary. See CODE CIV. PROC. § 1230.020 (law governing exercise of eminent domain power).

Regional Park District

Public Resources Code § 5542 (amended)

5542. A district may exercise the right of eminent domain to take any property necessary or convenient to accomplish the purposes of this article.

A district may not acquire by condemnation any of the lands, properties, or facilities of any municipal utility district which are appropriated to public use or are used in or are useful to the operations of the municipal utility district or which are within the watershed of any stream or reservoir which supplies water for domestic use or which the directors of the municipal utility district determine by resolution to be properties which are required for the purposes of the municipal utility district.

Law Revision Commission Comment

Comment. The deleted portions of Section 5542 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use).

Public Resources Code § 5542.5 (repealed)

Law Revision Commission Comment

Comment. Section 5542.5 is continued without substantive change in the Eminent Domain Law. The substance of subdivision (a) is continued in Code of Civil Procedure Section 1240.680. See the Comment to that section. The substance of subdivision (b) is continued as Code of Civil Procedure Section 1240.700. See the Comment to that section.

Public Resources Code § 5566 (repealed)

Law Revision Commission Comment

Comment. Section 5566 is unnecessary. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.010 (statement that the use is a public use unnecessary). See also Code Civ. Proc. § 1250.210 and Comment thereto (identification of plaintiff).

State Lands Commission

Public Resources Code § 6808 (amended)

6808. The commission, if it deems such action for the best interests of the state, may condemn, acquire, and possess in the name of the state any right-of-way or easement, including surface rights, for any operation authorized or contemplated under this chapter, that may be necessary for the development and production of oil and gas from state-owned land and for their removal, transportation, storage, and sale.

Legislative Committee Comment—Assembly

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.

Lands Exempt From Condemnation

Public Resources Code § 8030 (added)

Article 11. Exemption From Condemnation

8030. Notwithstanding any other provision of law, all 16th and 36th sections, both surveyed and unsurveyed, owned by the state or the United States, which are now or may hereafter be included within the exterior boundaries of a national reservation, a reserve, or lands withdrawn from public entry, are exempt from taking by eminent domain.

Law Revision Commission Comment

Comment. Section 8030 continues without substantive change the limitation upon condemnation of the lands described in subdivision 2 of former Code of Civil Procedure Section 1240.

National Parks

Public Resources Code § 8402 (technical amendment)

8402. Any county may exercise the right of eminent domain to acquire any property necessary or convenient for carrying out the provisions of this chapter.

Law Revision Commission Comment

Comment. The provisions deleted from Section 8402 are unnecessary. See CODE CIV. PROC. §§ 1240.010 (declaration of public use unnecessary), 1240.110 (right to acquire any necessary right or interest in any type of property), 1230.020 (law governing exercise of eminent domain power).

Resort Improvement District**Public Resources Code § 13070.1 (added)**

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

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

State Energy Resources Conservation and Development Commission**Public Resources Code § 25528 (amended)**

25528. (a) The commission shall require, as a condition of certification of any site and related facility, that the applicant acquire, by grant or contract, the right to prohibit development of privately owned lands in the area of the proposed site which will result in population densities in excess of the maximum population densities which the commission determines, as to the factors considered by the commission pursuant to Section 25511, are necessary to protect public health and safety.

If the applicant is authorized to exercise the right of eminent domain under Article 7 (commencing with Section 610) of Chapter 3 of Part 1 of Division 1 of the Public Utilities Code, the applicant may exercise the right of eminent domain to acquire such development rights as the commission requires be acquired.

(b) In the case of an application for a nuclear facility, the area and population density necessary to insure the public’s health and safety designated by the commission shall be that as determined from time to time by the United States Atomic Energy Commission, if the commission finds that such determination is sufficiently definitive for valid land use planning requirements.

(c) The commission shall waive the requirements of the acquisition of development rights by an applicant to the extent that the commission finds that existing governmental land use restrictions are of a type necessary and sufficient to guarantee the maintenance of population levels and land use development over the lifetime of

the facility which will insure the public health and safety requirements set pursuant to this section.

(d) No change in governmental land use restrictions in such areas designated in subdivision (c) of this section by any government agency shall be effective until approved by the commission. Such approval shall certify that the change in land use restrictions is not in conflict with requirements provided for by this section.

(e) It is not the intent of the Legislature by the enactment of this section to take private property for public use without payment of just compensation in violation of the United States Constitution or the Constitution of California.

Law Revision Commission Comment

Comment. Section 25528 is amended to make reference to the provisions of the Public Utilities Code that authorize condemnation of property for utility purposes. The portion of Section 25528 making conclusive in an eminent domain proceeding the commission's determination that the development rights be acquired is continued in subdivision (d) (1) of Section 25531.

Public Resources Code § 25531 (amended)

25531. (a) The decisions of the commission on any application of any electric utility for certification of a site and related facility shall be subject to judicial review in the same manner as the decisions of the Public Utilities Commission on the application for a Certificate of Public Convenience and Necessity for the same site and related facility.

(b) No new or additional evidence may be introduced upon review and the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the United States Constitution or the California Constitution. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review, except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission. A report prepared by, or an approval of, the commission pursuant to Section 25510, 25514, 25516, or 25516.5, or subdivision (b) of Section 25520.5, shall not constitute a decision of the commission subject to judicial review.

(c) Subject to the right of judicial review of decisions of the commission, no court in this state shall have jurisdiction to hear or determine any case or controversy concerning any matter which was, or could have been, determined in a proceeding before the commission, or to stop or delay the construction or operation of any thermal powerplant except to enforce compliance with the provisions of a decision of the commission.

(d) Notwithstanding Section 1250.370 of the Code of Civil Procedure:

(1) If the commission requires pursuant to subdivision (a) of Section 25528, as a condition of certification of any site and related facility, that the applicant acquire development rights, such requirement conclusively establishes the matters referred to in Sections 1240.030 and 1240.220 of the Code of Civil Procedure in any eminent domain proceeding brought by the applicant to acquire such development rights.

(2) If the commission certifies any site and related facility, such certification conclusively establishes the matters referred to in Sections 1240.030 and 1240.220 of the Code of Civil Procedure in any eminent domain proceeding brought to acquire such site and related facility.

Law Revision Commission Comment

Comment. Subdivision (d) (1) is added to Section 25531 to continue the substance of a provision formerly found in Section 25528. Subdivision (d) (2) deals with the effect of the certification of the commission as to a site when an eminent domain proceeding is brought to acquire the site.

Under subdivision (d), the commission's decision is conclusive on the matters referred to in Code of Civil Procedure Sections 1240.030 (need for project, proper location of project, need for property sought to be acquired) and 1240.220 (property will be devoted to public use within reasonable time). It should be noted that in some cases a public utility may seek to acquire property for utility purposes prior to certification by the State Energy Resources Conservation and Development Commission. Section 25531 does not preclude this. Long-term planning may require, for example, acquisition of the right of way for an electric transmission line well in advance of need. See, e.g., *Pacific Gas & Elec. Co. v. Parachini*, 29 Cal.App.3d 159, 105 Cal. Rptr. 477 (1972). Compare *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal.App.2d 472, 480-481, 14 Cal. Rptr. 899, 904-905 (1941). In such case, the burden of proof is on the condemnor to establish the matters listed in Section 1240.030. See also Section 1240.230 (burden of proof where taking is for future use). In cases where a certification from the commission is not required, the condemnor also has the burden of proof to establish the matters listed in Section 1240.030 and, where applicable, Section 1240.230.

Privately Owned Public Utilities

Public Utilities Code § 221 (amended)

221. "Gas plant" includes all real estate, fixtures, and personal property, owned, controlled, operated, or managed in connection

with or to facilitate the production, generation, transmission, delivery, underground storage, or furnishing of gas, natural or manufactured, for light, heat, or power.

Law Revision Commission Comment

Comment. Section 221 is amended to make express the inherent right of a gas corporation to condemn for underground storage of natural gas. See PUB. UTIL. CODE § 613 (gas corporation may condemn for its “gas plant”).

Public Utilities Code § 610 (added)

Article 7. Eminent Domain

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

Law Revision Commission Comment

Comment. Section 610 is included to make clear that this article extends the right of eminent domain only to “public utilities” as defined in Section 216 (“service is performed for or the commodity delivered to the public or any portion thereof”) and not to persons or corporations that are not subject to regulation and rate control. It has been held that the exercise of the right of eminent domain conclusively evidences an intention to devote the property so acquired to a public use, thereby rendering the condemnor a public utility. *Producers Transp. Co. v. Railroad Comm’n*, 176 Cal. 499, 505, 169 P. 59, 61 (1917). Compare *McCullagh v. Railroad Comm’n*, 190 Cal. 13, 210 P. 264 (1922). This section is consistent with the holding in the *Producers Transp. Co.* case.

Public Utilities Code § 611 (added)

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

Law Revision Commission Comment

Comment. Section 611 grants a “railroad corporation” (defined in Section 230) the right of eminent domain to acquire property necessary for the construction and maintenance of its railroad. “Railroad” is defined in Section 229 to mean in substance all railroad property devoted to public use in the transportation of persons or property. Thus, Section 611 authorizes condemnation of any property necessary to carry out the regulated activities of the railroad. It retains in substance the authority formerly found in subdivision (g) of Section 7526 of the Public Utilities Code and in Section 1238 of the Code of Civil

Procedure. See, e.g., *Southern Pac. Co. v. Los Angeles Mill Co.*, 177 Cal. 395, 170 P. 829 (1918) (spur tracks); *Vallejo & N. R.R. v. Reed Orchard Co.*, 169 Cal. 545, 147 P. 238 (1915) (land for wharves for transfer of freight between railroad cars and boats where reasonably necessary for railroad corporation's future business); *Central Pacific Ry. v. Feldman*, 152 Cal. 303, 92 P. 849 (1907) (land adjacent to station grounds required for a freight house); *Southern Pac. R.R. v. Raymond*, 53 Cal. 223 (1878) (workshop); *Madera Ry. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 P. 27 (1906) (spur tracks). Cf. *City of Los Angeles v. Los Angeles Pac. Co.*, 31 Cal. App. 100, 159 P. 992 (1916) (land for pole line for transmission of power to public railway). Section 611 would not, however, permit condemnation by a railroad corporation of land to be used, for example, as an industrial park.

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

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

Public Utilities Code § 612 (added)

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

Law Revision Commission Comment

Comment. Section 612 grants an "electrical corporation" (defined in Section 218) the right of eminent domain to acquire property necessary for the construction and maintenance of its electric plant. "Electric plant" is defined in Section 217 to mean in substance all property devoted to public use in the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power. Thus, Section 612 authorizes condemnation of any property necessary to carry out the regulated activities of the electrical corporation. It retains and possibly broadens the

authority formerly found in subdivisions 12 and 13 of Section 1238 of the Code of Civil Procedure and supersedes those subdivisions insofar as they applied to privately owned public utilities. See also the Comment to Section 613. Insofar as subdivision 13 permitted acquisition of property for future use, this authority is continued in Code of Civil Procedure Section 1240.220.

Public Utilities Code § 613 (added)

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

Law Revision Commission Comment

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

Sections 612, 613, and 614 largely supersede subdivision 17 of Section 1238 of the Code of Civil Procedure. Insofar as subdivision 17 permitted acquisition of property for future use, this authority is continued in Code of Civil Procedure Section 1240.220.

Public Utilities Code § 614 (added)

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

Law Revision Commission Comment

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

Public Utilities Code § 615 (added)

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

Law Revision Commission Comment

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

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

Public Utilities Code § 616 (added)

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

Law Revision Commission Comment

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

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

Public Utilities Code § 617 (added)

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

Law Revision Commission Comment

Comment. Section 617 grants a “telegraph corporation” (defined in Section 236) the right of eminent domain to acquire property necessary for the construction and maintenance of its telegraph line. “Telegraph line” is defined in Section 235 to include all property used, in connection with or to facilitate communication by telegraph, whether such communication is

had with or without the use of transmission wires. Thus, Section 617 authorizes condemnation of any property necessary to carry out the regulated activities of the telegraph corporation.

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

Public Utilities Code § 618 (added)

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

Law Revision Commission Comment

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

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

Public Utilities Code § 619 (added)

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

Law Revision Commission Comment

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

Section 619 supersedes portions of subdivisions 3 (“public mooring places for watercraft”) and 4 (“wharves, docks,

piers, . . . chutes, booms”) of Section 1238 of the Code of Civil Procedure insofar as those portions related to privately owned public utilities.

Public Utilities Code § 620 (added)

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

Law Revision Commission Comment

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

Public Utilities Code § 621 (added)

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

Law Revision Commission Comment

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

Public Utilities Code § 622 (added)

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

- (1) A highway common carrier as defined in Section 213.
- (2) A passenger stage corporation as defined in Section 226.

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

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

Law Revision Commission Comment

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

Public Utilities Code § 623 (added)

623. A warehouseman may condemn any property necessary for the construction and maintenance of its facilities for storing property.

Law Revision Commission Comment

Comment. Section 623 grants a “warehouseman” (defined in Section 239) the right of eminent domain to acquire property necessary for storing property. Section 623 supersedes a portion of subdivision 4 of Section 1238 of the Code of Civil Procedure (granting authority to condemn for “warehouses”) insofar as that portion related to privately owned public utilities.

Public Utilities Code § 624 (added)

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

Law Revision Commission Comment

Comment. Section 624 grants a “sewer system corporation” (defined in Section 230.6) the right of eminent domain to acquire property necessary for the construction and maintenance of its sewer system. “Sewer system” is defined in Section 230.5 to include all property used in connection with or to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes. Thus, Section 624 authorizes condemnation of any property necessary to carry out the regulated activities of sewer system corporations. Section 624 does not, however, authorize condemnation for a sewer system which merely collects sewage on the property of a single owner (Section 230.5); nor does it authorize condemnation by anyone other than a public utility subject to the jurisdiction, control, and regulation of the Public Utilities Commission.

Section 624 supersedes portions of subdivisions 3, 4, and 8 of Section 1238 of the Code of Civil Procedure insofar as those portions related to condemnation by privately owned public utilities.

Controversies Concerning Relocation of Utility Improvements

Public Utilities Code § 861 (added)

Article 7. Controversies Concerning Relocation of Utility Improvements

861. (a) As used in this section, "special law water district" means the Santa Clara Valley Water District and the Yuba-Bear River Basin Authority and, if created by an uncodified special law, any of the following: a county flood control district, a county flood control and water district, a county flood control and water conservation district, a county water conservation and flood control district, or a county water agency.

(b) Whenever by court order or judgment in an eminent domain proceeding or by agreement a special law water district is required to relocate any improvements of a public utility, if the special law water district and the public utility fail to agree as to the character or location of the new improvements to be relocated by the special law water district, the character and location of such new improvements and any other controversy relating thereto shall be submitted to and determined by the Public Utilities Commission in the manner prescribed in Chapter 6 (commencing with Section 1201).

Law Revision Commission Comment

Comment. Section 861 is derived from and supersedes numerous provisions formerly found in the uncodified statutes relating to special water districts. See, *e.g.*, Alameda County Flood Control and Water Conservation District Act, § 28 (Cal. Stats. 1949, Ch. 1275); Alpine County Water Agency Act, § 19 (Cal. Stats. 1961, Ch. 1896); Amador County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 2137); Contra Costa County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1951, Ch. 1617); El Dorado County Water Agency Act, § 20 (Cal. Stats. 1959, Ch. 2139); Kern County Water Agency Act, § 4.9 (Cal. Stats. 1961, Ch. 1003); Lake County Flood Control and Water Conservation District Act (Cal. Stats. 1951, Ch. 1544), § 33 (added Cal. Stats. 1954, 1st Ex. Sess., Ch. 62, § 48); Marin County Flood Control and Water Conservation District Act, § 28 (Cal. Stats. 1953, Ch. 666); Mariposa County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 2036); Monterey County Flood Control and

Water Conservation District Act, § 29 (Cal. Stats. 1947, Ch. 699); Napa County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1951, Ch. 1449); Nevada County Water Agency Act, § 19 (Cal. Stats. 1959, Ch. 2122); Placer County Water Agency Act, § 4.9 (Cal. Stats. 1957, Ch. 1234); San Benito County Water Conservation and Flood Control District Act, § 33 (Cal. Stats. 1953, Ch. 1598); San Diego Flood Control District Act, § 39 (Cal. Stats. 1966, 1st Ex. Sess., Ch. 55); San Joaquin County Flood Control and Water Conservation District Act, § 33 (Cal. Stats. 1956, 1st Ex. Sess., Ch. 46); San Luis Obispo County Flood Control and Water Conservation District Act, § 29 (Cal. Stats. 1945, Ch. 1294); Santa Barbara County Flood Control and Water Conservation District Act, § 30 (Cal. Stats. 1955, Ch. 1057); Santa Clara Valley Water District Act, § 29 (Cal. Stats. 1951, Ch. 1405); Sutter County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 2088); Tulare County Flood Control District Act, § 32 (Cal. Stats. 1969, Ch. 1149); Tuolumne County Water Agency Act, § 20 (Cal. Stats. 1969, Ch. 1236); Yuba-Bear River Basin Authority Act, § 19 (Cal. Stats. 1959, Ch. 2131); Yuba County Water Agency Act, § 4.9 (Cal. Stats. 1959, Ch. 788). The substance of these superseded provisions is continued in Section 861 and is extended to all special law water districts of the same type.

Extension of Service Into Area Served by Private Utility

Public Utilities Code § 1503 (technical amendment)

1503. The Legislature finds and declares that whenever a political subdivision constructs facilities to provide or extend water service, or provides or extends such service, to any service area of a private utility with the same type of service, such an act constitutes a taking of the property of the private utility for a public purpose to the extent that the private utility is injured by reason of any of its property employed in providing the water service being made inoperative, reduced in value or rendered useless to the private utility for the purpose of providing water service to the service area.

Law Revision Commission Comment

Comment. The provision deleted from Section 1503 is unnecessary. See the last sentence of Section 1504.

Mutual Water Companies

Public Utilities Code § 2729 (added)

2729. A mutual water company may exercise the power of eminent domain for water, water rights, canals, ditches, dams, poundings, flumes, aqueducts, and pipes for irrigation of lands furnished with water by such company.

Legislative Committee Comment—Senate

Comment. Section 2729 specifies the condemnation authority of a mutual water company (defined in Section 2725). The section continues without substantive change the authority to condemn formerly conferred by Code of Civil Procedure Section 1238(4) (condemnation authorized for “water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only”).

Mutual water companies are not generally subject to the jurisdiction of the Public Utilities Commission. See PUB. UTIL. CODE § 2705. However, it is possible that exercise of the power of eminent domain by a mutual water company may demonstrate an intention to devote the property so acquired to public use and thereby render the company subject to regulation as a public utility. See *Corona City Water Co. v. Public Utilities Comm’n*, 54 Cal.2d 834, 357 P.2d 301, 9 Cal. Rptr. 245 (1960); *Lamb v. California Water & Tel. Co.*, 21 Cal.2d 33, 129 P.2d 371 (1942). Nevertheless, the authority granted by this section is not dependent upon whether a company is or is not held to be a public utility by exercising such authority.

The condemnation authority granted by this section is subject to the consent of the relevant local public entities under Sections 1245.310–1245.390 of the Code of Civil Procedure.

Railroads**Public Utilities Code § 7526 (technical amendment)**

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

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

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

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

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

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

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

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

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

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

Law Revision Commission Comment

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

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

railroad corporations to condemn any property necessary for the construction and maintenance of its railroad provided by Section 611.

Public Utilities Code § 7557 (added)

7557. Where any railroad or street railroad tracks are located on property that a public entity is authorized to acquire by eminent domain for road, highway, boulevard, street, or alley purposes or on property that a city, county, or municipal water district is authorized to acquire by eminent domain for the right-of-way of a public utility that it will construct, complete, and maintain, the plaintiff may require the relocation or removal of such tracks by exercise of the power of eminent domain. In such case, the complaint shall contain a description and map of the location and proposed location of such tracks.

Law Revision Commission Comment

Comment. Section 7557 is an exception to the general rule that, in eminent domain proceedings, the plaintiff must acquire all structures and improvements upon the property it is taking. See CODE CIV. PROC. § 1263.210. It continues the substance of former Code of Civil Procedure Section 1248a. Section 7557 does not affect any jurisdiction that the Public Utilities Commission may have over the relocation or removal of tracks in an eminent domain proceeding. See CODE CIV. PROC. § 1230.060 and Comment thereto (Public Utilities Commission jurisdiction preserved).

Municipal Utility District

Public Utilities Code § 12703 (amended)

12703. A district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this division.

Law Revision Commission Comment

Comment. Section 12703 is amended to delete portions made unnecessary by the enactment of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1250.210 and Comment thereto (identification of plaintiff).

Public Utility District

Public Utilities Code § 16404 (amended)

16404. A district may exercise the right of eminent domain to

take any property necessary or convenient to the exercise of the powers granted in this division.

Law Revision Commission Comment

Comment. Section 16404 is amended to delete portions made unnecessary by the enactment of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use).

Public Utilities Code § 16405 (repealed)

Law Revision Commission Comment

Comment. Section 16405 is unnecessary. See Code Civ. Proc. § 1250.210 and Comment thereto.

Department of Transportation—Aeronautics

Public Utilities Code § 21633 (amended)

21633. For the purposes of this article, the department, by purchase, gift, devise, lease, condemnation, or otherwise, may acquire real or personal property, or any interest therein, including any property described in Section 21652.

Law Revision Commission Comment

Comment. Section 21633 as amended continues the authority of the Department of Transportation to acquire property for airport purposes. The reference to Section 21652, which is substituted for the deleted portion of Section 21633, continues the authority of the department to acquire property for the elimination of airport hazards.

Airport Hazards

Public Utilities Code § 21634 (repealed)

Law Revision Commission Comment

Comment. The substance of Section 21634 is continued in Section 21653.

Public Utilities Code § 21635 (repealed)

Law Revision Commission Comment

Comment. Section 21635 is not continued. The rules governing the conduct of eminent domain proceedings generally are prescribed in the Eminent Domain Law. See CODE CIV. PROC. § 1230.020 (law governing exercise of eminent domain

power). Particular aspects of Section 21635 are dealt with in the sections of the Code of Civil Procedure indicated below.

<i>Section 21635</i>	<i>New Provisions</i>
Entry for survey and examination	§ 1245.010 <i>et seq.</i>
More necessary use requirement ..	§ 1240.610 <i>et seq.</i>
Right of common use.....	§ 1240.510 <i>et seq.</i>

Aircraft Hazard or Disturbance Elimination

Public Utilities Code § 21652 (added)

Article 2.6. Hazard Elimination; Flight Disturbance

21652. (a) Any person authorized to exercise the power of eminent domain for airport purposes may acquire by purchase, gift, devise, lease, condemnation, or otherwise:

(1) Any property necessary to permit the safe and efficient operation of the airport, or to permit the removal, elimination, obstruction-marking, or obstruction-lighting of airport hazards, or to prevent the establishment of airport hazards.

(2) Airspace or an easement in such airspace above the surface of property where necessary to permit imposition upon such property of excessive noise, vibration, discomfort, inconvenience, interference with use and enjoyment, and any consequent reduction in market value, due to the operation of aircraft to and from the airport.

(3) Remainder property underlying property taken pursuant to paragraph (2), where permitted by Section 1240.410 of the Code of Civil Procedure.

(b) As used in this section, "property" includes real and personal property and any right or interest therein, whether within, beyond, adjacent to, or in the vicinity of, the boundaries of an airport or airport site, and, by way of illustration and not by way of limitation, includes air rights, airspace, air easements, and easements in airport hazards.

Legislative Committee Comment—Senate

Comment. Section 21652 continues the authority of the state (formerly found in Section 21633) of cities, counties, and airport districts (formerly found in CODE CIV. PROC. §§ 1239.2 and 1239.4 and GOVT. CODE § 50485.13) to condemn or otherwise acquire property for the elimination and prevention of airport hazards. See PUB. UTIL. CODE § 21017 ("airport hazard" defined). In addition, it extends this authority to entities previously not covered by a specific grant, *e.g.*, San Diego Unified Port District. See Cal. Stats. 1962, 1st Ex. Sess., Ch. 67, §§ 4, 5, 27. For statutes granting local public entities the power of eminent domain for airport purposes, see GOVT. CODE §§ 26020 (counties), 50470 (cities, counties); PUB. UTIL. CODE § 22553 (port districts); Cal. Stats. 1962, 1st Ex. Sess., Ch. 67, §§ 4, 5, 27 (San

Diego Unified Port District). For statutes granting the state the power of eminent domain for airport purposes, see GOVT. CODE §§ 15853 and 15854; PUB. UTIL. CODE § 21633.

Section 21652 also continues and expands the authority (formerly found in CODE CIV. PROC. § 1239.3) of cities, counties, airport districts, and the San Diego Unified Port District to condemn to provide areas where flight disturbance will result in damage that might otherwise be the subject of actions for property damage. *Cf.* PUB. UTIL. CODE § 21688. Section 21652 extends this authority to the state and to any other airport condemnors previously not covered by specific grant.

Subdivision (a). Paragraph (1) of subdivision (a) is based on language formerly found in Public Utilities Code Section 21633 (authority of Department of Transportation). As a specific authorization of condemnation for airport protective purposes, it duplicates the more general authority found in Section 1240.120 of the Code of Civil Procedure, but this duplication has been retained because it provides useful detail.

Paragraph (2) of subdivision (a) retains the substance of former Code of Civil Procedure Section 1239.3 that airspace or airspace rights may be taken in any area to which flight disturbance will penetrate.

Paragraph (3) of subdivision (a) permits airport condemnors to take—in addition to airspace interests—land and other property for the purpose of providing areas of flight disturbance where a taking pursuant to paragraph (2) would leave a remnant. The procedures and standards applicable to such takings are those set forth in Section 1240.410 of the Code of Civil Procedure. The right to take pursuant to Section 1240.410 entails the right to dispose of property thus acquired pursuant to Section 1240.430 of the Code of Civil Procedure.

Subdivision (b). Subdivision (b) makes clear that property of any character or degree may be condemned for airport protective or flight disturbance purposes. As such, it supersedes the restrictive language of former Code of Civil Procedure Sections 1239.2 and 1239.3, and it is consistent with the more general acquisition authority found in Code of Civil Procedure Section 1240.110. See also Code Civ. Proc. §§ 1235.125 (interest in property defined) and 1235.170 (property defined).

The provision formerly found in Code of Civil Procedure Section 1239.4, authorizing acquisition of land, reserving an “irrevocable free license” in the former owner to use and occupy such land has not been continued since subdivision (b) defines “property” so broadly that a condemnor may take land subject to such an interest where necessary.

Public Utilities Code § 21653 (added)

21653. Any person authorized to exercise the power of eminent domain for airport purposes may provide, by purchase, gift, devise, lease, condemnation, or otherwise, for the removal or relocation of any airport hazard or the removal or relocation of all facilities, structures, and equipment that may interfere with the location, expansion, development, or improvement of the airport and other air navigation facilities or with the safe approach thereto and takeoff therefrom by aircraft. Any person acting under authority of this section shall pay the cost of such removal or relocation.

Law Revision Commission Comment

Comment. Section 21653 continues the authority of the state (formerly found in PUB. UTIL. CODE § 21634) and of cities and of counties (formerly found in GOVT. CODE § 50485.13) to require the removal or relocation of airport hazards. See PUB. UTIL. CODE § 21017 (“airport hazard” defined). In addition, it extends this authority to entities previously not covered by a specific grant, *e.g.*, airport districts. See PUB. UTIL. CODE § 22553.

Section 21653 also continues the authority of the state to require the removal and relocation of structures, facilities, and equipment that might interfere with the location, expansion, development, or improvement of the airport and its facilities and extends this authority to other public entities. In addition, it requires payment for relocation or removal of airport hazards generally.

While Section 21653 is phrased as a separate grant of authority to require removal or relocation, such authority can be exercised in connection with an eminent domain proceeding brought under Section 21652.

It should be noted that the removal or relocation of property held for or devoted to a public use may be required only after the court in which proceedings are pending finds that the relocation for airport purposes is of greater public necessity than the public use for which the property was previously held or used. See CODE CIV. PROC. § 1240.610 *et seq.*; see Comment to former PUB. UTIL. CODE § 21635.

**Transit District—Alameda or Contra Costa County
Public Utilities Code § 25703 (amended)**

25703. A district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this division. The district, in exercising such power, shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, wires, cables or poles of any public utility which is required to be moved to a new location.

Law Revision Commission Comment

Comment. The deleted portions of Section 25703 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1250.210 and Comment thereto (identification of plaintiff).

**San Francisco Bay Area Rapid Transit District
Public Utilities Code § 28953 (amended)**

28953. The district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this part. The district, in exercising such power, shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost, exclusive of betterment and with credit for salvage value, of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, wires, cables or poles of any public utility which is required to be moved to a new location.

Law Revision Commission Comment

Comment. The deleted portions of Section 28953 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1250.210 and Comment thereto (identification of plaintiff).

Public Utilities Code § 28954 (repealed)

Law Revision Commission Comment

Comment. Section 28954 is superseded by Code of Civil Procedure Sections 1240.040 and 1245.210 *et seq.*

**Southern California Rapid Transit District
Public Utilities Code § 30503 (amended)**

30503. The district may exercise the right of eminent domain within the boundaries of the district to take any property necessary or convenient to the exercise of the powers granted in this part.

No such taking or acquisition by the district which would involve the abandonment, removal, relocation or use of property of a railroad corporation, as defined in Section 230 of this code, shall be permitted, unless the Public Utilities Commission, after hearing, shall find and determine that the public interest and necessity require the abandonment, removal, relocation or use of such property and that such taking or acquisition will not unreasonably impair the ability of the railroad corporation involved to provide safe, adequate, economical and efficient service.

Law Revision Commission Comment

Comment. The deleted portion of Section 30503 is superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1230.060 (Public Utilities Commission jurisdiction preserved), 1240.510 *et seq.* (compatible

use), 1240.610 *et seq.* (more necessary public use). See also Code Civ. Proc. §§ 1235.170 (“property” defined) and 1240.110 (right to acquire any necessary right or interest in any type of property).

Public Utilities Code § 30504 (repealed)

Law Revision Commission Comment

Comment. Section 30504 is superseded by Code of Civil Procedure Section 1240.610 *et seq.* (more necessary public use). See also Code Civ. Proc. § 1240.510 *et seq.* (compatible use).

Orange County Transit District

Public Utilities Code § 40162 (amended)

40162. The district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this part. The district in exercising such power shall, in addition to the damage for the taking, injury or destruction of property, also pay the cost of removal, reconstruction or relocation of any structure, railway, mains, pipes, conduits, cables or poles of any public utility which is required to be moved to a new location.

No such taking or acquisition by the district which would involve the abandonment, removal, relocation, or use of property of a railroad corporation, as defined in Section 230 of this code, shall be permitted, unless the Public Utilities Commission, after hearing, shall find and determine that the public interest and necessity require the abandonment, removal, relocation, or use of such property and that such taking or acquisition will not unreasonably impair the ability of the railroad corporation involved to provide safe, adequate, economical, and efficient service.

Law Revision Commission Comment

Comment. The deleted portions of Section 40162 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1250.210 and Comment thereto (identification of plaintiff). See also Pub. Util. Code § 40175 (extraterritorial condemnation authority).

Stockton Metropolitan Transit District

Public Utilities Code § 50162 (amended)

50162. The district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this part. The district, in exercising such power shall, in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, cables,

or poles of any public utility or public district which is required to be moved to a new location.

No action in eminent domain to acquire property within any incorporated city or any county shall be commenced unless the legislative body of the affected city or county has consented to such acquisition by resolution.

Law Revision Commission Comment

Comment. The deleted portions of Section 50162 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1250.210 and Comment thereto (identification of plaintiff). See also Code Civ. Proc. §§ 1235.070 (“property” defined) and 1240.110 (right to acquire any necessary right or interest in any type of property).

Transit District—Marin County

Public Utilities Code § 70162 (amended)

70162. The district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this part. The district in exercising such power shall, in addition to the damage for the taking, injury or destruction of property, also pay the cost of removal, reconstruction or relocation of any structure, railway, mains, pipes, conduits, cables or poles of any public utility which is required to be moved to a new location.

Law Revision Commission Comment

Comment. The deleted portions of Section 70162 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1250.210 and Comment thereto (identification of plaintiff).

San Diego County Transit District

Public Utilities Code § 90402 (amended)

90402. The district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this act. The district, in exercising such power shall, in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, cables, or poles of any public utility which is required to be moved to a new location.

No such taking or acquisition by the district which would involve the abandonment, removal, relocation or use of the property of a

railroad corporation, as defined in Section 230 of this code, shall be permitted, unless the Public Utilities Commission, after hearing, shall find and determine that the public interest and necessity require the abandonment, removal, relocation or use of such property and that such taking or acquisition will not unreasonably impair the ability of the railroad corporation involved to provide safe, adequate, economical and efficient service.

Law Revision Commission Comment

Comment. The deleted portions of Section 90402 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1250.210 and Comment thereto (identification of plaintiff).

**Santa Barbara Metropolitan Transit District
Public Utilities Code § 96002 (amended)**

96002. The district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this part. The district, in exercising such power shall, in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, cables or poles of any public utility or public district which is required to be moved to a new location.

No action in eminent domain to acquire property within any incorporated city or any county shall be commenced unless the legislative body of the affected city or county has consented to such acquisition by resolution.

No such taking or acquisition by the district which would involve the abandonment, removal, relocation, or use of property of a railroad corporation, as defined in Section 230 of this code, shall be permitted, unless the Public Utilities Commission, after hearing, shall find and determine that the public interest and necessity require the abandonment, removal, relocation, or use of such property and that such taking or acquisition will not unreasonably impair the ability of the railroad corporation involved to provide safe, adequate, economical, and efficient service.

Law Revision Commission Comment

Comment. The deleted portions of Section 96002 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1250.210 and Comment thereto (identification of plaintiff). See also Code Civ. Proc. §§ 1235.070 ("property" defined) and 1240.110 (right to acquire any necessary right or interest in any type of property).

**Santa Cruz Metropolitan Transit District
Public Utilities Code § 98212 (amended)**

98212. The district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this part. The district, in exercising such power, in addition to the damage for the taking, injury, or destruction of property, shall also pay the cost of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, cables, or poles of any public utility or public district which is required to be moved to a new location.

Law Revision Commission Comment

Comment. The deleted portions of Section 98212 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1250.210 and Comment thereto (identification of plaintiff).

**Santa Clara County Transit District
Public Utilities Code § 100130.5 (repealed)**

Law Revision Commission Comment

Comment. Section 100130.5 is superseded by Code of Civil Procedure Section 1240.410 *et seq.*

Public Utilities Code § 100131 (amended)

100131. The district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this part. The district, in exercising such power, shall in addition to the damages for the taking, injury, or destruction of property, also pay the cost, exclusive of betterment and with credit for salvage value, of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, wires, cables, or poles of any public utility which is required to be moved to a new location.

No taking or acquisition by the district which would involve the abandonment, removal, relocation, or use of the property of a railroad corporation, as defined in Section 230, shall be permitted, unless the Public Utilities Commission, after a hearing, shall find and determine that the public interest and necessity require the abandonment, removal, relocation, or use of such property and that such taking or acquisition will not unreasonably impair the ability of the railroad corporation involved to provide safe, adequate, economical, and efficient service.

Law Revision Commission Comment

Comment. The deleted portions of Section 100131 are superseded

by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1250.210 and Comment thereto (identification of plaintiff).

Greater Bakersfield Metropolitan Transit District

Public Utilities Code § 101177 (amended)

101177. The district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this part. In the exercise of such power, in addition to the damage for the taking, injury, or destruction of property, the district shall also pay the cost of removal, reconstruction, or relocation of any railways, mains, pipes, conduits, cables, poles, or other structures or facilities of any public utility or public agency which is required to be moved to a new location.

Law Revision Commission Comment

Comment. The deleted portions of Section 101177 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1250.210 and Comment thereto (identification of plaintiff).

Sacramento Regional Transit District

Public Utilities Code § 102241 (repealed)

Law Revision Commission Comment

Comment. Section 102241 is superseded by Code of Civil Procedure Section 1240.410 *et seq.*

Sacramento Regional Transit District

Public Utilities Code § 102242 (amended)

102242. The district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this part. The district, in exercising such power, shall in addition to the damages for the taking, injury, or destruction of property, also pay the cost, exclusive of betterment and with credit for salvage value, of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, wires, cables, or poles of any public utility which is required to be moved to a new location.

Law Revision Commission Comment

Comment. The deleted portions of Section 102242 are superseded by provisions of the Eminent Domain Law. See Code Civ. Proc. §§

1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1250.210 and Comment thereto (identification of plaintiff).

San Mateo County Transit District

Public Utilities Code § 103241 (repealed)

Law Revision Commission Comment

Comment. Section 103241 is superseded by Code of Civil Procedure Section 1240.410 *et seq.*

Public Utilities Code § 103242 (amended)

103242. The district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this part. The district, in exercising such power, shall, in addition to the damages for the taking, injury, or destruction of property, also pay the cost, exclusive of betterment and with credit for salvage value, of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, wires, cables, or poles of any public agency or utility which is required to be moved to a new location.

Law Revision Commission Comment

Comment. The deleted portions of Section 103242 are superseded by provisions of the Eminent Domain Law. See CODE CIV. PROC. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary use), 1250.210 and Comment thereto (identification of plaintiff), 1255.410 *et seq.* (possession prior to judgment).

Department of Transportation—Highways

Streets & Highways Code § 102 (amended)

102. In the name of the people of the State of California, the department may acquire by eminent domain any property necessary for state highway purposes.

Law Revision Commission Comment

Comment. The deleted portions of Section 102 are superseded by provisions of the Eminent Domain Law. See CODE CIV. PROC. §§ 1230.020 (law governing exercise of eminent domain power), 1235.170 and 1240.110 (right to acquire any necessary right or interest in any type of property), 1240.040 and 1245.210 *et seq.* (resolution of necessity).

Streets & Highways Code § 103 (repealed)**Law Revision Commission Comment**

Comment. The substance of Section 103 is continued in Code of Civil Procedure Section 1245.250.

Streets & Highways Code § 103.5 (amended)

103.5. Subject to Sections 1240.670, 1240.680, and 1240.690 of the Code of Civil Procedure, the real property which the department may acquire by eminent domain, or otherwise, includes any property dedicated to park purposes, however it may have been dedicated, when the commission has determined by resolution that such property is necessary for state highway purposes.

Law Revision Commission Comment

Comment. Section 103.5 is amended to make reference to provisions that limit the right to acquire park property under Section 103.5.

Streets & Highways Code § 104.1 (repealed)**Law Revision Commission Comment**

Comment. Section 104.1 is superseded by Code of Civil Procedure Section 1240.410 *et seq.*

Streets & Highways Code § 104.2 (repealed)**Law Revision Commission Comment**

Comment. Section 104.2 is superseded by Code of Civil Procedure Section 1240.310 *et seq.* (condemnation for exchange purposes). See also CODE CIV. PROC. §§ 1230.030 (exercise of eminent domain power discretionary), 1240.160 (interpretation of grants of condemnation authority).

Streets & Highways Code § 104.3 (repealed)**Law Revision Commission Comment**

Comment. Section 104.3 is superseded by Code of Civil Procedure Section 1240.120.

Streets & Highways Code § 104.7 (repealed)**Law Revision Commission Comment**

Comment. The substance of Section 104.7 is continued in Code of Civil Procedure Section 1240.160.

Streets & Highways Code § 104.15 (amended)

104.15. Whenever land has been acquired pursuant to former Section 104.1 or pursuant to Article 5 (commencing with Section 1240.410) of Chapter 3 of Title 7 of Part 3 of the Code of Civil Procedure, the department may, in its discretion, lease to a local agency for park purposes all or any portion of the remainder outside the boundary of the state highway or public work or improvement, but not beyond the next adjacent dedicated street, when such use will protect such highway, public work, or improvement and its environs, and will preserve its view, appearance, light, air, and usefulness. Such lease shall be made in accordance with procedures, terms, and conditions to be prescribed by the commission. Such terms and conditions shall include all of the following:

(a) Provisions requiring the local agency to develop and maintain such portion of the remainder as a park.

(b) Provisions that whenever such portion of the remainder is needed for state highway purposes, the lease shall terminate.

(c) Provisions that whenever such portion of the remainder ceases to be used for park purposes, the lease shall terminate.

Law Revision Commission Comment

Comment. Section 104.15 is amended to substitute a reference to the statutory provisions that superseded Section 104.1. See CODE CIV. PROC. § 1240.430 (disposal of acquired remnants). *Cf.* CODE CIV. PROC. § 1240.120 (right to acquire property to make effective the principal use).

Streets & Highways Code § 135 (amended)

135. The department may enter into contracts for the removal or relocation of structures or improvements situated upon real property over which a right-of-way for state highway purposes has been or is to be acquired. Nothing in this section limits or restricts the authority of the department to make agreements authorized by Section 1263.610 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. The second sentence has been added to Section 135 to make clear that the authority granted the department by that section does not limit or restrict the authority granted by Code of Civil Procedure Section 1263.610 (performance of work on property not taken to reduce compensation).

Streets & Highways Code § 146.5 (amended)

146.5. The department may construct fringe and transportation corridor parking facilities along the state highway system when such construction is financed, in whole or in part, with federal funds and the entire balance of the cost of such construction is financed with funds contributed by the local agency or transit district. For the

purposes of this code, such facilities shall be considered as part of the state highway and the department shall acquire the right-of-way necessary for such facilities in accordance with all of the laws and procedures applicable to other state highway projects.

The rights and obligations of the department and the local agency or transit district with respect to such fringe and transportation corridor parking facilities shall be determined by agreement between the department and the local agency or transit district.

Law Revision Commission Comment

Comment. Section 146.5 is amended to delete the reference to Sections 104–104.3. Sections 104.1–104.3 have been repealed, and the reference is unnecessary. See CODE CIV. PROC. §§ 1240.120 (condemnation for protective purposes), 1240.310 *et seq.* (condemnation for exchange purposes), and 1240.410 *et seq.* (excess condemnation).

County—Acquisitions for State Highway Purposes

Streets & Highways Code § 760 (technical amendment)

760. Whenever it is determined by a four-fifths vote of the membership of the board of supervisors of any county that such acquisition or contribution, or both, will promote the interests of the county and such acquisition or contribution, or both, is recommended in writing by the department, the board thereafter may, by resolution passed by a four-fifths vote of its members, determine:

(a) To acquire any real property or interest therein needed for state highway purposes and described in such recommendation. The board shall proceed, if necessary, to condemn any such real property or interest therein. The title to such property or interest may be taken in the name of the state or the county. The resolution of the board is the only preliminary procedure required prior to the acquisition of such property or interest, or to the commencement of such condemnation proceeding; but if the acquisition is by eminent domain, the resolution shall be one that satisfies the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4 of Title 7 of Part 3 of the Code of Civil Procedure.

(b) To contribute bridges, fencing, money, labor, materials, and appurtenances toward the construction of state highways within the limits of the county.

Such acquisitions or contributions, or both, shall be for the use of the state as provided in Section 762.

Legislative Committee Comment—Senate

Comment. Section 760 is amended to make clear that the last sentence of subdivision (a) is not intended to excuse compliance with Code of Civil Procedure Section 1245.210 *et seq.* (resolution of necessity).

Change of Grade

Streets & Highways Code § 858 (technical amendment)

858. The department shall not make any change in the physical grade of said highway affecting any property as to which an objection has been filed until it has been finally determined by a court of competent jurisdiction that the objection filed is without merit or until the probable compensation has been deposited for each person filing an objection as provided in Article 1 (commencing with Section 1255.010) of Chapter 6 of, or the amount of the award has been deposited as provided in Article 2 (commencing with Section 1268.110) of Chapter 11 of, Title 7 of Part 3 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. Section 858 is amended to refer to the statutory provisions relating to deposits in eminent domain proceedings.

Boundaries of Highways

Streets & Highways Code § 869 (technical amendment)

869. If an objection is filed the department shall not perform any work on the property claimed by the objector until it has been finally determined by a court of competent jurisdiction that the objection filed is without merit or until the probable compensation has been deposited for the person filing the objection as provided in Article 1 (commencing with Section 1255.010) of Chapter 6 of, or the amount of the award has been deposited as provided in Article 2 (commencing with Section 1268.110) of Chapter 11 of, Title 7 of Part 3 of the Code of Civil Procedure. This section shall not apply insofar as any objector may make claim to a part of the established traveled way.

Law Revision Commission Comment

Comment. Section 869 is amended to refer to the statutory provisions relating to deposits in eminent domain proceedings.

Department of Parks and Recreation

Streets & Highways Code § 887.2 (amended)

887.2. The Department of Parks and Recreation may, when funds are specifically appropriated therefor by the Legislature, acquire by purchase, gift, grant, bequests, demise, lease, or otherwise, the fee or any lesser interest or right in real property, including but not limited to access rights and scenic easements, for the purpose of establishing such parkway.

Law Revision Commission Comment

Comment. Section 887.2 is amended to delete the authority

of the Department of Parks and Recreation to exercise the power of eminent domain since the Department of Parks and Recreation no longer has this power. Acquisitions of property by eminent domain for the purposes of Section 887.2 are to be accomplished under the Property Acquisition Law by the Public Works Board. See GOVT. CODE §§ 15853–15855.

County Roads and Highways

Streets & Highways Code § 943 (amended)

943. Such board may:

(a) Acquire any property necessary for the uses and purposes of county highways. When eminent domain proceedings are necessary, the board shall require the district attorney to institute such proceedings. The expense of and award in such proceedings may be paid from the road fund or the general fund of the county, or the road fund of any district benefited.

(b) Lay out, construct, improve, and maintain county highways.

(c) Incur a bonded indebtedness for any of such purposes, subject to the provisions of Section 944.

(d) Construct and maintain stock trails approximately paralleling any county highway, retain and maintain for stock trails the right-of-way of any county highway which is superseded by relocation. Such stock trail shall not be included in the term “maintained mileage of county roads” as that term is used in Chapter 3 (commencing with Section 2100) of Division 3 of this code.

Law Revision Commission Comment

Comment. The provisions deleted from Section 943 are superseded by provisions of the Eminent Domain Law. See CODE CIV. PROC. §§ 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), 1240.310 *et seq.* (condemnation of property to be used for exchange purposes). See also CODE CIV. PROC. § 1240.130 (acquisition by gift, purchase, lease, or other means).

Streets & Highways Code § 943.1 (repealed)

Law Revision Commission Comment

Comment. Section 943.1 is superseded by Section 1240.410 *et seq.* of the Code of Civil Procedure.

Streets & Highways Code § 943.2 (repealed)

Law Revision Commission Comment

Comment. Section 943.2 is superseded by Code of Civil

Procedure Section 1240.310 *et seq.* See also CODE CIV. PROC. § 1230.030 (exercise of eminent domain power discretionary).

Streets & Highways Code § 943.4 (repealed)

Law Revision Commission Comment

Comment. Section 943.4 is superseded by Code of Civil Procedure Section 1240.320. See also CODE CIV. PROC. § 1230.030 (exercise of eminent domain power discretionary).

Work to Reduce Compensation

Streets & Highways Code § 970 (repealed)

Law Revision Commission Comment

Comment. Section 970 is superseded by Code of Civil Procedure Section 1263.610 (performance of work to reduce compensation).

Private Byroads

Streets & Highways Code §§ 1050–1054 (repealed)

Law Revision Commission Comment

Comment. Chapter 3.5 (commencing with Section 1050), relating to private byroads, is repealed because it is special legislation that should not be preserved in the codes.

Improvement Act of 1911

Streets & Highways Code § 5100 (technical amendment)

5100. All streets, places, public ways, or property, or rights-of-way, or tidelands, or submerged lands owned by any city, open or dedicated to public use, and any property for which an order for possession prior to judgment has been obtained, and all tidelands or submerged lands to which all the right, title and interest of the state have been granted to any city, and all tidelands or submerged lands which have been leased by the state to any city for the construction of improvements authorized by subdivision (g) of Section 5101, are open public streets, places, public ways, or property or rights-of-way owned by the city, for the purposes of this division, and the legislative body of the city may establish and change the grades of the respective ways, properties, and rights-of-way hereinbefore enumerated and fix the width thereof and is hereby invested with jurisdiction to order to be done therein, over or thereon, either singly or in any combination thereof, any of the work mentioned in this division under the proceedings described in this part.

Law Revision Commission Comment

Comment. Section 5100 is amended to conform to the terminology of the Eminent Domain Law. See Article 3 (commencing with Section 1255.410) of Chapter 6 of Title 7 of Part 3 of the Code of Civil Procedure.

Streets & Highways Code § 5101 (technical amendment)

5101. Whenever in the opinion of the legislative body the public interest or convenience may require, it may order the whole or any portion, either in length or in width, of any one or more of the streets, places, public ways, or property, easements, or rights-of-way, or tidelands, or submerged lands owned by any city, or tidelands or submerged lands leased by the state to any city for the construction of improvements authorized by subdivision (g), open or dedicated to public use, and any property for which an order for possession prior to judgment has been obtained, to be improved by or have constructed therein, over or thereon, either singly or in any combination thereof, any of the following:

(a) The grading or regrading, the paving or repaving, the planking or replanking, the macadamizing or remacadamizing, the graveling or regraveling, the oiling or reoiling thereof.

(b) The construction or reconstruction of sidewalks, crosswalks, steps, safety zones, platforms, seats, statuary, fountains, parks and parkways, recreation areas, including all structures, buildings, and other facilities necessary to make parks and parkways and recreation areas useful for the purposes for which intended, culverts, bridges, curbs, gutters, tunnels, subways or viaducts.

(c) Sanitary sewers or instrumentalities of sanitation, together with the necessary outlets, cesspools, manholes, catch basins, flush tanks, septic tanks, disposal plants, connecting sewers, ditches, drains, conduits, tunnels, channels or other appurtenances.

(d) Drains, tunnels, sewers, conduits, culverts and channels for drainage purposes; with necessary outlets, cesspools, manholes, catch basins, flush tanks, septic tanks, disposal plants, connecting sewers, ditches, drains, conduits, channels and appurtenances.

(e) Poles, posts, wires, pipes, conduits, tunnels, lamps and other suitable or necessary appliances for the purpose of lighting said streets, places or public ways of any such city or property or rights-of-way owned by any such city, or for the purpose of furnishing electricity and electric service or telephone service to property within a city.

(f) Pipes, hydrants and appliances for fire protection.

(g) Breakwaters, levees, bulkheads, groins, and walls of rock or other material to protect the streets, places, public ways and other property in any such city, from overflow by water, or to prevent beach erosion or to promote accretion to beaches.

(h) Wells, pumps, dams, reservoirs, storage tanks, channels, tunnels, conduits, pipes, hydrants, meters or other appurtenances for supplying or distributing a domestic water supply.

(i) Mains, services, pipes, fittings, valves, regulators, governors, meters, drips, drains, tanks, ditches, tunnels, conduits, channels, or other appurtenances for supplying or distributing a domestic or industrial gas supply.

(j) The construction or maintenance of bomb shelters or fallout shelters which are primarily designed to protect and shelter the population from conventional or nuclear bomb or missile warhead explosions, shellfire, radiation, and fallout in the event of an enemy attack.

(k) Retaining walls, embankments, buildings and any other structures or facilities necessary or suitable in connection with any of the work mentioned in this section.

(l) The planting of trees, shrubs or other ornamental vegetation.

(m) The construction, repairing, or improving of public mooring places for watercraft, the building, repairing and improving of wharves, piers, docks, slips, quays, moles, or other utilities, structures, and appliances necessary or convenient for the promotion or accommodation of commerce, navigation and the protection of lands within said city, and for aiding and securing access to the waters of said lands to the people of the State of California, in the exercise of their rights to fish, or for the extension of public streets or places.

(n) Compaction of land, change of grade or contours, construction of caissons, retaining walls, drains and other structures suitable for the purpose of stabilizing land.

(o) All other work which may be deemed necessary to improve the whole or any portion of such streets, places, public ways, property, easements or rights-of-way owned by such city.

(p) All other work auxiliary to any of the above, which may be required to carry out the same.

Law Revision Commission Comment

Comment. Section 5101 is amended to conform to the terminology of the Eminent Domain Law. See Article 3 (commencing with Section 1255.410) of Chapter 6 of Title 7 of Part 3 of the Code of Civil Procedure (possession prior to judgment).

Streets & Highways Code § 5104 (technical amendment)

5104. If the written consent of the owner of the property is first obtained, work may be done on private property to eliminate any disparity in level or size between the improvement and private property, provided that the legislative body determines in the resolution of intention to order the improvement that it is in the public interest and more economical to do such work on private property than to adjust the work on public property to eliminate such disparity. The actual cost of such work may be added to the

assessment of the lot on which the work is done. Nothing in this section limits or restricts the authority of the legislative body to make agreements authorized by Section 1263.610 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. The last sentence has been added to Section 5104 to make clear that the authority granted by that section does not limit or restrict the authority granted by Code of Civil Procedure Section 1263.610 (performance of work to reduce compensation).

Streets & Highways Code § 5661 (technical amendment)

5661. No proceedings taken or had under this division shall ever be held to be invalid on the ground that the street, right-of-way, public property or any portion thereof, upon which the work or any part thereof is or was done has not been lawfully dedicated or acquired; provided, the same is lawfully dedicated or acquired, or an order for possession prior to judgment has been obtained.

Law Revision Commission Comment

Comment. Section 5661 is amended to conform to the terminology of the Eminent Domain Law. See Article 3 (commencing with Section 1255.410) of Chapter 6 of Title 7 of Part 3 of the Code of Civil Procedure (possession prior to judgment).

Municipal Improvement Act of 1913

Streets & Highways Code § 10100.1 (technical amendment)

10100.1. If the written consent of the owner of the property is first obtained, work may be done on private property to eliminate any disparity in level or size between the improvement and private property, provided that the legislative body determines in the resolution of intention to order the improvement that it is in the public interest and more economical to do such work on private property than to adjust the work on public property to eliminate such disparity. The actual cost of such work may be added to the assessment of the lot on which the work is done. Nothing in this section limits or restricts the authority of the legislative body to make agreements authorized by Section 1263.610 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. The last sentence has been added to Section 10100.1 to make clear that the authority granted by that section does not limit or restrict the authority granted by Code of Civil

Procedure Section 1263.610 (performance of work to reduce compensation).

Pedestrian Mall Law of 1960

Streets & Highways Code § 11400 (amended)

11400. If following the hearing the legislative body shall determine that the pedestrian mall shall be established, and if at that time there remain any written claims for damages which have not been allowed pursuant to Section 11310 or which have not been withdrawn, the legislative body shall direct that an action or actions be brought in the superior court in the name of the city by the county counsel, district attorney, or city attorney, as the case may be, or other attorney designated by the legislative body for a determination of the damages, if any, to which the claimant may legally be entitled because of the establishment of the pedestrian mall. Such action shall be in the nature of a proceeding in eminent domain for the condemnation of the right or rights in real property, the taking of which by the establishment of the pedestrian mall results in the damages claimed. Except as may otherwise be provided in this part, such action and proceeding shall be governed so far as the same may be made applicable by the provisions relating to proceedings in eminent domain. Except as provided in Article 2 (commencing with Section 1245.210) of Chapter 4 of Title 7 of Part 3 of the Code of Civil Procedure, in any such action the resolution of intention adopted pursuant to this part and the resolution adopted under Section 11311 conclusively establish the matters referred to in Section 1240.030 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. Section 11400 is amended to delete the special exception to the general eminent domain provisions and to conform to Code of Civil Procedure Section 1245.250 (effect of resolution of necessity).

Joint Highway District

Streets & Highways Code § 25052 (repealed)

Law Revision Commission Comment

Comment. Section 25052 is superseded by Code of Civil Procedure Sections 1240.040 and 1245.210 *et seq.*

Streets & Highways Code § 25280 (amended)

25280. The board of directors of the district may request the board of supervisors and the proper officers of any county situated within the district to condemn and acquire property or rights-of-way

within that county which are necessary for the projects of the district. Upon receipt of the request, the board of supervisors shall undertake the condemnation and acquisition requested by the board of directors and the cost thereof shall be a proper deduction from any levy made by the district upon or within that county. Any excess in such cost over and above the amount of any such levy shall be paid to the county by the district out of any funds provided for that purpose. The proceedings required to be taken by any county or county officers under the provisions of this section may include the taking of possession prior to judgment of any property or rights-of-way necessary for district purposes.

Law Revision Commission Comment

Comment. Section 25280 is amended to conform to the language used in the Eminent Domain Law. See Article 3 (commencing with Section 1255.410) of Chapter 6 of Title 7 of Part 3 of the Code of Civil Procedure.

Bridge and Highway District

Streets & Highways Code § 27166 (amended)

27166. The district may exercise the right of eminent domain to take any property necessary to the exercise of the powers granted in this part, or in any provision of law, to the district.

Law Revision Commission Comment

Comment. Section 27166 is amended to delete portions superseded by the Eminent Domain Law. See Code Civ. Proc. §§ 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use), 1255.410 *et seq.* (possession prior to judgment), 1250.210 and Comment thereto (identification of plaintiff).

Department of Transportation—Toll Bridges

Streets & Highways Code § 30401 (amended)

30401. In eminent domain proceedings to acquire property for any of the purposes of this chapter, any toll bridge or other toll highway crossing, real property, personal property, franchises, rights, easements, or other property or privileges appurtenant thereto appropriated or dedicated to a public use or purpose by any person, private, public, or municipal corporation, county, city, district, or any political subdivision of the state, may be condemned and taken, and the acquisition and use thereof as provided in this chapter for the same public use or purpose to which such property has been appropriated or dedicated or for any other public use or purpose, shall be deemed a superior and permanent right and

necessity, and a more necessary use and purpose than the public use or purpose to which such property has already been appropriated or dedicated.

It shall not be necessary in any eminent domain proceedings pursuant to this section to plead or prove any acts or proceedings preliminary or prior to the adoption of the resolution required by Section 1245.220 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. Sections 30401 and 30402 are amended to reflect the repeal of Section 30404. See the Comment to that section.

Streets & Highways Code § 30402 (amended)

30402. In eminent domain proceedings to acquire property for any of the purposes of this chapter, any transportation facilities, additional transportation facilities, real property, personal property, franchises, rights, easements, or other property or privileges appurtenant thereto appropriated or dedicated to a public use or purpose by any person, private, public, or municipal corporation, county, city, district, or any political subdivision of the state may be condemned and taken and the acquisition and use thereof as provided in this chapter for the same public use or purpose to which such property has been appropriated or dedicated or for any other public use or purpose shall be deemed a superior and permanent right and necessity, and a more necessary use and purpose than the public use or purpose to which such property has already been appropriated or dedicated, except as to real estate, personal property, franchises, rights, privileges, or easements actively used by or necessary for the operation or a common carrier by railroad other than those used primarily by such railroad for the transportation of persons or property by interurban operation to and from an area within 50 miles from either end of any toll bridge or other toll highway crossing acquired or constructed pursuant to this chapter.

Except for such prior railroad use, it shall not be necessary in any eminent domain proceedings pursuant to this section to plead or prove any acts or proceedings preliminary or prior to the adoption of the resolution required by Section 1245.220 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. See the Comment to Section 30401.

Streets & Highways Code § 30403 (repealed)

Law Revision Commission Comment

Comment. Section 30403 is unnecessary. See CODE CIV. PROC. §§ 1230.020 (law governing exercise of eminent domain power), 1240.110 (right to acquire any necessary right or interest

in any type of property). See also Sections 30401 and 30402.

Streets & Highways Code § 30404 (repealed)

Law Revision Commission Comment

Comment. Section 30404 is superseded by Code of Civil Procedure Sections 1240.040 and 1245.210 *et seq.*

Streets & Highways Code § 30405 (repealed)

Law Revision Commission Comment

Comment. Section 30405 is superseded by Code of Civil Procedure Section 1240.310 *et seq.*

Gold Rush Parkway Authority

Streets & Highways Code § 31001 (amended)

31001. In eminent domain proceedings to acquire property for any of the purposes of this chapter, any real property, personal property, franchises, rights, easements, or other property or privileges appurtenant thereto appropriated or dedicated to a public use or purpose by any person, private, public, or municipal corporation, county, city, district, or any political subdivision of the state, may be condemned and taken, and the acquisition and use thereof as provided in this chapter for the same public use or purpose to which such property has been appropriated or dedicated or for any other public use or purpose, shall be deemed a superior and permanent right and necessity, and a more necessary use and purpose than the public use or purpose to which such property has already been appropriated or dedicated.

It shall not be necessary in any eminent domain proceedings pursuant to this section to plead or prove any acts or proceedings preliminary or prior to the adoption of the resolution required by Section 1245.220 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. Section 31001 is amended to reflect the repeal of Section 31003 and to make reference to Section 1245.220 (resolution of necessity).

Streets & Highways Code § 31002 (repealed)

Law Revision Commission Comment

Comment. Section 31002 is unnecessary. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.110 (right to acquire any necessary right or interest in any type of property), 1250.210 and Comment thereto (identification of plaintiff). See also Section 31001 (more necessary public use).

Streets & Highways Code § 31003 (repealed)

Law Revision Commission Comment

Comment. Section 31003 is superseded by Code of Civil Procedure Sections 1240.040 and 1245.210 *et seq.*

Streets & Highways Code § 31004 (repealed)

Law Revision Commission Comment

Comment. Section 31004 is superseded by Code of Civil Procedure Section 1240.310 *et seq.* See also Code Civ. Proc. § 1250.210 and Comment thereto (identification of plaintiff).

El Dorado County Toll Tunnel Authority

Streets & Highways Code § 31201 (amended)

31201. In eminent domain proceedings to acquire property for any of the purposes of this chapter, any real property, personal property, franchises, rights, easements, or other property or privileges appurtenant thereto appropriated or dedicated to a public use or purpose by any person, private, public, or municipal corporation, county, city, district, or any political subdivision of the state, may be condemned and taken, and the acquisition and use thereof as provided in this chapter for the same public use or purpose to which such property has been appropriated or dedicated or for any other public use or purpose, shall be deemed a superior and permanent right and necessity, and a more necessary use and purpose than the public use or purpose to which such property has already been appropriated or dedicated.

It shall not be necessary in any eminent domain proceedings pursuant to this section to plead or prove any acts or proceedings preliminary or prior to the adoption of the resolution required by Section 1245.220 of the Code of Civil Procedure.

Law Revision Commission Comment

Comment. Section 31201 is amended to reflect the repeal of Section 31203 and to make reference to Section 1245.220 (resolution of necessity).

Streets & Highways Code § 31202 (repealed)

Law Revision Commission Comment

Comment. Section 31202 is unnecessary. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.110 (right to acquire any

necessary right or interest in any type of property), 1250.210 and Comment thereto (identification of plaintiff). See also Section 31201 (more necessary public use).

Streets & Highways Code § 31203 (repealed)

Law Revision Commission Comment

Comment. Section 31203 is superseded by Code of Civil Procedure Sections 1240.040 and 1245.210 *et seq.*

Streets & Highways Code § 31204 (repealed)

Law Revision Commission Comment

Comment. Section 31204 is superseded by Code of Civil Procedure Section 1240.310 *et seq.* See also Code Civ. Proc. § 1250.210 and Comment thereto (identification of plaintiff).

Department of Water Resources

Water Code § 250 (amended)

250. In the name of the people of the State of California, the department may acquire by eminent domain any property necessary for state water and dam purposes. The department shall not commence any such proceeding in eminent domain unless the project for which the property is being acquired has been authorized and funds are available therefor.

Law Revision Commission Comment

Comment. The portion of Section 250 that required a declaration of necessity by the Director of Water Resources, concurred in by the California Water Commission, before the Department of Water Resources could condemn property, is superseded by Code of Civil Procedure Sections 1240.040 and 1245.210 *et seq.* Under Code of Civil Procedure Section 1245.210 *et seq.*, a resolution of necessity adopted by the California Water Commission is required, but the requirement of a declaration of necessity by the director is not continued.

Other portions of Section 250 have been omitted as unnecessary. See CODE CIV. PROC. §§ 1230.020 (law governing exercise of eminent domain power), 1235.170 and 1240.110 (right to acquire any necessary right or interest in any type of property).

Water Code § 251 (repealed)**Law Revision Commission Comment**

Comment. Section 251 is superseded by Code of Civil Procedure Section 1245.250.

Water Code § 251.1 (repealed)**Law Revision Commission Comment**

Comment. Section 251.1 is superseded by Code of Civil Procedure Sections 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use).

Water Code § 252 (amended)

252. Subject to Sections 1240.670 and 1240.680 of the Code of Civil Procedure, the real property which the department may acquire by eminent domain, or otherwise, includes any property dedicated to park purposes, however it may have been dedicated.

Law Revision Commission Comment

Comment. Section 252 is amended to make reference to provisions that limit the right to acquire park property under Section 252. The deleted portion of Section 252 is unnecessary. See the Comment to Section 250.

Water Code § 254 (repealed)**Law Revision Commission Comment**

Comment. Section 254 is superseded by Code of Civil Procedure Section 1240.410 *et seq.*

Water Code § 255 (repealed)**Law Revision Commission Comment**

Comment. Section 255 is superseded by Code of Civil Procedure Section 1240.310 *et seq.*

Water Code § 256 (repealed)**Law Revision Commission Comment**

Comment. Section 256 is superseded by Code of Civil Procedure Section 1240.120.

Private Ways for Canals

Water Code §§ 7020-7026 (repealed)

Law Revision Commission Comment

Comment. Chapter 2 (commencing with Section 7020), relating to private ways for canals, is repealed because it is obsolete; its functions are presently being served by special districts and other local agencies.

Department of Water Resources

Water Code § 8304 (amended)

8304. The department may obtain or condemn any right-of-way necessary for any construction under this chapter.

Law Revision Commission Comment

Comment. The deleted portion of Section 8304 is unnecessary. See CODE CIV. PROC. § 1230.020 (law governing exercise of eminent domain power).

Sacramento and San Joaquin Drainage District

Water Code § 8590 (amended)

8590. The board may do any of the following:

(a) Acquire either within or without the boundaries of the drainage district, by purchase, condemnation or by other lawful means in the name of the drainage district, all lands, rights-of-way, easements, property or material necessary or requisite for the purpose of bypasses, weirs, cuts, canals, sumps, levees, overflow channels and basins, reservoirs and other flood control works, and other necessary purposes, including drainage purposes.

(b) Construct, clear, and maintain bypasses, levees, canals, sumps, overflow channels and basins, reservoirs and other flood control works.

(c) Construct, maintain, and operate ditches, canals, pumping plants, and other drainage works.

(d) Make contracts in the name of the drainage district to indemnify or compensate any owner of land or other property for any injury or damage caused by the exercise of the powers conferred by this division, or arising out of the use, taking, or damage of any property for any of the purposes of this division.

Law Revision Commission Comment

Comment. The deleted portion of Section 8590 is superseded by Code of Civil Procedure Section 1240.310 *et seq.* (condemnation for exchange purposes).

Water Code § 8590.1 (repealed)**Law Revision Commission Comment**

Comment. Section 8590.1 is superseded by Code of Civil Procedure Section 1240.410 *et seq.*

Water Code § 8593 (amended)

8593. The board may acquire by eminent domain in the name of the drainage district any property necessary for any of the purposes set forth in this part.

Law Revision Commission Comment

Comment. The deleted portions of Section 8593 are unnecessary. See CODE CIV. PROC. §§ 1230.020 (law governing exercise of eminent domain power); 1235.170 and 1240.110 (right to acquire any necessary right or interest in any type of property).

Water Code § 8594 (repealed)**Law Revision Commission Comment**

Comment. Section 8594 is superseded by Code of Civil Procedure Sections 1240.040 and 1245.210 *et seq.*

Water Code § 8595 (repealed)**Law Revision Commission Comment**

Comment. Section 8595 is superseded by Code of Civil Procedure Section 1245.250.

Central Valley Project**Water Code § 11575.1 (repealed)****Law Revision Commission Comment**

Comment. Section 11575.1 is superseded by Code of Civil Procedure Section 1240.210 *et seq.*

Water Code § 11575.2 (repealed)**Law Revision Commission Comment**

Comment. Section 11575.2 is superseded by Code of Civil Procedure Section 1240.410 *et seq.*

Department of Water Resources

Water Code § 11580 (amended)

11580. When the department cannot acquire any necessary property by agreement with the owner, the department may exercise the power of eminent domain to acquire the property in the name of the state if the project for which the property is being acquired has been authorized and funds are available therefor.

Law Revision Commission Comment

Comment. Section 11580 is amended to continue the final portion of former Section 11581 and to delete unnecessary language. See CODE CIV. PROC. § 1230.020 (law governing exercise of eminent domain power).

Water Code § 11581 (repealed)

Law Revision Commission Comment

Comment. Section 11581 is superseded by the more general provisions of Code of Civil Procedure Section 1245.210 *et seq.* which makes a resolution of necessity adopted by the governing body of the condemning entity a prerequisite to condemnation. Under Code of Civil Procedure Section 1245.210 *et seq.*, a resolution of necessity adopted by the California Water Commission is required, but the requirement of a declaration of necessity by the director is not continued. See Comment to Section 250.

The final portion of Section 11581 is preserved in Section 11580.

Water Code § 11582 (repealed)

Law Revision Commission Comment

Comment. Section 11582 is superseded by Code of Civil Procedure Section 1245.250.

Water Code § 11583 (repealed)

Law Revision Commission Comment

Comment. Section 11583 is superseded by Code of Civil Procedure Sections 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use).

Water Code § 11587 (repealed)

Law Revision Commission Comment

Comment. Section 11587 is superseded by Chapter 6 (commencing with Section 1255.010) of Title 7 of Part 3 of the Code of Civil Procedure.

Irrigation District
Water Code § 22229 (repealed)

Law Revision Commission Comment

Comment. Section 22229 is superseded by Code of Civil Procedure Section 1245.010 *et seq*

Water Code § 22425 (amended)

22425. A district may acquire by any means any property or interest in property to carry out its purposes, including any of the following:

(a) Property for the construction, improvement, and operation of works in this state or in any other state or in a foreign nation.

(b) Works being constructed.

(c) Stock of domestic or foreign corporations owning water, water rights, canals, waterworks, franchises, concessions, or rights.

(d) Works by which land has been or may be supplied with water for irrigation.

(e) Property not otherwise authorized herein that may be required as a condition to obtaining state financial assistance for local projects as set forth in Chapter 5 (commencing with Section 12880), of Part 6, Division 6, of the Water Code.

(f) Public buildings and grounds.

Law Revision Commission Comment

Comment. Subdivision (f) is added to Section 22425 to preserve the authority of irrigation districts to condemn property for public buildings and grounds for their use. This addition was necessitated by the repeal of subdivision 3 of Section 1238 of the Code of Civil Procedure which authorized the exercise of the power of eminent domain for "public buildings and grounds . . . for the use of any . . . irrigation district." See former Code Civ. Proc. § 1238 and Comment thereto.

Water Code § 22455 (repealed)

Law Revision Commission Comment

Comment. Section 22455 is unnecessary. See Code Civ. Proc. § 1230.020 (uniform procedure).

Water Code § 22456 (amended)

22456. The district may exercise the right of eminent domain to take any property necessary to carry out its purposes.

Comment. Section 22456 is amended to preserve the substance of former Section 22455 and Section 22456 as it formerly read. The statement that the use is a public use is omitted as unnecessary. See Code Civ. Proc. § 1230.030. See also Code Civ. Proc. § 1235.170 (defining “property”).

County Water District

Water Code § 31040 (amended)

31040. A district may take any property necessary to carry out the business of the district by grant, purchase, gift, devise, condemnation, or lease with or without the privilege of purchase.

Law Revision Commission Comment

Comment. Section 31040 is amended to make clear that any property “necessary to carry out the business of the district” may be acquired. The added language is taken from former Section 31043.

Water Code § 31043 (repealed)

Legislative Committee Comment—Senate

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).

Water Code § 31044 (repealed)

Law Revision Commission Comment

Comment. Section 31044 is unnecessary. See Code Civ. Proc. § 1230.020 (uniform procedure).

California Water District

Water Code § 35625 (repealed)

Law Revision Commission Comment

Comment. Section 35625 is unnecessary. See Code Civ. Proc. § 1230.020 (uniform procedure).

Water Code § 35626 (repealed)

Law Revision Commission Comment

Comment. Section 35626 is unnecessary. See Section 35600 and Code Civ. Proc. § 1240.010.

California Water Storage District
Water Code § 39061 (repealed)

Law Revision Commission Comment

Comment. Section 39061 is unnecessary. See Section 43530 and Code Civ. Proc. § 1240.010.

Water Code § 43531 (repealed)

Law Revision Commission Comment

Comment. Section 43531 is unnecessary. See Code Civ. Proc. § 1230.020 (uniform procedure). See also Code Civ. Proc. § 1250.210 and Comment thereto (identification of plaintiff).

Water Code § 43532 (repealed)

Law Revision Commission Comment

Comment. Section 43532 is superseded by Code of Civil Procedure Sections 1240.040 and 1245.210 *et seq.*

Water Code § 43532.5 (amended)

43532.5. Notwithstanding any other provision in this article, the board shall not commence any proceedings in eminent domain with respect to property located outside of a county in which the district is located unless the board of supervisors of the county in which such property is situated gives its approval to such proceedings.

Law Revision Commission Comment

Comment. The last sentence of Section 43532.5 is superseded by Code of Civil Procedure Section 1245.250.

Water Code § 43533 (repealed)

Law Revision Commission Comment

Comment. Section 43533 is superseded by Code of Civil Procedure Section 1240.410 *et seq.*

Water Replenishment District
Water Code § 60230 (amended)

60230. For the purposes of replenishing the ground water supplies within the district, a district shall have power:

- (1) To have perpetual succession.
- (2) To sue and be sued, except as otherwise provided herein or by law, in all actions and proceedings in all courts and tribunals.
- (3) To adopt a seal and alter it at pleasure.

(4) To take by grant, purchase, gift, devise, or lease, to hold, use and enjoy, and to lease, convey or dispose of, real and personal property of every kind, within or without the district, necessary or convenient to the full exercise of its power.

(5) Within or outside of the district to construct, purchase, lease, or otherwise acquire, and to operate and maintain necessary waterworks and other works, machinery and facilities, canals, conduits, waters, water rights, spreading grounds, lands, rights and privileges useful or necessary to replenish the underground water basin within said district, or to augment the common water supplies of said district.

(6) For the common benefit of said district, to store water in underground water basins or reservoirs within or outside of said district, to appropriate and acquire water and water rights within or outside of said district, to import water into said district, and to conserve water within or outside of said district.

(7) To carry out the purposes of this division, to commence, maintain, intervene in, defend and compromise, in the name of said district, or otherwise, and to assume the costs and expenses of any and all actions and proceedings now or hereafter begun to determine or adjudicate all or a portion of the rights to divert, extract, or use waters within the district, or within any segments thereof or subbasins therein, as between owners of or claimants to said rights, to prevent any interference with water or water rights used or useful to the lands, inhabitants, owners, operators, or producers within said district, or to prevent the diminution of the quantity or quality of the water supply of said district, or to prevent unlawful exportation of water from said district.

(8) To exercise the right of eminent domain to take any property necessary to supply the district or any portion thereof with replenishment water, except (a) water and water rights already devoted to beneficial use, and (b) property (other than water and water rights) already appropriated to public use unless the taking be for a more necessary public use than that to which the property is already appropriated; provided, the district in exercising such power shall in addition to the damage for taking, injuring, or destruction of property also pay the cost of removal, reconstruction or relocation of any structure, including, but not limited to, railways, mains, pipes, conduits, wires, cables, towers, or poles of any public utility which is required to be removed to a new location. No use by a district of property owned, at the time the action to condemn is brought, by an existing agency having powers to provide for the replenishment of ground waters, shall constitute a more necessary public use than the use to which the property is already appropriated.

A district shall not exercise the right of eminent domain to acquire property outside the boundaries of the principal county in which the district is situated unless it first obtains the consent thereto of the board of supervisors of the county in which such property is located.

(9) To act jointly with or cooperate with the United States or any agency thereof, and, under the applicable laws of this state, cooperate and act jointly with the State of California, or any county or agency thereof, or any political subdivision or district therein, including flood control districts, public and private corporations, and any person, to the end that the purposes and activities of this district may be fully and economically performed.

(10) To cause assessments and/or charges to be levied as hereinafter provided to accomplish the purposes of this act and to maintain such reserve funds for the future purchase of water for replenishment purposes as are hereinafter authorized to be levied.

(11) To make contracts, to employ labor and to do all acts necessary for the full exercise of the foregoing powers.

(12) To carry on technical and other investigations of all kinds, necessary to carry out the provisions of this act, and for this purpose said district shall have the right of access through its authorized representative to all properties within said district.

(13) To borrow money and incur indebtedness and to issue bonds or other evidences of such indebtedness; also to refund or retire any indebtedness or lien that may exist against the district or property thereof; also to issue warrants to pay the formation expenses of the district, which warrants may bear interest at a rate not exceeding 6 percent a year from the date of issue until funds are available to pay the warrants, and which formation expenses may include fees of attorneys and others employed to conduct the formation proceedings, but shall not include the expenses of holding and conducting the formation election.

(14) To cause taxes to be levied, in the manner hereinafter provided, for the purpose of paying any obligation of the district, including its formation expenses and any warrants issued therefor.

(15) To fix the rates at which water shall be sold for replenishment purposes, and to establish different rates for different classes of service or conditions of service, provided the rates shall be uniform for like classes and conditions of service.

(16) To fix the terms and conditions of any contract under which producers may agree voluntarily to use replenishment water from a nontributary source in lieu of ground water, and to such end a district may become a party to such contract and pay from district funds such portion of the cost of such replenishment waters as will encourage the purchase and use of such water in lieu of pumping so long as the persons or property within the district are directly or indirectly benefited by the resulting replenishment.

Law Revision Commission Comment

Comment. Section 60230 is amended to delete unnecessary language. See Code Civ. Proc. § 1230.020 (uniform procedure).

Municipal Water District

Water Code § 71693 (amended)

71693. A district may exercise the right of eminent domain to take any property necessary to supply the district or any portion thereof with water. The district, in exercising such power, shall, in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, wires, cables, or poles of any public utility which is required to be removed to a new location.

Law Revision Commission Comment

Comment. Section 71693 is amended to delete provisions made unnecessary by the enactment of general provisions in the Eminent Domain Law. See Code Civ. Proc. §§ 1230.020 (uniform procedure), 1240.510 *et seq.* (compatible use), 1240.610 *et seq.* (more necessary public use). See especially Code Civ. Proc. § 1240.650 (use by public entity more necessary than use by other persons).

Water Code § 71694 (amended)

71694. A district may exercise the right of eminent domain to take any property necessary to carry out any powers of the district. The district, in exercising such right, shall, in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, wires, cables, or poles of any public utility which is required to be removed to a new location.

A district shall not exercise the right of eminent domain, under this section, for the condemnation of property outside the boundaries of the district for any purpose, unless it first obtains the consent thereto of the board of supervisors of the county in which such property is located; provided, however, that a district may exercise the right of eminent domain, under this section, for the condemnation of property outside the boundaries of the district for the acquisition of rights-of-way in any county in which territory of the district is located or in any county adjacent to such county without obtaining the consent of the board of supervisors thereof.

When a district proposes to exercise the power of eminent domain, under this section, for the condemnation of property outside the boundaries of the district for the acquisition of rights-of-way in any county in which territory of the district is located or in any county adjacent to such county, it shall give written notice, at least two weeks prior to condemning the property, to the board of supervisors of the county in which the property is located. Such written notice shall contain a description of the property to be condemned.

Law Revision Commission Comment

Comment. Section 71694 is amended to delete unnecessary language. See Code Civ. Proc. § 1230.020 (uniform procedure).

Water Conservation District**Water Code § 74553 (amended)**

74553. A district may exercise the right of eminent domain to take any property necessary to be used for dams, damsites, reservoirs, reservoir sites, canals, ditches and conduits, spreading basins, sinking wells or sinking basins, or otherwise necessary to accomplish the purposes of this division, or to operate or to make use of such works.

Law Revision Commission Comment

Comment. The deleted portion of Section 74553 is unnecessary. See Code Civ. Proc. § 1230.020 (uniform procedure).

Water Code § 74555 (repealed)**Law Revision Commission Comment**

Comment. Section 74555 is superseded by Code of Civil Procedure Section 1240.310 *et seq.*

APPENDIX I

DISPOSITION OF EXISTING GENERAL CONDEMNATION STATUTE

Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure was repealed by Chapter 1275 of the Statutes of 1975 which enacted the Eminent Domain Law.

The text of each section of Title 7 is set out below. The disposition of the provisions of these sections is indicated in the Comments that follow the text of the sections.

With the exceptions noted below, both the Senate and Assembly Committees on Judiciary adopted a report that stated that the Comments contained under the sections as set out in the *Recommendation of the California Law Revision Commission Proposing the Eminent Domain Law*, 12 CAL. L. REVISION COMM'N REPORTS 1601 (1974), reflect the intent of the committee in recommending approval of the proposed eminent domain legislation. *Report of the Senate Committee on Judiciary on Assembly Bills 11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278*, SENATE J. (Aug. 14, 1975) at 6537; *Report of Assembly Committee on Judiciary on Assembly Bills 11, 124, 125, 126, 127, 128, 129, 130, 131, 266, and 278*, ASSEMBLY J. (May 19, 1975) at 5183. The Senate Committee on Judiciary in its report, *supra*, also revised the preliminary portion of the Comment to Section 1238, revised the portion of the Comment to subdivision 4 of Section 1238 discussing extraterritorial condemnation, revised the Comments to subdivisions 14 and 21 of Section 1238, and revised the Comments to Sections 1238.3 and 1243.5. The report states that these revised Comments, which are incorporated into the Comments as set out below, also reflect the intent of the Senate Judiciary Committee in recommending approval of the proposed eminent domain legislation.

TITLE 7. OF EMINENT DOMAIN

Chapter 1. Eminent Domain Generally

§ 1237 (repealed). Eminent domain defined

1237. Eminent domain is the right of the people or Government to take private property for public use. This right may be exercised in the manner provided in this Title.

Comment. The first sentence of Section 1237 is superseded by Section 1240.010 of the Code of Civil Procedure. The second sentence is superseded by Section 1230.020 of the Code of Civil Procedure.

§ 1238 (repealed). Exercise of right; uses

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

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

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

3. Any public utility, and public buildings and grounds, for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district, ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other character of property necessary for conducting or storing or distributing water for the use of any county, incorporated city, or city and county, village or town or municipal water district, or the inhabitants thereof, or any state institution, or necessary for the proper development and control of such use of said water, either at the time of the taking of said property, or for the future proper development and control thereof, or for draining any county, incorporated city, or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels; roads, highways, boulevards, streets and alleys; public mooring places for watercraft; public parks, including parks and other places covered by water, and all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, warehouses, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads; paths and roads either on the surface, elevated, or depressed, for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric, and horse railroads, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable, and water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only, and lands with all wells and water therein adjacent to the lands of any municipality or of any corporation, or person supplying water to the public or to any neighborhood or community for domestic use or irrigation.

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

6. Byroads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes.

7. Telegraph, telephone, radio and wireless lines, systems and plants.

8. Sewerage of any incorporated city, city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than 10 families, or of any buildings belonging to the state, or to any college or university, also the connection of private residences and other buildings, through other property, with the mains of an established sewer system in any such city, city and county, town or village.

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

10. Oil pipelines.

11. Railroads, roads and flumes for quarrying, logging or lumbering purposes.

12. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages, towns, or irrigation districts; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations; together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

13. Electric power lines, electric heat lines, electric light lines, electric light, heat and power lines, and works or plants, lands, buildings or rights of any character in water, or any other character of property necessary for generation, transmission or distribution of electricity for the purpose of furnishing or supplying electric light, heat or power to any county, city and county or incorporated city or town, or irrigation district, or the inhabitants thereof, or necessary for the proper development and control of such use of such electricity, either at the time of the taking of said property, or for the future proper development and control thereof.

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

15. The plants, or any part thereof, or any record therein of all persons, firms or corporations heretofore, now or hereafter engaged in the business of searching public records, or publishing public records, or insuring or guaranteeing titles to real property, including all copies of, and all abstracts or memoranda taken from, public records, which are owned by, or in the possession of, such persons, firms or corporations or which are used by them in their respective businesses; provided, however, that the right of eminent domain in behalf of the public uses mentioned in

this subdivision may be exercised only for the purposes of restoring or replacing, in whole or in part, public records, or the substance of public records, of any city, city and county, county or other municipality, which records have been, or may hereafter be, lost or destroyed by conflagration or other public calamity; and provided further, that such right shall be exercised only by the city, city and county, county or municipality whose records, or part of whose records, have been, or may be, so lost or destroyed.

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

17. Works or plants for supplying gas, heat, refrigeration or power to any county, city and county, or incorporated city or town, or irrigation district, or the inhabitants thereof, together with lands, buildings, and all other improvements in or upon which to erect, install, place, maintain, use or operate machinery, appliances, works and plants for the purpose of generating, transmitting and distributing the same and rights of any nature in water, or property of any character necessary for the purpose of generating, transmitting and distributing the same, or necessary for the proper development and control of such use of such gas, heat, refrigeration, or power, either at the time of the taking of said property, or for the future proper development and control thereof.

18. Standing trees and ground necessary for the support and maintenance thereof, along the course of any highway, within a maximum distance of 300 feet on each side of the center thereof; and ground for the culture and growth of trees along the course of any highway, within the maximum distance of 300 feet on each side of the center thereof.

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

20. Airports for the landing and taking off of aircraft, and for the construction and maintenance of hangars, mooring masts, flying fields, signal lights and radio equipment.

21. Any work or undertaking of a city, county, or city and county, housing authority or commission, or other political subdivision or public body of the state: (a) to demolish,

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

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

Comment. Section 1238 of the Code of Civil Procedure, which listed public uses in behalf of which the right of eminent domain might be exercised, is not continued in the new Eminent Domain Law. This legislative listing of public uses was intended to satisfy the constitutional requirement that property be taken by eminent domain only for a public use. See CAL. CONST., Art. I, § 19. It attempted to do so by providing a definitive schedule of such uses. However, many recognized public uses were not included in the schedule, and the inclusion of a use in the schedule was no guarantee that the use was in fact a public use under the Constitution. See Comment to CODE CIV. PROC. § 1240.010. Moreover, to a considerable extent, the listing of uses in Section 1238 was surplusage since specific authorizations to condemn for particular uses were provided in other codes.

The scheme of the Eminent Domain Law renders a listing of public uses in the general condemnation statute unnecessary. The power of eminent domain may be exercised to acquire property only by a person expressly authorized by statute to exercise the power for a particular use. CODE CIV. PROC. § 1240.020. However, a statutory authorization to condemn property for a particular use is a legislative declaration that that use is a public use. CODE CIV. PROC. § 1240.010. Accordingly, there is no need to maintain a separate listing of public uses.

Under the scheme of the Eminent Domain Law, every public entity that would be authorized to condemn for a use listed in Section 1238 may still condemn for that use. The state (GOVT.

CODE § 15853), cities (GOVT. CODE § 37350.5), counties (GOVT. CODE § 25350.5), and school districts (EDUC. CODE § 1047) may exercise the power of eminent domain to acquire property necessary for any of their powers or functions. These general authorizations to condemn for proper state, city, county, and school district functions often overlap more specific authorizations to condemn or simply to acquire property for particular public uses. On occasion, a statute authorizes a public entity to undertake a public use but specifically denies the right of eminent domain for that use. See, *e.g.*, GOVT. CODE § 37353(c) (existing golf course may not be acquired by city by eminent domain). In such a case, the specific provision controls over the general authorization. Special districts may condemn only for those specific public uses for which they have expressly been granted the power of eminent domain. The great majority of special districts have, by virtue of their enabling statutes, general authority to condemn all property necessary to carry out any powers of the district. A few districts, such as soil conservation districts (PUB. RES. CODE §§ 9074–9953) and the City of Marysville Levee District (Cal. Stats. 1875–76, Ch. 134), have limited condemnation authority or none at all.

The repeal of Section 1238, together with the repeal of Civil Code Section 1001, deprives private persons of condemnation rights previously recognized by the courts. See *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955). Separately enacted provisions in other codes, however, continue the right of some types of private 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. Although private persons may no longer condemn for sewers, they may request the appropriate public authority to undertake such condemnation on their behalf. HEALTH & SAF. CODE § 4967.

The particular private persons authorized to condemn are quasi-public, and the purposes for which they are authorized to condemn are public in nature. Whether it would be

constitutional to authorize a private person to condemn for what appear to be predominately private purposes is doubtful. *Cf. Lorenz v. Jacob*, 63 Cal. 73 (1883) (supplying mines with water); *Lindsay Irr. Co. v. Mehrrens*, 97 Cal. 676, 32 P. 802 (1893) (supplying farming neighborhoods with water); *General Petroleum Corp. v. Hobson*, 23 F.2d 349 (S.D. Cal. 1927) (byroad to prospect for oil).

There follows below an indication where, in other codes, the authorization to condemn for specific public uses formerly listed in Section 1238 can be found. It should be noted that, although Section 1238 purported to list only public uses in behalf of which the right of eminent domain might be exercised, it in fact on occasion also indicated what types of property or interests may be taken. In general, under the Eminent Domain Law, this type of particularization is not continued. The authority to condemn property for a public use includes the authority to condemn any property right or interest necessary for that use. See CODE CIV. PROC. §§ 1235.170 ("property" defined), 1240.110, and 1240.120 (right to take property or interest necessary for project). Section 1238 also in some instances indicated which persons were authorized to condemn property for specific uses. The persons authorized to condemn for particular uses are indicated in the Comments to particular subdivisions below.

Subdivision 1

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

Subdivision 2

Insofar as subdivision 2 authorized takings for state purposes, it is unnecessary because it has been superseded by the much broader condemnation powers conferred upon the State Public Works Board. See GOVT. CODE §§ 15853-15855. Insofar as the subdivision might have authorized condemnation on behalf of a state other than California, it is not continued. Takings under the eminent domain power of one state for the benefit of another state raise serious problems under the public use doctrine. See 1 P. NICHOLS, EMINENT DOMAIN § 2.112 (3d ed. 1964). If property is to be condemned by or for another state for a particular

purpose, the takings should be authorized by a specific statute dealing with the specific situation. *E.g.*, WATER CODE § 5901, Art. VI, § A (Klamath River Basin Compact). The authorization in subdivision 2 for acquisitions for nonprofit colleges and universities (“institution . . . which is exempt from taxation under the provisions of Section 1a, of Article XIII of the Constitution of the State of California”) is continued in Section 30051 of the Education Code. The reference in subdivision 2 to “all other public uses authorized by the Legislature of the State of California” was superfluous and had no substantive effect.

Subdivision 3

Any public utility. The authority to condemn “any public utility . . . for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district” was ambiguous in that it may have authorized condemnation of property owned by a public utility or may have authorized condemnation of property to be used for public utility purposes whether or not already devoted to public utility purposes. *Cf. Breeze, Limitations on the Right of a Municipality in California to Condemn a Public Utility*, 16 CAL. L. REV. 105, 106 (1927). As evidenced by other statutes enacted the same year relating to condemnation of public utility property, the apparent original intent of the provision was to authorize only the taking of property owned by public utilities. *Compare* Cal. Stats. 1913, Ch. 291, § 1, *with* Cal. Stats. 1913, Ch. 339, § 1. See also Cal. Stats. 1913, Chs. 158, 159, 160, 200, 292, 293, 298.

To the extent this provision authorized the acquisition of property belonging to a public utility, it was superfluous. A municipal corporation may acquire utility property. See PUB. UTIL. CODE § 10002; former CODE CIV. PROC. §§ 1240(3), (4), (5), and 1241(3). See also PUB. UTIL. CODE §§ 1401–1421 (just compensation where utility property acquired by a political subdivision) and former CODE CIV. PROC. §§ 1264.1–1264.9. *Cf. Comment, Eminent Domain Powers Exercisable Over California Property by Oil and Gas Corporations*, 7 U.C.L.A. L. REV. 327 (1960).

It is not clear whether the provision concerning any public utility “for the use of” the local public entities in subdivision 3 restricted the exercise of condemnation to the named entities or permitted condemnation by private public utilities providing service within the territorial limits of the named entities. Whichever is the proper construction of the provision, it is unnecessary. The authority of private corporations to condemn for particular public utility purposes is continued in Public Utilities Code Sections 611–624; the authority of local entities to

condemn for particular public utility purposes is continued in specific grants of authority in other codes. See, e.g., the Comments to other repealed provisions of subdivisions 3, 4, 12, 13, and 17 *infra*.

Public buildings and grounds. The authority granted in subdivision 3 to condemn for “public buildings and grounds, for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district” is continued in other sections. *E.g.*, GOVT. CODE §§ 25351 (county), 37353 (city); EDUC. CODE § 1047 (school district); WATER CODE § 22425 (irrigation districts). See also GOVT. CODE §§ 50333, 50531 (local agencies may acquire property for public buildings and grounds on public squares or to grant to the state). Villages and towns, as unincorporated territory, may not condemn. In addition to the general authority to condemn for public buildings and grounds, entities also have specific authority to condemn for particular types of buildings and works. For a compilation of statutes authorizing condemnation for certain types of public assembly facilities, see Comment to former CODE CIV. PROC. § 1238.4.

It should be noted that an entity authorized to acquire property for a building may acquire grounds necessary to protect or preserve the attractiveness, safety, or usefulness of the building. See CODE CIV. PROC. § 1240.120. See also *University of So. Cal. v. Robbins*, 1 Cal. App.2d 523, 37 P.2d 163 (1934).

Water supply. The portion of subdivision 3 relating to condemnation of property necessary for conducting, storing, or distributing water is superseded by other sections. Where other sections authorize the acquisition of “property,” the authorization subsumes particular types of property, such as those mentioned in subdivision 3: ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other “character of property.” See CODE CIV. PROC. §§ 1235.170, 1240.110. The authority to condemn for a particular purpose includes the authority to condemn all property necessary for the proper control and development of that purpose at the time of the taking of the property as well as in the future. CODE CIV. PROC. §§ 1240.120, 1240.220. See also CODE CIV. PROC. § 1240.220 for limitations on acquisition for future use.

Insofar as this portion of subdivision 3 may have been intended to grant any county, incorporated city, city and county, municipal water district, or state institution authority to condemn property necessary to conduct, store, or distribute water, such authority is continued in the following sections: STS. & HWYS. CODE §§ 5101(h), 5102, 10010, 10100(a), 10101–10102

(cities and counties); GOVT. CODE §§ 54309(a), 54340–54341 (“local agencies,” including cities and counties), 38730 (city), 25353, 25662, 25691 (county), 15853 (state institutions); WATER CODE § 71694 (municipal water districts). An unincorporated town or village, not being a public entity, may not condemn; however, water supplies can be condemned on their behalf. See below.

The authority granted by subdivision 3 to condemn property necessary to conduct, store, or distribute water for the use of any county, incorporated city, city and county, town or village, municipal water district, or state institution, or the inhabitants thereof, is continued in other sections. There are numerous special water districts servicing various areas of the state. See, e.g., GOVT. CODE §§ 61600, 61610 (community services districts); WATER CODE §§ 35600 (California water districts), 31040–31042 (county water districts), 55370 (county waterworks districts), 22425 (irrigation districts). Water corporations, which are public utilities, may also condemn for these purposes. PUB. UTIL. CODE § 618. Private corporations may not condemn for other than public utility purposes. See *Burr v. Maclay Rancho Water Co.*, 160 Cal. 268, 280, 116 P. 715, 721 (1911) (a leading case adopting a strict view of public use where it was held that water used to fulfill a contract obligation was a private use because “it is not offered to the public generally, or to all who may want it within a certain territory”); *Thayer v. California Dev. Co.*, 164 Cal. 117, 128 P. 21 (1912). Cf. CIVIL CODE §§ 548–552.

Drainage. The authority provided by subdivision 3 to condemn for draining named local entities is continued in other sections. Where other sections authorize the acquisition of “property” for drainage purposes, the authorization includes property and interests of all types, including the types listed in subdivision 3: ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, pipes, lands, buildings, rights of any nature in water, and any other “character of property.” See CODE CIV. PROC. §§ 1235.170, 1240.110, 1240.120.

The authority of the state to condemn for drainage is expressed in Government Code Section 15853. See also WATER CODE § 8304. The authority granted to cities and counties to condemn for drainage is continued in the following sections: GOVT. CODE § 40404(b), and STS. & HWYS. CODE §§ 5101(d), 5102 (cities only); Storm Drain Maintenance District Act, § 5 (Cal. Stats. 1937, Ch. 265) (counties). See also HEALTH & SAF. CODE §§ 4602.4, 4627 (community facilities); WATER CODE § 8010(b) (cities). Drainage for villages, towns, and other areas can be provided by some of the numerous special districts

authorized to provide drainage. See, *e.g.*, GOVT. CODE §§ 61600, 61610 (community service districts); PUB. UTIL. CODE § 16404 (public utilities districts); WATER CODE §§ 22425 (irrigation districts), 31040–31042 (county water districts), 35600 (California water districts), 43500 (California water storage districts).

Although drainage is an established public use (*e.g.*, *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955)), private persons may not condemn to supply drainage. Sewer system corporations may provide drainage (PUB. UTIL. CODE § 230.5) and may condemn for that purpose (PUB. UTIL. CODE § 624) because they are public utilities (PUB. UTIL. CODE § 216). See also former WATER CODE §§ 7020–7026 and Comment thereto (private ways for drainage and seepage canals).

Generally, the authority to provide for drainage overlaps the authority to provide for sewerage, reclamation, and flood control. For a compilation of statutes authorizing condemnation for sewerage, see Comment to subdivision 8 *infra*. For statutes relating to reclamation, see Comment to subdivision 4 *infra*. For flood control, see Comment to former CODE CIV. PROC. § 1238.6. See also stream improvements, immediately below.

Stream improvements. Raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels is in itself a public use. See, *e.g.*, *Reclamation District No. 551 v. Superior Court*, 151 Cal. 263, 90 P. 545 (1907) (“levee” is a public use although not specifically mentioned). Nonetheless, the authority to condemn for stream improvements is not normally a “use” or end in itself but rather a means to some other end such as flood control, navigation, irrigation, drainage, reclamation, water supply, and the like. These uses may, and often do, involve stream improvements. See Comments to subdivisions 3 (water supply, drainage) and 4 (water supply, water transport, drainage, reclamation, irrigation). See also Comments to former CODE CIV. PROC. §§ 1238.5 (irrigation) and 1238.6 (reclamation, flood control). See also WATER CODE §§ 7040–7045 (maintenance of flow in streams for various purposes).

In addition to the general public uses described above under authority of which stream improvements might be undertaken, there is specific authority granted in various codes for entities to engage in stream improvement. Some statutes authorizing public entities to condemn for stream improvements, including raising its bank (levees and dikes) and altering its channel (widening, deepening, straightening), are: GOVT. CODE §§ 39901, 40404(c) (cities may alter channels), 25680–25684 (county control of streams and floodwaters), 54152 (“local

agency” action for flood relief); HEALTH & SAF. CODE § 2270 (d) (mosquito abatement district may raise banks); STS. & HWYS. CODE § 965 (county stream improvements for highway protection); WATER CODE §§ 12934(3) (state water development projects), 8110, 8126 (county stream improvements), 8590(a), 8631 (Sacramento-San Joaquin Drainage District), 50930, 50932 (reclamation district).

Roads, highways, boulevards, streets, alleys. The authority to condemn for roads, highways, boulevards, streets, and alleys duplicates authority contained in other sections. *E.g.*, for highways: STS. & HWYS. CODE §§ 104 (state for state highway), 941–943 (county for county highway), 25050 (joint highway district), and GOVT. CODE § 38304 (city for extraurban highways); for boulevards: PUB. RES. CODE §§ 5157 (county for boulevards), 5301 (city for boulevards), 5541–5542 (regional park districts for boulevards), and STS. & HWYS. CODE § 26113 (boulevard districts); for streets: STS. & HWYS. CODE § 4090 (city and county for streets), and GOVT. CODE §§ 37353, 39934, 40404(a) (county for streets). For a discussion of the right to condemn for byroads, see Comment to subdivision 6 *infra*.

Public mooring places for watercraft. The authority to condemn for public mooring places for watercraft is continued in other sections. See discussion under subdivision 4 *infra*, relating to the authority to condemn for wharves, docks, and piers. See also, *e.g.*, GOVT. CODE §§ 39961 (b) (authority of city to acquire property for public mooring places for watercraft), 26301 (b) (authority of county to acquire property for public small boat harbors).

Public parks. The authority to condemn for public parks, including parks and other places covered by water, is continued in other sections. Where other sections authorize the condemnation of land for parks, that authorization includes submerged lands and water rights for parks of all types including aquatic parks. See CODE CIV. PROC. §§ 1235.170, 1240.110, 1240.120. *Cf.* GOVT. CODE § 61600(e) (“park” includes “aquatic park”).

Cities may condemn for public parks. GOVT. CODE §§ 38002, 38010, 39732, 40401 (b). Counties may acquire property interests for public parks. GOVT. CODE § 25353; PUB. RES. CODE § 5157 (this section authorizes only “purchase,” “lease,” and “gift” acquisitions; however, the authority to acquire, combined with the general power of the county to condemn for its proper functions—GOVT. CODE § 25350.5—enables the county to make use of the power of eminent domain for park purposes). In addition, cities and counties may acquire land for state parks

(PUB. RES. CODE § 5150), and counties may acquire land for federal parks (PUB. RES. CODE § 8402).

Special districts having the power to condemn for public parks include community services districts (GOVT. CODE §§ 61600(e), 61610), public utilities districts (PUB. UTIL. CODE §§ 16404, 16463), recreation and park districts (PUB. RES. CODE §§ 5782.2, 5782.5; *but see* §§ 5790–5791—districts with powers not including eminent domain), and regional park districts (PUB. RES. CODE §§ 5541–5542).

All other public uses. The authority to condemn for all uses authorized by the Legislature is superseded by Section 1240.010 of the Code of Civil Procedure, which provides that a legislative authorization of condemnation on behalf of a particular purpose constitutes a declaration that that purpose is a public use. This rule is applicable to legislative authorizations to any condemnor—not merely to counties, incorporated cities, cities and counties, villages, towns, and their inhabitants, as previously provided in subdivision 3.

Costs of public improvements. The provision formerly found in subdivision 3 that the mode of apportioning and collecting the costs of public improvements was to be in the manner provided in their authorizing statutes is not continued. With the repeal of Section 1238, the only public use declarations that exist are in particular statutory authorizations which carry with them any applicable financial limitations on the construction of improvements.

Subdivision 4

Wharves, docks, piers, chutes, booms. The authority to condemn for wharves, docks, piers, chutes, and booms is continued in other sections. Cities, counties, and cities and counties may provide harbors and construct any structures necessary or convenient to promote commerce and navigation. GOVT. CODE §§ 39901(a), 39962, 54309(g), 54309.1(e), 54340, 54341; STS. & HWYS. CODE §§ 5101(m) and 5102. These entities may also condemn for authorized uses. GOVT. CODE §§ 25350.5 and 37350.5. See also GOVT. CODE § 40404(d)–(f). The authority of special districts to condemn for wharves, docks, piers, chutes, and booms is expressed in their enabling legislation. Public utilities may condemn for wharves, docks, piers, chutes, and booms. PUB. UTIL. CODE § 619. Private persons that are not public utilities may not condemn property for these purposes.

Warehouses. The authority to condemn for warehouses is continued in other sections. Cities and counties have general authority to condemn for any proper function. GOVT. CODE §§ 25350.5 (county), 37350.5 (city). As to warehouses operated in

connection with a harbor, see the sections cited above in connection with wharves, docks, piers, chutes, and booms. See also *Clark v. City of Los Angeles*, 160 Cal. 317, 323, 116 P. 966, 968 (1911). Since cities and counties have general authority to condemn for proper city or county functions, they may condemn for a warehouse if they have general authority to construct and operate such a warehouse. Contrast *City of Los Angeles v. Koyer*, 48 Cal. App. 720, 192 P. 301 (1920) (city may not condemn for warehouses apart from wharves absent express authority); the rule in this case is not being continued.

The authority of special districts to condemn for warehouses is expressed in their enabling legislation. See, *e.g.*, HARB. & NAV. CODE §§ 6075, 6076, 6077.3 (harbor districts), 6295, 6296, 6307 (port districts), 6895, 6896 (river port districts), 7147, 7149(b), (c) (small craft harbor districts). Privately operated public warehouses that are public utilities may condemn property. PUB. UTIL. CODE § 623. Private persons that are not public utilities may not condemn property for this purpose.

Ferries. The authority to condemn for ferries is continued in other sections. Cities, counties, and cities and counties are authorized to acquire and maintain public ferries. See, *e.g.*, GOVT. CODE §§ 39731, 39963, 54301, 54309(e), 54340, 54341; STS. & HWYS. CODE §§ 1750–1757. These entities may condemn to carry out their functions. GOVT. CODE §§ 25350.5, 37350.5. A privately owned public ferry system is a common carrier. (PUB. UTIL. CODE § 211(b)) and may not operate unless granted a franchise by the Department of Transportation or by the city within which it provides service. STS. & HWYS. CODE §§ 30800–30902. See also CIVIL CODE §§ 528–531. As common carriers, the ferries are also public utilities (PUB. UTIL. CODE § 216) and may condemn property. PUB. UTIL. CODE § 620.

Bridges. The authority to condemn for bridges was enacted in 1872, based on Sections 9 and 10 of an act concerning *toll* bridges. Cal. Stats. 1855, Ch. 147, amended Cal. Stats. 1864, Ch. 196. For legislative intent, see 2 CAL. CODE CIV. PROC. ANN. § 1238, at 102 n.5 (Haymond & Burch 1872). The word “toll” was deleted at the time the authorization for bridges was inserted in subdivision 4. As it relates to bridges generally, this authorization is superfluous, for under Streets and Highways Code Section 23, “highway” includes bridges; hence any authorization to condemn for highways includes authorization to condemn for bridges. See Comment to subdivision 3 *supra*. See also STS. & HWYS. CODE §§ 1300–1404 (county bridges).

As it relates to toll bridges, the authority of public entities to condemn is continued in other sections. See STS. & HWYS. CODE

§§ 30400–30413 (California Toll Bridge Authority), 27165 (county bridge and highway districts), 31000–31010 (Gold Rush Parkway). Private toll bridge corporations (defined in PUB. UTIL. CODE § 237) are public utilities. PUB. UTIL. CODE § 216(a). They may not operate without a franchise granted by the Department of Transportation. STS. & HWYS. CODE §§ 30800–30873; see also CIVIL CODE §§ 528–531. Their authority to condemn is not continued since it is state policy to acquire and own all toll bridges and, ultimately, to eliminate all toll charges thereon. STS. & HWYS. CODE § 30001. See also Comment to former CODE CIV. PROC. §§ 1264.1–1264.9 (condemnation of toll bridge franchises). If the power to condemn property for a privately owned toll bridge is to be granted, it should be granted by a specific statute.

Toll roads. If the power of public entities to condemn property for toll roads is to be provided, it should be expressly stated by statute.

The authority of private corporations to condemn for toll roads is not continued. A private toll road must be granted a franchise by the Department of Transportation (STS. & HWYS. CODE § 30800) unless the franchise was granted prior to August 14, 1929 (STS. & HWYS. CODE § 30811). Under Streets and Highways Code Section 902, at the expiration of a franchise to run a toll road, the road becomes public with no need for compensation. See *People v. Davidson*, 79 Cal. 166, 21 P. 538 (1889); *People v. O'Keefe*, 79 Cal. 171, 21 P. 539 (1889). No evidence has been found that the Department of Transportation has granted franchises for toll roads; under modern conditions, there is no need to continue the authority of private persons to condemn for such roads. See also Comment to former CODE CIV. PROC. §§ 1264.1–1264.9 (condemnation of toll road franchises).

Byroads. See the Comment to subdivision 6 *infra*.

Plank and turnpike roads. The authority to condemn for plank and turnpike roads is discontinued as obsolete. This provision was enacted in 1872, based on Section 15 of an act authorizing the formation of private corporations for the construction of plank or turnpike roads. See Cal. Stats. 1853, Ch. 121. See also the discussion in 2 CAL. CODE CIV. PROC. ANN. § 1238, at 102 n.5 (Haymond & Burch 1872). This act was repealed years ago. Moreover, any plank or turnpike roads that existed at the time of repeal would have since become free public roads upon the expiration of the private franchise to collect tolls. See *People v. Auburn & Yankee Jim's Turnpike Co.*, 122 Cal. 335, 55 P. 10 (1898).

Paths or roads for bicycles, tricycles, motorcycles, or other

horseless vehicles. The authority to condemn for paths or roads either on the surface, elevated, or depressed for the use of bicycles, tricycles, motorcycles, and other horseless vehicles duplicates other provisions and is not continued. This provision was added to Section 1238 in 1897 to provide an express grant of authority to condemn for public ways for driver-propelled and self-propelled vehicles. The apparent reasoning behind this addition was that the authority to condemn for roads contained in subdivision 3, having been enacted in 1872, applied only to horse-drawn vehicles. This reasoning is not sound, however, for the authority to condemn for “roads” includes the authority to condemn for public ways for all types of vehicles and nonvehicles. See *Muscolino v. Superior Court*, 172 Cal. App.2d 525, 341 P.2d 773 (1959) (pedestrian and equestrian trails). Thus, the authority to condemn for paths and roads for bicycles and the like duplicates general authority to condemn for roads found in other sections and is repealed as unnecessary. See Comment to subdivision 3 *supra*.

In addition to the general authority found in other sections to condemn for roads, there is added special authority to condemn for bicycle and other paths separate from automotive thoroughfares. See, *e.g.*, PUB. RES. CODE § 5078.5 (city, county, or local agency may condemn property to establish bicycle paths or routes); STS. & HWYS. CODE §§ 104(j) (Department of Transportation may condemn property for bicycle lanes and paths), 951 (county may construct “sidepaths” along highways), 5101(b), 5102 (city and county construction of sidewalks and parkways). See also VEH. CODE § 21207 (bicycle regulations not to be construed to deny right to construct bicycle lanes); STS. & HWYS. CODE §§ 100.12 (incorporation of pedestrian and bicycle facilities in design of freeways), 105.5, and 105.7 (facilities for pedestrian, bicycle, and other nonmotorized traffic).

Steam, electric, and horse railroads. The authority contained in subdivision 4 to condemn for “steam, electric, and horse railroads” is discontinued. (These words are not to be read in series with any other uses or qualifications—*e.g.*, “public transportation”—contained in subdivision 4. *San Francisco & S.J.V. Ry. v. Leviston*, 134 Cal. 412, 66 P. 473 (1901); *Central Pac. Ry. v. Feldman*, 152 Cal. 303, 92 P. 849 (1907).) The grant is obsolete because such railroads have largely been replaced by railroads using diesel-powered locomotives. Further, railroad corporations are given the power of eminent domain by Section 611 of the Public Utilities Code. See also PUB. UTIL. CODE §§ 7533 (additional tracks), 7535 (railroad intersections), 7536 (railroad crossings). *Cf.* PUB. UTIL. Code § 7508 (right of eminent domain

in transferee of railroad corporation). Cities may condemn for facilities in aid of railroads and other public utilities. GOVT. CODE §§ 39790–39794.

Irrigation. The authority to condemn for irrigation is continued in other sections. Where other sections authorize the acquisition of “property” for irrigation, the authorization subsumes particular types of property, such as those mentioned in subdivision 4: canals, ditches, dams, poundings, flumes, aqueducts, and pipes. See CODE CIV. PROC. §§ 1235.170, 1240.110, 1240.120. See also *Stratford Irr. Dist. v. Empire Water Co.*, 44 Cal. App.2d 61, 111 P. 2d 957 (1941) (property an irrigation district may condemn).

The power of any local agency authorized to supply irrigation to condemn property is continued generally in Government Code Sections 54309(a), 54340–54341 (local agency includes city, county, city and county, municipal or public corporation or district). In addition, numerous special districts are specifically authorized to condemn for irrigation. See, e.g., GOVT. CODE §§ 61600, 61610 (community services districts); WATER CODE §§ 35600 (California water districts), 31040–31042 (county water districts), 55370 (county waterworks districts), 22425 (irrigation districts), and 50910 (reclamation districts).

In addition, a water corporation, as a public utility (PUB. UTIL. CODE § 216; see also CIVIL CODE §§ 548–552), may condemn (PUB. UTIL. CODE § 618) for irrigation purposes (PUB. UTIL. CODE § 240). This is a valid public use. See *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 36 Cal. App. 556, 178 P. 150 (1918); compare former CODE CIV. PROC. § 1238.5 (eminent domain for irrigation). See also former WATER CODE §§ 7020–7026 and Comment thereto (private ways for irrigation canals).

Public transportation by water. The authority granted by subdivision 4 to condemn canals, ditches, dams, poundings, flumes, aqueducts, and pipes for public transportation is not continued. This grant of authority was enacted in 1872 primarily for the benefit of private canal transport companies and is obsolete.

Condemnation authority for public transportation by water is provided by other statutes. Any water carrier may condemn for terminal facilities. PUB. UTIL. CODE § 622. See also PUB. UTIL. CODE § 620 (certain common carriers by water may condemn property necessary for transportation purposes). See also HARB. & NAV. CODE §§ 4150–4153 (county may acquire towpath easement along navigable streams); GOVT. CODE § 39901 (city may construct deep water canal, waterway, or water facilities for transportation purposes).

Supplying mines with water. The authority of private persons to condemn for canals, ditches, dams, poundings, flumes, aqueducts, and pipes for supplying mines with water is of doubtful constitutionality and is not continued. See *Lorenz v. Jacob*, 63 Cal. 73 (1883); see also former subdivision 5 *infra*. Public entities and public utilities have adequate condemnation authority. See discussion of their authority in other portions of the Comment to this section.

Supplying farming neighborhoods with water. The authority granted in subdivision 4 to condemn canals, ditches, dams, poundings, flumes, aqueducts, and pipes for supplying farming neighborhoods with water is not continued since it is superfluous. This grant of authority has been construed to be a grant of authority for irrigation purposes. See *Lux v. Haggin*, 69 Cal. 255, 4 P. 919, 10 P. 674 (1886). As such, it merely duplicated the authority of those public entities already authorized to supply irrigation (see discussion above).

This grant of authority could also be interpreted as bestowing an added power upon owners of private farms to condemn for their own use. As such, it is probably an unconstitutional private use; in order for a private person to condemn to supply irrigation to farming neighborhoods, he must become in essence a public utility, offering to supply every person in the farming neighborhood he services. *Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 676, 32 P. 802 (1893); *Lux v. Haggin*, 69 Cal. 255, 4 P. 919, 10 P. 674 (1886). Furthermore, water corporations, which are public utilities (see discussion above), have adequate authorization to supply farming neighborhoods with water. In addition, farming neighborhoods may obtain their irrigation through the mechanism of mutual water companies (see discussion below) which have the power of eminent domain. PUB. UTIL. CODE § 2729. Also, many special water districts have condemnation authority. Compare former CODE CIV. PROC. § 1238.5 (eminent domain for irrigation).

Drainage. The authority provided by subdivision 4 to condemn for draining lands is continued in other sections. Where other sections authorize the acquisition of “property” for drainage purposes, the authorization includes property and interests of all types, including the types listed in subdivision 4: canals, ditches, dams, poundings, flumes, aqueducts, and pipes. CODE CIV. PROC. §§ 1235.170, 1240.110, 1240.120. The authority of various entities and utilities to condemn for drainage is set out in the Comment to subdivision 3 *supra*. Generally, the authority to provide for drainage overlaps the authority to provide for

sewerage, reclamation, and flood control. For a compilation of statutes authorizing condemnation for sewerage, see Comment to subdivision 8 *infra*. For statutes relating to reclamation, see Comment immediately below. For flood control, see Comment to former CODE CIV. PROC. § 1238.6. See also stream improvements, subdivision 3 *supra*.

Reclamation. The authority granted by subdivision 4 to condemn for reclaiming lands is continued in other sections. Where other sections authorize the acquisition of "property" for reclamation of land, the authorization extends to all types of and interests in property, including but not limited to the types mentioned in subdivision 4: canals, ditches, dams, poundings, flumes, aqueducts, and pipes. CODE CIV. PROC. §§ 1235.170, 1240.110, 1240.120.

The authority of the state to condemn for reclamation is continued in Government Code Section 15853. See also WATER CODE § 8593 (Reclamation Board). The authority of cities and counties to condemn for reclamation is continued in Government Code Sections 25681.1 (counties) and 38901 (cities). See also *City of Redwood City v. Moore*, 231 Cal. App.2d 563, 42 Cal. Rptr. 72 (1965). The authority of special districts, if any, to condemn for reclamation is contained in their grants of power. See, e.g., WATER CODE §§ 31040–31042 (county water districts), 35600 (California water districts), 43500 (California water storage districts), 50930 (reclamation districts).

Private persons do not have authority to condemn for reclamation. Although reclamation of land is a public use (*cf. Reclamation Dist. No. 511 v. Superior Court*, 151 Cal. 263, 90 P. 545 (1907)), reclamation by private persons of land for their own benefit remains a private use. While a water corporation may condemn for "reclamation," it is clear that reclamation of water only—rather than land reclamation—is authorized. See PUB. UTIL. CODE § 240.

Generally, the authority to provide for reclamation of land overlaps the authority to provide for drainage. See discussion of the authority to condemn for drainage immediately above and under subdivision 3 *supra*. See also former CODE CIV. PROC. § 1238.6 (eminent domain for protection, preservation, reclamation of land, flood control).

Floating logs on nonnavigable streams. The authority to condemn for canals, ditches, dams, poundings, flumes, aqueducts, and pipes for floating lumber on nonnavigable streams is of doubtful constitutionality and is not continued. See Annot., 51 A.L.R. 1199 (1927); *cf. People v. Elk River M. & L. Co.*, 107 Cal. 221, 40 P. 531 (1895). See also former subdivision 11 *infra*.

Mutual water company. The authority of a mutual water company to condemn for water, water rights, canals, ditches, dams, poundings, flumes, aqueducts, and pipes for irrigation of lands serviced by the company is continued in Public Utilities Code Section 2729. See the Comment to that section.

Extraterritorial condemnation for domestic and irrigation water. The grant of authority for any municipality, corporation, or person that supplies water to the public or to any neighborhood or community for domestic use or irrigation to condemn land with wells and water adjacent to it is not continued because it is unduly restrictive.

A municipality, or any local public entity, may condemn property beyond its territorial limits—regardless of whether that property is adjacent or whether it consists of lands with wells and water—for water supply purposes, including irrigation. CODE CIV. PROC. § 1240.125 and Comment thereto. Moreover, municipalities are expressly granted the right to condemn property beyond their jurisdictional limits in aid of supplying water for domestic use and irrigation. See GOVT. CODE § 54341. In addition, absent such provisions, the power of extraterritorial condemnation would be necessarily implied as an incident of the power to supply water. See *City of North Sacramento v. Citizens Util. Co.*, 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961). See also CODE CIV. PROC. § 1240.050.

The limitations on the extraterritorial condemnation rights of special districts, if any, are expressed in their particular authorizing statutes. See, e.g., WATER CODE §§ 35628 (California water districts), 71694 (municipal water districts).

A corporation or person that supplies water to the public for domestic use or irrigation may, of course, no longer condemn at all unless it is a water corporation—a public utility—or a mutual water company. See discussion above. There are no restrictions upon the locations in which a water corporation or any public utility may condemn; the only limitation is that the property condemned must be “necessary” for the water system. PUB. UTIL. CODE § 618.

Subdivision 5

Subdivision 5 is not continued. It is clear from the language of the subdivision itself, and from the statute that it superseded (Cal. Stats. 1869–70, Ch. 404), that the Legislature intended to authorize takings by individual mine owners to facilitate the working of their mines. However, the California courts have refused to give the subdivision its intended application or any effect whatsoever. *County of Sutter v. Nichols*, 152 Cal. 688, 93 P. 872 (1908); *Amador Queen Min. Co. v. Dewitt*, 73 Cal. 482, 15 P.

74 (1887); *Lorenz v. Jacob*, 63 Cal. 73 (1883); *Consolidated Channel Co. v. Central Pac. R.R.*, 51 Cal. 269 (1876). Although the courts have not held the subdivision unconstitutional, they have invoked the constitutional doctrine of public use to prevent any takings under the subdivision. The only possible application of the subdivision might have been under the former Placer Mining District Act (PUB. RES. CODE §§ 2401–2512, repealed Cal. Stats. 1953, Ch. 1365). See *Black Rock Placer Mining Dist. v. Summit Water & Irr. Co.*, 56 Cal. App.2d 513, 133 P.2d 58 (1943). Although the repeal of that act did not affect the existence or powers of any district previously organized pursuant to the repealed act, there are no such districts presently reporting financial transactions to the State Controller. See CAL. STATE CONTROLLER, FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS OF CALIFORNIA (1971–72).

Subdivision 6

Subdivision 6 is not continued. The authority of public entities to condemn property for byroads necessary to reach any property for public purposes is embraced in the authority to condemn for roads generally. For a compilation of such authority, see Comment to subdivision 3 *supra* (“roads, highways, boulevards, streets, alleys”). See also CODE CIV. PROC. § 1240.350 (substitute condemnation to provide utility service or access to public road).

Private persons have no right to condemn property for byroads. The former law was unclear because there was no case precisely on point. See *General Petroleum Corp. v. Hobson*, 23 F.2d 349 (1927) (prospecting for oil not a use listed in Section 1238); *City of Sierra Madre v. Superior Court*, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961) (land developer not authorized to bring condemnation action in name of city). *Cf. Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955) (private individual may condemn sewer easement over property adjoining his). See also *Sherman v. Buick*, 32 Cal. 242 (1867) (“byroad” a public use for which county could acquire property). *Cf.* former STS. & HWYS. CODE §§ 1050–1054 and Comment thereto (private byroads).

Subdivision 7

The authority granted in subdivision 7 to condemn for telegraph, telephone, radio, and wireless (and by implication other forms of communication) lines, systems, and plants to a considerable extent duplicated other provisions. (“Wireless” duplicated “radio,” the former being the word preferred in British usage. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1872, 2624 (1961).)

The state has a teletype system (GOVT. CODE §§ 14710, 14711) and the Department of Justice maintains a statewide telecommunication system for the use of law enforcement agencies (GOVT. CODE § 15152). In addition, the Department of General Services is authorized to acquire, construct, and maintain communications systems and facilities available to all public agencies in the state. GOVT. CODE § 14931. The state may exercise the power of eminent domain on behalf of these uses and any other communication purposes for which appropriations are made. GOVT. CODE § 15853.

Cities, counties, and cities and counties, as municipal corporations, may establish and operate public works to provide their inhabitants with telephone service or other means of communication. PUB. UTIL. CODE §§ 10001–10004, 10101; GOVT. CODE §§ 25350.5, 37350.5, 39732, 39790, 39792; STS. & HWYS. CODE §§ 5101 (e), 5102. Moreover, municipal utility districts may be formed to provide their members with telephone service or other means of communication. PUB. UTIL. CODE § 12801. These districts are empowered to exercise eminent domain to provide and maintain the facilities necessary to afford their members the requisite means of communication. PUB. UTIL. CODE §§ 12703, 12771.

Private communications companies may continue to condemn only if they are public utilities. Telephone and telegraph companies are public utilities that are strictly regulated by the Public Utilities Commission. PUB. UTIL. CODE §§ 216, 1001. These companies may exercise the power of eminent domain to take land for almost any purpose that would facilitate communication by telephone and telegraph. See PUB. UTIL. CODE §§ 233–236, 616, 617. Such exercise is a public use. *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961). It should be noted that these utilities may use the public highways for the creation and maintenance of telephone and telegraph lines and the fixtures necessary thereto. PUB. UTIL. CODE § 7901. See also *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal.2d 766, 336 P.2d 514 (1959) (construction by utilities amounts to state franchise); STS. & HWYS. CODE §§ 117, 5101 (e) (location of structures of fixtures in public rights of way); federal “Post Roads Act” (discussion in 1 P. NICHOLS, EMINENT DOMAIN § 2.15 (1964)).

Subdivision 8

Insofar as subdivision 8 authorized condemnation by public entities, it was unnecessary. Cities have general condemnation authority for connection to sewer systems.

E.g., GOVT. CODE §§ 37350.5, 38900, 40404. See also GOVT. CODE §§ 54340, 55003; HEALTH & SAF. CODE §§ 5001, 5008. Counties also have general condemnation authority for connection to sewer systems. *E.g.*, GOVT. CODE §§ 25350.5, 25825. See also HEALTH & SAF. CODE §§ 4740, 4760 (county sanitation districts). The authority of an incorporated village or town to condemn for sewer purposes is the same as that of a city. See GOVT. CODE § 20 (“city” includes “incorporated town”).

Unincorporated towns, villages, and small settlements have no authority to condemn, but there are a number of methods by which sewer service can be provided in these areas. For example, the county may condemn for a sewer system on their behalf. GOVT. CODE § 25825. The county may form a county sanitation district on their behalf. HEALTH & SAF. CODE § 4711. A city may form an improvement district on their behalf. HEALTH & SAF. CODE § 4614.4. A sewer maintenance district may be formed. HEALTH & SAF. CODE § 4870. In addition, 25 persons in any county may form a sanitary district with the power to condemn for sewage. HEALTH & SAF. CODE § 6514. A municipal utility district may be formed. PUB. UTIL. CODE §§ 12703, 12771.

The authority of the state and of any college or university to condemn for sewage from its buildings is continued elsewhere. The state may condemn for any state purpose. GOVT. CODE § 15853. The University of California, the state college system, and nonprofit higher education institutions may condemn property necessary to carry out any of their functions. EDUC. CODE §§ 23151, 30051. See also the Comment to subdivision 2 *supra*.

Under prior law, private persons were authorized to condemn for the connection of buildings with city or county sewer mains. See *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955). This authority is not continued. Instead, a private person may request the public entity that operates the sewer system in his vicinity to make the connection for him and to condemn an easement or other property if needed for that purpose. See HEALTH & SAF. CODE § 4967. A sewer system corporation, as a public utility, is authorized to condemn property. See PUB. UTIL. CODE § 624.

Subdivision 9

Subdivision 9, which was enacted in 1891, is obsolete. Traction engines and road locomotives—essentially steam-powered locomotives which ran on wheels rather than tracks—have long been considered collector’s items. See F. CLYMER, ALBUM OF HISTORICAL STEAM TRACTION ENGINES (1949); Fisher, *Road Locomotives* in TRANSACTIONS OF THE AMERICAN INSTITUTE OF NEW YORK CITY, 31ST ANNUAL REPORT at 877 (1870–71); F.

GILLFORD, THE TRACTION ENGINE 1843-1936 (1952).

Subdivision 10

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

Subdivision 11

Subdivision 11 is repealed as unnecessary.

The authority of public entities to condemn for quarrying is not affected by the repeal of subdivision 11 and is continued in other provisions. *E.g.*, GOVT. CODE § 39793; STS. & HWYS. CODE § 104(c).

The authority of logging railroads to condemn is valid only to the extent that the railroads are common carriers. See *Great Northern Ry. v. Superior Court*, 126 Cal. App. 575, 14 P.2d 899 (1932). This authority is continued in Public Utilities Code Section 611.

Byroads servicing private lumbering or quarrying property may no longer be condemned by private persons. See former subdivision 6 *supra*.

Insofar as quarrying, logging, and lumbering are businesses carried on by private persons for private profit, the attempt to grant the right to condemn for rights of way servicing those businesses is of doubtful constitutionality and is not continued. See former subdivision 4 *supra* (logging). *Cf.* former subdivision 5 and Comment thereto *supra* (mining).

Subdivision 12

Subdivision 12 is superseded in whole by other provisions. Where other sections authorize the acquisition of "property," the authorization subsumes particular types of property, such as those mentioned in subdivision 12: canals, reservoirs, dams, ditches, flumes, aqueducts, pipes, outlets, buildings, and "all other improvements." See CODE CIV. PROC. §§ 1235.170, 1240.110, 1240.120.

Subdivision 12 authorized condemnation for generating and transmitting electricity to supply power, light, and heat to individuals and corporations, both public and private. This grant of authority duplicated, and was broader than, that found in subdivision 13.

The power of local public entities to condemn for these purposes is continued in other sections. *E.g.*, STS. & HWYS. CODE §§ 5101(e), 5102, 10010, 10100(b), 10101-10102 (cities and counties); GOVT. CODE §§ 39732, 39790-39792 (cities); PUB. UTIL. CODE § 10002 (municipal corporation).

The power of special districts to condemn for the purposes

listed above also is continued in other sections. *E.g.*, PUB. UTIL. CODE §§ 12703, 12801 (municipal utility district), 16404, 16461 (public utility district); WATER CODE §§ 22115, 22456 (irrigation districts). See also PUB. UTIL. CODE §§ 8101–8134 (joint operation by irrigation district and public utility); GOVT. CODE §§ 55300–55367 (joint city, county, sanitation district project for electric lines).

The power of private persons generally to condemn is not continued. However, a public utility may condemn to generate and transmit electricity for the purposes listed above. See PUB. UTIL. CODE § 612.

In addition, insofar as railroads and “tramways” are common carriers, their authority to condemn in aid of their operations is continued in Public Utilities Code Sections 611 and 621.

Subdivision 13

Subdivision 13 is superseded in whole by provisions of other sections. Where other sections authorize the acquisition of “property,” the authorization subsumes particular types of property, such as those mentioned in subdivision 13: electric lines, works or plants, lands, buildings, rights of any character in water, or “any other character of property.” See CODE CIV. PROC. §§ 1235.170, 1240.110, 1240.120.

Insofar as subdivision 13 specifically authorized takings for future use, it is continued in the Eminent Domain Law; the authority to condemn for a particular purpose includes authority to condemn for the proper development and control of that purpose at the time of the taking of the property as well as in the future. CODE CIV. PROC. §§ 1240.120, 1240.220. See also CODE CIV. PROC. § 1240.220 for limitations on acquisition for future use.

Subdivision 13 authorized condemnation for generating, transmitting, and distributing electricity to supply power, light, and heat to local public entities or their inhabitants. This grant of authority duplicated, and was narrower than, that found in subdivision 12. For a listing of statutes authorizing condemnation for these purposes, see Comment to subdivision 12 *supra*.

Subdivision 14

Subdivision 14 is unnecessary because all public entities that operate cemeteries have specific authority to condemn for cemetery purposes. The state’s authority appears in Government Code Section 15853. The cities’ authority appears in Government Code Section 37350.5. See also GOVT. CODE § 37681. The authority of public cemetery districts is in Health and Safety Code Section 8961. Private nonprofit cemetery authorities may condemn for expansion of existing cemeteries. HEALTH & SAF.

CODE § 8501. See also HEALTH & SAF. CODE § 8715 (taking of roadways, parks, and the like by private cemetery).

Subdivision 15

Subdivision 15 is superseded by Sections 14770 and 53040 of the Government Code.

Subdivision 16

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

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

With the repeal in 1949 of all special constitutional grants in aid of private expositions, subdivision 16 became obsolete. (The subdivision was enacted in 1911, apparently as a grant of eminent domain power to the Panama-Pacific International Exposition Company. See former CAL. CONST., Art. XI, § 8a.) *But see County of Alameda v. Meadowlark Dairy Corp.*, 227 Cal. App.2d 80, 38 Cal. Rptr. 474 (1964) (subdivision 16 relied upon to authorize condemnation by a county for fair purposes on the theory that the Constitution grants to counties a tax-exempt status which is a “thing of value . . . authorized by the Constitution” within the meaning of subdivision 16). However, subdivision 16 is no longer necessary because counties now have a specific grant of condemnation authority. GOVT. CODE § 25350.5. See also GOVT. CODE §§ 25900–25908.

Subdivision 17

Subdivision 17 is in part discontinued and in part superseded by provisions of other sections. Where other sections authorize the acquisition of “property,” the authorization subsumes particular types of property, such as those mentioned in subdivision 17: works or plants, lands, buildings, and all other improvements, rights of any nature in water, or property “of any character necessary for the purpose.” See CODE CIV. PROC. §§ 1235.170, 1240.110, 1240.120. The authority to condemn for a particular purpose includes the authority to condemn all property necessary for the proper development and control of that purpose at the time of the taking of the property, as well as

in the future. CODE CIV. PROC. §§ 1240.120, 1240.220.

The authority granted by subdivision 17 to condemn property necessary for generating, transmitting, distributing, and supplying refrigeration to any county, city and county, incorporated city or town, or irrigation district, or the inhabitants thereof is not continued. The provision has no apparent present application. There is no statute regulating the incorporation or operation of "refrigeration" companies. Hence, there is no need to continue a general condemnation authority for refrigeration. Insofar as a railroad company, for example, supplies "refrigeration" in connection with the transportation of property (see PUB. UTIL. CODE § 209), it can condemn necessary property under Public Utilities Code Section 611.

The authority granted by subdivision 17 to public entities to condemn property necessary for generating, transmitting, distributing, and supplying gas, heat, and power is continued in other sections. *E.g.*, STS. & HWYS. CODE §§ 5101(i), 5102 (Improvement Act of 1911—gas), 10010, 10100(c), 10101–10102 (Municipal Improvement Act of 1913—gas, heat, power); GOVT. CODE § 39732 (cities—gas, heat, power); PUB. UTIL. CODE §§ 10002 (municipal corporation—heat, power), 12703, 12801 (municipal utility districts), 16404, 16461 (public utility districts). See also Comments to subdivisions 12 and 13 *supra*, relating to electrical power. For the authority of irrigation districts to condemn for electrical power, see Comments to subdivisions 12 and 13 *supra*.

The authority granted by subdivision 17 to private persons to condemn property necessary for generating, transmitting, distributing, and supplying gas, heat, and power is continued to the extent the private person is a public utility. See Comments to subdivisions 12 and 13 *supra* for power of electrical corporations to supply electrical power. A gas corporation (see PUB. UTIL. CODE § 222) may condemn property (PUB. UTIL. CODE § 613) for its gas plant (PUB. UTIL. CODE § 221). See also 15 U.S.C. § 717(f)–(h) (1964) (Natural Gas Act—condemnation by public utility in interstate commerce). A heat corporation (see PUB. UTIL. CODE § 224) may condemn property (PUB. UTIL. CODE § 614) for its heating plant (PUB. UTIL. CODE § 223).

Subdivision 18

Subdivision 18 is superseded by Code of Civil Procedure Section 1240.120, providing general authority to condemn property necessary for protective purposes. This general authority permits condemnation to provide for the culture and growth of trees along highways without the 300-foot limitation formerly found in subdivision 18. Under Code of Civil Procedure

Section 1240.120, a condemnor may take any property “necessary” for protective purposes. See also STS. & HWYS. CODE § 104(f) (authorizing the taking of property by the Department of Transportation).

Subdivision 19

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

Subdivision 20

Subdivision 20 is superseded by provisions conferring adequate condemnation authority on all public entities authorized to operate airports. See GOVT. CODE §§ 26020 (counties), 50470 (cities, counties, cities and counties); PUB. UTIL. CODE §§ 21633 (state), 22553 (airport districts); HARB. & NAV. CODE APP. 1, §§ 4, 5, 27 (West Supp. 1967) (San Diego Unified Port District). Subdivision 20 did not authorize condemnation for airport purposes by private persons. See 9 OPS. CAL. ATTY. GEN. 187 (1947) and *City of Los Angeles v. Japan Airlines, Ltd.*, 41 Cal. App.3d 416, 426–428, 116 Cal. Rptr. 69, 76–77 (1974).

Subdivision 21

Subdivision 21 was unnecessary because it merely duplicated express grants of the power of eminent domain given the agencies engaged in slum clearance and low-rent housing by other statutes. Thus, housing authorities, which may be activated within any city or county, may condemn property for slum clearance, construction of low-cost housing, or construction of farm labor camps. HEALTH & SAF. CODE §§ 34240, 34325,

36059(i). See also HEALTH & SAF. CODE §§ 34874, 34875, 34879 (limited dividend housing corporations). The addition of Section 35167 to the Health and Safety Code to grant condemnation authority to community land chest corporations (nonprofit corporations formed under Health and Safety Code Sections 35100–35237 to provide “housing in rural and suburban areas for families of low income”) provides all of the agencies covered by subdivision 21 with adequate condemnation authority.

Subdivision 22

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

§ 1238.1 (repealed). Offstreet parking

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

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

Comment. Section 1238.1, which applied only to cities and to the City and County of San Francisco, has been repealed as unnecessary. Cities are authorized to acquire property for parking facilities by numerous other statutes. Some of these authorizations contain express powers of condemnation. *E.g.*, GOVT. CODE §§ 54031, 54341 (offstreet revenue-producing parking); STS. & HWYS. CODE §§ 4090(a), (b) (offstreet parking authorizations), 31506 (offstreet vehicle parking districts), 35108(j) (offstreet parking districts), 32802(b) (offstreet parking authorities). Other statutes merely provide for acquisition of the necessary property. *E.g.*, GOVT. CODE §§ 37353(a) (offstreet parking), 54061 (offstreet stadium-coliseum parking); STS. & HWYS. CODE § 36000(a) (offstreet business area parking facilities). However, these latter statutes are both augmented and supplemented by Government Code Section 37350.5 (general grant of condemnation authority). Cf. *City of Anaheim v. Michel*, 259 Cal. App.2d 835, 66 Cal. Rptr. 543 (1968). Thus, retention of Section 1238.1 would add nothing to the condemnation authority given cities by other statutes.

§ 1238.2 (repealed). Farmers' free market

1238.2. Subject to the provisions of this title, the right of

eminent domain may be exercised in behalf of the following public uses:

1. **Farmers' Free Market.** Contiguous property at one site necessary for the establishment of a farmers' free market solely for the vending of fresh fruits and vegetables, including property necessary or convenient for ingress thereto or egress therefrom may be acquired under this title for a public use by a county or city and county whose average population per square mile is more than ten thousand persons.

Comment. Section 1238.2, which applied only to the City and County of San Francisco, has been repealed as unnecessary. The section obviously was intended to facilitate a particular acquisition. See GOVT. CODE §§ 25350.5, 37350.5 (general grant of condemnation authority).

§ 1238.3 (repealed). Nonprofit hospitals

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

Property immediately adjacent to and necessary for the operation or expansion of a nonprofit hospital then in existence and engaged in scientific research or an educational activity and the acquisition of which has been certified as necessary by the Director of the State Department of Health, except that property devoted to use for the relief, care, or treatment of the spiritual, mental, or physical illness or ailment of humans shall not be taken under this section. The director shall adopt reasonable regulations which will provide for a public hearing to be conducted by a hearing officer in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code in the area in which the hospital is located to determine the necessity of any acquisition of property under this section prior to certifying such necessity. Written notice of such hearing shall be given to the voluntary area health planning agency, if one exists, in the area in which the hospital is located. The voluntary area health planning agency so notified shall make its recommendations to the hearing officer within 90 days

from the receipt of notice and no hearing shall be held prior to the expiration of such 90-day period unless the hearing officer has received the recommendations of the voluntary area health planning agency. At such public hearing, the hearing officer shall insure that the hearing shall, in part at least, consider the proposed expansion's impact upon the delivery of health care services in the community and upon the environment, as gathered from an environmental impact report. The applicant and all interested parties to the acquisition, including the voluntary area health planning agency, shall have the right to representation by counsel, the right to present oral and written evidence and confront and cross-examine opposing witnesses. A transcript of the public hearing shall be filed with the State Department of Health as a public record.

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

Comment. Section 1238.3 is superseded by Section 1260 of the Health and Safety Code.

§ 1238.4 (repealed). Public assembly facilities

1238.4. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

Public Assembly Facilities. Public buildings and grounds for convention and exhibition halls, trade and industrial centers, auditoriums, opera houses, music halls and centers, and related facilities for public assembly including off-street motor vehicle parking places and property necessary or convenient for ingress thereto or egress therefrom.

Comment. Section 1238.4 was added to the Code of Civil Procedure in 1955, apparently to authorize counties to condemn for the purposes listed. Compare Government Code Section 25351.3(a), enacted simultaneously with Section 1238.4, granting counties the authority to construct and acquire land for such public assembly facilities. For this purpose, Section 1238.4 is

repealed as no longer necessary, for a county may condemn for any proper county function. GOVT. CODE § 25350.5.

To the extent that Section 1238.4 may incidentally have authorized other entities to condemn for the purposes listed, it is superseded by other sections. Generally, the state may condemn for public buildings and grounds for any of its activities. See Comment to subdivision 2 of former CODE CIV. PROC. § 1238. It should be noted, however, that the power of eminent domain may not be exercised on behalf of California World Trade Centers. GOVT. CODE § 8324.

Cities may condemn land for public assembly and convention halls as well as for public buildings and grounds generally. GOVT. CODE § 37501. See Comment to subdivision 3 of former CODE CIV. PROC. § 1238. In addition, cities (and counties) may construct exhibition halls, historical museums, and art galleries. GOVT. CODE § 50331. The power of eminent domain is available for these purposes. GOVT. CODE § 37350.5.

District agricultural associations and citrus fruit fairs (and counties) may construct recreational and cultural facilities of general public interest. BUS. & PROF. CODE § 19630.5. For a compilation of statutes authorizing the power of eminent domain for fair and exposition purposes, see Comment to subdivision 16 of former CODE CIV. PROC. § 1238.

Although public assembly facilities are a public use (see, e.g., *County of Los Angeles v. Anthony*, 224 Cal. App.2d 103, 36 Cal. Rptr. 308, cert. denied, 376 U.S. 963 (1964)), private persons may not condemn for that use. See former CIVIL CODE § 1001 and Comment thereto.

The authority contained in former Section 1238.4 to condemn for offstreet parking that services public assembly facilities is repealed because it duplicates broader and more general authority to condemn for offstreet parking. See Comment to former CODE CIV. PROC. § 1238.1.

The authority contained in former Section 1238.4 to condemn for access to public assembly facilities is repealed as unnecessary. The right to condemn for public assembly facilities has inherent in it the right to provide for ingress to and egress from the facilities. See CODE CIV. PROC. § 1240.120.

§ 1238.5 (repealed). Irrigation

1238.5. Irrigation is a public use in behalf of which the right of eminent domain may be exercised pursuant to this title.

Comment. Section 1238.5, declaring irrigation to be a public use, is repealed as unnecessary. All public entities authorized to

supply irrigation to the public have adequate independent authority to condemn for that purpose. See Comment to former CODE CIV. PROC. § 1238, subdivision 4 (irrigation generally, and for various specific purposes, declared to be a public use). Irrigation is a public use only so long as it is offered to the public. See *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 36 Cal. App. 556, 178 P. 150 (1918). Private persons may not condemn for this purpose. See former CIVIL CODE § 1001 and Comment to that section. However, a mutual water company does have the power of eminent domain for irrigation purposes. See PUB. UTIL. CODE § 2729 and the Comment to that section.

§ 1238.6 (repealed). Protection, preservation or reclamation of land against overflow or incursion of water

1238.6. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Protection, preservation, or reclamation of land, whether covered or uncovered by water, against the overflow or incursion of water or the threat thereof, or against the effects of subsidence of the surface of said land, as by constructing levees or by filling, diking, draining or other appropriate remedial method.

Comment. Former Section 1238.6 was enacted in 1957 to declare as a public use the protection, preservation, and reclamation of lands subject to flooding or subsidence. This declaration is no longer necessary because the scheme of the Eminent Domain Law is to eliminate a listing of general public uses and to rely instead on specific legislative authorizations to condemn. See the introductory portion of the Comment to former CODE CIV. PROC. § 1238. Generally speaking, the state (GOVT. CODE § 15853), cities (GOVT. CODE § 37350.5), and counties (GOVT. CODE § 25350.5) may condemn for any of their functions. Special districts may condemn if expressly authorized to do so. Private persons may not condemn for this purpose.

Specific authority for the above-named entities to preserve, protect, and reclaim lands subject to flooding or subsidence can be found in numerous sections. See, *e.g.*, WATER CODE §§ 12579, 12861 (flood control policy declaration), 8300–8304 (flood control by Department of Water Resources), 8590–8596, 8619 (flood control by Reclamation Board), 8000–8061 (flood control by cities), 8100 (flood control by counties), 8110 (flood control by county-formed districts), 50930 (flood control by reclamation

districts), 70150 (flood control by protection districts). See also HEALTH & SAF. CODE §§ 4602.4(e), 4627 (flood control by municipal utilities); GOVT. CODE §§ 25680–25684 (flood control by counties); PUB. RES. CODE §§ 3315–3347 (land subsidence in oil and gas pool areas), 6303 (flood control policy declaration).

The authority granted in former Section 1238.6 overlaps the authority of governmental entities to condemn for drainage, land reclamation, stream improvements, and sewerage. For compilations of these statutes, see Comments to subdivisions 3, 4, and 8 of former CODE CIV. PROC. § 1238.

§ 1238.7 (repealed). Earth fill source

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

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

Comment. Section 1238.7 is repealed as unnecessary since Section 1047, which is added to the Education Code, permits condemnation of any property necessary to carry out the functions of the district and, therefore, would permit condemnation of an earth fill source. See also CODE CIV. PROC. §§ 1235.170, 1240.110, 1240.120.

§ 1239 (repealed). Classification of estates and rights subject to be taken

1239. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, or for the protection of water bearing lands from drought therefrom of any character whatsoever from any adjacent lands.

2. Except as provided in subsections 3 and 4, or specifically in any other statute, an easement, when taken for any other use; provided, however, that when the taking is by a municipal corporation, and is for the purpose of constructing, equipping, using, maintaining or operating

any works, road, railroad, tramway, power plant, telephone line, or other necessary works or structures, for the preparation, manufacture, handling or transporting of any material or supplies required in the construction or completion by such municipal corporation of any public work, improvement, or utility, a fee simple may be taken if the legislative body of such municipal corporation shall, by resolution, determine the taking thereof to be necessary; and provided, further, that, when any land is taken for the use of a by-pass, or drainage way, or overflow channel, or a levee, or an embankment, or a cut required by the plans of the California Debris Commission referred to in that certain act of the Legislature, entitled "An act approving the report of the California Debris Commission transmitted to the Speaker of the House of Representatives by the Secretary of War on June 27, 1911, directing the approval of plans of reclamation along the Sacramento River or its tributaries or upon the swamp lands adjacent to said river, directing the State Engineer to procure data and make surveys and examinations for the purpose of perfecting the plans contained in said report of the California Debris Commission, and to make reports thereof, making an appropriation to pay the expenses of such examinations and surveys, and creating a Reclamation Board and defining its power," approved December 24, 1911, or any modifications or amendments that may be adopted to the same, either a fee simple or easement may be taken as a reclamation board shall by resolution determine may be necessary. Such resolution shall be conclusive evidence that a taking of the fee simple or easement, as the case may be, is necessary.

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

4. When the property is taken by any mutual water system, county, city and county, or incorporated city or town, or a municipal water district, or other political subdivision, regardless of the use, a fee simple may be taken if the legislative or other governing body of such mutual water system, county, city and county, or incorporated city or town, or municipal water district, or other political subdivision, shall, by resolution, determine the taking

thereof in fee to be necessary. Such resolution shall be conclusive evidence of the necessity for the taking of the fee simple. Where the fee is taken, the decree of condemnation shall specifically provide for the taking of a fee simple estate.

The provisions of this subsection shall not be applicable where the property is taken under the authority conferred by subsection 1 hereof.

Comment. Section 1239 is superseded by Section 1240.110 of the Code of Civil Procedure. See also CODE CIV. PROC. §§ 1240.040, 1245.210 *et seq.* (resolution of necessity). A background study, prepared for the Law Revision Commission, on Section 1239 is published as Taylor, *The Right to Take—The Right to Take the Fee or Any Lesser Interest*, 1 PAC. L.J. 555 (1970).

§ 1239.2 (repealed). Airspace or air easement

1239.2. Airspace above the surface of property or an air easement in such airspace may be acquired under this title by a county, city or airport district if such taking is necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such height or character as to interfere with or be hazardous to the use of such airport.

Comment. The substance of Section 1239.2 is continued in Public Utilities Code Section 21652.

§ 1239.3 (repealed). Airspace or air easement; taking near airport to provide interference-free area

1239.3. Airspace above the surface of property or an air easement in such airspace may be acquired under this title by a county, city, port district, or airport district if such taking is necessary to provide an area in which excessive noise, vibration, discomfort, inconvenience or interference with the use and enjoyment of real property located adjacent to or in the vicinity of an airport and any reduction in the market value of real property by reason thereof will occur through the operation of aircraft to and from the airport.

Comment. The substance of Section 1239.3 is continued in Public Utilities Code Section 21652.

§ 1239.4 (repealed). Airspace or air easement; uses reserved to property owner; acquisition in fee

1239.4. Where necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such a height or character as to interfere with or be hazardous to the use of such airport, land adjacent to, or in the vicinity of, such airport may be acquired under this title by a county, city or airport district reserving to the former owner thereof an irrevocable free license to use and occupy such land for all purposes except the erection or maintenance of structures or the growth or maintenance of vegetable life above a certain prescribed height or may be acquired by a county, city or airport district in fee.

Comment. The substance of Section 1239.4 is continued in Public Utilities Code Section 21652. The right under former Section 1239.4 to take a fee interest or a fee with an "irrevocable free license" reserved to the original owner is continued under Section 21652 of the Public Utilities Code which permits the taking of a fee or any lesser interest. See also CODE CIV. PROC. §§ 1240.110, 1240.120.

§ 1240 (repealed). Property subject to be taken

1240. The private property which may be taken under this title includes:

1. All real property belonging to any person;
2. Lands belonging to this state, including tide and submerged lands, not within the corporate limits of any city, or city and county, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use; provided, that all 16th and 36th sections, both surveyed and unsurveyed, owned by the state or the United States, which may now or may hereafter be included within the exterior boundaries of a national reservation, or of a reserve, or within the exterior boundaries of lands withdrawn from public entry, shall be and hereby are withheld from the operation of this title and shall not be condemned as against the state or the United States;
3. Property appropriated to public use; but such property shall not be taken unless for a more necessary

public use than that to which it has already been appropriated; provided, that where any such property has been so appropriated by any individual, firm or private corporation, the use thereof for a state highway or a public street or highway of the state, or a county, city and county, or incorporated city or town, joint highway district, or the use thereof by the state or a county, city and county, incorporated city or town, joint highway district, or irrigation or municipal water district, for the same public purpose to which it has been so appropriated, or for any other public purpose shall be deemed more necessary uses than the public use to which such property has already been appropriated; and provided further, that where property already appropriated to a public use or purpose, by any person, firm or private corporation, is sought to be taken by the state, a county, city and county, incorporated city or town, joint highway district, irrigation or municipal water district, for another public use or purpose, which is consistent with the continuance of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by the state, such county, city and county, incorporated city or town, joint highway district, or irrigation or municipal water district, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures, or improvements therein or thereon, so far as may be required by such common use. But property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated.

4. Property appropriated to any public use by any irrigation district, may be taken by another irrigation

district for another public use and purpose, which is consistent with the use of such property for such existing purposes to the same extent as such property is then used; provided, that the right to such limited use in common shall include the right to enlarge, change or improve the property so taken; provided further, that such enlargement, change or improvement shall not interfere with the original use or any necessary extension or enlargement of such use.

5. Franchises for any public utility, and all kinds of property of any nature whatsoever used, either during the existence of or at the termination of said franchise, to supply and furnish the service of such public utility, but such franchise or property shall not be taken except for a more necessary public use.

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

7. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

8. Proceedings to condemn lands belonging to this state are hereby authorized, and must be maintained and conducted in the same manner as are other condemnation proceedings provided for in this title; except, that in such proceedings the summons and a copy of the complaint must be served on the Governor, Attorney General, and the State Lands Commission of this state.

Comment. Section 1240 is superseded by the provisions listed below. Unless otherwise indicated, the references are to the Code of Civil Procedure.

Section 1240

New Provisions

Subdivision 1	§§ 1235.170, 1240.110
Subdivision 2	PUB. RES. CODE § 8030

Subdivision 3	§§ 1240.510 <i>et seq.</i> , 1240.610 <i>et seq.</i> ; see also § 1235.180
Subdivision 4	§ 1240.510 <i>et seq.</i> ; see also § 1235.180
Subdivision 5	§ 1240.610 <i>et seq.</i> ; see also §§ 1235.170, 1240.110
Subdivision 6	§ 1240.510 <i>et seq.</i> ; see also §§ 1235.170, 1240.030, 1240.110
Subdivision 7	§§ 1235.170, 1240.110
Subdivision 8	§§ 1230.020, 1235.170, 1240.110, 1250.140. <i>But see</i> §§ 1235.180, 1240.640.

§ 1241 (repealed). Prerequisites

1241. Before property can be taken, it must appear:

1. That the use to which it is to be applied is a use authorized by law;

2. That the taking is necessary to such use; provided, when the board of a sanitary district or the board of directors of an irrigation district, of a transit district, of a rapid transit district, of a public utility district, of a county sanitation district, of a community service district, or of a water district or the legislative body of a county, city and county, or an incorporated city or town, or the governing board of a school district, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, community services or water district, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; provided, that said resolution or ordinance shall not be such conclusive evidence in the case

of the taking by any county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, community services or water district, of property located outside of the territorial limits thereof.

3. If already appropriated to some public use, that the public use of which it is to be applied is a more necessary public use; provided, that where such property has been so appropriated by any individual, firm or private corporation the use thereof for a public street or highway of the state, a county, city and county, or any incorporated city or town, or joint highway district, or the use thereof by the state, a county, city and county, or any incorporated city or town, or joint highway district, or a municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, a community service district, or a water district for the same purposes to which it has been appropriated or for any public purpose, shall be deemed a more necessary use than the public use to which such property has been already appropriated; and provided, further, that property of any character, whether already appropriated to public use or not, including all rights of any nature in water, owned by any person, firm or private corporation may be taken by a county, city and county, or any incorporated city or town or by a municipal water district, or an irrigation district, a transit district, a rapid transit district, a public utility district, a community service district, or a water district, for the purpose of supplying water, or electricity for power, lighting or heating purposes to such county, city and county, or incorporated city or town, or municipal water district, or an irrigation district, a transit district, a rapid transit district, a public utility district, a community service district, or a water district, or the inhabitants thereof, or for the purpose of supplying any other public utility, or for any other public use. And such taking may be made, either to furnish a separate and distinct supply of such water, and such electricity for power, lighting or heating purposes, or to provide for any such separate and distinct other public utility or other public use; to furnish such a supply or provide for any such other public utility or other public use in conjunction with

any other supply or with any other public utility or other public use that may have been theretofore provided for or that may thereafter be provided for in so supplying or providing for such county, city and county, or incorporated city or town, or municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, a community service district, or a water district, or the inhabitants thereof; or in conjunction with any other supply or with any other public utility or other public use that may have been theretofore determined upon or that may thereafter be determined upon in accordance with law by the people of any such county, city and county, incorporated city or town or municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, a community service district, or a water district. Nothing herein contained shall be construed as in any way limiting such rights as may be given by any other law of this state to counties, cities and counties, incorporated cities or towns or municipal water districts or irrigation districts, transit districts, rapid transit districts, public utility districts, a community service district, or water districts.

But private property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, or irrigation district, or transit district, or rapid transit district, or public utility district, or community services district, or water district, may not be taken by any other county, city and county, incorporated city or town, or municipal district, or irrigation district, or transit district, or rapid transit district, or public utility district, a community services district, or water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated.

Comment. Section 1241 is superseded by the provisions of the Code of Civil Procedure indicated below.

<i>Section 1241</i>	<i>New Provisions</i>
Subdivision 1	§§ 1240.010, 1240.020
Subdivision 2	§§ 1240.030, 1240.040, 1245.210 <i>et seq.</i>
Subdivision 3	§ 1240.610 <i>et seq.</i> ; see also § 1235.180

§ 1241.7 (repealed). Park property; presumption as to best public use; declaratory relief against highway use

1241.7. (a) Except as provided in subdivision (b), notwithstanding any other provision of law to the contrary, the fact that property is appropriated for public use as a state, regional, county, or city park or recreation area, or wildlife or waterfowl management area as presently established by the Department of Fish and Game pursuant to Section 1525 of the Fish and Game Code, or historic site included in the National Register of Historic Places or state-registered landmarks, or as 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, establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

(b) When property appropriated for a public use as a state, regional, county, or city park or recreation area, or wildlife or waterfowl management area as presently established by the Department of Fish and Game pursuant to Section 1525 of the Fish and Game Code, or historic site included in the National Register of Historic Places or state-registered landmarks, or as 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, is sought to be acquired for state highway purposes, or for public utility route or structure purposes, and such park or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve was dedicated to or established for park or recreational purposes, or as a wildlife or waterfowl management area, or as an historic site included in the National Register of Historic Places or state-registered landmarks, or as 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, prior to the initiation of highway route location studies, or public utility route or structure location studies, an action for declaratory relief may be brought only by the public agency owning such park or recreational area, or wildlife or

waterfowl management area, or historic site, or ecological reserve in the superior court to determine the question of which public use is the best and most necessary public use for such property. Such action for declaratory relief shall be filed and served within 120 days after publication by the California Highway Commission or the public utility in a newspaper of general circulation pursuant to Section 6061 of the Government Code, and delivery of a written notice to the public agency owning such park or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve by the California Highway Commission or public utility that a proposed route or site or an adopted route or site includes park land or recreational area, or a wildlife or waterfowl management area, or an historic site, or an ecological reserve owned by that agency. In such declaratory relief action, the resolution of the California Highway Commission shall not be conclusive evidence of the matters set forth in Section 103 of the Streets and Highways Code. Such action for declaratory relief shall have preference over all other civil actions in the matter of setting the same for hearing or trial to the end that any such action shall be quickly heard and determined. If an action for declaratory relief is not filed and served within such 120-day period, the right to bring such action is waived and the provisions of subdivision (a) shall not apply. When a declaratory relief action, with respect to such property being sought for highway purposes, or for public utility route or structure purposes, may not be brought pursuant to this subdivision, the provisions of subdivision (a) of this section shall not apply.

Comment. Section 1241.7 is superseded by Sections 1240.680 and 1240.690 of the Code of Civil Procedure. The provision for public utility lines and structures is not continued since property appropriated to a public use by a public entity is for a more necessary public use than any use by any person that is not a public entity. CODE CIV. PROC. § 1240.650.

§ 1241.9 (repealed). Preservation of certain property in its natural condition; presumption as to best public use; declaratory relief against highway use

1241.9. (a) Except as provided in subdivision (b), notwithstanding any other provision of law to the contrary, the fact that property is owned by a nonprofit organization contributions to which are deductible for state and federal income tax purposes under the law of this state and of the United States and having the primary purpose of preserving areas in their natural condition, and that such property is open to the public subject to reasonable restrictions and is appropriate, and used exclusively, for the preservation of native plants, or native animals, including, but not limited to, mammals, birds, and marine life, or biotic communities, or geological or geographical formations of scientific or educational interest; and further that such property is irrevocably dedicated to such uses so that upon liquidation, dissolution, or abandonment of or by the owner, such property will be distributed only to a fund, foundation, or corporation whose property is likewise irrevocably dedicated to such uses, or to a governmental agency holding land for such uses; establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

(b) When property described in subdivision (a) is sought to be acquired for state highway purposes, and such property was exclusively devoted to a use or uses described in subdivision (a) prior to the initiation of highway route location studies, an action for declaratory relief may be brought only by such nonprofit organization owning such property in the superior court to determine the question of which public use is the best and most necessary public use for such property. Such action for declaratory relief shall be filed and served within 120 days after written notice to the nonprofit organization owning such property by the California Highway Commission that a proposed route or an adopted route includes such property owned by that organization; provided that such written notice need only

be given to nonprofit organizations that are on file with the Registrar of Charitable Trusts of this state. In such declaratory relief action, the resolution of the commission shall not be conclusive evidence of the matters set forth in Section 103 of the Streets and Highways Code. Such action for declaratory relief shall have preference over all other civil actions in the matter of setting the action for hearing or trial to the end that any such action shall be quickly heard and determined. If an action for declaratory relief is not filed and served within such 120-day period, the right to bring such action is waived and the provisions of subdivision (a) shall not apply. When a declaratory relief action, with respect to such property being sought for highway purposes, may not be brought pursuant to this subdivision, the provisions of subdivision (a) of this section shall not apply.

Comment. Section 1241.9 is superseded by Sections 1240.670 and 1240.690 of the Code of Civil Procedure.

§ 1242 (repealed). Location; examinations; surveys; maps; entry upon land

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

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

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

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

(e) As used in this section, "public entity" means a

public entity as defined in Section 811.2 of the Government Code.

Comment. Section 1242 is superseded by the provisions of the Code of Civil Procedure indicated below.

<i>Section 1242</i>	<i>New Provisions</i>
Subdivision (a)	§ 1240.030(b)
Subdivision (b)	§ 1245.010
Subdivisions (c), (d)	§ 1245.060
Subdivision (e)	unnecessary, see § 1235.190

§ 1242.5 (repealed). Survey and exploration of land for reservoir purposes

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

- (1) The written consent of the owner to enter upon his property and to undertake such activities; or
- (2) An order for entry from the superior court in accordance with subdivision (b).

(b) The person seeking to enter upon the property shall petition the court for an order permitting the entry and shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case. Upon such petition and after such notice has been given, the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use. After such determination, the court may issue its order permitting the entry. The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit the probable amount of compensation in the manner provided in Section 1243.6.

(c) At any time after an order has been made pursuant to subdivision (b), either party may, upon noticed motion, request the court to determine whether the nature and

scope of the activities reasonably necessary to accomplish the purpose of the entry should be modified or whether the amount deposited is the probable amount of compensation that will be awarded. If the court determines that the nature and scope of the activities to be undertaken or the amount of the deposit should be modified, the court shall make its order prescribing the necessary changes.

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

(e) The owner is entitled to recover from the person who entered his property the amount necessary to compensate the owner for any damage which arises out of the entry and for his court costs, and reasonable attorney fees to be fixed by the court, in the proceeding under this section. Where a deposit has been made pursuant to this section, the owner may, upon 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 subdivision. Thereupon, the court shall determine such amount and award it to the owner and the money on deposit shall be available for the payment of such amount. Nothing in this subdivision affects the availability of any other remedy the owner may have for the damaging of his property.

Comment. Section 1242.5 is superseded by the provisions of the Code of Civil Procedure indicated below.

<i>Section 1242.5</i>	<i>New Provisions</i>
Subdivision (a)	§ 1245.020
Subdivision (b)	§ 1245.030
Subdivision (c)	§ 1245.040
Subdivision (d)	§ 1245.050
Subdivision (e)	§ 1245.060

§ 1243 (repealed). Jurisdiction; venue; method of commencing proceedings; change of venue; lis pendens

1243. All proceedings under this title must be commenced in the superior court of the county in which the property sought to be taken is situated; provided, that

where, of any one piece or article of property, or of any one interest in or to property, sought to be taken, a portion thereof is situated in one county and another portion thereof is situated in another county, the plaintiff may commence such proceedings in any of the counties where any portion of such piece or article of property, or interest in or to property, is situated, and the county so selected is the proper county for the trial of such proceedings; and provided, further, that when the plaintiff is a county, city and county, incorporated city or town, or a municipal water district, and the property sought to be taken is situated in more than one county, then the proceeding may be brought, at the option of the plaintiff, in any county wherein is situated any of the property sought to be taken, and said proceeding may be tried in said county, with reference to any property situated in the state; provided, however, that the right in this section granted to any plaintiff to commence and try an action in any county other than the county in which may be located any property in said action sought to be taken, shall be limited to property which is owned by the defendant, or by the defendant in common with the other defendants, or some of them. All such proceedings must be commenced by filing a complaint and issuing a summons. The provisions of this code for the change of place of trial of actions shall apply to proceedings under this title except as in this section otherwise provided. Nothing herein contained shall be construed to repeal any law of this state giving jurisdiction to the Public Utilities Commission to ascertain the just compensation which must be paid in eminent domain proceedings. A *lis pendens* shall be recorded in the office of the county recorder at the time of the commencement of the action in every county in which any of the property to be affected shall be located.

Comment. Section 1243 is superseded by the provisions of the Code of Civil Procedure indicated below.

Section 1243

Sentence 1
 Sentence 2
 Sentence 3
 Sentence 4
 Sentence 5

New Provisions

§§ 1250.010–1250.030
 § 1250.110
 § 1250.040
 § 1230.060
 § 1250.150.

See also § 1250.130.

§ 1243.1 (repealed). **Inverse condemnation proceeding against public entity; grounds; effect on powers of public entity**

1243.1. In any case in which a public entity, as defined in Section 811.2 of the Government Code, which possesses the power of eminent domain establishes by resolution or ordinance the necessity to acquire a particular parcel or parcels of real property by eminent domain, and such public entity does not thereafter initiate, within six months, an action in eminent domain to take such parcel, the owner of the parcel may bring an action in inverse condemnation requiring the taking of such parcel and a determination of the fair market value payable as just compensation for such taking. In such inverse condemnation action, the court may, in addition, or in the alternative, if it finds that the rights of the owner have been interfered with, award damages for any such interference by the public entity. This section shall not affect a public entity's authority to do any of the following:

- (1) Institute a condemnation action.
- (2) Take immediate possession of the particular parcel of property sought to be condemned.
- (3) Rescind a resolution or ordinance which established the necessity to acquire a particular parcel of real property and abandon the condemnation action.

Comment. Section 1243.1 is superseded by Section 1245.260 of the Code of Civil Procedure.

§ 1243.4 (repealed). **Immediate possession and use of right of way or lands for reservoir purposes**

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

subject to the conditions prescribed by law.

Comment. Section 1243.4 is superseded by Section 1255.410 of the Code of Civil Procedure.

§ 1243.5 (repealed). Immediate possession and use of property; security

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

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

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

(2) State the purposes of the condemnation.

(3) State the amount of the deposit.

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

(c) At least 20 days prior to the time possession is taken,

the plaintiff shall serve a copy of the order on the record owner or owners of the property and on the occupants, if any. Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or has previously been served with a copy of the summons and complaint in the manner prescribed by law, in which case service of the order may be made by mail upon such person and his attorney of record, if any. If a person upon whom a copy of the order authorizing immediate possession is required to be personally served under this section resides out of the State, or has departed from the State or cannot after due diligence be found within the State, the plaintiff may in lieu of such personal service send a copy of the order by registered or certified mail addressed to such person at his last known address. If a copy of the order is sent by registered or certified mail in lieu of personal service, the plaintiff shall file an affidavit in the proceeding setting forth the facts showing the reason personal service could not have been made. The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property without serving a copy of the order of immediate possession upon a record owner not occupying the property. A single service upon or mailing to those at the same address shall be sufficient. The court may, for good cause shown by affidavit, shorten the time specified in this subdivision to a period of not less than three days.

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

(d) At any time after the court has made an order authorizing immediate possession, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the security that the plaintiff is required to deposit pursuant to this section if the court determines that the security which should be deposited for the taking of the property and any damage

incident thereto is different from the amount of the security theretofore deposited. Prior to judgment, such security may not be reduced to an amount less than that already withdrawn pursuant to Section 1243.7.

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

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

Comment. Section 1243.5 is superseded by the provisions of the Code of Civil Procedure indicated below.

<i>Section 1243.5</i>	<i>New Provisions</i>
Subdivision (a)	§§ 1255.010, 1255.410
Subdivision (b)	§ 1255.410
Subdivision (c)	§§ 1255.410(c), 1255.450
Subdivision (d)	§ 1255.030
Subdivision (e)	§ 1255.060
Subdivision (f)	§ 1255.470.
	See also § 1255.080.

§ 1243.6 (repealed). Deposit of security in state treasury; investment; disbursement of interest

1243.6. When money is required to be deposited as provided by Section 1243.5, the court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section it shall be held, invested, deposited, and disbursed in the manner specified in Section 1254, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that section.

Comment. Section 1243.6 is superseded by Section 1255.070 of the Code of Civil Procedure.

§ 1243.7 (repealed). Withdrawal of deposit

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

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

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

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

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

If the undertaking is executed by an admitted surety

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

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

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

(e) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the grounds that other persons are known or believed to have interests in the property. In this event the plaintiff shall attempt to personally serve on such other persons a notice to such persons that they may appear within 10 days after such service and object to such withdrawal, and that failure to appear will result in the waiver of any right to such amount withdrawn or further rights against the plaintiff to the extent of the sum withdrawn. The plaintiff shall state in such objection the names and last known addresses of other persons known or believed to have an interest in the property, whether or not it has been able to serve them with such notice and the date of such service. If the plaintiff in its objection reports to the court that it is unable to personally serve persons known or believed to have interests in the property within the 20-day period, said money shall not be withdrawn until the applicant causes such personal service to be made.

(f) If the persons so served appear and object to the withdrawal, or if the plaintiff so requests, the court shall thereupon hold a hearing after notice thereof to all parties and shall determine the amounts to be withdrawn, if any, and by whom. If the court determines that a party is

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

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

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

Comment. Section 1243.7 is superseded by the provisions of the Code of Civil Procedure indicated below.

<i>Section 1243.7</i>	<i>New Provisions</i>
Subdivision (a)	§§ 1255.210, 1255.220
Subdivision (b)	§ 1255.250
Subdivision (c)	§§ 1255.210, 1255.230

Subdivision (d)	§ 1255.230
Subdivision (e)	§ 1255.230
Subdivision (f)	§§ 1255.230, 1255.240
Subdivision (g)	§§ 1255.260, 1268.010
Subdivision (h)	§ 1255.280

§ 1244 (repealed). Complaint; parties; statement of right; map; description; parcels in same or separate proceedings; board of supervisors as plaintiff

1244. The complaint must contain:

1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled the plaintiff;

2. The names of all owners and claimants, of the property, if known, or a statement that they are unknown, who must be styled defendants;

3. A statement of the right of the plaintiff;

4. If a right of way be sought, the complaint must be accompanied by a map showing the location, general route, and termini of said right of way, so far as the same is involved in the action or proceeding;

5. A description of each piece of land, or other property or interest in or to property, sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract or piece of property, or interest in or to property, but the nature or extent of the interests of the defendants in such land need not be set forth. All parcels of land, or other property or interest in or to property, lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties. When application for the condemnation of a right of way for the purpose of sewerage is made on behalf of a settlement, or of an incorporated village or town, the board of supervisors of the county may be named as plaintiff.

Comment. Section 1244 is superseded by the provisions of the Code of Civil Procedure indicated below.

<i>Section 1244</i>	<i>New Provisions</i>
Subdivision 1	§§ 1250.210, 1250.310
Subdivision 2	§§ 1250.220, 1250.310

Subdivision 3	§ 1250.310
Subdivision 4	§ 1250.310
Subdivision 5	§§ 1250.240, 1250.310. See also § 1048 and GOVT. CODE §§ 25350.5 and 25825.

§ 1245 (repealed). Summons; issuance; contents; form; service

1245. The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, or specific descriptions of the parcels to be taken, a statement of the public use for which it is sought, and, where a general description is used, a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. Except as otherwise specified in this title, it must be in the form of a summons in civil actions, and must be served in like manner.

Comment. Section 1245 is superseded as to the form and contents of the summons by Section 1250.120 of the Code of Civil Procedure. See also Section 1250.130 (additional requirements in eminent domain proceedings where service is by publication). As to the service of summons, Section 1230.040 (rules of practice in eminent domain proceedings) incorporates the general rules provided by Sections 415.10–415.50.

§ 1245.2 (repealed). Alias summons; issuance and contents; conclusiveness of judgment by default

1245.2. A summons may be issued which contains only the names of the defendants to be served therewith and a description or descriptions of only the property sought to be condemned against the defendants. Judgment based on failure to appear and answer after service of such summons shall be conclusive against such defendants in respect only to the property described in such summons.

Comment. The substance of former Section 1245.2 is continued in Section 1250.125.

§ 1245.3 (repealed). Unknown persons as defendants; heirs and devisees of deceased claimants; publication and posting of summons; protection of interest of claimant believed dead; conclusiveness and effect of judgment

1245.3. In any action brought under this title the plaintiff may name as defendants, in addition to those persons who appear of record or are known to plaintiff to have or claim an interest in the property, "all persons unknown claiming any title or interest in or to the property," naming them in that manner, and if any person who appears of record to have or claim an interest or who is known to plaintiff to have or claim an interest in the property is dead or is believed by plaintiff to be dead, and if no executor or administrator of the estate of said person has been appointed by the superior court of the county in which the property is located who is then duly qualified, and if no certified copy of an order of the superior court of any other county appointing an executor or administrator of the estate of said person who is then duly qualified and acting has been recorded in the county in which the property is located, and if plaintiff knows of no other duly qualified and acting executor or administrator of the estate of said person and said facts are averred in the complaint or in an affidavit by the plaintiff or its attorney filed with the complaint, plaintiff may also name as defendants, "the heirs and devisees of _____ (naming such deceased claimant), deceased and all persons claiming by, through, or under said decedent," naming them in that manner, and if it is alleged that any such person is believed by plaintiff to be dead, such person may also be named as a defendant. If it appears to the satisfaction of the court by affidavit that after due diligence the plaintiff is unable to ascertain the identity and whereabouts of any person or persons sued as the heirs and devisees of a deceased claimant or one believed to be dead or the identity and whereabouts of any person or persons sued as persons claiming by, through or under said deceased claimant or one believed to be dead or the identity and whereabouts of any person or persons sued

as persons unknown claiming any title or interest in the property, the court shall make its order directing that process be served upon such persons by posting a copy of the summons on the property within 10 days after the making of the order and by publication of the same in some newspaper of general circulation published in the county in which the property is located and designated by the court as most likely to give notice to such persons once a week for four successive weeks.

Upon the trial the court shall determine the extent of and the value of the interest or damages thereto of any person whom it is alleged is dead or believed by plaintiff to be dead whose interest or claim appears of record or is known to plaintiff and unless such person or a duly qualified and acting executor or administrator of the estate of said person appears in the action, shall order the amount thereof paid to the county clerk to be held by him for the account of the persons entitled thereto and shall determine the extent of and the value of the interest or damages thereto, if any, of all persons sued as persons unknown, whether or not they are in being, and shall order the amount thereof paid to the county clerk to be held by him for the account of the persons entitled thereto. Any person claiming any title or interest of any character in or to said property, whether legal or equitable, may appear in said action.

Any judgment rendered in such a proceeding shall be binding and conclusive not only upon the persons named as defendants and served with process but upon the heirs and devisees of, and all persons claiming by, through, or under, any decedent sued and served as herein provided and upon all persons unknown claiming any right, title, estate or interest in the property described in the complaint and shall have the force and effect of a judgment in rem.

Comment. Section 1245.3 is superseded by the provisions of the Code of Civil Procedure indicated below.

<i>Section 1245.3</i>	<i>New Provisions</i>
Sentence 1	§ 1250.220
Sentence 2	§§ 1230.040, 1250.130
Sentence 3	§ 1260.240; <i>cf.</i> § 1268.110
Sentence 4	§ 1250.230
Sentence 5	§ 1250.220

§ 1245.4 (repealed). **Land shown upon map as a square or other open space; parties; authority to sue state; conclusiveness of judgment**

1245.4. Whenever in any proceeding brought under this title in which any municipal corporation is the plaintiff it is sought to condemn to public use any land or any remainder, reversion, easement or other estate therein, which land is shown upon any filed or recorded map as a "square" or other open space without any further words specifying the intentions of the owners thereof filing such map with respect thereto or the uses or purposes for which the same may have been abandoned or dedicated, and no deed, offer of dedication or other instrument appears of record in the office of the county recorder showing or indicating the uses or purposes for which the same may have been abandoned or dedicated and such map has been on file or on record for more than 50 years, the plaintiff may in said proceeding seek a judgment against the county in which the land is located and the inhabitants thereof and against the State of California and the people thereof, determining its title thereto, the uses or trusts, if any, under which it holds the same, and the purposes to which it may put the same. Authority is hereby granted in any such proceeding to sue the State of California and in any such proceeding service of process shall be made upon the Attorney General and the Director of General Services. In any such action the Attorney General shall represent the State of California in its sovereign and in its proprietary capacity and also the people of the State of California as the beneficiaries of any trust under which said land is, or is alleged to be, held. Any judgment rendered in such proceeding shall be conclusive upon the State of California and the people thereof and upon the county in which said land is located and the inhabitants thereof, if said county is made a party to said proceedings.

Comment. Section 1245.4 was evidently intended as narrowly drawn special legislation designed to aid the City of Marysville in condemning property known as Cortez Square and conveying it to the County of Yuba for the purpose of erecting a county courthouse. *Cf.* GOVT. CODE §§ 50530 and 50533, and *City of Marysville v. Boyd*, 181 Cal. App.2d 755, 5 Cal. Rptr. 598 (1960).

As such, it has outlasted any usefulness it may have had. See *City of Marysville v. Boyd, supra*. Cf. CODE CIV. PROC. § 1230.070 (effect of enactment of Eminent Domain Law).

The right of a person authorized to condemn property for a public use to name as defendants all persons public and private, known or unknown, is continued in Code of Civil Procedure Section 1250.220. See also Section 1250.140 (service on Attorney General where state is a defendant).

§ 1246 (repealed). Answer of named defendants; persons who may defend

1246. Each defendant must, by answer, set forth his estate or interest in each parcel of property described in the complaint and the amount, if any, which he claims for each of the several items of damage specified in section 1248.

All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

Comment. The first paragraph of Section 1246 is superseded by Section 1250.320. It should be noted, however, that Section 1250.320 no longer requires that the defendant specify the compensation he claims for the taking. The second paragraph of Section 1246 is superseded by Section 1250.230.

§ 1246.1 (repealed). Determination of amount of award; apportionment of award; costs

1246.1. Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of such defendants in and to the award shall be determined by the court, jury, or referee and the award apportioned accordingly. The costs of determining the apportionment of the award shall be allowed to the defendants and taxed against the plaintiff 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.

Comment. The first sentence of Section 1246.1 is superseded

by Section 1260.220 of the Code of Civil Procedure. The second sentence of Section 1246.1 is superseded by Section 1268.710.

§ 1246.2 (repealed). Award not to include penalty for prepayment of mortgage or deed of trust

1246.2. Where the property acquired for a public use is encumbered by a mortgage, deed of trust, or contract of sale, the amount payable to the mortgagee or beneficiary under the deed of trust, or seller under a contract of sale, shall not include any penalty for prepayment.

Comment. Section 1246.2 is superseded by Section 1265.240 of the Code of Civil Procedure.

§ 1246.3 (repealed). Inverse condemnation; judgment for plaintiff; costs, disbursements, and expenses

1246.3. In any inverse condemnation proceeding brought for the taking of any interest in real property, the court rendering judgment for the plaintiff by awarding compensation for such taking, or the attorney representing the public entity who effects a settlement of such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or such attorney, reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

Comment. Section 1246.3 is continued without change in Section 1036 of the Code of Civil Procedure.

§ 1246.4 (repealed). Condemnation; judgment against public entity; costs, disbursements, and expenses of owner

1246.4. In any condemnation proceeding in which the final judgment is that the public entity cannot acquire the real property, the owner shall be awarded such an amount, as determined by the court, which will reimburse him for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

Comment. Section 1246.4 is superseded by Section 1268.610 of

the Code of Civil Procedure. See also Section 1268.620 (recovery after dismissal of damages caused by possession).

§ 1247 (repealed). Powers of court

1247. The court shall have power:

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

2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor;

3. To determine the respective rights of different parties seeking condemnation of the same property.

Comment. Section 1247 is repealed. The disposition of its provisions is indicated below.

Subdivision 1. The broad jurisdictional grant to the court to regulate and determine the place and manner of making all connections and crossings of rights of way is not continued. The Public Utilities Commission has jurisdiction to determine and regulate connections and crossings of rights of way of certain public utilities. *E.g.*, CODE CIV. PROC. § 1230.060 (jurisdiction of Public Utilities Commission preserved); PUB. UTIL. CODE §§ 764 and 765 (railroad connections), 766 (connection of telephone and telegraph lines of different companies), 767 (order by Public Utilities Commission for joint use of utility facilities), 1201 and 1202 (railroad crossings). See *Breidert v. Southern Pac. Co.*, 272 Cal. App.2d 398, 77 Cal. Rptr. 262 (1969). See also *City of Union City v. Southern Pac. Co.*, 261 Cal. App.2d 777, 67 Cal. Rptr. 816 (1968). Moreover, the manner and place of street and highway connections and crossings are normally within the exclusive control of the entities concerned. *Cf.* STS. & HWYS. CODE § 100.2; CODE CIV. PROC. § 1245.250 (conclusive effect of resolution of necessity); *City of Los Angeles v. Central Trust Co.*, 173 Cal. 323, 159 P. 1169 (1969); *People v. Reed*, 139 Cal. App. 258, 33 P.2d 879 (1934). Hence, the power of the court is limited to its general authorization to determine whether the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. CODE CIV. PROC. § 1240.030. However, the power of the court to regulate and determine the place and manner of enjoying common use of rights of way is continued in Article 6 (commencing with Section 1240.510) of Chapter 4 of Title 7 of the Code of Civil Procedure. This jurisdiction extends to crossings and intersections of rights of way since crossings and intersections of rights of way are

familiar examples of common uses. *San Bernardino County Flood etc. Dist. v. Superior Court*, 269 Cal. App.2d 515, 75 Cal. Rptr. 24 (1969).

Subdivision 2. Subdivision 2 is not continued except insofar as the general rules of practice grant the court the power to hear and determine issues. See CODE CIV. PROC. § 1230.040; see also CODE CIV. PROC. § 428.10 and Comment thereto (cross-complaints).

Subdivision 3. The power of the court to determine the respective rights of different parties seeking condemnation of the same property is continued in Code of Civil Procedure Section 1260.020.

§ 1247a (repealed). Powers of court; regulation of removal or relocation of structures

1247a. The court shall also have power to regulate and determine the place and manner of removing or relocating structures or improvements, or of enjoying the common use mentioned in subdivision 3 of Section 1240.

Comment. Section 1247a is repealed, and the power granted the court by this section to regulate and determine the place and manner of enjoying common use of property already appropriated to public use (see former CODE CIV. PROC. § 1240(3)) and of removing or relocating structures or improvements in connection with such enjoyment is continued in Section 1240.630 and in Article 6 (commencing with Section 1240.510) of Chapter 4 of Title 7 of the Code of Civil Procedure. See the Comment to former Section 1247 (discussion of subdivision 1). *Cf. San Bernardino County Flood Control Dist. v. Superior Court*, 269 Cal. App.2d 514, 521-522, 75 Cal. Rptr. 24, 30 (1969). To the extent the Public Utilities Commission has jurisdiction over the manner of relocation and removal of structures and improvements of a public utility, such jurisdiction is continued. See Section 1230.060 and Comment thereto.

§ 1247b (repealed). Portion of parcel sought to be taken; preparation of map on request of defendant

1247b. Whenever in a condemnation proceeding only a portion of a parcel of property is sought to be taken and upon a request of a defendant to the plaintiff made at least 30 days prior to the time of trial, the plaintiff shall prepare a map showing the boundaries of the entire parcel, indicating thereon the part to be taken, the part remaining,

and shall serve an exact copy of such map on the defendant or his attorney at least fifteen (15) days prior to the time of trial.

Comment. Section 1247b is not continued in the Eminent Domain Law. Unlike former Section 1244, Section 1250.310 of the Code of Civil Procedure does not require that the complaint indicate whether the property taken is a part of a larger parcel, and the framing and resolution of this issue is done under general discovery and pretrial procedures. *Cf.* Section 1250.310(d) (map indicating property described in the complaint).

§ 1248 (repealed). Hearing; items to be ascertained and assessed

1248. The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceeding, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiffs. If the benefit shall be equal to the damages assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken. If the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value. If the benefit shall be greater than the damages so assessed, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but the benefit shall in no event be deducted from the value of the portion taken;

4. If the property sought to be condemned be water or

the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property;

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences, along the line of such railroad, and the cost of cattle guards, where fences may cross the line of such railroad; and such court, jury or referee shall also determine the necessity for and designate the number, place and manner of making such farm or private crossings as are reasonably necessary or proper to connect the parcels of land severed by the easement condemned, or for ingress to or egress from the lands remaining after the taking of the part thereof sought to be condemned, and shall ascertain and assess the cost of the construction and maintenance of such crossings;

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

7. As far as practicable, compensation must be assessed for each source of damages separately.

8. When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of the judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid; except that the amount for which, as between the plaintiff and the defendant, the plaintiff is liable under Section 1252.1 may not be deducted from the judgment.

9. Where property is encumbered by a mortgage or other lien and only a portion of the encumbered property

is sought to be taken, and where the property being taken, or some portion of it, is also encumbered by a mortgage or other lien which is junior to the first-mentioned lien and such junior mortgage or other lien is against only a portion of the property encumbered by the senior mortgage or other lien, it shall be determined whether the award is sufficient in amount so that the amounts owing to the holders of such senior and junior liens may be paid in full from the award.

If it is determined that the award is not sufficient in amount to pay in full such senior and junior liens, the amount of indebtedness which is secured respectively by the senior and junior liens on the property taken, and which will be paid from the award or deducted from the judgment pursuant to subdivision 8, shall be determined as follows:

(a) The total amount of the award which will be available for payment to the senior and junior lienholders shall be determined. Such amount shall tentatively be allocated first to the senior lien up to the full amount of the indebtedness secured by the senior lien, and the remainder, if any, shall tentatively be allocated to the junior lien.

(b) It shall then be determined whether the payment to the junior lienholder of the amount tentatively allocated to the junior lien together with elimination of the junior lien on the property taken, would cause the junior lienholder's security remaining after the taking, if any, to be of less value in proportion to the indebtedness owing after the taking than was the value of his security prior to the taking in proportion to the indebtedness to him prior to the taking.

(c) If it is determined that the proportionate security of the junior lienholder would be reduced by the taking if only the tentative amount allocated to the junior lien were paid to the junior lienholder, the tentative allocations to the senior and the junior liens shall be adjusted. To make such adjustment there shall be deducted from the amount tentatively allocated to the senior lien, and there shall be added to the amount tentatively allocated to the junior lien, an amount sufficient, considering the junior lienholder's remaining lien on property not taken, to preserve the security of the holder of the junior lien for amounts which will remain owing to him after payment to him from the

award. Deduction shall not be made from the amount tentatively allocated to the senior lien to the extent that the remaining amount allocated to the senior lien, if paid to the senior lienholder, would cause the security of the senior lienholder remaining after the taking to be of less value in proportion to the amount remaining owing to him after such payment, than the value of his security prior to the taking, in proportion to the amount secured by his lien before such payment.

(d) No adjustment of the tentative allocations shall be made if it is determined that the security of the junior lienholder which will remain after the taking appears to be sufficient in value to satisfy the indebtedness which will remain owing to the junior lienholder after the taking.

The amounts tentatively allocated to such senior and junior liens, adjusted by such deduction and addition, if any, are the amounts of indebtedness owing to such senior and junior lienholders which are secured by their respective liens on the property taken, and any other indebtedness owing to the senior or junior lienholders shall not be considered as secured by the property to be taken. If the amount of such indebtedness payable to either the senior or to the junior lienholder is not due at the time of entry of the judgment, and the plaintiff makes the election provided in subdivision 8, the indebtedness which shall be deducted from the judgment is the indebtedness in the amount so determined, and the lien shall continue until that amount of indebtedness is paid.

Comment. Section 1248 is superseded by the provisions of the Code of Civil Procedure indicated below.

<i>Section 1248</i>	<i>New Provisions</i>	
Introductory clause	§ 1260.220	
Subdivision 1	§§ 1260.220, 1263.210, 1263.310. See also § 1048.	1260.230,
Subdivision 2	§§ 1260.230, 1263.420	1263.410,
Subdivision 3	§§ 1260.230, 1263.430	1263.410,
Subdivision 4	§§ 1263.410, § 1235.170.	1263.430; <i>cf.</i>
Subdivision 5	See discussion below.	

Subdivision 6	§ 1240.530.	See also
	§§ 1263.210, 1263.610, and	
	GOVT. CODE § 7262.	
Subdivision 7	§ 1260.230	
Subdivision 8	§ 1265.220	
Subdivision 9	§ 1265.230	

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

The duty of a railroad corporation to construct and maintain good and sufficient fences on both sides of its track and property is continued in Public Utilities Code Section 7626 *et seq.* Where any project, whether or not a railroad, would require the owner of the remainder to construct and maintain fencing to service the highest and best use of the remainder, the cost of such construction and maintenance is part of the damage caused by the project and is assessed accordingly. See, *e.g.*, *Butte County v. Boydston*, 64 Cal. 110, 29 P. 511 (1883); *California So. R.R. v. Southern Pac. R.R.*, 67 Cal. 59, 7 P. 153 (1885). See also CODE CIV. PROC. §§ 1263.450 (compensation to reflect project as proposed), 1263.610 (performance of work to reduce compensation).

The duty of a railroad corporation to construct and maintain private or farm crossings over its tracks is continued in Public Utilities Code Section 7537, subject to the control of the Public Utilities Commission. Where any project, whether or not a railroad, would limit the access of the owner of the remainder so as to impair the service of the remainder for its highest and best use, the loss of access is part of the damage caused by the project and is assessed accordingly. See, *e.g.*, *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799 (1943).

§ 1248a (repealed). **Municipal public utilities; removal or relocation of railroad, streetcar, or interurban tracks; complaint; compensation**

1248a. In any proceeding taken under the provisions of this title, where any railroad, street or interurban railway tracks are situated on, upon, along or across any lands or rights of way sought to be taken therein, for road, highway, boulevard, street or alley purposes, or for the purposes of a right of way for any public utility to be constructed, completed and maintained by a county, city and county, or any incorporated city or town, or by a municipal water

district, the plaintiff shall, if the complaint contains a prayer therefor, and shows the matter hereinafter provided, obtained a final judgment of condemnation ordering, in addition to the condemnation of such lands or right of way for the purposes set forth in the complaint, the relocation or removal of any railroad, street or interurban railway tracks thereon. Where the removal or relocation of such tracks is sought in any such proceedings, the complaint must contain a description of the location and proposed location of such tracks, and must be accompanied by a map showing such location and the proposed location of such tracks. The compensation to be paid for such relocation or removal of tracks shall be ascertained and assessed in the action, as in other cases, and separately from other sources of damage.

Comment. Section 1248a is repealed. The substance of the portion of the section authorizing the plaintiff to seek relocation or removal of railway tracks in certain cases is continued in Section 7557 of the Public Utilities Code. See also CODE CIV. PROC. §§ 1240.310–1240.330 (substitute condemnation), 1240.610 (condemnation for more necessary public use). As to right of the defendant to compensation for the taking, see CODE CIV. PROC. §§ 1263.210, 1263.610.

§ 1248b (repealed). Manufacturing or industrial equipment installed for use in fixed location as realty

1248b. Equipment designed for manufacturing or industrial purposes and installed for use in a fixed location shall be deemed a part of the realty for the purposes of condemnation, regardless of the method of installation.

Comment. Section 1248b is superseded by Section 1263.205 of the Code of Civil Procedure.

§ 1249 (repealed). Compensation and damages; accrual of right; improvements after service of summons

1249. For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all

cases where such damages are allowed as provided in Section 1248; provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

Comment. Section 1249, insofar as it specified the date of valuation in an eminent domain proceeding, is superseded by Article 2 (commencing with Section 1263.110) of Chapter 9 of Title 7 of Part 3 of the Code of Civil Procedure. The provision relating to the accrual of the right to compensation is continued in Section 1263.020. The last sentence of Section 1249 is superseded by Section 1263.240. As to the measure of compensation, see generally Article 4 (commencing with Section 1263.310) of Chapter 9.

§ 1249.1 (repealed). Compensation and damages; improvements at time of service of summons

1249.1. All improvements pertaining to the realty that are on the property at the time of the service of summons and which affect its value shall be considered in the assessment of compensation, damages and special benefits unless they are removed or destroyed before the earliest of the following times:

(a) The time the title to the property is taken by the plaintiff.

(b) The time the possession of the property is taken by the plaintiff.

(c) The time the defendant moves from the property in compliance with an order of possession.

Comment. Section 1249.1 is superseded by Sections 1263.210 and 1263.230 of the Code of Civil Procedure.

§ 1249.2 (repealed). Harvesting and marketing of crops

1249.2. The condemning agency may permit the owner of the property sought to be taken to harvest and retain the financial benefit for crops planted before or after the service of summons in any eminent domain proceeding if the owner in writing agrees to assume the responsibility for

the completion of the growing process and the harvesting and marketing of the crops.

If the condemning agency takes possession of the property sought to be condemned at a time when such action prevents the property owner from harvesting and marketing crops planted before or after the service of summons in an eminent domain proceeding, then the value of such crops shall be included in the compensation awarded for the property taken.

Comment. Section 1249.2 is superseded by Section 1263.250 of the Code of Civil Procedure.

§ 1249.3 (repealed). Pretrial settlement offers

1249.3. At least 30 days prior to the date of trial, plaintiff shall file with the court and serve a copy thereof on defendant its final offer to the property sought to be condemned and defendant shall in like manner, file and serve a copy thereof on plaintiff his final demand for the property sought to be condemned. Service shall be accomplished in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the condemnor was unreasonable and that the demand of condemnee was reasonable, all viewed in the light of the determination as to the value of the subject property, the costs allowed pursuant to Section 1255 shall include all expenses reasonably and necessarily incurred in preparing for and in conducting the condemnation trial including, and not limited to, reasonable attorney's fees, appraisal fees, surveyor's fees, and the fees for other experts, where such fees are reasonably and necessarily incurred to protect defendant's interest prior to trial, during trial and in any subsequent judicial proceedings in the condemnation action.

In determining the amount of attorneys fees and expenses to be awarded under this section, the court shall consider written, revised or superseded offers and demands served and filed prior to or during the trial.

Comment. The substance of former Section 1249.3 is continued in Section 1250.410. See also Section 1235.140 (defining "litigation expenses").

§ 1250 (repealed). **Defective title; new proceedings**

1250. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this Title prescribed.

Comment. Section 1250 is not continued. The section is unnecessary because nothing in the Eminent Domain Law precludes institution of new proceedings where necessary to acquire additional interests not previously acquired.

§ 1251 (repealed). **Time for paying assessments; bond to build railroad crossings, fences and cattle guards; deposit to build highway fences**

1251. The plaintiff must, within thirty days after final judgment, pay the sum of money assessed. In case the plaintiff is the State of California, or is a public corporation, and it appears by affidavit that bonds of said State or of any agency thereof, or of said public corporation must be issued and sold in order to provide the money necessary to pay the sum assessed, then such sum may be paid at any time within one year from the date of such judgment; provided further, that if the sale of any such bonds can not be had by reason of litigation affecting the validity thereof, then the time during which such litigation is pending shall not be considered a part of the one year's time in which such payment must be made.

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

In case of property being taken by the State or any county, or city and county, for highway purposes, the State or such county, or city and county, may elect to build the fences for which damages may have been assessed and in such case the amount assessed shall be deposited with the

clerk of the court having jurisdiction of the action, and if such fences are not constructed within one year from the date of judgment the said money shall be paid to the defendant or defendants entitled thereto, or to his or their order, who shall immediately build said fences. In case the State, or county, or city and county, builds said fences the moneys deposited shall be returned to said State or county, or city and county, and in case the said moneys are paid to the owner or owners of the lands condemned and are not used for said purposes, within one year from the date of judgment, the same may be recovered by said State or county, or city and county.

Comment. The first sentence of Section 1251 is continued by Section 1268.010 of the Code of Civil Procedure. The provision of Section 1251 that extended the 30-day time for payment of the judgment by one year where necessary to permit bonds to be issued and sold is not continued.

The second and third paragraphs of Section 1251 relating to the performance of work by the plaintiff is superseded generally by Sections 1263.450 and 1263.610 of the Code of Civil Procedure. However, the cost of fences, cattle guards, and crossings is no longer assessed in an eminent domain proceeding as a separate item of damages. A railroad corporation has an affirmative duty to fence its tracks and to provide crossings as determined by the Public Utilities Commission. See PUB. UTIL. CODE §§ 7626 and 7537. The railroad is partially absolved from liability for a failure to fence if damages for the lack of a fence were awarded to the owner of adjoining property as part of compensation in an eminent domain proceeding. See PUB. UTIL. CODE § 7627.

§ 1252 (repealed). Compensation and damages; payment or deposit; execution; vacation of proceedings and restoration of possession for nonpayment

1252. Payment may be made to the defendants entitled thereto, or the money may be deposited in Court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the Court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

Comment. Section 1252 is superseded by Sections 1268.010, 1268.020, and 1268.620 of the Code of Civil Procedure.

§ 1252.1 (repealed). Liability of plaintiff for ad valorem taxes, penalties and costs; payments to defendant

1252.1. As between the plaintiff and defendant, the plaintiff is liable for any ad valorem taxes, penalties and costs upon the property sought to be taken by eminent domain that would be subject to cancellation under Chapter 4 (commencing with Section 4986) of Part 9 of Division 1 of the Revenue and Taxation Code if the plaintiff were a public agency covered by Section 4986 of the Revenue and Taxation Code and if such taxes, penalties and costs had not been paid, whether or not the plaintiff is such a public agency.

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

If the plaintiff takes possession of the property prior to judgment, the amount the defendant is entitled to be paid under this section shall be claimed at the time and in the manner provided for claiming costs. If the plaintiff does not take possession of the property prior to judgment, the amount the defendant is entitled to be paid under this section shall be claimed not later than 30 days after the title vests in the plaintiff and shall be claimed in the manner provided for claiming costs.

Comment. The first paragraph of Section 1252.1 is superseded by Section 1268.410 of the Code of Civil Procedure. The final two paragraphs are superseded by Section 1268.430.

§ 1252.2 (repealed). Separate valuation on assessment roll; application

1252.2. When the property sought to be taken by eminent domain does not have a separate valuation on the assessment roll, any party to the eminent domain proceeding may, at any time after the taxes on such property are subject to cancellation pursuant to Section 4986 of the Revenue and Taxation Code, apply to the tax collector for a separate valuation of such property in

accordance with Article 3 (commencing with 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.

Comment. Section 1252.2 is superseded by Section 1268.420 of the Code of Civil Procedure.

§ 1253 (repealed). Final order; contents; recordation; vesting of title

1253. When payments have been made and the bond given, if the plaintiff elects to give one, as required by Sections 1251 and 1252, the court shall make a final order of condemnation, which shall describe the property condemned, the estate or interest acquired therein, the purposes of such condemnation, and if possession is taken pursuant to Section 1243.5 or 1254 prior to the making and entry of the final order of condemnation, the date of such possession. For the purposes of this section, the date of possession shall be the date upon or after which the plaintiff is authorized by order of the court to take possession of the property. A certified copy of the order shall thereupon be recorded in the office of the recorder of the county in which the property is located. The title to the property described in the final order of condemnation vests in the plaintiff for the purposes described therein upon the date that a certified copy of the final order of condemnation is recorded in the office of the recorder of the county.

Comment. Section 1253 is superseded by Section 1268.030 of the Code of Civil Procedure.

§ 1254 (repealed). Possession and use of property by plaintiff pending conclusion of litigation

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

property sought to be condemned.

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

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

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

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

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

A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation.

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

(h) The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceeding), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided. The court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If the court orders deposit in the State Treasury, it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and to safely keep the same in the Condemnation Deposits Fund, which fund is hereby created in the State Treasury and for such duty he shall be liable to the plaintiff upon his official bond. Money in the Condemnation Deposits Fund shall be invested under the provisions of Article 4 (commencing with Section 16470) of Chapter 3 of Part 2 of Division 4 of Title 2 of the Government Code.

(i) The State Controller shall apportion as of June 30th

and December 31st of each year the interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

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

Comment. The disposition of the provisions of Section 1254 is indicated below; unless otherwise indicated, the new sections are in the Code of Civil Procedure.

<i>Section 1254</i>	<i>New Provisions</i>
Subdivision (a)	§§ 1268.110, 1268.130, 1268.210
Subdivision (b)	§§ 1268.210, 1268.220
Subdivision (c)	§ 1268.220
Subdivision (d)	§ 1268.130
Subdivision (e)	§§ 1268.170, 1268.230
Subdivision (f)	§ 1268.140
Subdivision (g)	§ 1268.160
Subdivision (h)	§ 1268.150; GOVT. CODE § 16429
Subdivision (i)	GOVT. CODE § 16429
Subdivision (j)	Not continued. See Comment to § 1268.710.

§ 1255 (repealed). Costs; discretion

1255. 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.

Comment. Section 1255 is superseded by Code of Civil Procedure Sections 1268.710 (costs in trial court) and 1268.720 (costs on appeal). See also Sections 1268.610 (litigation expenses upon dismissal or defeat of right to take) and 1250.410 (pretrial settlement offers).

§ 1255a (repealed). Abandonment

1255a. (a) The plaintiff may abandon the proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment. Failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceeding.

(b) The court may, upon motion made within 30 days after such abandonment, set aside the abandonment 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 the 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, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their recoverable costs and disbursements. Recoverable costs and disbursements include (1) all expenses reasonably and necessarily incurred in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action and (2) reasonable attorney fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendant's interests in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action, whether such fees were incurred for services rendered before or after the filing of the complaint. In case of a partial abandonment, recoverable costs and disbursements shall include only those recoverable costs and disbursements, or portions thereof, which would not have been incurred had the property or property interest sought to be taken after the partial abandonment been the property or property interest originally sought to be taken. Recoverable costs and disbursements, including expenses and fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions. Upon

judgment of dismissal on motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of such judgment.

(d) If, after the plaintiff takes possession of or the defendant moves from the property sought to be condemned in compliance with an order of possession, the plaintiff abandons the proceeding as to such property or a portion thereof or it is determined that the plaintiff does not have authority to take such property or a portion thereof by eminent domain, the court shall order the plaintiff to deliver possession of such property or such portion thereof to the parties entitled to the possession thereof and shall make such provision as shall be just for the payment of damages arising out of the plaintiff's taking and use of the property and damages for any loss or impairment of value suffered by the land and improvements after the time the plaintiff took possession of or the defendant moved from the property sought to be condemned in compliance with an order of possession, whichever is the earlier.

Comment. Section 1255a is superseded by the provisions of the Code of Civil Procedure indicated below.

<i>Section 1255a</i>	<i>New Provisions</i>
Subdivision (a)	§§ 1268.020, 1268.510 (a)
Subdivision (b)	§ 1268.510 (b)
Subdivision (c)	§§ 1235.140, 1268.510 (c), 1268.610
Subdivision (d)	§ 1268.620

§ 1255b (repealed). Compensation and damages; interest

1255b. (a) The compensation and damages awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

- (1) The date of the entry of judgment.
- (2) The date that the possession of the property sought to be condemned is taken or the damage thereto occurs.
- (3) The date after which the plaintiff may take possession of the property as stated in an order authorizing the plaintiff to take possession.

(b) If after the date that interest begins to accrue the defendant continues in actual possession of or receives rents, issues and profits from the property, the value of such possession and of such rents, issues and profits shall be offset

against the interest that accrues during the period the defendant continues in actual possession or receives such rents, issues or profits.

(c) The compensation and damages awarded in an eminent domain proceeding shall cease to draw interest on the earliest of the following dates:

(1) As to any amount deposited pursuant to Section 1243.5, the date that such amount is withdrawn by the person entitled thereto.

(2) As to any amount paid into court pursuant to Section 1254, the date of such payment.

(3) As to any amount paid to the person entitled thereto, the date of such payment.

(4) If the full amount the defendant is then entitled to receive as finally determined in the eminent domain proceeding together with the full amount of the interest then due thereon is paid into court for the defendant after entry of judgment, the date of such payment.

Comment. Section 1255b is superseded by the provisions of the Code of Civil Procedure indicated below.

<i>Section 1255b</i>	<i>New Provisions</i>
Subdivision (a)	§ 1268.310
Subdivision (b)	§ 1268.330
Subdivision (c)	§ 1268.320

§ 1256 (repealed). Applicable rules of practice

1256. Except as otherwise provided in this Title, the provisions of Part II of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this Title.

Comment. Section 1256 is superseded by Section 1230.040 of the Code of Civil Procedure.

§ 1256.1 (repealed). Argument; defendant's right to open and close

1256.1. Notwithstanding the provisions of Part 2 of this code, in any action brought under the provisions of this title, the defendant shall commence and conclude the argument.

Comment. Section 1256.1 is superseded by a portion of subdivision (a) of Section 1260.210 of the Code of Civil Procedure.

§ 1257 (repealed). **New trials and appeals; applicable provisions; improvements pending new trial or appeal; application of money deposited**

1257. The provisions of part II of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; *provided*, that upon the payment of the sum of money assessed, and upon the execution of the bond to build the fences and cattle-guards, as provided in section twelve hundred and fifty-one, the plaintiff shall be entitled to enter into, improve, and hold possession of the property sought to be condemned (if not already in possession) as provided in section twelve hundred and fifty-four, and devote the same to the public use in question; and no motion for new trial or appeal shall, after such payment and filing of such bond as aforesaid, in any manner retard the contemplated improvement. Any money which shall have been deposited, as provided in section twelve hundred and fifty-four, may be applied to the payment of the money assessed, and the remainder, if any there be, shall be returned to the plaintiff.

Comment. Section 1257, insofar as it provided general rules relating to new trials and appeals in an eminent domain proceeding, is superseded by Section 1230.040 of the Code of Civil Procedure. Insofar as Section 1257 related to possession after judgment, it is superseded by Section 1268.210. It might be noted that, where the judgment is reversed, vacated, or set aside, the plaintiff may obtain possession only pursuant to Article 3 (commencing with Section 1255.410) of Chapter 6 of the Eminent Domain Law. See CODE CIV. PROC. § 1268.210(c). Regarding the repayment of an excess withdrawal, see CODE CIV. PROC. § 1268.160.

§ 1258 (repealed). **Effective date; construction**

1258. With relation to the Acts passed at the present session of the Legislature, this Title must be construed in the same manner as if this Code had been passed on the last day of this session, and from and after the time this Code takes effect, all laws of this State in relation to the taking of private property for public uses are abolished, and all proceedings had in the exercise of the powers of eminent

domain must conform to the provisions of this Title.

Comment. Section 1258, insofar as it required the exercise of the power of eminent domain to conform to the provisions of Title 7 of Part 3 of the Code of Civil Procedure, is superseded by Section 1230.020.

§ 1259 (repealed). Effective date

1259. Title VII of Part III of THE CODE OF CIVIL PROCEDURE of the State of California (this Title) shall be in force and effect from and after the fourth day of April, one thousand eight hundred and seventy-two.

Comment. Section 1259 is obsolete.

§ 1260 (repealed). Construction

1260. From and after the time this Title takes effect, it must be construed in the same manner as it would be were Sections 4 and 17 of this Code in force and effect.

Comment. Section 1260 is superseded generally by Article 1 (commencing with Section 1235.010) of Chapter 2 of the Eminent Domain Law. See Comment to Section 1235.010.

§ 1261 (repealed). Pending proceedings; effect upon

1261. No proceeding to enforce the right of eminent domain commenced before this Title takes effect, is affected by the provisions of this Title.

Comment. Section 1261 is superseded by Section 1230.065 of the Code of Civil Procedure.

§ 1262 (repealed). Rules of practice

1262. Until the first day of January, one thousand eight hundred and seventy-three, at twelve o'clock noon, the provisions of Sections 1256 and 1257 of this Title are suspended, and until then, except as otherwise provided in this Title, the rules of pleading and practice in civil actions now in force in this State are applicable to the proceedings mentioned in this Title, and constitute the rules of pleading and practice therein.

Comment. Section 1262 is superseded by Section 1230.065 of the Code of Civil Procedure.

§ 1263 (repealed). **Construction; statutes providing for taking for street purposes**

1263. Nothing in this Code must be construed to abrogate or repeal any statute providing for the taking of property in any city or town for street purposes.

Comment. Section 1263 is superseded generally by Section 1230.020 of the Code of Civil Procedure which provides that the power of eminent domain shall be exercised as provided by the Eminent Domain Law except where otherwise specifically provided by statute.

§ 1264 (repealed). **Preference; setting for trial and hearing**

1264. In all actions brought under the provisions of this title, to enforce the right of eminent domain, all courts wherein such actions are or may hereafter be pending, shall give such actions preference over all other civil actions therein, in the matter of setting the same for hearing or trial, and in hearing the same, to the end that all such actions shall be quickly heard and determined.

Comment. Section 1264 is superseded by Section 1260.010 of the Code of Civil Procedure.

§ 1264.1 (repealed). **Franchise to collect tolls**

1264.1. Where the property sought to be condemned is a franchise of limited duration to collect tolls on any bridge or highway, the plaintiff may condemn the right to take such franchise as of a future date, which date shall be specified in the complaint and in the judgment of condemnation.

Comment. Section 1264.1 and its implementing sections (Sections 1264.2–1264.6 and 1264.8), relating to condemnation of toll franchises of limited duration as of a future date, are not continued. These sections were of extremely limited application and are presently of little or no significance, for there appear to be no existing toll bridge or toll road franchises. In addition, these sections largely restated the rules of eminent domain that would be applicable in their absence. See Comment, *Work of the 1937 California Legislature*, 11 SO. CAL. L. REV. 1, 33–39 (1937).

For related provisions, see CODE CIV. PROC. §§ 1235.170 (“property” defined) and 1240.110 (right to acquire necessary interest in property); STS. & HWYS. CODE §§ 30800 and 30810 (granting franchises); PUB. UTIL. CODE § 1403 (condemnation of

utilities); CAL. CONST., Art. XII, § 8 (right of Legislature). See also former CODE CIV. PROC. §§ 1238(4) and 1240(5) and Comments thereto (condemnation of toll bridges and roads, and of franchises).

§ 1264.2 (repealed). Franchise to collect tolls; measure of damages

1264.2. The measure of damages in the case of a proceeding coming under section 1264.1 shall, except as provided in section 1264.3, be the value of the rights granted under said franchise for the period between said date and the expiration of said franchise, due consideration being had to the burdens as well as the benefits conferred by such franchise.

Comment. See Comment to former Code of Civil Procedure Section 1264.1.

§ 1264.3 (repealed). Franchise to collect tolls; provision in franchise for acquisition of road or bridge; amount of compensation

1264.3. If provision was made in the franchise sought to be condemned or in the applicable statutes under which the franchise was granted for the acquisition of said toll bridge or toll road or said franchise by the county granting the franchise or by the counties, jointly acting, in which the toll bridge or toll road is situate, on the payment of the fair cash value of said toll bridge or toll road, without consideration of the value of the franchise, then and in that event, in any proceeding brought for the taking of such franchise, the compensation awarded shall not exceed the fair cash value of such toll bridge or toll road, exclusive of the value of the franchise.

Comment. See Comment to former Code of Civil Procedure Section 1264.1.

§ 1264.4 (repealed). Franchise to collect tolls; amendment of complaint on new trial

1264.4. If a new trial is granted or the judgment is reversed and remanded for a new trial, the plaintiff shall have the right as a matter of course, in cases coming under section 1264.1 to amend the complaint to specify a different date as of which said franchise shall be taken.

Comment. See Comment to former Code of Civil Procedure Section 1264.1.

§ 1264.5 (repealed). **Franchise to collect tolls; affirmance on appeal; deduction of net receipts if plaintiff offered to pay judgment; net receipts defined; exception**

1264.5. If the defendant appeals from the judgment and the judgment is affirmed in a case coming under Section 1264.1, the plaintiff shall be entitled to have deducted from the principal of the judgment to be paid the net receipts of tolls collected or collectible from the date for the taking as specified in the judgment to the date on which the judgment of the reviewing court becomes final, on showing that prior to the date specified for said taking the plaintiff was able to pay the said judgment and offered to pay the same to the defendant, or into court for his benefit, in return for a waiver of the appeal. The term "net receipts" means the sum obtained by subtracting from the total amount of tolls collected or collectible the amounts actually and necessarily expended or incurred for operation and maintenance of said toll road or toll bridge during said period.

This section does not apply in those cases in which the plaintiff takes possession pending appeal pursuant to the provisions of Section 1254 or takes possession under the provisions of Section 14 of Article I of the Constitution.

Comment. See Comment to former Code of Civil Procedure Section 1264.1.

§ 1264.6 (repealed). **Franchise to collect tolls; determination of deduction of net receipts; motion; jury trial**

1264.6. To secure the deduction specified in Section 1264.5 the plaintiff must within 10 days after the remittitur is received from the reviewing court serve on the defendant and file in the superior court his motion to set for hearing the question of the deduction to be made. If, on the hearing of said motion, proof is made to the satisfaction of the court of plaintiff's ability to pay, and offer to pay, the judgment, as specified in Section 1264.5, the court shall grant the motion and shall fix a time for the determination

of the amount to be deducted, which amount shall be determined by the court sitting without a jury unless plaintiff or defendant on or before the date of the hearing of said motion to set files with the court a demand in writing for a jury, in which case the said amount shall be determined by a jury.

Comment. See Comment to former Code of Civil Procedure Section 1264.1.

§ 1264.7 (repealed). Judgment and final judgment defined

1264.7. The term “judgment” as used in this title means the judgment determining the right to condemn and fixing the amount of compensation to be paid by the plaintiff. The term “final judgment” as used in this title means such judgment when all possibility of direct attack thereon by way of appeal, motion for a new trial, or motion to vacate the judgment has been exhausted.

Comment. The first sentence of Section 1264.7 is superseded by Section 1235.130 of the Code of Civil Procedure. The second sentence of Section 1264.7 is superseded by Section 1235.120.

§ 1264.8 (repealed). Franchise to collect tolls; time for payment of judgment; extension; abandonment

1264.8. In any case brought under Section 1264.1, the plaintiff shall have the full period specified in Section 1251 in which to pay the judgment, but in case the period specified in that section expires prior to the date specified in the judgment for the taking of said franchise, the period shall be extended to and including the day preceding said specified date.

No abandonment shall be implied under section 1255a unless the judgment is not paid within the time herein specified.

Comment. See Comment to former Code of Civil Procedure Section 1264.1.

§ 1264.9 (repealed). Franchise to collect tolls; toll road or bridge; award to county, city, or public mandatory for taxes, etc.

1264.9. In any action for the acquisition hereunder of a toll road or toll bridge or the franchise for the collection of tolls thereon, the court in which such action is pending shall have jurisdiction to determine the liability of the condemning party to any county, city or other public mandatory for taxes, license fees or franchise payments and to determine the reversionary rights of any such county, city or other public mandatory in or to the franchise or property so sought to be acquired, and if, and in the event, any such liability be so determined against said condemning party, then and in that event an award shall be made to such county, city or other public mandatory, pursuant to the provisions of the law.

Comment. Section 1264.9—relating to the jurisdiction of the court to determine the liability of a condemnor for taxes, license fees, and franchise payments on, as well as reversionary interests of a city, county, or other public mandatory in, a toll bridge or toll road or franchise thereon—is not continued. The section was of little or no current significance, for there appear to be few existing private toll roads or bridges and no existing franchises for their operation. Moreover, the court has general jurisdiction to determine matters incident to the condemnation of property (*cf.* former CODE CIV. PROC. § 1247(2) and Comment thereto) as well as specific jurisdiction to determine liability for taxes (see REV. & TAX. CODE § 4986; see also CODE CIV. PROC. §§ 1268.410–1268.430).

§ 1265 (repealed). Acquisition of realty by public agency; purchase price as public information

1265. Whenever any public agency acquires real property by eminent domain, purchase, or exchange, the purchase price or other consideration paid by such agency shall be public information made available upon request from the agency concerned.

Comment. Section 1265 is superseded by Section 7275 of the Government Code.

§ 1266 (repealed). Taking whole parcel where award for part would equal value of whole

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

Comment. Section 1266 is superseded by Section 1240.410 *et seq.* of the Code of Civil Procedure.

§ 1266.1 (repealed). Acquisition by gift or purchase; purposes

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

Comment. Section 1266.1 is superseded by Sections 1240.130 and 1240.150 of the Code of Civil Procedure.

§ 1266.2 (repealed). Compensation or fee for appraisers, referees, commissioners, etc.

1266.2. In any action or proceeding for the purpose of condemning property where the court may appoint appraisers, referees, commissioners, or other persons for the purpose of determining the value of such property and fixing the compensation thereof, and may fix their fees or compensation, the court may set such fees or compensation in an amount as determined by the court to be reasonable, but such fees shall not exceed similar fees for similar services in the community where such services are rendered.

Comment. Section 1266.2 is not continued. The limitation on the court's power to fix fees was inappropriate and served to prevent the court from obtaining the best qualified experts in

cases where there was no expert available in the immediate community.

§ 1267 (repealed). Expert witnesses; limitations

1267. (a) Notwithstanding any other provision of law, only two experts shall be permitted to testify for any party as to each parcel in an eminent domain proceeding; but, for good cause shown, the court may permit one or more additional experts to testify for any party. If one or more experts are regularly employed and paid as such by the plaintiff, at least one of the experts who is called as a witness by the plaintiff may be such an employee.

(b) Nothing in this section shall be construed as limiting the number of witnesses, other than experts, which a party may call in such proceeding, including a person who is qualified to testify pursuant to paragraph (2) of subdivision (a) of Section 813 of the Evidence Code.

(c) As used in this section, "expert" means a person who is qualified to testify pursuant to paragraph (1) of subdivision (a) of Section 813 of the Evidence Code.

Comment. Section 1267 is not continued. The repeal of this section does not, however, affect the general authorization to control the number of expert witnesses provided by Section 723 of the Evidence Code.

**Chapter 2. Exchange of Information in
Eminent Domain Proceedings**

§ 1272.01 (repealed). Exchange of lists of expert witnesses and statements of valuation data

1272.01. (a) Not later than 50 days prior to the day set for the trial, any party to an eminent domain proceeding may serve upon any adverse party and file a demand to exchange lists of expert witnesses and statements of valuation data.

(b) A party on whom a demand is served may, not later than 40 days prior to the day set for the trial, serve upon any adverse party and file a cross-demand to exchange lists of expert witnesses and statements of valuation data relating to the parcel of property described in the demand.

(c) The demand or cross-demand shall:

(1) Describe the parcel of property to which the

demand or cross-demand relates, which description may be made by reference to the complaint.

(2) Include a statement in substantially the following form: “You are required to serve and deposit with the clerk of court a list of expert witnesses and statements of valuation data in compliance with Chapter 2 (commencing with Section 1272.01) of Title 7 of Part 3 of the Code of Civil Procedure not later than 20 days prior to the day set for trial. Except as otherwise provided in that chapter, your failure to do so will constitute a waiver of your right to call unlisted expert witnesses during your case in chief and of your right to introduce on direct examination during your case in chief any matter that is required to be, but is not, set forth in your statements of valuation data.”

(d) Not later than 20 days prior to the day set for trial, each party who served a demand or cross-demand and each party upon whom a demand or cross-demand was served shall serve and deposit with the clerk of the court a list of expert witnesses and statements of valuation data. A party who served a demand or cross-demand shall serve his list and statements upon each party on whom he served his demand or cross-demand. Each party on whom a demand or cross-demand was served shall serve his list and statements upon the party who served the demand or cross-demand.

(e) The clerk of the court shall make an entry in the register of actions for each list of expert witnesses and statement of valuation data deposited with him pursuant to this chapter. The lists and statements shall not be filed in the proceeding, but the clerk shall make them available to the court at the commencement of the trial for the limited purpose of enabling the court to apply the provisions of this chapter. Unless the court otherwise orders, the clerk shall, at the conclusion of the trial, return all lists and statements to the attorneys for the parties who deposited them. Lists or statements ordered by the court to be retained may thereafter be destroyed or otherwise disposed of in accordance with the provisions of law governing the destruction or disposition of exhibits introduced in the trial.

Comment. Subdivisions (a) and (c) of Section 1272.01 are superseded by Section 1258.210 of the Code of Civil Procedure.

Subdivisions (d) and (e) are superseded by Sections 1258.220 and 1258.230. Subdivision (b) is not continued.

§ 1272.02 (repealed). Statement of valuation data; persons from whom exchanged; contents

1272.02. (a) A statement of valuation data shall be exchanged for each person intended to be called as a witness by the party to testify to his opinion as to any of the following matters:

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

(2) The amount of the damage, if any, to the remainder of the larger parcel from which such property is taken.

(3) The amount of the special benefit, if any, to the remainder of the larger parcel from which such property is taken.

(b) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in subdivision (a) and, as to each such matter upon which he will give an opinion, what that opinion is and the following items to the extent that the opinion on such matter is based thereon:

(1) The estate or interest being valued.

(2) The date of valuation used by the witness.

(3) The highest and best use of the property.

(4) The applicable zoning and the opinion of the witness as to the probability of any change in such zoning.

(5) The sales, contracts to sell and purchase, and leases supporting the opinion.

(6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or obsolescence the improvements have suffered, and the method of calculation used to determine depreciation.

(7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements thereon, and the estimated gross rental income and deductions therefrom upon which such reasonable net rental value is computed; the rate of capitalization used; and the value indicated by such

capitalization.

(8) If the property is a portion of a larger parcel, a description of the larger parcel and its value.

(c) With respect to each sale, contract, or lease listed under paragraph (5) of subdivision (b):

(1) The names and business or residence addresses, if known, of the parties to the transaction.

(2) The location of the property subject to the transaction.

(3) The date of the transaction.

(4) If recorded, the date of recording and the volume and page or other identification of the record of the transaction.

(5) The price and other terms and circumstances of the transaction. In lieu of stating the terms contained in any contract, lease, or other document, the statement may, if the document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

(d) If any opinion referred to in subdivision (a) is based in whole or in substantial part upon the opinion of another person, the statement of valuation data shall include the name and business or residence address of such other person, his business, occupation, or profession, and a statement as to the subject matter to which his opinion relates.

(e) Except when an appraisal report is used as a statement of valuation data as permitted by subdivision (f), the statement of valuation data shall include a statement, signed by the witness, that the witness has read the statement of valuation data and that it fairly and correctly states his opinions and knowledge as to the matters therein stated.

(f) An appraisal report that has been prepared by the witness which includes the information required to be included in a statement of valuation data may be used as a statement of valuation data under this chapter.

Comment. Subdivision (a) of Section 1272.02 is superseded by Section 1258.250 of the Code of Civil Procedure. Subdivisions (b) through (f) are superseded by Section 1258.260.

§ 1272.03 (repealed). **List of expert witnesses; contents**

1272.03. The list of expert witnesses shall include the name, business or residence address, and business, occupation, or profession of each person intended to be called as an expert witness by the party and a statement as to the subject matter to which his testimony relates.

Comment. Section 1272.03 is superseded by Section 1258.240 of the Code of Civil Procedure.

§ 1272.04 (repealed). **Notice to persons upon whom list and statements served of additional witnesses or data; form**

1272.04. (a) A party who is required to exchange lists of expert witnesses and statements of valuation data shall diligently give notice to the parties upon whom his list and statements were served if, after service of his list and statements, he:

(1) Determines to call an expert witness not included in his list of expert witnesses to testify on direct examination during his case in chief;

(2) Determines to have a witness called by him testify on direct examination during his case in chief to any opinion or data required to be listed in the statement of valuation data for that witness but which was not so listed; or

(3) Discovers any data required to be listed in a statement of valuation data but which was not so listed.

(b) The notice required by subdivision (a) shall include the information specified in Sections 1272.02 and 1272.03 and shall be in writing; but such notice is not required to be in writing if it is given after the commencement of the trial.

Comment. Section 1272.04 is superseded by Section 1258.270 of the Code of Civil Procedure.

§ 1272.05 (repealed). **Limitations upon calling witnesses and testimony by witnesses**

1272.05. Except as provided in Section 1272.06, upon objection of any party who has served his list of expert witnesses and statements of valuation data in compliance with Section 1272.01:

(a) No party required to serve a list of expert witnesses may call an expert witness to testify on direct examination during the case in chief of the party calling him unless the

information required by Section 1272.03 for such witness is included in the list served by the party who calls the witness.

(b) No party required to serve statements of valuation data may call a witness to testify on direct examination during the case in chief of the party calling him to his opinion of the value of the property described in the demand or cross-demand or the amount of the damage or benefit, if any, to the remainder of the larger parcel from which such property is taken unless a statement of valuation data for the witness was served by the party who calls the witness.

(c) No witness called by any party required to serve statements of valuation data may testify on direct examination during the case in chief of the party who called him to any opinion or data required to be listed in the statement of valuation data for such witness unless such opinion or data is listed in the statement served, except that testimony that is merely an explanation or elaboration of data so listed is not inadmissible under this section.

Comment. Section 1272.05 is superseded by Section 1258.280 of the Code of Civil Procedure.

§ 1272.06 (repealed). Grounds for court authority to call witness or permit testimony by witness

1272.06. (a) The court may, upon such terms as may be just, permit a party to call a witness, or permit a witness called by a party to testify to an opinion or data on direct examination, during the party's case in chief where such witness, opinion, or data is required to be, but is not, included in such party's list of expert witnesses or statements of valuation data if the court finds that such party has made a good faith effort to comply with Sections 1272.01 to 1272.03, inclusive, that he has complied with Section 1272.04, and that, by the date of the service of his list and statements, he:

(1) Would not in the exercise of reasonable diligence have determined to call such witness or discovered or listed such opinion or data; or

(2) Failed to determine to call such witness or to discover or list such opinion or data through mistake,

inadvertence, surprise, or excusable neglect.

(b) In making a determination under this section, the court shall take into account the extent to which the opposing party has relied upon the list of expert witnesses and statements of valuation data and will be prejudiced if the witness is called or the testimony concerning such opinion or data is given.

Comment. Section 1272.06 is superseded by Section 1258.290 of the Code of Civil Procedure.

§ 1272.07 (repealed). Applicability of chapter

1272.07. This chapter does not apply in any eminent domain proceeding in any county having a population in excess of 4,000,000 in which a pretrial conference is held.

Comment. Section 1272.07 is superseded by Section 1258.300 of the Code of Civil Procedure. However, Section 1258.300 is not limited solely to Los Angeles County but authorizes any county with the approval of the Judicial Council to provide exchange procedures in lieu of those provided by statute.

§ 1272.08 (repealed). Use of discovery procedures

1272.08. The procedure provided in this chapter does not prevent the use of discovery procedures or limit the matters that are discoverable in eminent domain proceedings. Neither the existence of the procedure provided by this chapter, nor the fact that it has or has not been invoked by a party to the proceeding, affects the time for completion of discovery in the proceeding.

Comment. Section 1272.08 is superseded by Sections 1258.010 and 1258.020 of the Code of Civil Procedure.

§ 1272.09 (repealed). Admissibility of evidence

1272.09. Nothing in this chapter makes admissible any evidence that is not otherwise admissible or permits a witness to base an opinion on any matter that is not a proper basis for such an opinion.

Comment. Section 1272.09 is superseded by Section 1258.030 of the Code of Civil Procedure.

Chapter 3. Arbitration of Compensation in Acquisitions of Property for Public Use

§ 1273.01 (repealed). Public entity defined

1273.01. As used in this chapter, “public entity” includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

Comment. Section 1273.01 is not continued because it is unnecessary. See CODE CIV. PROC. § 1235.190.

§ 1273.02 (repealed). Person authorized to enter arbitration agreement; “person” defined

1273.02. (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.

Comment. Section 1273.02 is continued without substantive change in Code of Civil Procedure Section 1273.010.

§ 1273.03 (repealed). Expenses and fees payable by party acquiring property; fees of any other party payable by agreement; source of funds

1273.03. (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.

Comment. Section 1273.03 is continued without substantive change in Code of Civil Procedure Section 1273.020.

§ 1273.04 (repealed). Applicability of Title 9; exceptions

1273.04. (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 an eminent domain proceeding has been commenced or is commenced, any petition or response relating to the arbitration shall be filed and determined in the eminent domain proceeding.

(c) Notwithstanding Section 1281.4, 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 eminent domain proceeding, the court shall stay the determination of compensation until any petition for an order to arbitrate is determined and, if arbitration is ordered, until arbitration is had in accordance with the order.

(d) The effect and enforceability of an agreement authorized by this 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 proceedings.

(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.

Comment. Section 1273.04 is continued without substantive change in Code of Civil Procedure Section 1273.030.

§ 1273.05 (repealed). Abandonment of proceedings; time

1273.05. (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 and 1288.2.

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

Comment. Section 1273.05 is continued without substantive change in Code of Civil Procedure Section 1273.040.

§ 1273.06 (repealed). Agreements acknowledged, recorded, and re-recorded; notice; memorandum

1273.06. (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.

Comment. Section 1273.06 is continued without substantive change in Code of Civil Procedure Section 1273.050.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Relocation Assistance by
Private Condemnors

October 1975

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

CALIFORNIA LAW REVISION COMMISSION

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GEORGE H. MURPHY
Ex Officio

October 11, 1975

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study and make recommendations relating to condemnation law and procedure. The Commission has previously submitted recommendations concerning various aspects of condemnation law and procedure, including the recently enacted Eminent Domain Law (Cal. Stats. 1975, Ch. 1275). The Commission submits herewith a recommendation dealing with another aspect of its study—relocation assistance by private condemners.

Respectfully submitted,
MARC SANDSTROM
Chairman

RECOMMENDATION

relating to

RELOCATION ASSISTANCE BY PRIVATE CONDEMNORS

California's general relocation assistance statute¹ was enacted primarily to implement the requirements imposed on the state by the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970² and to more adequately compensate persons whose property is taken for public use. One major purpose of the statute was to assure a uniform policy of relocation assistance to all persons in the state regardless of the acquiring entity.³

By its terms, the relocation assistance statute applies only to acquisitions by public entities. But, in California, private persons also may exercise the power of eminent domain to acquire private property for public use.⁴

Of the private condemners, only privately owned public utilities acquiring real property by eminent domain must comply with relocation assistance provisions applicable to public entities.⁵ Such private condemners as nonprofit hospitals, nonprofit colleges, nonprofit cemeteries, nonprofit housing corporations, and mutual water companies are not required to comply with the relocation assistance provisions.

The Law Revision Commission recommends that all private condemners be required to comply with the relocation assistance provisions imposed on public entities. This will assure that every person in the state whose property is acquired by eminent domain will be treated

¹ Govt. Code §§ 7260-7275.

² 42 U.S.C. §§ 4601-4655 (1971).

³ Comment, *Relocation Assistance in California: Legislative Response to the Federal Program*, 3 Pac. L.J. 114, 118 (1972).

⁴ See, e.g., Pub. Util. Code §§ 610-624 (Cal. Stats. 1975, Ch. 1240, § 65) (public utilities); Health & Saf. Code § 1260 (Cal. Stats. 1975, Ch. 1240, § 43) (nonprofit hospitals); Educ. Code § 30051 (Cal. Stats. 1975, Ch. 1240, § 14) (nonprofit colleges); Health & Saf. Code §§ 8501 (Cal. Stats. 1975, Ch. 1240, § 45) (nonprofit cemeteries), 34874 (limited dividend housing corporations), 35167 (Cal. Stats. 1975, Ch. 1240, § 55) (land chest corporations); Pub. Util. Code § 2729 (Cal. Stats. 1975, Ch. 1240, § 68) (mutual water companies).

⁵ Pub. Util. Code § 600.

fairly and equally and that the burdens of compensation accompany the right of condemnation.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Section 7276 to the Government Code, relating to eminent domain relocation assistance.

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

SECTION 1. Section 7276 is added to the Government Code, to read:

7276. A person acquiring real property by eminent domain shall provide relocation advisory assistance and shall make any of the payments required to be made by public entities pursuant to the provisions of this chapter.

This section does not apply to public utilities which are subject to the provisions of Article 6 (commencing with Section 600) of Chapter 3 of Part 1 of Division 1 of the Public Utilities Code or to public entities which are subject to the provisions of this chapter.

Comment. Section 7276 is new. The relocation assistance provisions of Sections 7260-7275 are applicable by their terms only to public entities. Section 7276 extends their application to eminent domain acquisitions by private condemners other than public utilities. Public utilities are covered by Public Utilities Code Section 600. Private condemners that would be covered by Section 7276 include nonprofit hospitals (Health & Saf. Code § 1260), nonprofit colleges (Educ. Code § 30051), nonprofit cemeteries (Health & Saf. Code § 8501), limited dividend housing corporations (Health & Saf. Code § 34874), land chest corporations (Health & Saf. Code § 35167), and mutual water companies (Pub. Util. Code § 2729).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Condemnation for Byroads and
Utility Easements

October 1975

CALIFORNIA LAW REVISION COMMISSION
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The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study and make recommendations relating to condemnation law and procedure. The Commission has previously submitted recommendations concerning various aspects of condemnation law and procedure, including the recently enacted Eminent Domain Law (Cal. Stats. 1975, Ch. 1275). The Commission submits herewith a recommendation dealing with another aspect of its study—condemnation for byroads and utility easements.

Respectfully submitted,
MARC SANDSTROM
Chairman

RECOMMENDATION

relating to

CONDEMNATION FOR BYROADS AND UTILITY EASEMENTS

The 1975 Legislature, on recommendation of the California Law Revision Commission,¹ abolished private condemnation authority² except for condemnation by public utilities³ and five types of quasi-public entities—nonprofit hospitals,⁴ nonprofit educational institutions of collegiate grade,⁵ nonprofit cemeteries,⁶ certain nonprofit housing corporations,⁷ and mutual water companies.⁸

This recommendation is concerned with private condemnation to provide appurtenant easements necessary for access or utility service to property of the condemnor. Prior to 1975, the law permitted private persons to condemn appurtenant easements for access and utility service purposes.⁹ This authority served the function

¹ *Recommendation Proposing the Eminent Domain Law*, reprinted in 12 Cal. L. Revision Comm'n Reports at 1635-1636 (1974).

² Former Civil Code Section 1001, which authorized condemnation by private persons, was repealed by Cal. Stats. 1975, Ch. 1240, § 1. It provided:

1001. Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of Title VII, Part III, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such Title is "an agent of the State," or a "person in charge of such use," within the meaning of those terms as used in such Title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two.

³ Pub. Util. Code §§ 610-624 (Cal. Stats. 1975, Ch. 1240, § 65).

⁴ Health & Saf. Code § 1260 (Cal. Stats. 1975, Ch. 1240, § 43).

⁵ Educ. Code § 30051 (Cal. Stats. 1975, Ch. 1240, § 14).

⁶ Health & Saf. Code § 8501 (Cal. Stats. 1975, Ch. 1240, § 45).

⁷ Health & Saf. Code §§ 35167 (Cal. Stats. 1975, Ch. 1240, § 55), 34874.

⁸ Pub. Util. Code § 2729 (Cal. Stats. 1975, Ch. 1240, § 68).

⁹ Condemnation for byroads was authorized by Civil Code Section 1001 and Code of Civil Procedure Section 1238(4), (6). See also *Sherman v. Buick*, 32 Cal. 241 (1867) (taking for byroad proper where road was open to public). Condemnation for utility connections was authorized by Civil Code Section 1001 and Code of Civil Procedure Section 1238, subdivisions 3-4 (water and drainage), 7 (telephone), 8 (sewerage), 12-13 (electricity), 17 (gas). See *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955) (apartment owner may condemn appurtenant sewerage easement under authority of Civil Code Section 1001 and Code of Civil Procedure Section 1238(8)).

The authorizing statutes were repealed in 1975. Cal. Stats. 1975, Ch. 1240, § 1; Cal. Stats. 1975, Ch. 1275, § 1.

of opening what would otherwise be landlocked property to enable its most beneficial use. As a practical matter, land to which utility service cannot be extended or that is cut off from access to public roads cannot be developed.¹⁰

The need for private condemnation for byroads and utility easements is unrelieved by the ability of public entities to condemn for such easements on behalf of private persons. Many local public entities and public utilities are reluctant or unwilling to institute such proceedings even though the benefited person offers and is willing to bear the cost of acquiring and maintaining the easement.

For these reasons, the Law Revision Commission recommends that private persons be authorized to condemn appurtenant easements for byroads and utility service, subject to the following limitations designed to prevent abuse of the condemnation power:

(1) The law prior to 1975 limited the interest in property that a private condemnor could take to an easement;¹¹ this limitation should be perpetuated.

(2) The private condemnor should be required to show a "great necessity" for the taking of the easement by eminent domain. This standard is consistent with the holding of *Linggi v. Garovott*¹² requiring a stronger showing of necessity for condemnation by a private person than if the condemnor were a public or quasi-public entity.

(3) There should be a requirement that the easement be located in such a manner as to afford the most reasonable service or access to the property of the condemnor consistent with the least damage to the property burdened by the easement. This requirement is comparable to that imposed on public and quasi-public entities that the location of their projects be compatible with the greatest public good and the least private injury.¹³

(4) The condemnation right should be subject to consent of the governing bodies of affected cities and counties in the

¹⁰ The common law doctrine of "way of necessity" affords only limited relief to the landlocked property owner. See 3 B. Witkin, *Summary of California Law*, Real Property § 363 (8th ed. 1973).

¹¹ Former Code Civ. Proc. § 1239.

¹² 45 Cal. 2d 20, 286 P.2d 15 (1955).

¹³ Code Civ. Proc. § 1240.030(b).

same manner and to the same extent as condemnation by quasi-public condemnors.¹⁴

(5) The consent of the local public entities should not have a conclusive effect in the eminent domain proceeding. The private condemnor should be required to prove the propriety of the acquisition if the taking is challenged in court. This continues existing law which places the burden of proof of necessity on the private condemnor.¹⁵

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to add Section 1001 to the Civil Code, and to add Section 1245.325 to the Code of Civil Procedure, relating to eminent domain.

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

Civil Code § 1001 (added)

SECTION 1. Section 1001 is added to the Civil Code, to read:

1001. (a) As used in this section, "utility service" means water, gas, electric, drainage, sewer, or telephone service.

(b) Any owner of real property may acquire by eminent domain an appurtenant easement over private property for which there is a great necessity to provide utility service to, or access to a public road from, the owner's property. The easement that may be taken shall afford the most reasonable service or access to the property to which it is appurtenant, consistent with the least damage to the property burdened by the easement.

(c) This section shall not be utilized for the acquisition of a private or farm crossing over a railroad track. The exclusive method of acquiring such a private or farm crossing is that provided in Section 7537 of the Public Utilities Code.

¹⁴ Code Civ. Proc. §§ 1245.310-1245.390.

¹⁵ Code Civ. Proc. §§ 1240.030 (burden of proof on condemnor) and 1245.250 (resolution of public entity conclusive on issues of necessity).

Comment. Section 1001 is added to provide the right of eminent domain to private persons for the limited purposes of establishing byroads and making utility connections. Compare Code Civ. Proc. § 1240.350 (substitute condemnation by public entities to provide utility service or access to public road). This restores authority found under former Section 1001 (repealed Cal. Stats. 1975, Ch. 1240, § 1). See also *Sherman v. Buick*, 32 Cal. 241 (1867) (condemnation for byroad proper where road open to public use of persons who may have occasion to travel it). The exercise of eminent domain authority under Section 1001 is subject to consent of the appropriate local public entities under Code of Civil Procedure Sections 1245.310-1245.390 to the same extent as quasi-public condemners. See Code Civ. Proc. § 1245.325.

Condemnation under this section must comply with the provisions of the Eminent Domain Law. See Code Civ. Proc. § 1230.020 (law governing exercise of eminent domain power). Under the Eminent Domain Law, there must be “public necessity” for the acquisition (Code Civ. Proc. § 1240.030), and any necessary interest in property may be acquired (Code Civ. Proc. § 1240.110); under Section 1001, however, there must be “great necessity” for the acquisition and only an easement may be acquired. See also *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955) (condemnation by private person for sewer connection a public use, but a “stronger showing” of necessity required than if plaintiff were a public or quasi-public entity). It should be noted that the condemner must pay compensation for the easement taken and for damage to the property from which it is taken. See Code Civ. Proc. §§ 1263.010-1263.620.

Code of Civil Procedure § 1245.325 (added)

SEC. 2. Section 1245.325 is added to the Code of Civil Procedure, to read:

1245.325. Where an owner of real property seeks to acquire by eminent domain an appurtenant easement over private property pursuant to Section 1001 of the Civil Code:

(a) The person seeking to exercise the power of eminent domain shall be deemed to be a “quasi-public entity” for the purposes of this article.

(b) In lieu of the requirements of subdivision (c) of Section 1245.340, the resolution required by this article shall contain a declaration that the legislative body has found and determined each of the following:

(1) There is a great necessity for the taking.

(2) The location of the easement affords the most reasonable service or access to the property to which it is appurtenant, consistent with the least damage to the burdened property.

(3) The hardship to the owner of the appurtenant property, if the taking is not permitted, outweighs any hardship to the owner of the burdened property.

Comment. Subdivision (a) of Section 1245.325 makes clear that acquisitions pursuant to Civil Code Section 1001 are subject to the requirements of this article. Subdivision (b) replaces the findings required in Section 1245.340(c) with findings necessitated by the special provisions of Civil Code Section 1001(b).

TABLE SHOWING SESSION LAW CHAPTER SOURCE FOR CONFORMING REVISIONS

This table shows the chapter of the Statutes of 1975 which added, amended, or repealed the code sections listed below. Since Title 7 (Sections 1237-1273.06) of Part 3 of the Code of Civil Procedure was repealed in its entirety by Chapter 1275, none of the sections formerly contained in Title 7 are listed in this table.

One of the following abbreviations is used after each section listed in the table to indicate how the section is affected:

“(new)”—a new section to be added to the code

“(A)”—a section of existing law that is amended

“(R)”—a section of existing law that is repealed

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CODE OF CIVIL PROCEDURE

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190-196 (R) Ch. 1240

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14662 (A) Ch. 1239

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