#36.33 4/23/71

Memorandum 71-20

Subject: Study 36.33 - Condemnation (Right to Take--Public Necessity)

SUMMARY

The Commission has determined that, before a condemnor may take property by eminent domain, it must have a need for the property ("public necessity"). In order for a local public entity to condemn, it must pass (by two-thirds vote of all of the members of the governing body) a resolution declaring its need for the property. Such resolution is conclusive on the issue of need if the property is within the territorial limits of the local public entity.

The Commission reserved consideration whether the resolution should be subject to attack by a showing of actual fraud, corruption, or manifest abuse of discretion, and deferred consideration of the specific treatment to be given resolutions by the state and of how necessity is to be established for public utilities and other private condemnors.

This memorandum presents for Commission consideration some of the issues previously reserved, deferred, or not considered.

BACKGROUND: CHALLENGING THE RIGHT TO TAKE

The Commission has determined that a condemnee can challenge the condemnor's right to take his property on the following grounds:

(1) Lack of public use. A condemnor may take property by eminent domain only for a public use. Eminent Domain Code Section 300. If the use for which the condemnor is taking the property is not a "public use," or if the condemnor does not intend to put the property it takes to the public use for which it purports to be taken, the condemnee can defeat the taking on this ground. This

is a constitutionally guaranteed requirement, which the Legislature cannot alter. Cf. People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959).

(2) Lack of statutory authority. The condemnor is not authorized by statute to condemn the property for the use for which it is sought to be taken.[1] Eminent Domain Code Section 301.

(3) Lack of public necessity. If the condemnor is unable to establish the requisite necessity for the taking, the condemnee can defeat the taking on this ground. Eminent Domain Code Sections 302-303. The Commission has granted local public entities a conclusive presumption of "public necessity" if the entity passes a resolution of necessity by a two-thirds vote. Eminent Domain Code Section 312. The Commission has also determined that the state should have a similar conclusive presumption but has deferred drafting the statutory provisions to effectuate this decision. The Commission has not yet determined how public utilities and other private condemnors must show public necessity.

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1. In 7 P. Nichols, Eminent Domain App. 309 (3d ed. 1970), a pleading in a case where the condemnee prevailed on the right to take issue is set out. The condemnee alleged that the determinations by various governmental officials and bodies were "unreasonable, arbitrary, capricious, artificial, not based upon substantial evidence, an abuse of discretion and legally unsupportable." The enabling New York statute permitted taking of "predominantly open or natural lands" for conservation and outdoor recreation. The lands sought to be taken were "completely developed and subdivided, fully utilized by commercial and industrial enterprises of various kinds and substantially and predominantly improved by numerous and costly buildings and other structures." In essence, the condemnee took the position that the statute did not authorize the taking of the type of property sought to be taken. We think that a similar result would obtain under Eminent Domain Code Section 301 ("The power of eminent domain may be exercised to acquire property for a public use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use"). We will revise the Comment to Section 301 to make this clear.

Notwithstanding the conclusive resolution of necessity, under the Commission's scheme, the condemnee can contest the right to take in certain types of cases:

(1) More necessary public use. Where the property is already devoted to a public use, the condemnor must (unless a statute determines the issue) establish that its use is a "more necessary public use." Eminent Domain Code Sections 450-455.

(2) Future use. Where work on the public work or improvement for which the property is to be taken will not be commenced within seven years, the condemnor must establish that the taking is justified under a statutory standard drafted by the Commission. Eminent Domain Code Sections 400-401.

(3) Substitute condemnation. Where the condemnor seeks to acquire property to exchange for property needed for a public work or improvement, the Commission drafted provisions to provide for court review. Eminent Domain Code Sections 410-414.

(4) Excess condemnation. The condemnor's need to acquire property in excess of that needed for a particular project to avoid excess severance damages is made a matter for court review under provisions drafted by the Commission. Eminent Domain Code Sections 420-422.

(5) Joint use. Staff drafted provisions (not yet considered by the Commission) would permit court review of a taking for a consistent public use of an interest in property already appropriated to a public use. Eminent Domain Code Sections 470-471.

Although the Commission has determined that four of the five matters listed above are justiciable limitations on the right to take and has drafted provisions dealing with them, consideration of the procedure for raising the issues

in court and related matters has been deferred pending receipt of the consultant's study on the procedural aspects of eminent domain. Moreover, some of the provisions already drafted have been reviewed by the State Bar Committee, and the comments of the State Bar Committee and other comments will be considered at a future meeting. We do not plan to discuss these special provisions when we consider this memornadum.

There is one additional area where we believe that the courts will review the right to take: A taking for an unconstitutional purpose will be reviewed and prevented. We have no doubt that the California courts would prevent a taking if the sole purpose of the condemnation was to condemn the sites of two new, integrated subdivisions in order to prevent construction of the integrated subdivisions. See Deerfield Park Dist. v. Progress Dev. Corp., 22 Ill.2d 132, 174 N.E.2d 850 (1961)("It is also well settled that state power cannot be used as an instrument to deprive any person of a right protected by the Federal Constitution. . . . [The condemnees] are entitled to show, in a condemnation proceeding, that the land sought to be taken, is sought not for a necessary public purpose, but rather for the sole purpose of preventing [the condemnee from constructing racially integrated subdivisions]."). We see no need to attempt to codify this type of constitutional limitation on the exercise of the power of eminent domain in the Eminent Domain Code.

PUBLIC NECESSITY AND FRAUD

California is one of the few states that has enacted a requirement that public necessity be shown before property can be taken by eminent domain. However, over the years since the 1872 California enactment, the Legislature has added various statutory provisions that make the resolution of necessity conclusive for the great majority of local public entities. This accords with the law in other states. 1 P. Nichols, Eminent Domain 540 (3d ed. 1964) states:

> The overwhelming weight of authority makes clear beyond any possibility of doubt that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review.

The Commission has adopted the general rule that the resolution be conclusive on the issue of public necessity on takings within the boundaries of the local public entity but has reserved the question whether a resolution should be subject to challenge for "fraud, bad faith, or abuse of discretion."

Beyond the issues previously mentioned--public use, statutory authority, more necessary public use, future use, substitute condemnation, excess condemnation, joint use, and taking for unconstitutional purpose--California does not presently allow challenge to the conclusiveness of the resolution of necssity even if fraud, bad faith, or abuse of discretion is alleged. The leading case is People v. Chevalier, 52 Cal.2d 299, 307, 340 P.2d 598 (1959) attached (yellow), where the court stated:

> We therefore hold, despite the implications to the contrary in some of the cases, that the conclusive effect accorded by the Legislature to the condemning body's findings of necessity cannot be affected by allegations that such findings were made as the result of fraud, bad faith, or abuse of discretion. In other words, the questions of the necessity for making a public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvement, cannot be made justiciable

issues even though fraud, bad faith, or abuse of discretion may be alleged in connection with the condemning body's determination of such necessity. To hold otherwise would not only thwart the legislative purpose in making such determinations conclusive but would open the door to endless litigation, and perhaps conflicting determinations on the question of "necessity" in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement. We are therefore in accord with the view that where the owner of land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body's "motives or reasons for declaring that it is necessary to take the land are no concern of his." [citation] Any language in the prior cases implying a contrary rule is hereby disapproved. It follows that there was no error in the trial court's ruling striking the "special defenses" relating to the question of necessity.

On the other hand, 1 P. Nichols, Eminent Domain 553-558 (3d ed. 1964), claims that other states place a limit on the extent to which the Legislature can place issues of necessity beyond court review:

> There is, however, at least a theoretical limit beyond which the legislature cannot go. The expediency of constructing a particular public improvement and the extent of the public necessity therefor are clearly not judicial questions; but it is obvious that, if property is taken in ostensible behalf of a public improvement which it can never by any possibility serve, it is being taken for a use that is not public, and the owner's constitutional rights call for protection by the courts. So, also, the due process clause protects the individual from spoliation under the guise of legislative enactment, and while it gives the courts no authority to review the acts of the legislature and decide upon the necessity of particular takings, it would protect an individual who was deprived of his property under the pretense of eminent domain in ostensible behalf of a public enterprise for which it could not be used. While many courts have used sweeping expressions in the decisions in which they have disclaimed the power of supervising the selection of the site of public improvements, it may be safely said that the courts of the various states would feel bound to interfere to prevent an abuse of the discretion delegated to the legislature by an attempted appropriation of land in utter disregard of the possible necessity of its use, or when the alleged purpose was a cloak to some sinister scheme. In other words, the court would interpose in a case in which it did not merely disagree with the judgment of the legislature, but felt that that body had acted with total lack of judgment or in bad faith. In every case, therefore, it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity.[93] But while the courts have frequently declared their power to set aside acts of the legislature upon such a ground, cases in which the power has been actually exercised seem rarely to have arisen. [Note lack of footnote!]

A federal Court of Appeals has held that the judicial review of an administrative or legislative determination of necessity, based on the qualification of bad faith, arbitrariness, or capriciousness, is warranted only by dicta.

All of the instances suggested by Nichols would be reviewable in California despite Chevalier. An obvious case of fraud--where "property is taken in ostensible behalf of a public improvement which it can never by any possibility serve"--is the case where the condemnor does not intend to devote the property to the improvement for which it alleges it is taking the property. The Commission has determined to permit court review in this case, and this continues the existing California law. Another case of fraud would be a case where 55 acres are being taken when only one is need so that payment of severance damages can be avoided, the condemnor alleging in its complaint that the property is needed for the public improvement when, in fact, it intends to resell the excess 54 acres as soon as the improvement is completed. The Commission has determined to permit such a taking only under very carefully limited circumstances and to permit a court review in any such "excess" taking. Nichols devotes most of his discussion in subsequent portions of his treatment of public necessity to takings for future use. He points out that a taking for speculation purposes--if that can be shown--is one that would be reviewed and set aside by a court even though the condemnor claims the taking is for "future use." Some showing of the need of the land for the future use and that it will be devoted to public use within a reasonable time under the circumstances is required of the condemnor in such a case. The Commission has determined that there should be a court review in the case of any taking where the project for which the property is taken will not be commenced within seven years. The substitute condemnation situation is another example of a type of case where the property taken will not be devoted to the public use, and, here again, the Commission has determined that there be a court review.

Although Nichols does not treat the so-called "fraud, corruption, bad faith, manifest abuse of discretion" exception in a satisfactory manner, he does cite a number of takings by railroads and other public utilities where the taking was defeated because no reasonable condemnor would have taken the property. Under existing California law, these nonpublic entity takings also are subject to court review.

A search of the California appellate cases before 1959 (when Chevalier declared nonexistent the fraud exception) reveals no instances of any condemnor making a determination of necessity that upon review was upset under the fraud, bad faith, or abuse of discretion doctrine. Hence, the California decisions--which apparently only recognized the exception in dicta--are of no help in determining the meaning of the exception.

Obviously, then, the content of "fraud, corruption, bad faith, manifest abuse of discretion," or similar language is unclear and would yield unpredictable results. Assuming that the property sought to be taken is actually going to be used for the public use for which it is taken and that the case is not a future use case (or one of the other cases listed above where court review is provided), what are the kinds of situations where a taking should be stopped by a court on the ground of "fraud, corruption, bad faith, or manifest abuse of discretion"?

Some of the situations that might come before a court under this standard are:

(1) One or more of the members of the governing body of the condemnor are bribed to take the particular property rather than another property.

(2) One or more of the members of the governing body of the condemnor decide to undertake the project or to take the particular property rather than another property because of a concealed conflict of interest.

(3) The governing body of the condemnor makes a decision to undertake a particular project or to take particular property or a particular interest in property that no reasonable governing body would make.

(4) The particular project or the particular taking is against the public interest in that it ignores economic, social, environmental, and other more or less related public concerns that may be affected by the project or the decision of the governing body of the condemnor was made without any information or with inadequate information concerning these elements.

(5) The taking is motivated by the economics of the situation. This may involve putting the improvement in a poor place because it makes the improvement less expensive. It may involve taking more land than is actually needed (even though it will be put to the public use) in order to avoid paying severance damages. The latter situation is the Lagiss case (attached to Memorandum 71-13).

(6) The plan or design for the improvement is so technically defective that no governing body could reasonably adopt it, and a proper plan would not require the taking of the particular property.

(7) The motive for taking the property is to prevent racial integration of a housing tract.

(8) The property taking is plainly not suitable for its intended use--urban areas taken for open space, unblighted areas taken for urban redevelopment (specific statute makes public entity determinations of what is a blighted area conclusive).

(9) At the time of the taking, the condemnor lacks some form of permit or approval needed before it can construct the improvement. (For example, the power of a city to refuse to consent to the closing off of a street can prevent the construction of a freeway.) The requirement of a permit or approval can, of course, be imposed as a prerequisite to condemnation.

(10) A fee interest is sought when all that a reasonable person would take is an easement.

Because we are unable to determine with any degree of certainty what additonal types of cases would become subject to court review if a fraud, bad faith, or abuse of discretion exception to the conclusive effect of a resolution of necessity, we make no suggestions for language that might be used to include such an exception. We hope that the discussion at the meeting will reveal the extent to which, if at all, these or any additional situations should be made subject to court review.

ARGUMENTS FOR AND AGAINST FRAUD EXCEPTION

The argument for attack on the resolution of necessity in the cases hypothesized above is initially appealing, for judicial review of an administrative decision that is clearly against the public interest will aid in rendering more responsible the agency charged with the public interest; and that, after all, is the purpose for requiring a determination of necessity in the first place. An argument based on this notion is made in Professor McIntire's recent article, "Necessity" in Condemnation Cases--Who Speaks for the People?, 22 Hastings L.J. 561 (1971)(attached--white pages).

What Professor McIntire seeks, basically, is to make administrative decision-making more responsive to public interest and demands by making the determination of necessity subject to judicial review in case of fraud and the like. In analyzing this argument, it is important to note that "necessity" involves two fundamentally different concepts. It involves the rather broad notions of public interest and need and the rather narrow intricacies of technical and engineering requirements. It is to the former, the broad determinations of public interest, that Professor McIntire's article is addressed.

Public Interest

A determination of the questions whether the public interest and necessity require a project and whether that project as planned or located are consistent with the greatest public good and least private injury involves not only the public need for a particular project but also economic, social, environmental, and other more or less related public concerns which may be affected by a public project. It is doubtful whether fraud, bad faith, or abuse of discretion is a broad enough ground to reach poor administrative

planning decisions. "Abuse of discretion" might be stretched to include consideration of environmental factors in planning a project, but it seems unlikely, for there are usually good, rational reasons for particular decisions. Further, if planning decisions are to be reviewable in court, the review should occur at a stage before actual construction begins and not on the chance basis that some condemnee will contest the right to take.

Professor Joseph Sax, for example, in his recent book, Defending the Environment (1970), argues that court review of administrative decisions is essential to assure that those decisions are in the public interest. He would have any member of the public be able to seek an injunction to halt a project before construction begins on the grounds that either the administrative approval has not followed policies enunciated by the Legislature or that no clear legislative policies exist in an area where immediate irreparable harm is threatened. In this way, judicial review in essence "makes democracy work" by remanding arbitrary administrative actions back to the Legislature which had delegated its authority for redetermination of the underlying policy issues.

Judicial review prior to commencement of a project is one way to accomplish administrative responsibility. Another way, and the way which California has been pursuing, is to enable greater public participation in and influence over the administeative decision-making process. Attached (green) is an excerpt from Arthur Silen's interesting article, Highway Location in California: The Federal Impact, 21 Hastings L.J. 781 (1970), in which the author describes the public concern over freeway routing, the ways people make their views known and felt, and the ways the administrative process is attempting to incorporate public opinion in the planning process.

In both of these methods of assuring adequate planning, the concept is clear that intervention must occur at an early stage if it is to be effective. The ensuing decisions are basically political and ones which a court is rightly reluctant to touch. Review on the nebulous grounds of fraud, within the context of an eminent domain action, should be avoided both because it is haphazard and because it is ineffective. It may well be beyond the scope of the Commission's eminent domain authority to propose reforms for the administrative process, which must necessarily involve many areas other than condemnation. This is particularly true since the Legislature is already well aware of the problems, and legislation is constantly being introduced on the subject. The staff suggests that the task of making administrative agencies more responsive to the public will should be left to the Legislature.

Technical Considerations

Apart from the broad questions of the wisdom, design, and location for a project, "public necessity" also involves the narrower questions such as the exact interest in property needed and the amount of property needed for construction. These are basically technical and engineering questions which, unlike the broader political questions, belong inherently to the administrators with expertise. Although the Commission has determined that a resolution of necessity by the condemnor should be given the benefit of a conclusive presumption on these narrow aspects, an argument can be made that the presumption should be subject to challenge on the basis of fraud.

Local public entities have been known to make arbitrary or capricious decisions in these technical areas, possibly because these are areas where there is neither a great deal of expertise in the public nor a great deal of interest; as a result, political pressures for reasonable and accommodating decisions have been lacking. This phenomenon is nowhere more apparent than

in the field of extraterritorial condemnation where a public entity decides to condemn outside its boundaries. In such a situation, there is little or no pressure exerted on the entity to make a decision in the interest of the general public as opposed to a decision in the interest of the entity.

The recent case of City of Los Angeles v. Keck, 14 Cal. App.3d 920, ____ Cal. Rptr. ____ (1971)(attached, gold) illustrates the decision of a public entity to take a fee interest in land located outside its bounds even though it needed only an easement. The taking was defeated on appeal. In City of Carlsbad v. Wight, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963), the city attempted to condemn land lying outside its boundaries for construction of a storm drainage canal. Its reasons for going outside its limits were that a private developer who stood to benefit from a roundabout route had offered substantially all the land needed for the right of way and had offered to construct the canal at its own expense; in addition, the city felt that property located within the city limits would become more valuable. The condemnee produced hydraulic experts as witnesses to testify that the natural drainage path within the city was by far the best location for a drainage ditch and that the proposed channel outside the city had the following engineering defects: (1) water would stand in it, causing accumulation of debris and silt and aggravating the mosquito problem the ditch was intended to solve; (2) the ditch would cut across an existing road, an existing sewer line, and through the force main of a neighboring city's sewage treatment and pump station. The trial court found no "necessity" for this project, and the finding was upheld on appeal.

The Keck and Carlsbad cases illustrate situations where a poor technical decision on necessity was made and where an exception for bad faith or abuse of discretion might have been useful. However, those cases are also both

extraterritorial condemnation situations for which the Commission has determined that the resolution shall not be conclusive. See Em. Dom. Code §313(b).

Where the taking is outside the territorial limits of a city, for example, the normal restraint of political responsibility is relatively ineffective as a means of making the public entity act responsibly. In fact, the situation is one where there is a fair chance that the public entity is acting irresponsibly. It is much easier to avoid political pressures against an undesirable improvement--such as a garbage dump or sewage treatment plant--by locating it outside the city. No one wants it in the city and, if it is located in the city, the voters in that area may react adversely against their elected officials at the next election. Accordingly, the elected officials, rather than select the best site in the city, may choose one outside the city that is not really suitable for the improvement. The courts have recognized this possibility, and there are a number of cases where they have stopped an attempt to condemn property outside the boundaries of a local public entity.

It is conceivable that similar situations might arise within the territorial bounds of the public entity. The case of People v. Lagiss, 223 Cal. App.2d 23, 35 Cal. Rptr. 554 (1963)--discussed in Memorandum 71-13 (Protective Condemnation) and there set out as Exhibit I--raises the spectre at the state level of the taking of more property than is really "necessary" for a project in order to force waiver of severance damages. This type of situation, if it occurred, might be appropriate for a challenge to the resolution of necessity on the ground of bad faith.

On the other hand, there are strong arguments against allowing a challenge to the resolution of necessity on grounds of fraud. One agrument is that such a right would be of little practical benefit to anyone since actual fraud, bad faith, or abuse of discretion rarely occur or, at least, have rarely been proved.

Further, while challenging the right to take on the grounds of fraud, bad faith, and abuse of discretion will prove to be of little real use to anyone, it may prove to be of great strategic use to property owners as a delay tactic in litigation. Challenges to the resolution will thus hinder public projects, increase the cost to public condemnors by adding a new issue to litigate, and further burden the courts without tangible justice resulting.

It appears to be difficult to define the scope of "fraud, bad faith, and abuse of discretion." The Commission and the Legislature have enunciated a policy that planning decisions are vested in the sole discretion of the administrative agencies. But when an attack is allowed on the ground that the agency has made a grossly unreasonable decision, i.e., it has abused its discretion, the doctrine of administrative independence is eroded. The exception threatens to swallow the rule, particularly if a judge is given discretion to classify a decision he happens to disagree with as "grossly unreasonable." Unless the fraud exception can be given some specific and precisely defined content, there is danger that it will be abused.

The policies at stake here are clear. On the one hand, where the public has delegated authority to administrative agencies to make decisions, there has been increasing concern over the responsiveness of those decisions to the public interest. As a Florida court expressed the concern in a case involving a challenge of the public necessity for a highway taking:

> The abuse of power by misguided, though well intentioned, administrative bureaus, boards, departments or agencies of government poses an ever present threat to the very foundation of our democratic institutions. Though such abuses occur infrequently, their occurrence has a devastating effect upon the rights of individual citizens adversely affected thereby. Thus the courts must be ever zealous in protecting the basic rights of the governed against the improper excerise of governmental power perpetrated under the cloak of lawful sanction.

> It is settled in this jurisdiction that a determination of the necessity for acquiring private property under the power of eminent domain by an administrative agency of government, or a quasi-public corporation, will not be set aside by the courts in the absence of a showing that such a determination was motivated by bad faith, fraud, or constitutes a gross abuse of discretion. [State Road Dep't v. Southland, Inc., 117 So.2d 512 (Fla. 1960).]

(The court found, however, that the trial judge improperly stopped a taking for future highway use.) On the other hand, as the opinion indicates, such abuses appear infrequent, at best. Existence of a challenge may be of marginal value. Additionally, there does not appear to be any way to precisely define the scope of a fraud exception so that it is clear in the cases to which it applies and does not swallow up the rule that planning decisions belong to the administrative planners and not to the courts.

In balancing these factors, the Commission must decide whether the potential burdens of a fraud challenge are worth the benefits it will provide in an appropriate case. It should be noted that the Commission has already determined to allow review in private condemnor, future use, and similar cases, and these are the only types of cases we know of where the so-called fraud exception has had any effect in other states.

DEFECTIVE RESOLUTION OF NECESSITY

There is a related though distinct area involving the conclusiveness of a resolution of necessity. This is where the resolution is not valid on its face or where there are some procedural defects in its enactment, recording, publication, and the like. Was there adequate notice of the meeting at which the resolution was passed? was there a quorum present to vote? was the vote actually two-thirds as recorded in the resolution? Although there is no law on this question, it is apparent that a resolution not properly adopted is invalid and therefore can have no effect whatsoever. Conclusive presumptions

apply only to a "valid" resolution of necessity. The current draft of the necessity chapter in the forthcoming C.E.B. book states the following (without supporting authority):

> If the condemnor lacks the right of resolution above referred to, or has such right but adopts and promulgates a defective resolution, the defenses of fraud, bad faith and abuse of discretion appear to be available. Other defenses, sometimes up to and including a challenge to the right of condemnation itself, may also be raised, depending upon the enabling legislation of the particular condemnor involved, and the nature of the defects in the particular resolution, if any.

Accordingly, the Comments to the sections declaring the resolution of necessity conclusive should point out that the resolution is only conclusive where there is in fact a valid resolution; the validity of the resolution is a litigable issue. A purposted resolution will, however, be given the benefit of a presumption affecting the burden of proof. Evid. Code § 664.

OTHER CONDEMNORS

The preceding discussion has focused on the resolution of necessity issued by a local public entity. The statutes, with Comments, are set out as Exhibit I. One technical change has been made in Section 302(b) incorporating the term "public interest" to conform with the contents of the resolution of necessity. See Section 311. The Commission previously deferred consideration of specific requirements for showing necessity as applied to other condemnors.

The State

The Commission has determined that the resolution of necessity of state condemnors should generally be treated similarly to that of local public entities. Consideration of specific provisions, such as the vote required for passage of a resolution, designation of appropriate governing bodies for state condemnors, and the like, must continue to await reorganization and restructuring at the state level. See Memorandum 71-31 (The Declared Public Uses).

Nongovernmental Condemnors

Generally nongovernmental condemnors are given the benefit of no statutory presumptions, but must prove their necessity in court. The nongovernmental condemnors that are authorized to condem include public utilities, nonprofit hospitals, nonprofit higher educational institutions, land chest corporations, limited dividend housing corporations, and possibly private individuals for sewer purposes. See Memorandum 71-31 (The Declared Public Uses).

The staff has observed that some of these nongovernmental condemnors are quasi-public organizations, dedicated to serving the public and regulated by government administrative agencies. If these quasi-public agencies could have their land acquisition programs subject to administrative scrutiny, the staff feels there may be value in treating the administrative resolution of necessity just as a public entity's resolution, for purposes of determing necessity. The public would benefit by having a public group oversee the operation of the nonpublic condemnor, thus making it susceptible to public opinion. And the condemnor would benefit by being relieved of the obligation to demonstrate necessity in court. Of course, the success of such a plan would depend upon its monetary practicality, as well as upon the independence of the reviewing agency. At this time, the staff suggests that the Commission determine whether it wishes the staff to further investigate the possibility of making public utility acquisitions subject to review by the Public Utility Commission, perhaps making hospital acquisitions subject to review of the Director of Public Health, and to investigate the status of the other nongovernmental condemnors.

If a procedure involving a resolution of necessity is not worked out for the nongovernmental condemnors, they will have to prove necessity in court. The Commission has yet to consider what presumptions and burdens should apply in such a case, pending receipt of the background study on condemnation procedure by its consultant.

Respectfully submitted,

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Memorandum 71-20

EXHIBIT I

COMPREHENSIVE STATUTE § 302

Staff draft April 1971

The Right to Take

§ 302. Condemnation permitted only when necessity established

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

(a) The 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.

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

Comment. Section 302 supersedes various former Code of Civil Procedure sections, making public necessity a prerequisite for taking property by eminent domain. Under Section 302, all condemnors must establish the same specific elements constituting "public necessity" before they may condemn property. Certain condemnors may establish the requisite necessity by enacting a resolution of necessity. See Sections 313(a), ____, and _____. Other condemnors must demonstrate the requisite necessity in court. See Sections _____ and _____. The burden of pleading necessity is specified in Section _____.

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" includes 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, ____ (1891).

Subdivision (b). Subdivision (b) prevents the taking of property by eminent domain unless the proposed project is planned or located in the manner which will be most compatible with the greatest public good and the least private injury. Subdivision (b) involves essentially a comparison between two or more sites and has also been described as "the necessity for adopting a particular plan" for a given public improvement. State v. Chevalier, 52 Cal.2d 299, 240 P.2d 598, 603 (1959). See also City of Pasadena v. Stimson, supra; Eel 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. Montebello etc. School Dist. v. Keay, 55 Cal. App.2d 839, 131 P.2d 384. 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) continues the requirement formerly found in Code of Civil Procedure Sections 1242(a) and 1240(6) but, unlike subdivision (b), these sections were limited to cases where land or rights of way were to be condemned. Subdivision (b) applies without regard to the property or property interest sought to be condemned.

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. This aspect of necessity involves 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 101 (defining "property" to include any right or interest therein). Cf. City of Los Angeles v. Keck, 14 Cal. App.3d 920, ____ Cal. Rptr. ____ (1971).

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

The Right to Take

CHAPTER 2. LIMITATIONS ON TAKINGS BY LOCAL PUBLIC ENTITIES

Article 1. Resolution of Necessity

§ 310. Resolution of necessity required

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

Comment. Before a local public entity begins condemnation proceedings, it must pass a valid resolution of necessity. A valid resolution is one that has been duly and properly adopted and that complies with the requirements of Sections 311 and 312. If the local public entity fails to adopt a resolution or adopts a defective resolution of necessity, it may not condemn property. See California Condemnation Practice § 8.44 (Cal. Cont. Ed. Bar 1960); California Condemnation Law § 3.20 (Cal. Cont. Ed. Bar, 1971 draft). If the local public entity does adopt a valid resolution of necessity, the condemnation action may proceed.

Section 310 generalizes the provision previously applicable to some but not all local public entities that a resolution of necessity is a condition precedent to condemnation. Compare, e.g., Code of Civil Procedure Section 1241(2)(resolution not required) with Water Code Section 43532 (resolution required).

The Right to Take

§ 311. Contents of resolution

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

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

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

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

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

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

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

Comment. Section 311 prescribes the contents for a local public entity's resolution of necessity.

Subdivision (a). In addition to a general description of the proposed project, the resolution must make reference to the specific statute or statutes authorizing the exercise of the power of eminent domain for the project. Only local public entities authorized by statute to condemn for a public use can condemn for that use. Section 301. Such authorizing statutes may be of several types. Cities and counties, for example, may condemn any property necessary to carry out any of their powers or functions. Govt. Code §§ 25350.5, 37350.5. 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 401 (future use), 411 (substitute), 471 (consistent use), _____, _____, _____. The purpose of this subdivision is to enable a condemnee better to determine whether the taking of his property is authorized.

Subdivision (b). The resolution of necessity must contain a description of the property, right, or interest to be taken. See Section 101 ("property" defined). The purpose of this subdivision is to enable a condemnee better to determine whether the taking of his property is for a public use and whether public necessity for the taking exists where taking outside territorial limits.

Subdivision (c). The resolution of necessity must contain a declaration that the governing body of the local public entity has found and determined the existence of each of the three elements of public necessity required by

Section 302 to be established for a taking. See Section 302 and Comment thereto. This provision is modeled after similar provisions formerly applicable to various condemnors. See, e.g., Code of Civil Procedure Section 1241(2).

The Right to Take

§ 312. Adoption of resolution

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

Comment. In order for a local public entity's resolution of necessity to be valid, it must be adopted by two-thirds of all the members of the governing body, not merely two-thirds of those present at the time of adoption. See California Condemnation Law § 3.16 (Cal. Cont. Ed. Bar, 1971 draft).

Section 312 supersedes numerous special provisions prescribing the vote required for the governing body of a local public entity to authorize the condemnation of property. Section 312 generalizes the provision formerly found in Code of Civil Procedure Section 1241(2) that a two-thirds vote of certain local public entities is conclusive on issues of public necessity. See Section 313.

The Right to Take

§313. Effect of resolution

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

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

Comment. Section 313 describes the effect to be given to a valid resolution of necessity.

Section 313 supersedes numerous sections of various Codes that afforded disparate treatment of the resolution of necessity, depending upon the type of local public entity. Section 313 gives uniform presumptions to valid resolutions of necessity by all local public entities.

[NOTE: The various specific provisions will have to be repealed. The Commission has deferred this task until such a time as it is prepared to review the authorizing statutes of the local public entities on all aspects of condemnation, not merely on the effect to be given the resolution of necessity.]

Subdivision (a). Subdivision (a) provides that the resolution of necessity of a local public entity is conclusive evidence of the public necessity for property

located entirely within its boundaries. Such a provision has been upheld against an assertion that the failure to give the property owner notice and a hearing on necessity and proper location before the condemnor or a hearing on necessity and proper location in the condemnation proceeding makes the condemnation an unconstitutional taking without due process of law. 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).

Because a valid resolution of necessity is conclusive on the questions of public necessity required by Section 302, it is not subject to judicial review on those questions, even where it is alleged that they were determined with "fraud, bad faith, or abuse of discretion." See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959).

A valid resolution of necessity conclusively establishes only those aspects of public necessity described in Section 302. It does not affect in any way the right of a condemnee to challenge a taking on the grounds that the project is not an authorized public use or on the grounds that the condemnor does not intend to put the property to its declared public purpose. See Sections 301, _____, _____. Nor does the conclusive presumption granted the resolution on matters of necessity affect the right of a condemnee to contest the right to take his property on specific statutory grounds provided in the Eminent Domain Code. See Sections 401 (future use), 412 (substitute), 421 (excess), 455 (more necessary public use), and 471 (consistent use).

Subdivision (a) makes applicable to all local public entities the conclusive effect given by former Code of Civil Procedure Section 1241(2) and numerous special provisions to the resolution of certain local public entities.

Subdivision (b). Subdivision (b) provides that a resolution of necessity creates a presumption affecting the burden of producing evidence with regard to the public necessity for property not entirely within the boundaries of the local public entity.

Subdivision (b) supersedes the portion of former Code of Civil Procedure 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). Subdivision (b) extends this limitation of the resolution of necessity to all local public entities condemning property outside their territorial jurisdiction.

Silen, Highway Location in California: The Federal Impact, 21 HASTINGS L.J. 781, 802-825 (1970)

IV. The "Freeway Revolt" and Its Impact on Highway Location

Through its federal-aid-for-highways programs, the federal government has become inextricably involved in some of the bitter highway location controversies that have rocked California since the late 1950's. For the most part, these freeway location controversies have been resolved at the state level, with the federal government remaining aloof from (but not unaware of)[161] the battles that raged between the Highway Commission and the Department of Public Works on the one side wanting to obtain the greatest traffic service benefits from the money available, and local citizens groups on the other seeking (often in vain) to preserve the characters of the affected communities. Initially the opposition to highway decisions was maintained by small ad hoc groups that concentrated on local issues;[162] however, as more and more cities were blighted (or actually disfigured), a wave of resentment was generated against the highway builders.[163]

In a state where the primary means of transportation is the automobile, the focus of popular indignation has not been directed toward the building of freeways, but toward the method of freeway route selection. The major criticism is that there are no alternatives to the routes selected by the state highway engineers. One writer characterized the popular feeling in this way:

> [T]he statewide flood of resentment is directed against the notion —sanctified by laws—that the highway authorities are competent to mold the future of the State, making life-or-death judgments on the value of scenery, parks, redwoods, residential neighborhoods, community centers, irreplaceable farmland and historic sites.[164]

Although California ranks as the nation's leader in highway development, many of its residents who value scenery and "unspoiled wilderness" in preference to contemporary urbanization have come to regard the highway building programs as juggernauts to be resisted at all costs.[165] Others, though unwilling to call a halt to development in general, are very much concerned that new or improved highways will destroy the character of the communities through which they pass. Those who are sensitive to their surroundings are horrified by the crass commercialism that so often attends urban development. In addition

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161. A. MOWBRAY, ROAD TO RUIN *passim* (1969).

162. S. WOOD & A. HELLER, THE PHANTOM CITIES OF CALIFORNIA 13 (1963) [hereinafter cited as WOOD & HELLER].

163. *See id.* at 32-33; Gilliam, *The Freeway Octopus*, San Francisco Chronicle, Oct. 12, 1964, at 1, col. 1; Gilliam, *S.F.'s Freeway Revolt*, San Francisco Chronicle, Oct. 13, 1964, at 1, col. 7; Gilliam, *Many Seeds of Rebellion*, San Francisco Chronicle, Oct. 14, 1964, at 1, col. 7.

164. Gilliam, *Many Seeds of Rebellion*, San Francisco Chronicle, Oct. 14, 1964, at 1, col. 1.

165. *See, e.g.*, A. MOWBRAY, ROAD TO RUIN 111-32 (1969); Wood & Lembke, *The Federal Threats to the California Landscape*, CRY CALIFORNIA 4, 31-34 (Spring 1967).

to aesthetic ruin, modern highway traffic, particularly in urban areas, is a constant source of air pollution which affects people and property throughout the area, not merely those adjacent to the right-of-way.

Environmental destruction is often coupled with economic consequences that are not balanced by post-construction increases in trade or business. Where a freeway has cut through noncommercial properties, the entire community may be altered by rampant commercialization of the right-of-way area.[166] Even where the area is already commercially developed or where commercial development is deemed desirable, the ultimate effect of a freeway may vary greatly from that originally anticipated. The hopes for offramp bonanzas may in fact be displaced by the reality of freeway blight.[167]

Traffic congestion, the prime impetus for creating urban freeways, actually seems to be compounded by the completion of a new freeway. For as each new freeway is completed, it is almost immediately filled to capacity.[168] The increased volume of traffic attracted by urban freeways,[169] both on the right-of-way and in off-freeway access and parking requirements,[170] requires substantial amounts of urban property. A multilane urban freeway may divide a community as effectively as a river. Besides absorbing a substantial portion of a city's central business district, wide swaths may be cut across parks, open areas, and residential districts. Even those properties that are not needed as right-of-way may be seriously affected by increased levels of noise, dirt, and other pollutants which are the inevitable by-products of the urban freeway.

Rural freeways, while not as large as their urban counterparts, may constitute threats to parks, recreation areas, and other objects of natural beauty or historic value which many people feel should be preserved against the encroachments of contemporary commercialization and urbanization.

166. Gilliam, *The Freeway Octopus*, San Francisco Chronicle, Oct. 12, 1964, at 1, col. 1.

167. Gilliam, *The Freeway Octopus*, San Francisco Chronicle, Oct. 12, 1964, at 1, col. 1; Gilliam, *S.F.'s Freeway Revolt*, San Francisco Chronicle, Oct. 13, 1964, at 1, col. 7; Gilliam, *Many Seeds of Rebellion*, San Francisco Chronicle, Oct. 14, 1964, at 1, col. 7; Otten, *Concrete Catastrophes*, The Wall Street Journal, Feb. 25, 1969, at 20, col. 3.

168. *See* Miller, *We Must Stop Choking Our Cities*, The Readers Digest 37 (Aug. 1966).

169. "Many people go considerably out of their way simply to gain the safety, ease, and possible time advantage of freeway design." California System, *supra* note 4, at 19.

170. *See* Wood & Heller, *supra* note 162, at 10-11.

Whether freeways are the answer to all transportation problems or whether freeways *ought* to be built to service particular localities or facilities are legitimate policy questions which should be decided either by the people or by their elected representatives. Until very recently, however, popular participation in the freeway route location process has been minimal, and the views and philosophy of the professional highway engineers have tended to prevail. Although there have been few, if any, complaints of fraud, bad faith, or chicanery,[171] California highway officials have not been responsive to the desires of the persons most affected by their choice of route locations. Because of this unresponsiveness to community values, highway builders have been regarded not only as harbingers of urban blight and scenic desecration, but also as callous bureaucrats insensitive to those whom they are supposed to serve.[172] Although beauty may indeed lie in the eyes of the beholder, and even a "freeway can appear a thing of beauty to the harried motorist,"[173] blatant violation of a community's sensibilities has commonly aroused intense feelings of resentment among those affected, and has led to reactions greatly out of proportion to the actual damage done. Indignation and resentment have been particularly strong in communities that feel, for good cause or not, that their desires have been given little consideration or have been wholly ignored by an impersonal and unresponsive government agency.[174] A recent legislative investigation into popular discontent with freeway location practices and procedures in California concluded:

> Under existing administrative organization and procedures, primary emphasis in the evaluation of routing alternatives appears to be on engineering considerations and construction and so-called user costs . . . . (a) if indeed all values are considered in the evaluation of routing alternatives, the conclusions are not always presented to the affected interests in a meaningful manner; (b) the organizational structure, staffing, and administrative procedures of the Highway Transportation Agency and State Highway Commission—in which decisions at every level of the administrative heirarchy within the agency are considered and made by engineers —do not inspire confidence in the capacity of the agency, even if it so does, to consider nonengineering and noncost factors in a truly significant way; and (c) in reviewing several specific routing con-

171. *See* A. MOWBRAY, ROAD TO RUIN 158-83 (1969).

172. *See* Gentry, *Iron Heel on the California Coast*, CRY CALIFORNIA 4-10 (Fall 1968). The tone of this article clearly indicates the enmity many conservationists feel toward the state and federal governments for desecrating the environment.

173. Howard, *Preemption Aspects of the Freeway Problems*, 17 HASTINGS L.J. 571, 580 (1966).

174. *See, e.g.*, Testimony of J. L. Ayers, *Highway and Freeway Planning*, *supra* note 23, at 55.

> troversies, it appeared . . . that there were serious questions concerning the efficacy of the agency's consideration of the total impact of a given routing alternative.[175]

Traditionally, highway engineers have not been sympathetic toward noncost or nonuser preferences and values.[176] For many years California highway engineers used cost, user benefit, and engineering considerations as the primary criteria to be considered in choosing among alternative routings for new freeways,[177] irrespective of the effect that these alternatives would have on the communities affected. However, as the *San Francisco Chronicle* has suggested:

> If the purpose of a highway is simply to move traffic, then the engineers are justified in doing any amount of damage to parks, residential areas, schools, and scenery in order to get the most traffic through as quickly as possible. A broader viewpoint might maintain that strictly engineering considerations must be part of the broader purposes of a community—to provide a pleasant environment for people to live in, to provide homes and parks and recreation areas free from noise and exhaust fumes of heavy traffic. The Highway Engineers of course agree theoretically with these broader purposes, but the engineering mind is understandably preoccupied with measurable costs and benefits.[178]

It is arguable that these "measurable" costs and benefits are, in fact, variable to a greater or lesser extent. A former member of the Highway Commission, in noting that additional right-of-way costs generally raised the level of actual expenditure for freeway construction by an average of 32 percent, candidly commented:

> [N]o matter how many slide rules and computers are used in developing estimates, there are likely to be as many subjective judgments put into the cost equation as go into the *community values* aspect of freeway route selection. And those who find it hard to give an exact economic figure to these community values should have sympathy for the engineers who have the same difficulty in their field.[179]

175. *Highway and Freeway Planning*, *supra* note 23, at 5-6. California highway engineers are not alone in being criticized for obfuscating the decisionmaking process with a plethora of professional jargon and for fragmenting the responsibility of decisionmaking. *See* Note, *Pressures in the Process of Administrative Decision: A Study of Highway Location*, 108 U. PA. L. REV. 534, 573 n.267 (1960).

176. *E.g.*, Otten, *Concrete Catastrophes*, The Wall Street Journal, Feb. 25, 1969, at 20, col. 3.

177. *Highway and Freeway Planning*, *supra* note 23, at 5.

178. Gilliam, *The Freeway Octopus*, San Francisco Chronicle, Oct. 12, 1964, at 1, col. 1.

179. Houghteling, *Confessions of a Highway Commissioner*, CRY CALIFORNIA 30 (Spring 1966). The author gives a revealing insight into the seemingly purposeless and ceremonial role that the commissioners were expected to play. The commissioners' dependence upon the Department of Public Works for information made independent decisionmaking from alternative points of view very difficult, if not impossible

Assuming that the above statement is accurate, the question becomes, why has the Division of Highways been so impassive toward suggestions of alternative routings for proposed freeways. It has been suggested that a proposed project acquires a momentum of its own during and after the initial planning stages, which becomes increasingly harder to thwart as plans move closer to fruition.[180] This resistance to alteration or deviation is particularly pronounced where route location studies are made solely by state highway engineers, and where the viewpoint of the local community is not well presented to the district's engineering staff, either because that community has not been significantly involved in the initial freeway design studies,[181] or because the master plan does not appreciate the full effect of proposed alternative routings on the community as a whole.[182]

With regard to involvement in a proposed freeway's initial design studies, the failure or delay in making its wishes known may well cost a community its opportunity to have the kind of freeway that is most compatible with its needs and values. The initiation of engineering studies is considered to be the focal point in the entire freeway route location process,[183] because at this point no commitments have been made and no substantial sums of money have been expended in favor of any particular route alternative.

Early involvement in the route adoption process presupposes adequate planning for possible freeways *prior to* the initiation of engineering studies.[184] While a city might have a general plan that is adequate for most purposes, the imposition of a freeway would require more specific planning to meet such problems as a drastic alteration of traffic patterns within the entire community, the effect of design details (whether the facility will be level with the ground, elevated, or de-

to do. Since the Director of the Department of Public Works was also ex officio the chairman of the commission, independent investigation and decisionmaking by the other commissioners was further inhibited. See note 44 *supra*. He argues that the commission ought to have an independent staff so that it may properly evaluate the proposals submitted by the Division of Highways and the State Transportation Agency. Under the prevalent system, it is a commissioner's function to approve, and not to question, costs, policy decisions, and other items pertaining to route locations which have been made at lower levels of the highway department bureaucracy.

180. Gilliam, *S.F.'s Freeway Revolt*, San Francisco Chronicle, Oct. 13, 1964, at 1, col. 7.

181. REPORT OF THE ADVISORY COMM. TO THE CAL. HIGHWAY COMM. AND THE DIRECTOR OF PUBLIC WORKS ON FREEWAY ROUTE ADOPTION AND DESIGN PROCEDURES 7-8, 28-31 (Aug. 20, 1969) [hereinafter cited as DESIGN PROCEDURES].

182. LEAGUE OF CALIFORNIA CITIES, CITY FREEWAY GUIDE 3-4 (Jan. 1964).

183. DESIGN PROCEDURES, *supra* note 181, at 28.

184. LEAGUE OF CALIFORNIA CITIES, CITY FREEWAY GUIDE 3 (Jan. 1964).

pressed, location of entrance and exit ramps, or landscaping details) or very often, the exact location of the freeway itself.[185] Moreover, since future plans must remain flexible, even the most comprehensive of plans will necessarily be general, and general plans do not arouse the degree of public concern at the time of their adoption as they do at the time of implementation.[186]

Where community planning has been inadequate, or where the exact details of proposed freeway location and design have not been made known either to local officials or to the general public, community responses to proposed freeways have taken on a decidedly negative cast. Highway engineers, confronted with local opposition unsupported by well-drafted alternatives, could feel justified in imposing their own solutions to freeway location problems, even where strongly felt community values would be ignored. By meeting resistance with intransigence, California highway engineers have forced communities to accept freeways largely on the engineers' terms.[187]

Where local governments or citizen groups demonstrate their desires and interests in a knowledgeable and persuasive manner, the Division of Highways is more likely to make concessions and accommodations.[188] There are several reasons, however, why local representatives have been unable to present arguments that greatly influence decisions of the highway engineers. First, and probably most important, communities or their leaders have not had the information which would permit them to participate meaningfully in any freeway location discussion, whether it be for the favored route or possible alternatives.[189] Lack of information prevents the effective advocacy of an alternative route, especially where noncost and nonengineering values are at issue.

Second, where alternative routes have been proposed, they are often mere window dressing, or would adversely affect the local population to the extent that none are acceptable.[190]

Third, even where a freeway is considered desirable, a freeway routing is so filled with important economic consequences for the entire community that the highway engineers' decision often throws the community into a muddled struggle of conflicting interests.[191] Because

185. *Id.*
186. *Id.*
187. *See* DESIGN PROCEDURES, *supra* note 181, at 13-14.
188. *Id.* at 11.
189. *Id.* at 8.
190. *E.g.*, Gilliam, *The Freeway Octopus*, San Francisco Chronicle, Oct. 12, 1964, at 1, col. 1.
191. Gilliam, *Many Seeds of Rebellion*, San Francisco Chronicle, Oct. 14, 1964, at 1, col. 7.

of the numerous local interests that may be involved in a freeway location controversy, highway officials have often been unable to ascertain the predominant sentiments of the affected communities even when they make a valid attempt to do so.[192] Moreover, because of the extended length of time between the commencement of engineering studies and the actual construction of a freeway, the affected community may undergo a significant change of attitude toward the proposed project,[193] especially if the community is undergoing a period of rapid growth. Thus, the advantages of extended lead time for land use planning may be outweighed by rapidly changing public attitudes regarding such things as environmental factors, conservation, recreation, and related community values. These rapidly changing attitudes may force the highway department to sell the same project to two or three generations of citizens in the same community.[194]

Finally, community development may be seriously affected by an extensive lead time between the proposal of a freeway and actual acquisition of right-of-way. Lead times of a decade or more may generate an atmosphere of uncertainty, especially where the actual right-of-way is not announced or where design or route changes may mislead or confuse those persons having an interest in specific route locations.[195] The existence of such uncertainty prevents the unity of action necessary to present arguments which will have a decided influence on the highway planners.

The legal impregnability of resolutions by the California Highway Commission (in the absence of a clear showing of fraud, bad faith, or an abuse of discretion),[196] and the commission's political unaccountability[197] has significantly contributed to the bitterness felt by the community and has sparked strenuous resistance to further freeway routings in particular areas.[198] To combat the hard-line attitudes

192. Interview with a state highway official, April 1969.

193. *Id.*

194. DESIGN PROCEDURES, *supra* note 181, at 25.

195. *See generally Highway and Freeway Planning*, *supra* note 23, at 54-58.

196. *Cf.* People *ex rel.* Department of Pub. Works v. Schultz Co., 123 Cal. App. 2d 925, 941, 268 P.2d 117, 128 (1954).

197. Gunzburg, *Transportation Problems of the Megalopolitan*, 12 U.C.L.A.L. REV. 800 (1965) [hereinafter cited as Gunzburg], where the author notes that the highway commission should be insulated from the political pressures that result primarily from "logrolling" by legislators who are more interested in particular segments of highways than in the final results. The nonpartisan, politically "free" body of experts would then be better able to serve the public interest. *See* Howard, *Preemption Aspects of the Freeway Problems*, 17 HASTINGS L.J. 571, 579-81 (1966).

198. *Highway and Freeway Planning*, *supra* note 23, *passim*. Similar disregard of local interests has not been uncommon in other areas of the United States. *See*

of highway planners, affected communities have resorted to invoking a 1953 amendment to the California Streets and Highways Code which provides:

> No city street and no county highway shall be closed, either directly or indirectly, by the construction of a freeway *except pursuant to . . . an agreement* or while temporarily necessary during construction operations.[199]

By refusing to agree to the closing of any streets until demands were met concerning specific route changes,[200] San Francisco, Beverly Hills, Santa Barbara, and other communities have been able to prevent unwanted freeway location.[201] In the now famous San Francisco "freeway revolt" of March 1959, the San Francisco County Board of Supervisors used the leverage of this provision to defeat seven freeway routes proposed by the Division of Highways. Popular dissatisfaction with the appearance of the newly completed Embarcadero Skyway, coupled with threats of massive destruction to Golden Gate Park, and similar damage to the city's western residential districts resulted in a tremendous groundswell of protests against the proposed structures.[202] San Francisco's action has been described as "the first concerted revolt of a city against the highwayman's singleminded urge to drive freeways through by the most convenient engineering routes without regard to the city's tissue and fabric of life."[203]

Although cities such as San Francisco have successfully thwarted attempts to route unwanted freeways through their territory, such "victories" have been possible only because the population, local government, and the dominant financial, business, and community interests

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Note, *Pressures in the Process of Administrative Decisions: A Study of Highway Location*, 108 U. PA. L. REV. 534, 566-73, 577-78, 581-86 (1960). The way some state highway officials have ridden roughshod over local views has caused national concern. A. MOWBRAY, ROAD TO RUIN *passim* (1969) is an articulate statement of the entire problem. Of course, in the alternative, the dissenters have not always been the most reasonable of men either. The most reliable gauge of the intensity of popular feeling is the frequency and extent of legislative restrictions and "due process" type procedural requirements now being imposed by both state and federal governments, most of them in the past decade.

199. CAL. STS. & H'WAYS CODE § 100.2 (emphasis added).

200. 27 OPS. CAL. ATT'Y GEN. 173 (Mar. 29, 1956) (section 100.2 is valid).

201. Gunzburg, *supra* note 197, at 810.

202. *See* Gilliam, *S.F.'s Freeway Revolt*, San Francisco Chronicle, Oct. 13, 1964, at 1, col. 1.

203. *Arresting the Highwayman*, ARCHITECTURAL FORUM 93 (Apr. 1969); *see Transportation and the City*, ARCHITECTURAL FORUM 64, 69-70 (Oct. 1963). The San Francisco dispute eventually resulted in the deletion of the two transcity routes from the interstate system and their reallocation, in mileage, to southern California. Gunzburg, *supra* note 45, at 809.

were united on the issue.

The highwater mark of antifreeway sentiment came in 1965 with the passage into law of a number of measures aimed at reforming the practices and procedures employed by the Division of Highways in freeway location.[204] These reforms, and others that failed to pass the legislature,[205] or were vetoed by the governor,[206] were part of a package measure introduced by Assemblyman Z'berg. The drafting of these reforms follow extensive hearings, conducted by the Committee on Natural Resources, Planning, and Public Works,[207] on the popular discontent with then existing freeway location practices.[208] Even though only a portion of this legislative program became law, its total effect has had a profound impact upon current Division of Highways policy. Many of the objectives of the unpassed portion of Assemblyman Z'berg's 1965 legislative program have been incorporated into the Department of Public Works' new procedural regulations adopted by the California Highway Commission in December of 1968.[209]

Since 1967, there appears to have been a gradual, but nevertheless significant, shift in freeway location policies by the California Highway Commission and the Department of Public Works,[210] evidenced by an appreciation of community involvement and a sensitivity toward

204. The following laws were enacted during the 1965 session of the legislature: CAL. STS. & H'WAYS CODE § 75.6, which requires the Department of Public Works, on request of city or county officials, to present at public hearings a "graphic portrayal" of alternative routes, § 210.4, which allows a local agency to petition the Highway Commission if it is not satisfied with the preliminary discussions with the Department of Public Works, § 210.5, requiring the commission to employ officers to preside over the public hearings, § 75.7, which imposes a duty on the commission to publish a report containing the basis for its decision to select a certain highway route. Section 90, was amended by deleting the requirement that state highways be located on the most direct and practical route.

205. *E.g.*, AB 1434 (1965), which authorized a petition by registered voters in the area affected for a public hearing on a proposed freeway location by the Highway Commission, if the local governing body had not requested such a hearing. AB 1441 (1965) would have precluded the Department of Public Works from acquiring by eminent domain any land dedicated for park uses. For a complete list of those 1965 bills which did not pass the legislature, see *Assembly Comm. on Natural Resources, Planning, and Public Works, Highway Beautification* 16-17, in 1967 SUPP. TO THE APPENDIX TO THE JOURNAL OF THE CALIFORNIA ASSEMBLY, No. 3.

206. AB 1439 (1965). This bill required that one member of the State Highway Commission be a former member of a county board of supervisors.

207. *Highway and Freeway Planning*, *supra* note 23.

208. *Id.*

209. Letter from President of the California Roadside Council, to Arthur Silen, Sept. 29, 1969.

210. *Id.*

community values.[211] This heightened sensitivity has been reflected in the institution of the design team or multidisciplinary approach to freeway location and design problems.[212] Since many of the so-called "community values" are represented by a wide variety of technical and socio-economic disciplines, highway planners are now taking advantage of the expertise of professional consultants who have heretofore played a peripheral role in freeway route location and design.[213]

The Division of Highways' increasing responsiveness to local desires and values may indeed signal the closing of the era of great freeway location battles.[214] It is submitted that the recognition of the tremendous social cost of such hostile encounters and the realization that freeways, particularly in urban areas, have not solved the state's transportation problems has made highway builders more willing now than in the past to make accommodations to nonhighway interests.

V. Federal Requirements, Due Process, and the Right of Appeal

Although federal participation in the highway construction programs is primarily fiscal, federal-aid statutes usually contain "eligibility" requirements which penalize those states that fail to implement provisions of federal law related to highway construction,[215] such as junkyard control programs[216] and federal labor standards.[217] Federal controls and requirements are felt at all levels of federal-aid programs,

211. Local resistance, either actual or potential, seems to have instilled an attitude of solicitude in highway planners for those affected, especially where a proposed highway is to be routed through an urban area where local feeling is volatile. After suffering a defeat over the San Francisco Panhandle Freeway in 1966, the California Division of Highways made every effort to secure local cooperation in the routing of the Century Freeway and its two interchanges through the riot-torn community of Watts; the state's anxiety not to add fuel to the fires of racial unrest seems to have been a primary incentive to seek the broadest possible support for its proposals, and its solicitous attitude toward those who were to be displaced. *See Watts, supra* note 158, at 68-71, 73-74.

212. *See, e.g., id.* at 73. For many examples of the "design team" approach to freeway planning throughout the country, see HIGHWAY RESEARCH BOARD, JOINT DEVELOPMENT AND MULTIPLE USE OF TRANSPORTATION RIGHTS-OF-WAY (Special Report 104, 1969).

213. *E.g., Transportation and the City*, ARCHITECTURAL FORUM 64, 71 (Oct. 1963).

214. Interview with a member of the Executive Committee of the California Roadside Council, Sept. 22, 1969.

215. IMPACT, *supra* note 11, at 21.

216. 23 U.S.C. § 136 (Supp. I, 1965).

217. *E.g.*, 23 U.S.C. § 113 (Supp. IV, 1969).

from the initial planning and project discussions[218] to post-completion maintenance.[219]

The Federal Highway Administration does not engage in any construction projects of its own, but merely approves and supervises construction programs submitted to it by state highway departments.[220] Approval is also required for the detailed plans, specifications, and cost estimates of each project.[221] Until approval has been given for changes in projects,[222] or for the projects themselves, no work may proceed,[223] and no reimbursement may be made for funds obligated prior to project approval.[224] When given, approval is deemed "a contractual obligation of the federal government for the payment of its proportionate contribution thereto."[225]

Federal-aid highways programs are meant to be a cooperative venture between the federal government and the states. State highway departments are designated as the responsible delegate agencies for the purpose of construction and maintenance of federal-aid highways,[226] and as such are required to have final authority to make decisions and to undertake contractual obligations on behalf of their states. Project agreements[227] indicate acceptance by state highway departments of the conditions that federal laws and regulations place on the payment of federal funds as well as acceptance of the amount of funds obligated.[228]

Coordination between the responsible state and federal officials is maintained through the Bureau of Public Roads and through Federal Highway Administration regional and field offices throughout the United States. To insure its coordination with the federal government,

218. *See, e.g.*, 23 C.F.R. § 1.8 (1969), requiring submission of detailed programs of proposed projects for approval. 23 U.S.C. § 128(a) (Supp. IV, 1969) requires that public hearings take into account the proposed highway's "consistency with the goals and objectives of such urban planning as has been promulgated by the community."

219. *See, e.g.*, 23 C.F.R. § 1.27 (1969).

220. 23 U.S.C. § 105 (1964).

221. *Id.* § 106(a).

222. *See* 23 C.F.R. § 1.13 (1969).

223. *Id.* §§ 1.10, 1.12 (1969).

224. 23 C.F.R. § 1.09 (1969). *But see* 23 U.S.C. § 115(a) (Supp. IV, 1969), where an exception is made for state expenditures in commencing construction of interstate projects, subject to the Federal Highway Administrator's approval.

225. 23 U.S.C. § 106(a) (1964).

226. 23 U.S.C. § 302 (1964), *as amended*, (Supp. III, 1968).

227. *See id.* § 110 (1964). The Secretary "may rely upon representations made by the State highway department with respect to the arrangements or agreements made" with local officials where their cooperation is necessary.

228. 23 C.F.R. § 1.14 (1969).

the California Division of Highways maintains a permanent staff of 71 persons to administer federal-aid programs in California.[229] As is the case with many nonreimbursable duties which are imposed by federal law or by regulation, the costs of maintaining such a sizable administrative staff are not shared by the federal government.[230] Similarly, California has the burden of enforcing federal labor and equal opportunity employment contract provisions, contracting and subcontracting standards, uniform reporting and accounting requirements, and the submission of the required documentation and vouchers, all without the aid of federal funds. Furthermore, certain other expenses are nonreimbursable because of differences between the requirements of California and federal law.[231] Yet, the working relationship between the Federal Highway Administration and the California Department of Public Works appears to be most cordial.[232]

To facilitate a close working relationship with federal authorities, California has specifically assented to federal highway legislation, and has provided that federal-aid construction programs are to be performed as required. To insure that California law does not interfere with the completion of federal programs, the California Streets and Highway Code provides that the "laws, rules or regulations of this state inconsistent with such laws, or rules and regulations of the United States, shall not apply to such work, to the extent of the inconsistency."[233]

Many of the requirements of federal law are intended to mitigate the social harm which earlier highway construction programs have caused; other requirements serve to codify practices initiated by more advanced state highway departments.[234] For some state highway de-

229. *Id.* § 1.11 (1969).

230. See text accompanying note 117 *supra*.

231. IMPACT, *supra* note 11, at 18-19. The Division of Highways exerts a constant "sales pressure" on the Bureau of Public Roads to induce it to absorb more of the administrative expenses connected with exclusively federal-aid requirements. *Id.* at 20 n.23.

232. Interview with Federal Highway Administration official, Apr. 1969. This official had high praise for the way California runs its highway construction programs with little need for bureau interference, except for the necessary project approvals.

233. CAL. STS. & H'WAYS CODE § 820. *See generally id.* §§ 820-28, which provide for state compliance with federal requirements, and appropriations of state funds to finance federal-aid highways, including those not within the state highway system, agreements with cities regarding federal-aid projects, and general cooperation with the responsible federal authorities in meeting federal-aid requirements.

234. Interview with official of the California Division of Highways, Nov. 3, 1969. State practices may simultaneously meet or exceed the required federal standard in certain areas, while in others federal requirements may act to create uniform minimal standards which have been found to be necessary on a nationwide basis.

partments, the increasing burden of federal regulation, however beneficial it may be, has not been easy to bear.[235] Part of the difficulty lies in the nature of highway construction programs themselves. Much of the state highway construction has been concerned primarily with long distance intercity travel through predominantly rural areas. In such cases, the scope of highway planning and land use development has been quite narrow. Cost and user-benefits could be taken as the primary criteria for highway route location without undue damage to local towns and cities.

As freeways have intruded into urban areas in ever-increasing size and number, local opponents have sought to influence the course of highway construction at all levels of government through whatever legal or political means available.[236] As suggested above,[237] highway programs are essentially political in nature; and in too many cases, location decisions have been thinly veiled exercises of raw power. Intergovernmental conflicts have increased with respect to highway location and design policies as cities have become more powerful political entities, especially where the aid of the federal government has been obtained through urban renewal and similar federal-aid programs. Efforts to alleviate urban poverty and rehabilitate nonwhite ghettoes through a variety of federal-aid programs have inevitably brought to the fore the feeling that nonuser community values must be accommodated,[238] or at the very least, that such interests be given priority in the

235. *See* A. MOWBRAY, ROAD TO RUIN 235 (1969) where the author states that several state highway officials have threatened to "go it alone," rather than submit to further federally imposed restrictions.

236. *See* Mandelker, *The Legal Framework for Planning and Decision Making*, 137 HIGHWAY RESEARCH RECORD 9, 10 (1966).

237. See text accompanying note 28 *supra*.

238. "Community values," as the term has been used either in law or otherwise, has been given no special definition. Generally, the term has been taken to mean values concurrently held with, and in addition to, the values associated with highway transportation and user benefits. In a very real sense, however, highway transportation values are real community values, and the problem is to assign a meaningful status to such values, at the same time relating these to the overall needs of the community. Much of what has been rather loosely termed "community values" is an aggregate of expressions of sentiment or opinion from diverse sectors of the community at large. Some of these values may in fact conflict with each other, such as the desire to protect both industrial and residential properties from possible freeway development, yet at the same time wanting a freeway for the benefits it brings to the community. Similarly, such desire to have easy access to freeways may be counterbalanced by a dislike of any close proximity to freeway development. *See generally* Boulding, *The Formation of Values as a Process of Human Learning*, in HIGHWAY RESEARCH BOARD, TRANSPORTATION AND COMMUNITY VALUES 31 (Special Report 105, 1969).

On a broader scope, conflicts in community values occur where the merits of

decisionmaking process.[239] Because state highway location and design practices (not to mention the influence of vested interests securely entrenched in state capitals) have been immune to judicial attack, cities and local underrepresented groups of people (often ethnic or racial minorities) have been appealing to the federal government for relief.[240] The inevitable result has been that past abuses of authority and gross disregard of local sensibilities have resulted in the promulgation, both by states and the Federal Highway Administration, of longer and more detailed laws, rules and regulations which now govern the "due process" of highway route location.[241]

community progress are at issue; and the freeway is perhaps the most obvious symbol of community progress. *Quaere*: If the public expects current and future transportation facilities to be planned with due deference and consideration to local community values, might these other values be planned and protected by law as well? *See* Frankland, *Coexistence in the Highway Corridor: A Test of Intergovernmental Cooperation*, 166 HIGHWAY RESEARCH RECORD 22 (1967). For a general discussion of community values and their impact on highway transporation planning, see Legarra & Lammers, *The Highway Administrator Looks at Values*, in HIGHWAY RESEARCH BOARD, TRANSPORTATION AND COMMUNITY VALUES 109 (Special Report 105, 1969).

239. For example, both the federal and California law provide for relocation assistance to low-income families. 23 U.S.C. §§ 501-11 (Supp. IV, 1969); CAL. STS. & H'WAYS CODE §§ 156-59.6. The Department of Transportation has announced that "future highway projects which involve dislocating people will not be approved until adequate replacement housing has already been provided for and built." Palo Alto Times, Sept. 13, 1969, at 32, col. 4.

240. A. MOWBRAY, ROAD TO RUIN 155, 234-35 (1969).

241. *E.g.*, 23 U.S.C. § 128(a) (Supp. IV, 1969). "Due process," in this context, would seem to focus on the right to be heard, the right to be informed, and the right to have due consideration given to counterproposals and objections. It may also involve a requirement that the lead time between route adoption and right-of-way acquisition be not unreasonably long. *But see* Helpern v. McMorran, 50 Misc. 2d 134, 270 N.Y.S. 2d 656 (Sup. Ct. 1965), which held that the route adoption hearing, though occurring more than five years prior to the suit to void the route location decision was nevertheless valid, that there was no judicial remedy because the hearing was valid on its face, and that the applicable statute of limitations barred any legal remedy. Thus, the court held, "[i]f an inordinate time has passed between the hearing and the commencement of construction, the delay is a matter of concern for the appropriate federal and state authorities, but raises no legal impediment upon which this court may act." *Id.* at 137-38, 270 N.Y.S.2d at 659-60. The approach of the court, though good doctrine insofar as administrative law is concerned, is to be criticized today because it is not in accord with the spirit and trends of recent legislation. Both change of circumstances and laches have a certain appeal, particularly in situations where unreasonable delay, lack of due diligence, or other inequitable conduct would unjustly prejudice the party against whom the decision is to be enforced. It would seem the better view, especially in a California context, to keep in mind the ever-changing nature of urban communities whenever a highway location decision is challenged because of an unreasonable delay in implementing it; the burden should pass to those who seek to enforce that decision to justify such enforcement with a showing of due diligence or other good cause to ignore the delay.

The current emphasis of federal policy is aimed primarily at improving communications between highway planning agencies and the public at large,[242] and at increased consideration of the overall impact that route location and design has upon community values.[243] The impetus of the federal requirements is the recognition that many of the narrow-approach, user-oriented location practices characteristic of highway planning in the past have been counterproductive, and that local opposition to freeways, especially in urban areas, is becoming increasingly intense.[244] To avoid such undesirable results, federal law requires public hearings for all federal-aid projects.[245] State highway departments must certify that such hearings have been held.[246] The intention of the federal government is to insure that states afford full opportunity for effective public participation in the consideration of highway location and design proposals before the proposals are submitted to the Federal Highway Administration for approval.[247] It also hopes to encourage early and amicable resolution of controversial issues that arise.[248]

To this end, federal policy requires that state highway departments

> consider fully a wide range of factors in determining highway locations and highway designs. It provides for extensive coordination of proposals with public and private interests . . . [and] it provides for a two-hearing procedure to give all interested persons an opportunity to become fully acquainted with highway proposals of concern to them and to express their views at those stages of any proposal's development when the flexibility to respond to these views still exists.[249]

Despite the fact that California highway officials are in complete

242. *See* Bridwell, *Remarks Before Pennsylvania Department of Highways Seminar, February 28, 1968, Harrisburg*, 220 HIGHWAY RESEARCH RECORD 1, 2 (1968) [hereinafter cited as Bridwell].

243. *See* 23 U.S.C. § 128(a) (Supp. IV, 1969); Bridwell, *supra* note 242, at 2. In attempting to take into account the nonquantifiable values of urban freeway location and design, the Federal Highway Administration has developed the so-called "design team," or multidisciplinary approach to meet the complex needs of urban transportation. *See* 220 HIGHWAY RESEARCH RECORD *passim* (1968).

244. *See* Bridwell, *supra* note 242, at 1-2.

245. 23 U.S.C. § 128(a) (Supp. IV, 1969). Detailed regulations concerning the hearing requirements are issued under the authority of 23 C.F.R. § 1.32 (1969). These requirements are known as Policy and Procedure Memoranda (PPM's) or Instructional Memoranda (IM's), and are intended to provide detailed guidance to state officials who administer Federal-aid programs. Public hearing and location approval are contained in PPM 20-8, dated January 14, 1969. 34 Fed. Reg. 728 (1969).

246. 23 U.S.C. § 128(b) (1964).

247. PPM 20-8, ¶ (1)(a), 34 Fed. Reg. 728 (1969).

248. *Id.*

249. *Id.* ¶ (1)(b).

agreement with the spirit of the federal two-hearing requirement (at least with respect to the desirability of public involvement in the route location and design process), it has been suggested that if the federally required hearings actually serve their intended purpose, the result could be disastrous to a highway construction program of any size or complexity.[250] Federal-aid hearings are implicitly an all-or-nothing proposition; completed route locations or design features are presented for acceptance or rejection, even though the ostensible purpose is to permit the public to initiate certain changes in route location or design features. While it is possible that such hearings will enable the public to initiate route changes, the likelihood of such changes occurring is slight.[251] The reason for the limited usefulness of public involvement *at this stage of the design process* is rather obvious. The need for a particular facility and the level of expenditure already made, in terms of time, effort, and money, will usually outweigh any benefit to be derived from additional changes or in the resulting delay. Moreover, even when changes are proposed, or project decisions are postponed for further study, the final decision is not likely to be any easier or more palatable.[252]

Although the federally required "corridor"[253] and "design-feature"[254] hearings are intended to give the public the opportunity to comment on the type of facility to be built as well as its location, it is likely that the separation of highway location from highway design distorts the highway location and design process, at least in the public's mind. Such distortion results because the terrain over which a highway is to be built will often dictate the kind of facility needed.[255] A separate hearing is useful, however, where the issue is the type of facility (among those feasible, such as a depressed freeway as compared to an elevated freeway) most compatible with local community values. Such hearings also provide another opportunity to examine a proposed design, to test the underlying presuppositions, and to allow for corrections

250. Interview with state highway official, Nov. 1969.

251. *Id.*

252. Legarra & Lammers, *The Highway Administrator Looks at Values*, in HIGHWAY RESEARCH BOARD, TRANSPORTATION AND COMMUNITY VALUES 109, 110 (Special Report 105, 1969) [hereinafter cited as Legarra & Lammers].

253. PPM 20-8, ¶ 6, 34 Fed. Reg. 728 (1969). This is a hearing to be held before a route location is approved, and before the state highway department is committed to a specific proposal. Its purpose is to discuss the need for and alternatives to a proposed federal-aid highway. *Id.* ¶ 4(a).

254. This requirement has reference to the major design features of the proposed project. *Id.* ¶ 4(b).

255. Interview with state highway official, Nov. 1969.

in design or route location where such corrections are found to be necessary.

The intent of both California and federal practice is to permit the maximum feasible amount of discussion of the issues presented. Although extended discussion lengthens the highway location process,[256] California highway officials consider this a small price to pay for guaranteeing the public's right of participation in the highway location process.[257] Recent studies suggest methods of improving the hearing process; however, the recommendations concerned improvements in communications techniques rather than policy changes.[258] Notwithstanding any difficulties in its application, California officials feel that their procedures more than meet the requirements of federal policy.[259]

The current trend of California's highway procedure is to maximize community involvement in the location and design process. This is a difficult and often an unrewarding task, but it is necessary if later community opposition is to be avoided. Quite frequently, highway officials agree to recommend a particular route alternative, only to encounter an outraged public reaction once the proposal becomes publicized. Local governmental bodies may respond to pressure from a particular interest group within the city, or a particular city within a county at the expense of the remainder of the city or county. The result may well be irreconcilable controversies over plans for future development.[260] Cities within a highway corridor may either support or oppose the recommendation of the State Highway Engineer, depending upon the purported benefit or loss to the community served.[261]

To reduce the possibility of a "disproportionate representation of certain sectors of the public"[262] within the local community, public hearings by the planning commission or legislative body of a city or county are now required before that body may recommend the adoption of a state highway route.[263] In an effort to achieve the earliest possible

256. *See* Legarra & Lammers, *supra* note 252, at 110. Similar comments were made by a highway official during an interview, Nov. 1969.

257. *See* Legarra & Lammers, *supra* note 252.

258. DESIGN PROCEDURES, *supra* note 181, at 28-29.

259. See Legarra & Lammers, *supra* note 252, at 115.

260. See *id.* at 118-21 (giving four California examples).

261. *See, e.g., id.*; DIV. OF HIGHWAYS, DEP'T OF PUBLIC WORKS, ANNUAL REPORT OF THE CAL. HIGHWAY COMM'N RELATING TO FREEWAY ROUTE ADOPTIONS 12-15 (Dec. 196[illegible].

way Beautification 14, [illegible] *Natural Resources, Planning, and Public Works, High-*IFORNIA ASSEMBLY, NO. 3. [illegible] THE APPENDIX TO THE JOURNAL OF THE CAL-

263. CAL. STS. & H'WAYS CODE § 74.5.

resolution of potential sources of conflict, the Division of Highways has sought to contact, or to create where none exist,[264] local groups within the community to acquire and disseminate information concerning freeway proposals and community values.[265] A recent study applauds such steps and recommends further broadening of the roles that local governments[266] and private interest groups[267] play in the initial design studies process; however, the study notes that the Division of Highways' efforts to insure local participation and to preserve community values will be to little avail if local communities fail to act positively in their own behalf and accept the responsibilities inherent in the undertaking.[268] Local government must have the ability and desire to motivate other groups within the community to assume their fair share of the burden.[269]

Beginning with the initial route adoption discussions, California's legislative policy favors a complete exchange of pertinent information between local governing bodies and the Department of Public Works. Recommendations from local agencies should be considered by the department and by the Highway Commission in reaching a final decision.[270] Freeway route plans recommended to the commission are required to be publicized, and an opportunity must be afforded for local governing bodies to request a hearing on the matter before the commission takes final action.[271] In addition to consultations with affected local agencies and governing bodies, public meetings are required to be held "when sufficient information has been accumulated to permit intelligent discussion . . . ."[272] To insure fairness and orderly procedure at department-sponsored public meetings, the Highway Commission is required to employ independent hearing officers to preside over such public hearings or meetings.[273]

If, in the course of preliminary freeway location discussions, local governmental agencies (which would seem also to include the legislative or governing bodies for cities and counties) are dissatisfied with the

264. *See* Legarra & Lammers, *supra* note 252, at 116.
265. *See id.*; DESIGN PROCEDURES, *supra* note 181, at 7-9.
266. DESIGN PROCEDURES, *supra* note 181, at 12-14, 19-20.
267. *See id.* at 21-23.
268. *See id.* at 8, 12-15.
269. *See id.* at 12-15.
270. CAL. STS. & H'WAY CODE § 210.
271. *Id.*
272. *Id.*
273. *Id.* § 210.5. In addition, hearings are to be conducted in an informal but orderly manner; formal rules of evidence do not control; time permitting, all interested persons should be heard. *Id.*

Division of Highways' choice of "the most logical segment to be studied for route selection,"[274] they may appeal to the Highway Commission and be granted a hearing.[275] Upon the request of an aggrieved city or county governing body (specifically detailing the kind of information desired), the Department of Public Works is required to produce comparative estimates of costs and benefits accruing to alternative route proposals.[276] Judging by current practice, however, it would seem that the burden of coming forward with new facts justifying a reversal of the State Highway Engineer's recommendation would rest with the complaining entity.

A public hearing before the Highway Commission is required after the Director of Public Works proposes a freeway route to the commission. After such a recommendation is made, a resolution of intention to consider the location of that proposed freeway is passed by the commission; thereafter, the State Highway Engineer is required to notify the appropriate local governing body of the resolution.[277] Such notification must be in writing, and it must include a statement that the Highway Commission will hold a hearing on the proposal, if requested to do so within 30 days after the first regular meeting of the local legislative body following the receipt of notification.[278]

If a public hearing before the commission is requested in the manner prescribed above, such hearing must be provided and all interested parties must be given the opportunity to be heard.[279] Where the commission believes that a hearing is necessary or desirable and no request has been made, it may call or hold such hearings on its own motion.[280] Although the public hearing allows all interested parties to be heard, there is little assurance that the sentiments and recommendations expressed will be acted upon. The general tendency has been that the recommendation of the Director of Public Works will be followed, unless the local entity brings forward new facts that would justify reconsideration.[281] Similarly, requests for hearings for the purpose of recon-

274. *Id.* § 210.4.
275. *Id.* §§ 74, 210.4.
276. *Id.* § 75.5. However, the commission's failure to comply with the requirements of the Act will not reverse the decision, and proof of such failure to comply is inadmissible as evidence in court. *Id.*
277. Procedural Resolution of the California Highway Commission, adopted Dec. 13, 1968.
278. *Id.*
279. *Id.* ¶ 5.
280. *Id.*
281. Interview with a California Highway Commission official, Oct. 1969.

sidering previously adopted freeway routes are not granted unless the petitioning party establishes new facts that justify further study.

After the expiration of the prescribed 30 day period, or after public hearings have been held, the Highway Commission may adopt the proposed freeway route within the project limits under consideration.[282] In reaching its final decision, the commission is required to consider recommendations and other information submitted by local agencies,[283] including any officially approved master plans or other highway and transportation plans.[284] The standard of judgment is to be "the standpoint of the overall public interest."[285] Upon final adoption of a freeway route, the commission is required to prepare a report to interested persons and public agencies stating the basis for its decision.[286]

Even if public hearings are held as prescribed, it is questionable whether they accomplish their intended results. Until recently, it was widely felt, in California and elsewhere, that public meetings and hearings were merely pro forma rituals which served to ratify decisions effectively made much earlier.[287] Today's hearings and public meetings are probably more effective as vehicles for expressing community sentiment; however, the problems inherent in public hearings—apathy, indifference, and lack of knowledge—remain.[288]

282. Procedural Resolution of the California Highway Commission, ¶ 6, adopted Dec. 13, 1968.

283. *Id.* ¶ 8; *see* CAL. STS. & H'WAYS CODE § 210.

284. *See* CAL. STS. & H'WAYS CODE 210.

285. *Id.* § 211.

286. *Id.* § 75.7. Consideration must be given, but not limited to, the following factors:

"(a) Driver benefits.
(b) Community values.
(c) Recreational and park areas.
(d) Historical and aesthetic values.
(e) Property values, including impact on local tax rolls.
(f) State and local public facilities.
(g) City street and county road traffic.
(h) Total projected regional transportation requirements." *Id.*

287. *See* LEAGUE OF CALIFORNIA CITIES, CITY FREEWAY GUIDE 3 (Jan. 1964): "It has been the experience throughout the State that changes in freeway locations have occurred most often as a result of meetings held by the Division of Highways rather than resulting from Highway Commission hearings." The only really effective way of influencing a particular highway location or design feature is to make a private presentation to the resident district engineer in whose jurisdiction the facility is to be built. From an interview with a state highway official, April 1969.

288. *See* DESIGN PROCEDURES, *supra* note 181, at 8.

As a general rule, public hearings have not been well-attended[289] unless an issue of significant community interest or controversy is involved.[290] Moreover, even when community interest is high, attendance lags because the hearings are held during working hours.[291] All too often they have been less a vehicle for a meaningful exchange of information and expressions of popular preferences, and more a self-congratulatory ritual to be used by local special interests, business groups, and chambers of commerce to weight the record in their favor.

Whether public participation through public hearings is a "success" or a "failure" is largely dependent upon how it is used by the parties concerned.[292] Although the public is invited to participate in the route selection process and safeguards have been established to aid the hearing participants in appreciating the import of the information being presented,[293] the only meaningful protection for the public is the willingness and capacity of those who contribute to the process to act in the spirit of mutual cooperation so as to compromise existing or potential sources of conflict in as equitable a manner as possible. Notwithstanding the procedural safeguards that the law imposes on the

289. *E.g.*, DIV. OF HIGHWAYS, DEP'T OF PUBLIC WORKS, ANNUAL REPORT OF THE CAL. HIGHWAY COMM'N RELATING TO FREEWAY ROUTE ADOPTIONS 12, 14 (Dec. 1968), wherein it was reported that one meeting had 1,100 in attendance, while two meetings in which alternate routes were considered had 350 and 125 in attendance. Remarks confirming the inefficacy of public hearings were made by various highway officials in personal interviews with the author.

290. Interviews with state highway officials, Apr. 1969.

291. In the public hearing at Maxwell, California, to consider design features for a segment of Interstate Route 5, held on May 15, 1969, one participant commented that had the hearing been held in the evening hours, twice the number of people present would have attended.

292. At the Maxwell Design Hearing, all officials made what seemed to be full disclosure of all material details of interest to that community; they seemed to make every reasonable effort to inform the audience and to solicit the views and opinions of those present; questions concerning the proposed facility, and related traffic safety devices which were of community interest, were answered as fully as possible. Where requests could not be immediately granted, as with a particular traffic control signal, full explanation was given. At the conclusion of the hearing, a member of the Advisory Committee to the California Highway Commission rose to ask the audience if there was anything that they could suggest to improve the hearing process. Several suggestions were offered, principally concerning at what hour the hearing should have been held, and regarding future efforts to keep people abreast of new developments.

293. *See, e.g.*, CAL. STS. & H'WAYS CODE § 75.6, which provides: "At public hearings before the [highway] commission or department [of public works] on the selection of alternative state highway or freeway routes, on request of any city or county affected, the department shall present a graphic portrayal of selected significant portions of the route alternatives by means of sketches or preliminary models, where appropriate, to show the general appearance and basic design features of the highway or freeway upon which the estimated cost is based."

highway location process, so much decisionmaking authority is discretionary that mere demands for strict compliance with procedural niceties render that remedy somewhat nugatory. The California Highway Commission is the ultimate authority in the state highway location decisionmaking process, and even though its procedure meets the requirements necessary for adoption and promulation[294] of route locations, there is no way in law to assure the wisdom of its decisions. Such wisdom, and the ability to know and to act in the public interest, must come from constructive public involvement in the route location process.

Where state level attempts to change a location or design decision regarding a federally aided highway have failed, direct appeal may be made to the Federal Highway Administration to disapprove a particular routing, to withdraw an earlier approval, or to refuse to approve all alternatives except one. This was the case in September of 1968, when the Federal Highway Administrator in an unprecedented action announced that, with regard to disputes over the location of Interstate 280 as it passed near the Crystal Springs Reservoir in San Mateo County, he would only approve the San Francisco ridge routing.[295] Never before had a high federal official publicly repudiated a state highway department; and the incident received wide publicity.[296] Although there is some probability that San Francisco's case may have been overstated in some respects,[297] the impact of the incident has been farreaching. Whatever the merits of either position, the dispute demonstrates the leading role that the Federal Highway Administration can play in a freeway location controversy.

Appeal to the Federal Highway Administration, however, is a two-edged sword; there is no guarantee of protection to local interests, even if the Administrator does at times appear to possess a greater aura of objectivity than local highway planners. The Federal Highway Administration may refuse to approve any route other than the one it desires, despite local opposition and the support of alternative routings by the state highway department.[298]

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294. CAL. STS. & H'WAYS CODE § 213. The highway commission procedure —largely a restatement of statutory criteria—is set out in CAL. ADMIN. CODE tit. 21, § 1451.

295. Memorandum from Cal. Dep't of Public Works, Div. of Highways, to Mr. James A. Moe, Director of Public Works, *Freeway Route Recommendation* 2 (File 04-SM-280, Feb. 4, 1969).

296. 23 U.S.C. § 138 (Supp. II, 1967), *as amended*, (Supp. IV, 1969) was successfully invoked by the opponents of the Crystal Springs route. The section states: "[T]he Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreational area, or wildlife or waterfowl refuge of national, State, or local significance, as determined by the Federal, State, or local officials having jurisdiction thereof, . . . unless there is no reasonable alternative to such a taking, and all reasonable precautions have been taken to minimize damage from such use."

297. This principally concerned the city's allegation that the proposed freeway would pollute the reservoir. See Memorandum from Cal. Dep't of Public Works, Div. of Highways, *supra* note 295, at 13-15.

298. Road Review League v. Boyd, 270 F. Supp. 650 (1967).

[Civ. No. 1232. Fifth Dist. Jan. 29, 1971.]

CITY OF LOS ANGELES et al., Plaintiffs and Respondents, v. W. M. KECK, JR., et al., Defendants and Appellants.

SUMMARY

Plaintiffs filed an eminent domain proceeding to acquire a fee simple estate in defendant's grazing land, across which they had, in a prior proceeding, obtained a permanent easement for the purpose of constructing and maintaining electrical transmission lines. At the time of the present proceeding, they had constructed one transmission line across the property, and were in the process of constructing another. In response to interrogatories they admitted that under the terms of the existing easement they could continue their present use and accomplish any future use within their contemplation. The parties stipulated that the only issue between them was whether public interest and necessity required plaintiffs' acquisition of the fee in the property subject to the easement. The trial court found that it did, and awarded plaintiffs an estate in fee simple over such property. (Superior Court of Kern County, John D. Jelletich, Judge.)

The Court of Appeal reversed on the grounds that the evidence was insufficient to support the trial court's finding that public use and necessity required the taking of the property in fee simple. The court pointed out that plaintiffs had admitted in the interrogatories that all the uses of the property, present and contemplated, are permissible under the terms of the existing easement. The court also stated it would be a waste of the utility users' and taxpayers' funds to purchase the land in that plaintiffs would gain no rights which they did not already have. (Opinion by Ginsburg, J., with Gargano, Acting P. J., and Coakley, J., concurring.)

HEADNOTES

Classified to McKinney's Digest

(1a-1d) Eminent Domain §§ 154, 157—Proceedings—Evidence—Burden of Proof—Sufficiency.—In an eminent domain proceeding by the City

of Los Angeles, et al., to acquire a fee simple estate in property outside its territorial jurisdiction in Kern County, over which it had already acquired an easement to construct electrical transmission lines, plaintiffs failed to meet their burden of proof that the proposed taking of the fee was necessary for the public use, and the evidence was insufficient to support the trial court's finding that public use and necessity required the taking, where plaintiffs admitted in the interrogatories that all uses of the property, present or contemplated, were permissible under the existing easement, where plaintiffs' uses of the easement created no conflicts or problems with defendant's use of the property as grazing land, where the taking of the fee would result in an unwarranted diminution in market value of the defendant's land, and where it would be a waste of the utility users' and taxpayers' funds to purchase the land in that they would gain no rights which they did not already have.

[See Cal.Jur.2d, Eminent Domain, §§ 150 et seq.; Am.Jur.2d, Eminent Domain, §§ 27-37.]

(2) **Eminent Domain § 27—Requirement That Use Be Necessary—Province to Determine Necessity: Municipal Corporations § 98—General Powers—Extraterritorial Powers.**—In an eminent domain proceeding it is the province of the courts to determine whether the public interest and necessity support the condemnation of land by a city where the property sought to be taken is outside and distant from its territorial limits.

(3) **Municipal Corporations § 96—General Powers—Rule of Strict Construction.**—The language purporting to define the powers of municipal corporations must be strictly construed.

(4) **Eminent Domain § 154—Proceedings—Evidence—In General—Presumptions—Burden of Proof.**—Under Code Civ. Proc., § 1241, subd. 2, neither the resolution of the board of a public utility district nor the ordinance of the legislative body of a city is prima facie evidence of necessity where the property sought to be acquired is outside the condemning agency's territorial limits.

(5) **Eminent Domain § 155—Proceedings—Evidence—Admissibility.**—In a proceeding in eminent domain by a city to acquire a fee simple estate in property outside its territorial limits and over which it had already acquired an easement to build and maintain electrical transmission lines, the trial court improperly admitted evidence of the city's

departmental policy to obtain the fee to transmission line rights of way, as a reason or a fact of itself upon which to find necessity for the taking in this particular case, although legislative policy may be evidence of a fact in certain situations, since to do so would permit, through indirection, a legislative determination instead of a judicial determination of what constitutes a taking for public use and necessity, and thus would denigrate the plain language of Code Civ. Proc., § 1241, subd. 2, which provides, inter alia, that a legislative determination of public use and necessity is not conclusive evidence of such use and necessity where the property in question lies outside the territorial limits of the City.

(6) **Eminent Domain § 129—Proceedings—Construction of Statutes.**—Irrespective of a condemning agency's power to determine, as a legislative decision, the issue of the quantum of the estate to be taken under Code Civ. Proc. § 1239, subd. 4, such issue is moot until a basic finding that public use and necessity required the taking of the property is first made pursuant to Code Civ. Proc. § 1241, subd. 2.

COUNSEL

Hanna & Morton, Harold C. Morton, John H. Blake and Douglas P. Grim for Defendants and Appellants.

Roger Arnebergh, City Attorney, Gilmore Tillman, Assistant City Attorney, and Kenneth W. Downey, Deputy City Attorney, for Plaintiffs and Respondents.

OPINION

GINSBURG, J.*—This is an appeal from a judgment condemning the fee title to certain real property. Plaintiffs are the City of Los Angeles and its Department of Water and Power, and defendants are the owners of 640 acres of agricultural land situate outside the territorial limits of plaintiff city, being in the County of Kern.

In 1950 plaintiffs brought an action in the Superior Court of Kern County to obtain a permanent easement across defendants' property for

*Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

the purpose of constructing and maintaining electrical transmission lines. Subsequently, the then owners of the property conveyed to plaintiffs an easement over a strip of property sometimes called "Parcel 104." This strip is 250 feet wide, runs diagonally across the 640-acre parcel, and contains 17.34 acres. The easement so obtained contains broad grants of rights in connection with the construction, maintenance and operation of one or more electrical transmission lines.[1]

In 1952, plaintiffs constructed an electrical transmission line across the subject property within the easement right of way. They now are constructing an additional line within this area; this additional line was contemplated at the time they obtained the right of way, and there is no question but that they have adequate space within the 250-foot easement and the right to construct it under the terms of their existing easement. In fact, plaintiffs admit that by virtue of the existing easement they not only can continue their present use, but also they may accomplish any future use now within their contemplation.

This action was commenced in 1967 for the purpose of acquiring a fee simple estate in the identical property subject to the easement. No additional property nor right in any other portion of defendants' property was sought. A written "Stipulation Limiting Issues and Setting Just Compensation" was

[1]The conveyance is to the City of Los Angeles, its successors and assigns forever. It describes the rights so conveyed in the following language:

". . . all those certain permanent easements and rights of way to be used at any time and from time to time, to construct, reconstruct, maintain, operate, use, inspect, renew and enlarge one or more electrical transmission lines constructed on steel or wooden towers or poles with one or more overhead and underground wires for lightning protection and other purposes, and for any other similar and like structures which are necessary or convenient to transmit, distribute, regulate, use and control electrical energy; to construct, use, and maintain patrol roads; to clear and keep said right of way free from explosives, structures, brush and wood growths, and all combustible or other materials hazardous to the safe, efficient use and operation thereof; to protect them from fire and any other hazards; and for any and all other necessary, incidental or convenient purposes which may be required in, under, over, upon and across that certain real property situate in the County of Kern, State of California, more particularly described as follows, to wit:

". . . . . [description of property] . . . . . .

"Together with the right of ingress to said right of way across adjoining lands of grantor from the public highway most convenient to said right of way and the right of egress from said right of way to such highway across said adjoining lands of grantor, over and along any road now existing, or if none, then over the most direct and practical route grantee may select.

"Excepting and reserving unto the grantor only such grazing, agricultural and mineral rights as will not interfere with or prohibit the free and complete use and enjoyment by grantee, its successor or assigns of said rights and easements hereby granted.

"It is further understood and agreed that no other easement thereon shall be given by grantor to any third person, firm or corporation without the written consent of grantee."

executed by the parties prior to trial wherein they stipulated that ". . . [t]he only issue remaining between plaintiffs and defendants is public use and necessity for the taking of the above parcel [the land subject to the easement] and the *fee interest* therein." (Italics added.)

The trial court awarded judgment to the plaintiffs, finding that "[t]he public interest and necessity require interests in said parcel 104 in addition to those owned and enjoyed under the easement . . . ," and "[t]he public interest and necessity require the taking by plaintiffs of an estate *in fee simple* in the real property described in the Complaint as Parcel 104."[2]

The issues raised on this appeal are as follows:

(1) Was the finding of the trial court of necessity for the taking of the fee sustained by the evidence?

(2) Do plaintiffs have the absolute right to condemn the fee estate on property outside their territorial limits on which they already hold a permanent easement that includes all present and contemplated uses?

Plaintiffs contend that evidence supports the finding that the taking is for a public use and is necessary. They further contend that a resolution of the Board of Water and Power Commissioners and the ordinance of the City Council of the City of Los Angeles determining that public interest and necessity require the taking of a fee estate in Parcel 104 is conclusive upon the issue of the *quantum* of the estate to be taken.

(1a) We first consider whether the plaintiffs have shown that the public interest and necessity require the taking of the property, i.e., the taking of the fee in the real property subject to this easement.

Public use and necessity are controlled by Code of Civil Procedure section 1241, which provides, in part, as follows: "*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 public utility district . . . or the legislative body of a . . . city . . . 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 . . . city . . . of any proposed public utility, or any public

[2]Findings "5" and "6." But cf. Finding "9," which reads:
"Under the terms of said [existing] easements plaintiffs have the right to construct and operate a public improvement and works consisting of one or more electric power transmission lines and related appurtenances, including the electric power transmission line presently under construction, and a right of way therefor for the transmission and distribution of electricity for the purpose of furnishing and supplying electric energy to THE CITY OF LOS ANGELES."

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 . . . city . . . of property located outside of the territorial limits thereof.*" (Italics added.)

In *City of Carlsbad* v. *Wight,* 221 Cal.App.2d 756, 761 [34 Cal.Rptr. 820], the court said: ". . . section 1241, subdivision 2, of the Code of Civil Procedure limits the power of the condemning agency when the proposed taking is outside its territorial limits. . . .

". . . . . .

"It is thus clear that a determination of the condemner as to public need, necessity and route for, or site of, a proposed public improvement within its boundaries is a legislative, not a judicial, matter (*People* v. *Chevalier,* 52 Cal.2d 299, 305 [340 P.2d 598]); but when a city seeks to condemn land without its corporate limits, it devolves upon the courts to determine whether the taking of the particular land is necessary for the use (*Harden* v. *Superior Court,* 44 Cal.2d 630 [284 P.2d 9])."

It is apparent that the Legislature, in differentiating between property inside and outside the territorial limits of the condemning agency, recognized the differences in the postures of both the property owner and the condemning agency in these contrasting situations. Where the property is inside the territorial limits, the ministerial officers and legislative body of the condemning agency and the property owners and taxpayers should have full knowledge of conditions, locations, and the public good involved in the proposed improvement. Furthermore, the legislative body and, by derivation, their ministerial functionaries, are accountable to those who are property owners and, also, to those who are taxpayers within the territorial limits through the elective process. (2) But where the property sought to be taken is outside and distant from these territorial limits, neither such knowledge nor such accountability may be present. Thus, the Legislature has specifically provided that the courts shall pass upon such a taking (see Code Commissioners' Note to Code Civ. Proc., § 1241, Deering's Ann. Codes).

We must thus look to the evidence adduced at the trial to determine whether the plaintiffs have met the burden of proving that the "public

interest and necessity require the acquisition" of the fee of the property in question, within the meaning and intent of Code of Civil Procedure section 1241, subdivision 2, *supra*. In so doing, we apply the limited power of appellate review, and to that end determine only whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court (*Crawford* v. *Southern Pac. Co.*, 3 Cal.2d 427, 429 [45 P.2d 183]; 3 Witkin, Cal. Procedure (1954) Appeal, § 84, p. 2245, and cases cited therein).

Plaintiffs point to the ordinance and resolution as *prima facie* evidence of *necessity* under Code of Civil Procedure section 1241, relying upon *People* ex rel. *Dept. Pub. Wks.* v. *Lagiss*, 223 Cal.App.2d 23, 36 [35 Cal.Rptr. 554]. The *Lagiss* case holds such a resolution to be *prima facie* evidence that the taking is, in fact, for a *public use* under Code of Civil Procedure section 1238, subdivision 3; but, where the property is outside the condemning agency's territorial limits, we know of no case which holds it is evidence of *necessity* under Code of Civil Procedure section 1241, subdivision 2, or any statute so providing. Section 1241, subdivision 2, states that such a resolution shall not be *conclusive* evidence that the taking is necessary. **(3, 4)** Under the general rule that language purporting to define the powers of municipal corporations must be strictly construed (see *Harden* v. *Superior Court*, 44 Cal.2d 630, 638-639 [284 P.2d 9], and cases cited therein), we hold that neither the resolution of the board of a public utility district nor the ordinance of the legislative body of a city is *prima facie* evidence of necessity under Code of Civil Procedure section 1241, subdivision 2, where the property is outside the condemning agency's territorial limits.

(1b) Plaintiffs' only evidence, other than the ordinance and resolution, was the testimony of one York, an engineer employed by the Los Angeles Department of Water and Power. York testified that one electrical transmission right of way was located on the property, that a second was then in the process of being constructed, that this second line was contemplated at the time the easement was acquired in 1951, and "that's why the right of way [is of] the width of 250 feet. . . ." He admitted that 250 feet would be excessive for only one line, and that the first line had been placed 75 feet from the easterly edge of the right of way in 1952 in contemplation of the second line, now being constructed. He further testified that no additional use of the property is contemplated.

Perhaps the most compelling evidence of lack of necessity is plaintiffs' answers to certain interrogatories, wherein they admit that all uses of the

property present or contemplated are permissible under the existing easement.[3]

(5) Over defendants' objection, certain testimony was given concerning departmental "policy," which counsel for plaintiffs described as ". . . the meat of the coconut . . . [t]his is what the whole lawsuit is about." This "policy" was stated to be to obtain the fee to transmission line rights of way. Although the policy of a legislative body may be admissible evidence of a fact in certain situations, to hold policy to be admissible in evidence as a reason or a fact of itself upon which to find necessity for taking in a case such as this, would be to denigrate the plain language and intent of Code of Civil Procedure section 1241, subdivision 2; it would permit, through indirection, a legislative determination instead of a judicial determination. (See *City of Carlsbad* v. *Wight, supra,* 221 Cal.App.2d 756, 761.) It may be presumed that "policy" is an im-

[3]The pertinent interrogatories and their respective answers are as follows:

Interrogatory No. 3

"Paragraph 3 of the complaint alleges that public interest and necessity require the construction and operation of 'electric power transmission lines and related appurtenances, and a right of way therefor,

for the transmission and distribution of electricity for the purpose of furnishing and supplying electric enery to the City of Los Angeles and the inhabitants thereof.' Is it not a fact that the plaintiffs presently have constructed and operate electric power transmission lines and related appurtenances over and across a right of way therefor for such purposes, pursuant to the easements Exhibits A and B to the answer of these defendants?"

Answer: "Yes."

Interrogatory No. 4

"Do the plaintiffs contemplate and propose any further or additional purpose or use of parcel 104 than as presently used by plaintiffs pursuant to the easements Exhibits A and B referred to?"

Answer: "The only additional use the plaintiffs presently contemplate for Parcel 104 is the construction of an additional electric transmission line across said parcel."

Interrogatory No. 5

"If the answer to previous interrogatories is "yes," describe what use or purpose is contemplated by plaintiffs different or in addition to use and purpose to which parcel 104 is presently put pursuant to said easements Exhibits A and B to the answer."

Answer: "This new project would be an additional use rather than a different use or purpose."

Interrogatory No. 6

"If plaintiffs have answered they contemplate additional use or purpose with respect to parcel 104, does plaintiff take the position that such additional use or purpose is one which plaintiffs cannot subject parcel 104 to under the existing agreements held by plaintiffs?"

Answer: "The additional use is one that is permissible under the existing easements."

pelling force for the taking in any case, but it does not, of itself, create nor is it evidence of necessity.[4]

(1c) The evidence of the defendants, on the other hand, shows that this land is now used for grazing, and that plaintiffs' easement and their use have created no conflicts or problems. It was uncontradicted that there has been no trouble or even inconvenience to either party resultant from the combined uses. It is uncontradicted from the evidence that to divide this 640-acre farming unit by the diagonal strip of land would result in a totally unnecessary and unwarranted diminution of its economic potential; further, it would be a waste of the utility users and taxpayers' funds to purchase it in that they would gain no rights which they do not already have.[5]

We, therefore, hold that plaintiffs have failed to meet the burden of showing that the proposed taking of the fee is necessary for the public use, and that the judgment is not supported by the evidence.

(1d, 6) Plaintiffs' next contention is that the resolution and ordinance of plaintiffs are conclusive evidence for the taking of the fee estate whether the property is located outside their territorial limits or not. They cite Code of Civil Procedure section 1239, subdivision 4, as giving the condemning agency the power to determine, as a legislative decision, the issue of the *quantum* of the estate to be taken. They cite *City of Santa*

[4]Much of the other testimony of the witness York, admitted over objection, was completely irrelevant to the issue of necessity. It was concerned with the importance of electrical energy and the dependence of people in metropolitan areas upon an uninterrupted flow of it. Such events as a recent blackout of power on the east coast received due consideration, along with a discourse on the history of the particular transmission line then in construction upon defendants' property. Nor was the subject of public opinion neglected—it was brought out that people object less to power lines paralleling each other (as permitted by the existing easement here) than to separate lines across the country side, and that the Division of Light and Power of the City of Los Angeles is "not indifferent to [public opinion] in this day and age." Various difficulties having to do with violations of the easements by third parties in areas other than the area of the subject property were testified to; the numbers of men and pieces of equipment necessary to repair a line were discussed, and the interference with their movement by violations of the right of way was considered. There was no evidence either (1) that these difficulties had occurred, were occurring, or were likely to occur in the future on the *subject property* or near it, or (2) that owning the fee would prevent violations of the right of way. *The witness admitted under cross-examination that plaintiffs could have the same problems with the fee as with an easement.*

[5]We note from the "Stipulation Limiting Issues and Setting Just Compensation" that the sum of $2,900 is the price to be paid for the fee herein if it is taken. Said fee is over an approximately one-mile portion of the transmission line. The witness York testified that the plaintiffs were buying or taking by condemnation the entire existing right of way from the Oregon border to the City of Los Angeles.

Barbara v. *Cloer*, 216 Cal.App.2d 127 [30 Cal.Rptr. 743] as authority for such an interpretation.

Even assuming plaintiffs' interpretation is correct, still, the basic finding that public use and necessity required the taking of any property under Code of Civil Procedure section 1241, subdivision 2, must necessarily be made. Here the evidence does not support a finding that the plaintiffs need anything more than they already have; so the question of quantum of the estate to be taken is moot.

The judgment is reversed.

Gargano, Acting P. J., and Coakley, J.,** concurred.

**Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

George C. Hadley, William H. Peterson, Charles E. Spencer, Jr., Roger Arnebergh, City Attorney, and Peyton H. Moore, Jr., for Respondents.

SPENCE, J.—Defendants Richard C. Goodspeed and William A. Hyland, as trustee, appeal from a judgment entered in two consolidated eminent domain actions, one brought by the state and the other by the city, to extinguish certain street access rights and to acquire an easement over said defendants' land for street purposes. The takings were incidental to the construction of a freeway. The jury found that the market value of the property taken was $7,500, and that severance damages were offset by special benefits to the portion of the land which was not taken. Defendants seek a reversal on the following grounds of alleged error: (1) the striking of portions of their answer, which purported to raise special defenses of fraud, bad faith, and abuse of discretion; (2) the consolidation of the two proceedings for trial; (3) the refusal of certain instructions bearing on the measure of damages; (4) the submitting to the jury of an alleged improper form of verdict; and (5) the exclusion from evidence of a proposed plan for improving defendants' land.

The litigation involved property in a block in the city of Los Angeles, which block was bounded on the north by 98th Street, on the east by Broadway, on the south by Century Boulevard, and on the west by Olive Street. Defendants owned a strip on the southeast corner, with a frontage of 87 feet on Century Boulevard and 441.63 feet on Broadway. 99th Street formerly cut into the block, crossing Olive Street from the west, but did not continue through to Broadway. It ended at the westerly boundary of defendants' land.

A section of the new Harbor Freeway was built, running generally along Olive Street. It does not cross defendants' land but its construction resulted in the closing of the intersection of 99th Street and Olive. Access to the west along 99th Street was thereby denied to defendants and to the owners of property located in said block on 99th Street to the east of its former intersection with Olive Street.

To provide access for the landlocked parcels located on 99th Street east of its former intersection with Olive Street, the state sought to obtain an easement measuring 60 feet by 87 feet over defendants' land, for the purpose of extending 99th Street to Broadway. Defendants successfully interposed demurrers on the theory that the condemnation to provide

for this extension was beyond the power of the state with respect to the freeway project. The state and the city then entered into an agreement whereby the city agreed to condemn the easement across defendants' land. The state therefore limited its action against defendants to condemning defendants' right of access over 99th Street to and across the former Olive Street; and the city then brought the action to condemn the easement over defendants' land to extend 99th Street to Broadway.

The two actions were thereafter consolidated for trial. At the outset of the trial plaintiffs moved to strike from the defendants' answers those portions which defendants characterize as establishing "special defenses" of fraud, bad faith and abuse of discretion. With respect to the state's action, the allegations were that it was feasible to construct the freeway over 99th Street instead of closing off defendants' westerly access, and that in failing to so construct the freeway, the State Highway Commission acted arbitrarily and abused its discretion.

The allegations of fraud, bad faith, and abuse of discretion with respect to the city's action were more detailed. They attacked the city council's action in finding that condemning an easement across defendants' land was necessary and in the public interest. In substance, the allegations were that (1) the council abused its discretion in that (a) it failed to investigate properly the advisability of providing access to the landlocked parcels by constructing a north-south service road along the east side of the freeway, from 99th Street to 98th Street, across land available for the purpose; (b) the council's finding was "pursuant to an agreement and conspiracy by and between said Council and the California State Highway Commission" merely to further the commission's desires rather than to further any of the city's own interests, since the state would otherwise have to construct the described service road; (c) the council refused to hear defendants' arguments that the described service road was more in the public interest; (2) the council acted in bad faith, fraudulently, arbitrarily, and negligently in that (a) it acted in concert with and under the domination, control, and influence of state agencies, without studying or investigating for itself the necessity or desirability of the described service road as an alternative; (b) rather than for a legitimate city interest, the condemnation was for the purpose of accomplish-

ing for the state what the state was unable to do, and saving the state from having to build the described service road; (c) it refused to hear defendants' arguments that the public interest would be better served by the described service road.

After receiving in evidence the city ordinance and the commission's resolution containing the findings attacked in the answer, the court ordered the "special defenses" stricken. The question is whether the stricken allegations presented a justiciable issue.

[1] Because eminent domain is an inherent attribute of sovereignty, constitutional provisions merely place limitations upon its exercise. (*County of San Mateo* v. *Coburn*, 130 Cal. 631, 634 [63 P. 78, 621]; *County of Los Angeles* v. *Bridge Co.*, 53 Cal.App. 166, 174 [200 P. 27].) **[2a]** The only limitations placed upon the exercise of the right of eminent domain by the California Constitution (art. I, § 14) and the United States Constitution (Fourteenth Amendment) are that the taking be for a "public use" and that "just compensation" be paid for such taking. Each of these limitations creates a justiciable issue in eminent domain proceedings. But "all other questions involved in the taking of private property are of a legislative nature." (*University of So. California* v. *Robbins*, 1 Cal.App.2d 523, 525 [37 P.2d 163].) **[3]** The taking of property for use as a public street or highway is clearly a taking for an established public use (*Bridge Co.* v. *County of Los Angeles*, 262 U.S. 700, 706 [43 S.Ct. 689, 67 L.Ed. 1186]; 2 Nichols on Eminent Domain (3d ed.) § 7.512 [2], p. 489), even though the street or highway will bear relatively little traffic. (*Sherman* v. *Buick*, 32 Cal. 241, 255 [91 Am.Dec. 577].) There is no question, then, that the takings in the instant case are for a public use. Defendants did not allege fraud, bad faith, or abuse of discretion in the sense that the condemner does not actually intend to use the property as it resolved to use it. The stricken allegations in defendants' "special defenses" sought judicial review of the findings that the respective takings were necessary and commensurate with the greatest public good and the least private injury. These legislative determinations are frequently termed the question of necessity.

[4] The recitations in the city ordinance and Highway Commission's resolution of the "public necessity" of the proposed improvements, that "such property is necessary therefor," and that the improvements were "planned or located in the manner which will be most compatible with the greatest

public good, and the least private injury," are "conclusive evidence" of those matters. (Code Civ. Proc., § 1241, subd. 2; Sts. & Hy. Code, § 103.) **[5a]** In upholding the constitutionality of this conclusive presumption, the United States Supreme Court said: "That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. . . . The question is purely political, does not require a hearing, and is not the subject of judicial inquiry." (*Bindge Co.* v. *County of Los Angeles, supra*, 262 U.S. 700, 709.)

However, defendants maintain that there is an implied exception to the statutory conclusive presumption. They argue that the determination of necessity is justiciable when facts constituting fraud, bad faith, or abuse of discretion are affirmatively pleaded. Plaintiffs, on the other hand, assert that implying such an exception would allow public improvements to be unduly impeded by frequent and prolonged litigation by persons whose only real contention is that someone else's property should be taken, rather than their own. Plaintiffs point out that property owners do have considerable protection in any case, since just compensation must always be paid, and since the conclusive presumption attaches only to those city ordinances that have been passed by a two-thirds vote. (Code Civ. Proc., § 1241, subd. 2.)

There is no doubt that the language used in several decisions seems to imply that the condemning body's findings of necessity are reviewable in condemnation actions when facts establishing fraud, bad faith, or abuse of discretion are affirmatively pleaded. (*People* v. *Lagiss*, 160 Cal.App.2d 28, 32-33 [324 P.2d 926]; *Orange County Water Dist.* v. *Bennett*, 156 Cal.App.2d 745, 750 [320 P.2d 536]; *Los Angeles County Flood Control Dist.* v. *Jan*, 154 Cal.App.2d 389, 394 [316 P.2d 25]; *City of La Mesa* v. *Tweed & Gambrell Planing Mill*, 146 Cal.App.2d 762, 777 [304 P.2d 803]; *People* ex rel. *Department of Public Works* v. *Schultz Co.*, 123 Cal.App.2d 925, 941 [268 P.2d 117]; *People* v. *Thomas*, 108 Cal.App.2d 832, 835 [239 P.2d 914]; *People* v. *Milton* 35 Cal.App.2d 549, 552 [96 P.2d 159].) But the cases upon which defendants rely appear to confuse the question of public use with the question of necessity for taking particular property. This is especially true in those instances in which the property owner's contention was that the condemning body was seeking to take more land than it intended to put to a public use.

(See *People* v. *Lagiss, supra,* 160 Cal.App.2d 28; *Los Angeles County Flood Control Dist.* v. *Jan, supra,* 154 Cal.App.2d 389; *People* ex rel. *Department of Public Works* v. *Schultz Co., supra,* 123 Cal.App.2d 925; *People* v. *Thomas, supra,* 108 Cal.App.2d 832; *People* v. *Milton, supra,* 35 Cal.App.2d 549. See also 2 Nichols on Eminent Domain (3d ed.) § 7.5122, p. 492.) [6] However, the distinction between the question of public use and the question of necessity has been, and should be, recognized. (*County of Los Angeles* v. *Rindge Co., supra,* 53 Cal.App. 166, 174; *People* v. *Olsen,* 109 Cal.App. 523, 531 [293 P. 645].)

The failure of some of the cases to recognize such distinction may have resulted from adherence to the language employed in certain earlier cases decided before section 1241 of the Code of Civil Procedure was amended in 1913 to provide that the condemning body's determination of "necessity" should be "conclusive evidence" thereof. (Stats. 1913, p. 549.) That amendment, however, definitely brought the law of this state into line with that of the vast majority of other jurisdictions. (See numerous cases cited in note L.R.A. (N.S.) vol. 22, p. 64, at p. 71.) [5b] The majority rule is summarized in the cited note as follows: "If a use is a public one, the necessity, propriety, or expediency of appropriating private property for that use is ordinarily not a subject of judicial cognizance. In general, courts have nothing to do with questions of necessity, propriety, or expediency in exercises of the power of eminent domain. They are not judicial questions." Continuing on page 72, it is further said: "Once it is judicially established that a use is public, it is within the exclusive province of the Legislature to pass upon the question of necessity for appropriating private property for that use, unless the question of necessity has been made a judicial one, either by the Constitution or by statute." Such a constitutional provision is found in the Constitution of Michigan (1850) (art. 18, § 2) but as stated at page 70 in the cited note: "This provision, according to the court in *Paul* v. *City of Detroit,* 32 Mich. 108, is not found in Constitutions generally, and was never known in Michigan until the adoption of the Constitution of 1851."

[2b] As above indicated, the only pertinent limitations placed by the California Constitution upon the exercise of the right of eminent domain (art. I, § 14) are that the taking be for a "public use" and that "just compensation" be paid for such taking. It is further clear that since 1913, our statutory

provisions (Code Civ. Proc., § 1241, subd. 2; see also Sts. & Hy. Code, § 103) have placed the determination of the question of "necessity" within the exclusive province of the condemning body by expressly declaring that the latter's determination of "necessity" shall be "conclusive evidence" thereof.

[7] We therefore hold, despite the implications to the contrary in some of the cases, that the conclusive effect accorded by the Legislature to the condemning body's findings of necessity cannot be affected by allegations that such findings were made as the result of fraud, bad faith, or abuse of discretion. In other words, the questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvement, cannot be made justiciable issues even though fraud, bad faith, or abuse of discretion may be alleged in connection with the condemning body's determination of such necessity. To hold otherwise would not only thwart the legislative purpose in making such determinations conclusive but would open the door to endless litigation, and perhaps conflicting determinations on the question of "necessity" in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement. [8] We are therefore in accord with the view that where the owner of land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body's "motives or reasons for declaring that it is necessary to take the land are no concern of his." (*County of Los Angeles* v. *Rindge Co.*, *supra*, 53 Cal.App. 166, 174, aff'd *Rindge Co.* v. *County of Los Angeles*, 262 U.S. 700 [43 S.Ct. 689, 67 L.Ed. 1186].) Any language in the prior cases implying a contrary rule is hereby disapproved. It follows that there was no error in the trial court's ruling striking the "special defenses" relating to the question of necessity.

"Necessity" in Condemnation Cases—Who Speaks for the People?

By MICHAEL V. MCINTIRE*

"Pave Paradise
Put up a parking lot."
Big Yellow Taxi

IN August 1970 a United States district court halted the construction of a freeway bridge and interchanges in the District of Columbia at the behest of property owners and others who proved, *inter alia*, that the bridge as then designed was, in the words of the Federal Highway Administrator, "extremely hazardous and fraught with danger."[1] If the identical situation had occurred in California, the California state courts would have refused to grant relief.

In 1969, a United States district court enjoined the construction of a freeway requiring the filling of a portion of the Hudson River on the grounds that Congress had prohibited such activity without specific congressional approval, and that no such approval had been granted.[2] California state courts, however, refuse to hear evidence of such illegality when offered by a landowner seeking to save his land from an unauthorized taking.

In July 1969 a United States district court in California enjoined the construction of a freeway through a national park and forest to a proposed ski resort on the grounds that the permits for such construction were illegally issued by federal agencies.[3] The court of appeals reversed, not on the merits, but because plaintiff, the Sierra Club, did not have a sufficient interest in the action to bring the law suit.[4] By curious coincidence, the persons who have the most direct economic in-

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1. District of Columbia Fed'n of Civic Ass'ns, Inc. v. Volpe, 316 F. Supp. 754, 792 (D.D.C. 1970).

2. Citizen's Comm. v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970).

3. Sierra Club v. Hickel, Memorandum Dec. Civil No. 51464 (N.D. Cal. July 23, 1969).

4. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

terest—those whose property would be taken to construct this "illegal" project—are precluded by California law from attacking the State Division of Highways in the state court on the same grounds.

In Illinois, in 1961, the Park Board of a Chicago suburb moved to condemn the sites of two new, integrated subdivisions for use as a park after it learned that the developments were to be interracial. The Illinois Supreme Court allowed the developer to introduce evidence that the sole purpose of the condemnation was to prevent the plaintiffs from constructing the integrated subdivisions.[5] In California, however, the developer would not have been able to question the board's motive.

California courts are closed to litigants—at least to land-owning litigants—in cases like the foregoing because of a 1959 decision by the California Supreme Court in *People ex rel. Department of Public Works v. Chevalier*.[6] In that landmark decision, the court declared:

> [W]here the owner of land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body's "motives or reasons for declaring that it is necessary to take the land are no concern of his."[7]

At this critical time in the nation's history, when a myriad of technical, sociological and economic problems are challenging the very core of the federal system of government, and when all branches of government are required to put shoulder to the wheel to meet these challenges, such a judicial abrogation of responsibility is not only inexcusable, but dangerous.

I. History of Judicial Avoidance of "Necessity" Questions

Almost from the beginning of statehood, California courts have demonstrated a disturbing tendency to avoid reviewing decisions made by a condemning authority as to the location of or necessity for a public works project.[8] They have taken this position in spite of an enactment by the legislature in 1872, continued to the present day, which specifically provides:

> Before property can be taken, it must appear: 1. That the use to which it is applied is the use authorized by law; 2. That the taking is necessary to such use . . . .[9]

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5. Deerfield Park Dist. v. Progress Dev. Corp., 22 Ill. 2d 132, 174 N.E.2d 850 (1961).

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

7. *Id.* at 307, 340 P.2d at 603, *quoting* County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 174, 200 P. 27, 31 (1921), *aff'd*, 262 U.S. 700 (1922).

8. *See, e.g.*, cases cited notes 10, 17, 29 *infra*.

9. CAL. CODE CIV. PROC. § 1241.

As early as 1891, the court began limiting the scope of that statute. In *Pasadena v. Simpson*[10] the court permitted a condemnee to present evidence to prove that a taking by the City of Pasadena for a sewer system was not necessary, but took a narrow view of the word "necessary:"

> When a city or town decides for itself—as it may do—that a sewer is desirable, it is not bound to prove that such sewer is necessary, but only that the taking of the property it seeks to condemn is necessary for the construction of the sewer.[11]

The court then ruled that the location as determined by the condemning authority must be presumed to be correct and could only be overcome by very strong proof.[12]

Several years later, in *Wulzen v. Board of Supervisors*,[13] the same court refused to review a resolution of the San Francisco Board of Supervisors declaring that the taking of petitioner's property was necessary for the extension of Market Street. In its decision the court noted that governing statutes provided petitioner with an opportunity to be heard before the city council, which had power to stop the project if his objections were sustained.[14] Relief was denied. The following year, in *County of Siskiyou v. Gamlich*,[15] the court ruled that a condemnee could not introduce evidence questioning the necessity for a county road or the appropriateness of its proposed location, notwithstanding that the final location of the road as laid out by the board of supervisors did not conform to the location suggested by the "viewers" appointed by the board. The court said:

> It was for the Board of Supervisors to determine whether a new road was necessary or not, and, if necessary, over what route it should be laid out and constructed.[16]

By 1900 a relatively firm rule had been established. Where the legislature had created a tribunal to determine the necessity of a public work after notice to affected parties and the opportunity for a hearing, and if such tribunal stayed within the statute, it acquired the *exclusive jurisdiction* to determine whether the work and the location were necessary, and no subsequent review by the judiciary was authorized.[17]

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10. Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891).
11. *Id.* at 253, 27 P. at 607.
12. *Id.* at 255-56, 27 P. at 608.
13. Wulzen v. Board of Supervisors, 101 Cal. 15, 35 P. 353 (1894).
14. *Id.* at 19, 35 P. at 354. *See also* Cal. Stat. 1889, ch. LXXVI, §§ 1-5 at 70-71.
15. County of Siskiyou v. Gamlich, 110 Cal. 94, 42 P. 468 (1895).
16. *Id.* at 98, 42 P. at 469.
17. San Mateo County v. Coburn, 130 Cal. 631, 63 P. 78 (1900).

The average citizen who has had sufficient contact with administrative agencies to acquire a healthy skepticism about bureaucratic wisdom may marvel at this polyanna-like view of governmental decisions. Yet it must be noted that all the cases above, and many others decided in the same era,[18] had a number of common features which can explain judicial abstention. They involved projects of only local interest and the condemnor who made the decision as to necessity and location was an agency very close to the people. In addition, the aggrieved citizens had ample opportunity to fully air their views, and none of the cases involved a factual situation so grossly unfair and unjust that it cried for remedy by the judiciary—the City of Pasadena obviously had to have a sewer; the Market Street extension was certainly appropriate, if not in fact "necessary;" and farmers were entitled to some public highway to reach their land.

What is most disturbing about the trends indicated by these cases is the apparent predisposition of the court to decline review of "necessity" questions. This attitude is evident from the contradictory rationales used by the court to support its abstention. In the *Wulzen*[19] case, for example, when a landowner petitioned for certiorari to review the resolution of the San Francisco Board of Supervisors declaring the necessity for taking petitioner's land, the court held that the board's determination was a "legislative" function. It thus avoided review under the oft-cited rule that "certiorari does not lie to review the action of an inferior tribunal or board in the exercise of purely *legislative functions which are not judicial* in character."[20] On the other hand, when the attack on the resolution of a county board of supervisors was made by way of defense to the condemnation action, the court took comfort in the principle of collateral estoppel, reasoning that, "[i]n laying out a public road, the Board of Supervisors exercises *judicial* functions, and its order approving the report of the viewers cannot be collaterally attacked on the ground that it was made on insufficient evidence."[21] The

18. Sutter County v. Tisdale, 136 Cal. 474, 69 P. 141 (1902); Sonoma County v. Crozier, 118 Cal. 680, 50 P. 845 (1896); Riverside County v. Alberhill Coal & Clay Co., 34 Cal. App. 538, 168 P. 152 (1917). The general discretion afforded to public agencies by these cases was, even then, being extended to private corporations supplying public needs without reconsidering the rationale. Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 110 P. 134 (1910); San Francisco & S.J.V. Ry. Co. v. Leviston, 134 Cal. 412, 66 P. 473 (1901).

19. Wulzen v. Board of Supervisors, 101 Cal. 15, 21, 35 P. 353, 355 (1894).

20. *Id.* at 18, 35 P. at 354 (emphasis added).

21. County of Siskiyou v. Gamlich, 110 Cal. 94, 98, 42 P. 468, 469 (1895) (emphasis added).

court distinguished *Pasadena v. Stimson*,[22] wherein such a review was allowed, by observing that the *Stimson* case "was a direct proceeding for condemnation of land, without any intermediate action taken before suit by any board or tribunal acting in a *judicial capacity*. . . ."[23]

In 1913 the state legislature entered the picture, amending the law to provide that approval by two-thirds of the governing board of counties, cities and towns (later extended to include nearly all special purpose districts)

> 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 would be most compatible with the greatest public good, and the least private injury. . . .[24]

Thus the way was cleared for some abuse of the power of eminent domain, as evidenced in *County of Los Angeles v. Rindge Co.*[25] The litigation discloses that some conflict had occurred between the owners of a very large ranch outlying Los Angeles and the city fathers over the public or private character of a road running through the ranch. When the ranch owners closed the road at the ranch boundary and excluded the public the city decided to expropriate the road. A condemnation resolution was passed without any notice, actual or constructive, to the ranch owners. There was no opportunity for them to be heard. In the condemnation suit which followed, the Rindge Company attempted to resist the taking by proving, *inter alia*, that the road was unnecessary—it would go absolutely nowhere, but would end in a *cul de sac* at the opposite side of the ranch. There was no existing or planned highway with which it could or would connect. People living on the ranch had free access over the private road to town, and no one alleged, much less proved, that they were unhappy with the existing arrangement.

Nevertheless, the California appellate court viewed the question as a legislative issue and affirmed the order of condemnation.[26] The

22. 91 Cal. 238, 27 P. 604 (1891).

23. 110 Cal. at 100, 42 P. at 470 (emphasis added).

24. Cal. Stat. 1913, ch. 293, § 1, at 549-50. Later, the benefits of this proviso were extended to irrigation districts, public utility districts, water districts, school districts, transit districts, rapid transit districts and sanitary and county sanitation districts. Cal. Stat. 1933, ch. 465, § 2, at 1199; Cal. Stat. 1935, ch. 254, § 1, at 939; Cal. Stat. 1949, ch. 802, § 1, at 1539; Cal. Stat. 1955, ch. 1036, § 3, at 1987; Cal. Stat. 1957, ch. 1616, § 1, at 2961; Cal. Stat. 1961, ch. 610, § 1, at 1760.

25. 53 Cal. App. 166, 200 P. 27 (1921), *aff'd*, 262 U.S. 700 (1923).

26. 53 Cal. App. 166, 200 P. 27 (1921).

state supreme court apparently found nothing in the case to review. Hearing the case on a writ of error, the United States Supreme Court characterized the determination of the "necessity" issue as "purely political," not the subject of any judicial inquiry, *not a "judicial question,"* and said: "This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers."[27] The considerations which, in earlier cases, had furnished a rationale for judicial abstention in planning and locating public works—*i.e.*, the decision of an impartial administrative tribunal, the opportunity for notice and hearing and at least some apparent justification for the project—were absent in this case.

It was during this decade of the roaring twenties that the California Legislature passed several bills which, coupled with the studied effort of the state courts to avoid any role in the physical planning process, set the stage for many of the serious sociological and environmental problems which now plague California. The legislature created the Division of Highways and conferred on it the power of eminent domain.[28] This legislation provided that any resolution of the California Highway Commission, an appointive board, which declares a highway or improvement to be necessary and in the public interest is *conclusive* evidence that the use is public, that the property can be taken as needed, and that the location is most compatible with the greatest public good and the least private injury.[29]

The California Supreme Court solidified its no-review policy shortly thereafter, declaring in *People v. Olsen*[30] that the legislature delegated to the California Highway Commission the exclusive authority to determine the necessity for and location of highways. Nevertheless, the court did hedge its decision, stating that the commission's determination could not be disputed "in the absence of fraud, bad faith, or an abuse of discretion."[31] At this point in the development of the law, the California Legislature and courts were in accord with the vast majority of the other states.[32]

27. 262 U.S. 700 (1923).

28. Now codified in CAL. STS. & H'WAYS CODE §§ 50-104.6.

29. *Id.* §§ 102-03.

30. People v. Olsen, 109 Cal. App. 523, 531, 293 P. 645, 648 (1930). Interestingly enough, the court characterized the decision of the Highway Commission as a *judicial* action, and also stated that the Highway Commission is a quasi-judicial body for the purpose of determining necessity. Ordinarily, judicial review of some sort is available over quasi-judicial determinations of administrative agencies.

31. *Id.* at 531, 293 P. at 648.

32. Helsted, *Recent Trends in Highway Condemnation Law*, 1964 WASH. U.L.Q. 58, 60.

II. Limited Judicial Review—Developments in Other Jurisdictions

The law remained static in California until 1959, the condemnor being permitted to freely plan and take property for public improvements without fear of judicial review except in those cases where the condemnee could sufficiently maintain the onerous burden of proving the elusive concepts of fraud, bad faith or abuse of discretion. Nevertheless, had the development ended at this point there would have been much cause for optimism. Even these limited grounds of review are sufficient to permit a condemnee to resist condemnation in cases where the project is potentially unsafe, illegal, in excess of authority or based upon patently improper motives.[33]

Indeed, courts in other states are tending to construe these exceptions to the "no-review" rule with greater liberality,[34] conforming to the principle that "[t]o hold that these decisions cannot be reviewed, no matter how arbitrary they may be, would be unsound and unjust,"[35] and sometimes noting the insulation from the general public of the agency making the decision.[36] An agency's actions in excess of its statutory authority have been held to be an abuse of discretion,[37] and failure to hold required public hearings and follow other prescribed procedures in making location and design decisions has sometimes invalidated the decision.[38] Judicial innovation has expanded these concepts; the New Jersey Supreme Court held in *Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.*[39] that a condemnor's refusal to consider alternative locations for its project was arbitrary and an abuse of discretion, giving the condemnee the right to present evidence of alternative locations as a defense to a condemnation proceeding. The Massachusetts high court, skeptical of giving any agency unrestrained power to wreak havoc on the environment, has construed an apparently broad legislative grant of power to that state's highway depart-

33. See text accompanying notes 1-5 & 25-27 *supra*.

34. See cases cited notes 35-40 *infra*.

35. Road Review League v. Boyd, 270 F. Supp. 650, 660 (S.D.N.Y. 1967).

36. *See, e.g.*, District of Columbia Fed'n of Civic Ass'ns, Inc. v. Airis, 391 F.2d 478, 484 (D.D.C. 1968); Road Review League v. Boyd, 270 F. Supp. 650, 660 (S.D.N.Y. 1967). *See also* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 558 (1970).

37. Citizens Comm. v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969); Brown v. McMorran, 42 Misc. 2d 211, 247 N.Y.S.2d 737 (Sup. Ct. 1963).

38. District of Columbia Fed'n of Civic Assn's, Inc. v. Volpe, 316 F. Supp. 754 (D.D.C. 1970).

39. Texas E. Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 225 A.2d 130 (1966).

ment in an extremely narrow fashion.[40]

State legislatures, too, have responded to the need for providing some rein on the powers of highway departments and other public agencies in their location and construction processes. Recent laws require that an opportunity be provided for increased public participation in or familiarity with the decisions in early stages,[41] or that local public agencies be given significant voice, sometimes a veto, in the decision making process.[42] Montana has long permitted full judicial review of the necessity for public works projects in condemnation proceedings.[43] Recently, the State of Vermont substantially revised its highway location procedures to require a State Highway Board to hold a hearing on the necessity of the highway and the proposed location, after which the board must seek an "order of necessity" from the courts prior to condemnation.[44] Such order is granted only after full judicial hearing in which the burden of proof is upon the highway board to prove the necessity and location by a preponderance of the evidence. There is no presumption of good faith or reasonable discretion.[45]

III. The Finishing Touch—People ex rel. Department of Public Works v. Chevalier

None of this legislative or judicial response to the needs of the times has occurred in California. In fact, California appears to be moving in the opposite direction. Consider, for example, California's legislation requiring the Division of Highways to consult closely with local agencies

> to assure all interested individuals, officials and civic or other groups an opportunity to become acquainted with the studies being made and to express their views with respect thereto. . . .[46]

This statute, unfortunately, was not intended to be substantive. This is clearly revealed by the concluding section:

> Failure of the department or the commission to comply with the requirements of this article shall not invalidate any action of the commission as to the adoption of a routing for any state highway, nor shall such failure be admissible evidence in any litigation for

40. Robbins v. Department of Public Works, 355 Mass. 328, 244 N.E.2d 577 (1969); Sacco v. Department of Public Works, 352 Mass. 670, 227 N.E.2d 478 (1967).

41. *See, e.g.* WASH. REV. CODE ANN. §§ 47.52.133-.135 (1970).

42. *E.g.*, MICH. STATS. ANN. § 8.171(i) (1958); MONT. REV. CODES ANN. § 32-4304 (1969 Supp.); PA. STAT. ANN. tit. 36, § 2391.2(d) (1961); WASH. REV. CODE ANN. §§ 47.52.131-.180 (1970).

43. State Highway Comm'n v. Danielsen, 146 Mont. 539, 402 P.2d 443 (1965).

44. VT. STATS. ANN. tit. 19, §§ 222-28 (1968).

45. *Id.*

46. CAL. STS. & H'WAYS CODE § 210.

> the acquisition of rights-of-way or involving the allocating of funds or the construction of the highway.[47]

The most significant regressive activity, however, has been in the area of judicial review. In 1959, the California Supreme Court removed what little remained of judicial control over the aggressive designs of public agencies intent upon development. In *People ex rel. Department of Public Works v. Chevalier*[48] the court set the issue to rest in the following language:

> We therefore hold, despite the implications to the contrary in some of the cases, that the conclusive effect accorded by the Legislature to the condemning body's findings of necessity cannot be affected by allegations that such findings were made as the result of fraud, bad faith, or abuse of discretion. In other words, the questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvement, cannot be made justiciable issues even though fraud, bad faith, or abuse of discretion may be alleged in connection with the condemning body's determination of such necessity. . . . We are therefore in accord with the view that where the owner of land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body's "motives or reasons for declaring that it is necessary to take the land are no concern of his."[49]

The opinion is devoid of any significant rationale or justification for such a major pronouncement of public policy. It does recite the arguments of the Department of Public Works (under which the Division of Highways is organized) that to allow review where fraud, bad faith or abuse of discretion were affirmatively pleaded

> would allow public improvements to be unduly impeded by frequent and prolonged litigation by persons whose only real contention is that someone else's property should be taken, rather than their own.[50]

This argument, of course, assumes the issue; it is apparent that if the public improvement is illegal, improperly authorized, unsafe or would cause an undue amount of private injury, it should be "impeded."

The court in *Chevalier* also noted the state's argument "that property owners do have considerable protection . . . since just compensa-

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47. CAL. STS. & H'WAYS CODE § 215. *See id.* § 75.5 for a similar statute regarding location of state highways other than freeways.

48. 52 Cal. 2d 299, 340 P.2d 598 (1959).

49. *Id.* at 307, 340 P.2d at 603, *quoting* County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 174, 200 P. 27, 31 (1921), *aff'd*, 262 U.S. 700 (1922).

50. *Id.* at 305, 340 P.2d at 602.

tion must always be paid. . . ."[51] This proposition is highly debatable;[52] in any event, the court's only explicit rationale for its ruling was the statement that:

> To hold otherwise [*i.e.*, to allow even limited review of necessity questions] would not only thwart the legislative purpose in making such determinations conclusive but would open the door to endless litigation, and perhaps conflicting determinations on the question of "necessity" in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement.[53]

The impact of the *Chevalier* ruling, that the "conclusive" effect of the condemning body's findings of necessity means "conclusive without exception," is quite sweeping, since a "resolution of necessity" by nearly all public condemning authorities is statutorily "conclusive" on the issues of public use and necessity and on the finding that the public benefit outweighs the private harm.[54] The only significant condemning agency whose determination to expropriate land is not statutorily "conclusive"—and is therefore reviewable—is the State Department of Parks and Recreation.[55] Projects which will permanently change the landscape and have severe social and economic trauma associated with them (such as freeways) are therefore unreviewable, while projects having relatively minor environmental impact and which maintain the greatest flexibility for future use are subject to judicial scrutiny.

In *Chevalier* the concept of due process to the landowner, embodied in his opportunity to be heard before an impartial tribunal, and due process to the public, embodied in governmental responsiveness to all of the issues affecting the public interest, were not even mentioned. As a result, when the question of the desirability of changing the landscape arises, "right" is what the highway commission says it is. All of which leads the average landowner to the cynical comment articulated to the author by a California rancher who has been subject to no less than four separate condemnation actions: "You spend the first part of your life working for the land, and the rest of your life trying to keep it."

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51. *Id.*

52. *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. W.L. REV. 57 (1969).

53. People ex rel. Department of Public Works v. Chevalier, 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (1959).

54. *See, e.g.*, CAL. CODE CIV. PROC. § 1241; CAL. STS. & H'WAYS CODE § 103. Special districts created by specific legislation usually receive this same power. *See, e.g.*, the powers of the San Mateo County Flood Control District, CAL. WATER CODE APP. § 87-3.

55. CAL. PUB. RES. CODE § 5006.1. A determination by the State Department of Parks and Recreation is prima facie evidence.

IV. Public Projects and Quality of Life

To understand why society can no longer afford to allow the judiciary to withdraw from an affirmative role in decisions affecting resources management, it is necessary to bear in mind the enormously complex impact that results from such decisions. A panel recently established by the National Academy of Sciences to study the assessments of technology has cataloged, by way of example only, a few of the far-reaching problems resulting from decisions made from a limited, technological viewpoint:

> [D]rilling rights were leased to oil companies operating in the Santa Barbara channel without sufficient consideration of the possible effects of massive oil leakage near the coast and with inadequate preventive measures to minimize the damages; . . . vast quantities of chemicals have been released into the biosphere with little attention to their potential hazard; . . . the number of internal-combustion automobiles has been allowed to mount steadily with only sporadic efforts to study alternatives that would entail less pollution and crowding. . . . Although . . . pesticides have undoubtedly prevented a great many deaths from starvation and disease, it is now apparent that they have also inflicted unintended but widespread losses of fish and wildlife, and it is increasingly suspected that they are causing injury to man.
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> . . . .
>
> . . . One can fly from London to New York in six hours and then encounter difficulties getting from the airport to the city because the roads are often crowded and there is no rail service between the city and the major airports.[56]

To this catalog we must also add freeways, the necessity, location and design of which have generated widespread concern and bitter controversies, sometimes resulting in physical violence.[57] This reaction is understandable, for

> [f]reeways have done terrible things to cities in the past decade, and and in many instances have almost irrevocably destroyed large sections of the cities which they were meant to serve. On the social level, they not only have often devastated, more completely than any bombing, vast acreages of houses which provided needed low cost housing for families who could not afford higher rents, but they have also wrecked neighborhoods whose old buildings had great character and charm. . . . [The] freeway in the city has been a great destroyer of neighborhood values.[58]

A specific example of the destruction of neighborhood values is the proposed routing of Interstate 40 through the City of Nashville, which

56. Brooks & Bowers, *The Assessment of Technology*, SCIENTIFIC AMERICAN, Feb. 1970, at 13, 15, 18 [hereinafter cited as Brooks & Bowers].

57. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227-29 (1966).

58. L. HALPRIN, FREEWAYS 24 (1966).

was alleged to create a permanent barrier between the largely white community to the south and the largely black community of North Nashville. The Sixth Circuit Court of Appeal noted in *Nashville I-40 Steering Committee v. Ellington*:[59]

> For example, it is shown that the blocking of other streets will result in a heavy increase in traffic through the campus of Fisk University [a predominantly Negro educational institution] and on the street between this university and Meharry Medical College. A public park used predominantly by Negroes will be destroyed. Many business establishments owned by Negroes will have to be relocated or closed.[60]

Too frequently the engineer's solution to the problem is simple: ease the congestion by building another freeway,[61] and solve the park problem by buying other park land elsewhere.[62] The creation of further congestion by the new freeway and the location of the new park far from the high-density population area where it is most severely needed are apparently not considered significant.

The severe adverse effects of freeway location and construction are not limited to urban areas. Freeways through the rural countryside consume at least 40 acres per mile.[63] Since freeway location is dictated largely by economic considerations, which means ease of construction, this acreage is almost always the same land which is the most fertile and productive for agricultural purposes.[64] Freeway construction requires that mountains be lowered and valleys filled, with severe ecological consequences. Rural communities are often totally destroyed, river beds

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59. 387 F.2d 179 (6th Cir. 1967).

60. *Id.* at 186.

61. *See, e.g.*, District of Columbia Fed'n of Civic Ass'ns, Inc. v. Volpe, 316 F. Supp. 754, 780-81 (D.C. 1970). *See also* Covey, *Freeway Interchanges: A Case Study and an Overview*, 45 MARQ. L. REV. 21, 36 (1961).

62. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F. Supp. 1189 (W.D. Tenn. 1970).

63. As of 1967 all interstate highways were required to have a *minimum* right-of-way width, exclusive of cuts, fills and ditches, of 150 feet, without frontage roads or interchanges being considered. At this minimum width, highway right-of-way would consume 18 acres per mile. For each foot of cut or fill required, an additional 4 feet of right-of-way is required on each side. States usually establish their own minimum criteria which exceed this minimum. *See* L. RITTER & R. PAQUETTE, HIGHWAY ENGINEERING 181-86 (3rd ed. 1967). Experienced highway engineers and professors of engineering have reported to the author that because of wide slopes and other state criteria increasing the median width, requiring drainage ditches of certain sizes alongside the roadway, and minimum right-of-way fence set backs, right-of-way for interstate highways averages 40 acres per mile, *without* interchanges.

64. A review of some basic texts on highway location and design confirms that consideration is given only to economics, traffic counts, soil and geologic conditions and "highway-needs studies." Aesthetics are considered as they relate to traffic safety and highway beautification, after the fact. *See, e.g.*, L. RITTER & R. PAQUETTE,

and stream beds are frequently rechanneled, and drainage and run-off patterns are blithely changed to suit highway needs, all without any serious consideration given to their long-range effects.[65] Furthermore, ease of travel stimulates larger numbers of vehicles, and studies have confirmed that the lead emissions from automobiles driving through the countryside find their way into the agricultural crops growing alongside the roadways, thence into food and thence into the human body.[66]

The National Academy of Sciences panel has recognized the urgent demand for expanding the frame of reference within which these critical decisions are made. It further noted that there is sufficient knowledge and ability available to evaluate the long-range effect of such projects:

> The experience [with pesticides] suggests that carefully designed experiments in the early days might have influenced the technology of pesticides before the nation was so committed to certain forms of pest control as to make any significant alteration of the technology extremely difficult. Knowledge has advanced to the point where, in spite of many uncertainties, it is possible to predict at least some of the ecological effects of building another Aswân dam or opening a sea-level canal through the Isthmus of Panama, or the effects of paving and housing on the reflectivity of the earth's surface, or the effects of high-altitude aircraft exhaust on the radiation balance of the earth. The panel saw an obligation to undertake the necessary research and monitoring at the earliest possible stages of development.[67]

Congress has expressed a similar philosophy through the National Environmental Policy Act of 1969.[68] Among other things, that act directs all federal agencies to use an interdisciplinary approach in the planning of projects to ensure that "presently unquantified environmental amenities and values are given appropriate consideration in decision making. . . ."[69] Prior to any approval of legislation or other major federal action affecting the environment, the concerned agency must prepare a detailed report relative to the project's environmental impact, its unavoidable adverse effects, alternatives, and any irreversible

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HIGHWAY ENGINEERING (3rd ed. 1967). One author recognizes the need to consider intangibles more fully than has been done in the past. R. WINFREY, ECONOMIC ANALYSIS FOR HIGHWAYS 552-83 (1969).

65. *Id.*

66. Chow, *Lead Accumulation in Roadside Soil and Grass*, 225 NATURE 295 (1970); Motto, Daines, Chilko & Motto, *Lead in Soils and Plants: Its Relationship to Traffic Volume and Proximity to Highways*, 4 ENV'L SCI. & TECH. 231 (Mar. 1970). *See also* Dedolph, Tel Haar, Holtzman & Lucus, *Sources of Lead in Perennial Ryegrass and Radishes*, 4 ENV'L SCI. & TECH. 217 (Mar. 1970); Tel Haar, *Air as a Source of Lead in Edible Crops*, 4 ENV'L SCI. & TECH. 226 (Mar. 1970).

67. Brooks & Bowers, *supra* note 56, at 15.

68. 42 U.S.C. §§ 4331-47 (Supp. V, 1970).

69. *Id.* § 4332(C).

and irretrievable commitments of resources which would be involved.[70] President Nixon's Executive Order[71] further expands the role of federal agencies in environmental protection, and specific legislation at both the state and federal level is designed to insure that certain specified amenities, such as historical places and buildings and parks and recreational facilities, are given some measure of protection from the highwayman's bulldozer.[72]

Still, the ultimate decision as to whether to construct a public improvement, and where and how to construct it, is made by a special purpose government agency, often with the support of some legislation which the agency has sponsored and advocated. There is justifiable skepticism as to the ability of such agencies to broaden their horizons sufficiently to protect the public interest, notwithstanding legislative mandates or rules and regulations requiring them to do so:

> Within the set of governmental and market processes the initial assessment of the costs and benefits of alternative technologies is normally undertaken by those who seek to exploit them. As a result the frame of reference is often quite limited. Although such groups as professional societies and conservation organizations may add inputs to the evaluation, the assessment is usually based on the contending interests of those who already recognize their stake in the technology and are prepared to enter the public arena to defend their position. In all but a few cases, usually when Congress takes a special interest, no other assessment occurs. The central question asked is what will the technology do for the economic and institutional interests of those who want to exploit it or to the interests of those with a stake in competing technologies. If the technology leads to social problems, they are usually recognized only when they have reached serious proportions and generated acute public concern.[73]

In theory, administrative decisions are kept within reasonable bounds by the courts' exercising a limited power of review.[74] Logically, as the courts become increasingly aware of the seriousness and irreversibility of decisions affecting the environment, the scrutiny should

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70. *Id.*

71. Exec. Order No. 11,507, 35 Fed. Reg. 2573 (1970). The executive order establishes standards and pollution control and abatement procedures for federal facilities and installations.

72. *See, e.g.*, 16 U.S.C. § 470(f) (Supp. II, 1966) (historical buildings and sites); CAL. CODE CIV. PROC. §§ 1241(3) (property already devoted to public use), 1241.7 (park, recreation, wildlife and historical areas).

73. Brooks & Bowers, *supra* note 56 at 16-18.

74. "Absent any evidence to the contrary, Congress may rather be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual." Cappadora v. Celebrezze, 356 F.2d 1, 6 (2d Cir. 1966).

become closer. Recent cases,[75] both state and federal, seem to point in this direction—except in California.

V. Can Public Agencies Protect the Public Interest?

The California Supreme Court has attempted to rationalize its total refusal to see or to hear any criticism of condemnation decisions by utilizing an archaic, court-created presumption of regularity. The court presumes, conclusively, without exception, and as a matter of law, that the Division of Highways, charged with promoting and developing highway transportation systems, has carefully and sympathetically considered alternative means of transport and all relevant ecological, sociological and economic information in determining whether and where to lay-out and to build the next freeway. It is as reasonable to presume that the fox will properly guard the henhouse.

The fallacy of this presumption is evident from a review of the highway decision-making process. First, decisions affecting the number, location and design of freeways are made by engineers of the Division of Highways, who are ill-equipped through education or experience to evaluate ecological or sociological problems.[76] Second, where hearings are required to increase the "frame of reference" for the decision-makers, they give every appearance of being a pro-forma performance. They are usually chaired by a highway official, whose natural predisposition and bias is so obvious that it has been judicially recognized[77]—although not in California. Notices of the hearing are often carelessly given or inconspicuously posted; microphones are unavailable to other than proponents of the project; and equipment malfunctions sometimes prevent an accurate transcript of the "hearing."[78]

In addition, the "mission orientation" of a single-purpose public agency tends to obscure whatever objective analysis exists. Very rarely

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75. See cases cited notes 1, 2, 5, & 35-40 *supra*.

76. Two excellent decisions describing in detail the highway location procedure in two controversial cases are Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967), and District of Columbia Fed'n of Civic Ass'ns, Inc. v. Volpe, 316 F. Supp. 754 (D.D.C. 1970). *See also Pressures in the Process of Administrative Decision: A Study of Highway Location*, 108 U. PA. L. REV. 534 (1960). Note the absence of disciplines other than engineering in the design, location and approval process.

77. Glass v. Mackie, 370 Mich. 482, 486-87, 122 N.W.2d 651, 653 (1963). *See also* Road Review League v. Boyd, 270 F. Supp. 650, 661-62 (S.D.N.Y. 1967): "[T]his attitude on the part of highway officials toward highways in general does not necessarily make their selection of a particular route arbitrary or capricious."

78. Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F. Supp. 1189, 1192-93 (W.D. Tenn. 1970); Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179, 183-84 (6th Cir. 1967).

does the agency entertain the thought that the criticisms of its decision may have merit. Quite the contrary is often true. Where a decision of such an agency is questioned, the considerable resources of the agency are marshalled to defend and implement that program as conceived, regardless of the cost.[79]

This "damn the torpedoes" attitude was recently demonstrated in *San Luis Obispo County Flood Control and Water Conservation District v. DeVauls*,[80] a rare California case in which the condemnee was permitted to challenge the necessity of the taking. A county flood control district sought to take a 600 acre ranch for a water supply and recreation reservoir. The law then in force provided that the district's "resolution of necessity" was only prima facie evidence of the necessity of the taking and that the project was consistent with the greatest public good and least private injury. The condemnee introduced expert testimony showing, *inter alia*, that the proposed dam would very likely stop the recharge of a ground-water aquifier relied upon for the intensive irrigation of the fertile valley downstream, in violation of the downstream owners' water rights, and would probably increase the already serious problem of salt-water intrusion. As a result of a special setting which advanced the case on the trial calendar, the condemnee's witnesses were forced to testify after only 2 months of investigation. Yet this was the only investigation ever made into those problems. The district's witnesses admitted that they had not studied them, while at the same time denying that they existed.

The trial judge, entirely missing the point, ruled that the condemnee had failed to prove by a preponderance of the evidence that the proposed dam *definitely would* have the adverse effects projected by his witnesses, and allowed construction to commence. The flood control district apparently did not, either before or after the trial or during construction, attempt to study the impact of the project upon the surface or the ground water supplies in the fertile valley downstream, or of the salt-water intrusion problem. The objection here made is not that the dam was constructed, but that the district apparently proceeded without ever considering these factors, even after it knew of competent evidence indicating the possibility of serious adverse consequences.

79. *See, e.g.*, San Luis Obispo County Flood Control & Water Conservation Dist. v. DeVauls, Civil No. 32427 (San Luis Obispo Co. Superior Court, Apr. 21, 1967 *judgment amended*, Aug. 10, 1970); District of Columbia Fed'n of Civic Ass'ns, Inc. v. Volpe, 316 F. Supp. 754 (D.D.C. 1970); Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967).

80. Civil No. 32427 (San Luis Obispo Co. Superior Ct. Apr. 21, 1967).

Reported cases from other jurisdictions also illustrate the extent to which institutional loyalty supersedes objective analysis of previous decisions. Where objective court review is sought, the agency frequently attempts to attack the standing of the objectors to raise the question or argues that the agency's action is immune from judicial review.[81] If this procedural approach fails, the agency then vigorously argues for a very narrow, restrictive interpretation of the statute or regulation alleged to have been violated.[82] The spirit of the law is disregarded.

For example, in *South Hill Neighborhood Association v. Romney*,[83] a citizen's group sued to prevent an urban renewal project from destroying seven historical buildings listed in the National Register of Historic Places, on the grounds that the Department of Housing and Urban Development had failed to consider their historic value and had failed to submit the question of preservation of the buildings to the Advisory Council on Historic Preservation, as required by statute.[84] The federal and local agencies urged upon the court a construction of the statute which would limit its operation to only those buildings which had been on the Historical Register prior to the time federal funds were committed for the project. The court agreed with this argument and allowed demolition of the buildings, notwithstanding the expressed policy of Congress to seriously consider and preserve the nation's historical heritage, and despite the listing of the buildings on the National Register more than 3 months before a regional federal engineer orally approved the local agency's demolition plan.

Similarly, the Farmers Home Administration recently sought to avoid complying with the Environmental Policy Act's requirement to review and to report upon the environmental impact of a program it was funding on the grounds that the paper work was largely completed prior to the effective date of the act, totally ignoring petitioner's objections of serious ecological damage which would result from the project. Happily, this argument was unsuccessful.[85]

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81. *See, e.g.*, Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970); Citizens Comm. v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970); District of Columbia Fed'n of Civic Ass'ns, Inc. v. Airis, 391 F.2d 478 (D.C. Cir. 1968); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967).

82. District of Columbia Fed'n of Civic Ass'ns, Inc. v. Volpe, 316 F. Supp. 754 (D.D.C. 1970); South Hill Neighborhood Ass'n, Inc. v. Romney, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970); Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967).

83. 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1075 (1970).

84. 16 U.S.C. §§ 470(a)-(f) (Supp. V, 1970).

85. Texas Comm. on Natural Resources v. United States, 1BNA ENV. REP. *Decisions* 1303 (W.D. Tex. Feb. 2, 1970), *appeal dismissed as moot*, 430 F.2d 1315 (5th Cir. 1970).

One of the most recent and cogent illustrations of the length to which public agencies will go in attempting to justify ill-considered decisions is *Citizens Committee for the Hudson Valley v. Volpe*.[86] In that case citizens objected to construction of the Hudson River Expressway in New York on the grounds that the construction would require filling significant amounts of the Hudson river, an illegal act unless Congress had expressly authorized it. The citizen's committee relied upon a federal statute which expressly provides:

> It shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any . . . navigable river . . . of the United States until the consent of Congress to the building of such structures shall have been obtained. . . .[87]

Congressional authorization for the project had never been obtained. Nevertheless, the project was commenced and litigation challenging the right to do so was vigorously defended. The arguments of the highway men are best set forth in the words of the court:

> The defendants, while accusing the plaintiffs of arguing semantics, postulate that what is called a dike (by the various engineers who prepared the plans for the State Department of Transportation and the Corps of Engineers) is not really a dike since a real dike has a different purpose from their dikes. . . .
>
> The defendants urged that Congress, in using the term "dike" in 1899, meant a structure that would be within the definition set forth in Chambers Technical Dictionary, p. 273 . . . which was originally published in 1940. . . .
>
> We hold . . . that Congress when it said "any dike" over or in any navigable river meant exactly that.[88]

Unbending loyalty often leads otherwise honest and competent employees to resort to devices more drastic than mere semantics in attempting to justify their own or their employer's decison. In a recent case involving the disputed location of the Three Sisters Bridge in Washington, D.C., highway officials and their attorneys, after unsuccessfully opposing judicial inquiry into the decision-making process, "manufactured" evidence in the form of subsequent inter-office memos in an attempt to prove that they had complied with the mandate of certain statutes and regulations.[89]

Another factor inhibiting objective decision-making by the highway departments is the heavy pressure imposed by the federal aid programs designed for the construction of the interstate highway system. The federal statute requires that federal funds be paid out by the end of the

86. 302 F. Supp. 1083 (S.D.N.Y. 1969).

87. 33 U.S.C. § 401 (1964).

88. 302 F. Supp. at 1088.

89. District of Columbia Fed'n of Civic Ass'ns, Inc. v. Volpe, 316 F. Supp. 754, 770 n.31, 785 n.52 (D.D.C. 1970).

second year after the state and the Federal Governments have signed the highway project agreement;[90] "the threat of losing federal money [therefore] creates strong pressure to bend state policies and laws in the way that will most quickly build the highway."[91] As a result of the congressional declaration that " 'the prompt and early completion of the national system of defense and interstate highways . . . is essential to the national interest,' . . . highway engineers frequently propose routing an interstate along the cheapest and straightest of alternative routes."[92]

The foregoing illustrations should serve to confirm or reinforce what the average man-in-the-street already knows—that it is unrealistic to expect a public agency created to promote, build and maintain a highway system throughout the state to entertain any point of view which conflicts with this mission, and that the enactment of a statute directing consideration of other viewpoints is not going to change things. A single-purpose, mission-oriented public agency cannot, by definition, protect the public interest, which by definition requires competent consideration of a variety of factors.

It is evident that the presumption utilized in California to avoid judicial review of the necessity or location of a proposed public work is the kind of "fading presumption" to which Judge (now Chief Justice) Berger referred when he wrote:

> The theory that the [Federal Communications Commission] can always effectively represent the listener interests . . . without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it.[93]

In view of the ever-broadening powers of condemnation and the very serious environmental consequences resulting therefrom, the continued refusal of California courts to critically review the decision-making process is judicial naiveté in the extreme.

VI. Is Judicial Review Practical?

There are other reasons, besides the "presumption of regularity,"

90. 23 U.S.C. § 118(b) (1964).

91. Tippy, *Review of Route Selections for the Federal Highway Systems*, 27 MONT. L. REV. 131, 135 (1965).

92. *Id.*

93. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1004 (D.C. Cir. 1966).

which are urged to support the condemnor's argument that a court should abstain from inquiry into the necessity or location of the proposed public work. These arguments proceed along more pragmatic lines.

The first of these is that if the court permits any condemnee to question a project, such as a highway, which involves taking the land of a number of landowners, the project will be plagued by continuous delays while each landowner separately litigates the necessity of the taking or the desirability of the location.[94] Such an argument distorts reality by ignoring the extensive costs of litigation. Furthermore, even if every landowner were resolved to oppose the condemnation in court, the condemnor's attorney, who completely controls the action from the standpoint of determining when the complaints are filed and against whom, could move to bifurcate the trial into the "necessity" question and the compensation issues and consolidate the trial of all cases raising the necessity question. Where landowners contest the necessity of the taking without any evidence a motion for summary judgment in favor of the condemnor on the necessity issue could expediently dispose of that defense. In short, by a comparatively easy modification of condemnation practices, a desirable project can be completed economically and with minimum delay, while still permitting landowners to seek judicial review of the necessity for the taking of their lands.

It is apparent, of course, that a project which is of questionable value and necessity ought not proceed until those issues are finally resolved. The typical condemnor's argument—that judicial review should be avoided because it only delays the project—can therefore be put aside as so much make-weight.

Another pragmatic argument against judicial review in condemnation suits is that the condemnor may find himself in a perplexing situation if one court finds the original location of the project unnecessary and in a subsequent action another court determines an alternative route is unnecessary, and so forth. This argument caught the fancy of the California Supreme Court in 1891 in *Pasadena v. Stimson*,[95] where the court said:

> And we think that when an attempt is made to show that the location made is unnecessarily injurious the proof ought to be clear and convincing, for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so *ad infinitum*. . . . [I]mprovement could

94. People v. Chevalier, 52 Cal. 2d 299, 305, 340 P.2d 598, 602 (1959).
95. 91 Cal. 238, 27 P. 604 (1891).

> never be secured, because, whatever location was proposed, it could be defeated by showing another just as good.[96]

The self-defeating aspects of that argument apparently never occurred to the court, sitting in a state which was still frontier in many respects. For if the prospective condemnor could never find a location which could be determined to be compatible with the greatest public good and the least private injury, he obviously ought not construct the project.

Another argument nearly always heard on this question is that judicial review is inappropriate at the stage when condemnation proceedings are initiated because, by that time: (1) the financial arrangements have been made; (2) the contracts to construct the project have been let;[97] or (3) the project has already been commenced on land previously taken. This argument is an equitable one, equivalent to laches, except that the equities seem to favor the condemnee. Since the condemnor has full control over the commencement of a condemnation action, and as the condemnee has no standing to bring an action challenging the determination of necessity,[98] it is grossly inequitable to prohibit a condemnee from questioning the taking because the suit against him was not filed until the project reached advanced stages.

Here again, a revision of the condemnor's land acquisition procedures can alleviate any problem which arises during condemnation. Acquisition of land for highway projects which are constructed in segments can be acquired in equivalent segments. Condemnation complaints could be issued against the holdout landowners, and since an attack on the necessity of the project is only by affirmative defense, the condemnor would quickly know to what extent the project would be challenged for that segment. If the project were contested, and there were no triable issue of fact, the matter could be resolved by summary judgment. If there were no contest, the project could proceed as scheduled.

It is conceded that there will necessarily be some delay to some desirable projects if a condemnee is permitted to test the necessity of the project as a defense to the taking of his land. Considering, however, the limited amount of land resources available, the permanence of the public work and the serious nature of its ramifications, a well-planned and well-thought-out project which is truly in the public interest will not be significantly harmed by a delay of even 12 to 24 months. If a project is based on so precarious a footing that it will topple if its mo-

96. *Id.* 255-56, 27 P. at 608.
97. Road Review League v. Boyd, 270 F. Supp. 650, 664 (S.D.N.Y. 1967).
98. See notes 6 & 8 & accompanying text *supra*.

mentum is reduced or lost, such an argument should present a prima facie case against the necessity of the project.

Finally, it might be argued that courts are incompetent to pass judgment on questions involving location of public work projects because of the necessarily complex nature of such decisions.[99] This argument, however, is as devoid of rational support as the others. California courts are not now, nor have they ever been, incapable of determining complex sociological and technical issues. The court has been in the forefront of major changes in criminal justice,[100] civil rights,[101] defacto segregation,[102] and minority-group voting,[103] to name only a few social issues. On the technical side, the court could rarely be presented with cases involving more complex technology than those in which it is required to apportion the state's scarce water resources among a multitude of competing uses. Yet in 1938, the California Supreme Court ordered a trial court to work out a physical solution to resolve competing water-users' demands, considering water available from surface stream flow, springs, underground flow and underground reservoirs.[104] As far back as 1903, responding to an argument that the court had insufficient capability to deal with complex problems of underground waters, and therefore must avoid any judicial activity in this field, the court said:

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99. This argument—that courts should not involve themselves in second-guessing the experts—is not often articulated so bluntly, but the thread of it appears in some cases. *E.g.*, District of Columbia Fed'n of Civic Ass'ns, Inc. v. Volpe, 316 F. Supp. 754, 770-71 (D.D.C. 1970): "The court is merely reviewing the actions of the Secretary to determine whether they have a basis in fact, and that they do not amount to an abuse of discretion. The wisdom of the statutory scheme of committing such decisions to administrative officials experienced in the area of their jurisdiction, rather than to the courts, is evident in the present situation." Similarly, in Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 223, 257 N.E.2d 870, 871, 309 N.Y.S.2d 312, 314 (1970), a citizen's action against an air polluter, the court said: "[I]t seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution."

100. People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964), was the first case to require proof that the defendant have objective knowledge of the victim's minority in a statutory rape case.

101. Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), *aff'd*, 387 U.S. 369 (1967). The Supreme Court upheld the California high court's invalidation of proposition 14 as a legislative act encouraging private discrimination in the sale of housing.

102. *Id.*

103. Castro v. California, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970), struck down a California constitutional provision making the ability to read English a prerequisite of voting.

104. Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 81 P.2d 533 (1938).

> The objection that this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among a large number of users, is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but if the rule is the only just one, as we think has been shown, the difficulty in its application in extreme cases is not a sufficient reason for rejecting it and leaving property without any protection from the law.[105]

These are hardly words from a court incompetent to handle complex issues.

VII. Conclusion

Americans are only now beginning to realize the many facets of "public interest" and to appreciate that the decision to spend public monies to build public works requiring permanent changes of our diminishing natural resources must be made only after long, thoughtful and objective analysis considering a wide variety of viewpoints. The recent enactments by the Federal Government requiring public hearings in highway location cases, the Environmental Policy Act and the Presidential Executive Order issued thereunder are salutary first steps in reversing the existing trend. But they are only first steps. Yet to be developed is an ultimate means of balancing conflicting viewpoints and arriving at a sound determination of what public works are within the public interest.

One possibility is the creation of a "super-agency" in the state with the power to license public agencies to condemn private property for a given public work after extensive public hearings and inquiries, with all parties having the right of cross examination. Ultimate appeal from such an agency to a court would have to be provided, the extent of which would depend upon the composition of the agency, its methods and the possibility of abuse of power.

On the other hand, the National Academy of Sciences report recommends the creation of an agency which would be responsible for independently evaluating and assessing proposed technological changes within the realm of each branch of the Federal Government. To maintain their credibility among diverse interests, such an agency would not have any policy-making authority, regulatory powers or responsibility for promoting any particular technology. Nor would it be given authority to screen new technological undertakings, since such a power might discourage innovation. In the views of the panel, the agency "should be empowered to study and recommend but not to act; it must

105. Katz v. Walkinshaw, 141 Cal. 116, 136, 74 P. 766, 772 (1903).

be able to evaluate but not to sponsor or prevent."[106] It would be designed to influence, and thus would be situated close to the seat of the executive and legislative power. Existing institutions would operate much as they now do, but would be under varying degrees of influence from these technological assessment groups.[107] Presumably, the court would still maintain its traditional review, where necessary.

The mechanism by which a landowner challenges the necessity or location of the proposed public work as a defense to a condemnation action is not the most desirable one for ensuring complete and full consideration of the public interest in highway location decisions. Nor is court review guaranteed to prevent all or most of the abuses of the condemnation power which are now condoned. But in the absence of any single agency capable of determining all of these questions, judicial review is an absolutely necessary intermediate step.

The general trend throughout the country is certainly in the direction of increasingly critical judicial review. The courts, responding to the clamor for more responsive and objective decisions, are taking increased notice of the insulation and bias of the sponsoring agencies, usually highway departments. While it is still the general rule throughout most of the country that decisions locating highways or other public works projects will not be reviewed by courts except in cases of fraud, bad faith or abuse of discretion, there is a distinct and growing trend to liberalize those concepts and thus provide greater judicial scrutiny of those decisions.

There is absolutely no question that there must be substantial improvement in the process for planning public works.[108] Suggestions for such changes vary, but all agree that the process must include adequate representation of the variety of viewpoints which go into the definition of "public interest." But until such an ultimate process is developed, we must live with what we have; and we cannot permit environmental degradation by single-purpose agencies to continue until the perfect solution is found.

Notwithstanding its imperfections, the mechanism of judicial review of administrative decisions is sufficiently flexible to protect the public interest in a quality environment without major changes in judicial

106. Brooks & Bowers, *supra* note 56, at 20.

107. *Id.*

108. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Brooks & Bowers *supra* note 56, Tippy, *Review of Route Selections for the Federal Highway Systems*, 27 MONT. L. REV. 51, 131 (1965).

process. By liberally interpreting the concepts of "arbitrariness" or "abuse of discretion," the court can expand the scope of its review. Further, the courts can make their determinations on a more flexible and realistic basis by adopting as the standard of review the yardstick suggested by the panel of the National Academy of Sciences:

> [A] basic principle of decision-making should be to maintain the greatest practicable latitude for future action. Other things being equal, the technological projects that should be favored are the ones that leave maximum room for maneuver. The reversibility of an action should thus be counted as a major benefit, its irreversibility as a major cost.[109]

In highway location problems, the court is presently the first and only forum in which objectors to the location or necessity of the project can obtain a fair and impartial hearing, together with the all-important right to cross-examine highway officials. Since the court is the first forum which can adequately protect the public interest, its responsibility is analogous to that of the Federal Power Commission in licensing projects involving water resources: it must "affirmatively protect the public interest"; it cannot adopt the role of the umpire "blandly calling balls and strikes for adversaries appearing before it. . . ."[110] Courts have the power to call upon independent referees. They can, on their own motion, appoint one or more qualified experts to testify as friends of the court on matters affecting the public interest, regardless of whether the parties raise the questions.

Courts must be permitted a significant amount of discretion in the handling of such cases. And while some complaints about judicial abuse of discretion can be expected, there is no doubt that the approval of a controversial highway project after a full and extensive hearing, in the exercise of judicial discretion, is vastly more credible than the approval of such a project by a highway engineer under the present circumstances. The judicial mechanism, if handled by judges bent on a realistic protection of the broad public interest, can do much to prevent the sacrifice of our vital national resources on the altar of short term expedience. But to reach this goal in California requires the immediate overruling, judicially or legislatively, of the unrealistic and deadly case of *People ex rel. Department of Public Works v. Chevalier.*

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109. Brooks & Bowers 15.
110. Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 620 (2d Cir. 1965).