The California Roadway--A More Necessary Public Use

Norman E. Matteoni
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By Norman E. Matteoni*

Eminent domain is usually considered to be the power to take private property for a public purpose. Yet that power has also been employed to take property that is already devoted to a public use. The California Legislature has enacted several statutes defining, by law, priorities of public use. It has also enacted Code of Civil Procedure sections 1240(3) and 1241(3), which provide for the acquisition of land already devoted to a public use whenever the subsequent public use is a “more necessary” one. It is the purpose of this article to suggest guidelines to aid the courts in weighing the issue of greater necessity as raised by sections 1240(3) and 1241(3) by focusing upon the general legal apparatus that allows one public user to supersede another.

While property already devoted to a public use may be acquired under sections 1240(3) and 1241(3) for any number of subsequent more necessary uses, it is the convergence of streets, expressways and highways in urban centers that produces the greatest possibility of collision with a pre-existing use. In fact, the designers of streets and highways have not always attempted to avoid the conflict. However, sometimes because of legislative restraint and other times because of inter-governmental relations or the balance of power (certainly it is easier to overcome the resistance of a private property owner than that of a public user) this conflict is avoided. For example, the California Highway Commission, in a pamphlet that it distributes regarding freeway route hearings, warns: “Schools, public buildings, hospitals, churches, cemeteries and parks are difficult to replace in favorable locations. They are important controls governing the location of a new freeway and wherever possible these establishments are

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3 See text accompanying notes 19-46 infra.

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not disturbed.4

San Francisco's Mayor, Joseph L. Alioto, has mocked such warn-
ings of the Commission, labeling its members "piratical raiders"5 who arbitrarily lay their ribbons of concrete through parks, schools and public opinion. The city's chronicler, Herb Caen, is no less critical: "As for the highway engineers, their problem is simply to build a straight line between two points at the lowest possible cost (in millions) and if something like Golden Gate Park gets in the way, too bad for Golden Gate Park. In the hierarchy of anarchy, the car is god and a place to park is heaven."6

However, while San Francisco publicly manifests a negative attitude toward unaesthetic concrete channels of traffic,7 it is clear that the State's major centers of population, including San Francisco, are heavily dependent upon the highway for transportation and flow of commerce. For example, the Los Angeles metropolitan area is an 1,800 square-mile web of 89 cities lashed together by the threads of a complicated freeway pattern.8 Furthermore, statewide statistics show that Californians drive more than 11½ million motor vehicles over 171,000 lineal miles of roadways.9 For these reasons, the California roadway offers the best means of examining the general question of "more necessary public use," and the scope of this article is aimed, therefore, at a consideration of the problems related to this particular context.

A. Introduction

Before considering the narrow question of how a court in Califor-
nia should handle the issue of "more necessary public use," it is appro-
priate to examine the general judicial and legislative dogmas that historically have surrounded the pre-emption of one public user by another. Basically, these are two: (1) the judicial doctrine of prior

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4 STATE OF CALIFORNIA, DEPARTMENT OF PUBLIC WORKS, DIVISION OF HIGHWAYS, FREEWAY FACTS 6 (1964).
5 San Francisco Chronicle, July 26, 1968, at 1, col. 2. The newspaper article indicated the Mayor acknowledged that the phrase was borrowed from a New York Times editorial writer.
6 H. CAEN & D. KINGMAN, SAN FRANCISCO—CITY ON GOLDEN HILLS 62 (1967).
7 In addition to the above quotes from the first and fourth estates—the government and the press—a few years ago the City of San Francisco stopped the Embarcadero Freeway in mid-span across its water front. Further, in 1968, pressure was exerted to make the State choose a ridge route for its Junipero Serra Freeway instead of a path through San Francisco's Crystal Springs area of watershed and future recreation.
9 COUNTY SUPERVISORS ASS'N OF CAL., 1968 CALIFORNIA COUNTY FACT BOOK 85, 87.
public use; and (2) the legislative mandates of specific statutory priorities.

The Doctrine of Prior Public Use

The condemnation of the lands of one public user by another may be thwarted initially by the doctrine of "prior public use," a limitation developed by the judiciary to prevent arbitrary or retaliatory acquisitions by authorized condemning agencies against one another. The New Jersey Supreme Court explained this rule simply as a denial of the right of condemnation "where the proposed use will destroy an existing public use or prevent a proposed public use unless authority to do so has been expressly given by the Legislature or must necessarily be implied."10

Actually, this doctrine is a corollary of the principle that requires strict construction of statutory grants of eminent domain authority. As the California Supreme Court has stated: The right to take property must be exercised according to "the will of the sovereign as expressed by the legislature, and such right can be exercised only in behalf of those public uses that the legislature has authorized, and in the mode and with the limitations prescribed in the statute which confers the authority."11 As early as 1863, California had adopted the doctrine of "prior public use," when Justice E. B. Crocker held that one railroad company could not locate its line over the previously located line of another company, except at crossings and intersections.12

In another railroad case, Commissioner13 Niles Sears of the 1896 California Supreme Court borrowed reasoning from a New York decision14 to explain the rationale of the doctrine: Although the power of eminent domain is one of the inalienable incidents of sovereignty, it must be exercised by virtue of the legislative will. For, if the power were uncontrolled, one corporation having the right of condemnation would be able to take the land of a similar corporation; whereupon the second corporation having the same power could then re-condemn the land for its own use. This absurd process of retaliation was never intended by the law-making power.15

11 Lindsay Irr. Co. v. Mehrten's, 97 Cal. 676, 678, 32 P. 802 (1893).
13 From 1885 until 1904 when the District Courts of Appeal were established, the California Supreme Court had the power to appoint three persons as commissioners "to aid and assist the Court in the performance of its duties, and in [disposition of the] numerous causes now pending in said Court undetermined." Act of March 12, 1885, ch. 120, § 1, 1885 Cal. Stats. 101.
14 In re New York, 99 N.Y. 12, 23, 1 N.E. 27, 32 (1885).
The courts, however, have carved out an exception to this rule of restriction where it is shown that "the proposed use will serve a greater public interest than the existing use." Unfortunately, the courts of some states have declined to fix definite priorities in this situation to help determine when a public use can qualify as a "more necessary," or greater use. To the Indiana Supreme Court "the determination of the relative values and importance of different public uses, one of which will be inconsistent with or destroy the other is purely a legislative matter—one of policy to be determined in the legislative halls and not in the court room."

While not all legislatures have acted to delineate those situations in which one public use, by statute, is of greater public interest than another, the California Legislature has not hesitated to establish many statutory priorities, as well as some restrictions. Since a statute of specific authorization controls a general provision, it will be helpful to review some of these specific legislative priorities, especially those dealing with the California roadway, before turning to the general provisions of sections 1240(3) and 1241(3).

Specific Legislative Statutory Priorities

While it is beyond the scope of this article to consider all specific legislative priorities, the following should serve to illustrate the general trend of roadway pre-emption. Recognizing the importance of the highway to California's future, the legislature has acted to clarify a number of situations in which the roadway, by law, takes express priority over other public uses.

Code of Civil Procedure section 1248a provides that in any proceeding under the general eminent domain law where any railroad, street or interurban railway tracks are within land sought for "road, highway, boulevard, street or alley purposes," the condemning agency may obtain a judgment of condemnation not only securing the lands, but also ordering the relocation or removal of the tracks thereon. This statute is interesting for what it leaves unsaid. The crossing of tracks by streets is a natural intersection of two modes of transportation and both can exist without destroying the other. Even without such statutory authorization as section 1248a, therefore, the law confers by necessary implication the right of a street to cross a track.

16 1 P. Nichols, The Law of Eminent Domain § 2.2[3], at 225 (rev. 3d ed. 1964) (emphasis added).
However, a longitudinal take of the track would absolutely preclude any further use by the railroad, so that in the absence of section 1248a there could be no such longitudinal take unless it were "more necessary" under section 1241(3). Section 1248a is important, therefore, because it implies that roads of asphalt and concrete have indisputable priority over those of rail.

It should be noted that certain powers also reside in the California Public Utilities Commission in the case of railroad grade crossings. No crossing of a railroad by a public road, highway or street can be made without prior permission of the Commission in order that it may review and prescribe the location, maintenance and use of warning devices for such crossing. Further, certain monies must be budgeted in a state highway fund for the purpose of assisting cities, counties and cities, and counties to pay their proportionate share of constructing grade crossing protection works.

The Streets and Highways Code declares that it is State policy to acquire and own all toll bridges upon or along any part of its highways. In accordance with that statement of policy, the State's acquisition of "any transportation facilities ... real property, personal property, franchises, rights, easements, or other property or privileges appurtenant thereto appropriated or dedicated to a public use ... by any person, public, private or municipal corporation, county, city, district, or any political subdivision of the State" for the same or a different use is deemed a more necessary use and purpose than the use to which the property had already been appropriated or dedicated. There is an exception to this priority provision for rights-of-way necessary for the operation of a common carrier by railroad. Yet this railroad use is narrowly defined to be one other than an interurban operation to and from an area within 50 miles from either end of any toll bridge or other toll highway crossing. Further, even a prior railroad use falling within this exception may be taken upon pleading and proving that the public interest and necessity require the acquisition.

Parking facilities are an obvious auxiliary to the roadway, and the legislature has dispensed a broad power to parking authorities to acquire any property, "except that property of a state public body shall not be acquired without its consent."

Recently, the State invoked its strong Property Acquisition Law
to take lands owned by the City of Los Angeles and used for park purposes. The proposed use of the Public Works Board was to be for a parking lot for the California Museum of Science and Industry. The law relied upon included provisions enacted in 1944 to secure a post-war construction program. Section 15,856 of the Government Code establishes a priority of public use: "In any condemnation proceeding brought under this law, the use for which the property is condemned shall be deemed a public use more necessary than any other public use to which the property is devoted at the time the action was commenced." In this case the automobile seems to have been the accidental beneficiary of a law that was established for other purposes.

Another certain priority was established in 1937 with the enactment of Streets and Highways Code section 103.5, declaring that lands necessary for state highway purposes may be placed over any property dedicated to park purposes, regardless of the manner by which such property may have been dedicated. Two cases, People v. City of Los Angeles and Barry v. Department of Public Works, ruled that this statute of specific authorization controls the general power expressed in Code of Civil Procedure section 1240 (3). But the statement in City of Los Angeles that "it cannot be said as a matter of law that a state freeway is not a 'more necessary public use' than a city park . . ." has recently been emasculated by the legislature.

In the 1968 session, Senator Milton Marks introduced a bill, passed by the Legislature and approved by the Governor, which added new language to the Code of Civil Procedure. This new enactment establishes a rebuttable presumption that the "best and most necessary public use" of property appropriated to a state, regional, county or city park is such use as a park. Further, whenever a state highway seeks to intrude, the public agency owning the park may bring an action for declaratory relief within 120 days of the notification by the State Highway Commission that the park is sought for highway use.

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27 State v. Los Angeles, 258 A.C.A. 1041, 64 Cal. Rptr. 476 (1967).
30 179 Cal. App. 2d 558, 4 Cal. Rptr. 531 (1960).
33 S.B. 1109 (1968).
35 Cal. Code Civ. Proc. § 1241.7(a) (emphasis added).
36 Id. § 1241.7(b).
At such a hearing, the resolution of need by the Commission is not conclusive. But unless the action is brought within 120 days, the benefits of the statute are lost. Thus, the road may still invade the park, but its entry will be made more difficult.

One specific area that roadways, by law, cannot enter is land dedicated to cemetery purposes. When the Division of Highways nonetheless sought to lay out a freeway through Eden Memorial Park Cemetery of Los Angeles, claiming that the prohibiting statute stood in derogation of sovereignty and had to be construed, therefore, strictly in favor of the State, the Second District Court of Appeal found that the Legislature had long protected burial grounds from molestation and desecration through invasion of public thoroughfares. Such a policy would be defeated if the State could except itself from the general prohibition.

Curiously, in another case, a school district was allowed to amend its complaint upon the sustaining of a demurrer, in order to show that, although the land sought was dedicated for cemetery purposes, it had not been used for that purpose. Since there is no specific prohibition against school uses, that case could only interpret the general law of Code of Civil Procedure section 1240(3) and Health and Safety Code section 8552 pertaining to cemeteries. Section 8552 provides that upon the filing of the map for dedication to cemetery purposes “the dedication is complete for all purposes and thereafter the property shall be held, occupied and used exclusively for a cemetery and for cemetery purposes.” If the land could be shown not to have been used for any purpose, however, presumably the school district could assert that its location of educational facilities in the unused cemetery grounds would serve a higher public purpose.

A further reserve from highway invasion is the land of State hospitals. Welfare & Institutions Code section 4104, however, does provide an exception allowing the Legislature by special enactment to consent to the opening of streets or roads through State hospital boundaries. In addition, there are specific code sections authorizing the Director of General Services, with the consent of the Department of Mental Hygiene, to grant rights-of-way across specifically described areas of the Sonoma State Hospital, Patton State Hospital, Agnew

37 CAL. HEALTH & SAFETY CODE § 8560.
40 CAL. WELF. & INST'NS CODE § 4104.
41 Id. § 4105.
42 Id. § 4106.
State Hospital, Stockton State Hospital and the Modesto State Hospital.

In spite of these attempts to establish specific priority of public uses in certain areas, litigation has occurred. But the clearest invitation to legal dispute lies in Code of Civil Procedure sections 1240(3) and 1241(3), which provide for the acquisition of land already devoted to a public use whenever a proposed public use is a "more necessary" one. If a condemnor does not enjoy the advantage of an express statutory priority, therefore, it may well attempt to acquire publicly used land under the "more necessary" provisions of sections 1240(3) and 1241(3). If it does, the court, unaided by specific legislative priorities, must determine which of the two competing public uses will serve the greatest public good. While the issue of which of the competing uses is of greater interest to the public can be determined only on a case-by-case basis, the general criteria and procedural mechanics for reaching that determination can be abstractly formulated. Before attempting such a formulation, however, the language and the history of sections 1240(3) and 1241(3) should be examined.

B. Code of Civil Procedure Sections 1240 and 1241—
General Background and Interpretation

When the Sacramento lawmakers first put together California's procedural code in 1872, they provided that "private property" that may be taken under the power of eminent domain includes "property appropriated to a public use." Section 1240(3) is the enabling

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43 Id. § 4107.
44 Id. § 4108.
45 Id. § 4108.1.
46 CAL. CODE CIV. PROC. § 1240(3).
47 The text of sub-section three thereof states that "private property" includes: "Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated; provided, that where any such property has been so appropriated by any individual, firm or private corporation, the use thereof for a State highway or a public street or highway of the state, or a county, city and county, incorporated city or town, joint highway district, or irrigation or municipal water district, for the same public purpose to which it has been so appropriated, or for any other public purpose shall be deemed more necessary uses than the public use to which such property has already been appropriated; and provided further, that where property already appropriated to a public use or purpose, by any person, firm or private corporation, is sought to be taken by the state, a county, city and county, incorporated city or town, joint highway district, irrigation or municipal water district, for another public use or purpose, which is consistent with the continuance of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to
statute⁴⁸ and 1241(3)⁴⁹ is the implementation of what is granted, al-

use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by the state, such county, city and county, incorporated city or town, joint highway district, or irrigation or municipal water district, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures, or improvements therein or thereon, so far as may be required by such common use. But property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated.”

⁴⁸ CONDEMNATION PRACTICE § 8.17, at 144 (Cal. Cont. Educ. Bar ed. 1960), states that “[a]lthough C.C.P. § 1240 appears to be enabling and § 1241 pro-
cedural, a recent case assumes that the sections are interchangeable.” The case mentioned is Marin County v. Superior Court, 53 Cal. 2d 633, 349 P.2d 526, 2 Cal. Rptr. 758 (1960).

⁴⁹ The text of sub-section three thereof is as follows: “If already appro-
priated to some public use, that the public use of which it is to be applied is a more necessary public use; provided, that where such property has been so appropriated by any individual, firm or private corporation the use thereof for a public street or highway of the State, a county, city and county, or any incorporated city or town, or joint highway district, or the use thereof by the State, a county, city and county, or any incorporated city or town, or joint highway district, or a municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district for the same purposes to which it has been appropriated or for any public purpose, shall be deemed a more necessary use than the public use to which such property has been already appropriated; and provided, further, that property of any character, whether already appropriated to public use or not, including all rights of any nature in water, owned by any person, firm or private corporation may be taken by a county, city and county, or any incorporated city or town or by a municipal water district, or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district, for the purpose of supplying water, or electricity for power, lighting or heating purposes to such county, city and county, or incorporated city or town, or municipal water district, or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district, or the inhabitants thereof, or for the purpose of supplying any other public utility, or for any other public use. And such taking may be made, either to furnish a separate and distinct supply of such water, and such electricity for power, lighting or heating purposes, or to provide for any such separate and distinct other public utility or other public use; to furnish such a supply or provide for any such other public utility or other public use in conjunction with any other supply or with any other public utility or other public use that may have been theretofore provided for or that may thereafter be pro-
vided for in so supplying or providing for such county, city and county, or incorporated city or town or municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district, or the inhabitants thereof; or in conjunction with any other supply
though much of the latter section is redundant. In 1911, a proviso was added to these laws, which inter alia declared that the taking of property already appropriated for a public purpose by any "individual, firm or private corporation" for the construction of a public street or highway of the State, county, municipality or joint highway district "shall be deemed a more necessary use than the public use to which the property has already been appropriated."\(^{50}\)

As is frequently the case, however, the law disburses power only to qualify it by a subsequent limitation. The last sentences of subsection 3 of sections 1240 and 1241 perform this task. Property already appropriated to the use of a county, city or one of the following types of districts—municipal water, irrigation, transit, rapid transit, public utility or water—may not be taken for a new public use by another county, city or one of the designated districts "while such property is so appropriated."

Upon first look, the exemption seems to have been intended to prevent one political subdivision or district from taking over the like functions of a similar entity or district. But the language is broader than that necessary merely to effect this result. For example, in 1960 the Marin Municipal Water District was prohibited from condemning two county roads that would have been inundated by the proposed public project of a dam and reservoir to be constructed under the supervision of the District. The decision held that the county roads were within the exemption provisions of sections 1240(3) and 1241(3).\(^{51}\)

The classification of exempted entities is difficult to understand. One of the largest groups of condemning agencies that has a vital pub-
lic purpose—school districts—is omitted. Apparently the desired goal was only to keep sacrosanct key utility services of urban life. Yet the exemption does not smoothly coincide with other language of the subsection that indicates that the State, counties, cities, joint highway districts, water districts, irrigation districts, transit districts and public utility districts may take the lands of an individual, firm or private corporation appropriated to a public purpose for either the same purpose or another public purpose.

In interpreting the proviso and the exemption, the cases have made careful distinctions. First, a private power company, which had devoted its properties to the public use of other municipalities and water districts, was ruled within the exemption when threatened with a takeover by the City of Los Angeles. Second, the exemption was not extended to a private water company that supplied services to persons within the boundaries of the condemning city. But a governmental agency—an irrigation district—that supplied water to the inhabitants of the condemning city, was within the exemption.

In seeking direction from these two statutes, it is also important to determine what is mean by “appropriation” to a public use. “Appropriation” obviously is not synonymous with ownership by a public entity. Both sections 1240 and 1241 expressly declare that property may be appropriated to a public use, even though it is owned by a private individual or corporation. Moreover, subsection 2 of section 1240 declares that lands of the State “not appropriated to some public use” are susceptible to condemnation by a lesser public agency, and then describes those lands to include “tide and submerged lands.” Although the negative description is not complete, the legislature has been more concrete than the judiciary, which declared that the word is synonymous with “devoted to.”

Secondly, “appropriation to” or “devotion to” a public use does not necessarily mean that the property must actually be in use for a public purpose. Property acquired by a condemnor for public use and held in reasonable anticipation of future needs with a bona fide intention of using it for such public purpose within a reasonable time is “appropriated to” a public use.

It is suggested that simply by giving the word its usual meaning,

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52 Mono Power Co. v. Los Angeles, 284 F. 784 (9th Cir. 1922), cert. denied, 262 U.S. 751 (1923).
i.e., "to designate the use of a thing," it follows that once an agency has exercised control over a parcel of property, it has been appropriated. Unappropriated land would include "excess lands" acquired to avoid severance damage, and property that has escheated to the State.

Nevertheless, Code of Civil Procedure section 1241(3) "has no application to a case where the same land can be subject to a second servitude without disturbing the first." In such a case, there is no "taking" of the prior public use. For example, in City of Pasadena v. Stimson, the California Supreme Court held that section 1241(3) was not applicable where the acquisition was for a sewer that would not seriously interfere with the use of the highway along which it was installed.

With the above general rules in mind, it is now possible to consider the narrower question of "more necessary public use," which is the essence of sections 1240 and 1241. Assuming that a condemnor is without the benefit of a legislative priority, what procedure should the trial court follow to determine whether the proposed use is of greater public merit than the existing one?

C. Judicial Resolution of the "More Necessary Public Use"

In order to determine the framework within which a trial court must decide the "more necessary public use" issue of sections 1240(3) and 1241(3), one must start with the syntax of that phrase. Unfortunately, much of the confusion surrounding this issue arises from the juxtaposition of the words "more necessary" rather than the words offered in Nichols' treatise on eminent domain—a "greater public interest."

Nonjusticiability of Necessity

It is essential to the right of eminent domain that the property sought to be condemned will be applied to a public use and that it is needed for that use. But while the issue of public use is justiciable, the issue of necessity is not. Unfortunately, the distinction between necessity and public use is not an easy one to draw and the courts have frequently confused the two concepts. Whereas "[n]ecessity is

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59 91 Cal. 238, 27 P. 604 (1891).
60 1 P. Nichols, The Law of Eminent Domain § 2.2[3], at 225 (rev. 3d ed. 1964).
equated with a want, an exigency, or an expediency for the interest and safety of the people," raising questions first of need and then of location, public use "concerns the whole community or promotes the general interest in its relation to any legitimate object of government." These legitimate governmental objects are listed in Code of Civil Procedure section 1238 and include such obvious functions as road building, erection of school facilities, flood control projects and so forth. As the California appellate court has said, "[t]he character of the use, and not its extent, determine the question of public use."

The question immediately arises, however, whether the legislature, by having the word "necessary" stand in modification of "public use" in the two sections, intended to give the judiciary the right to review necessity as a tool for weighing the comparative merits of two public uses. Actually, there are three necessity questions: (1) whether the court can inquire into the need for the particular project; (2) whether the court can weigh the plan presented with alternate plans and locations in terms of cost and practicability; and (3) whether the court can determine if the property in question is an integral part of the project.

It appears that the answer to each question must be negative. The legislative concern was with greater public use, not with necessity. The court must assume, therefore, that the land under condemnation is necessary to both of the contesting parties.

Confirmation of this conclusion is evident in section 1241(2): A resolution or ordinance of the governing board of a city, county, school district or other designated public service district, "when adopted by a vote of two-thirds of all its members," 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 least private injury.

There follows a proviso that the resolution or ordinance is not conclusive as against property located beyond the territorial limits of the condemning agency.

In the case of People v. Chevalier, both the State and the City of Los Angeles had condemned different portions of the same privately owned parcel of land for a project of mutual interest regarding high-

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62 Id. at 406.
63 Bauer v. Ventura County, 45 Cal. 2d 276, 284, 289 P.2d 1, 6 (1955).
65 See Cal. Code Civ. Proc. § 1241(2), where the following language is found: "That the taking is necessary to such [public] use."
way and street coordination. The City passed a resolution of necessity pursuant to section 1241(2) and the California Highway Commission did the same under a similar statute, Streets and Highways Code section 103. The cases were consolidated for trial and both public agencies met allegations of fraud, bad faith and abuse of discretion with respect to their resolutions. More specifically, the landowner raised the spectre of a conspiracy between the City and the State. The charge was that the condemnation by the City served no legitimate city purpose, but was simply in aid of the State project and saved the latter the cost of building a service road to the landowner’s property. The superior court, however, struck these special defenses of the condemnee and an appeal was taken.

The California Supreme Court reaffirmed that the only limitations placed upon the right of eminent domain are those of the Constitution that the taking be for a “public use” and that “just compensation” be paid for the taking. While these questions are justiciable, that of necessity is not. 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.

The constitutionality of section 1241(2) had previously been upheld by the United States Supreme Court in Rindge Co. v. Los Angeles. It was alleged there that the failure to provide for a hearing before the resolution of necessity was adopted violated the due process clause. Justice Sanford answered with language from another case that was decided the same day: “[T]he necessity and expediency of taking property for public use is a legislative and not a judicial question [and] is not open to discussion. . . . The question is purely political, does not require a hearing, and is not subject to judicial inquiry.” Or, as the lower court in that decision had stated:

67 Id. at 304, 340 P.2d at 601.
68 Id. at 307, 340 P.2d at 603 (emphasis added).
69 262 U.S. 700 (1923).
71 Rindge Co. v. Los Angeles, 262 U.S. 700, 709 (1923).
Where the owner of property that is being condemned is accorded his constitutional right to just compensation, the condemning body's “motives or reasons that it is necessary to take the land are no concern of his.”

Finally, there are other judicial clues pointing to the conclusion that the issue of “more necessary public use” does not draw into focus the trilogy of necessity questions. For example, in Barry v. Department of Public Works, the Division of Highways sought to traverse, as a part of U.S. 99E, the 2,400 acre Bidwell Park in Butte County. An action to enjoin the taking was instituted. The supreme court had already decreed in People v. City of Los Angeles that the Highway Commission's resolution of necessity under Streets and Highways Code section 103.5 was final and presented no issue for the court. The petitioner in Barry, however, urged that the City of Los Angeles case be overruled, “contending that said section 103.5 does not authorize a determination of greater necessity by the commission which the courts cannot review.”

The trial court granted summary judgment, based upon section 103.5, which states:

The real property which the department may acquire by eminent domain, or otherwise, includes any property dedicated to park purposes, however it may have been dedicated, when the commission has determined by such resolution that such property is necessary for State highway purposes.

Justice Pierce, speaking for the appellate court, affirmed the trial court's judgment by announcing that the statutory language “leaves no room to insert, judicially, any further authorization for court review.” Although this language was sufficiently strong to dispose of the case entirely, Justice Pierce went on to answer what he termed “the theory of appellants' concerning the justiciability of necessity. That theory was that although under the rule of the Chevalier decision a court had to give “conclusive effect to the resolution of necessity where condemnation of private property is involved, the rule cannot be applied where the property to be condemned is already devoted to a public use.”

The court, citing from Nichols' treatise on eminent domain, concluded that “[w]hen the legislature has author-

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74 179 Cal. App. 2d 558, 4 Cal. Rptr. 531 (1960).
76 Id. at 362, 18 Cal. Rptr. at 639.
77 Id. at 361, 18 Cal. Rptr. at 639.
78 Id.
ized the exercise of eminent domain in a particular case, it has necessarily adjudicated that the land to be taken is needed for the public use, and no other or further adjudication is necessary . . . .”

Although acknowledging that both this latter statement and the Chevalier decision refer to condemnation of private property, the court had no difficulty in finding that the issue of necessity is “no less a matter of legislative prerogative . . . where the property is already applied to another public purpose.”

What the court indicates by such language is that irrespective of section 103.5’s specific legislative priority, a general resolution of necessity must be accepted by the bench in its determination of which conflicting public use serves the greater public purpose. There are three decisions, prior to Barry, that offer support for such a conclusion.

First, the 1891 case of Pasadena v. Stimson equated “more necessary” to “superior.” The court, finding that the use of a proposed sewer would not interfere with the existing highway, dismissed Code of Civil Procedure section 1241 (3) as not being applicable. “[I]t was not necessary to show that the new use was superior to the one to which the property was already appropriated.”

The next case in point is Woodland School District v. Woodland Cemetery Association, in which the court distinguished between “necessity” and “more necessary public use.” In ascertaining the propriety of a school’s invasion of cemetery lands, the court narrowly defined the issue as “whether the taking of the lands in question for necessary school purposes would be a more necessary public use than that for which it has already been appropriated, that is, cemetery purposes.” The court in Woodland thus appears to have accepted both the cemetery and the school as having a legitimate need for the particular land.

Finally, in People ex rel. Department of Pub. Works v. Los Angeles, the Second District Court of Appeal gave strong evidence that the presumption of necessity applies to the taking of both private property and property already devoted to a public use. In that case the court ignored the specific priority established by Streets and

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79 Id. at 362, 18 Cal. Rptr. at 640; see 1 P. Nichols, THE LAW OF EMINENT DOMAIN § 4.11, at 376 (rev. 3d ed. 1964).
81 91 Cal. 238, 27 P. 604 (1891).
82 Id. at 256, 27 P. at 609.
84 Id. at 246, 344 P.2d at 327 (emphasis added).
85 179 Cal. App. 2d 558, 4 Cal. Rptr. 531 (1960).
Highways Code section 103.5 and upheld the State’s acquisition of a city park as a “more necessary public use” under the more general law of Code of Civil Procedure sections 1240(3) and 1241(3). Recognizing the “essential” public importance of streets, highways and freeways, the court concluded that “it cannot be said as a matter of law that a state freeway is not a ‘more necessary public use’ than a city park—particularly when, as here, the freeway also constitutes a federal defense highway (Ex. 13) of concern to city, county, state and nation, primary to a park dedicated and maintained for the use of city residents.”

As to Los Angeles’ contention that the State’s acquisition was not necessary, the court turned to the language of Chevalier to establish the conclusiveness of the State’s resolution of necessity. The court added that Chevalier “is also controlling on the inadmissibility of evidence of alternate routes and we find on the issue of ‘necessity’ no error in excluding the same or evidence of cost of acquisition of other land to substitute for the park land taken.” The court was referring to the fact that the trial court received evidence regarding the character of the use, as shown by reference to Exhibit 13 of the record, but would not consider alternate routes. This is perhaps the strongest indicia that the judiciary will embrace the Chevalier rule of necessity, which was formulated to sustain the taking of private property, as the correct statement of law for the taking of lands already devoted to a public use.

It can be seen, therefore, that the above cases reiterated the distinction between necessity and public use, with the Woodland decision placing the issue of “more necessary public use” in a third category, separate even from general necessity. These decisions were the bedrock upon which the court in Barry established its conclusion that, even without the benefit of a specific legislative priority, a condemnor’s general resolution of necessity must be accepted by the trial court in its balancing of conflicting public uses.

Since the court is precluded from reviewing necessity questions, its decision of which public use is “more necessary” is made vastly simpler. It need not analyze engineering and cost data upon which the selection of the particular route under consideration is based. Rather, it can take judicial notice of prior decisions exclaiming the dependency of the State on a modern system of freeways and connections thereto, and legislative priorities giving the roadway supremacy over other uses. Under this system, the proponent of a road that is designed to be a major carrier of traffic and commerce would enjoy

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86 Id. at 564, 4 Cal. Rptr. at 535.
87 Id. at 565, 4 Cal. Rptr. at 535-36.
88 Id. at 568, 4 Cal. Rptr. at 538.
a justifiable advantage when condemning lands used for such purposes as school playgrounds or public recreational facilities.

The above rule of procedure allows the trial court to measure only the character of the conflicting uses—the public extent and impact of each. Yet by asking how many vehicles a particular roadway will carry, where it will carry them and what the importance to the community of that course of traffic will be, the court is coming close to a consideration of the first necessity question, i.e., the need for the improvement. Furthermore, by ruling in favor of the invader, the court effectively holds that the condemnee does not need all or part of its particular lands, or that it can locate elsewhere. As a result, it cannot be stated absolutely that the framework outlined above is complete or fully satisfactory. There is need of legislative clarification of 1240(3) and 1241(3), the latter already being burdened with provisos that present more confusion than direction.

Marks Bill

Perhaps an even better procedure for solving the dilemma of "more necessary public use" can be achieved through an extension of the 1968 Marks Bill,\textsuperscript{89} which dealt exclusively with parks. That bill enacted Code of Civil Procedure section 1241.7\textsuperscript{90} which provides that

\textsuperscript{89} S.B. 1109 (1968).

\textsuperscript{90} The full text of that section is as follows: "(a) Except as provided in subdivision (b), notwithstanding any other provision of law to the contrary, the fact that property is appropriated for public use as a state, regional, county, or city park establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

(b) When property appropriated for a public use as a state, regional, county, or city park is sought to be acquired for state highway purposes, and such park was dedicated to or established for park purposes prior to the initiation of highway route location studies, an action for declaratory relief may be brought only by the public agency owning such park in the superior court to determine the question of which public use is the best and most necessary public use for such property. Such action for declaratory relief shall be filed and served within 120 days after written notice to the public agency owning such park by the California Highway Commission that a proposed route or an adopted route includes park land owned by that agency. In such declaratory relief action, the resolution of the commission shall not be conclusive evidence of the matters set forth in Section 103 of the Streets and Highways Code. Such action for declaratory relief shall have preference over all other civil actions in the matter of setting the same for hearing or trial to the end that any such action shall be quickly heard and determined. If an action for declaratory relief is not filed and served within such 120-day period, the right to bring such action is waived and the provisions of subdivision (a) shall not apply. When a declaratory relief action with respect to such property being sought for highway purposes, may not be brought pursuant to
land already appropriated to a state, regional, county or city park is the most necessary use of the property. In order to overcome this presumption the State Highway Commission must establish compelling reasons for needing the project, the propriety of the location and the need for the particular property in question. Further, because the park can only challenge the condemnation by bringing an action for declaratory relief within 120 days after written notice by the Commission, the Commission is under pressure to inform the public agency owning the park that a proposed or adopted route includes its lands.

In addition, Streets and Highways Code section 210.1 requests that the Department of Public Works and the Highway Commission avoid using park lands. But in cases “where such lands are necessary for state highway purposes . . . the department shall coordinate and confer with appropriate public agencies responsible for park development during the route planning, design and construction phase of a state highway project.” Finally, the department must report to the Commission alternate route studies, showing the feasibility of bypassing the park.

These new sections are designed only to give preference to parks, but the extension of the checks and balances there described is a desired goal for all roadway challenges of other prior public uses.

Conclusion

The employment by sections 1240(3) and 1241(3) of the criterion “more necessary public use” is an insufficient safeguard because there is uncertainty regarding its interpretation and because the statutes

this subdivision, the provisions of subdivision (a) of this section shall not apply.”

91 The full text of that section is as follows: “(a) The department and the commission, in the planning and design of highway projects, shall attempt to avoid using lands for public parks, and where such lands are necessary for state highway purposes shall attempt to minimize the intrusion or impact on such parks by special design, construction and landscape treatment so that the highway will be harmonious with the environment. The department shall coordinate and confer with appropriate public agencies responsible for park development during the route planning, design and construction phase of a state highway project. The feasibility of bypassing a public park by an alternative route shall be studied and included in the report of alternate route studies to the commission.

(b) Public agencies having jurisdiction over parks shall, in their planning and location of parks, consider present and future needs for safe and modern highway transportation, including highway access to such parks, and shall coordinate their planning with public agencies having jurisdiction over streets and highways so that conflicts are minimized and the public interest is best served.”
fail to require prior conferences with the invaded public use and/or studies of the design and cost feasibility of avoiding that use.

The problem is one of legislative policy. While the legislature cannot possibly define an order of public use priorities that would cover every situation, it should act to clarify the general provisions of sections 1240(3) and 1241(3) to provide an orderly procedure for determining which of two conflicting public uses is "more necessary." The present judicial interpretation of those sections, as illustrated by the California roadway cases, is more by innuendo than by decree. The resulting danger of confusion and misinterpretation can only be alleviated by express statutory guidelines.