California Code of Civil Procedure Section 1241.7: Protecting Public Parks from Highway Intrusion

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Prior to the addition of section 1241.7 to the California Code of Civil Procedure in 1968, California parks were at the mercy of the state highway commission to which is delegated the power to determine the location of state and federal highways. Once a location has been determined by the commission, the Department of Public Works, of which the highway commission is a division, is authorized to condemn by proceedings in eminent domain the designated land and, acting through the Division of Highways, to construct a state highway or freeway on it. Section 103.5 of the Streets and Highways Code expressly authorizes the department to condemn for highways land which is devoted to public use as a park. The only statutory limitation upon the exercise of this power has been that the department could not begin a proceeding in eminent domain unless the California Highway Commission had first passed a resolution “declaring that public interest and necessity require the acquisition . . . by the State . . . and that the real property . . . therein described in such resolution is necessary for the improvement.” Under section 103 of the Streets and Highways Code,

3. The legislature determines the necessity of state highways and designates their terminal points, see CAL. STS. & H'WAYS CODE §§ 301-635 (West 1969, as amended, Supp. 1971), but it is the California Highway Commission that determines the actual locations of state highways between those terminals, see CAL. STS. & H'WAYS CODE §§ 71, 75 (West 1969), and is primarily responsible for locating federal highways, 23 U.S.C. §§ 103, 117(a) (1970). Route selection of federal highways by the state highway commission is, however, subject to final approval by the Secretary of Transportation. 23 U.S.C. § 103(e) (1970); 49 U.S.C. § 1655(a)(1) (1970).
5. Id. § 102.
7. CAL. STS. & H'WAYS CODE § 90 (West 1969). The actual construction and most of the planning is carried out by the Division of Highways.
this resolution is conclusive evidence of the public necessity of the improvement and that the particular property is necessary therefor.\(^{10}\)

Attempts by the condemnees, and in one case by a citizen group,\(^{11}\) to curb the exercise of the power delegated to the state highway commission to locate highways through public parks have been foreclosed by the leading case of *People ex rel. Department of Public Works v. Chevalier.*\(^{12}\) In *Chevalier* the California Supreme Court held that the conclusive effect accorded by the legislature to the condemning body's finding of necessity precluded any judicial determination on the necessity of the particular taking despite allegations of fraud, bad faith, or abuse of discretion.\(^{13}\)

At a time when the availability of land resources is in increasingly short supply,\(^{14}\) particularly in urban areas, and when environmental concerns have only recently come into clear focus, the decision in *Chevalier* is most disturbing because it has meant, in effect, that use of property as a highway is the best and most necessary use for property anywhere in the state without regard for the use to which that property is presently devoted.\(^{15}\)

Code of Civil Procedure section 1241.7,\(^{16}\) however, reverses this priority in regard to land which is presently appropriated for use as a

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10. *Cal. Sts. & H'ways Code* § 103 (West 1969) provides: "The resolution of the commission shall be conclusive evidence:

\(\text{"a") Of the public necessity of such proposed public improvement.}\)

\(\text{"b") That such real property or interest therein is necessary therefor.}\)

\(\text{"c") That such proposed public improvement is planned or located in a manner which will be most compatible with the greatest public good and the least private injury."}\)

The apparent reason for this provision is the possibility of "endless litigation, and perhaps conflicting determinations . . . in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement." *People ex rel. Dept of Pub. Works v. Chevalier*, 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (1959).


13. *Id.* at 307, 340 P.2d at 603.

14. Agricultural and other open space areas are being prematurely forced out of existence at a rate of approximately 150,000 acres per year. *Report of the Senate Permanent Factfinding Comm. on Natural Resources, Section II*, at 43, in 1 SUPPLEMENT TO THE APPENDIX TO THE JOURNAL OF THE CALIFORNIA SENATE (1967).


state, regional, county, or city park. The section provides that appropriation for park use establishes a rebuttable presumption that such use is the best and most necessary use for the particular property.

Whenever such park property is sought to be acquired for state highway purposes, the section authorizes the public agency owning the park to bring an action for declaratory relief. Such an action must be brought within 120 days after the highway commission gives notice of its proposal. In this action, the resolution of the commission is not conclusive evidence of the public necessity of the improvement nor that the particular property is necessary thereto. Furthermore, the duty is expressly imposed upon the court to determine which use, a highway or a park, is the best and most necessary use to the public for the park property in question.

Enacted concurrently with section 1241.7, section 210.1 of the Streets and Highways Code provides that in the planning and design of highway projects, the Department of Public Works shall attempt to avoid using park lands, but where such lands are necessary to the project, the department shall, by special design and construction, attempt to

17. The protective scope of CAL. CODE CIV. PROC. § 1241.7 (West Supp. 1971) has recently been extended to recreation, wildlife or waterfowl management areas, Cal. Stat. 1969, ch. 357, § 1 at 872, and ecological reserves, Cal. Stat. 1970, ch. 854, § 1, at 1589. In addition, a 1971 amendment provides the same protection against intrusion by public utility structures. Cal. Stat. 1971, ch. 68, § 1 (West Cal. Legis. Serv.) CAL. CODE CIV. PROC. § 1241.9(a) (West Supp. 1971) provides the same presumption of best and most necessary public use to property owned by nonprofit corporations "having the primary purpose of preserving areas in their natural condition" and used for the "preservation of native plants, or native animals . . . or biotic communities . . . ."

Subsection (b) allows the nonprofit corporation owning such property to bring a declaratory action whenever that property is sought for highway use.

18. Notice must take the form of a single publication in a newspaper of general circulation, see CAL. GOV'T CODE § 6061 (West 1966), and a written notice to the public agency owning the park. Cal. Stat. 1971, ch. 1524, § 1 (West Cal. Legis. Serv.), amending CAL. CODE CIV. PROC. § 1241.7 (West Supp. 1971).


20. Section 210.1 provides in part:

"(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."
achieve harmony with the environment.21 Further, this section now requires consultation with the appropriate public agencies responsible for park development during all significant stages of the highway project and compels study of the “feasibility of bypassing a public park by an alternate route.”

The purpose of this note is to show that the enactment of sections 1241.7 of the Code of Civil Procedure and 210.1 of the Streets and Highways Code was motivated by a legislative awareness of the importance of park and other environmental values in land use planning generally and highway planning in particular, and that these sections must therefore be construed in light of legislative declarations relating to such land use planning.22 Further, this note will seek to show that, read in this light, these sections constitute a bar to the taking of park property for highway use except in unusual circumstances. Finally, this note will attempt to expose the problems and weaknesses inherent in the legislative attempt to preserve public parklands from destruction by highways and to suggest some possible solutions to these difficulties.

It should be made clear at the outset, however, that this note will deal only with the protection afforded public parks under California law. A substantial number of state highway projects are funded by the federal government23 and will be subject to the requirements of federal as well as state law.24 Nevertheless, for the considerable number of highway projects undertaken solely by the state, parties seeking to protect public parks must look to California law.

**Legislative Awareness of Environmental Values**

In 1959 the legislature enacted section 250 of the Streets and Highways Code which declares that the construction of a statewide system of freeways is essential to the future development of the state. More recent legislative pronouncements, however, indicate that the methods utilized to effect this policy have not conformed to other statewide land use goals, particularly those related to environmental concerns.


22. “The Legislature finds and declares that future growth of the state should be guided by an effective planning process and should proceed within the framework of officially approved statewide goals and policies directed to land use.” CAL. GOV’T CODE § 65030 (West Supp. 1971) (emphasis added).

23. The federal government has provided approximately 445.5 million of the 761 million dollars allocated by the state for highway construction in the 1970-71 budget. CALIFORNIA DEP’T OF PUBLIC WORKS, 1970 ANNUAL REPORT 93.

The first such pronouncement was made in 1965 when a state assembly committee severely criticized the narrow approach taken by the highway commission in performing its duties with respect to public parks. Concurrently, the legislature amended section 90 of the Streets and Highways Code to eliminate the requirement that all state highways be located on the "most direct and practicable routes" between termini. A subsequent report issued by the California Senate Permanent Factfinding Committee on Natural Resources concluded: "California to date has been developing around its highways rather than influencing controlled development with the highway system being only an integral portion thereof." The commission also suggested that the primary consideration by the highway commission should be directed toward the alternatives available to avoid any portion of a public park.

More recent amendments to the Streets and Highways Code manifest serious legislative concern over the degradation of environmental quality resulting from inadequate consideration of highway route locations. Section 75.7, which requires the highway commission to prepare and disseminate a report containing the basis for a route location decision, was amended in 1970 to include consideration by the commission.

25. In 1965 the California Assembly Committee on Natural Resources, Planning, and Public Works found that "primary emphasis in the evaluation of routing alternatives appears to be on engineering considerations" and "that there were serious questions concerning the efficacy of the agency's consideration of the total impact of a given routing alternative." Highway and Freeway Planning, supra note 15, at 5-6.

27. 3D Progress Report, supra note 2, at 114.
28. Id. at 112.
29. In this connection, The California Assembly Select Committee on Environmental Quality, Environmental Bill of Rights 29 (1970) states: "In spite of the obvious and critical relationship between environmental quality and the transportation network, there are, at present, no effective mechanisms for ensuring that transportation facilities conform to and support our environmental goals." The committee concluded that "unrestrained use of the automobile threatens to affect both the health of millions of California citizens and the natural resources of the State." Id. at 6.
mission of the "[n]oise impact upon the communities affected" and "[e]nvironmental values and impact on the ecology of the area." Another recent addition to the code authorizes the highway commission to expend monies from the state highway fund to contract with specialists in such fields as fish and wildlife management and park and recreation management in order to obtain "an independent evaluation of routing proposals." In addition, the legislature has created the Resources Protection Account, monies from which are to be used "for the preservation and enhancement of natural resources . . . affected by state highway construction."

More comprehensive legislative pronouncements of the importance of environmental values in land use planning are expressed in the Environmental Quality Act of 1970. Under the provisions of this act, the policy of this state is declared to be to "[e]nsure that the long-term protection of the environment shall be the guiding criterion in public decisions." The legislature has also declared that man has a moral obligation to protect, enhance and make the highest use of land and resources he holds in trust for future generations.

Certain environmental values will inevitably be destroyed no matter where a highway is located. Such destruction, however, is maximized by inadequate consideration of alternative route locations. The above mentioned sections constitute an implicit recognition of this possibility. Moreover, they indicate that the highway authorities can no longer ignore this possibility and, in fact, must actively seek to avoid it.

Construction of Best and Most Necessary Use

Section 1241.7 of the Code of Civil Procedure establishes a presumption that use of property as a park is the "best and most necessary public use for such property." That section also provides that where such park property is sought to be acquired for highway purposes, an action for declaratory relief may be brought to determine the question of which use is the best and most necessary use for the public. The presumption established by section 1241.7 is one affecting the burden of proof and the party against whom it is invoked (in this case the high-

34. Id. § 8601.
35. Id. §§ 21000-21151.
36. Id. § 21001(d).
39. Id.
way authorities) has the burden of proving the nonexistence of the presumed fact—that park use is the best and most necessary public use—by a preponderance of the evidence.40

By imposing a duty on the courts to determine which use is the "best and most necessary public use," section 1241.7 contemplates a two-step process. The first step requires a determination of which use is the "most necessary." Since the presumption operates in favor of the park, the burden is on the highway authorities to show that use of park property is most necessary to the highway, i.e., that use of the park is unavoidable. Where the highway authorities fail to establish this, the court should refuse to sanction the taking. Where the highway authorities establish that use of park property is unavoidable, the court must then take the second step and determine which use is the "best use" for the particular property.

Support for the proposition that focus should initially be directed to whether use of park property is really necessary to the construction of a highway may be found in the provisions of section 1241.7. The statute provides that the resolution of the highway commission is not conclusive evidence of the matters set forth in section 103 of the Streets and Highways Code.41 Thus, section 1241.7 nullifies Chevalier42 in this context and opens three questions for decision heretofore closed by section 103: the public necessity of the project, the necessity of the particular property to the project and whether the proposed project is planned or located in a manner which will be most compatible with the greatest public good and least private injury. As to the first, it is unlikely the legislature intended the courts to question the legislative decision on the necessity of the highway,43 a matter peculiarly with the legislative province. The second and third questions present, in effect, the same issue for decision: whether locating the highway through a public park is necessary.

If the court is initially only concerned with the necessity of locating the highway through a public park and the presumption of section 1241.7 operates in favor of the park, the burden is on the highway authorities to show that the taking of park property is necessary to the construction of the highway. However, in view of the environmental despoliation caused by a modern highway44 and the fact that section 1241.7

40. CAL. EVID. CODE § 606 (West 1966).
41. See note 10 supra.
42. See text accompanying notes 12-13 supra.
43. See note 3 supra. See Holloway v. Purcell, 35 Cal. 2d 220, 231, 217 P.2d 665, 672 (1950), where the court stated: "The Legislature has adopted a policy of freeway construction in the public interest."
44. In 1969, smog caused an estimated $250 million loss to California agriculture. ENVIRONMENTAL BILL OF RIGHTS, supra note 29, at 18. The Pure Air Act of 1968,
was specifically designed to afford protection against highway intrusion, it is clear that the presumption of "most necessary" cannot be overcome merely by a showing of expediency or convenience. If sections 1241.7 and 210.1 of the Streets and Highways Code, both of which declare the policy of avoiding parks, are to have any meaning, "most necessary" can only mean that the highway commission must show that use of park property is unavoidable in determining the location of the highway.

The proposition that considerations of expediency are not sufficient to overcome the presumption of "most necessary" is supported simply by the enactment of sections 1241.7 and 210.1. This is so because considerations of expediency such as cost, directness of route, and community disruption often make park property extremely desirable for highway purposes. Since the public already owns the land, there is no need to pay for acquiring the right of way, and since open space parks are always free of residential or commercial development, relocation costs and community disruption are minimal. These considerations, however, are common to all highway development and if the legislature intended such expediency factors to be on equal footing with the policy of preserving parklands, thus allowing the use of parkland where practicably avoidable, there would have been no need for sections 1241.7 and 210.1. As the United States Supreme Court has recently stated in a similar context:

The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost of community disruption resulting from alternative routes reached extraordinary magnitudes.


"(a) That the emission of pollutants from motor vehicles is the primary cause of air pollution in many portions of the state.

"(b) That the control and elimination of such pollutants is of prime importance for the protection and preservation of the public health and well-being, and for the prevention of irritation to the senses, interference with visibility and damage to vegetation and property." Id. § 39081. With regard to noise pollution the Environmental Quality Study Council Act, as amended, declared at section 16000 of the Government Code: "The Legislature finds that . . . (b) The proliferation of noise from transportation sources have led to the exposure of large sectors of the populace to an unacceptable degree of noise." Cal. Stat. 1969, ch. 1042, § 1, at 2026 (repealed Cal. Stat. 1970, ch. 346, § 9, at 744).

45. Cf. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), where the Supreme Court was construing the federal statutory policy of protecting parklands from highway intrusion and concluded that "the very existence of the statutes indicates that protection of parkland was to be given paramount importance." Id. at 412.

46. Id. at 411-12.

47. Id.

48. Id. at 413.
The burden should be placed on the highway authorities to show that the costs of alternative routes avoiding the park would reach "extraordinary magnitudes." To construe sections 1241.7 and 210.1 otherwise would deprive them of all serious purpose. As the late Justice Black said, "[p]arks are not to be condemned in order to try and save a few dollars on a multimillion dollar highway project."49

Where the highway commission has failed to establish use of park property is unavoidable, the court should refuse to sanction the taking of park property for highway use. Where the commission has established that use of park property is unavoidable, the court must then consider the importance of the park and balance that importance against the necessity of locating the highway through the park—i.e., determine the "best use" of that land.

Determination of "best use," however, connotes a wide variety of choices. It is readily apparent that the legislature did not intend the court to consider which use, among several possible uses, is the "best" in an action brought under section 1241.7. Rather, the court is only concerned with two competing choices—a highway and a park—and must determine which is the "better use" for the particular property.

As to the particular park, the court should consider its importance to people in the area—the extent of use and for what purposes? What wildlife does it embrace?50 Are there other parks nearby? It is relevant to note here that the legislature has declared the policy of this state to provide its citizens with "enjoyment of aesthetic, natural, scenic [and] historic environmental qualities"51 and to prevent the extinction of fish and wildlife species and "preserve for future generations representations of all plant and animal communities."52 The legislature has also found that

[T]he rapid growth and spread of urban development is encroaching upon or eliminating many open areas . . . having significant scenic or aesthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, aesthetic or economic assets to existing and impending urban and metropolitan development.53

Also the people have declared in an amendment to the California Constitution that it is in the

best interest of the state to maintain, preserve [and] conserve . . . open space lands . . . to assure the use and enjoyment of natural

50. See id. at 977 (Douglas, J., dissenting).
51. CAL. PUB. RES. CODE § 21001(b) (West Supp. 1971).
52. Id. § 21001(c).
53. CAL. GOV'T CODE § 6951 (West 1966).
resources and scenic beauty for the economic and social well being of the state and its citizens.\textsuperscript{54}

With more specific reference to public parks, the legislature has asserted that it is the responsibility of the state to provide recreation areas for its citizens and that present facilities for this purpose are inadequate.\textsuperscript{55}

Thus, the recreational, environmental, and aesthetic value of the park must be determined. The court should then consider what impact a highway will have on these values. For example, where the highway commission is merely seeking to widen an existing road on the outskirts of a park, the impact may be minimal. On the other hand, where the park is located in an urban area with a high population density or where the park embraces unique plant or animal life, these factors alone may preclude invasion by a highway. In this connection, the California Senate Permanent Factfinding Committee on Natural Resources stated:

\begin{quote}
Proposed highway alignments can be moved almost anywhere on the map, effecting only perhaps the relative utility or ultimate costs thereof. Parks, however, are designated as such primarily because of their unique character which affords a major contribution to preservation of scenic wonders, historical features or recreational values. With regard to natural features involved, these cannot be replaced, reconstructed or relocated at any cost.\textsuperscript{56}
\end{quote}

Thus, the legislature has set the policy of preserving public parklands from unwarranted highway intrusion,\textsuperscript{57} and section 1241.7 of the Code of Civil Procedure imposes on the courts the duty to apply this policy.

**The Inherent Shortcomings of Section 1241.7**

Where the agency owning a public park brings an action under section 1241.7 to prevent the taking of park property for highway purposes, that section may be interposed as a bar to such taking except in unusual circumstances. Two conditions, however, must be satisfied before the action to determine the best and most necessary use under section 1241.7 may be brought. One condition requires the agency to act within 120 days after publication and written notification by the highway commission that park property is sought to be acquired for high-

\begin{footnotes}
\textsuperscript{54} CAL. CONST., art. XXVIII, § 1.
\textsuperscript{55} "California today is facing an overwhelming unmet existing and projected need in a wide range of outdoor recreation opportunities, especially in and near rapidly growing urban areas throughout the state. The primary reason for this growing deficiency is the persistent refusal of public officials at all levels of government to assign sufficient priority to recreation as a legitimate human and social need." Report of the Assembly Comm. on Natural Resources, Planning and Public Works, The Recreation Gap 43 in 1968 Supplement to the Appendix to the Journal of the California Assembly (1968). The legislative finding that park facilities are inadequate is embodied in CAL. PUB. RES. CODE § 5096.3 (West Supp. 1971).
\textsuperscript{56} 3d PROGRESS REPORT, note 2 supra, section I, at 111.
\textsuperscript{57} See note 20 supra.
\end{footnotes}
way use. The provision is, in effect, a statute of limitation, and if the action for declaratory relief is not brought within the 120-day period, the right to bring such action is waived.

Satisfaction of the other condition may present greater difficulty. Section 1241.7 requires that property be dedicated to park use prior to the initiation of route location studies before the right to bring declaratory relief action accrues. Since state highway projects require several years of advance planning, this condition precedent will pose a problem in many newly developed communities where highway route location studies preceded dedication to park use.

The equivocality of section 1241.7 concerning action by the park agency creates even more basic difficulties. Under the provisions of the statute "an action for declaratory relief may be brought only by the public agency owning such park." The decision whether to challenge the taking of the park is thus left to the sole discretion of an agency which is neither subject nor perhaps even sensitive to the demands of the public. In addition, section 1241.7 expressly provides that where the declaratory action is not brought pursuant to that section, i.e. by the park agency, the presumption of "best and most necessary use" does not apply. Thus, it appears that the conclusive effect given to the highway commission's resolution of necessity under section 103 of the Streets and Highways Code is thereby reinstated. Clearly, section 1241.7 was not intended to be invoked by a member of the public. Senator Milton Marks, the original author of section 1241.7, introduced a bill in the 1971 session of the state legislature to amend that section to give every citizen the right to bring an action to determine the best and most necessary use for park property when such property is sought for highway use, that bill was defeated.

Although section 1241.7 has been part of California law since 1968 and Division of Highway officials admit that several proposed

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58. See note 18 & accompanying text supra.
60. Id. (emphasis added).
61. CAL. STS. & H'WAYS CODE § 103 (West 1969) set out in full at note 10 supra.
62. The last sentence of section 1241.7 provides: "When a declaratory relief action, with respect to such property being sought for highway purposes . . . may not be brought pursuant to this subdivision, the provisions of subdivision (a) of this section [establishment of a rebuttable presumption of appropriation for the best and most necessary public use] shall not apply." Cal. Stat. 1971, ch. 1524, § 1 (West Cal. Legis. Serv.), amending CAL. CODE Civ. Proc. § 1241.7 (West Supp. 1971). This provision is an implicit recognition that other avenues may be available to challenge the taking of park property.
64. See CALIFORNIA SENATE WEEKLY HISTORY, Jan. 3, 1972, at 44.
routes will slice through public parks,\textsuperscript{65} that section has yet to be used as an effective basis for challenging the proposed taking of park property.\textsuperscript{66} Therefore, unless the protection afforded park land under section 1241.7 may be invoked at the instance of a member of the public—the real party in interest—the statute will apparently remain unused.

**Remedy by Mandamus**

Despite the inadequacies of the protection afforded public parks by the legislature in section 1241.7, a writ of mandamus\textsuperscript{67} is available to local property owners or taxpayers to challenge the condemnation of park property. This writ may be issued to the agency which owns the threatened park or to the Department of Public Works.

Generally two basic requirements are essential to the issuance of the writ: (1) a clear, present and usually ministerial duty upon the part of the respondent; (2) a clear, present and beneficial right in the petitioner to the performance of that duty.\textsuperscript{68} Where a local property owner or taxpayer seeks to prevent the destruction of a neighborhood park, under California law, both these requirements are met.

**Right of the Petitioner**

At the outset, those seeking to prevent the destruction of park lands are faced with the restrictive rule of *Chevalier*\textsuperscript{69} as applied by a California Court of Appeal in *Barry v. Department of Public Works*.\textsuperscript{70} The *Barry* court held that on the basis of *Chevalier* no condemnee, public or private, may challenge the taking. The supreme court in *Chevalier*, however, was faced with a challenge by a private condemnee, and its rationale does not support such a conclusion when public property is to be condemned. *Chevalier* was decided on the principle that the private landowner is adequately protected by his constitutional right to just compensation, and where this right is protected, the motive of the

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\textsuperscript{65} Interview with Robert J. Speigel, Public Information, Dep't of Pub. Works, Division of Highways, Dec. 1, 1971.

\textsuperscript{66} Interview with Robert R. Buell, Staff, Legal Division of Dep't of Public Works, Feb. 25, 1972. In La Raza Unida of Southern Alameda County v. Volpe, Civ. No. C-71 1166 (N.D. Cal. 1971), appeal docketed, No. 72-1059, 9th Cir., Jan. 12, 1972, the California Environmental Quality Act was pleaded as an alternative basis for challenging the proposed condemnation of park land but was ignored by the court because relief was granted upon the basis of federal law.

\textsuperscript{67} CAL. CODE CIV. PROC. §§ 1085-86 (West 1955).

\textsuperscript{68} People ex rel. Younger v. County of El Dorado, 5 Cal. 3d 480, 491, 487 P.2d 1193, 1199, 96 Cal. Rptr. 553, 559 (1971).

\textsuperscript{69} See text accompanying notes 12-14 supra.

\textsuperscript{70} 199 Cal. App. 2d 359, 18 Cal. Rptr. 637 (1962).
condemning body is not his concern.\textsuperscript{71} The private owner then has no right to question the determination, by the condemnor, that his property is necessary to the project so long as he is justly compensated for the taking. The language concerning just compensation, however, clearly does not apply where public property is taken because the state already owns the land, and no compensation need be made.

The decision in \textit{Chevalier} rested on another ground which is inapplicable to the condemnation of public property. The court reasoned that allowing each landowner whose property lay in the path of a proposed public improvement to challenge the taking would result in "endless litigation, and perhaps conflicting determinations on the question of 'necessity' in separate condemnation actions brought to . . . carry out a single public improvement."\textsuperscript{72} Since only one mandamus action may be brought to challenge the taking of a particular park, there is no possibility of "endless litigation and perhaps conflicting determinations." Thus, the \textit{Chevalier} rule should not serve to bar a challenge to the condemnation action through mandamus brought on behalf of the public.

The "clear and beneficial" right of the petitioner is the same whether mandamus is sought against the park agency or the highway authorities. The writ will issue at the instance of a private individual only where he can assert some particular right or interest to be secured or protected independent of that which he holds with the public at large.\textsuperscript{73} Although the right to enjoy the facilities of a public park is common to all, it is particularly significant to local residents. It is the value of property within the immediate vicinity of the park which is affected by the invasion of a highway and the resulting increase in traffic, noise, and air pollution. It is the local community that loses an important part of its character when a park is destroyed. Certainly, the local resident has a clear and beneficial interest in protecting the neighborhood park.\textsuperscript{74} At any rate, where the issue is one of public interest, the requirement of a clear and beneficial interest has been dispensed with or at least greatly relaxed.\textsuperscript{75}

\textsuperscript{71} 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (1959).
\textsuperscript{72} Id.
\textsuperscript{73} Parker v. Bowron, 40 Cal. 2d 344, 351, 254 P.2d 6, 9-10 (1953).
\textsuperscript{74} Cf. Kappadahl v. Alcan Pacific Co., 222 Cal. App. 2d 626, 644-45, 35 Cal. Rptr. 354, 366 (1963). In Archbold v. McLaughlin, 181 F. Supp. 175, 180 (D.D.C. 1960) the court ruled that "[l]and dedicated to the use of the public for park purposes is held in trust for that use, and a resident of the city . . . in which the park is located may maintain a suit in equity to prevent diversion of the use of such land. . . ." The contemplated diversion in that case was for highway purposes.
Where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced. 76

Clearly, a local property owner or taxpayer is a proper party to challenge the imminent destruction of park property by mandamus. 77

Duties of the Park Agency and the Highway Authorities

The other basic prerequisite to the issuance of mandamus is a "clear, present and usually ministerial" duty upon the respondent. 78 Section 1241.7 imposes no affirmative duty upon the park agency to bring the declaratory relief action. 79 It is inconceivable, however, that the protection afforded public park land by the legislature 80 could be ignored or nullified by the arbitrary refusal of the park agency to act. Mandamus therefore should lie to compel the park agency to make an investigation to determine whether or not an action should be brought. 81 Thus, the park agency cannot simply ignore the destruction of park property but must critically evaluate the total impact the loss of the park will have on the local community. 82 If there is any doubt as to the best and most necessary use of the park property, the agency should bring a declaratory action to challenge the feasibility of the condemnation.

With respect to the highway authorities, the duties "which the law specifically enjoins" 83 are explicit and free of ambiguities. Under the provisions of the Environmental Quality Act of 1970 84 all state agencies, boards, and commissions are required to give detailed consideration to environmental effects "on any project they propose to carry out

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77. In Nickols v. Commissioners of Middlesex County, 341 Mass. 13, 166 N.E.2d 911 (1960), it was held that taxpayers have standing as citizens to enforce a public duty by mandamus to prevent injuries to the shores and woods surrounding Walden Pond. See also, Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97, 105 (2d Cir. 1970), where the court said: "The public interest in environmental resources . . . is a legally protected interest affording . . . responsible representatives of the public standing to obtain judicial review of agency action alleged to be in contravention of that public interest."
78. See note 68 supra.
79. See text accompanying note 60 supra.
82. See text accompanying notes 21-37 supra.
83. CAL. CODE CIV. PROC. § 1085 (West 1955).
which could have a significant effect on the environment. In addition, section 75.7 of the Streets and Highways Code specifically requires the highway commission to consider the noise and environmental impact of the area affected by a route location decision. Finally, section 210.1 of the Streets and Highways Code commands the highway authorities to attempt to avoid public park lands. These statutes impose clear and present duties upon the agencies responsible for the planning and construction of state highway projects, i.e., those agencies are under a duty to consider environmental impact and must make a meaningful attempt to avoid using park lands. Moreover, since these duties do not involve the exercise of judgment and discretion over whether they are to be performed, they should be considered as clearly ministerial. Thus, as a first step, mandamus will lie to compel consideration of relevant factors and adherence to the statutory policy of avoiding public parks. Where the highway authorities establish that these statutory duties have been performed, i.e., that all relevant factors have been considered and an attempt made to avoid park lands, mandamus is also available to control the abuse of discretion where there has been a clear error of judgment. Although the scope of judicial review is narrow, the range of discretion permitted the highway authorities with regard to parks is similarly narrow. A public park is not to be invaded by a highway unless it is unavoidable. It is the duty of the courts to assure that this discretion is not abused.

Summary

Thus, the restrictive rule of Chevalier is inapplicable to the condemnation of a public park. Where a public park is sought to be condemned for highway use, local property owners and taxpayers have a

85. Id. § 21100.
87. Cf. Calvert Cliffs Coordinating Comm. v. AEC, — F. Supp. —, 1 ENVIRONMENTAL L. REP. 20346, 20349 (D.D.C. Cir. July 23, 1971), where the court concluded that the National Environmental Policy Act "mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits . . . unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors —conducted fully and in good faith—it is the responsibility of the courts to reverse."
89. See text accompanying notes 40-56 supra.
clear and beneficial interest in the preservation of that park. Furthermore, the statutory provisions mentioned above impose clear and present duties upon those agencies responsible for highway development to consider all relevant factors and make a good faith attempt to avoid the unnecessary sacrifice of parklands for highway use. Therefore, mandamus will lie to control abuse of discretion by the highway commission in selecting a route through an existing public park. In addition, the writ should lie to compel the park agency to affirmatively evaluate the effect the condemnation will have on the local community before it decides not to bring an action under section 1241.7. In either event, the public interest can be adequately protected against arbitrary administrative action.

Legislative Solutions

Several means are available to remedy the inadequacies of section 1241.7. One simple solution was embodied in Senate Bill 1109 (now section 1241.7) as originally introduced. In its original form that bill would have imposed as a condition to allowing the condemnation of park property, a duty on the condemnor to substitute property of equivalent value. Section 104.1 of the Streets and Highways Code, in fact, authorizes the Department of Public Works to condemn real property for such exchange purposes. Such a provision obviates the necessity of the delicate balancing process that follows a determination, under section 1241.7 in its present form, that park property is unavoidable. Another virtue of such a provision is that its implicit recognition that preservation of public parklands is equally as important in our society as further construction of highways is easily translatable into meaningful action since condemned park property would be replaced. This provision was deleted before enactment.

Another possible legislative solution would be to amend section 1241.7 so as to require the park agency to bring a declaratory action whenever park property is threatened by highway construction. This requirement would eliminate any doubts concerning the duty of the park agency to act and would thus assure that the public interest in preserving parklands would be adequately protected.

A more comprehensive and decisive solution would be to immunize public parks from the eminent domain powers delegated to the Department of Public Works. Such a solution, however, is perhaps too rigid since park lands, like highways, are not always located in a manner that is most compatible with the greatest public good.

Finally, the legislature could make route location decisions of the highway commission explicitly subject to broad judicial review. This

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90. S.B. 1109, as introduced April 16, 1968.
solution would allow those removed from the initial decision-making process and thus free of private pressures to evaluate and balance the relevant factors. No legitimate interest is served by immunizing what is in effect a public decision from public scrutiny.

**Conclusion**

In section 1241.7 of the Code of Civil Procedure the legislature has manifested its awareness of the importance of public parks and the fact that they are being unnecessarily sacrificed to highway use. To translate this awareness into meaningful action, however, the public must be allowed to assert its right to protect public parks. That the transportation network of highways has been a vital factor in the economic development of our state cannot be disputed. It is also evident that the price paid for this quantitative growth in terms of environmental quality has been extremely high. Unfortunately, our legislature has recognized the problem but failed to take adequate action to remedy it.

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