THE POWER OF KINGS

(Eminent Domain - A Discussion of "More Necessary Public Use")

> *"Every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it."*
> (Theodore Roosevelt, speech, 1910)

American law grants each State of the Union the power of eminent domain to condemn private property for public use. Most states, including California, allow the State, cities, counties, redevelopment agencies, school districts, community colleges, water districts, and other political subdivisions of state government to use this power to obtain private property for a public use.

However, the power of kings does not always involve the condemnation of *private* property for public use (as in the prior threats of the State to condemn private utilities for public use.) In some instances, a public entity may want to condemn property already belonging to another governmental entity, including property that the other governmental entity has taken by eminent domain itself. For example, a city may want to condemn property owned by a school district to build a civic center, or a water district may want to condemn an undeveloped public park site for construction of a reservoir.

Taxpayers may expect that two public entities serving their constituents would reach an amicable agreement as to the transfer of public property to another public entity rather than spend taxpayer monies litigating the issue against each other. But experience demonstrates that such cooperation is rare. Instead, each governing body has a different view of the "public good" -- its own. In California we have a statutory scheme that we may refer to which provides for a means to mediate such disputes by spelling out the priorities among the competing public uses; the methods to use in evaluating the competing priorities; and the procedures we are to be follow in the condemnation process.

MORE NECESSARY PUBLIC USE

Just as in the condemnation of private property, once a public entity takes action to condemn public property, it must prove that the property is being sought for public use, and that the property is necessary for the public use. Both concepts are broadly defined. For example, "public use" can include taking of property for commercial redevelopment or may include the operation of professional sports franchise (City of Oakland v. Oakland Raiders, **NEED CITATION).** (Ultimately, the City of Oakland lost out on antitrust grounds when the NFL sued them in federal court.) The test does not involve the nature of the use, but whether the taking of the property primarily provides *public* benefits. Additionally, the degree of "necessity" required is that of reasonable or practical necessity, balancing the public good against the least private injury.

The threshold question is which of the competing public uses is the "more necessary public use". Generally, the California Code of Civil Procedure (**NEED CITATIONS**) allows the present owner to continue its public use alongside the condemning public entity's new use, provided the continuation of such use will not unreasonably interfere with, impair, or require a significant alteration of, the more necessary public use as it is then planned or exists or may reasonably be expected to exist in the future".

In the event that **CCP Section _____** cannot be met, and the public entities cannot agree as to the more necessary public use, the courts will make this determination for them, guided by certain statutory rules. The CCP (**NEED CITES)** provides a "fixed hierarchy of uses@ specifying, for example, that any use by the state government is presumed to be the most necessary public use. The CCP also provides several more presumptions for ranking the relative priorities of competing uses by local public entities (counties, cities, school districts, park districts, utilities, etc.).

Generally, the public use by the *current* public entity owner is *presumed* to be "more necessary" than the *proposed* use by the condemning entity. Also, environmentalists will be pleased to know that dedication of property to preservation of natural areas, park, open space, recreation areas, etc. is *presumed* more necessary than any other public use except uses claimed by State government). However, these presumptions are *not* absolute; they may be rebutted by the opposing public entity, which then has the burden of proving that *its* proposed use is more necessary.

CASE LAW

There are a few examples where public entities have fought over public property. For example, in the case of People by Public Utilities Commission vs. City of Fresno **(NEED CITE**), the City of Fresno was granted a final judgment of condemnation of a public water company. Thereafter, the Public Utilities Commission of the State of California (the APUC@) sought to set the sale aside based upon its erroneous belief that it had to formally approve the condemnation action. Ultimately, the Court of Appeal ruled that the statutory scheme was clear and that the city may, by condemnation, take property already appropriated to a public use if the public use to which it is to be applied is a more necessary. The PUC was not allowed to regulate the unrestricted power of the city to condemn the public utility property clearly granted under the eminent domain law.

What Theodore Roosevelt said in 1910 still holds true. It is just as true for public entities as it is for private citizens.

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The attorneys of the Firm are expert in all aspects of eminent domain including, direct and inverse condemnation, and evaluation of real and personal property and business goodwill. Please contact any of the following attorneys for assistance in this area of law: Lee Amidon, Wes Beverlin, Alex Shipman and Julia Sylva.