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PRECONDEMNATION ACTIVITIES – CHALLENGING NEED IN CALIFORNIA

I. INTRODUCTION

Eminent Domain is the power federal, state, and local governments have to purchase private property for public use.1 Governments exercise this power to buy property for public projects such as flood control, expansion of roads and highways, mass transportation, parks, recreation facilities, and low and moderate income housing.2 The power of eminent domain is an inherent power,3 restricted by both federal and state constitutional requirements of due process and just compensation.4 Since governments can purchase private property without the owner's consent,5 the governing bodies

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1. J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 1.11, at 1-7 (rev. 3d ed. 1985 & Supp. 1990) (eminent domain is a power that can be exercised to purchase private property for public projects, without an owner's consent); U.S. CONST. amend. V, XIV (provides that property will not be taken without payment of just compensation).

2. See infra notes 33-36.


4. The power of eminent domain is limited by the fifth amendment of the United States Constitution and extended to states under the 14th amendment. The limits to the exercise of this power provided in the Constitution are due process and payment of just compensation. See U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”); U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”). The government must provide for due process through a judicial forum in which the property owner can appear and be heard. See 1 J. SACKMAN, supra note 1, § 1.1, at 1-7 (rev. 3d ed. 1985 & Supp. 1990) (issues of whether or not the public needs the property and whether or not the amount of just compensation is fair and equitable can be raised and tried by the court). California adds to these limitations in its Constitution. See CAL. CONST. art. I, § 19 (providing that property can not be taken or damaged unless just compensation has been paid to the owner or deposited in the court. The owner is entitled to have the amount of just compensation determined by a jury and the money promptly released in exchange for possession).

5. 1 J. SACKMAN, supra note 1, § 1.11, at 1-7 (rev. 3d ed. 1985 & Supp. 1990); Comment, Statutory Restrictions on the Exercise of Eminent Domain in Wisconsin: Dual
requirements to make certain determinations about project benefit and need before the condemnation proceedings will be given validity by courts. These conditions precedent are set out in federal and state statutes. The statutes are designed to give property owners the opportunity to be heard on government need and location of a public project, and to encourage acquiring agencies and property owners to reach a settlement on the amount of just compensation that the owners will receive.


7. See generally CAL. GOV'T CODE § 7267 (West 1982); CAL. CIV. PROC. CODE §§ 1240.030, .040, .610, .650, 1245.210, .220, .230, .235, .250, .255, .260, .270, 1250.360, .370, 1255.410 (West 1982 & Supp. 1990) (statutes governing and defining the required precondemnation activities and requirements for condemnation action). Compare Uniform Relocation Assistance and Real Property Acquisition Policies Act, Pub. L No. 91-646, 84 Stat. 1894-1904 (1971) (codified as amended at 42 U.S.C. §§ 4601-4651 (1982 & Supp. 1989) [hereinafter Uniform Act] (federal requirements; section 4651, subchapter III, of the Uniform Act, entitled “Uniform Real Property Acquisition Policy” governs acquisitions using federal funds for public projects). Precondemnation activities include: 1) environmental assessment; 2) the opportunity for the property owners to meet with an independent appraiser to discuss their land during the property inspection and the resulting preparation of an approved appraisal report indicating fair market value of the property needed; 3) an offer made to the property owner based on the appraisal, together with a summary of the basis for and the amount established as just compensation; 4) a public hearing giving the property owner notice and an opportunity to be heard on the proposed need of the property and the location of the project through notice of intent to pass; 5) passing of resolution of necessity in California; 6) opportunity to challenge the need and use of the project, jurisdictional boundaries of the governing body condemning, abuse of discretion in adopting resolution of necessity, use of bribery once condemnation action filed; 7) deposit of appraised amount of just compensation in exchange for possession of the property pending final determination of just compensation; 8) expiration of 30 days from the granting of possession; 9) withdrawal of deposited amounts by the property owner.

8. See CAL. CIV. PROC. CODE § 1245.235 (West 1982 & Supp. 1990) (provides that governing body notify property owners and give each a reasonable opportunity to be heard on need and location as provided by section 1240.030). This hearing is usually held in conjunction with the resolution of necessity. See CAL. GOV'T CODE § 7267 (West 1982).
In California, these statutes require the governing body to make a formal statement of need, referred to as a resolution of necessity, before instituting an action in court (condemnation proceedings) to exercise the power of eminent domain. Prior to passing the resolution of necessity, notice and an opportunity to be heard is provided to the property owner. To adopt the resolution of necessity, the government board must engage in a good faith consideration of the benefit and the impact of acquiring the land for the proposed public project. The governing board must consider whether 1) the project is necessary for the public, 2) the property is necessary for the project, 3) the proposed project is planned or located in the manner that will be most compatible with the greatest public good, and 4) the project is planned or located in a manner that will cause the least private injury (these considerations are hereinafter referred to as "greatest public benefit and least private injury"). The resolution of necessity requirement insures that a considered decision is made by a board empowered by statute to authorize acquisition, and that the property owner has an opportunity for a formal hearing before the property is acquired through the court in condemnation proceedings.

The resolution of necessity procedure was added in 1982, to better balance and protect private and public interests. Prior to 1982, California Government Code section 7267.2 was the same as the Uniform Eminent Domain Code ("Uniform Code"). These codes provided that appraisals of property and offers to purchase based on the appraisal must be made to the owner before initiating negotiations. Section

12. 13 CAL. L. REVISION COMM’N REPORTS at 1001, 1026 (1976) (the Commission recommended that all acquiring agencies be required to adopt a resolution of necessity to acquire property by eminent domain. They reasoned that “[i]n addition to informing the property owner of the authority for the proposed acquisition, it helps to insure that the public entity makes a considered decision of both the need for the property as well as the proposed project itself.”); Report of Senate Committee on Judiciary, 75 S.J. 6537 (1975); Report of Assembly Committee on Judiciary, 75 A.J. 5181 (1975).
7267.2 and the Uniform Code mirrored the acquisition laws prescribed by the federal Uniform Relocation Assistance and Real Property Acquisitions Policies Act (the "Uniform Act").

In 1982, the California Legislature changed Section 7267.2. The revision added the resolution of necessity requirement to 7267.2, providing that appraisals and offers must be made before the resolution of necessity can be adopted by the governing body. This revision supplements the 1975 addition to section 1245.235, which requires the governing body give property owners notice and an opportunity to be heard. Thus, the determination of greatest public benefit and least private injury is made by the governing body authorized to exercise the power of eminent domain at

13. In such states, where the federal Uniform Act has been adopted (adopted in Colorado, COLO. REV. STAT. §§ 38-1-101-121 (West 1990), intent to acquire can be passed before appraisals and offers. Usually, the acquiring agency passes intents to acquire and to condemn prior to the beginning of appraisals, offers, and negotiations, at which time the property owner is given the opportunity to be heard on need and location of the proposed project. The agency may determine not to go ahead with the project after hearing the owner, but usually, the property owner's input is used to improve the plans or shift the location of a roadway to save trees, for example, preserve historically significant monuments, or facilitate internal circulation problems. If the acquiring agency determines to go ahead with the modified project after hearing the property owner, the property owner is then given an opportunity to accompany an independent appraiser on a property inspection, appraisal reports are prepared, and offers made on the basis of the appraisal report. Time is given for acceptance of the initial offer, and final offers are made after a reasonable negotiation period. Condemnation will be commenced with the court if the good faith negotiations fail. The property owner is assured the protection of the court in the event of failure of negotiations; the court and jury determine the amount to be paid to the owner. The agency will be able to obtain immediate possession of the property upon request to the court at a hearing where the property owner can again challenge the need and location of the project, abuse of discretion of the acquiring agency, jurisdictional matters, bribery, and adequacy of negotiations, if the property owner can show that reasonable efforts to acquire by negotiations were not undertaken as required by section 4651(1) of the Uniform Act. If the court finds immediate possession appropriate, the acquiring agency will be able to begin construction of the improvements on the property pending determination of the final amount of just compensation to be paid. The acquiring agency must deposit the amount of the offer with the court in exchange for immediate possession, which amount will be released to the property owner. No 30-day lapse time is required as it is in California. By this time, the property owner has had several months to prepare for the acquisition. Immediate possession is granted in cases where owners must be relocated but only after a 90-day waiting period.

a hearing held after appraisals and offers to purchase are presented for acceptance to the property owners. The hearing provided by 1245.235 and the determination of benefit and injury can be held before adoption of the resolution of necessity. However, acquiring agencies usually do not hold a hearing unless a resolution of necessity is requested. A resolution of necessity is only requested if negotiations fail, the offer is rejected, and the matter must be decided by the courts.

Therefore, the 1982 revision had an impact on property owners and governing bodies acquiring land for public projects. Overall, California statutes, do not require the acquiring agency to pass the resolution of necessity unless they intend to file a condemnation action in court to acquire the property. If the property owner accepts the offer to pur-

17. See STATE OF CALIFORNIA, BUSINESS TRANSPORTATION AND HOUSING AGENCY, DEPARTMENT OF RIGHT OF WAY PROCEDURAL MANUAL, ISSUED BY DIVISION OF RIGHT OF WAY, VOL. 4A - ACQUISITION § 450.005 at 3 (1st ed. 1982, rev. 1989) [hereinafter ACQUISITION PROCEDURAL MANUAL] (nothing in the statutes require that the opportunity to be heard must be provided at the same time as the resolution of necessity is passed, but agencies like the California Transportation and Housing Agency, read these requirements together; the hearing required prior to passing the resolution of necessity is only held after the appraisals and the offers to purchase are made, and only if and when the offer is refused and the agency must file a condemnation action with the court, to acquire possession of the property and request the amount of just compensation be determined). Other hearings are held, such as during the environmental assessment process, but public notice is published in the newspaper, individual owners are not sent personal notice. The agency could send personal notice and combine this hearing with environmental assessment hearings addressing public benefit and least injury. Then if a resolution of necessity is requested, the agency has already complied with the hearing requirement.
18. CAL. CIV. PROC. CODE § 1245.230 (West 1982 & Supp. I 1990); ACQUISITION PROCEDURAL MANUAL, supra note 17 (this is not to say that the staff of acquiring agencies never consider public benefit and least private injury in selecting projects and identifying property needed. However, the location may be chosen for reasons other than greatest public benefit and least private injury. For example, the location for the alignment of a highway widening project may be chosen so that it is easier to construct. Perhaps a new lane will be added to the outside on each side of the existing road, which would enable the agency to build the new improvement without moving the median in the middle. Least private injury may not be a consideration. No formal hearing is held before the board authorized to adopt the resolution of necessity where the private owner has an opportunity to appear and be heard if he accepts the agencies' offer to purchase).
19. Cf. CAL. CIV. PROC. CODE §§ 1240.040, 1245.220 (West 1982) (these are the code section that require a resolution of necessity; the resolution is only required if the agency intends to file a condemnation action in court).
chase, the governing body authorized to exercise the power of eminent domain is not required to determine greatest public benefit and least private injury by adopting the resolution of necessity. Therefore, the determination by the authorized board is required only if the property owner rejects the offer to purchase. The result, analyzed in this comment, may be that the project is so advanced by the time the hearing can be conducted that the governing board virtually has no discretion to make a determination of greatest public benefit and least private injury.20

This limit on discretion is most significant when a number of properties are purchased for a public improvement, and one of the properties has a unique problem which is not apparent until the owner has an opportunity to be heard at a formal hearing. For example, many businesses are designed to function on a specific site, such as a warehouse with a loading dock area developed to serve delivery trucks. If a portion of the delivery area is acquired by the governing body to widen a street, the delivery trucks may not be able to "turn around" off of the street, as required by the city. The acquisition would make the site dysfunctional to the owner, but the problem may not be apparent until the owner is provided an opportunity to be heard.

As all owners receive appraisals and offers to purchase

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20. See Huntington Park Redevelopment Agency v. Slauson, 173 Cal. App. 3d 1121, 1129, 219 Cal. Rptr. 365, 370 (1985) (held the authorizing board removed its discretion, prior to the hearing held in conjunction with the resolution of necessity, by entering into a contract with a developer which incorporated Slauson's property, and issuing bonds to finance the redevelopment; the hearing and passing of the resolution, became a rubber stamp process, by virtue of prior actions which committed the agency irrevocably to take the property regardless of any evidence that might be presented at the hearing. The court dismissed the condemnation action). Compare San Bernadino County Flood Control Dist. v. Grabowski, 205 Cal. App. 3d 885, 252 Cal. Rptr. 676 (1988) (district did not bind itself to other commitments which removed its discretion, and presented at trial evidence to substantiate the considerations of greatest public benefit and least private injury); Anaheim Redevelopment Agency v. Dusek, 195 Cal. App. 3d 249, 239 Cal. Rptr. 319 (1987) (the court held the agency considered the pros and cons prior to passing the resolution of necessity); Huntington Park Redevelopment Agency v. Duncan, 142 Cal. App. 3d 17, 190 Cal. Rptr. 744 (1983), cert. denied, 646 U.S. 895 (1983) (the court held the Duncans were not attacking the resolution of necessity, but were attacking the agency's decision to select one of two competing plans for the redevelopment of the property. The court found no abuse of discretion as the pros and cons were considered prior to adopting the resolution of necessity).
prior to the hearing, the offers on adjoining properties may be accepted by owners who do not share the unique problem. In the warehouse example, the purchase of these adjoining properties may fix the alignment of the road so that the widening cannot be shifted to cause the least private harm. However, a large sum of money already has been expended on the acquisition before the determination of least private injury can be made. Thus, the governing board’s determination at a later formal hearing of greatest public benefit and least private injury is altered by the events that occur prior to the time the hearing is required by statute. This hypothetical is used in the analysis section of the comment to discuss the acquiring agency’s and the property owners’ options before and after the hearing and resolution of necessity.

First, the comment analyzes the result of the 1982 amendment to California Government Code section 7267.2 which provided for a resolution of necessity (the formal statement of a benefit/injury determination) after appraisals and offers. The comment also discusses the effect of the 1975 revision to section 1255.420 providing for an automatic 30 day lag time following every order for possession. Within this framework, the comment then examines whether or not the legislative intent has been achieved, or if the people of California are suffering from unanticipated side-effects, such as slowed delivery of needed public facilities, increased project costs, loss of board discretion to weigh public benefit and private injury at a formal hearing, less protection for property owners, disincentives to reach agreement and settle acquisition matters, and loss of confidence in public programs.

Second, the comment examines California’s present law


23. CAL. CIV. PROC. CODE § 1255.420 (West 1982) (30 days is automatically given property owners to request a stay of the order of possession of property under substantial hardship claims, whether or not a meritorious claim exists); CAL. CIV. PROC. CODE § 1255.410 (West 1982 & Supp. 1 1990) (order for possession).

24. CAL. GOV’T CODE § 7267 (West 1982) (sets forth legislative intent to “encourage and expedite acquisition by agreement . . . assure consistent treatment . . . and promote public confidence . . . “).
governing the exercise of the power of eminent domain from a procedural standpoint.25 This comment can be utilized as a checklist to determine if, under current law, all of the procedures have been followed during precondemnation activities, up to and through the request to the court for possession of the property prior to the final determination of just compensation. The comment also discusses the basis on which property owners can procedurally challenge acquisition.26 California procedures will be compared generally to

25. See generally CAL. GOV'T CODE § 7267 (West 1982); CAL. CIV. PROC. CODE §§ 1240.030, .040, .610, .650, 1245.210, .220, .230, .235, .250, .255, .260, .270, 1250.360, .370, 1255.410 (West 1982 & Supp. I 1990) (California requires that appraisals of property and offers of purchase be made to the property owner before the acquiring agency passes its resolution of necessity. The resolution of necessity states the need for the property and describes it. Notice is sent to the property owner that the resolution of necessity is going to be passed, and provides them with an opportunity to be heard on the question of need and location of the project (least private impact balanced with greatest public benefit). If the property owner requests a hearing, the right to be heard is preserved. If the owner does not respond to the notice that the resolution of necessity is going to be passed, the right to challenge need and location at a hearing is waived. (A valid resolution precludes judicial review of need and location, but not a challenge on the basis of public use, or that the condemnor does not intend to use the property for the declared purpose, abuse of discretion, bribery, jurisdiction, and in some circumstances the adequacy of negotiations where the owner can clearly show that every reasonable and diligent effort to acquire property was not taken as required by section 7267.1(a)). The hearing can be held and resolution of necessity passed at separate times, but generally the hearing is not held and the resolution of necessity is not passed unless negotiations to purchase the property fail, and the court will be asked to determine the amount of just compensation to be paid. If negotiations fail, and a resolution of necessity is passed, condemnation proceedings can be commenced). See ACQUISITION PROCEDUAL MANUAL, supra note 17; compare Uniform Act, 42 U.S.C. § 4651 (1982 & Supp. 1989).

26. The courts will only review the resolution of necessity on the basis of gross abuse of discretion, evidence of bribery, or lack of jurisdiction of the condemning agency to acquire property outside of its boundaries or on the validity of a resolution of necessity. See CAL. CIV. PROC. CODE § 1250.360 (West 1982 & Supp. I 1990) (judicial review after condemnation filed, grounds for objecting to right to take regardless of whether a resolution of necessity has been adopted); San Bernadino County Flood Control Dist. v. Grabowski, 205 Cal. App. 3d 885, 252 Cal. Rptr. 676 (1988) (discusses 1250.370); CAL. CIV. PROC. CODE § 1250.370 (West 1982 & Supp. I 1990) (if a resolution of necessity that has conclusive effect has not been passed); CAL. CIV. PROC. CODE § 1245.255 (West 1982) (attack on validity by writ of mandate, requesting dismissal of the eminent domain proceeding, but only on the grounds of abuse of discretion based on arbitrary, capricious or entirely lacking in evidentiary support, “and whether the governing body has failed to follow the procedures and given the notice required by law;” the 1975 and 1978 Comment following the statute notes that the validity of the resolution may be subject to direct attack by administrative mandamus (CAL. CIV. PROC. CODE § 1085 (West 1990)). Anaheim Redevelopment Agency v. Dusek, 193 Cal.
the Uniform Code and the federal Uniform Act.

Finally, this comment proposes the revisions to sections 7267.2 in 1982 and to 1255.420 in 1975 be repealed. The result will be to eliminate the effect of the requirement of appraisals and offers prior to adopting the resolution of necessity, and reduce the acquisition time required to begin construction of needed public projects. This comment con-

App. 3d 249, 239 Cal. Rptr. 319 (1987) (clarifies an interpretation made by the Legislative Comment; mandate is filed under 1085); or by request of declaratory relief and injunction due to conflict of interest attack under the Political Reform Act of 1974, (CAL. GOV'T CODE § 91003(b) (West 1982)); Grabowski, 205 Cal. App. 3d 885, 252 Cal. Rptr. 682 (1988) (objection to right to take which is not raised until after eminent domain procedure filed, and raised under the Political Reform Act of 1974, a conflict of interest challenge, must be asserted by way of a compulsory cross-complaint filed separately by objecting party, not asserted by answer filed in eminent domain action); Pacific Gas & Elec. v. Superior Court (hayfork Valley Public Utility Dist.), 180 Cal. App. 3d 770, 225 Cal. Rptr. 768 (1986) (even though the resolution of necessity did not comply with the eminent domain law requirements, the Court allowed the (public utility) acquiring agency to correct the deficiency and file an amended complaint in the eminent domain action).

27. By repealing these revisions, sections 7267.2 and 1255.420 will again conform to the Uniform Code and the Uniform Act. The 1982 and 1975 revisions made the California statutes differ from the Uniform Code and federal Uniform Act in an important area. California requires that appraisals of property and offers of purchase be made to the property owner before the agency passes its resolution of necessity (formal statement of need and greatest public benefit and least private injury). It is more difficult for the property owner to affect the location of the project and the necessity for the land being acquired at this time in the process. The project is often too advanced to change plans which would have resulted in less impact in the early stages. Usually many parcels of land have already been purchased and alignment fixed. Even if the governing body hears valid arguments from the property owner, a great deal of cost has already been incurred and other property owners irreversibly impacted. The federal Uniform Act does not require appraisals and offers be made before the resolution of necessity is passed. Under the Uniform Code and Act, the condemning agencies pass intents to acquire and condemn prior to the beginning of negotiations and offers. This type of resolution states the agencies' intent to acquire through good faith negotiations (appraisals and offers) and intent to protect the property owner's right to have a court determine the amount of just compensation by filing a condemnation action with the court if good faith negotiations fail. Further, in California, the resolution of necessity is not passed unless the negotiations have failed, and the court will be asked to determine the amount of just compensation to be paid. Therefore, not all property owners get a chance to appear. Under the federal Uniform Act, all owners are given an opportunity to be heard, even those who reach agreement with the acquiring agency. Further, all parcels of property needed for the entire project can be taken to the authorizing agency board for intents to acquire and condemn at one time; the board gets coordinated input. In California, the acquiring agency must return to the authorizing board each time a negotiation fails. (The Public Works Board and the Transportation Commission are the primary boards that have authority to pass resolutions of necessity for
cludes 1) that the requirement that appraisals and offers to purchase be made before the resolution of necessity can be passed, is misplaced, and should be deleted from California Government Code section 7267.2,28 2) that the governing board's determination of greatest public benefit and least private injury should be required earlier in the final design phase before appraisals and offers to purchase, and 3) that until these changes are implemented, acquiring agencies should separate the hearing on greatest public benefit and least private injury from the adoption of the resolution of necessity, and give all property owners an opportunity to appear and be heard earlier in the process, such as during final design, and 4) that the automatic 30-day lag time provided by 1255.420 be revised to allow for special requests due to hardship at the ex parte hearing when the order is granted.29 Absent a hardship request, acquiring agencies should get immediate possession of property upon deposit of the amount of just compensation with the court. The owner would have the ability to withdraw the deposit before final determination of the amount.

II. BACKGROUND

A. Public Entity Power to Condemn Under Eminent Domain

The revisions are analyzed against the background of history. Courts have long recognized eminent domain as an inherent power necessary to the advancement of society, which advancement is sometimes superior to private inter-

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29. CAL. CIV. PROC. CODE § 1255.420 (West 1982).
Government power of eminent domain is inherent in the United States Constitution. The power is limited by the fifth amendment provision that private property can not be taken for public use without payment of just compensation. The power of eminent domain is extended to the states through the fourteenth amendment which also requires due process of law. The California Constitution provides that the property owner is entitled to have a jury determine the amount of just compensation and further, that this just compensation must be released in exchange for possession of property needed for public improvements. Further, California statutes provide that the power of eminent domain may be exercised to acquire private property for public use.

State agencies including the Department of Parks and Recreation, the Department of Water Resources, and the Department of Fish and Game are authorized by statute to exercise the power of eminent domain. School districts and public utilities also possess condemnation authority. Special districts have general authority to condemn by virtue of enabling statutes. Cities and counties also have broad power to condemn to carry out government functions.

30. See supra note 3.
31. See U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); U.S. CONST. amend. XIV ([N]or shall any state deprive any person of life, liberty, or property, without due process of law."); CAL. CONST. art. I, § 19 (just compensation shall be determined by a jury and released in exchange for possession upon deposit in the court; land can be acquired for public improvements upon payment of just compensation).
32. CAL. CIV. PROC. CODE § 1240.010 (West 1982).
33. CAL. WATER CODE §§ 8590, 8593-8595 (West 1982) (Department of Water Resources); CAL. FISH & GAME CODE §§ 1348-1349 (West 1982) (Department of Fish and Game). See, e.g., CAL. MIL. & VET. CODE § 437 (West 1982) (Adjutant General); CAL. GOV'T CODE §§ 14661-14662 (West 1982) (Department of General Services); CAL. PUB. RES. CODE § 6808 (West 1982) (State Lands Commission); CAL. GOV'T CODE § 54093 (West 1982); CAL. PUB. RES. CODE §§ 5006, 5006.2 (West 1982) (Department of Parks and Recreation); CAL. GOV'T CODE § 15854 (West 1982) (Public Works Board); CAL. WATER CODE §§ 8590, 8593-8595 (West 1982) (Reclamation Board).
34. CAL. EDUC. CODE § 1047 (West 1982) (school districts); CAL. PUB. UTIL. CODE §§ 21639, 21652 (West 1982) (public utilities).
35. CAL. HARB. & NAV. CODE §§ 5900.4, 6076, 6296 (West 1982) (harbor improvement districts, port districts); CAL. PUB. UTIL. CODE §§ 12703, 16404, 28953 (West 1982) (municipal utility districts, public utility districts, San Francisco Bay Area Rapid Transit Districts).
36. CAL. GOV'T CODE § 38010 (West 1982).
These authorizing statutes provide that the entity may exercise the power of eminent domain to acquire property necessary for any purpose or function, which is equated with recognized public uses. Well-established public uses for which property can be acquired include highways, streets, electric transmission lines, water lines, parks, recreation facilities, and the elimination of slums and blight. However, public use is broadly defined as any use that promotes the general interest of a community or any legitimate object of government, whether or not the whole community directly or indirectly enjoys or participates in the improvement.

B. Balance of Government Power and Private Interests

1. The Public Rights Doctrine at the Heart of the Police Power of Eminent Domain

The public rights doctrine provides that private property owned by individuals is held on the condition that property will not be used to injure the equal rights of others. Property must be used in such a way that the rights and interests of individuals and the community as a collective public are not greatly impaired.

This doctrine is advanced under the notion that the community as a whole has rights that are sometimes superior to the rights of the individual. For example, the community's need for transportation systems are viewed as greater than the individual's need to retain private ownership of the land. The community's rights are exercised to meet the need for a street (which would cross over a series of private parcels of land) to access grocery stores, work places,
and schools. Without the power of eminent domain, the government would not be able to link the street from homes to stores, offices, and schools, unless all property owners agreed at the same time to sell their land. If the public right is not held superior to that of the individual, a single property owner could prevent the road from being built, denying the community access.\(^{42}\)

Commentators suggest that public rights in the United States date back to at least the middle of the 19th century. Public rights were judicially recognized in the 1848 eminent domain case of *West River Bridge Co. v. Dix.*\(^{43}\) The Court held that the government not only has the right but the duty to promote the interest of the community by purchasing private property for public purposes.\(^{44}\)

Against this background, private property owners sought protection from government greed. State governments were competing with each other to attract industrial development.\(^{45}\) The power of eminent domain was often exercised to build new transportation systems designed to move ever-increasing numbers of automobiles from the home to stores and work places.\(^{46}\) The perception that the government operated as an entity with interests separate from those of the community became pervasive as new trends developed.\(^{47}\)

The trends reflected attitudes about people's relationship with government. Government came to be seen as a "deep-pocket" source of money.\(^{48}\) People developed ideas

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\(^{43}\) See Scheiber, supra note 39, at 225 (citing West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848)).

\(^{44}\) This comment will not analyze the concept of the power of eminent domain generally. Its scope is limited to an analysis of the statutory provisions for its exercise in public facilities projects, using transportation needs as its primary example. See Scheiber, supra note 39; J. Sachman, supra note 1, § 1.12[1], at 1-12, § 1.14, at 1-21 to 1-34; Bennett, Eminent Domain and Redevelopment: The Return of Engine Charlie, 31 De Paul L. Rev. 115, 116-22 (1981); Grant, The "Higher Law" Background of the Law of Eminent Domain, 6 Wis. L. Rev. 67 (1937) (for a full discussion of the development of the power of eminent domain).

\(^{45}\) See Scheiber, supra note 39, at 218.


\(^{47}\) Bennett, supra note 44.

\(^{48}\) Bennett, supra note 44.
that they should get as much as possible from the government for their property. To obtain the highest compensation, people adopted hold-out tactics refusing to sell as long as possible.\textsuperscript{49} Most people did not make the connection between individuals as taxpayers and the tax-dollar that paid for these purchases.\textsuperscript{50} In response to public pressure, the legislature passed more laws to bridle the ability of government to purchase property for public purposes.\textsuperscript{51} The new legislation included the 1982 revision to section 7267.2 (adding the resolution of necessity after appraisals and offers) and the 1975 revision to section 1255.420 (providing for an automatic 30 days after an order for possession).\textsuperscript{52} However, revisions were made without the benefit of hindsight to evaluate the effect.\textsuperscript{53}

2. Externality Costs Associated with the “Deep-Pocket” Attitude

Revisions such as those to sections 7267 and 1255.420 were intended to give private owners more voice in balancing the public interest and private rights.\textsuperscript{54} As the goal of compensating the property owner is given more emphasis, social costs (externality costs) appear.\textsuperscript{55} Private rights are ex-

\begin{itemize}
\item \textsuperscript{49} Bennett, \textit{supra} note 44.
\item \textsuperscript{50} Bennett, \textit{supra} note 44.
\item \textsuperscript{51} 13 \textit{CAL. L. REVISION COMM’N REPORTS} at 1001 (1976) (background and recommendations for revision of California’s eminent domain laws).
\item \textsuperscript{52} \textit{CAL. CIV. PROC. CODE} § 1255.420 (West 1982); \textit{CAL. GOV’T CODE} § 7267.2 (West 1982 & Supp. I 1990); 13 \textit{CAL. L. REVISION COMM’N REPORTS} at 1001, 1026 (1976); Report of Senate Committee on Judiciary, 75 S.J. 6537 (1975); Report of Assembly Committee on Judiciary, 75 A.J. 5181 (1975).
\item \textsuperscript{53} \textit{CAL. GOV’T CODE} § 7267.2 (West 1982) (adding the requirement that the resolution of necessity can only be passed after appraisals and offers to purchase have been made is a good example).
\item \textsuperscript{54} \textit{CAL. GOV’T CODE} § 7267 (West 1982); \textit{CAL. CIV. PROC. CODE} § 1255.420 (West 1982); 13 \textit{CAL. L. REVISION COMM’N REPORTS} at 1001 (1976); Report of Senate Committee on Judiciary, 75 S.J. 6537 (1975); Report of Assembly Committee on Judiciary, 75 A.J. 5181 (1975).
\item \textsuperscript{55} Externality costs is a general concept associated with property whereby society bears the burden of extra costs if the property owner receives more than their land is worth. Externalities exist if a person makes a decision about how to use a resource (in the case of land acquisition, the resource is land and money available for the purchase of private property that is needed for public projects) without considering the full cost or benefit that would result as the burden falls on others, or is “external” to the decision maker. In the case of land acquisition for public projects, if the owner is paid fair market value in balance with commu-
changed for just compensation when property is needed for public projects, and if the property owner is paid more for the property than it would bring on the open market ("fair market value"),\textsuperscript{56} the extra cost is external to the property owner. Society bears the burden of the extra cost. Conversely, when the property owner's self-interest is minimized, the costs correspond to minimized social costs. Externality costs then shift onto the property owner. Therefore, if the property owner and the government balance the best interest of the community with the individual's self-interest, perfect compensation is reached.\textsuperscript{57} The owner is paid fair market value and the community benefits from the land acquired for the necessary public purpose.

In response, legislative revisions attempted to balance costs and benefits. The Legislature hoped the parties directly involved could balance self-interest with community interest.\textsuperscript{58} The Legislature wanted private owners and acquiring agencies to agree on the amount the owners should be paid in exchange for their land, thus relieving court congestion. Moreover, the Legislature reasoned that if land owners and government agencies reached agreements among themselves, without court assistance, public confidence in land acquisition practices would be built, and more consistent treatment could be achieved in public programs. California's Legislature revised the eminent domain law hoping to provide for procedures that achieved these goals.\textsuperscript{59} The state revised the eminent domain laws by adopting portions of the Uniform Emi-


\textsuperscript{57} Id.

\textsuperscript{58} \textit{CAL. GOV'T CODE} § 7267 (West 1982).

\textsuperscript{59} \textit{CAL. GOV'T CODE} § 7267 (West 1982) providing:

\begin{quote}
\textit{In order to encourage and expedite the acquisition of real property by agreement with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the public programs, and to promote public confidence in public land acquisition practices, public entities shall to the greatest extent practicable be guided by the provisions of sections 7267.1 to 7267.7 . . .}
\end{quote}

The Uniform Code was drafted collectively among a number of states at the National Conference of the Commissioners on Uniform State Laws.\(^6^0\) Notable efforts were pursued in California as well as in Florida, Maryland, New York, New Hampshire, Pennsylvania, and Virginia to prepare the code.\(^6^1\) The Uniform Code was drafted in response to wide concern that the lack of uniformity among state eminent domain statutes fostered injustice.\(^6^2\) Within each state there were different forms of condemnation procedure depending on the identity of the condemnor or the purpose of the acquisition or project. The concern was further prompted by the millions of dollars that were being spent to acquire thousands of parcels of land for public improvement programs like the federal interstate highway program and local urban renewal projects.\(^6^3\)

The Uniform Code was also adopted by the United States Congress. The Code significantly mirrors portions of the Uniform Act.\(^6^4\) Subchapter III (of the Uniform Act) provides for a uniform process for acquisition of property that is to be followed by any governmental agency using federal funds for any portion of the project.\(^6^5\) The Uniform Act also provides for a process to ensure assistance to property owners and tenants who are required to move off of the land that is needed for the public improvement. This portion of the Act was used extensively by governmental redevelopment agencies when slums were torn down and new housing and businesses were built. Subchapter I provides that the acquiring agency must find safe, decent, sanitary housing for people displaced by a project. Subchapter I further provides


\(^{61}\) **UNIFORM EMINENT DOMAIN CODE** (Official Text with Comments, West 1974).

\(^{62}\) Id.

\(^{63}\) Id.


\(^{65}\) Columbia v. Costle, 710 F.2d 1009 (4th Cir. 1983) (state must comply with section 4651 to greatest extent possible under state law, even if such compliance may be "uneconomical . . . [e]city must comply with federal real property acquisition procedures (42 U.S.C. §§ 4651, 4655) in connection with EPA construction grant for sewer line to waste water facility . . . ."); 7 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 6.03, at 6-7 (rev. 3d ed. 1989).
for payment of relocation expenses and financing for increased rents and mortgage amounts that might have to be paid in the comparable home.\textsuperscript{66}

The Uniform Code and subchapter III of the Uniform Act provide that the acquiring agency cannot begin a condemnation action until a resolution stating public need and proposed use is adopted.\textsuperscript{67} This resolution corresponds to the resolution of necessity required in California. Initially, California Government Code section 7267.2 contained the same language as section 4651 of the Uniform Act.\textsuperscript{68} To protect private interests, these provisions provided that the acquiring agency prepare appraisals of the fair market value and offer the owner the full amount of the appraisal before the commencement of negotiations with the property owner. In 1982, California deviated from the Uniform Act and Code by adopting the revision to Government Code section 7267.2 requiring the appraisal and offer be made before the resolution of necessity was passed.

To help insure that the acquiring agency make a considered decision of both the need for the property as well as

\textsuperscript{66} 42 U.S.C. § 4601 (1982 & Supp. 1989). (The relocation aspect of property acquisition will not be discussed at length. This comment will concentrate on the purchase aspect. It should be noted that most projects undertaken by governmental agencies in the nature of infrastructure construction and reconstruction do not require more than a few feet of a property owner's land, for example, enough area to build a lane in a roadway widening project. Provisions which relate to the relocation of people (that must vacate their land) require different considerations due to the time needed to adjust to the relocation. Therefore, the provisions of the Uniform Act and California's statutes covering relocation and displaced persons are not subject to the same need for modification as acquisition of property where people will not be asked to move.).  


\textsuperscript{68} 42 U.S.C. § 4651 (1982 & Supp. 1989); CAL. GOV'T CODE § 7267.2 (West 1982 & Supp. I 1990) (as well as Section 4651(3) of the Uniform Act) read: Before the initiation of negotiations for real property, the public entity shall establish an amount which it believes to be just compensation therefor, and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the public entity's approved appraisal of the fair market value of such property . . . . The public entity shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation.  

for the proposed project itself,\textsuperscript{69} public entities are required to adopt resolutions of necessity pursuant to section 1245.230,\textsuperscript{70} after the hearing in which these determinations are made, but before filing a condemnation proceeding as required by sections 1240.040 and 1245.220.\textsuperscript{71} The resolution must contain the governing body's declaration of the public use for which the described property is needed, and a statement that the governing body made a determination that the project serves the greatest public good and causes the least private injury to justify the taking.\textsuperscript{72} Under section 1245.235\textsuperscript{73} the property owner can appear and be heard on section 1240.030\textsuperscript{74} matters. Section 1240.030 encouraged the acquiring agencies to acquire only land needed when the public interest and necessity require the proposed project. Necessity is defined as "reasonably suited and useful to the project" in this determination.\textsuperscript{75} Section 1245.235\textsuperscript{76} pro-

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\textsuperscript{69} 13 CAL. L. REVISION COMM'N REPORTS at 1001, 1026 (1976).

\textsuperscript{70} CAL. CIV. PROC. CODE § 1245.230 (West 1982 & Supp. 1990).

\textsuperscript{71} CAL. CIV. PROC. CODE §§ 1240.040, 1245.220 (West 1982).

\textsuperscript{72} CAL. CIV. PROC. CODE § 1240.030 (West 1982) provides:

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

(a) The public interest and necessity require the project.

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

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


\textsuperscript{73} CAL. CIV. PROC. CODE § 1245.235 (West 1982 & Supp. 1990).

\textsuperscript{74} CAL. CIV. PROC. CODE § 1240.030 (West 1982); CAL. CIV. PROC. CODE § 1245.235(b) (West 1982 & Supp. 1990) provides that notice will be sent by first-class mail and state:

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

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

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

\textsuperscript{75} Necessary to the project is defined as "suitable and desirable for the construction and use of the proposed public project. \textbf{See} City of Hawthorne v. Peebles, 166 Cal. App. 2d 758, 769, 335 P.2d 442, 445 (1959) ("necessity does not signify impossibility of constructing the improvement . . . without taking the land in question, but merely requires that the land be reasonably suitable and useful for the improvement."). \textbf{See} Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 P. 484
vides that the resolution of necessity can only be adopted after a notice and opportunity to be heard has been given to the property owner.

In balancing whether the property serves the greatest public need and causes the least private injury, governing bodies look at factors such as economic costs, and physical and geographic location. For example, the court in Huntington Park Redevelopment Agency v. Duncan, held that the governing body had weighed the public benefit against the private injury by finding that the taking of Duncan's land for development of an office building would enhance tax revenues more than the alternative (proposed by Duncan) use of the property. Additionally, the government project would provide 35 new jobs and add $2 million to the area's gross revenues, while the Duncan proposal would only create eight new jobs and would not significantly increase gross revenues.\(^{77}\)

Similarly, the court emphasized economic considerations in Huntington Park Redevelopment Agency v. Slauson, where it stated the governing body must determine the value of the parking lot being acquired and compare this amount to the value of other property on the block.\(^{78}\) Further, in San Bernadino County Flood Control Dist. v. Grabowski the court stated that implicit in arriving at the decision to take by eminent domain, the governing body must weigh the pros and cons of the 1240.030 requirements that the public interest and necessity required the project, the project is planned or located so as to achieve greatest public good and least private injury, and the property is necessary for the project. The district satisfied the requirements by considering that Grabowski's site was the smallest and least expensive site which would accommodate the project, and that the project was needed for the public good.\(^{79}\) Further, the land was the

\(^{76}\) CAL. CIV. PROC. CODE § 1245.235 (West 1982 & Supp. 1 1990).


most topographically suitable and desirable as a location.\textsuperscript{80}

Once the pros and cons are weighed and a 1240.030 determination is made (need, benefit and injury), the resolution of necessity can be passed.\textsuperscript{81} The acquiring agency then can file for condemnation of the property and request that the court determine the amount of just compensation. The resolution conclusively establishes the findings of 1240.030 (need, benefit and injury).\textsuperscript{82}

Owners can challenge the conclusive effect of the resolution under 1245.255\textsuperscript{83} by claiming abuse of discretion. The owner may request a writ of mandate before the action is filed with the court. The court clarified this process in \textit{Morgan Hill v. Alberti}, stating that if the owner challenges the resolution of necessity before the condemnation action is filed with the court, judicial review may be obtained by petition for a writ of mandate pursuant to section 1085\textsuperscript{84} or the owner can challenge the government's determination to acquire after the eminent domain action has been filed by asserting a defense to the proceeding under section 1245.255.\textsuperscript{85}

The court in \textit{Anaheim Redevelopment Agency v. Dusek}\textsuperscript{86} discussed writ of mandate under 1085 as a limited judicial review where the court would not substitute its own judgment regarding need and location, but rather would look at the resolution of necessity proceedings to determine: 1) if the governing body had been arbitrary, capricious or had been acting without firm evidentiary support, 2) if the proce-

\textsuperscript{80} Id. at 899, 252 Cal. Rptr. 684
\textsuperscript{81} \textsc{Cal. Civ. Proc. Code} \textsection{} 1240.030 (West 1982); \textsc{Cal. Civ. Proc. Code} \textsection{} 1250.370 (West 1982) (resolution of necessity can be adopted only after notice and a hearing on 1240.030 matters).
\textsuperscript{83} \textsc{Cal. Civ. Proc. Code} \textsection{} 1245.255 (West 1982); \textit{Grabowski}, 205 Cal. App. 3d 885.
\textsuperscript{84} See \textsc{Cal. Civ. Proc. Code} \textsection{} 1085 (West 1980).
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dures required by law were followed,87 and 3) if notice had been given to the property owner. The standard of review under a 1085 proceeding is whether or not there had been a gross abuse of discretion.88

The court in Slauson found a gross abuse of discretion and rendered the agency’s resolution of necessity invalid. The agency failed to determine the value of the Slauson’s parking lot as opposed to other property on the block when weighing public benefit and least private injury. Moreover, the

87. The grounds do not include the ability to challenge the negotiation process, or the appraisal, only the need and location. 6 J. SACKMAN, supra note 6, § 24.14[1], at 24-234 (rev. 3d ed. 1990) (however, commentators state “unless there is a bona fide attempt . . . to induce the owner to sell the land at a reasonable figure, the condition under which the power is granted is not fulfilled and . . . any attempted exercise of eminent domain is unauthorized and consequently void and of no effect.”). The requirement that prior negotiations be undertaken is a prerequisite to the jurisdiction of the acquiring agency. However, the word itself is not defined in any relevant section of the condemnation statutes. See Comment, supra note 5 (the negotiation process is divided into three areas for challenging the acquisition: 1) the effort made by the condemnor to reach agreement with the landowner; 2) the nature of the offer or offers made; and 3) the extent to which negotiations must be carried out before a statutory condemnation proceeding may be commenced. The effort must be in good faith, without duress, and with the goal in mind of reaching voluntary agreement (rather than making a perfunctory or formal offer only); principles of contract law have been carried over into this area of condemnation proceedings. The offer must be more than perfunctory or lack of effort and good faith will can be found). See Comment, supra note 5, at 498, (citing United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979); Boom Co. v. Patterson, 98 U.S. 403, 408 (1878); United States v. 320.0 Acres of Land, 605 F.2d 762, 781 (5th Cir. 1979) (the acquiring agency must be willing to pay the market value and make an effort to purchase the property for the market price); Comment, supra note 5, at 500) (the extent of negotiations is not governed by the length or number of offers or counteroffers, but rather “whether the quality of the negotiations is adequate and sufficient to show a good faith and vigorous attempt to induce a voluntary and reasonable settlement.” Parties are not required to negotiate to an impasse, but rather until it has become “clear that [the property owner] will not accept an offer which the condemnor deems reasonable.”); Comment, supra note 5, at 502-03, n.67 (the courts seem to look at whether or not there was adequate communication with an intent that the communication would lead to agreement among the parties). Adequate communication is defined by the statutory procedures regarding offers and appraisals. If these procedures are not met, the property owner may be able to challenge the quality, adequacy, and sufficiency, thereby voiding the acquisition. The acquiring agency would then have to start the entire acquisition procedure over again, meeting the procedural requirements. If the procedures are met the first time, the owner may be able to challenge the intent of the offers or communication as perfunctory or formal rather than communication intended to lead to agreement between the parties. See CAL. GOV’T CODE § 7267.2 (West 1982 & Supp. 1 1990).

court found the governing body’s discretion had been removed altogether by entering into irrevocable contracts with developers and by issuing bonds to finance the development.89 Conversely, in Grabowski90 and Duncan91 the court found each property owner failed in their challenge of the governing body’s discretion.

The burden of proving the existence of gross abuse of discretion shifts from the property owner to the governing body if the resolution of necessity is not conclusive as to the truth of the 1240.030 matters (need, benefit and injury). For example, adoption of the resolution of necessity does not conclusively establish the matters referred to section 1240.030 (need, benefit and injury) if the property is not entirely located within the boundaries of the local entity.92 If the property is outside of the boundaries, the resolution of necessity creates a presumption that the matters in section 1240.030 (need, benefit and injury) are true.93 The burden is shifted to the property owner to prove that the matters provided in section 1240.030 are not true.94

Regardless of whether the property is outside or inside the boundaries, a 1085 writ of mandate can be used before the condemnation is filed. Section 1250.30 provides that after the condemnation action has been filed, the property owner can challenge the government’s right to take on gross abuse grounds by way of demurrer or answer under 430.30 on grounds defined by sections 1250.360 and 1250.370.95 Under 1250.360, the owners can challenge the acquisition whether or not a resolution of necessity has been adopted.96

93. CAL. CIV. PROC. CODE §§ 1240.010, 1245.250, 1250.360 (West 1982).
94. CAL. EVID. CODE § 604 (West 1966).
96. CAL. CIV. PROC. CODE § 1250.360 (West 1982 & Supp. I 1990); see
The grounds include challenging 1) the use of the land as not for public use, 2) the authority of the acquiring agency to condemn, 3) the intent of the acquiring agency to use the land within seven years or ten years if the property is taken pursuant to the Federal Aid Highway Act of 1973, and 4) that a resolution of necessity was not adopted after a determination of 1240.030 matters (need, greatest public benefit and least private injury). 97

In addition to the grounds listed in section 1250.360, 98 section 1250.370 99 provides that if the condemning agency

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97. CAL. CIV. PROC. CODE § 1250.360 (West 1982 & Supp. I 1990) grounds include:

(a) The plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint.
(b) The stated purpose is not a public use.
(c) The plaintiff does not intend to devote the property described in the complaint to the stated purpose.
(d) There is no reasonable probability that the plaintiff will devote the described property to the stated purpose within (I) seven years, or (2) 10 years where the property is taken pursuant to the Federal Aid Highway Act of 1973, (23 U.S.C.A. § 101) or (3) such longer period as is reasonable.
(e) The described property is not subject to acquisition by the power of eminent domain for the stated purpose.
(f) The described property is sought to be acquired pursuant to section 1240.410 (excess condemnation), 1240.510 (condemnation for compatible use), or 1240.610 (condemnation for more necessary public use), but the acquisition does not satisfy the requirements of those provisions.
(g) The described property is sought to be acquired pursuant to section 1240.610 (condemnation for more necessary public use), but the defendant has the right under section 1240.630 to continue the public use to which the property is appropriated as a joint use.
(h) Any other ground provided by law.


99. CAL. CIV. PROC. CODE § 1250.370 (West 1982 & Supp. I 1990) (article II of chapter 4 states resolution of necessity must 1) contain all information in 1245.230, 2) must be adopted only after notice and a 1245.235 hearing on
has not adopted a resolution which has conclusive effect, the
property owner also can object on the basis of the agency
not adopting a resolution of necessity that satisfied the re-
quirements of article II of chapter 4 (including 1240.030 and
sections beginning 1245.210). Section 1250.370 also pro-
vides that need and location (public benefit with least private inju-
ry) can be challenged where no resolution has been adopt-
ed. 100

If the agency has met its burden of proof, possession
can be obtained from the court to build the needed public
improvement prior to judgment under section 1255.410. 101
If the court grants the order for immediate possession, the
only question remaining before the court is the amount of
just compensation to be paid. 102 The property owner is
served with the complaint and the agency can apply ex parte
to the court for an order for possession under 1255.410. 103

1240.030 matters, and 9) must be adopted by two-thirds vote); Grabowski, 205 Cal.
App. 3d 885, 894, 252 Cal. Rptr. 676, 680.
   In addition to the grounds listed in [s]ection 1250.360, grounds for
   objection to the right to take where the plaintiff has not adopted a
   resolution of necessity that conclusively establishes the matters re-
   ferred to in section 1240.030 include:
   (a) The plaintiff is a public entity and has not adopted a reso-
   lution of necessity that satisfies the requirements of article 2 (com-
   mencing with section 1245.210) of chapter 4.
   (b) The public interest and necessity do not require the pro-
   posed project.
   (c) The proposed project is not planned or located in the man-
   ner that will be most compatible with the greatest public good and
   the least private injury.
   (d) The property described in the complaint is not necessary
   for the proposed project.
   (e) The plaintiff is a quasi-public entity within the meaning of
   section 1245.320 and has not satisfied the requirements of article 3
   (commencing with section 1245.310) of chapter 4.
See Note, supra note 37 (for an excellent discussion on public interest and neces-
sity); City of Oakland v. Superior Court of Monterey County, 150 Cal. App. 3d
267, 197 Cal. Rptr. 729 (1983), appealed after remand, 174 Cal. App. 3d 414, 220
Cal. Rptr. 153 (1985), cert. denied, 106 S. Ct. 3300 (1986) (city sought to acquire
by eminent domain professional football team. Supreme Court ruled that the city
could acquire the franchise by eminent domain. The trial court was therefore
foreclosed from inquiring into whether the public interest and necessity required
the proposed project and whether the property was necessary for the proposed
project).
103. CAL. CIV. PROC. CODE § 1255.410 (West 1982 & Supp. I 1990); Morgan
The court will grant the order upon the agency's deposit of the fair market value offered to the property owner, which the owner may withdraw pending final determination of the amount of just compensation.\textsuperscript{104}

Currently, pursuant to 1255.420 California automatically allows 30 days for property owners to request a stay of the order of possession due to substantial hardship.\textsuperscript{105} In addition, if the owner is challenging the right to take, the court can stay the order for possession under 1255.430.\textsuperscript{106} If the property owner is required to move, possession will not be allowed for 90 days.\textsuperscript{107} The Federal Uniform Act also provides the same 90-day provision for property owners required to move from the property being acquired, but does not require 30 days, or additional time for proof of hardship where owners do not have to leave their land.\textsuperscript{108} Proof of hardship is required at the time possession is requested under the Uniform Act.

III. IDENTIFICATION OF THE PROBLEM

The 1982 revision to the California Government Code section 7267.2 and the 1975 revision to the California Civil Procedure Code section 1255.420 did not produce the intended results. The revision to 7267.2 requiring appraisals of property and offers to purchase prior to passing the resolution of necessity places the determination of greatest public benefit and least private injury too late in the acquisition process. The result is that if the owner accepts the offer, the resolution and the formal benefit and injury determination is never made by the authorized board. Although the acquiring agency can hold the hearing separately from the resolution, the hearing is not required unless a resolution is adopted. As a result, the hearing is only held if a resolution will be requested, and not if the offer is accepted.\textsuperscript{109} If the owner

\begin{itemize}
\item \textsuperscript{104} CAL. CIV. PROC. CODE § 1255.410 (West 1982).
\item \textsuperscript{105} CAL. CIV. PROC. CODE § 1255.420 (West 1982); Alberti, 211 Cal. App. 3d 1435, 260 Cal. Rptr. 42 (1989) (challenge to immediate possession).
\item \textsuperscript{106} CAL. CIV. PROC. CODE § 1255.430 (West 1982).
\item \textsuperscript{107} CAL. GOV'T CODE § 7267.3 (West 1982).
\item \textsuperscript{109} Compare 42 U.S.C. § 4651 (West 1982 & Supp. 1989) (the Uniform Act,
does not accept the offer in order to preserve his right to a hearing, the project may be so advanced that the governing body may no longer have any discretion in balancing public need and private injury. If the hearing and resolution of necessity are held late in the process, the property owner may use the time delay as a tactic to get more than fair market value for the property which results in externality costs. Time delays exist as a result of the 1255.420 automatic 30 days provided to owners to claim hardship after the order for possession is granted, whether or not a meritorious hardship claim exists.

Overall, California statutes do not balance private injury with public need as the Legislature intended. Consistent treatment has not been achieved because some property owners have an opportunity to appear and be heard and others do not. Some are paid more money than others to avoid time delays caused by the late resolution of necessity requirement. Agreement is not promoted among parties because there are incentives to refuse the offer in order to preserve the right to hearing and formal determination of greatest public benefit and least private injury. Public confidence is not promoted.

When the Legislature adds further agency or administrative procedures, or provides for approvals at improper junctures in the negotiating process, an imbalance in public and private rights occurs. Imbalance occurred as a result of the

on the other hand, does not require offers to be made before a resolution of necessity is passed. Condemning agencies pass intents to acquire and condemn prior to the beginning of negotiations and offers. Condemnation will be commenced in the court if good faith negotiations. Owners are given an opportunity to challenge the acquisition at hearings before the appraisals are prepared and offers are made. This puts in place the established need and the intent of the acquiring agency to buy the property described in the resolution and allows the agency to take questions of just compensation to the court expeditiously. The property owner is assured the protection of the court in the event of failure of negotiations without undue delay. Moreover, the taking can be challenged in the condemnation action just as it can in California. See COLO. REV. STAT. § 38-1-121 (West 1990).


111. CAL. GOV'T CODE § 7267 (West 1982) (legislative intent set forth in this section included goals of: 1) encouraging property owners to reach agreement with the governing body to avoid litigation and crowding of courts, 2) expediting acquisitions, 3) establishing a procedure for consistent treatment of owners, and 4) to promote public confidence).
IV. ANALYSIS

Before the 1982 and 1975 revisions, statute sections 7267.2 and 1255.420 better met California legislative intent to expedite acquisition procedures and encourage property owners and acquiring agencies to agree on the amount of just compensation to be paid. Pre-1982 California statutes conformed to the Uniform Code and federal Uniform Act. The California Legislature intended the 1982 revision to 7267.2 and the 1975 revision to 1255.420 to encourage and expedite acquisition of property by agreement, minimize the time property owners must wait for payment, provide for an opportunity to appear before the governing body for a formal determination of public benefit and least private injury, and promote public confidence. The revisions, however, increase the cost of public improvements and discourage efficient and timely acquisition, causing the private owner to wait for payment, and the public to wait for improvements. The time for passing the resolution of necessity is misplaced.

Since the resolution of necessity is uniformly read with the requirement for hearing, property owners do not have an opportunity to raise their concerns about public benefit and private injury until they refuse to accept the agency's offer to purchase. Futhermore, because the resolution of necessity is misplaced.

112. CAL. GOV'T CODE § 7267.2 (West 1982 & Supp I 1990); CAL. CIV. PROC. CODE § 1255.420 (West 1982). California statutes should be revised in order to give property owners more input on the project earlier in the process, and enable public agencies to achieve more efficient acquisition of property, speedier rebuilding of the needed public improvements such as deteriorating water and sewer lines, roads and bridges, parks, drainage facilities, utilities for electricity and telephone, as well as projects that provide housing for the homeless and lower-income or elderly persons, and urban redevelopment of slums.

113. See CAL. GOV'T CODE § 7267 (West 1982) ("to encourage and expedite the acquisition of real property by agreement with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the public programs, and to promote public confidence in public land acquisition practices . . . ."); 42 U.S.C. § 4651(1) (West 1982 & Supp. 1989); CAL. GOV'T CODE § 7267.1 (West 1982) (the public entities were directed to "make every reasonable effort to acquire expeditiously real property by negotiation.").


115. See CAL. GOV'T CODE § 7267 (West 1982).
only passed if negotiations fail and condemnation is sought in court, the hearing is likewise not held until negotiations fail.\textsuperscript{116} Owners and agencies are not encouraged to agree on the amount of just compensation. In fact, the inability to appear and be heard and have a formal determination of benefit and injury discourages negotiations and undermines public confidence. Owners have valid concerns to voice in formal hearings. This change in legislation encourages property owners not to reach agreement in order to take advantage of their rights afforded by the resolution of necessity procedure. Those property owners who reach an agreement with the acquiring agency through negotiations never have an opportunity to appear and be heard.

Acquisition is not expedited. The acquiring agency must request a place on the authorizing board's agenda, prepare a packet for presentation, send notice to the property owner, and attend the hearing before the complaint is filed to acquire the property through the court in a condemnation action. This process takes an additional four months.\textsuperscript{117} Once the hearing is held and the resolution is passed, the acquiring agency is given nine months to prepare documents, serve process, and authorize possession in order to begin construction of the public improvement.\textsuperscript{118} Once the order for possession is granted, the property owner must wait until the money is deposited by the acquiring agency in a fund established by the court.\textsuperscript{119} The time the property owner must wait for payment has not been minimized. Further problems arise because the owner is unlikely to continue to maintain or improve his property, causing the community to suffer unsightly deterioration known as condemnation blight.\textsuperscript{120}

Moreover, to avoid this time delay, the acquiring agency may offer more than fair market value for the property. This

\textsuperscript{116} See Acquisition Procedural Manual, supra note 17.
\textsuperscript{117} Id. at 3-6.
\textsuperscript{118} Policy Manual, supra note 27, 01-105-01.
\textsuperscript{119} Acquisition Procedural Manual, supra note 17 § 452.001-.027 at 1-8.
causes externality costs. When more than fair market value is paid to the owner, society pays the cost of the individual’s gain. If the property owner knows the agency will pay more for the property if the offer to purchase is refused, the owner will refuse and hold out for more money, thereby decreasing the possibility for early settlement. Further, if the acquiring agency pays more over time to finally encourage settlement, each owner may be paid a different amount over the fair market value, thus encouraging arbitrary practices and discouraging public confidence. Statutory procedure such as the 1975 revision to 1255.420 and the 1982 revision to 7267.2 (requiring resolution of necessity after appraisals and offers) inefficiently allocate cost of acquiring property for public improvement.

Commentators state that “[t]here are at least two distinct goals for adopting allocation cost rules: the equity goal of compensating victims and the efficiency goal of minimizing costs to society as a whole”. If a statutory acquisition system is adopted which is complicated and time consuming, the property owner will receive a signal that the government will pay an excess amount of compensation to shorten the time necessary for acquisition under the statute. The time delay will not only increase the cost of the property, but will increase the cost of construction. Each year land, materials and labor are more expensive. An analysis of the California Department of Transportation’s time schedule for acquisition under the current statutes indicates approximately two years are necessary for the purchase of property. A similar time schedule under the federal acquisition statute is six months.

If the resolution of necessity and the hearing are held at any time in the process after the agency determines their

121. See Cooter, supra note 55.
122. See Cooter, supra note 55 at 1.
123. See Cooter, supra note 55.
125. POLICY MANUAL, supra note 27.
126. See STATE OF COLORADO, DEPARTMENT OF LOCAL AFFAIRS, 1990 GUIDE-BOOK FOR PUBLIC FACILITIES AND CONSTRUCTION PROJECTS UNDER FEDERAL COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM (rev. ed. 1990) (this manual sets forth the typical time schedule and procedure for federal projects and land acquisition under the Uniform Act).
intent to acquire the property, the procedure achieves more efficiency in terms of time and cost while providing enough time for notice to the owner and an opportunity for the owner to appear and be heard. Since the hearing and resolution of necessity process could occur simultaneously with the final design, the additional time currently needed to pass the resolution after negotiations fail will be avoided. Acquiring agencies may adopt uniform policies to pay only the appraised amount, resulting in more consistent treatment for owners. Legislative intent is better achieved when 1) the owner is paid for the property taken without waiting for government compliance with lengthy processes, 2) condemnation blight does not set in, and 3) the owner does not receive the message that the government will pay more than the property would bring on the open market in order to shorten the acquisition time. Further, the government is not faced with increased costs of property and construction. The likelihood of allocating costs fairly and efficiently is greater. Perfect compensation might be achieved. The private interests of all owners are better protected. The owner has the ability to be heard earlier in the process, before the project is fixed by other constraints. Other constraints include commitments to fund a project through bonds,\textsuperscript{127} commitments to developers in urban renewal projects,\textsuperscript{128} or the constraint produced by an alignment of a highway project being fixed by purchase of substantially all of the property required for the highway project.

If the resolution is passed too late in the process (such as after adjoining parcels of property have been purchased), it may be very difficult for the governing body to reevaluate need and location. California statutes provide that need and location must be considered when passing the resolution of necessity.\textsuperscript{129} The Law Review Commission recommended the resolution of necessity process to encourage acquiring agencies to take a good look at "need for the property and the project itself."\textsuperscript{130} The board, which has the authority to

\begin{itemize}
  \item \textsuperscript{127} Governments sell bonds to the public to raise money for public projects. Often the bonds are secured by government revenues.
  \item \textsuperscript{129} \textit{CAL. CIV. PROC. CODE} § 1240.030 (West 1982).
  \item \textsuperscript{130} \textit{15 CAL. L. REVISION COMM'N REPORTS} at 1001, 1026-27 (1976) ("in addi-
pass the resolution, should look at the need and project before the purchase of property begins. Otherwise, the board's action can become a mere formality. Further, the 1982 amendment excluded any opportunity of bringing important information into the process when the board has discretion to make a considered decision.

The owner currently has four options: 1) to reach an agreement with the acquiring agency and transfer title to it without the opportunity to be heard, 2) to refuse all offers made by the acquiring agency in order to have the opportunity to appear and be heard, 3) to hold out, not accepting the acquiring agency's offer until the offer becomes so high it no longer matters to the property owner whether or not he has the opportunity to appear and be heard (rights are circumvented by the high offer, and externality costs appear), or 4) to challenge the resolution of necessity by attempting to show gross abuse of discretion, or that no discretion existed when the resolution of necessity was passed.

A situation often arises where the property owner has internal problems that are not apparent to the designers or planners of a project. In examining a realistic hypothetical, the statutory requirements discussed in the background section of this comment may become more clear. Suppose a highway project is planned that will widen an existing road through a growing industrial area. Ten feet of land is needed on each side of the highway along a two-mile corridor. Property will be purchased from owners on each side of the highway, including Lot A on the south and Lots B and C on the north, as well as lots adjoining A, B, and C for a distance of two miles. Each lot has driveway access from the highway. Lot A is developed with two buildings which have the required parking area and a delivery dock. No buildings have been built on Lots B and C to date. The project staff decided to widen the highway equally on each side making construction easier. There would be no need to restripe the lanes and move the median; the governing body would only need to construct an outside lane on each side. The highway

agent has appraisals prepared on each parcel of land needed for the project, and makes offers to purchase to the owners as required by section 7267.2.\textsuperscript{132}

All of the owners of lots within the two-mile corridor, except the owners of Lots A, B, and C, accept the offers and transfer title to the acquiring agency. Personal notice and an opportunity to be heard was not given pursuant to section 1245.235.\textsuperscript{133} The acquiring agency read section 1245.235 (which provides for the hearing) as only necessary if it needed to pass a resolution of necessity.\textsuperscript{134} A resolution of necessity was not required since the owners accepted their offers. Section 1245.235 provides that the governing body can only pass a resolution of necessity if it has given notice to the record owners and provided them with an opportunity to be heard on matters referred to in 1240.040.\textsuperscript{135} Section 1240.040 provides that the acquiring agency can only exercise the power of eminent domain if a resolution has been passed and if it meets the requirements of 1245.210, 1245.220, 1245.230.\textsuperscript{136}

Section 1245.230 is crucial, providing the governing body must determine and declare that public interest and necessity require the project, the property is necessary for the project, and most importantly, the project is planned or located so that the public will benefit the most and the private owner will be injured the least.\textsuperscript{137} This hearing and declaration is generally not held if the offer is accepted\textsuperscript{138} although the hearing can be held at any time, including at the same time as the any other hearing.\textsuperscript{139} Section 1245.235(d) provides that the governing body can satisfy the hearing requirement through any other procedure where personal notice and a reasonable opportunity to appear has been given.\textsuperscript{140} For example, the Legislative Committee Comment-Senate 1975

\begin{itemize}
  \item \textsuperscript{132} CAL. GOV'T CODE § 7267.2 (West 1982 & Supp. I 1990).
  \item \textsuperscript{133} CAL. CIV. PROC. CODE § 1245.235 (West 1982 & Supp. I 1990).
  \item \textsuperscript{135} CAL. CIV. PROC. CODE § 1245.235 (West 1982 & Supp. I 1990).
  \item \textsuperscript{136} CAL. CIV. PROC. CODE § 1240.040 (West 1982 & Supp. I 1990).
  \item \textsuperscript{137} CAL. CIV. PROC. CODE § 1245.230 (West 1982 & Supp. I 1990).
  \item \textsuperscript{138} See ACQUISITION PRODUAL MANUAL, supra note 17.
  \item \textsuperscript{139} CAL. CIV. PROC. CODE § 1245.235(d) (West 1982 & Supp. I 1990).
  \item \textsuperscript{140} CAL. CIV. PROC. CODE § 1245.235(d) (West 1982 & Supp. I 1990).
\end{itemize}
Addition to 1245.235(d) suggests this hearing be combined with the hearings on environmental impact reports. Alternatively a separate hearing could be held during final design.

The owners who accepted the agency's offer in this hypothetical may have been able to provide information at the hearing that would make the project plan or design better. However, the owners accepting the offer in the hypothetical did not necessarily suffer any injury without the governing body's considered determination of the most public benefit and least private injury. These lots were undeveloped. Lots B and C were also undeveloped lots in the hypothetical. However, Lot B and Lot C owners decided not to accept the agency's offer to purchase.

The agency offered Lot B and C owners more money, hoping to entice them into accepting the offer. They reasoned that if the owners accepted the additional money, construction would not be delayed, and increased costs of land and construction materials and labor could be avoided. The Lot C owner understood his power to delay the project meant more money to him. He accepted an offer over fair market value just before the acquiring agency decided he would never agree. Again, the agency did not hold the 1245.235 hearing. It (agency) was not required to since no resolution of necessity was requested.

The acquiring agency never offered the Lot B owner enough to override his desire to tell the governing body what he knew about his property and the project. The Lot B owner merely wanted to have a chance to speak his mind about the project in a formal hearing. He refused the offer in order to have the opportunity to appear and be heard even if it meant he would not get paid for the property for

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142. See Epstein, supra note 42.
143. This is an example of how externality costs are incurred. The additional costs have been external to the individual due to self-interest. Society, the taxpayer, bear the amount of money paid over what the land was actually worth, the fair market value. This amount is more than Lot C owner could get on the open market if he sold his property. Additional costs are also incurred as a result of the time delay due to increased construction costs of materials and labor. See Cooper, supra note 55.
another eight months, and even if it meant the construction would be delayed.

The agency prepared the information packets to present to the authorizing board and requested a place on the agenda. The Lot B owner was notified as required by 1245.235. The Lot B owner requested the ability to appear within 15 days as provided for in 1245.235(b)(3). At the hearing, the acquiring agency explained the plan to widen the highway by adding a lane to each side of the existing roadway. No presentation was made as to the value of Lot B's land compared to the other properties available for the project. There was no evidence that the agency considered shifting the alignment of the road to lessen private impact, only that the design was chosen so that an additional outside lane could be built on each side of the existing highway. The resolution of necessity was passed, and the acquiring agency proceeded to prepare the information necessary to file the condemnation action with the court. Again, the agency offered more than fair market value to avoid the time delay and expense of condemnation proceedings. The Lot B owner accepted the agency's offer before he incurred the expense of a lawyer to prepare an answer to the condemnation action in the court.

Unlike Lot B and Lot C owners, the Lot A owner was not interested in more money or preserving his right to be heard. The Lot A owner had a much more complicated problem. The ten feet required for the project reduced his parking lot and driveway area in such a way that he could no longer get his delivery trucks into and out of the property without backing onto the busy highway. Currently, there is enough room for the trucks to enter the property and turn around to leave. When he built the buildings on the land, the city required him to have enough room for the trucks to turn around on the property before re-entering the highway. Further, he discovered that it is against the law to back onto the highway, his insurance company would not cover any

\[144. \text{See Policy Manual, supra note 27 at 01-105-01.}\]
\[145. \text{CAL. CIV. PROC. CODE § 1245.235 (West 1982 & Supp. 1 1990).}\]
\[146. \text{CAL. CIV. PROC. CODE § 1245.235(b)(3) (West 1982 & Supp. 1 1990) (ability to appear and be heard waived if not requested within 15 days of the date the notice sent).}\]
claims for damage if the trucks were hit, and the drivers refused to make deliveries if they had to back onto the highway. The Lot A owner refused to accept the offer to purchase. The agency prepared the packets for presentation to the authorizing board and a hearing date was set after the Lot A owner requested an appearance within the required 15 days. He raised his concern at the hearing when the resolution of necessity was to be passed. The agency presented its plan to widen the existing road on each side. Again, no evidence of the value of other available property was presented. The Lot A owner claimed the project was not planned or located to achieve the greatest public good and the least private injury. If the highway had been shifted to the other side, less private injury would occur. The other side was undeveloped land. Lot A was developed with buildings. His business required deliveries. He would not be able to do business on the property if the land was taken for the highway. The Lot A owner requested that the road be shifted north a few feet so that he could turn his trucks around on the property. The board said the alignment was fixed; the other land necessary for the project had already been purchased. The resolution was passed.

Lot A owner decides to challenge the resolution of necessity in the court. He could seek judicial review before the condemnation action was filed, by filing a writ of mandate pursuant to section 1085, or after the action was filed by objecting to the right to take under 1245.255. The judicial inquiry examines whether or not there was a gross abuse of discretion by the governing body in passing the resolution of necessity; whether or not the 1240.030 matters were considered without a gross abuse of discretion.
Under a 1085 mandate, Lot A owner will object to the right to take pursuant to 1245.255 (right to take objection after action filed). The resolution of necessity conclusively established the findings of 1240.030 (need, benefit and injury). The resolution will not be conclusive as to 1240.030 matters (need, benefit and injury), however, if the Lot A owner can show there was gross abuse of discretion by the governing body.

The Lot A owner will show that implicit in the requirement of 1245.235 (notification and hearing requirements) and the adoption of a resolution of necessity under 1240.040 (acquiring agency can only condemn after resolution) and 1245.220 (eminent domain proceedings can not be commenced until the governing body adopts a resolution), the government must engage in good faith consideration of the pros and cons of the issues provided in 1240.030. Section 1240.030 requires the governing body determine after the 1245.235 hearing (section sets forth the notification and hearing requirements), that 1) the project is necessary for a public purpose, 2) the property is necessary for the project, and 3) the project is compatible with the greatest public benefit and the least private injury. Lot A owner will assert that there was a gross abuse of discretion as the governing body did not consider the injury he would suffer in comparison to the lack of injury to other property available in the area for the project. With the taking, Lot A

review under 1085 and defines abuse of discretion as a questioning of the judgment of the governing body, stating that a court will not substitute its own judgment regarding need and location, but rather is "limited to an examination of the proceedings to determine whether adoption of the resolution by the governing body was arbitrary, capricious, or entirely lacking in evidentiary support"; see 14 CAL. L. REVISION COMM'N REPORTS at 87 (1978) (recommendations relating to review of resolution of necessity by writ of mandate).

151. CAL. CIV. PROC. CODE § 1085 (West 1980).
152. CAL. CIV. PROC. CODE § 1245.250 (West 1982) (resolution of necessity has conclusive effect as the property is within the boundaries of the agency's jurisdiction, which our hypothetical assumes, the resolution has a rebuttable presumption under section 1245.150(b) if the property is located outside of the boundaries). See also San Bernardino County Flood Control Dist. v. Grabowski, 205 Cal. App. 3d 885, 252 Cal. Rptr. 676 (1988); Note, supra note 37.
153. CAL. CIV. PROC. CODE § 1245.255(b) (West 1982).
155. CAL. CIV. PROC. CODE § 1240.030 (West 1982).
owner will be unable to turn trucks around on this property, resulting in little or no ability to receive deliveries by truck. He will be out of business without truck delivery. On the other hand, the land on the other side of the road is vacant, and the owners would not suffer comparable injury if the road was designed to use the unimproved land. Lot A owner can offer evidence that the board made their decision based on a plan to widen on each side, instead of a weighing of the pros and cons of greatest public benefit and least private injury. Moreover, the governing body stated the alignment was fixed since other parcels had already been purchased, indicating the governing body had no discretion in the decision. Adoption of the resolution of necessity was merely a rubber stamp.

The Lot A owner can use the Huntington Park Redevelopment Agency v. Slauson\(^{156}\) case to substantiate his claim that the governing body had no discretion or if discretion existed, there was a gross abuse. In Slauson, the acquiring agency did not hold the 1245.235 hearing (section sets forth the notification and hearing requirements) until the governing body was ready to adopt the resolution of necessity. By the time the governing body held the hearing, irrevocable commitments had been made, such as a contract with a developer which incorporated Slauson's land and the issuance of revenue bonds to finance the redevelopment project. The court stated the hearing was a sham at which the predetermined result was simply rubber stamped.\(^{157}\) The court further held the hearing was affected not only by a gross abuse of discretion, but by elimination of discretion.\(^{158}\) Once this finding has been made, the resolution of necessity does not have a conclusive effect\(^{159}\) and the burden of proving, by a preponderance of evidence, falls on the acquiring agency to show the taking was proper (compatible with the least private injury and greatest public benefit requirement). In Slauson, the court found the governing body had not met the burden of proof. The court stated it would be crucial in determining

\(^{157}\) Id. at 1127, 219 Cal. Rptr. at 369.
\(^{158}\) Id.
cost and injury for the agency to assess the effect the loss of 60 per cent of Slauson's parking area would have on his business. ¹⁶⁰

The Lot A owner may be able to draw a close parallel to the Slauson case. ¹⁶¹ The project's effect on Lot A owner's business was not considered in the determination of least private injury. The governing board only considered the plan to widen the highway on each side by ten feet. The agency would not need to restripe the lanes or move the median. Further, the governing body stated the alignment was already fixed by the purchase of other parcels, indicating discretion might already be eliminated. No proper determination was ever made.

However, proper determinations were made by the agencies prior to passing resolutions of necessity in other cases which the Lot A owner would need to distinguish from his situation. Grabowski,¹⁶² Dusek,¹⁶³ and Duncan¹⁶⁴ survived the property owner's challenge as the acquiring agencies actually made a considered determination of greatest public benefit, least private injury. In Grabowski¹⁶⁵ the court found the acquiring agency did not have irrevocable commitments in the nature of revenue bonds that removed discretion, unlike the governing body in Slauson.¹⁶⁶ Further, the governing body was prepared to consider alternative construction proposals, but Grabowski did not request alternative plans, suggest alternative plans, or ask for a continuance of the hearing to pursue the information. Moreover, the agency's engineer presented detailed project specifics that addressed the benefit and injury issue.¹⁶⁷

In Dusek,¹⁶⁸ the court reversed the trial court's dismissal of the condemnation of the Pickwick Hotel. The trial court erred by imposing a duty upon the condemning agency

¹⁶¹. Id.
¹⁶⁵. 205 Cal. App. 3d at 898-99, 252 Cal. Rptr. at 683-84.
¹⁶⁷. Grabowski, 205 Cal. App. 3d 885, 252 Cal. Rptr. 676.
to state what the specific findings were in the determination of need, benefit and injury. The California Court of Appeals held that the court must search for a gross abuse of discretion, not retrace the analytical route of the determination. The court of appeals resolved the issue by finding that 1) there was a valid public use as the purpose of the acquisition was to eliminate blight of the area; redevelopment of blighted areas constitutes public use, 2) the agency had the statutory power to condemn the land within the redevelopment district where Dusek’s land was located, and 3) the agency adopted a redevelopment plan which included Dusek’s blighted building, attempting to remove a blighted structure. Implicit in the redevelopment plan was the agency’s weighing of the public benefit and private injury. No gross abuse of discretion was found.

In Duncan, the court held that there was no gross abuse of discretion by the redevelopment agency in accepting Spitzer’s proposal and passing the resolution of necessity to condemn a parking lot owned by Duncan. The agency accepted proposals from both Duncan and Spitzer to redevelop a blighted area. Duncan and Spitzer both proposed to expand their businesses onto the parking lot adjoining both properties. Duncan owned the parking lot. Spitzer’s proposal provided 35 new jobs compared to Duncan’s proposal which provided only eight. Spitzer’s plan added $2 million to the area’s revenues, while there was no comparable showing of revenue increases by Duncan’s plan. Spitzer made a definite commitment to build, Duncan would not commit. Further, the agency found Duncan’s remaining land would easily accommodate his proposed construction.

While the Lot A owner is considering these cases and whether to file a 1085 writ of mandate pursuant to 1245.255, the hypothetical acquiring agency will file the

169. Id.
171. Id.
172. CAL. CIV. PROC. CODE §§ 1085, 1245.255 (West 1982) (if the 1085 writ of mandate is pending and the eminent domain action is filed by the acquiring agency, the writ may be prosecuted to completion only if required by the interest of justice. The 1978 Legislative Comment to 1245.255 suggests the writ may be prosecuted to completion if the matter had already been heard, and a judgment
condemnation action and serve the Lot A owner with a summons and pleadings prepared according to 1250.125. Under 1245.255, the Lot A owner will need to bring his challenge by objecting to the right to take pursuant to 1250.350, by demurrer or answer as provided in section 430.30 on grounds authorized by 1250.360 (plaintiff not authorized by statute to exercise the power of eminent domain, purpose is not a public use, property will not be devoted to public use, property will not be used within seven years) or 1250.370 (if resolution of necessity has not been passed, owner can challenge need, benefit and injury, or the governing body has no statutory authority). The Lot A owner will not challenge the governing body on some 1250.360 grounds, such as that 1) the statutory authority did not exist for the agency to exercise the power of eminent domain, since the hypothetical agency has statutory authority to condemn 2) the stated purpose is not a public use, since the stated purpose of highway construction, is a public use, 3) the agency had no intent to devote the property to public use, because the Lot A owner has no evidence the agency does not intend to devote the property to the highway purpose, 4) the agency has no current use for the property, because the agency indicated the property needed from the Lot A owner was for immediate construction, the agency will be using the land for construction within a reasonable time. Nor will Lot A owner claim that the agency is purchasing excess land, since he has no evidence that the property sought is excessive. Lastly, the owner does not have evidence of fraud or bribery on the part of the acquiring agency, which can also be used to challenge a taking under 1245.270.

invalidating the resolution of necessity was being prepared); San Bernadino County Flood Control Dist. v. Grabowski, 205 Cal. App. 3d 885, 252 Cal. Rptr. 676 (1988) (once the condemnation action filed, objection to right to take pursuant to this title as prescribed by 1245.255(a)(2), not by writ of mandate).

175. CAL. CIV. PROC. CODE § 1250.360 (West 1987 & Supp. I 1990); Grabowski, 205 Cal. App. 3d at 894-95 (1250.360(h) provides that challenge can be made on any other grounds by law; the court interpreted these grounds to mean federal or constitutional grounds, not a challenge under the Political Reform Act of 1974 (CAL. GOV'T CODE § 91003(b) (West 1987 & Supp. 1990)).
176. CAL. CIV. PROC. CODE § 1245.270 (West 1982); Grabowski, 205 Cal. App.
The Lot A owner could try to attack the conclusive effect of the resolution of necessity by showing a gross abuse of discretion, or no discretion, as contemplated by the 1085 writ of mandate. The owner could use section 1250.370 to invalidate the resolution with the same argument, that the governing body did not consider the location that would be compatible with greatest public benefit and least private injury. The Lot A owner could claim no such determination was ever made; rather the governing body rubber stamped the decision as the alignment was fixed by prior acquisition of other parcels.\textsuperscript{177} The owner can distinguish his case from those in \textit{Grabowski},\textsuperscript{178} \textit{Dusek},\textsuperscript{179} and \textit{Duncan}\textsuperscript{180} by showing the agency acquiring the Lot A owner's property only examined the design and the widening of ten feet on each side, without considering least private injury. The highway could be built on the vacant land on the other side of the existing road, leaving the Lot A owner in business.

If the hearing required by 1245.235\textsuperscript{181} had been held during final design, the Lot A owner would have been able to discuss the internal circulation problem with the agency in time for the design to be shifted to the other side, where least private injury would occur with the same public benefit. If after considered determination, least private injury and greatest public benefit still existed with the designed alignment, the agency would be able to meet the evidentiary burden when the right to acquire is challenged by the property owner. However, agencies are not required to hold these hearings at all unless a resolution of necessity is being adopted.

If the agency does not hold the hearing as required by 1245.235\textsuperscript{182} early enough in the process, the board's discre-
tion may be eliminated as it was in *Slauson.* However, acquiring agencies would be able to hold hearings and pass the resolutions of necessity earlier in the process if the revision to California Government Code 7267 is repealed. The determination of greatest public benefit and least private injury would, therefore, be made at a more appropriate time in the project. The determination could then be made before offers are made and accepted.

Sometimes agencies offer justifications for not holding hearings early in the process, including that the owner can bring an inverse condemnation action against the agency. In inverse condemnation actions, property owners file the condemnation instead of waiting for the governing body to do so. The owner claims the agency's project in effect has amounted to a taking of his property. The owner requests that the amount of just compensation be determined by the court. However, inverse condemnation actions cannot be based solely on early hearings. If the property owner is sent a notice and a hearing is held on the issues of least private injury and public use, the property owner can later be notified that the property is no longer needed for the project, and inverse condemnation proceedings are avoided. Resolutions of necessity do not have to be passed at the time of the hearing, although passing a resolution of necessity on a particular parcel will not result by itself in an inverse condemnation action either.

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185. See Cambria Spring Co. v. Pico Rivera, 171 Cal. App. 3d 1080, 217 Cal. Rptr. 772 (1985) (quoting Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972)) ("certain announcements by a public entity of intent to condemn property, which result in a decline in the market value of the property prior to institution of condemnation proceedings, may give rise to damages in an inverse condemnation action. However, the court further held that to allow recovery under all circumstances . . . might deter public agencies from announcing sufficiently in advance their intention to condemn."); *Id.* (quoting Merced Irrigation Dist. v. Woolstenhulme, 4 Cal. 3d 478, 496 n.9, 93 Cal. Rptr. 833, 851 n.9 (1971) ("a reasonable interval of time between an announcement of intent and the issuance of the summons serves the public interest. To insure meaningful public input into condemnation decisions, it may be necessary for the condemnee to bear slight incidental loss."); *Id.* at 1090 ("when the condemnor acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated."); *Id.* at 1092 ("good faith negotiation by a municipality for purchase of private property over period of
the condemnation action within six months of passing the
resolution or the owner can bring the inverse condemnation
action. After six months, the agency still has the right to
withdraw the resolution before the owner commences the
action. If the resolution is withdrawn within six months or
before the owner files an inverse condemnation action after
six months, the owner loses the right to claim inverse con-
demnation.\textsuperscript{186}

The six month time period for inverse condemnation
begins to run when the resolution of necessity is passed, not
at the time of the 1245.235 hearing. Therefore, the acquiring
agency should hold the hearing at a separate time, and adopt

\begin{footnotesize}

(a) If a public entity has adopted a resolution of necessity but has
not commenced an eminent domain proceeding to acquire the
property within six months after the date of adoption of the resolu-
tion . . . the property owner may, by an action in inverse condemna-
tion.

(I) Require the public entity to take the property and pay com-
pensation therefor.

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

c) A public entity may commence an eminent domain proceeding or
rescind a resolution of necessity as a matter of right at any time be-
fore the property owner commences an action under this section. If
the public entity commences an eminent domain proceeding or re-
sconds the resolution of necessity before the property owner com-
\end{footnotesize}
the resolution of necessity later if it is apparent that more
than six months will be required for acquisition. Currently,
however, the resolution cannot be passed until appraisals and
offers are made. Since the hearing is routinely held together
with the passage of the resolution, the hearing occurs well
after it should be held to give property owners an opportuni-
ty to appear and be heard before a formal governing body
authorized to exercise the power of eminent domain. If the
1982 language requiring the resolution after appraisals and
offers is dropped, or the resolution is required before ap-
praisals and offers, the governing body would be more in-
iclined to hold the hearing earlier, pass the resolution, and
move the construction of the needed public improvement
along within six months.

Enabling the governing body to hold the 1245.235 hear-
ing and pass the resolution nearer in time to the completion
of the final design will encourage acquisitions within the six
month period required prior to inverse condemnation, thus
fulfilling the legislative intent. The additional time between
when negotiations fail and when the resolution is passed will
be eliminated. Further, reduced time for acquisitions miti-
gates the effect of hold-out tactics (the power to delay the
project by the additional time needed to go to the governing
body for the resolution is decreased). All of the acquisitions
necessary for one project can be presented to the governing
body for authority to exercise the power of eminent domain
at one time, giving the property owners collective input be-
fore the project is so fixed that the board has no discretion
to consider greatest public benefit and least private injury. By
providing the opportunity to be heard early in the process,
public confidence is promoted since the citizen will be able
to contribute to the project when his contributions can be in-
corporated into the end result. The property owner does not
have to refuse the offer to purchase in order to preserve the
right to appear and be heard.

As of today, the Department of Transportation estimates
that approximately 20 months pass before a challenge can be
filed or an order for immediate possession can be granted by
the court.187 Instead of the automatic 30 day provision,

187. See POLICY MANUAL, supra note 27.
1255.420\textsuperscript{188} should be revised to allow the property owner to request additional time at the \textit{ex parte} hearing on the order for possession\textsuperscript{189} if a meritorious claim exists in which the owner can show substantial hardship. Further, protection is currently provided by section 1255.430\textsuperscript{190} which sets forth that the court can stay the order of possession if there is reasonable probability the property owner will prevail in the objection to the acquisition such as in the hypothetical posed in this comment and in the \textit{Slauson}\textsuperscript{191} case.

The elimination of the automatic 30 day period for filing for hardship would relieve acquiring agencies of the additional 30 days if no claim exists due to the agency's proper handling of the precondemnation activities. Construction of badly needed improvements could begin without waiting through an automatic 30 days that may be unnecessary. The time lag is not required to protect owners who only want the matter of just compensation determined. Therefore, if all of the conditions to filing the condemnation action have been satisfied, and the acquisition is not questioned, the automatic 30-day lag time is unnecessary and should be eliminated.\textsuperscript{192} Possession should be exchanged immediately upon deposit of the appraised amount of just compensation. The deposit is available for the property owner to withdraw pending final determination of the amount the owner will be paid.

V. PROPOSAL

1. The first sentence of section 7267.2 should be revised to read "before the initiation of negotiations for real property, the public shall establish an amount which it believes to

\textsuperscript{188} CAL. CIV. PROC. CODE § 1255.420 (West 1982).
\textsuperscript{189} CAL. CIV. PROC. CODE § 1255.410 (West 1982).
\textsuperscript{190} CAL. CIV. PROC. CODE § 1255.430 (West 1982).
\textsuperscript{192} In Colorado, possession in cases where no move is required, is granted immediately at the hearing where the order for possession is granted. Notice of the hearing for an order for immediate possession is served with the summons and complaint for the condemnation proceeding. Valid issues of hardship can be raised. The 90-day provision between granting possession to the agency and actual possession provided for circumstances where relocation is necessary should be left in place. The difference seems to be that hardship is suffered if the owner must move, but is not substantial enough to hold up a project any longer if no move is required. See COLO. REV. STAT. § 38-1-108 (West 1900).
be just compensation therefor, and shall make a prompt offer to acquire the property . . . “ instead of the current language “prior to adopting a resolution of necessity pursuant to section 1245.230 and initiating negotiations for acquisition of real property, the public entity shall establish an amount which it believes to be just compensation therefor, and shall make an offer to the owner . . . ” 193

Acquiring agencies consistently interpret the 1245.235 hearing together with adopting the resolution of necessity. The resolution of necessity is only necessary if a condemnation action is filed in court. Thus, the agency reasons the hearing required prior to adopting the resolution is only necessary if the resolution is requested. This policy enables the agency to approach the board authorized to pass the resolution only one time, and only to present the parcels in which negotiations have failed and condemnation actions are required in the court. This policy denies the property owner the opportunity to be heard unless the owner refuses the offer to purchase. Moreover, a considered determination of greatest public benefit and least private injury may not be made for all owners affected by the project.

Further, agencies are likely to find irrevocable commitments have been made which in effect remove the discretion of the governing body to make the determination. Often project financing commitments are made in order to pay for property needed for the project, or commitments to developers in urban redevelopment projects are made before property is acquired. Attracting a developer is crucial to the redevelopment and such commitments are essential. Even the purchase of substantially all of the land for a highway project may be seen as irrevocable commitment if it fixes the alignment.

2. The 1982 language added to Section 7267.2 should be repealed. The provision that the agency can only adopt resolutions of necessity after appraisals and offers places this requirement too late in the process, in lieu of the consistent reading of the adoption of resolutions and the 1245.235 hearing. The intent of Congress is not met; private property rights are not protected, speedier and more efficient acquisi-

tion of property is not achieved, and public confidence is not promoted.

If the language is revised, private rights will still be protected by 7267.2 which requires appraisals and offers to purchase. If appraisals and offers have not been made, the condemnation is subject to inverse condemnation action or dismissal. However, if additional protection is desired, the legislature could ensure compliance with section 7267.2 by requiring that the condemning agency state in the complaint that they have made the offer under section 7267.2, or that it is an emergency project and the agency will comply with section 7267.2 within a reasonable time, but in no event later than perhaps 30 days.

Under this recommendation, the deletion of section 1245.230(c)(4) also would be necessary. Section 1245.230(c)(4) requires the agency to state in the resolution of necessity that offers required by section 7267.2 have been made, or that the owner could not be found. Section 1245.230(c)(4) would no longer be necessary if resolutions could be passed before appraisals and offers. The remaining portions of 1245.230 should be left intact. The remaining portions of section 1245.230 state the requirements for the resolution of necessity. The resolution must state that the governing body has authority to exercise the power of eminent domain, that the property is for an intended public use, that the property is necessary for the project, and that the project is compatible with the greatest public benefit and the least private injury.

194. Cal. Gov't Code § 7267.2 (West 1982 & Supp. 1990) (provides for appraisal prior to negotiations and sets forth the requirement that an offer be made together with a written explanation of how the agency arrived at the value being offered); San Jose v. Great Oaks Water, 192 Cal. App. 3d 1005, 237 Cal. Rptr. 845 (1987) (the city did not comply with the provision that a written summary of value must be provided. The court stated that the trial court did not err in finding the city failed to comply with this provision by not providing a written summary of the basis for its determination of the value of the property and affirmed the trial court's decision granting Great Oaks' motion for summary judgment).

195. Cal. Civ. Proc. Code § 1245.230(c)(4) (West 1982 & Supp. 1 1990) ("that either the offer required by section 7267.2 of the Government Code has been made to the owner or owners of record, or the offer has not been made because the owner cannot be located with reasonable diligence.").


3. Until these changes are made, acquiring agencies must separate the 1245.235 hearing from the provision for passing the resolution of necessity, and hold the hearing earlier for all of the property owners. This would require that the acquiring agency send personal notices to the property owners announcing the hearing. Section 1245.235(d) permits the hearing to be held with other hearings where use, need and benefit-injury considerations can be heard. The Legislative Committee Comment-Senate 1975 Addition suggests combining the hearing with those on relocation assistance and environmental assessment. The final design phase in highway projects might be a better time for the 1245.235 hearing, but in any event the hearing should be held before the alignment is fixed and the governing body no longer has discretion to consider greatest public benefit and least private injury.

4. Finally, with the considered determination of the greatest public benefit and least private injury more effectively placed early in the process, the acquiring agency should be

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198. CAL. CIV. PROC. CODE § 1245.235(d) (West 1982 & Supp. 1 1990) ("notwithstanding subdivision (b), the governing body may satisfy the requirements of this section through any other procedure that has given each person described in subdivision (a) reasonable written personal notice and a reasonable opportunity to appear and be heard on the matters referred to in Section 1240.030."). Some acquiring agencies do not have final design until after the environmental assessment is approved, and might hesitate to notify owners of an intent to pass a resolution of necessity until it is certain their property will be acquired. However, if the plans are complete enough for the agency to establish how much the environment will be impacted by the project in compliance with California Environmental Quality Act (CEQA), the agency should be able to determine the owners who might be affected by the project. The notice requirements state only that a general description of the property is necessary. Alternatively, such a public hearing may be very effective during the final design process, if the agency prefers. This will give the public more input into the process, and facilitate negotiations later; the affected owners will feel like they had some say in the project and could result in the feeling that they bought into and assisted the location and benefit to the community in the planning stage. At the same time notice and opportunity to be heard required by the statutes is provided. The notice sent under section 1245.235(b) must provide that it is the intent of the governing body to pass the resolution of necessity (to condemn) if the owners' property is necessary to build the project and negotiations fail. This will further establish the necessity of the property owner to negotiate reasonably with the governing agency, and avoid hold-out tactics. See generally POLICY MANUAL, supra note 27, at 7; POLICY MANUAL, supra note 27, § 105.020 at 105-2 (final design after environmental assessment approved, schedule 1245.235 hearings only if necessary to adopt resolution of necessity; hearings held at same time as resolution adopted, if negotiations fail).
granted possession immediately upon the court entering the order for possession under 1255.410,¹⁹⁹ and that the automatic 30 day wait currently allowed for requesting a stay for substantial hardship should be eliminated from section 1255.420.²⁰⁰ Section 1255.420 should be revised to read that an owner can request a stay of the order of possession for substantial hardship if a meritorious claim is presented at the ex parte hearing at which the order is entered.

VI. CONCLUSION

The recent revisions to the California eminent domain statutes have failed to achieve what the Legislature intended. The 1982 revision to Section 7267.2, requiring that appraisals and offers be made prior to adopting a resolution of necessity, and the 1975 addition to section 1255.420, automatically extending 30 days to all owners to prove substantial hardship (even if the remaining question is only the amount of just compensation to be paid) should be revised again.

The resolution of necessity states that the governing body has made a determination of public use, of need for the property, and of compatibility of public benefit and least private injury. The resolution of necessity declares that a considered determination has been made after the property owners affected by the project have had an opportunity to be heard. This determination should be made before negotiations begin and before appraisals and offers to purchase are made. The hearing and determinations stated in the resolution of necessity need to occur early enough in the condemnation process that the governing body does in fact still have discretion to weigh the pros and cons of the acquisition. After the appraisals and offers are made, it is too late to make a determination of greatest public benefit and least private injury because, at this point, the governing body's decision is often merely a rubber stamp, since irrevocable commitments and investments have already been made. The 1982 revision to Section 7267.2, requiring resolutions after appraisals and offers, should be repealed.

²⁰⁰. CAL. CIV. PROC. CODE § 1255.420 (West 1982) (this provision was added in 1975, and gives property owners 30 days after the order for possession has been entered to request stay of the order for substantial hardship reasons).
As the court pointed out in *Slauson*, there are very few cases in this area due to the difficulty of challenging the resolution of necessity once it has been passed. The property owner is in a much better position if he is able to raise his concern with private injury early, while the project can still accommodate his interest. The California Legislature should encourage, not discourage, early determination of benefit and injury.

Moreover, considered determinations of greatest public benefit and least private injury early in the process make the automatic 30 days allowed by section 1255.420 for substantial hardship claims less necessary. If the property owner has a meritorious claim of substantial hardship, the order for possession should be stayed upon request at the *ex parte* hearing when the order is entered.

If the only question remaining is the amount of just compensation to be paid, the 30 days serves no purpose. Section 1255.420 should be revised to provide for a stay of the order for possession upon request.

Legislative intent of balancing public benefit and needs with private interests and injury have not been served by these two revisions. Repeal of the 1982 revision to 7267 and the automatic 30 day hardship provision of 1255.420 will serve more effectively the legislative intent to achieve the greatest public benefit and the least public injury, to minimize acquisition time, to decrease condemnation blight, to provide property owners with an opportunity to be heard on the benefit-injury determination, to encourage parties to negotiate and settle acquisition matters, to institute uniform practices, and to promote confidence in public programs.

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