

Memorandum

To: CHAIR AND COMMISSIONERS

CTC Meeting: December 13-14, 2006

Reference No.: 2.4a.(4)
Action Item

From: CINDY McKIM
Chief Financial Officer

Prepared by: Bimla G. Rhinehart
Chief
Division of Right of Way and
Land Surveys

Subject: **RESOLUTIONS OF NECESSITY**

RECOMMENDATION:

The Department of Transportation (Department) recommends the California Transportation Commission (Commission) adopt Resolution of Necessity C-19528, summarized on the following page.

ISSUE:

Prior to initiating Eminent Domain proceeding to acquire needed right of way for a programmed project, the Commission must first adopt a Resolution of Necessity (RON), stipulating specific findings identified under Section 1245.230 of the Code of Civil Procedure.

1. The public interest and necessity require the project.
2. The project is planned to provide the greatest public good with the least private injury.
3. This property is required for the proposed project.
4. An offer to purchase the property in compliance with Government Code Section 7267.2 has been made to the owner of record.

In this case, the property owners are contesting the RON and have requested a written appearance before the Commission to address the outstanding issues of the Settlement Agreement in the eminent domain proceeding against the County. The remaining issues with the property owners are related to the need for the parcel as a replacement site for the parkland acquired from the County of San Diego (County) for the construction of State Route 125.

BACKGROUND:

Discussions have taken place with the owner, each of who has been offered the full amount of the Department's appraisal and, where applicable, advised of any relocation assistance benefits to which the owners may subsequently be entitled. Adoption of the resolution will not interrupt our efforts to secure equitable settlement. In accordance with statutory requirements, each owner has been advised the Department is requesting the resolution at this time. Adoption will assist the

Department in the continuation of the orderly sequence of events required to meet construction schedules.

C-19528 - Georges E. Argoud, Trustee, etc., et al.

11-SD-125- offsite - Parcel 33191 - EA 003009.

Right of Way Certification Date: 05/26/06. Freeway - construct a freeway. Authorizes condemnation of land in fee for replacement of County parkland acquired on State Route 125, pursuant to Code of Civil Procedure Section 1240.320 and 1240.330; and pursuant to a Court Order filed on August 26, 2005 in San Diego County, People of the State of California v. County of San Diego, et al., Case No. GIC 803748-1. Located in the city of San Diego near north side of Palm Avenue west of Lanoa Lane. APNs 628-050-17, -53, -55.

Attachments

Resolution of Necessity Appearance Fact Sheet

PROJECT DATA: 11-SD-125 (offsite)

Expenditure Authorization: 003009 (Connector)

Location: State Route (SR) 125 in the county of San Diego

Limits: In the county of San Diego on SR 125 from San Miguel Road to SR 54.

Cost: Current construction cost estimate: \$111,545,107
Current right of way cost estimate: \$37,618,000

Funding Source: TransNet/SANDAG/Federal Subvention

Number of Lanes: Existing: N/A
Proposed: six lanes with High Occupancy Vehicles (HOV) lanes from Olympic Parkway south to SR 905; eight lanes with provision for HOV lanes from SR 54 south to Olympic Parkway at final build out.

Proposed Major Features: Interchange at SR 54/SR 125; retaining walls; bridge at Sweetwater Regional Park; bridge over San Miguel Road; multi-use trails and local street improvements.

Traffic: Existing (year 2003): 93,000
Proposed (year 2030): 162,000

PARCEL DATA:

Property Owner: George E. Argoud, Trustee, et al.

Parcel Location: Assessor's Parcel Numbers 628-050-17; 628-050-53; 628-050-55. North side of Palm Avenue, west of Lanoa Lane, San Diego.

Present Use: Open space -vacant land

Zoning: Residential zone intended to accommodate single-family dwelling on detached lot (RS-1-1).

Area of Property: 6.90 acres

Area Required: 6.90 acres

ASARO, KEAGY, FREELAND & MCKINLEY LLP

ATTORNEYS AT LAW

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RICHARD R. FREELAND
STEVEN A. MCKINLEY*

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OF COUNSEL:

FRANK L. ASARO
CHARLES F. CAMPBELL
KAREN G. MCKINLEY

October 5, 2006

Via Facsimile Transmission and U. S. Mail
(916) 653-2134

The Honorable Marian Bergeson, Chair
California Transportation Commission
1120 N Street, Room 2221 (MS-52)
Sacramento, California 95814

John F. Barna, Jr., Executive Director
California Transportation Commission
1120 N Street, Room 2233
Post Office Box 942873, Mail Station 52
Sacramento, California 94273-0001

Re: Property Address: 2422 Palm Avenue, San Diego, CA 92154
Parcel Nos.: APN 628-050-17, 628-050-53, and 628-050-58
Hearing: On Adoption of Resolution of Necessity
Hearing Date: Thursday, October 12, 2006, 9:00 a.m.
Your Ref. No.: 2.4b

Dear Chairperson Bergeson and Executive Director Barna:

This firm represents Georges E. Argoud, Trustee U.D.T., and Johanna T. Argoud, Trustee of the Johanna T. Argoud Trust (collectively the "Argouds"), the owners of 6.9 acres of property located at 2422 Palm Avenue, San Diego, CA 92154 [APN 628-050-17, 628-050-53, and 628-050-58].

On Thursday, October 12, 2006 at 9:00 a.m., the California Transportation Commission ("CTC") has scheduled a hearing to adopt a resolution of necessity in order for the State of California, Department of Transportation ("Caltrans") to condemn the subject property to exchange it for certain park land already acquired from the County of San Diego for the construction of SR-125. The subject property was one of several parcels of land Caltrans agreed to acquire either through negotiations or condemnation as part of a Settlement Agreement in the eminent domain proceeding against the County.

The Argouds have refused to sell the subject property to Caltrans. The Argouds object to Caltrans' "right to take" the subject property through the power of eminent domain. The CTC should refuse to adopt the resolution of necessity and direct Caltrans' staff to locate different property for the purpose of satisfying its contractual obligation to the County of San Diego.

Attachment B1

Executive Summary

The adoption of the proposed resolution of necessity would be improper for the following reasons:

- The subject property is *not* necessary for state highway purposes.
 - Caltrans is *not* authorized to condemn land for park purposes.
 - There is no public necessity to justify the taking.
 - Caltrans has made a contractual commitment to condemn the subject property.
-
- ~~The Settlement Agreement is void as against public policy.~~
 - The Settlement Agreement does not establish public necessity.
 - The subject property is not necessary for park use.
 - Caltrans has not complied with CEQA.

DISCUSSION

1. Streets and Highway Code:

Under Streets and Highways Code §102, Caltrans may only acquire property by eminent domain that is *necessary* for state highway purposes. The subject property is *not* necessary for state highway purposes. It is outside the footprint of SR 125 and its acquisition is not required for the construction and use of a state highway.

2. Eminent Domain Law.

Under the Eminent Domain Law, the power of eminent domain may be exercised to acquire property for a *particular use* only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use. (Code Civ. Proc. §1240.020.) Caltrans is *not* authorized to condemn land for county park purposes.

3. Public Necessity.

Under the Eminent Domain Law, 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; and (c) the

property sought to be acquired is necessary for the project. (Code Civ. Proc. §1240.030.) The subject property is not being acquired for the SR 125 project. The planning for the SR 125 project did not include the acquisition of the subject property. The taking of the subject property is entirely unnecessary for the construction and use of the SR 125 project.

4. Illegal Pre-Commitment.

Under the Eminent Domain Law, a property owner is entitled to notice and a meaningful opportunity to be heard at the hearing on the resolution of necessity with respect to the three factors listed in §1240.030 (*i.e.*, the public necessity for taking the property). A resolution of necessity will be set aside if it appears that, at the time of the hearing, the governing board of the condemning agency was irrevocably committed to adopting the resolution of necessity regardless of the evidence presented. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1127.) By entering into the Settlement Agreement, Caltrans has irrevocably committed the CTC to adopting the resolution of necessity regardless of the evidence presented with respect to the lack of public necessity.

5. The Settlement Agreement is void.

The adoption of a resolution of necessity is a quasi-legislative act. (*Redevelopment Agency v. Rados Bros.* (2001) 95 Cal.App.4th 309, 316 fn. 4.) The execution of the Settlement Agreement by the Deputy District Director of the Right of Way Division, which contractually requires the acquisition of the subject property by negotiation or condemnation for exchange with the County of San Diego, violates the legislative prerogatives of the CTC. A settlement agreement that binds the legislative branch to take certain action is void as against public policy. (See, *Trancas Property Owners Association v. City of Malibu* (2006) 138 Cal.App.4th 172, 181.)

6. The Settlement Agreement does not establish public necessity.

Under the Eminent Domain Law, a resolution of necessity may be set aside for a gross abuse of discretion if it is not supported by substantial evidence or it is arbitrary and capricious. (*Redevelopment Agency v. Duncan* (1983) 142 Cal.App.3d 17, 25.) The Settlement Agreement does not establish the "public necessity" required for taking the subject property. At best, it establishes an arbitrary arrangement between the County and Caltrans where Caltrans agreed to acquire the subject property in order to exchange it for park land that was being taken for the SR 125 project. The Settlement Agreement does not address why the subject property was selected by the County or and why it is "necessary" to acquire this particular piece of property for park land as opposed to other similarly situated pieces of property.

7. The subject property is not necessary for a park.

Under the Eminent Domain Law, a public entity that is authorized to condemn land for a particular use may condemn "substitute property" for that use to exchange it for necessary property if all of the following are established: (1) the owner of the necessary property has agreed in writing to the exchange; (2) the necessary property is devoted to or held for some public use and the substitute property will be devoted to or held for the same public use by the owner of the necessary property; and (3) the owner of the necessary property is authorized to exercise the power of eminent domain to acquire the substitute property for such use. (Code Civ. Proc. § 1240.320(a).) The resolution of necessity shall state the property is necessary for such use. (Code Civ. Proc. §1240.320(b).)

The Settlement Agreement contains no guarantee or assurances that the County will actually hold or devote the subject property for park purposes. In addition, there is no evidence that would support the finding that the subject property is necessary for use as a park. There is no evidence that (a) the public interest and necessity require a park; (b) the park is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and (c) the property sought to be acquired is necessary for the park. Without making such findings based on substantial evidence, the CTC may not adopt a resolution of necessity to condemn the subject property.

8. CEQA.

Although Caltrans has presumably complied with CEQA with respect to the SR 125 project, neither it nor the County has undertaken any environmental review of a proposed park to be located on the subject property. The adoption of a resolution of necessity for a proposed project without compliance with CEQA will defeat a public agency's "right to take." (Code Civ. Proc. §1250.360(h).)

CONCLUSION

Eminent domain has been described as a sovereign's "most awesome grant of power." (*City of Oakland v. Oakland Raiders* (1985) 174 Cal.App.3d 414, 419.) As the result of a recent Supreme Court decision, the public has become increasingly aware that the power of eminent domain may be abused. (See, e.g., George F. Will, *Damaging Deference* (Washington Post, June 24, 2005).

If the County of San Diego were to exercise the power of eminent domain to acquire the subject property for a park, it would first have to hold a series of public hearings in order to plan for such a park, comply with CEQA, and adopt a resolution of necessity based on substantial evidence of public necessity. The Argouds, as property owners, would have notice and opportunity to oppose each of these actions.

October 5, 2006

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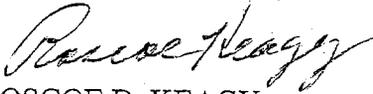
It would indeed be chilling if the County could establish the "public necessity" required for the taking of private property by entering into a Settlement Agreement with Caltrans in litigation involving SR 125, which would require Caltrans to condemn the subject property simply because the County, for whatever reason, desires to obtain title to the same.

We request that this correspondence be provided to all commission members, and to facilitate our request enclosed you will find twenty-five copies of the within correspondence. It is further respectfully requested that this correspondence be incorporated into the administrative record of the hearing to Adopt a Resolution of Necessity regarding our clients' property.

If you have any questions or comments, please do not hesitate to advise.

Sincerely,

ASARO, KEAGY, FREELAND & MCKINLEY, LLP


ROSCOE D. KEAGY

RDK/mla

DEPARTMENT OF TRANSPORTATION

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November 16, 2006

Via Hand Delivery

Roscoe D. Keagy, Esq.
ASARO, KEAGY, FREELAND & MCKINLEY
3170 Fourth Avenue, Fourth Floor
San Diego, California 92103

RE: Proposed Resolution of Necessity to Acquire the Argoud Property Located
at 2422 Palm Avenue, San Diego, California

Mr. Keagy:

This letter responds to your letter dated October 5, 2006, sent to the California Transportation Commission (Commission), objecting to the proposed adoption of a resolution of necessity authorizing the State of California, Department of Transportation (Department), to condemn certain real property owned by your clients Georges E. Argoud and Johanna T. Argoud, located at 2422 Palm Avenue, in San Diego, California.

This letter will respond to your objections, and is intended to be incorporated into the record of the upcoming December 13 – 14, 2006, meeting of the Commission. For convenience, your objections will be addressed in the same order in which they were raised.

1. *The Argoud parcel is necessary for state highway purposes within the meaning of Streets and Highways Code section 102.*

Streets and Highways Code section 102 authorizes the Department to “acquire by eminent domain any property necessary for state highway purposes.” The phrase “state highway purposes” includes the acquisition of real property deemed necessary “for the purposes of exchanging the same for other real property to be used for rights-of-way.” (Sts. & Hy. Code, § 104, subd. (b).)

The Argoud parcel is being acquired for the purpose of completing a court-ordered substitute condemnation necessitated by the Department's acquisition of portions of the County-owned Sweetwater Regional Park in San Diego for the construction of the State Route 125 South project.

The State Route 125 South project required the condemnation of approximately 65 acres of County parkland. The conversion of this parkland to a non-park use triggered the application of the Public Park Preservation Act of 1971 (PPPA). (Pub. Res. Code, §§ 5400 et seq.) The PPPA requires that park property condemned for a non-park use must be replaced with substitute, replacement parkland that is comparable in size, utility and location. (Pub. Res. Code, §§ 5401, 5405.) As a result of litigation with the County of San Diego, the court has ordered the Department to acquire the Argoud property, along with some other parcels similarly-situated within the boundaries of the Otay Valley Regional Park, as substitute parkland, offsetting the loss at the Sweetwater Regional Park.

The Department seeks to acquire the Argoud parcel for the purpose of exchanging it with the County of San Diego. The Department will then use the County parcel for State Route 125 South, while the County will be required to use the Argoud parcel as substitute park property. (Pub. Res. Code, § 5407.) Such an exchange is specifically contemplated by Streets and Highways Code section 104, and is therefore necessary for "state highway purposes" within the meaning of Streets and Highways Code section 102.

2. *The Department is authorized to condemn land that will ultimately be put to a park purpose by another public entity, where the acquisition is made as part of an exchange for highway right-of-way.*

The Department is authorized to condemn land for any "state highway purpose." (Sts. & Hy. Code, § 102.) This broad grant includes the authority to acquire real property deemed necessary "for the purposes of exchanging the same for other real property to be used for rights-of-way." (Sts. & Hy. Code, § 104, subd. (b).) In this case, the Argoud property is being acquired for the purpose of exchanging it for County-owned parkland on which State Route 125 South is being constructed. The Department will use the County's property for the construction of the State Route 125 South project. The County will then use the Argoud property to partially replace the parkland eliminated from Sweetwater Regional Park, consistent with the Public Park Preservation Act of 1971. Therefore, the Department's condemnation of the Argoud parcel is for a "state highway purpose," even if the land will ultimately be utilized by the County of San Diego as part of a public park.

3. *The condemnation of the Argoud parcel is necessary for the completion of State Route 125 South.*

In order to construct State Route 125 South, the Department was required to condemn parkland owned by the County of San Diego. Under the PPPA, parkland cannot be condemned unless it is replaced with substitute parkland. (Pub. Res. Code, § 5401.) The Argoud parcel has been identified as one of several properties that the Department must acquire, and subsequently exchange with the County of San Diego, to meet its court-ordered obligations under the PPPA. Therefore, the condemnation of the Argoud parcel is necessary for the State Route 125 South project.

4. *The Department has not irrevocably committed the Commission to adopting the resolution of necessity.*

The Department has been ordered to acquire certain properties to replace the County-owned parkland lost at the Sweetwater Regional Park as a result of the State Route 125 South project. This court order does not irrevocably commit the Commission to adopting the instant resolution of necessity however, because the Commission is an independent body, separate and apart from the Department.

You reference *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121. In that case, the agency that approved the challenged resolution of necessity was the same agency that had previously entered into a development agreement and issued bonds predicated on the condemnation of the property. The court found that this pre-resolution conduct amounted to an irrevocable commitment to adopt the subject resolution of necessity, regardless of the evidence presented by the property owner, and was improper. In this case however, the court order requiring the Department to acquire the Argoud parcel is between the Department and the County. The Commission is not a party to that litigation. Therefore, the Department has not irrevocably committed the Commission to adopting the resolution of necessity. While the Department believes it has demonstrated the need for the acquisition, it is ultimately up to the Commission to make the decision as to whether or not to approve the resolution.

5. *The court order requiring the Department to acquire the Argoud parcel is not void as against public policy.*

The Department has been ordered to acquire certain properties to replace the County-owned parkland lost at the Sweetwater Regional Park as a result of the State Route 125 South project. This court order, however, is between the Department and the County; the Commission is not a party to that litigation. As an independent body, separate and apart

from the Department, the Commission is not required by that order to abdicate its inherent discretion. By contrast, the settlement agreement in *Trancas v. City of Malibu* (2006) 138 Cal.App.4th 172, effectively required the City of Malibu—a party to the same agreement—to promise not to enforce its own zoning laws against the other party. Unlike *Trancas*, no such controversy arises in this case because the Commission is not a party to the court order at issue. Therefore, the court order is not void as against public policy on this basis.

6. *There is a “public necessity” for acquiring the Argoud parcel.*

In order to construct State Route 125 South, the Department was required to condemn parkland owned by the County of San Diego. Under the PPPA, parkland cannot be condemned unless it is replaced with substitute parkland. The Argoud parcel has been identified as one of several properties that the Department must acquire, and subsequently exchange with the County of San Diego, to meet its court-ordered obligations under the PPPA. The Department is statutorily authorized to engage in such a “substitute condemnation.” (Sts & Hy. Code, §§ 102, 104; Code Civ. Proc., §§ 1240.320 et seq.) The necessity for the initial condemnation (i.e., the State Route 125 South project), and the fact that the land initially condemned (i.e., the Sweetwater Regional Park) was already a public use, provides the necessity for the acquisition of the Argoud parcel as a replacement property. Therefore, there is a public necessity for the condemnation of the Argoud parcel.

7. *The County is necessarily obligated by statute and court order to use the Argoud property for a park use.*

When the Argoud parcel is exchanged with the County, the County will be obligated by statute and court order to use the property for a replacement park use. First, the PPPA requires that the land provided for substitute park use must be used for that purpose by the entity operating the park. (Pub. Res. Code, § 5407.) Second, the court order states that the County will devote the substitute property to the same public use (park) that is being displaced from the property necessary for the State Route 125 South project. Therefore, the County is obligated to use the replacement property for park purposes.

8. *Adoption of the resolution of necessity will not violate the California Environmental Quality Act.*

The adoption of the resolution of necessity requested by the Department will not violate the California Environmental Quality Act (CEQA). First, the acquisition of the Argoud parcel is necessitated by the State Route 125 South project. The State Route 125 South project obtained environmental clearance under both CEQA and the National Environmental Policy Act (NEPA) several years ago. Therefore, there is no CEQA violation.

Roscoe D. Keagy, Esq.
ASARO, KEAGY, FREELAND & MCKINLEY
November 16, 2006
Page 5

Second, the Argoud parcel was selected as a replacement park parcel based on its location within the concept boundaries of the Otay Valley Regional Park in South San Diego County.

The Otay Valley Regional Park is the result of a multi-jurisdictional planning effort in the Otay River Valley initiated in 1990 by the County of San Diego and the Cities of San Diego and Chula Vista. The park is approximately 13 miles long, stretching between the San Diego Bay in the west and Otay Lakes in the east. The park will contain a mix of recreational and open space uses, similar to the uses previously available in the Sweetwater Regional Park.

A programmatic analysis of the potential environmental impacts of the Otay Valley Regional Park concept plan was conducted within the environmental impact report issued for the City of San Diego's Multiple Species Conservation Program (MSCP) plan. Based on the foregoing, the Commission's adoption of the resolution of necessity sought by the Department will not violate the terms of the California Environmental Quality Act.

Sincerely,

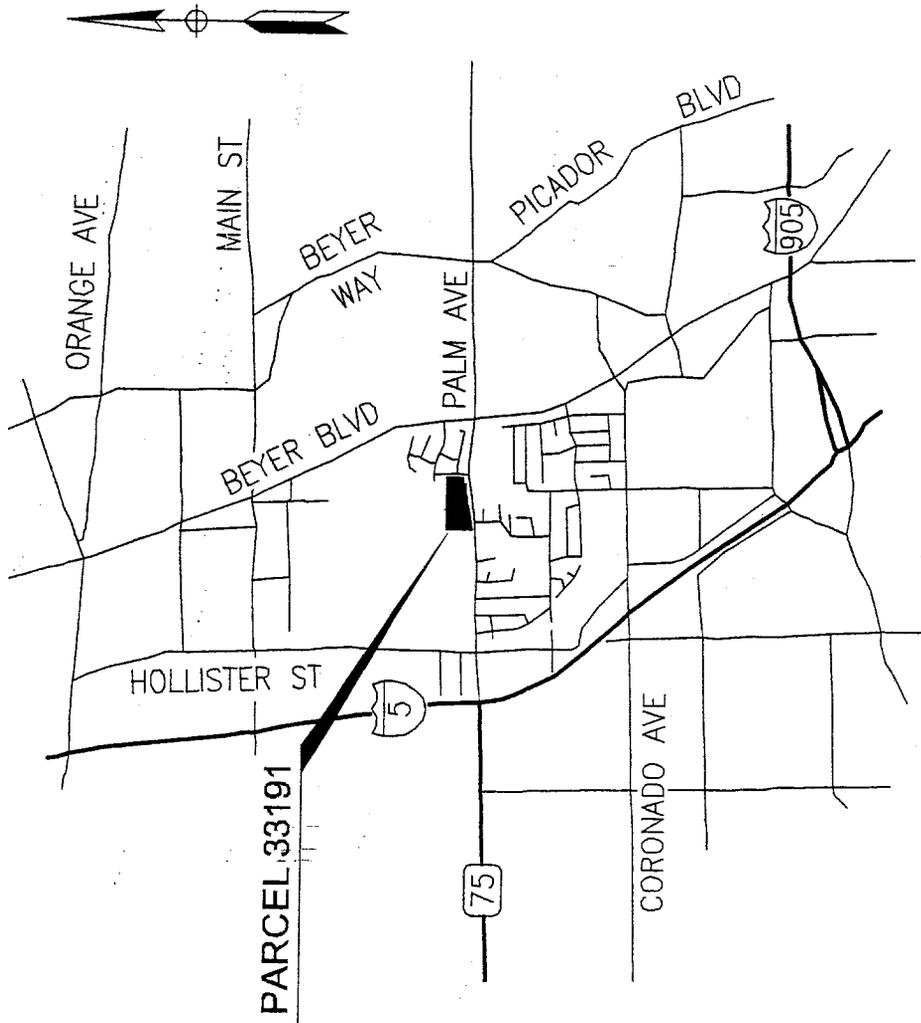


JOHN FREDERICK SMITH
Deputy Attorney

cc: Hon. Marian Bergeson, Chair, California Transportation Commission
Mr. John Barna, Executive Director, California Transportation Commission

COUNTY OF SAN DIEGO

SUIT # 1297



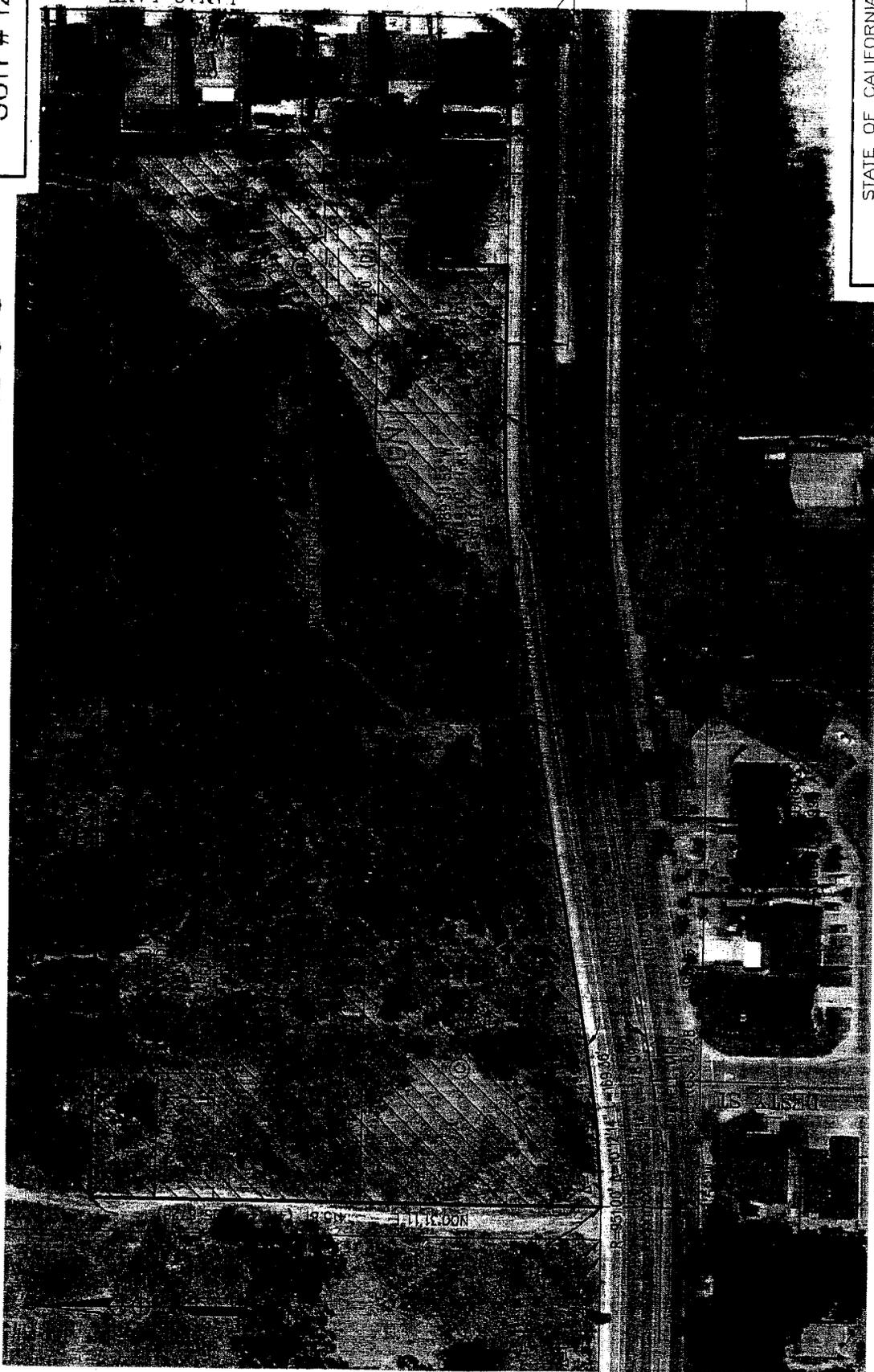
PARCEL 33191

STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION DISTRICT 11			
CONDEMNATION			
RIGHT OF WAY	MAP NO.	KEY MAP	
COUNTY ROUTE	SD	KP/PM	SCALE
125		OFFSITE	NO SCALE
			SHEET 1 OF 2

EXHIBIT "A" E.A. 003002

COUNTY OF SAN DIEGO

SUIT # 1297



PARCEL NUMBER	VESTEE	① AREAS (SQ. FT. OR NOTED)		ACQUIS. CODE ③
		R/W	EXC. ②	
33191	ARGOUD	300,547	0	F

STATE OF CALIFORNIA
DEPARTMENT OF TRANSPORTATION
DISTRICT 11

CONDEMNATION MAP

RIGHT OF WAY
MAP NO. 52039.1

COUNTY	ROUTE	KP/PM	SCALE
SD	125	OFFSITE	1" = 120'
			SHEET 2 OF 2

EXHIBIT "B" E.A. 003002