IN THE COURT OF APPEAL OF THE STATE OF CALIFONRIA FIRST APPELLATE DISTRICT, DIVISION ONE

A168497 & A168959

MENDOCINO RAILWAY
Plaintiff-Appellant,

v.

JOHN MEYER
Defendant-Respondent.

On Appeal from the Superior Court of California,
County of Mendocino
(Case No. SCUKCVED202074939, Hon. Jeanine Nadel)

RESPONDENT JOHN MEYER'S PETITION FOR REHEARING

STEPHEN F. JOHNSON
State Bar No. 205244
MANNON, KING, JOHNSON & WIPF, LLP
P.O. Box 419
Ukiah, CA 95482
Telephone: (707) 468-9151
Email: steve@mkjlex.com

Attorney for Defendant-Respondent John Meyer

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I. Introduction

Respondent John Meyer ("Meyer") respectfully petitions the court to order a rehearing of its decision in this matter pursuant to California Rules of Court 8.268(a)(1).

A. MR's Primary Purpose For Taking The Property Will Be For Private Enterprise.

Plaintiff and appellant Mendocino Railway ("MR") is a privately held corporation that operates round-trip excursion trains for sightseeing in Mendocino County. (RT 126:25-127:15, 322:13-16, 328:21-24, 525:10-17, CT 2037.) The line runs 40 miles between the towns of Fort Bragg and Willits. (RT 64:19-22, 65:3-6, 66:6-13.) In 2015 there was a landslide in a tunnel that prevents trains from running the full length of the line between Willits and Fort Bragg. (RT 95:19-101:4, 344:11-17.)

MR filed this action against defendant and respondent John Meyer ("Meyer") to take his 20 acre parcel west of Willits ("the Property" or "Meyer Property") by eminent domain. MR wishes to take the Property for the purpose of allegedly constructing a train station freight transloading facility and maintenance facility for its railroad operations. (CT 15:1-4.)

MR has freight tariffs posted for the line from Willits to Fort Bragg, even though a train cannot travel from Willits to Fort Bragg, or vice versa, due to the 2015 tunnel collapse. (RT 95:19-101:4, 344:11-17, 919:28-

920:27.) There has also been no interchanging of freight cars between the MR line and the adjoining NCRA line for 27 years because the Federal Railroad Administration has placed a moratorium on using the NCRA line due to track safety issues. (RT 336:19-26.)

MR offers passenger round trip commute services to a limited number of families with property on the line and their guests, and MR does not offer commute services to the public at large. (RT 916:12-918:2; CT 1234-1250.) Due to the tunnel collapse, MR also cannot take commuters between Willits and Fort Bragg. (RT 95:19-101:4, 344:11-17, 919:28-920:27.)

"The Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need." (*City & County of San Francisco v. Ross* (1955) 44 Cal 2d 52, 59.)

The taking of Meyer's property to start a freight operation and/or passenger service on its isolated 40 mile long line makes no financial or logistical sense. MR cannot transport freight or passengers on the adjoining NCRA rail line. (RT 95:19-101:4, 344:11-17, 919:28-920:27.) There are also no communities to transport passengers or freight to, other

than Willits and Fort Bragg, and MR cannot transport anything between these two towns. (CT 1756.) MR is in essence, attempting to proceed with the taking of the Meyer property to create a freight and commuter passenger line to nowhere.

As stated in this Court's decision, "[t]he primary purpose cannot be to promote private enterprise, or to accomplish a purpose the primary nature of which is not public under the pretext that it is. (See, e.g. *County of San Mateo v. Coburn* (1900) 130 Cal 631, 634." (Appellate Decision, p. 26.)

Even if MR is able to ever repair the tunnel, given these facts, the transportation of freight and/or passengers on the short and isolated line in rural Mendocino County will be minimal in comparison to its private excursion service. MR should not be able to take Meyer's property because the primary purpose of the line will still remain the promotion of MR's private excursion service, and not a public railroad purpose.

The trial court was correct when it stated in its decision that "it can easily find that MR's primary objective is to obtain the property to serve the excursion service." (CT 20141.)

B. MR Evaluated The Potential Project Sites With No Formal Plan In Place And The Evaluation Of The Various Project Sites Was Made For A Private Purpose.

The evidence established that MR's plan for the project when it

analyzed various potential project sites in accordance with Code of Civil Procedure § 1240.030 was for the construction of a train station, maintenance facility, *campground, pool,* and *recreational vehicle camping area*. (CT 1660, 1666-1668, 1685-1690; RT 456:5-457:28.) Just before trial MR subsequently changed its site plan to a construct transload facility for freight and a maintenance yard. (CT 1156, 1660, 1666-1668, 1685-1690; RT 266:21-23, 513:13-19, 456:5-457:28.) This change of plan came well after MR had already evaluated all of the potential project sites based upon its original "campground plan." (CT 1156, 1660, 1666-1668, 1685-1690; RT 266:21-23, 513:13-19, 456:5-457:28.)

"The power of eminent domain may be exercised to acquire property for a proposed project "only if the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury." (Code of Civil Procedure § 1240.030(b).) "The comparative word 'most,' 'greatest,' and 'least' are comparative terms that cannot be applied in the abstract". (*SFFP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal. App. 4th 452, 469-470.) "This limitation which involves essentially a comparison between two or more sites, has also been described as '*the necessity for adopting a particular plan* for a given public improvement.'" (*Id.* at 470, italics added.)

MR's evaluation of the potential project sites was made without a formal plan, and it was based upon a plan for a campground and a pool. (CT 1660, 1666-1668, 1685-1690; RT 267:2-16, 456:5-457:28.) The evaluation of the sites violates the requirements under Code of Civil Procedure § 1240.030 because it focused on sites that were conducive to developing a private campground rather than sites to be developed for railroad purposes. The fact that MR subsequently changed its site plan to provide for freight loading facilities does not rectify its failure to comply with Code of Civil Procedure § 1240.030.

MR's evaluation of potential sites without a formal plan and for a private purpose contradicts the foundational requirements of eminent domain law. Additionally, if a project plan can be completely changed right before trial without reevaluating the potential sites in accordance with Code of Civil Procedure § 1240.030, then one must ask, what is the Legislature's purpose for these statutory requirements?

II. Statement Of Facts.

A. MR's Operation Of The Line.

MR is a privately held California corporation that was formed in 2004. (CT 1318.) MR purchased the railroad line out of bankruptcy in 2004, and it is commonly referred to as the California Western Railroad ("CWR")

or the "Skunk Train." (RT 61:20-62:3, 63:3-7, 64:14-65:6, 154: 8-20; CT 1341.) MR operates the CWR as a tourist excursion train for sightseeing purposes. (RT 126:25-127:15, 322:13-16, 328:21-24, 525:10-17.)

In 2015 there was a landslide in tunnel number 1 that prevents trains from running the full length of the line between Willits and Fort Bragg. (RT 95:19-101:4, 344:11-17.) The sightseeing train leaves the station in Willits and heads west approximately 7.5 miles on the line and then returns to the Willits station. (RT 326:21-327:13, 525:10-17, 525:10-17.) MR also operates a different sightseeing train that leaves a station in Fort Bragg and travels to the east 3.5 miles on the line and then returns to Fort Bragg. (RT 319:12-26.) The trains respectively leaving Willits and Fort Bragg return the passengers to their original departing location when the ride is completed, these trains do not actually transport passengers to a different location. (RT 324:6-17, 327:3-14.)

MR offers passenger round trip commute services to a limited number of families that own property on the line and their guests, and MR does not offer commute services to the public at large. (RT 916:12-918:2; CT 1233-1256.)

MR has freight tariffs posted for the line from Willits to Fort Bragg, even though a train cannot travel from Willits to Fort Bragg, or vice versa,

due to the tunnel collapse. (RT 95:19-101:4, 344:11-17, 919:28-920:27; CT 959-966.) The tariffs also reference the costs for interchanging cars from other lines, which also cannot occur due the 1998 safety moratorium on the only adjoining line. (RT 95:19-101:4, 344:11-17, 919:28-920:27; CT 959-966.)

B. The 2020 Site Plan Was For A Private Purpose

The plan for the project when this action was filed consisted of MR taking the Property for the purpose of constructing a train station, maintenance facility, *campground, pool,* and *recreational vehicle camping area*. (CT 1660, 1666-1668, 1685-1690; RT 456:5-457:28.)

MR's Chief Executive Officer, Robert Pinoli ("Pinoli") testified that in 2020 MR did not have a plan in place at the time it decided to move forward with taking the Meyer Property by eminent domain. (RT 267:2-16.) The only conceptual preliminary site plan for the Meyer Property that was prepared as of the date of the filing of the complaint in December 22, 2020, reflected the development of a station/store, long-term RV rental park, a primary campground, and parking ("2020 Site Plan"). (RT 463:13-25, CT 14,1660.)

Pinoli testified that the operation of a campground and RV park is not consistent with the operation of a railroad. (RT 518:13-15.)

C. MR Completely Changed Site Plan After This Litigation Was Filed.

MR created a new preliminary site plan for the Property in June 2022. (RT 265:27-266:23; CT 1156.) This new plan was prepared 18 months after MR's complaint was filed in this action and only about two months before the trial began ("2022 Site Plan"). (RT 265:27-266:23, 513:16-19; CT 1156.) The 2022 Site Plan completely removed the campground, RV park, and pool, and the new plan provided for the construction of a "maintenance facility and yard," "rail transload facility," "natural habitat preserve," "depot and offices," and "parking." (CT 1156.)

The 2022 Plan depicts the train maintenance facility right next to two residential houses, one of which is owned by Meyer. (CT 1156; RT 516:14-19.) Pinoli admitted that the idling and operation of trains is loud, but also testified that the maintenance facility and the operation of such trains directly behind the residences would have no real impact on the residents. (CT 1156; RT 517:8-24.) The trial court stated that new plan "was done presumably to satisfy the requirements of the statutes." (CT 2042.) Additionally, the trial court found that "Pinoli's testimony that there would be not real impact on the residents is simply insufficient." (CT 2042.)

D. MR's Evaluation Of The Properties For The Project.

MR's evaluation of the Meyer Property and the other potential

property sites for the project were thoroughly discussed in emails by MR's management in 2020 over the course of seven months. (RT 443:19-444:1, CT 1765-1789; CT 1765-1794.)

MR began evaluating the Meyer Property for the project on May 14, 2020. (CT 1765-1789.) By June 26, 2020, the two main sites that MR was evaluating for the project were the Meyer Property and the nearby KOA campground property. (RT 435:13-21, CT 1787.) The major focus of the evaluation of the KOA campground property and the Meyer Property was whether each could be used as a campground/RV park, and the financial return and return on investment. (RT 448:13-449:10, CT 1686-1687, 1779-1780.)

On July 19, 2020, Mike Hart ("Hart"), who is Pinoli's boss, personally sent out an email that provided an overview of the financial evaluation of the KOA campground property and Meyer Property. (RT 456:5-14, CT 1686-1687, 1779-1780.) Hart's July 19th email with the conceptual plan included the following evaluation of the two sites:

> "The math: So if KOA owners would sell for $4M rather than $5M they indicated with Robert, we would have to adjust the Meyer property to match in value. We would deduct the $400,000 to purchase. We would then have $3,600,000 to recreate the same power, water, sewer and roads infrastructure etc. IF WE WANTED

> TO RUN THE RV PARK! To build 93 spaces on average would cost just under $2M based on average RV park costs. We would then have $1.6 M to cover the cost of a new pool, amenities, landscaping, main road, etc. . . . My opinion is that they Meyer property is a HUGE advantage for us as we would end up with new infrastructure designed in a way that helps our operation for the same or potentially lower cost." (CT 1687.)

At the time that Hart was making the plan and coming up with the improvements he was not evaluating the impact that the project may have on Meyer, or whether or not the use of the Property was for the greatest public good or railroad purposes. (RT 459:18-460:14.) The main focus was how to efficiently grow the organization. (RT 460:10-17.)

On July 21, 2020, which was just two days after Hart's evaluation of the KOA campground property and Meyer Property and the circulation of a conceptual map, MR began evaluating whether MR should engage an attorney to potentially take the Property by eminent domain. (RT 470:12-472:25, CT 1771-1772.) Hart referenced in an email that this could be a "test case," in which MR could test whether it could in fact take property through the eminent domain process. (RT 470:12-472:25, CT 1771-1772.) On August 19, 2020, Hart spoke with John Meyer regarding the project, and the next day MR decided to obtain an appraisal of the Meyer Property and engage an eminent domain attorney. (RT 473:13-474:5, CT 1765-1766,

1770.)

III. Questions Presented

1. Is the Meyer Property Going To Be Taken For A Public Use?

2. Did MR Properly Evaluate The Project In Accordance With Code of Civil Procedure § 1240.030?

3. Does Substantial Evidence Support The Court's Decision?

IV. The Standard of Review

In applying the substantial evidence standard, the appellate court generally views the evidence in the light most favorable to respondent. (*Turman v. Turning Point, Inc.* (2010) 191 Cal. App. 4th 53, 58.) It accepts respondent's evidence as true, resolves all conflicts in the evidence in respondent's favor, and draws all favorable interferences that reasonably may be drawn. (*Estate of Leslie* (1984) 37 Cal. 3d 186, 201.) Further, the appellate court cannot reweigh the evidence. (*In re E. B.* (2010) 184 Cal. App. 4th 568, 578.) Even if the court believes the evidence to be in appellants' favor, it cannot reverse the judgment on that basis. (*Albaugh v. Mount Shasta Power Corp.* (1937) 9 Cal. 2d 751, 773.)

V. The Trial Court Decision As It Relates To The Eminent Domain Requirements.

The trial court's decision stated the following in relation to the eminent domain requirements:

"Assuming for purposes of this opinion that MR has public utility status, it still needs to meet the statutory requirements of the eminent domain law. As stated above, a railroad company is entitled to condemn property that is necessary for the construction and maintenance of its railroad. (See Public Util. Code §611). '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.' CCP§1240.030. The power to take property under eminent domain is not unlimited. Such power '[m]ay be exercised to acquire property only for public use.' *(CCP §1240.010; City of Oakland v. Oakland Raiders (1982) 32 Cal. 3d 60,69.)* 'The statutory authorization to utilize the power of eminent domain for a given 'use, purpose, object, or function' constitutes a legislative declaration that the exercise is a 'public use.'(*City of Oakland.*)

Acquisition of the 20-acre site would enhance the operations of MR's excursion service that admittedly does not fall within the definition of transportation. MR cannot exercise the power of eminent domain to carry on its private business activities. In *City & County of San Francisco v. Ross (1955) 44 Cal 2d 52,54*, the City sought to acquire by eminent domain a site that would subsequently be leased to private individuals

who were planning to build and operate a parking structure and other facilities including private commercial retail. The court stated, '[w]hile it might be argued in the present case that the percentage area to be used for other commercial activity is small enough to be merely an incident to the parking activity and not in itself enough to invalidate the whole plan, nevertheless it aids in characterizing the whole operation as a private one for private gain.' 'The Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need.' *(Council of San Benito County Governments v. Hollister Inn, Inc. (2012) 209 Cal. App. 4th 473,494 (citations omitted.)* As stated previously, the income generated from the Skunk Train excursion service is 90% of MR's revenue. The court can easily find that MR's primary objective is to obtain the property to serve the excursion service. No explanation was offered to distinguish the private operations from the "proposed" freight and passenger enhancements.

Notwithstanding the above, MR's proposed use of the property conflicts with the statutory requirements of the public use and least private injury. At trial, approximately seven months of internal MR emails were admitted into evidence. Pinoli concluded the emails revealed that the original conception of the MR project reflected a train station, campground, and RV park. He also testified that his boss was known to brainstorm ideas and concepts for acquisition and use

of property acquired by MR, but those ideas were not always fully vetted. The only conceptual drawing for the Meyer property prepared by MR at the time it filed its complaint however, depicted a station/store, campground, and long-term RV rental park. It wasn't until June 2022, approximately 18 months after the eminent domain action was filed that a preliminary site plan was prepared. The site plan offered at trial is one that generally depicts maintenance/repair facilities, a yard, vehicle parking, a rail transloading facility, dept offices, a platform and a natural habitat preserve. The site plan is considerably different from the original conceptual drawing.

Pinoli admitted that the use of the property for a private campground was not consistent with the operation of a railroad and could not be the basis for eminent domain. Instead, he said that the current purpose is to develop the necessary maintenance and depot facilities on the Willits side of the line and to create a transload facility. The transload facility would not be operational or even necessary until 'Tunnel No. 1' was usable. In addition to the original drawing utilized at the time the case was filed, the site drawing was the only evidence offered to address the use of the property. There was no evidence of an actual plan for development or funding for the project. '[A]n adequate project description is essential to the three findings of necessity that are required to be made in all condemnation cases. Only by ascertaining what the project is can the governing body made those findings.' *(City of Stockton v. Marina Towers LLC (2009)171 Cal. App. 4th 93,113.)* While the plan in the City of Stockton case was severely lacking in detail, which arguably

differs from the instant case, the principle that a property owner is entitled to know what is being planned for the land remains the same. The court questions the credibility of the late hour evidence of a site drawing presented in the instant case. Particularly so, when a transload facility was added with MR's knowledge that freight transportation could not happen until "Tunnel No. 1" was available. No evidence was presented to establish whether or when the tunnel would be available for use.

The credibility of the testimony is also questionable when the initial plan prepared at the time the complaint was filed included a campground. Following the initial plan, in preparation for trial, MR develops a new site plan that eliminates the initial concept. This was done presumably to satisfy the requirements of the statute. Also lacking is an analysis from MR as to the impact the maintenance and transload facility would have on the residents (including Meyer) living directly adjacent to the proposed 20 acre site. The court finds that Pinoli's testimony that there would be no real impact on the residents is simply insufficient. Without such information the court is unable to determine if the project would impose a greater injury to the residents. The court finds that MR did not meet its burden to establish that the current site plan supports a project that is planned or located in the matter that will be most compatible with the greatest public good and least private injury which is required by statute and case law. *(See CCP §1240.030 and SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal. App. 4th 452.)" (CT 2040-2042.)

VI. The Appellate Court's Decision As It Relates To The Eminent Domain Requirements.

The Appellate Court's decision stated the following as it relates to the eminent domain requirements:

> "The trial court implicitly found Meyer had met his burden of proof, ruling that because 'the income generated from the Skunk Train excursion service is 90% [Mendocino Railway]'s revenue' it could 'easily find that [Mendocino Railway]'s primary objective is to obtain property to serve the excursion service.' Based on this finding, the court concluded Mendocino Railway 'cannot exercise the power of eminent domain to carry on its private business activities.' Although the court began this section by '[a]ssuming' Mendocino Railway 'has public utility status,' for the purpose of its eminent domain analysis, this finding is based on the same rationale for its determination that Mendocino Railway is not a public utility– i.e. that any public use is incidental to its private activities.
>
> This interpretation is contrary to the established law. It is the character of the use, not its extent, which determines whether it is public. (*Laguna Drainage Dist. v. Charles Martin Co.* (1904) 144 Cal 209, 217-218; *People ex rel. Department of Public Works v. Lagiss* (1963) 223 Cal. App. 2d 23, 38.) In other words, it is not necessary that a significant portion of the community enjoy the use. (*Laguna Drainage Dist. v. Charles Martin Co.*, at pp. 217-218.) Rather the law simply requires that all citizens in a given community, who are capable of enjoying the use, have an equal right to do so. (*San Joaquin & Kings*

River Canal & Irrigation Co. v. Stevenson (1912) 164 Cal. 221, 229.) The intended use must be the intended object (*Lorenz v. Jacob* (1883) 63 Cal. 73, 74), but incidental private benefit does not disqualify a use as a public use. (*Redevelopment Agency v. Rados Bros.* (2001) 95 Cal. App. 4th 309, 315.) Stated differently, the primary purpose cannot be to promote private enterprise, or to accomplish a purpose the primary nature of which is not public under the pretext that it is. (See, e.g. *County of San Mateo v. Coburn* (1900) 130 Cal. 631, 634 [where 'it is clear that it is for a private purpose, the legislative declaration will be of no avail']; [*City & County of*] *San Francisco v. Ross* (1955) 44 Cal. 2d 52, 59 ['percentage area to be used for other commercial activity is small enough to be merely an incident to the parking activity and not in itself enough to invalidate the whole plan, nevertheless it aids in characterizes the whole operation as a private one for private gain'].)" (Appellate Decision p. 26-27.)

This Court's decision goes on to state:

"Assuming, but not holding, that the 'late hour evidence of a site plan' was somewhat dubious, and the project description somewhat general in nature, it does not follow that the property sought to be condemned may not be put to a public use. Beyond an outdated conceptual drawing and mere speculation about Mendocino Railway's intentions, there is nothing in the record to force the conclusion that the principal, if not the predominant use of the property sought to be acquired will be private and not public. Nor is there anything to require

us to conclude that because Mendocino Railway has historically derived 90% of its income from its private excursion services that the property sought is merely incidental to the principal public use and is in fact private. (See, e.g. *Stratford Irr. Dist. v. Empire Water Co.* (1943) 58 Cal. App. 2d 616, 621-622.) Mendocino Railway's stated intention is to acquire the property to assist in commuter and freight services, by improving its facilities. Under such circumstances, the finding of public use has sufficient support in the declaration of the Legislature (see Pub. Util. Code, § 611), which is not overcome by the fact that the acquisition may also incidentally benefit Mendocino Railway's private business activities. Should the proposed development violate any provisions of the law of the Constitution by furthering a purely private endeavor– i.e., campgrounds, retail space, etc.– Meyer's remedy is an action attacking the future development and not in an attempt to defeat a proper acquisition of property for a valid purpose. (See *County of Los Angeles v. Anthony, supra,* 224 Cal. App. 2d at p. 107 . . . .)

Location

'Proper location is based on two factors: public good and private injury. Accordingly, the condemnor's choice is correct and proper unless another site would involve an equal or greater public good and a lesser private injury. A lesser public good can never be counter-balanced by a lesser private injury to equal a more proper location. [Citation.] Nor can equal public good and equal private injury combine to make the condemnor's choice an

improper location.' (*SFFP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal. App. 4th 452, 470-471, fn. omitted.)

This limitation essentially involves a comparison of two or more sites. (See *San Diego Gas & Elec. Co. v. Lux Land Co.* (1961) 194 Cal. App. 2d 472, 477-478.) The evidence at trial reflects Mendocino undertook an extensive search, investigation, and analyses of several potentially suitable locations for the project. In its search, Mendocino Railway considered various factors and site characteristics required for its project, including, without limitation, size, shape, location, and topography. Generally, the site needs to be relatively level, large enough to accommodate the construction or rail facilities suitable for ongoing and future operations, and located along Mendocino Railway's existing rail line.

After considering six other potential sites, Mendocino Railway determined that the subject property was the only site that met all key site requirements for the project. The subject property is a relatively level parcel of approximately 20 acres located along Mendocino Railway's main rail line near Willits, with good accessibility to a highway. Moreover, the subject property is undeveloped and the property owner, Meyer, at least initially, indicated a willingness to sell.

The trial court nevertheless implicitly concluded this uncontradicted evidence failed because Mendocino Railway presented no analysis regarding the impact the project would have on residents living directly adjacent to the property. It was certainly well within the court's province to disregard Pinoli's

testimony that there would be no real impact on the residents. (See *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal. 3d 374, 396.) We do not purport to second-guess this decision or reweigh the evidence. (*Washington Mutual Bank v. Blechman* (2007) 157 Cal. App. 4th 662, 670.) But whether the facts, when construed most favorably in Meyer's favor, are legally sufficient to establish an unlawful taking, is a question of law we review de novo. (See *R.D. v. P.M.* (2011) 202 Cal. App. 4th 181, 188 [whether facts, when construed most favorably to the prevailing party are legally sufficient to constitute civil harassment reviewed de novo]; *DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal. 4th 864, 890 [reviewing court independently examines whether facts come within 1st Amend.]; *Smith v. Selma Comm. Hosp.* (2008) 164 Cal. App. 4th 1478, 151 [existence or nonexistence of substantial evidence supporting jury instruction is question of law].)

Here the record reflects Mendocino Railway compared numerous locations and concluded Meyer's property was the most suitable. In other words, the selection of the property was proper because there was no other site with an equal or greater public good. (*SFFP v. Burlington Norther & Santa Fe Ry. Co.*, *supra*, 121 Cal. App. 4th att pp. 470-471, fn. omitted.)

Necessity of Property

Finally, '[t]he property sought to be acquired' must be 'necessary for the project." (Code of Civ. Proc., § 1240.030, sub. (c).) 'This aspect of necessity includes the suitability and usefulness of the property for the public use. [(*See City of*

Hawthorne v. Peebles [(1959)] 166 Cal. App. 2d 758, 763 ('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') . . . Thus, evidence on te aspect of necessity covered by subdivision (c) is limited to evidence showing whether the particular property will be suitable and desirable for the construction and use of the proposed public project.' (Cal. Law. Revision Com. Com., 19 West's Ann. Code Civ. Proc. (2025 ed.) foll. § 1240.030, p. 322.)

As discussed in the preceding section, the trial testimony established that there are several key site requirements for construction of the project including that the property be approximately 20 acres in size, relatively level, located along Mendocino's rail line, near the City of Willits, and adjacent to a highway. Meyer's property is the only property identified by Mendocino Railway as having these features and being suitable for the Project.

Accordingly, we conclude Mendocino Railway met its burden of establishing by a preponderance of the evidence that it has complied with the statutory requirements for eminent domain."

(Appellate Decision p. 27-31.)

VII. Argument

A. The Primary Purpose Of This Taking Will Be To Promote And Benefit MR's Private Excursion Enterprise.

While the eminent domain power is broad, it is not unlimited.

"The power of eminent domain may be exercised to acquire property

only for a public use." (Code of Civil Procedure § 1240.010; *City of Oakland v. Oakland Raiders, supra,* at 69.) "The statutory authorization to utilize the power of eminent domain for a given 'use, purpose, object, or function' constitutes a legislative declaration that the exercise is a 'public use.'" (*City of Oakland v. Oakland Raiders, supra,* at 69.)

The question as to whether the land was to be devoted to a public use, as distinguished from private purposes, or to accomplish some purpose which is not public in character, is a proper issue for judicial determination. (*Id.*; *Dept. Of Public Works v. Largiss* (1963) 223 Cal. App. 2d 23, 39.)

"A railroad corporation may condemn any property *necessary for the construction and maintenance of its railroad.*" (Public Util. Code § 611, italics added.) The Law Revision Commission Comments for Public Utilities Code § 611, state that this statute "would not, however, permit condemnation by a railroad corporation of land to be used for example, as an industrial park." Similarly, it is reasonable to assume, that section 611 would not permit the condemnation of land by a railroad corporation for the construction of a private campground, RV park, or for a private excursion service.

In *City & County of San Francisco v. Ross* (1955) 44 Cal 2d 52, 54 ("*Ross*"), the City of San Francisco sought to acquire by eminent domain a site that would subsequently be leased to private individuals who would build a parking structure in accordance with the city's specifications and operate parking and other facilities. The city intended to allow a portion of the ground floor frontage of the proposed building to be leased and occupied by retail stores. The total floor space to be occupied by such retail commercial activity was estimated by the city to be no more than four percent (4%) of the building. (*Id.*, at 58-59.)

In *Ross* it was argued that "there is a clear taking of private property for private purposes and [it is] so interwoven with an otherwise questionable exercise of eminent domain as to characterize the whole taking as one without authority." (*Id.*, at 59.) The court in *Ross* concluded that the "Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need." (*Id; Council of San Benito County Governments v. Hollister Inn, Inc.* (2012) 209 Cal. App. 4th 473, 494.)

Pinoli testified that MR did not perform common carrier services between 2004 and 2022. (RT 866:6-11.) Pinoli also testified that in 2020 approximately 90 percent of MR's revenue was from excursion services and the remaining 10% of revenue was obtained from leases and easements, and he refused to discuss MR's revenue streams for other years. (RT 926:26-927:2, 928:18-929:1.)

As stated in this Court's decision, "[t]he primary purpose cannot be to promote private enterprise, or to accomplish a purpose the primary nature of which is not public under the pretext that it is. (See, e.g. *County of San Mateo v. Coburn* (1900) 130 Cal 631, 634." (Appellate Decision, p. 26.)

The evidence established that MR is operating for private gain, and as such, the taking of the Property for the benefit of MR's private excursion services, leases, and easements, preclude MR from taking the Property by eminent domain.

MR presently hauls a very limited amount of freight. (RT 349:6-11.) MR has freight tariffs posted for the line from Willits to Fort Bragg, even though a train cannot travel from Willits to Fort Bragg, or vice versa, due to a 2015 tunnel collapse. (RT 95:19-101:4, 344:11-17, 919:28-920:27.)

MR's alleged plan is to use its line for the transportation of freight, even though MR has never interchanged a freight train off its line onto the only adjoining railroad line. (RT 43:23-43, 336:2-7, 706:13-22.) There has been no interchanging of freight cars between the MR line and the adjoining NCRA line for 27 years because the Federal Railroad Administration has placed a moratorium on using the NCRA line due to track safety issues. (RT 336:19-26.)

MR offers passenger round trip commute services to a limited number of families with property on the line and their guests, and MR does not offer commute services to the public at large. (RT 916:12-918:2.) Due to the tunnel collapse, MR also cannot take commuters between Willits and Fort Bragg. (RT 95:19-101:4, 344:11-17, 919:28-920:27.)

The taking of the Property to start a freight operation and/or commuter passenger service on its isolated 40 mile long line makes no financial or logistical sense. MR cannot transport freight or passengers on full length of its own line, and it also cannot transport freight or passengers on the adjoining NCRA rail line.(RT 95:19-101:4, 336:19-26, 344:11-17, 919:28-920:27.)

There are no communities to transport passengers or freight to, other than Willits and Fort Bragg, and MR cannot transport anything

between these two towns. (RT 95:19-101:4, 336:19-26, 344:11-17, 919:28-920:27, CT: 1756.) MR is in essence, a freight and commuter passenger line to nowhere. (CT: 1756.) Even if MR is able to ever repair the tunnel, the freight and passenger service will pale in comparison to MR's private excursion service, due to MR's high freight tariffs and its short and isolated line operating between two small towns. (RT 95:19-101:4, 336:19-26, 344:11-17, 919:28-920:27, 919:28-921:26; CT: 1756.)

Given these limiting factors, it is apparent that the transportation of freight and passengers will not be significant and MR's established private excursion service will remain the primary use made of the line. MR should not be able to take Meyer's property because it will be exercising the power of eminent domain to secure to private activities the means to carry on its private business whose primary objective and purpose is private gain and not public need, in violation of the Constitution, the holding in *Ross supra*, at 59, and *Council of San Benito County Governments v. Hollister Inn, Inc.* (2012) 209 Cal. App. 4th 473, 494.

The trial court was correct when it stated in its decision that "it can easily find that MR's primary objective is to obtain the property to serve the excursion service." (CT 20141.)

B. Mendocino Railway's Evaluation Of Potential Sites For The Project Was Not In Compliance With Code of Civil Procedure § 1240.030.

"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." (Code of Civil Procedure § 1240.030.)

"[A]n *adequate project description* is essential to the three findings of necessity that are required to be made in all condemnation cases. Only by ascertaining what the project is can the governing body make those findings." (*City of Stockton v. Marina Towers LLC* (2009) 171 Cal. App. 4th 93, 113; *Cincinnati v. Vester* (1930) 281 U.S. 439, 448, italics added.) "[A] public agency has no right to condemn in the absence of evidence to support the findings or necessity, and such evidence cannot exist without a sufficient project description." (*City of Stockton v. Marina Towers, supra,* at 115; *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal. App. 3d 1121, 1129.)

In *SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal. App. 4th 452, 469-470 ("*SFPP*"), the court analyzed the meaning of Code of Civil Procedure § 1240.030(b), which requires that the project be "planned or located in the manner that will be most compatible with the greatest public good and the least private injury." "This limitation which involves essentially a comparison between two or more sites, has also been described as 'the necessity for adopting a *particular plan* for a given public improvement.'" (*Id.* at 470, italics added.)

A "finder of fact inquiring into the greatest public good and least private injury should consider all the facts and circumstances." (*Id.* at 473.) The *SFPP* court stated that "[t]he words 'most', 'greatest' and 'least' are comparative terms that relate to both the plans and the location of the project." (*Id.* at 469.) The *SFPP* court explained that these "comparative terms cannot be applied in the abstract, instead they unambiguously show the Legislature's intent that the condemner's proposed location be compared with other potential locations to see how those other locations compare in effect on the public good and private injury resulting project." (*Id.* at 470; *People v. Chevalier* (1959) 52 Cal. 2d 299, 307.)

There was no specific description or plans for the project when MR began the eminent domain process, and no plan was ever provided to Meyer. (RT 505:27-508:8.) The only conceptual drawing in place for the Meyer Property as of the date of filing of the complaint depicted a *station/store*, *campground,* and *long-term RV rental park.* (CT 1660, 1666-1668, 1685-1690; RT 456:5-457:28.)

MR's evaluation of the potential sites was based upon whether or not the different sites were conducive to camping, RV vehicle parking, and use as an excursion service, which are all private uses. (CT 1660, 1666-1668, 1685-1690; RT 455:13-458:18.) Such private uses are not compatible with properly evaluating whether alternate locations are better, that is, compatible with the greatest public good and the least private injury.

MR developed a new site plan immediately before the trial in June 2022, and it planned for the construction of a freight transloading facility, and a train maintenance facility right next to two residential houses, one of which is owned by Meyer. (CT 1156; RT 516:14-19.) The trial court found that a site plan with a maintenance facility right next to two residences is not consistent with planning the project for the greatest public good and the least private injury. (CT 1156, 2042.)

MR's evaluation of the potential project sites without a formal plan and based upon a plan for a campsites and a pool violate the requirements under Code of Civil Procedure § 1240.030 because the evaluation focused on the sites and issues that were conducive to developing a private campground rather than developing the site for railroad purposes. The fact that MR subsequently changed its site plan to provide for freight loading facilities does not rectify its eminent domain evaluation failures.

The evaluation of potential sites for a private purpose contradicts the foundational requirements of eminent domain law. If a project plan can be completely changed right before trial without reevaluating the potential sites in accordance with Code of Civil Procedure § 1240.030, then there really is no reason for the Legislature to require a plan or such an evaluation at the outset.

VIII. Conclusion

MR did not meet its burden of proof, and Meyer's objections to that taking of the Property are justified. There is substantial evidence in the record supporting the court's decision, and we request that the court reconsider its decision and affirm the trial court's judgment.

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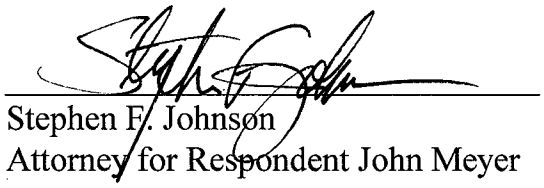
DATED: December 23, 2025.

MANNON, KING, JOHNSON & WIPF, LLP



Stephen F. Johnson
Attorney for Respondent John Meyer

CERTIFICATE OF COMPLIANCE

I, Stephen F. Johnson, hereby certify that the foregoing Respondent's Brief is proportionally spaced, has typeface of 13 points or more and contains 6,800 words.

DATED: December 23, 2025.

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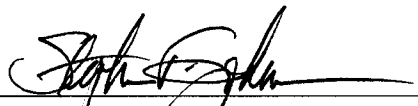

Stephen F. Johnson
Attorney for Respondent John Meyer