

Memorandum 70-80

Subject: Study 36.30 - Condemnation (The Right to Take--Substitute Condemnation)

At the July 1970 meeting, the Commission directed the staff to make certain revisions in the tentative statute relating to takings for substitute condemnation. The staff has incorporated these changes into the statutory sections attached to this memorandum. (Exhibit I--pink.) In addition, we have substantially revised the Comments to most of these sections in an effort to make their application and effect more clear. At the September meeting, we expect the Commission will wish to review this topic generally, and we hope that tentative approval can be secured for these redrafted sections. (For the convenience of the Commissioners, we have attached to their memoranda copies of a law review note--Note, Substitute Condemnation, 54 Cal. L. Rev. 1097 (1966)--previously furnished for background purposes. See Memoranda 70-55, 69-61.)

Section 410. This definitional section is identical to that previously tentatively approved by the Commission. We have made minor, non-substantive changes in the Comment.

Section 411. We have added to subdivision (b) the requirement that the petition for condemnation as well as the resolution of necessity refer specifically to this section where the authority provided by this section is being exercised. In addition, we have substantially revised the Comment to further explain the effect of the section, and we have added a Note regarding the policy and intent behind the provision relating to the effect of the resolution of necessity.

Section 412. This section has been substantially revised. Subdivisions (c), (d), and (e) are completely new. Subdivision (c) requires the owner of property to be exchanged to raise any defense to the taking by preliminary objection. Subdivision (c) also permits the court upon motion to join the owner of the necessary property as a party to the proceeding. Subdivision (d) makes clear that the condemnor has the burden of proof to justify the taking under this section. Finally, subdivision (e) provides reimbursement to the owner of the property to be exchanged of all litigation expenses connected with the taking of such property where he is successful in defeating such taking. The latter provision should prove to be a substantial deterrent to exercise of the authority granted here. We have also substantially revised the Comment both in connection with these substantive changes and also to make clear that the authority granted is a limited one to be exercised only in extraordinary circumstances. (Also, in this regard, we changed the wording in paragraph (1) of subdivision (a) to state that "justice requires" this action, rather than "it is reasonable" to so compensate the owner of the necessary property.

Section 413. This section was previously tentatively approved and is unchanged.

Section 415. We have made minor changes in the Comment to this section. We have also deleted the former Note to this section which indicated that the policy expressed here was subject to further review. At the September meeting, we hope that this section will be considered in connection with Section 412 and a tentative decision reached with respect to the policy stated.

Respectfully submitted,

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EXHIBIT I

COMPREHENSIVE STATUTE § 410

Tentatively approved June 1970
Revised July 1970

The Right to Take

CHAPTER 6. SUBSTITUTE CONDEMNATION

§ 410. Definitions

410. As used in this chapter:

(a) "Necessary property" means property to be used for a public use for which the public entity is authorized to acquire property by eminent domain.

(b) "Property to be exchanged" means property to be exchanged for necessary property.

Comment. Section 410 provides definitions useful in applying the "substitute condemnation" provisions contained in this chapter. Briefly stated, "substitute condemnation" involves the following type of situation: C decides to condemn O₁'s real property (the "necessary property"). C and O₁ agree that O₁ shall be compensated in whole or in part by other real property or an interest in real property (the "property to be exchanged") rather than money. C condemns O₂'s real property (the "property to be exchanged") to compensate O₁. See generally Note, Substitute Condemnation, 54 Cal. L. Rev. 1097 (1966). The C, O₁, O₂ model will be used throughout this chapter. See Sections 411 and 412 and Comments thereto.

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§ 411. Condemnation of property to be exchanged for property already devoted to public use

411. (a) A public entity may acquire by eminent domain property to be exchanged if all of the following are established:

(1) The person with whom the property is to be exchanged has agreed in writing to such exchange.

(2) The necessary property is devoted to or held for some public use and the property to be exchanged will be devoted to or held for the same public use.

(3) The person with whom the property is to be exchanged is authorized to exercise the power of eminent domain to acquire such property for such use.

(b) The resolution, ordinance, or declaration authorizing the taking of property under this section and the petition for condemnation filed pursuant to such authorization shall specifically refer to this section and shall recite a determination by the officer or body adopting the resolution, ordinance, or declaration that the property is necessary for the purpose specified in this section. The determination in the resolution, ordinance, or declaration that the taking of the property to be exchanged is necessary is conclusive.

Tentatively approved June 1970

Comment. Subdivision (a) of Section 411 authorizes C to condemn O₂'s property (and convey it to O₁) where O₁ has agreed in writing to such exchange, and O₁ could itself have condemned the property to be exchanged. In this situation, O₁ has the power of condemnation to accomplish the same end so that the authority provided here is simply a shortcut to an identical result. Subdivision (a) extends the advantages of this procedure to condemnors generally. Under former law, only certain condemnors were explicitly authorized to condemn for exchange purposes. See, e.g., Sts. & Hwys. Code §§ 104(b), 104.2; People ex rel. Dept. of Public Works v. Garden Grove Farms, 231 Cal. App.2d 666, 42 Cal. Rptr. 118 (1965)(state may condemn property to be conveyed to school district in exchange for property necessary for highway right-of-way). See generally Langenau Mfg. Co. v. City of Cleveland, 159 Ohio St. 525, 112 N.E.2d 658 (1953)(relocation of railroad by municipality); Tiller v. Norfolk & W. Ry., 201 Va. 222, 110 S.E.2d 209 (1959)(relocation of state highway by railroad); Note, Substitute Condemnation, 54 Cal. L. Rev. 1097, 1099-1100 (1966).

Where O₁ does not have the power to condemn O₂'s property for the use contemplated, C must rely upon the authority granted under Section 412.

Subdivision (b) makes clear that the determination in the resolution authorizing the taking that the property to be taken is necessary for exchange purposes is conclusive. See People ex rel. Dept. of Public Works v. Garden Grove Farms, supra. See also Section 313 and Comment thereto (effect of resolution of necessity).

Note: The issue of necessity under Section 411 will be treated in the same manner as the issue of necessity in condemnation actions generally. For the most part, this means that the resolution of necessity will be conclusive as provided in subdivision (b). See also Section 313(a). However, in certain situations, e.g., condemnation outside the boundaries of the condemnor's territory, the resolution is not conclusive. See Section 313(b). The Commission intends to conform the treatment of the resolution under Section 411 to that provided generally when a final decision on this matter has been reached.

The Right to Take

§ 412. Condemnation of property to be exchanged for property not already devoted to public use

412. (a) A public entity may acquire by eminent domain property to be exchanged if all of the following are established:

(1) The owner of the necessary property has agreed in writing to the exchange and, under the circumstances of the particular case, justice requires that he be compensated in whole or in part by the property to be exchanged rather than by money.

(2) The property to be exchanged is to be exchanged for property needed for a public improvement and is in the vicinity of such improvement.

(3) Taking into account the relative hardship to both owners, it is not unjust to the owner of the property to be exchanged that his property be taken so that the owner of the necessary property may be compensated by the property to be exchanged rather than by money.

(b) The resolution, ordinance, or declaration authorizing the taking of property under this section and the petition for condemnation filed pursuant to such authorization shall specifically refer to this section and shall recite a determination by the officer or body adopting the resolution, ordinance, or declaration that the property is necessary for the purpose specified in this section.

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(c) If the owner of the property to be exchanged desires to contest the taking, he shall raise the issue in the manner provided by Section 902. Where the owner of the property to be exchanged does contest the taking, the court in its discretion upon motion of the owner of the property to be exchanged, the owner of the necessary property, or the public entity, may order the owner of the necessary property to be joined as a party plaintiff.

(d) Upon the hearing of this issue, the public entity has the burden of proof as to the facts that justify the taking of the property.

(e) If, after the hearing of this issue, the court's determination is in favor of the owner of the property to be exchanged, the taking of such property shall be deleted from the proceeding. Upon final judgment, such owner shall be awarded his recoverable costs and disbursements. Recoverable costs and disbursements include (1) all expenses reasonably and necessarily incurred in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action and (2) reasonable attorney's fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the owner's interests in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action, whether such fees were incurred for services

Tentatively approved June 1970

rendered before or after the filing of the petition for condemnation. Where the property to be exchanged is only a portion of the property sought to be taken by the condemnor from the owner of such property, costs and disbursements recoverable under this section, shall include only those recoverable costs and disbursements, or portions thereof, which would not have been incurred had the property or property interest sought to be taken after deletion of the property to be exchanged been the property or property interest originally sought to be taken. Recoverable costs and disbursements, including expenses and fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions.

Comment. Section 412 authorizes substitute condemnation where the requirements of Section 411 cannot be satisfied, but, under the circumstances, justice dictates that O₁ be compensated in land rather than money. Under former law, only certain condemnors were explicitly authorized to condemn for exchange purposes generally. See, e.g., Sts. & Hwys. Code § 104(b) (Department of Public Works); Water Code § 253(b) (Department of Water Resources). However, the right to exercise the power of eminent domain for exchange purposes probably would have been implied from the right to take property for the improvement itself in the circumstances contemplated. See Brown v. United States, 263 U.S. 78 (1923) (property acquired to relocate town displaced by reservoir); Pitznogle v. Western Md. R.R., 119 Md. 637, 87 Atl. 917 (1913)(property needed to

relocate private road). One of the more common examples of such substitute condemnation is a taking to provide access to a public road from property cut off from access by C's original acquisition. This situation is provided for specifically by Section 415. See Section 415 and the Comment thereto. However, similar situations may arise where private activities--such as a nonpublic utility, railroad serving a mining, quarrying, or logging operation or belt conveyors, or canals and ditches--are displaced by a public improvement. In the latter situation, Section 412 authorizes condemnation of O₂'s property for exchange for O₁'s property where, taking into account the relative hardship to O₁ and O₂, such action is the only fair and equitable alternative. Generally, this will occur where O₁ by the very nature of its activity or character is limited in its selection of suitable property and C, by virtue of its taking, has placed O₂ in virtually a monopoly position with respect to O₁. In this situation, it would be unfair to require O₁ to pay an exorbitant price for the property needed or alternatively to require C to compensate for such damage. However, the authority granted by Section 412 is reserved for only such extraordinary situations. In this regard, it should be noted that paragraph (3) of subdivision (a) requires the court to consider the relative hardship to both owners. O₁ is not permitted to simply pass his problem along to O₂. Condemnation is permitted under this section only where both owners will be treated fairly.

Section 412 also contains certain special procedural provisions to help ensure complete fairness where O₂ has decided to contest the taking

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Tentatively approved June 1970

and has properly raised the issue pursuant to subdivision (c). First, O₂ will receive notice that C is relying on the authority conferred by this section because subdivision (b) requires the petition for condemnation to specifically refer to this section in such cases. In contrast to the procedure under Section 411, the resolution authorizing the taking under this section is not conclusive, the necessity for the taking is justiciable, and C has the burden of proof of showing that the facts justify the taking of O₂'s property. Compare Section 412(b), (d) with Section 411(b). The court is provided the power to join O₁ as a party to the action, thereby securing proper representation of all sides. See subdivision (c). Finally, subdivision (e) permits O₂ to recover litigation expenses connected with the taking of the property to be exchanged where C is unable to justify such taking. Compare Code of Civil Procedure Section 1255a(c) (recoverable costs and disbursements upon abandonment). The risk of incurring this additional burden should aid in limiting the exercise of this power to the most deserving situations.

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§ 413. Special statutes not affected

413. This chapter does not limit any authority a public entity may have under any other provision of law to acquire property for exchange purposes nor does it limit any authority a public entity may have to acquire, other than by eminent domain, property for exchange purposes.

Note: It is intended to repeal many of the existing substitute condemnation provisions so that Chapter 6 (Substitute Condemnation) will eventually be the primary statutory authority for substitute condemnation. It is possible, however, that some special substitute condemnation provisions will be retained, and Section 413 will protect these special provisions from being impliedly repealed.

The Right to Take

§ 415. Condemnation to provide access to public road

415. (a) Where a public entity acquires property for a public use and exercises or could have exercised the right of eminent domain to acquire such property for such use, the public entity may exercise the right of eminent domain to acquire such additional property as is reasonably necessary to provide access to a public road from any property which is not acquired for such public use but which is cut off from access to a public road as a result of the acquisition by the public entity.

(b) Where a public entity has furnished, offers to furnish, or will furnish, according to a specific plan, access to property cut off from access to a public road as a result of the acquisition of property for public use by the public entity, such fact shall be taken into account in determining the damage to the property which is not acquired for public use.

Comment. Section 415 provides explicit statutory recognition of the right of a public condemnor that acquires property for a public use to condemn such additional property as is necessary to provide access to property not taken which would otherwise lack access as a result of

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the acquisition. The access road need not be one that is open to the general public. Under former law, the right to exercise the power of eminent domain for such purpose probably would have been implied from the right to take property for the public improvement itself. Such a taking would be a taking for a public use. E.g., Department of Public Works v. Farina, 29 Ill.2d 474, 194 N.E.2d 209 (1963); Pitznogle v. Western Md. R.R., 119 Md. 637, 87 Atl. 917 (1913); Luke v. Mass. Turnpike Auth., 337 Mass. 304, 149 N.E.2d 225 (1958); May v. Ohio Turnpike Comm., 172 Ohio St. 555, 178 N.E.2d 920 (1962); Tracy v. Preston, Director of Highways, 172 Ohio St. 567, 178 N.E.2d 923 (1962).

Subdivision (b) of Section 415 is included to insure that, where a condemnor provides an access road to property to replace lost access or offers to make such provision, the provision or offer will receive proper consideration as a mitigating factor in determining compensation for the damage, if any, to the property not acquired. Obviously, where the work has not been completed, there must be a specific plan which indicates not only what access will be substituted but equally important, when such access will be provided.