

#36.55

Memorandum 73-71

9/6/73

Subject: Study 36.55 - Condemnation (Arbitration--Chapter 12)

Attached to this memorandum is another copy of Chapter 12 (Arbitration) of the Eminent Domain Law. Because of the scheduling difficulties reviewed in Memorandum 73-68, the staff asks that at the September meeting the Commission approve this chapter for printing. You will recall that this chapter is substantively identical to present Chapter 3 (commencing with Section 1273.01) of Title 7 of Part 3 of the Code of Civil Procedure, which was adopted upon the recommendation of the Commission in 1970. These provisions were opposed at that time both by condemnors (who feared that it was one step towards compulsory arbitration) and by some condemnee attorneys (who believed that inadequate safeguards were provided and that property owners would be generally mistreated). The legislation was enacted despite this opposition because it was strongly supported by the California Real Estate Association and some representatives of property owners. To the best of our knowledge, the opponents' fears have not materialized, but the procedures have been little used so far. We note that the Judicial Council in its 1973 Annual Report included a study on the role of arbitration in the judicial process and has introduced, or will soon introduce, in the Legislature a proposal for compulsory arbitration of personal injury actions where the special damages claimed for medical expense and wage loss is not more than \$1,000. The study concludes that compulsory arbitration in this limited area would be desirable but would not be beneficial or practical in other areas. We would be reluctant to propose changes in the present law in the absence of further experience and accordingly ask that Chapter 12 be approved for printing at this time subject to any editorial revisions. Comments relating to the substance of these provisions both from the State Bar Committee and others can be considered before a final recommendation is prepared in 1974.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

CHAPTER 12. ARBITRATION OF COMPENSATION IN ACQUI-
SITIONS OF PROPERTY FOR PUBLIC USE

Comment. Chapter 12 (commencing with Section 1273.010) continues without substantive change the provisions of former Chapter 3 (commencing with Section 1273.01) of Title 7 of Part 3 of the Code of Civil Procedure. For background, see Recommendation Relating to Arbitration of Just Compensation, 9 Cal. L. Revision Comm'n Reports 123 (1969).

§ 1273.010. Arbitration of amount of compensation authorized

1273.010. (a) Any person authorized to acquire property for public use may enter into an agreement to arbitrate any controversy as to the compensation to be made in connection with the acquisition of the property.

(b) Where property is already appropriated to a public use, the person authorized to compromise or settle the claim arising from a taking or damaging of such property for another public use may enter into an agreement to arbitrate any controversy as to the compensation to be made in connection with such taking or damaging.

(c) For the purposes of this section, in the case of a public entity, "person" refers to the particular department, officer, commission, board, or governing body authorized to acquire property on behalf of the public entity or to compromise or settle a claim arising from the taking or damaging of the entity's property.

Comment. Section 1273.010, which supersedes former Section 1273.02, authorizes arbitration in connection with the acquisition of property for public use.

The phrase "compensation to be made in connection with the acquisition of the property" is intended to encompass any amounts that may be assessed or awarded in a condemnation proceeding and, specifically, to include severance or other damages.

The term "controversy" is defined, for purposes of arbitration, in subdivision (c) of Section 1280.

The enactment of this chapter does not imply that public entities authorized to purchase, but not to condemn, property are not authorized to agree to arbitration. See Section 1273.030(d).

This chapter contains no provisions comparable to Sections 1250.220, 1250.230, and 1260.220, which require that all persons having an interest in the property be named as defendants in the condemnation complaint, permit any unnamed interest holder to appear as a defendant in the proceeding, and provide for allocation of the award among holders of various interests. The chapter assumes that prudence on the part of the acquiring agency will assure that it agrees to arbitrate with the person who owns the interest it seeks to acquire. Also, the interests of persons other than parties to the arbitration would be unaffected by the arbitration agreement or the carrying out of that agreement. In short, an arbitration agreement and award operates only as a contract and conveyance between the parties to the particular agreement.

Subdivision (a). Subdivision (a) authorizes any acquirer of property for public use to agree to arbitrate the question of compensation and to act in accordance with the agreement. The subdivision does not imply that the public entity must have complied with the formalities (such as the adoption of a formal condemnation resolution) commonly prescribed as conditions precedent to the commencement of an eminent domain proceeding. Rather, the subdivision contemplates that the question of compensation may be submitted to arbitration whenever acquisition has been authorized in the manner required of the particular entity or agency. As the arbitration agreement ordinarily would commit the public entity to purchase the property at the amount of the award (see Section 1273.040), the agreement should be approved and executed in the same manner as a contract to purchase property. Cf. Santa Monica Unified School Dist. v. Persh, 5 Cal. App.3d 945, 85 Cal. Rptr. 463 (1970).

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Subdivision (b). Subdivision (b) authorizes "persons" who own, hold, or control public property that may be taken by eminent domain proceedings to agree to arbitrate the amount of compensation. Public property may be taken by eminent domain proceedings whether or not it is already "appropriated to a public use" (see Sections 1240.510 and 1240.610), and condemnation by one public entity of property already devoted to a public use by another public entity is a fairly common occurrence.

§ 1273.020. Expenses of arbitration

1273.020. (a) Notwithstanding Sections 1283.2 and 1284.2, the party acquiring the property shall pay all of the expenses and fees of the neutral arbitrator and the statutory fees and mileage of all witnesses subpoenaed in the arbitration, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including attorney's fees or expert witness fees or other expenses incurred by other parties for their own benefit.

(b) An agreement authorized by this chapter may require that the party acquiring the property pay reasonable attorney's fees or expert witness fees, or both, to any other party to the arbitration. If the agreement requires the payment of such fees, the amount of the fees is a matter to be determined in the arbitration proceeding unless the agreement prescribes otherwise.

(c) The party acquiring the property may pay the expenses and fees referred to in subdivisions (a) and (b) from funds available for the acquisition of the property or other funds available for the purpose.

Comment. Section 1273.020 supersedes former Section 1273.03. Subdivision (a) of Section 1273.020 is consistent with the rule applicable to eminent domain proceedings that the condemnee is entitled to recover all "taxable costs." See Section 1268.710. See also City of Oakland v. Pacific Coast Lumber & Mill Co., 172 Cal. 332, 156 P. 468 (1916); City & County of San Francisco v. Collins, 98 Cal. 259, 33 P. 56 (1893). Subdivision (a) precludes the parties by agreement from imposing costs of this nature on the party from whom the property is being acquired.

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Subdivision (b), on the other hand, does permit the parties to provide in the arbitration agreement that the party acquiring the property will pay reasonable attorney's fees or expert witness fees incurred by other parties to the agreement. Absent such provision in the agreement, the party from whom the property is being acquired must pay his own attorney's fees and expert witness fees.

§ 1273.030. Effect and enforceability of agreements

1273.030. (a) Except as specifically provided in this chapter, agreements authorized by this chapter are subject to Title 9 (commencing with Section 1280) of this part.

(b) An agreement authorized by this chapter may be made whether or not an eminent domain proceeding has been commenced to acquire the property. If an eminent domain proceeding has been commenced or is commenced, any petition or response relating to the arbitration shall be filed and determined in the eminent domain proceeding.

(c) Notwithstanding Section 1281.4, an agreement authorized by this chapter does not waive or restrict the power of any person to commence and prosecute an eminent domain proceeding, including the taking of possession prior to judgment, except that, upon motion of a party to the eminent domain proceeding, the court shall stay the determination of compensation until any petition for an order to arbitrate is determined and, if arbitration is ordered, until arbitration is had in accordance with the order.

(d) The effect and enforceability of an agreement authorized by this chapter is not defeated or impaired by contention or proof by any party to the agreement that the party acquiring the property pursuant to the agreement lacks the power or capacity to take the property by eminent domain proceedings.

(e) Notwithstanding the rules as to venue provided by Sections 1292 and 1292.2, any petition relating to arbitration authorized by this chapter shall be filed in the superior court in the county in which the property, or any portion of the property, is located.

Comment. Section 1273.030 supersedes former Section 1273.04. Although Section 1273.030 provides that arbitration under this chapter is governed by the general arbitration statute (Sections 1280-1294.2), a few minor modifications in the procedure provided by the general statute are desirable when arbitration is used to determine the compensation for property acquired for public use.

Subdivision (a). Subdivision (a) makes clear that, in general, agreements to arbitrate under this chapter are subject to the general arbitration statute. See, in particular, Sections 1285-1288.8 (enforcement of the award) and 1290-1294.2 (judicial proceedings relating to the arbitration or the award).

Subdivision (b). Subdivision (b) makes clear that it is not necessary to commence an eminent domain proceeding in order to arbitrate under this chapter and also provides a special rule concerning the court in which any petition or response relating to the arbitration shall be filed and determined when an eminent domain proceeding is pending.

Subdivision (c). Subdivision (c) makes clear that an eminent domain proceeding may be begun and prosecuted notwithstanding an agreement to arbitrate the question of compensation and that such an agreement does not impair the condemnor's power to take possession prior to judgment. There is, of course, nothing to preclude the parties from including a provision in the arbitration agreement that permits the condemnor to take possession of the property prior to the award in the arbitration proceeding. Subdivision (c) also provides for staying the determination of compensation in an eminent domain proceeding pending an agreed arbitration--a practice provided for as to other arbitrations by Section 1281.4. Subdivision (c) contemplates that, if an eminent domain proceeding is pending, the arbitration award, whether confirmed or not (see Section 1287.4), may be entered as the amount of compensation in the judgment of condemnation. See Cary v. Long, 181 Cal. 443, 184 P. 857 (1919); In re Silliman, 159 Cal. 155, 113 P. 135 (1911).

Subdivision (d). Subdivision (d) makes clear that an agreement to arbitrate and to purchase and sell at the amount of the award does not require, and is not impaired by the acquirer's lack of, power to take the property by eminent domain. Cf. People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967); Beistline v. City of San Diego, 256 F.2d 421 (9th Cir. 1958).

Subdivision (e). Subdivision (e) requires that petitions relating to arbitration be filed in the county in which the property lies. The venue provided by this subdivision corresponds with the rule as to venue for eminent domain proceedings. See Section 1250.030.

§ 1273.040. Abandonment of acquisition

1273.040. (a) Except as provided in subdivision (b), an agreement authorized by this chapter may specify the terms and conditions under which the party acquiring the property may abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding that may have been, or may be, filed. Unless the agreement provides that the acquisition may not be abandoned, the party acquiring the property may abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding at any time not later than the time for filing and serving a petition or response to vacate an arbitration award under Sections 1288 and 1288.2.

(b) If the proceeding to acquire the property is abandoned after the arbitration agreement is executed, the party from whom the property was to be acquired is entitled to recover (1) all expenses reasonably and necessarily incurred (i) in preparing for the arbitration proceeding and for any judicial proceedings in connection with the acquisition of the property, (ii) during the arbitration proceeding and during any judicial proceedings in connection with the acquisition, and (iii) in any subsequent judicial proceedings in connection with the acquisition 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 his interests in connection with the acquisition of the property. Unless the agreement otherwise provides, the amount of such expenses and fees shall be determined by arbitration in accordance with the agreement.

Comment. Subdivision (a) of Section 1273.040 permits the parties to the agreement to provide whether and under what conditions the acquirer may abandon the acquisition. If the agreement does not so provide, the party who was to have acquired the property may abandon the acquisition within the time within which a petition or response to vacate an arbitration award may be filed and served. Generally, this period is 100 days after service of the award or 10 days after service of a petition to confirm an award. See Sections 1288-1288.4. See also Coordinated Constr., Inc. v. Canoga Big "A," Inc., 238 Cal. App.2d 313, 47 Cal. Rptr. 749 (1965). Subdivision (b)--which makes clear that the right of the "condemnee" to recover certain expenses is not subject to modification under the arbitration agreement--is consistent with Section 1268.610, which prescribes the rule governing dismissal of a judicial condemnation action.

§ 1273.050. Recordation of agreements

1273.050. (a) An agreement authorized by this chapter may be acknowledged and recorded, and rerecorded, in the same manner and with the same effect as a conveyance of real property except that two years after the date the agreement is recorded, or rerecorded, the record ceases to be notice to any person for any purpose.

(b) In lieu of recording the agreement, there may be recorded a memorandum thereof, executed by the parties to the agreement, containing at least the following information: the names of the parties to the agreement, a description of the property, and a statement that an arbitration agreement affecting such property has been entered into pursuant to this chapter. Such memorandum when acknowledged and recorded, or rerecorded, in the same manner as a conveyance of real property has the same effect as if the agreement itself were recorded or rerecorded.

Comment. Section 1273.050 supersedes former Section 1273.06. Section 1273.050 permits an agreement authorized by this chapter, or a memorandum thereof, to be acknowledged and recorded to afford "constructive notice" to subsequent purchasers and lienors. Arbitration rules may provide for the escrowing of an instrument of transfer (see, e.g., Sections 1, 44, and 45 of the Eminent Domain Arbitration Rules of the American Arbitration Association (June 1, 1968)), but such an escrow would not, of itself, protect the "condemnor" against subsequent transferees. Section 1273.050 provides a means for obtaining such protection (see Civil Code Sections 1213-1220) and is calculated to make unnecessary the filing of an eminent domain proceeding for no purpose other than to obtain the effect of a lis pendens.