

36.55

8/19/70

Memorandum 70-88

Subject: Study 36.55 - Condemnation (Disposition of Existing Statutes--
Arbitration)

Attached as Exhibit I are the sections to be added to the Comprehensive Statute to continue without substantive change the provisions of the new arbitration statute enacted upon recommendation of the Commission at the 1970 session. These should be approved for inclusion in the Comprehensive Statute.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

COMPREHENSIVE STATUTE § 1300

Staff recommendation (August 1970)

DIVISION 10. ARBITRATION OF COMPENSATION IN
ACQUISITIONS OF PROPERTY FOR PUBLIC USE

Comment. Division 10 (commencing with Section 1300) 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).

§ 1300. Arbitration of amount of compensation authorized

1300. (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

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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 1300, which supersedes former Section 1273.02 of the Code of Civil Procedure, 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 of the Code of Civil Procedure.

The enactment of this division does not imply that public entities authorized to purchase, but not to condemn, property are not authorized to agree to arbitration. See Section 1302(d).

This division contains no provisions comparable to [Code of Civil Procedure Sections 1244, 1246, and 1246.1], 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 intervene in the proceeding, and provide for allocation of the award among holders of various interest. The division 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

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arbitration agreement or the carrying out of that agreement. In short, unlike the in rem character of an eminent domain proceeding, an arbitration 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 1303), 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, Cal. Rptr. (1970).

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 and 1241]), and condemnation by one public entity of property already devoted to a public use by another public entity is a fairly common occurrence.

COMPREHENSIVE STATUTE § 1301

Staff recommendation (August 1970)

§ 1301. Expenses of arbitration

1301. (a) Notwithstanding Sections 1283.2 and 1284.2 of the Code of Civil Procedure, 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 division 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 1301 supersedes former Code of Civil Procedure Section 1273.03. Subdivision (a) of Section 1301 is consistent with the rule applicable to eminent domain proceedings that the condemnee is entitled to

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recover all "taxable costs." See 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.

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.

COMPREHENSIVE STATUTE § 1302

Staff recommendation (August 1970)

§ 1302. Effect and enforceability of agreements

1302. (a) Except as specifically provided in this division, agreements authorized by this chapter are subject to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

(b) An agreement authorized by this division 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 of the Code of Civil Procedure, an agreement authorized by this division 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 division is not defeated or impaired by contention or

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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 of the Code of Civil Procedure, any petition relating to arbitration authorized by this division shall be filed in the superior court in the county in which the property, or any portion of the property, is located.

Comment. Section 1302 supersedes former Code of Civil Procedure Section 1273.04. Although Section 1302 provides that arbitration under this division is governed by the general arbitration statute (Code of Civil Procedure 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 division are subject to the general arbitration statute. See, in particular, Code of Civil Procedure Sections 1285-1288.8 (enforcement of the award) and 1290-1294.2 (judicial proceedings relating to the arbitration ~~of~~ 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 division and also provides a special rule concerning the court in which an any petition or response relating to the arbitration shall be filed and determined when an eminent domain proceeding is pending.

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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 "immediate possession." 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 Code of Civil Procedure Section 1281.4. Subdivision (c) contemplates that, if an eminent domain proceeding is pending, the arbitration award, whether confirmed or not (see Code of Civil Procedure 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

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provided by this subdivision corresponds with the rule as to venue for eminent domain proceedings. See Code of Civil Procedure Section 1243.

§ 1303. Abandonment of acquisition

1303. (a) Except as provided in subdivision (b), an agreement authorized by this division 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 of the Code of Civil Procedure.

(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

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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 1303 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 Code of Civil Procedure 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 [1255a] which prescribes the rule governing abandonment of a judicial condemnation action.

§ 1304. Recordation of agreements

1304. (a) An agreement authorized by this division 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 division. 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 1304 supersedes former Code of Civil Procedure Section 1273.06. Section 1304 permits an agreement authorized by this division, 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

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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 1304 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.

Government Code § 15854 (conforming amendment)

Sec. . Section 15854 of the Government Code is amended to read:

15854. Property shall be acquired pursuant to this part by condemnation in the manner provided for in ~~Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure~~ the Eminent Domain Code , and all money paid from any appropriation made pursuant to this part shall be expended only in accordance with a judgment in condemnation or with a verdict of the jury or determination by the trial court fixing the amount of compensation to be paid. This requirement shall not apply to any of the following:

(a) Any acquisitions from the federal government or its agencies.

(b) Any acquisitions from the University of California or other state agencies.

(c) The acquisitions of parcels of property, or lesser estates or interests therein, for less than five thousand dollars (\$5,000), unless part of an area made up of more than one parcel which in total would cost more than five thousand dollars (\$5,000) which the board by resolution exempts from this requirement.

GOVERNMENT CODE § 15854

Staff recommendation (September 1970)

(d) Any acquisition as to which the owner and the State have agreed to the price and the State Public Works Board by unanimous vote determines that such price is fair and reasonable and acquisition by condemnation is not necessary.

(e) Any acquisition as to which the owner and the State Public Works Board have agreed to arbitrate the amount of the compensation to be paid in accordance with ~~Chapter-3-(commencing-with-Section 1273.01)-of-Title-7-of-Part-3-of-the-Code-of-Civil-Procedure~~ Division 10 (commencing with Section 1300) of the Eminent Domain Code .

Comment. Section 15854 is amended to substitute references to the provisions that superseded those previously listed.

Code of Civil Procedure §§ 1273.01-1273.06 (repealed)

Sec. . Chapter 3 (commencing with Section 1273.01) of
Title 7 of Part 3 of the Code of Civil Procedure is repealed.

Comment. The repealed provisions are continued without substantive
change in the Eminent Domain Code. The disposition of the repealed sec-
tions is indicated below.

<u>Repealed Section</u>	<u>New Section</u>
1273.01 - - - - -	Unnecessary. See § 108
1273.02 - - - - -	1300
1273.03 - - - - -	1301
1273.04 - - - - -	1302
1273.05 - - - - -	1303
1273.06 - - - - -	1304