

## Memorandum 76-80

Subject: Study 63.70 - Evidence (Eminent Domain and Inverse Condemnation)

At the January 1976 meeting, the Commission commenced consideration of Memorandum 76-8, a second copy of which has been sent in order to complete consideration at the September 1976 meeting. In January, the Commission reviewed the first 17 pages of Memorandum 76-6, which discuss Evidence Code Sections 810-816, and made a number of decisions. See extract of minutes of January 1976 meeting, attached as Exhibit I (pink).

The staff plans to continue consideration of Memorandum 76-6 on page 17, beginning with Evidence Code Section 817. Any questions or problems concerning the earlier sections or the Commission's action on the earlier sections should be raised at that time. The staff has the following additional points concerning the Evidence Code provisions at this time.

§ 810. Article applies only to condemnation proceedings

In January, the Commission deferred consideration of the question whether eminent domain valuation rules should be made applicable to valuation of property in other types of actions until it had completed its review of the eminent domain provisions. Since that time, the case of In re Marriage of Folb, 53 Cal. App.3d 862, 126 Cal. Rptr. 306 (1976), discussed the issue somewhat, noting that "Neither the Family Law Act, nor the decisional law of this state relating to community-property division offers any particular guidance as to how the value of a disputed real property asset should be ascertained." 53 Cal. App.3d at 868. The court applied the eminent domain valuation rules to the case before it, stating that "This principle of the relevancy of evidence of a sale or purchase of property being valued, made within a reasonable time before or after the date of valuation, found in condemnation proceedings, seems applicable here." 53 Cal. App.3d at 867. However, the court rejected the eminent domain rule that valuation may only be shown by expert opinion testimony, citing Section 810 (which limits the valuation rules to eminent domain and inverse condemnation proceedings), and stating that "both reason and logic" dictate that

valuation in noncondemnation proceedings may be shown by means other than expert opinion. 53 Cal. App.3d at 871.

§ 816. Comparable sales

The staff plans to refer in the Comment to Section 816 to the recent case of City of Los Angeles v. Retlaw Enterprises, Inc., 16 Cal.3d 473 (1976), which both supports the policy of liberal admissibility adopted by the Commission and clarifies the law relating to admissibility of comparable sales affected by project enhancement and blight.

§ 822. Matter upon which opinion may not be based

Memorandum 76-6 notes a possible conflict between Evidence Code Section 822(c) and Revenue and Taxation Code Section 4986 (Exhibit II--yellow), relating to the admissibility of taxes on the subject property. The relevant portion of Section 4986 reads:

The subject of the amount of the taxes which may be due on the property shall not be considered relevant on any issue in the condemnation action, and the mention of said subject, either on the voir dire examination of jurors, or during the examination of witnesses, or as a part of the court's instructions to the jury, or in argument of counsel, or otherwise, shall constitute grounds for a mistrial in any such action.

The Commission's consultant, Mr. Dankert, has written to suggest that this provision be repealed. See Exhibit III (green).

Mr. Dankert also has a number of other problems with Section 4986:

(1) It should be reorganized and perhaps split into several sections.

(2) It does not provide for cancellation of taxes in the case of possession prior to judgment by agreement of the parties rather than by court order.

(3) There are problems in the interrelation between Section 1268.420 of the Eminent Domain Law and Revenue and Taxation Code Section 4986. The staff does not understand the nature of the problems referred to; perhaps Mr. Dankert will be able to elaborate at the meeting.

Should the Commission decide that any amendments of Section 4986 are necessary, there are a number of technical amendments that also should be made to conform the language relating to immediate possession to that used in the Eminent Domain Law.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

Minutes

January 15, 16, and 17, 1976

STUDY 63.70 - EVIDENCE (EMINENT DOMAIN AND  
INVERSE CONDEMNATION)

The Commission began consideration of Memorandum 76-6 and the provisions of the Evidence Code relating to value, damages, and benefits in condemnation and inverse condemnation cases (Sections 810-822). The Commission considered Sections 810 through 816 but did not reach Sections 817-822.

The Commission took the following action:

1. The question of whether Section 810 should be broadened, so that the special rules of evidence for valuation of property in eminent domain and inverse condemnation would be applied to other proceedings where fair market value must be determined, should be considered after the necessary decisions have been made concerning possible amendments to Sections 811-822.
2. Recommended no change in Sections 811 and 812.
3. Determined to retain the language of subdivision (a) of Section 813, limiting evidence of value of property to opinion testimony (rejecting the less restrictive approach of the Uniform Eminent Domain Act).
4. Reaffirmed its previous tentative recommendation that Section 813(a)(2) be amended to read:

813. (a) The value of property may be shown only by the opinions of:

\* \* \* \* \*

(2) The owner of any right, title, or interest in the property or property-interest being valued.

\* \* \* \* \*

Comment. Section 813(a)(2) is amended to make clear that not only the fee owner of the property, but any person having a compensable interest in the property, may testify as to the value of the property or his interest therein. Cf. Code Civ. Proc. §§ 1235.170 ("property" defined) and 1263.010 (right to compensation).

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5. Referred to staff the language proposed to be added as subdivision (a)(3) of Section 813 in a previous tentative recommendation of the Commission, with instructions to draft language applicable to officers or employees of partnerships and unincorporated associations and to consider whether the Comment should indicate that the court has the power to restrict the number of witnesses who may testify as to value.

6. Recommended no change in subdivision (b) of Section 813, or in Sections 814 and 815.

7. Referred to staff the language proposed to be added as subdivision (c) of Section 816 in a previous tentative recommendation of the Commission, with instructions to draft language codifying the rule that great latitude is allowed in cross-examination of an expert witness. It was also suggested that language be put in the Comment indicating that, while the court should be liberal in allowing an expert witness wide discretion in his selection of comparable sales, the court should still adhere to the standard in the statute that comparable sales must not be too remote in time, space, and character. The staff was also directed to check the last paragraph of the proposed Comment explaining subdivision (c) of Section 816 (noting that existence of project enhancement or blight on comparable sales is one aspect of relevance) in view of a possible similar Comment in the eminent domain law.

EXHIBIT II

[REVENUE & TAXATION CODE § 4986]

**§ 4986. Cancellation of taxes, etc.: Procedure where governmental entity acquires property after the lien date**

(a) All or any portion of any tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the county legal adviser if it was levied or charged. (b)(3)(1) More than once.

(2) Erroneously or illegally.

(3) On the canceled portion of an assessment that has been decreased pursuant to a correction authorized by Article 1 (commencing with Section 4876) of Chapter 2 of this part.

(4) On property which did not exist on the lien date.

(5) On property annexed after the lien date by the public entity owning it.

(6) On property acquired prior to September 18, 1959, by the United States of America, the state, or by any county, city, school district or other political subdivision and which, because of such public ownership, became not subject to sale for delinquent taxes.

(b) On property acquired after the lien date by the United States of America, if such property upon such acquisition becomes exempt from taxation under the laws of the United States, or by the state or by any county, city, school district or other public entity, and because of such public ownership becomes not subject to sale for delinquent taxes, no cancellation shall be made in respect of all or any portion of any such unpaid tax, or penalties or costs, but such tax, together with such penalties and costs as may have accrued thereon while on the secured roll, shall be paid through escrow at the close of escrow or, if unpaid for any reason, they shall be collected like any other taxes on the unsecured roll. If unpaid at the time set for the sale of property on the secured roll to the state, they shall be transferred to the unsecured roll pursuant to Section 2921.5, and collection thereof shall be made and had as provided therein, except that the statute of limitations on any suit brought to collect such taxes and penalties shall commence to run from the date of transfer of such taxes, penalties and costs to the unsecured roll, which date shall be entered on the unsecured roll by the auditor opposite the name of the assessee at the time such transfer is made. The foregoing toll of the statute of limitations shall apply retroactively to all such unpaid taxes and penalties so transferred, the delinquent dates of which are prior to the effective date of the amendment of this section at the 1959 Regular Session.

If any property described in this subdivision is acquired by a negotiated purchase and sale, gift, devise, or eminent domain proceeding after the lien date but prior to the commencement of the fiscal year for which current taxes are a lien on the property, the amount of such

current taxes shall be canceled and neither the person from whom the property was acquired nor the public entity shall be liable for the payment of such taxes. If, however, the property is so acquired after the commencement of the fiscal year for which the current taxes are a lien on the property, that portion only of such current taxes, together with any allocable penalties and costs thereon, which are properly allocable to that part of the fiscal year which ends on the day before the date of acquisition of the property shall be paid through escrow at the close of escrow, or if unpaid for any reason, they, shall be transferred to the unsecured roll pursuant to Section 2921.5 and shall be collectible from the person from whom the property was acquired. The portion of such taxes, together with any penalties and costs thereon, which are allocable to that part of the fiscal year which begins on the date of the acquisition of the property, shall be canceled and shall not be collectible either from the person from whom the property was acquired nor from the public entity.

In no event shall any transfer of unpaid taxes, penalties or costs be made with respect to property which has been tax deceded to the state for delinquency.

For purposes of this subdivision, if proceedings for acquisition of the property by eminent domain have not been commenced, the date of acquisition shall be the date that the conveyance is recorded in the name of the public entity or the date of actual possession by the public entity, whichever is earlier. If proceedings to acquire the property by eminent domain have been commenced and an order of immediate possession obtained prior to acquisition of the property by deed, the date of acquisition shall be the date upon or after which the plaintiff may take possession as authorized by such order of immediate possession.

The subject of the amount of the taxes which may be due on the property shall not be considered relevant on any issue in the condemnation action, and the mention of said subject, either on the voir dire examination of jurors, or during the examination of witnesses, or as a part of the court's instructions to the jury, or in argument of counsel, or otherwise, shall constitute grounds for a mistrial in any such action.

No cancellation under paragraph (2) of subdivision (a) of this section shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, collectible by county officers on behalf of a municipal corporation without the written consent of the city attorney or other officer designated by the city council unless the city council, by resolution filed with the board of supervisors, has authorized the cancellation by county officers. The resolution shall remain effective until rescinded by the city council. For the purpose of this section and Section 4986.9, the date of possession shall be the date after which the plaintiff may take possession as authorized by order of the court or as authorized by a declaration of taking.

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THOMAS M. DANKERT  
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Mr. John DeMouilly  
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RE: Evidence of Assessed Valuation in  
Condemnation Proceedings; Cancellation  
and Apportionment of Taxes.

Dear Mr. DeMouilly:

The purpose of this letter is to formalize the conversation which I had with Mr. Sterling recently about the problems created by Revenue and Taxation Code Section 4986, dealing with the cancellation, segregation and apportionment of property taxes. This section is one of the longest and most confusing sections in the California codes. Towards the end of the section there is a paragraph which is a product of the 1959 amendment to the section. It deals with cancellation and segregation of taxes, and with the admissibility of evidence of taxes due in condemnation proceedings.

The 1959 amendment provided that any mention of the subject of taxes due "shall not be considered relevant on any issue in the condemnation action." The amendment further provided that the mention of the subject was grounds for a mistrial. This section was unnoticed by the Commission in earlier studies of the Evidence Code (see Reports, Recommendations and Studies, Vol. 3, pp. A-48 through A-50, California Law Revision Commission, 1961). It appears to conflict with Evidence Code Section 922, sub. (c), which permits consideration of taxes "actual or estimated" for the purpose of determining the reasonable net rental value. Section 4986 has been argued as precluding cross-examination on the actual taxes due where the witnesses used a grossly improper amount of "estimated taxes."

It should also be pointed out that prior to the 1959 amendment the issuance of an order for possession did

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not terminate the property owner's liability for real property taxes. The 1959 amendment did this, but some practical administrative problems have arisen out of the 1959 amendment which are not resolved by Code of Civil Procedures Sections 1252.1 and 1252.2 or its successor sections 1268.410, 1268.420 and 1268.430. The discussion to follow will be directed toward 1268.410 and 1268.420.

Section 1268.410 places liability upon the plaintiff for any ad valorem taxes, penalties, and costs upon the property acquired by eminent domain that would be subject to cancellation under Section 4986 of the Revenue and Taxation Code, assuming the plaintiff is a public agency.

Section 1268.420 authorizes segregation on the assessment role of properties being acquired by eminent domain. Such segregation, however, is authorized only after the taxes on the property are subject to cancellation pursuant to Section 4986 of the Revenue and Taxation Code. This choice of language creates certain problems. Section 4986 has been construed by some county counsels as authorizing cancellation only after judgment. Specifically, in these counties there is no cancellation of taxes after the issuance for the order of possession. Thus, in such counties by virtue of the language in Section 1268.420 it is arguable such taxes should not be subject to cancellation until after judgment. Such cancellation would, however, be retroactive. Incidentally, in the handling of some condemnation cases because of the oversight or inexperience of counsel the property owner continues to pay taxes and the agency does not necessarily refund this money to property owner at the conclusion of the case.

A further problem exists because of the language of Section 4986, which would appear to preclude cancellation of taxes where suit has been commenced and possession is by agreement between the parties rather than by order of possession. Once the property was acquired, cancellation would appear to be proper only as of the date of passage of title.

In conclusion, it would appear that the provision dealing with condemnation evidence should be deleted from Revenue and Taxation Code Section 4986. In addition, the

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section should be reorganized and perhaps split into several sections and the provisions dealing with cancellation, apportionment and segregation of taxes should be clearly spelled out.

Your consideration of the above matter would be appreciated.

Very truly yours,

  
THOMAS M. DANKERT

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