

Decision No. _____

ORIGINAL

Decision No. 5361

BEFORE THE RAILROAD COMMISSION
OF THE STATE OF CALIFORNIA.

<p>In the matter of the petition of the) CITY OF PALO ALTO to fix the just) compensation to be paid Loretta B.) Hart, property owner, for property) or any interest therein to be taken) or damaged in the separation of) grades at the City of Palo Alto and) for final order of condemnation.)</p>	<p>Application No. 3427.</p>
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Norman E. Malcolm, City Attorney, for
City of Palo Alto.
George D. Squires, for Southern Pacific
Company.
Wm. E. E. Hart and T. John Butler, for
Loretta B. Hart.

THELEN and GORDON, Commissioners.

OPINION ON MOTION
TO DISMISS.

CITY OF PALO ALTO, a municipal corporation, has filed herein its petition, as provided by Section 43 of the Public Utilities Act, asking that the Railroad Commission fix the just compensation to be paid for the damage, if any, to be caused to the property of Loretta B. Hart by the separation of grades and the construction and operation of a subway to be constructed under the right of way and tracks of the Southern Pacific Company at or near the intersection of Palo Alto Avenue and Alma Street in the City of Palo Alto. Petitioner also asks that the Railroad Commission designate the party or

parties to the proceeding who shall pay said compensation and apportion the same between them, and designate the owners and claimants of the property and interest in or to property condemned to whom such compensation shall be paid and that the Commission shall thereupon make its final order of condemnation.

Upon the filing of the petition herein, the Commission made its order to show cause and served notice upon all the parties as provided by Section 43c of the Public Utilities Act. Pursuant thereto, a public hearing was held in the office of the Railroad Commission in San Francisco on February 19, 1918. At that time, Loretta B. Hart moved to dismiss this proceeding, in so far as she is concerned, by reason of alleged lack of jurisdiction in the Railroad Commission. Briefs have been filed and the motion is now ready for decision.

This proceeding is brought under the provisions of Section 43 of the Public Utilities Act, as amended in 1917. (St. 1917, p. 320). Section 43a and b and the first paragraph of Section 43c read as follows:

"Sec. 43(a) No public road, highway or street shall hereafter be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without having first secured the permission of the commission; provided, that this subsection shall not apply to the replacement of lawfully existing tracks. The commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.

"(b) The commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public road or highway by a railroad or street railroad and of a street by a railroad or vice versa, subject to the provisions of section two thousand six hundred ninety-four of the Political Code so far as applicable, and to alter, relocate or abolish any such crossing and to require, where in its judgment

it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the state, county, municipality or other political subdivision affected. It shall be the duty of each corporation and political subdivision to which any of the expense is apportioned to pay from the funds available therefor in its treasury the amount apportioned to it at the time and to the parties specified by the order of the commission and if the same is not paid in accordance with the commission's order the corporation or political subdivision entitled thereto under the commission's order shall have the right to sue therefor in any court of competent jurisdiction. If no such funds are available as aforesaid, it shall be the duty of the appropriate boards, officers and employees entrusted with the levy and collection of the taxes or assessments of such political subdivision to do all acts necessary to include in the next succeeding tax or assessment levy the amount due and to collect the same, whereupon the amount due shall be paid over to the corporation or corporations, the state, political subdivision, or political subdivisions entitled thereto under the commission's order. The commission shall have the power by order to designate the state, certain of said corporations, and political subdivisions, affected, to do all or specified portions of the acts required by any order of the commission made under the provisions of this subsection, and to prescribe the manner and the time within which the parties so designated shall be paid or reimbursed by the other corporations, the state and political subdivisions among which the expense of the work has been apportioned by the commission.

(c) 1. The commission shall have the power in accordance with the procedure provided in this subsection to fix the just compensation to be paid for property or any interest in or to property to be taken or damaged in the separation of grades at any crossing specified in subsection (b) hereof, or for property or any interest in or to property to be taken or damaged in the construction, alteration or relocation, under the order or with the approval of the commission, of elevated tracks or subways for any railroad or street railroad over or under any public road, street, highway or private right of way, or of any public road, street or highway over or under the tracks of any railroad corporation or street railroad corporation; and upon the payment of the just compensation so fixed to make a final order of condemnation as hereinafter provided."

The remaining portions of Section 43c provide the machinery for making effective the authority conferred in the first paragraph of the section. The portions of the section hereinabove underlined are amendments of 1917. 3.

The petition herein alleges, in part, that the City of Palo Alto desires to secure an additional inlet and outlet as a highway in said city by the separation of grades and the construction of a subway under the right of way of the Southern Pacific Company at or near the intersection of Palo Alto Avenue and Alma Street in Palo Alto, as heretofore authorized by the Railroad Commission; that Loretta B. Hart is the sole owner of Block One in the City of Palo Alto which is held by her as her separate property; that in Decision No. 806 made by the Railroad Commission on July 23, 1913 in Application No. 352 the Railroad Commission authorized the separation of grades and the construction of a subway under the tracks of the Southern Pacific Company at or near the intersection of Palo Alto Avenue and Alma Street in said city; that said Loretta B. Hart claimed and does claim that said separation of grades and the construction of said subway will inflict damage to her property in said Block One; that such separation of grades and the construction of said subway are integral parts of the work authorized by the Railroad Commission for a subway crossing at said point; that the property of Loretta B. Hart affected by this project is only a portion of said Block One, namely, a portion of Lots 1 and 2 of said block; that no part of the property of said Loretta B. Hart will be taken; that the use sought to be taken is the necessary grading of the streets on which said property fronts in order to give access for travel through the subway and upon and along the highway and that the damages, if any, to said property, are an incident to said grading, location and building of the subway; that the City of Palo Alto will pay all the costs and expenses of the grading on the northeasterly side of the right of way of the Southern Pacific Company without any assessment to the property fronting thereon; and that the City will construct thereon a con-

crete pavement without cost or expense to the property owner, which pavement, as estimated by petitioner, will benefit the said property of Loretta B. Hart in the sum of \$1,700.00.

Loretta B. Hart filed herein an answer on the order to show cause. At the hearing of February 19, 1918, her counsel moved to dismiss this proceeding by reason of alleged lack of jurisdiction in the Railroad Commission. Protestant concedes that the Railroad Commission has jurisdiction to apportion between City of Palo Alto, County of Santa Clara and Southern Pacific Company the expense of the project but urges that the Commission cannot lawfully fix the just compensation to be paid to her for any taking or damage to her property resulting from the execution of the project. It is conceded that said Block One in Palo Alto is the private property of Loretta B. Hart and that she is in no sense a public utility.

The principal grounds of the motion to dismiss and the only grounds which it will be necessary to consider herein, are:

1. That protestant is entitled to a jury trial;
and
2. That the legislature cannot lawfully authorize the Railroad Commission to fix the compensation to be paid in eminent domain proceedings for any property other than that of a public utility.

In support of the first point, protestant relies on Section 14, Article 1 of the Constitution of California, reading in part as follows:

"Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be

waived, as in other civil cases in a court of record, as shall be prescribed by law."

In so far as the State Constitution is affected, Section 14 of Article I must yield to Sections 22 and 23 of Article XII and to legislation in pursuance thereof, conferring powers upon the Railroad Commission. Pacific Telephone and Telegraph Company vs. Eshleman, 166 Cal. 640; Sexton v. Atchison, Topeka and Santa Fe Railway Company, 173 Cal. 760; City of San Jose v. Railroad Commission, 53 Cal. Dec. 727, 730.

In so far as the Federal Constitution is affected, it is well known that it contains no requirement for the ascertainment by a jury of the just compensation to be awarded in eminent domain proceedings. All that is required in such proceedings, in so far as the Federal Constitution is concerned, is that the proceeding be conducted in a fair and just manner, with opportunity to the owners of the property to present evidence as to its value and to be heard thereon. United States v. Jones, 109 U.S. 513, 519; Long Island Water Supply Company v. City of Brooklyn, 166 U.S. 685, 694, 695; Bauman v. Ross, 167 U.S. 548, 593.

Referring to this very problem of the effect of Section 14, Article I of the State Constitution on the exercise by the Railroad Commission, sitting without a jury, of the powers of eminent domain, the Supreme Court of California, in the Pacific Telephone Case, at page 688 of the Reporter, said:

"In the consideration of this problem our constitution (Art. I, Sec. 14) is to be read as though amended by the proviso, that in the case of all public utilities the power of eminent domain may by authority of the legislature be vested in the Railroad Commission, with power to that body to determine the public convenience and make an award for damages without the intervention of a jury. The requirement of a jury and of a prepayment of damages is not a

part of the federal constitution nor of that of many of our states. It is in those jurisdictions quite a common practice to create boards and commissions to exercise the power on behalf of the state and to make awards between litigants. It is certainly true that in the vast modern development of public utilities in their multifarious activities, in their complicated inter-relations, where a taking of property is involved, a great saving of time and a more just award may be expected from a learned, skilled and dispassionate tribunal such as the Railroad Commission than ever can be hoped for from the haphazard verdicts of juries. And very good reasons therefore appear, why, for the benefit of the state as well as for the benefit of the public service companies, awards as to the latter should be made by this body and not by a jury. It is therefore concluded that no violence is done to the rights of petitioner under the constitution of the United States by this proviso of the state constitution authorizing the Railroad Commission to exercise the power of eminent domain and assess damages for a taking of property."

This leaves for consideration protestant's second point, that the legislature can not lawfully authorize the Railroad Commission to fix the compensation to be paid in eminent domain proceedings for any property other than that of a public utility. Protestant urges that her property is private property used for residence purposes and that the legislature can not lawfully authorize the Railroad Commission, under any circumstances, to fix the just compensation to be paid, in eminent domain proceedings, for taking or damaging any part of that property.

Section 43c of the Public Utilities Act authorizes the Railroad Commission "to fix the just compensation to be paid for property or any interest in or to property to be taken or damaged in the separation of grades at any crossing specified in subsection (b) hereof, or for property or any interest in or to property to be taken or damaged in the construction, alteration or relocation, under the order or with the approval of the commission, of elevated tracks or subways for any railroad or

street railroad over or under any public road, street, highway or private right of way, or of any public road, street or highway over or under the tracks of any railroad corporation or street railroad corporation".

The authority of the Railroad Commission to fix the just compensation is thus limited to property or any interest in or to property taken or damaged in the separation of grades at railroad crossings or in the construction, alteration or relocation of overhead or subway structures in connection with railroad crossings. The Commission can act only where property is taken or damaged in consequence of an order of the Commission authorizing or directing such separation of railroad grades or such construction, alteration or relocation of overhead or subway structures in connection with railroad crossings. The taking or damage results from the exercise of the Railroad Commission's unquestioned jurisdiction over the railroad or street railroad affected and is merely a consequence thereof and an incident thereto.

The case now under consideration clearly illustrates the situation. The Railroad Commission, on petition of the public authorities affected, finds that the public convenience and necessity require the construction of a subway under the tracks of the Southern Pacific Company at the intersection of Palo Alto Avenue and Alma Street in Palo Alto and authorizes such construction. The railroad company likewise agrees. As a necessary and unavoidable consequence of the construction of the subway, as a condition precedent to reaching the subway, and as an integral part and parcel of the plan, it becomes necessary to change the grade of the two streets which run into the proposed subway from the east and on which the property of protestant fronts. If the grade of these streets is

not altered, in accordance with the plans and specifications approved by the Railroad Commission as part of the plan, there can be no subway at this point. Protestant urges that the alteration in the grade of these two streets will damage her property and insists on having this damage ascertained and paid before she will permit the subway to be constructed.

If, in an instance of this kind, the property owner can resort to the usual ~~XXXXXX~~ proceedings in the courts, it is evident that he can thus materially delay the execution of the Railroad Commission's order even though, as here, the public authorities and the railroad company are all agreed on the necessity and the desirability of the particular project.

Furthermore, in a case in which the Railroad Commission has found that the consummation of the project requires the acquisition of additional property by the railroad, if the court's views disagree with those of the Railroad Commission as to whether such taking is necessary to the use, or in other contingencies which will readily occur, the pendency of the proceeding before the court may have the effect of interfering with and at times entirely blocking the project.

Again, if in the execution of a comprehensive plan for the elimination of railroad grade crossings in a community, the property of a number of landowners is to be taken or damaged, great confusion and long delays might ensue by reason of separate court proceedings brought by or against the individual land owners. Under the procedure prescribed by Section 43c of the Public Utilities Act, all these issues can be promptly determined by the Railroad Commission in a single, comprehensive proceeding.

The authority of the legislature to confer powers on the Railroad Commission under Sections 22 and 23 of Article XII of

the State Constitution is limited to powers germane to the regulation and control of public utilities (Pacific Telephone and Telegraph Company v. Eshleman, 166 Cal. 640, 691, 702; Soxton v. Atchison, Topeka and Santa Fe Railway Company, 173 Cal. 760, 762; City of San Jose v. Railroad Commission, 53 Cal. Dec. 727, 730.)

The case here presented is analogous to City of San Jose v. Railroad Commission, supra, in which case the Supreme Court of California held that the Railroad Commission has the power to apportion to a city part of the expense of constructing a railroad subway crossing within the city limits, although the city, of course, is not a public utility as those words are used in the Public Utilities Act. The Railroad Commission's power was upheld on the ground that the apportionment of the expense was germane and cognate to the installation of the subway.

For the reasons hereinbefore stated, we are clearly of the opinion that the powers conferred on the Railroad Commission by Section 43c of the Public Utilities Act are germane to and a cognate part of the Commission's conceded power to regulate and supervise railroads and street railroads.

In this connection, we call attention to the specific finding on this question made by the legislature in sub-section 9 of Section 43c and reading as follows:

"The legislature hereby declares that sub-section (c) hereof is enacted as a germane and cognate part of and as an aid to the jurisdiction of the railroad commission in the supervision and regulation of railroad and street railroad corporations."

We are of the opinion that the motion to dismiss should be denied and that this proceeding should thereafter be set for further hearing on the issues of fact herein presented.

We submit the following form of order:

O R D E R.

Loretta B. Hart having moved to dismiss the above entitled proceeding in so far as she is affected thereby, briefs on said motion having been filed and said motion being now ready for decision,

IT IS HEREBY ORDERED that said motion to dismiss be and the same is hereby denied.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, this 30th day of April, 1918.

Max Thelen
H. B. Loveland
W. G. Gordon

Commissioners.