7/19/60

Memorandum No. 60 (1960)

Subject: Study No. 36 - Pre-trial and Discovery in Eminent Domain Proceedings.

The study on pre-trial and discovery in eminent domain proceedings has been previously forwarded to you. To focus the Commission's discussion of the study, the consultant's conclusions and recommendations are set forth below:

1. The Commission should recommend no legislation relating to the pre-trial conference.

2. Legislation should be recommended which provides for the exchange of statements containing the sales transactions to be relied upon to support each party's estimate of value at the trial. An appraiser would be prohibited from testifying on direct examination as to any sales transactions not listed unless good cause for the ommission were shown. Each party would be required to object to particular sales not later than 5 days prior to the trial so that the court could rule upon admissibility before the jury trial begins. If no objection is made to listed sales prior to trial, the evidence would be admitted at the trial.

[A possible alternative is to clarify the right of the parties to question the other party's experts during discovery proceedings without requiring the exchange of statements. Another alternative appears at page 24 of the study; it is a statute from Wisconsin requiring the exchange of information relating to highest and best use, zoning, severance damages and other factors.

Compare, also, the rule of the Federal District Court for the Southern District of California that appears at page 7 of the study.]

3. The condemner should be required to furnish to the condemnee, on request, maps, drawings and plans for the construction of the improvement in the manner proposed by the condemner.

[The alternatives mentioned under Recommendation #2 are also available here. In addition, the Commission might recommend that maps, plans, etc. are inadmissible unless served upon the opposing party a certain number of days prior to trial.]

4. The condemner should be required to make an offer to the condemnee, before commencing the proceeding, based upon fair market value, provided that evidence of such an offer is inadmissible at the trial.

[Such a statute might also provide that if the condemnee receives an award no greater than the condemner's offer, the condemnee must bear the costs of the proceeding. If the condemnee receives an award greater than the offer, the condemner bears the costs of the action and, in addition, pays some increment to the condemnee which may consist of reasonable attorney's and appraisers' fees or a percentage (New York uses 5% of the award) of the award or a percentage of the difference between the offer and the award. We have no study on such proposals, but they are mentioned as possible ways to make the recommended offer procedure meaningful.]

Respectfully submitted,

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