9/14/60

Second Supplement to Memorandum No. 74(1960)

Subject: Additional letter re Commission's Recommendations

Attached is an additional letter that has been received relating to the Commission's eminent domain proposals.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Office of the Attorney General

DEPARTMENT OF JUSTICE

State Building, Los Angeles 12

August 29, 1960

California Law Revision Commission
School of Law
Stanford, California

Attention: Mr. John H. DeMoully
Executive Secretary

Re: Recommendation and Proposed Legislation Relating to Evidence in Eminent Domain Proceedings

Dear Mr. DeMoully:

This refers to your letter of May 2, 1960, in which you requested any comments or suggestions we may have concerning proposed legislation of the California Law Revision Commission on the subject of evidence in eminent domain proceedings.

In our letter to you dated August 9, 1960, concerning moving expenses, we indicated our interest in the subject of condemnation proceedings and the state agencies for whom we customarily handle eminent domain cases.

We have examined with great interest the Study Relating to Evidentiary Problems by Hill, Farrer & Burrill which accompanied the Tentative Recommendations and Proposed Legislation, and highly commend the Commission for obtaining this searching analysis of the subject. We have also had an opportunity to read Mr. Robert E. Reed's letter to you dated July 25, 1960, setting forth the comments of the Department of Public Works. We are in agreement with most of the statements contained in Mr. Reed's letter, particularly his statement: "It seems preferable to us not to disturb the existing evidentiary case law except to accomplish the objectives of the Commission by specific statutory provisions -- for example, a statute to clarify the Faus case, -- and a statute finally determining whether evidence of offers are properly received on direct or cross-examination."

At the outset, we feel that there are many provisions in the proposed evidence statutes which are needed. However, we do have some suggestions and a few objections.

While we are in agreement that the owner of property should be allowed to express an opinion as to its value, we do not particularly feel that the word "presumed" is proper. In our view, it would be

better to state in Section 1248.1 that the owner of the property sought to be condemned shall be permitted to express an opinion as to value. Also, it might be argued that the provisions of Section 1248.1 limit the scope of the trial with respect to determination of the amount to be paid for the property. We feel sure that the Commission did not intend to exclude the court's discretion in allowing a jury view of the premises subject to eminent domain and some technical argument might be made that this section would reach that result.

Section 1248.2 should be amended to make clear that the court has the right to reject the opinion of any expert witness who has not qualified.

The term "contract" should be eliminated from Section 1248.2(a). We feel that the comparable sales should be confined to recorded sales or binding leases only, since a contract of sale is often not consummated.

In regard to a comparable sale of improved property some provision might be considered allowing the witness to give a breakdown of the value of the land and improvement, but only where the subject property is also improved.

We find objectionable the general language in Section 1248.2(1) that the opinion may be given if it is based upon facts and data that a reasonably well informed prospective purchaser or seller of real property would take into consideration. Under this standard, we think it would be conceded that opinion testimony could be supported by reasons which are clearly inadmissible today. It is submitted that if a witness is going to give an opinion as to value, it should be supported by reasons which are judicially accepted. It would be better to delete this language and have a separate paragraph to the effect that any competent reason of such qualified witness which is relevant and material may be given.

We question the wisdom of permitting a witness to testify on direct examination concerning the capitalized value of the fair income attributed to the property as would be authorized under Section 1248.2(1)(b), or to testify concerning the cost of reproducing the improvements as contemplated in Section 1248.2(1)(c). For it has generally been agreed that these methods of valuation are primarily to be used as checks on the expert's determination as to what the market value of the property is. In our view, to allow a witness to testify on direct examination as to capitalized value or reproduction costs would be very confusing to the court or jury, and thus more harmful than helpful in the search for "just compensation". Quite frankly, we feel that if this matter is to be gone into with the witness at all, it can be brought out better by cross-examination. This, of course, would be equally applicable to those witnesses testifying on behalf of the condemning agency as for the landowner.

It is further suggested, however, if direct testimony of capitalization studies is to be authorized by Section 1248.2(1)(b), such testimony should be limited to actual income rather than fair income.

(Mosk)

We are in wholehearted agreement that evidence of comparable sales is not direct evidence of the value of the land to be condemned, and we agree that offers of the parties should not be admissible to support opinion testimony. Also, of course, there can be little doubt that the assessed value for taxation purposes of the property has little relevancy insofar as its market value is concerned.

We note that proposed Section 1248.3(1) provides a blanket prohibition against the use in evidence of sales to a condemning body. The Faus and Murata cases currently permit the use of such sales if it is first established that such sales are truly voluntary. We wish to point out that, although many sales to condemning agencies lack the requisite voluntariness to make them an index of market value, there are some such sales that are entirely voluntary and open market sales and upon which appraisers do rely in forming their opinions of value. We would agree that if such sales are to be admitted into evidence, a foundation establishing the voluntariness of the sales should first be laid, whether introduced on direct or cross-examination.

Section 1248.3 seems to provide that if the witness considers to any degree in arriving at his opinion any of the factors enumerated in the subsections, his opinion is inadmissible in its entirety. We merely point this out as an inquiry as to whether the Commission wants to exclude these factors from evidence or whether it also wants the witnesses to completely exclude such factors from their consideration.

Subsection 3 of Section 1248.3 apparently completely eliminates from consideration offers, listings and options, except insofar as they constitute admissions against interest. Inasmuch as appraisers give extensive consideration to listings and offers in arriving at their opinion of fair market value, it may be argued that on direct examination an expert witness should not be precluded from testifying that he has considered the offers and listings without giving the price thereof. On cross-examination we think that the party should be permitted to examine him as to offers, listings and options. In other words, on cross-examination "anything goes." In any event, we agree with Mr. Reed's comment regarding this section that, "A rule in this area is definitely needed due to the apparently conflicting opinions of some of the recent court decisions."

While the above comments have been somewhat critical, we do not mean to imply that this office is basically opposed to changes in the field of evidence in eminent domain cases, and while we may not agree with all of the recommendations, we commend you for the detailed consideration you have given to a problem which, quite frankly, is very complicated and controversial.

We appreciate your giving us the opportunity to submit our comments on this proposed legislation, and trust that our views are submitted in time to be considered by the Commission in its further studies of the proposed statute.

(Mosk)

Additional copies of this letter are enclosed for your convenience in making distribution thereof to members of the California Law Revision Commission.

Very truly yours,

STANLEY MOSK
Attorney General

WALTER S. ROUNTREE
Assistant Attorney General

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