4/11/60

Memorandum No. 31 (1960)

Subject: Study No. 36 - Evidentiary Problems in Eminent Domain Cases

Attached is a revised recommendation and statute relating to evidence in eminent domain cases. Revisions in the statute are shown by strike-out and underscore.

In Section 1248.2 (1) the deletion of the word "solely" has been recommended by the consultant. In the same subdivision the words "the judge finds" were taken from the Uniform Rules of Evidence to show that it is the judge that must pass upon this matter. These words were inserted in the statute by the staff. The Commission should decide whether it desires that the judge make this determination.

Subdivision (2) of Section 1248.2 was added by the staff to show that the hearsay rule is inapplicable to an expert's reasons. "Hearsay rule" is not specifically mentioned, however, because under the Code of Civil Procedure the hearsay rule is stated in the manner in which it is stated here. (C.C.P. Section 1845.) Moreover, Rule 19 of the Uniform Rules is similarly worded. It seemed to me that if the Uniform Rules are adopted, Rule 19 would provide a greater obstacle to the admissibility of this evidence than the hearsay rule as defined in the Uniform Rules, for a capable attorney should be able to demonstrate to the court that the hearsay rule is inapplicable. Therefore, this form of statement was adopted to overcome both Section 19 of the Uniform Rules and the Hearsay Rule.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

(#36) 4/12/60

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford, California

T E N T A T I V E

RECOMMENDATION AND PROPOSED LEGISLATION

relating to

EVIDENTIARY PROBLEMS IN EMINENT DOMAIN CASES

NOTE: This is a tentative recommendation and proposed statute prepared by the California Law Revision Commission. It is not a final recommendation and the Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature. This material is being distributed at this time for the purpose of obtaining suggestions and comments from the recipients and is not to be used for any other purpose.

(#36) 4/11/60

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

EVIDENTIARY PROBLEMS IN EMINENT DOMAIN CASES

The principal determination to be made in an eminent domain proceeding is the market value of the property to be condemned. The generally accepted view has been that this determination should be based on the opinions of persons qualified to form a reliable opinion of the value of the property, i.e., the owner of the property and expert witnesses. In determining the value of property, the modern appraiser considers many factors. Yet the California courts have not permitted expert witnesses in eminent domain proceedings to testify concerning many factors which they take into consideration in determining the market value of the property. For example, until the decision of the California Supreme Court in County of Los Angeles v. Faus* in 1957, an expert was not permitted to testify on direct examination about the sales of comparable property that he considered in reaching his opinion.

Rules that prevent witnesses from revealing all that they rely on to determine value in the market place have been criticized by lawyers, judges and appraisers. Although the Faus case eliminated some problems involved in the determination of market value, it created some uncertainties as well. To eliminate these uncertainties, and to bring judicial practice into conformity with modern appraisal practice, the Commission makes the following recommendations:

* 48 Cal.2d 672

1. Evidence of value in eminent domain cases should continue to be limited to the opinions of qualified experts, including the owner. Since the Faus decision, and particularly since the 1959 amendment to Code of Civil Procedure Section 1845.5, there has been uncertainty whether evidence of comparable sales is direct evidence of value upon which the trier of fact may base a finding or whether such evidence is received merely to explain and substantiate opinion evidence. The practical effect of this uncertainty is that trial courts have made conflicting decisions upon the question of whether a jury can find a value completely outside the range of opinion testimony in reliance upon some evidence of comparable sales that has been introduced.

The value of property has long been regarded as largely a matter of opinion. If this rule were changed, the trial of an eminent domain case might be unduly prolonged as witness after witness is called to relate facts within his knowledge of comparable sales. This evidence could be submitted to the jury with no expert having been called to analyze and correlate the data. Moreover, the jury would be permitted to return a verdict far above or far below what any expert that has testified thinks the property is worth, even though the jury may never have seen the property being condemned or the comparable property mentioned in the testimony. To avoid these consequences, the long established rule that value is a matter to be established by opinion evidence should be reaffirmed and codified.

2. An expert should be permitted to give the reasons for his opinion on direct examination. An expert's testimony is more meaningful when he can fully explain the reasons for his opinion on direct examination. If he cannot relate the data relied on in direct examination, the trier of fact may never

hear it, for the cross-examiner will ask only about the data most damaging to the expert's opinion. Practitioners in this field of law indicate that the trial of eminent domain cases has been simplified and shortened since this rule was enunciated in the Faus case.

3. An expert should be permitted to state the facts and data upon which he relied in forming his opinion whether or not he has personal knowledge of such matters. This is the practice at the present time, but it is desirable to make the rule explicit so that it may be clear that the hearsay rule is inapplicable to such testimony when it is introduced solely in explanation of the witness's opinion. It would be virtually impossible to try a condemnation case if all the facts and data introduced in support of opinion testimony had to be established by witnesses with personal knowledge of the facts.

However, to protect against the introduction of erroneous data from sources that cannot be cross-examined, adequate pre-trial and discovery procedures should be developed so that the data to be relied upon by the expert witnesses may be thoroughly examined prior to trial.

4. In formulating and stating his opinion as to the value of the property, an expert should be permitted to rely on and testify concerning any matter that a reasonable, well-informed man would take into consideration in deciding whether to buy or sell the property and the price to pay. As the court is trying to determine the "market" value of the property, it should consider the factors that would actually be taken into account in an arms-length transaction in the market place.

In modern appraisal practice, there are three basic approaches to the determination of value. These involve consideration of the sales of comparable property, the capitalization of the income attributable to the property, and

the cost of reproducing the improvements on the property less depreciation. Specific recognition should be given to these methods of appraising property as they are relied upon extensively to determine market value outside the courtroom.

5. Certain factors should be specifically excluded from consideration in determining value because they are of doubtful validity in their bearing upon value. To remove any doubt concerning the admissibility of these matters under the standards discussed above, it is recommended that the following matters be specifically made incompetent and inadmissible upon the question of value:

a. Sales to persons that could have acquired the property by condemnation for the use for which it was acquired. These sales do not involve a willing buyer and a willing seller. Factors such as the cost of litigation, the hazard of a jury verdict, the delay of court proceedings and similar matters are often reflected in the ultimate price. Moreover, sales to condemners often involve partial takings. In such cases valid comparisons are made more difficult because of the difficulty in allocating the compensation between the value of the part taken and severance damage to the remainder. These sales, therefore, are not sales in the "open market" and should not be considered in a determination of market value.

b. Offers between the parties to buy or sell the property sought to be condemned. Pre-trial settlement of condemnation cases would be greatly impaired if the parties were not assured that their offers during negotiations are not evidence against them. These offers are unreliable as indications of market value because they reflect the desire of the parties to avoid litigation, and they should be excluded under the general policy of excluding evidence of an

offer to compromise impending litigation.

c. Offers or options to buy or sell the property to be condemned or any other property to third persons, except to the extent that offers by the owner of the property to be condemned constitute admissions. An unaccepted offer is not an indication of market value because it does not indicate a price at which both a willing buyer and a willing seller can agree. An offer often represents a price at which the offeror is willing to begin negotiations. Moreover, offers may be easily fabricated because no one is bound. Offers cannot be said to represent market value until they are accepted, i.e., until both a buyer and seller are willing to bind themselves to transfer the property at the price stated.

To the extent that the owner's offers to sell constitute admissions, the considerations stated above are inapplicable and there is no reason to preclude consideration of such offers.

d. Valuations assessed for taxation purposes. It is well recognized that the assessed value of property cannot be relied upon as an indication of its market value.

6. The foregoing recommendations would supersede the provisions of Code of Civil Procedure Section 1845.5 and it should be repealed.

An act to add Sections 1248.1, 1248.2 and 1248.3 to the Code of Civil Procedure and to repeal Section 1845.5 of the Code of Civil Procedure, all relating to eminent domain.

The people of the State of California do enact as follows:

SECTION 1. Section 1248.1 is added to the Code of Civil Procedure, to read:

1248.1. The amounts to be ascertained under subdivisions 1, 2, 3 and 4 of Section 1248 may be shown only by the opinions of witnesses qualified to express such opinions. The owner of the property or property interest sought to be condemned is presumed to be qualified to express such opinions.

SEC. 2. Section 1248.2 is added to the Code of Civil Procedure, to read:

1248.2. (1) Subject to Section 1248.3, the opinion of a witness as to the amount to be ascertained under subdivisions 1, 2, 3 or 4 of Section 1248 is admissible only if it is [~~may be~~] based solely upon [~~any~~] facts or data that the judge finds a reasonable, well-informed prospective purchaser or seller of real property would take into consideration in deciding whether to purchase or sell the property or property interest and what price to pay, including but not limited to:

(~~1~~) (a) The amount paid or contracted to be paid for the property or property interest sought to be condemned or for any comparable property or property interest if the sale, lease or contract was freely made in good faith within a reasonable time before or after the date of valuation.

~~(2)~~ (b) The capitalized value of the fair income attributable to the property or property interest sought to be condemned [~~and the basis therefor~~] as distinguished from the capitalized value of any income or profits from any business conducted thereon.

~~(3)~~ (c) The value of the land, together with the cost of reproducing the improvements thereon, less whatever depreciation the improvements have suffered, functionally or otherwise, if the improvements are adapted to the land.

(2) The witness may, on direct or cross-examination, state the facts or data upon which his opinion is based, whether or not he has personal knowledge thereof, for the limited purpose of showing the basis for such opinion.

SEC. 3. Section 1248.3 is added to the Code of Civil Procedure, to read:

1248.3. Notwithstanding the provisions of Section 1248.2, the [~~following evidence~~] opinion of a witness as to the amount to be ascertained under subdivisions 1, 2, 3 or 4 of Section 1248 is [~~incompetent and~~] inadmissible if it is based, wholly or in part, upon [~~the issues of the compensation and damages to be assessed for the taking of the property or property interest sought to be condemned under Section 1248~~]:

(1) The price [~~and~~] or other terms of an acquisition of property or a property interest if the acquisition was made for a public use specified in this title.

(2) The price [~~and~~] or other terms of any offer made between the parties to the action [~~, or on their behalf,~~] to buy, sell or lease the property or property interest therein sought to be condemned, or any part thereof.

(3) The price at which an offer or option to purchase or lease was made, or the price at which property was optioned, offered or listed for sale or lease, except to the extent that an option, offer or listing to sell or lease the property or interest therein sought to be condemned constitutes an admission. Nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 1248.1.

(4) The value of any property as assessed for taxation purposes.

SEC. 4. Section 1845.5 of the Code of Civil Procedure is hereby repealed.