

11/29
October 6, 1960

Memorandum No. 87 (1960)

Subject: Study No. 36 - Evidence

The attached recommendation on Evidence in Eminent Domain Cases is presented to the Commission for final approval prior to printing the Recommendation and Study. The changes authorized by the Commission at its September meeting have been incorporated.

Certain changes from the draft presented in September by Memorandum No. 75 (1960) should be especially noted. In considering the use of "or property interest" as directed by the Commission, the staff considered the entire phrase "property or property interest sought to be condemned" and substituted for it the phrase "property or property interest to be taken or injuriously affected." The previously used phrase was inaccurate because in many instances the property being valued will not be the "property sought to be condemned" but will be the remaining property from which the property sought to be condemned is severed. Therefore, language used in Section 1249 of the Code of Civil Procedure to describe the compensation was substituted.

The proposed subdivision (3) of Section 1248.2 that appeared in the September draft has been deleted. This subdivision provided for the introduction of rental data to determine the value of a leasehold. The Commission believed that restricting this evidence to the valuation of leaseholds was improper as rental data on comparable property is

needed, among other reasons, to show a reasonable net rental on the subject property for purposes of capitalization. The elimination of the restriction would make it necessary specifically to exclude from consideration the capitalized value of income from comparable property. This could be accomplished by either a specific exclusion in Section 1248.3 or by limiting the purposes for which the evidence may be used in Section 1248.2. Either approach seems to result in a statute that is unnecessarily complex. It now appears that all of the problems created by this subdivision may be solved by deleting it from the statute. The subject matter of the subdivision is completely covered by other language in the statute. A lease on comparable property may be shown to determine the value of a leasehold that is being condemned under the general language of subdivision (2) permitting consideration of "contracts" relating to property "comparable" to that being valued. If the property being valued is a leasehold, necessarily the "comparable" property would include other leaseholds and the "contracts" relating thereto would include other leases. The data necessary to show a fair rental value and a proper rate of capitalization may be shown pursuant to the general language of the section that permits the use of the capitalization approach to value. So far as the exclusion of the capitalized value of income from comparable property is concerned, the exclusion is covered by the language of Section 1248.3 prohibiting consideration of opinions as to the value of comparable property. Nevertheless, if the Commission believes that language relating specifically to leases should be included, one of the following alternatives may be used:

1. Add subdivision (3) to Section 1248.2 to read:

(3) To determine the value of a leasehold interest or to determine the value of the property or property interest to be taken or injuriously affected pursuant to subdivision (4) of this section:

(a) The rent reserved and other terms of any lease which included the property or property interest to be taken or injuriously affected or any part thereof which was in effect within a reasonable time before or after the date of valuation; and

(b) The rent reserved and other terms of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation.

2. Add subdivisions (3) and (4) to Section 1248.2 to read as subdivisions (a) and (b) above, and add a subdivision to Section 1248.3 which would exclude from consideration:

The capitalized value of the income or rental from any property other than the property to be taken or injuriously affected.

The language relating to admissions in subdivision (3) of Section 1248.3 is new and should be noted.

Subdivision (5) of Section 1248.3 appears as revised by the Commission; however, the staff believes that the subdivision should be deleted. Because it excludes from consideration only opinions as to the value of other property, the inference may be drawn that an opinion based on another opinion as to the value of the subject property is admissible. Existing case law covers the problem, so the enactment of the subdivision is unnecessary. If such a subdivision is retained, the staff recommends that it be placed at the beginning of the section

together with another subdivision which would read as follows:

- (1) The opinion of another person as to such amount.

Respectfully submitted,

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T E N T A T I V E

RECOMMENDATION AND PROPOSED LEGISLATION

relating to

EVIDENCE 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.

October 10, 1960

RECOMMENDATION OF THE CALIFORNIA LAW

REVISION COMMISSION

Relating to Evidence in Eminent Domain Cases

The principal determination to be made in an eminent domain proceeding is the market value of the property that is to be taken or damaged for public use. 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 that a modern appraiser takes into consideration in determining the market value of the property. For example, it has been held that an expert may not testify on direct examination concerning the income from business property being condemned or the cost of reproducing the improvements, less depreciation, that enhance the value of the property being condemned. 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 prices 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.

*48 Cal.2d 672.

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:¹

1. Evidence of value in eminent domain cases should continue to be limited to the opinions of the owner and qualified experts.² 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 expert opinion. If this rule were changed to permit the court or jury to make a determination of value upon the sole basis of the testimony of

¹ Although the recommended revisions might have been made applicable to any case where the value of property is in issue, the Commission has limited its recommended legislation to eminent domain proceedings, because it was not authorized by the Legislature to suggest changes in the law which would be applicable generally.

² "Expert" as used here means a person qualified to express an opinion concerning the value of the property that is subject to condemnation. In California, the owner of the property is presumed to be so qualified. The Commission does not recommend that this rule be changed. Therefore, the term "expert" in this recommendation refers also to the owner of the property being condemned.

nonexpert witnesses concerning comparable sales or other basic valuation data, the trial of an eminent domain case might be unduly prolonged as witness after witness is called to present such testimony. In addition, the court or jury would be permitted to make a determination of value solely upon the basis of such testimony and without the assistance of experts qualified to analyze and interpret the facts established by the testimony. Moreover, the court would be permitted to enter judgment or the jury to return a verdict far above or far below what any expert that has testified considers the property is worth, even though the court or 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.

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.

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 willing, well-informed purchaser or seller would take into consideration in determining the price at which to buy or sell the property. 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 arm's 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 prices of comparable property and other market data, the capitalization of the income attributable to the property, and the cost of reproducing the improvements on the property less depreciation and obsolescence. Specific statutory 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 that are of doubtful validity in their bearing on value should be specifically excluded from consideration in determining value to remove any doubt concerning the admissibility of an opinion based on these factors under the standards discussed above.

Sales to persons that could have acquired the property by condemnation for the use for which it was acquired should be excluded from consideration on the issue of value. These sales do not involve a willing buyer and a willing seller. The costs, risks and delays of litigation are factors that often affect 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 the severance damage or benefit to the remainder. These

sales, therefore, are not sales in the "open market" and should not be considered in a determination of market value.

Offers between the parties to buy or sell the property to be taken or damaged should also be excluded from consideration. Pretrial settlement of condemnation cases would be greatly hindered 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.

Offers or options to buy or sell the property to be taken or damaged or any other property by or to third persons should not be considered on the question of value except to the extent that offers by the owner of the property subject to condemnation 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 an offer to sell constitutes an admission, the considerations stated above are inapplicable and there is no reason to preclude consideration of such an offer.

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

Opinions as to the value of comparable property should be excluded from consideration in determining the value of property subject to condemnation because they are too speculative to constitute a sound basis for an opinion of the value of the property being condemned. Moreover, their consideration would require the determination of many other collateral questions involving the weight to be given such opinions which would unduly prolong the trial of condemnation cases. Opinion evidence on value should be confined to opinions of the value of the property being taken or damaged for public use.

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

The Commission's recommendation would be effectuated by the enactment of the following measure:

(36)

An act to add Sections 1248.1, 1248.2, 1248.3 and 1248.4 to, and to repeal Section 1845.5 of, the Code of Civil Procedure, 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. (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 taken or injuriously affected is presumed to be qualified to express such opinions. Such a witness may, on direct or cross-examination, state the facts and data upon which his opinion is based, whether or not he has personal knowledge thereof, for the limited purpose of showing the basis for his opinion; and his statement of such facts and data is subject to impeachment and rebuttal.

(2) Nothing in this section prohibits a view of the property or the admission of any other evidence, including but not limited to evidence as to the nature and condition of the property and the character of the improvement proposed to be constructed by the plaintiff, for the limited purpose of enabling the court, jury or referee to understand and apply the testimony given under subdivision (1) of this section; and such evidence is subject to impeachment and rebuttal.

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

1248.2. Subject to Section 1248.3, the opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is admissible only if the court finds that the opinion is based upon facts and data that a willing purchaser and a willing seller, dealing with each other with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, would take into consideration in determining the price at which to purchase and sell the property or property interest, including but not limited to:

(1) The price and other terms of any sale or contract to sell which included the property or property interest to be taken or injuriously affected or any part thereof if the sale or contract was freely made in good faith within a reasonable time before the date of valuation.

(2) The price and other terms of any sale or contract to sell of comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation.

(3) The capitalized value of the reasonable net rental attributable to the property or property interest to be taken or injuriously affected as distinguished from the capitalized value of the income or profits attributable to any business conducted thereon.

(4) The value of the property or property interest to be taken or injuriously affected as indicated by the value of the land together with the cost of reproducing the improvements thereon, if the improvements enhance the value of the land for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.

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 opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is inadmissible if it is based, wholly or in part, upon:

(1) The price or other terms of an acquisition of property or a property interest if the acquisition was made for a public use for which property may be taken by eminent domain.

(2) The price or other terms of any offer made between the parties to the action to buy, sell or lease the property or property interest to be taken or injuriously affected, or any part thereof.

(3) The price at which an offer or option to purchase or lease the property or property interest to be taken or injuriously affected or any other property was made, or the price at which such property or interest was optioned, offered or listed for sale or lease, unless such option, offer or listing is introduced by a party as an admission of another party to the proceeding. 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 or property interest as assessed for taxation purposes.

(5) An opinion as to the value of any property or property interest other than that to be taken or injuriously affected.

SEC. 4. Section 1248.4 is added to the Code of Civil Procedure, to read:

1248.4. If the court finds that the opinion of a witness as to the amount to be determined under subdivision 1, 2, 3, or 4 of Section 1248 is inadmissible under Section 1248.2 or Section 1248.3 because it is based upon incompetent facts or data, the witness may then give his opinion as to such amount after excluding from consideration the facts or data determined to be incompetent.

SEC. 5. Section 1845.5 of the Code of Civil Procedure is repealed.

~~In an eminent domain proceeding a witness, otherwise qualified, may testify with respect to the value of the real property including the improvements situated thereon or the value of any interest in real property to be taken, and may testify on direct examination as to his knowledge of the amount paid for comparable property or property interests. In rendering his opinion as to highest and best use and market value of the property sought to be condemned the witness shall be permitted to consider and give evidence as to the nature and value of the improvements and the character of the existing uses being made of the properties in the general vicinity of the property sought to be condemned.~~

SEC. 6. This act does not apply to any action or proceeding that has been brought to trial prior to the effective date of this act.