

Memorandum 98-69

Eminent Domain Law: Date of Valuation (Further Alternatives)

BACKGROUND

At the July meeting the Commission requested the staff to prepare a draft of a scheme to allow interest on an eminent domain award from the date of valuation until the date the award is deposited. The interest would be prima facie compensation for any increase in the value of the property following the date of valuation. This would tend to minimize the number of cases in which a Kirby claim would or could be made. (In *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984), the court held that where property has increased substantially in value between the date of valuation used in the eminent domain proceeding and the date the condemnor pays the judgment, the property owner is constitutionally entitled to receive the increase in value.)

INTEREST ACCRUAL SCHEME

The interest accrual scheme raises a number of very thorny questions. Most significant of the questions is how the scheme relates to the existing statutory provisions for interest on the award.

In its simplest form an expanded interest allowance would provide:

Code Civ. Proc. § 1268.310 (amended). Date interest commences to accrue

1268.310. The compensation awarded in the proceeding shall draw interest, computed as prescribed by Section 1268.350, from the earliest of the following dates:

- (a) The date of ~~entry of judgment~~ valuation.
- (b) The date the plaintiff takes possession of the property.
- (c) The date after which the plaintiff is authorized to take possession of the property as stated in an order for possession.

Comment. Section 1268.310 is amended to run interest from the date of valuation rather than the date of entry of judgment. This is intended as prima facie satisfaction of the requirement that the owner of property taken by eminent domain receive just

compensation for any substantial increase in the value of the property after the date of valuation. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984). For determination of the date of valuation, see Sections 1263.110-1263.150.

This draft has a number of significant drawbacks:

(1) It does not solve the *Kirby* problem. *Kirby* expressly declares that interest is not an adequate remedy where the value of the property has increased at a rate substantially higher than the interest rate. We would need to supplement the prima facie interest scheme with some sort of backup procedure.

(2) The prima facie interest scheme is meshed with the existing postjudgment interest scheme, which will undoubtedly cause confusion. An eminent domain award accrues interest from the date of entry of judgment until the date the award is deposited in court for the property owner. Code Civ. Proc. § 1263.310, 1263.320.

The purpose of interest on the award in eminent domain is to compensate the property owner for the loss of use of the property until compensation is received. The purpose of the prima facie interest scheme, on the other hand, is to adjust the award for the change in value of the property between the date of valuation and the date of payment. The two types of interest serve similar but distinct functions, and their interrelation is certain to generate problems.

(3) The statutory rate of interest for eminent domain proceedings is imperfect and provides no certainty. The statutory rate is the earnings rate of the Surplus Money Investment Fund for the preceding six-month period. Code Civ. Proc. § 1263.350. (Currently that rate is about 5.7%.) It has been held that the rate is a statutory floor, and the courts may, under the just compensation clause, award a higher rate if necessary to conform to market value. *People v. Diversified Properties Co.*, 14 Cal. App. 4th 442, 17 Cal. Rptr. 2d 676 (1993). But note that the statutory rate is presumptively the market rate. 17 Cal. Rptr. 2d at 687.

(4) The prima facie interest scheme will generate political opposition, since it would increase the cost of every condemnation case, regardless of whether the subject property increases in value. Of course, the condemnor has the option to make a deposit in court, which would stop the running of interest. But until judgment is entered determining the amount of the award, the condemnor's deposit would have to be based on a projection of the amount of just compensation, with whatever procedural complications may be needed to ensure a sound projection.

OTHER APPROACHES

Before we develop the prima facie interest approach to the exclusion of other solutions, the staff believes it is worth devoting additional time to other options. These include: (1) Use some sort of multiplier for general real estate trends. (2) Provide a revaluation procedure along the lines suggested by Kirby. (3) Provide a simplified means of value updating.

Multiplier for General Real Estate Trends

It might be possible to simply update the property value by use of a multiplier based on general real estate trends in the vicinity of the subject property. This could be coupled with a provision allowing either party the opportunity to prove a different multiplier for the subject property if the party can prove a substantial differential.

While the staff thinks this approach offers potential, the problem is to find an appropriate multiplier. To work well it would need to be a multiplier developed by a neutral organization, not commissioned by a party to the eminent domain proceeding.

The staff's research to date has not revealed a viable option. We have examined the following possibilities:

Property tax assessor's multiplier. In years gone by, the county property tax assessor annually reassessed neighborhood values based on market trends. This is no longer done in the aftermath of Proposition 13, which provides for reassessment of an individual property only on transfer.

Board of Equalization's multiplier. The State Board of Equalization tracks ratios between assessed value and market value of commercial properties. Their statisticians inform us that these ratios do not provide a reliable basis for determining trends in market value.

California Association of Realtors' Median Home Prices for Selected California Cities and Areas. The CAR index has limited utility. It tracks median home prices for 330 cities in 26 counties, showing monthly and yearly changes. Its geographic coverage is not complete, and CAR personnel inform us that the residential index is not a reliable indicator for commercial properties.

Consumer Price Index. The CPI does not parallel real estate prices, even though there is some relationship between the two. During 1998, for example, the

CPI has increased only marginally, while residential property prices have skyrocketed.

Much as the concept of an automatic multiplier appeals to the staff, this cannot work unless we can find an appropriate index to use.

Revaluation Procedure

Kirby envisions a motion by the property owner to amend the condemnation award:

The evidence adduced in consideration of such a motion would be very limited. The parties would not be permitted to question the adjudicated value of the tract as of the date of its original valuation; they would be limited to the presentation of evidence and arguments on the issue of how the market value of the property altered between that date and the date on which the judgment was paid by the Government. So focused, the consideration of such a motion would be expeditious and relatively inexpensive for the parties involved. Further refinement of this procedural option we leave to the courts called upon to administer it.
467 U.S. at 18-19 (fns. omitted)

Such a procedure would clearly be more cumbersome than an automatic calculation of interest or application of a multiplier. Despite the court's conclusion that the procedure would be "expeditious and relatively inexpensive" the staff believes the procedure would in effect require a new valuation of the property. This would not necessarily be as cumbersome in federal court as it might be in California, since California law guarantees a jury trial on compensation. Cal. Const. art I, § 19 ("Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.") However, a case can be made that *Kirby* compensation is required by the just compensation clause of the United States Constitution, not the California Constitution, and therefore a jury determination of *Kirby* compensation is not required.

In any event, the procedure would be complex and many issues would need to be resolved — who may make the motion? when may it be made? is there a limitation period on the motion? who may participate in the updated valuation hearing? can discovery and evidence be limited? who is bound by the updated award? is the maker of the motion entitled to litigation expenses? how is any

increase in the award enforced? etc. The staff would avoid going down this road if at all possible.

Simplified Means of Value Updating

Is there a middle ground between an automatic multiplier and a hearing on increased value? The staff can conceive of schemes that might work, and **the staff believes the Commission should give serious consideration to such a scheme.**

For example, we could provide that if the award is paid within one year after the date of valuation, it is presumptively adequate. If the award is paid more than one year after the date of valuation, the condemnor would be required to increase the award based on the condemnor's assessment of any increased value, which assessment would be presumptively correct. If the property owner objects, the court would appoint a referee — an independent appraiser — whose determination would be binding on the parties. The costs of the appraisal would be borne equally by the condemnor and property owner (thereby encouraging the condemnor to make a realistic assessment at the outset and discouraging the property owner from objecting without good cause).

A statute along these lines might look something like this:

Code Civ. Proc. § 1268.040 (added). Adjustment of award for increase in market value

1268.040. (a) If the full amount required by the judgment is not paid within one year after the date of valuation, the plaintiff shall, at the time of payment, calculate and pay any amount by which the value of the property taken has increased since the date of valuation. The amount paid shall be in addition to the full amount required by the judgment.

(b) Before making a calculation and payment under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of any amount by which the value of the property has increased and (2) prepare a written statement of, or summary of the basis for, the appraisal. The plaintiff shall, at the time of payment, serve a copy of the written statement or summary on the parties entitled to payment.

(c) Within 30 days after service of a copy of a written summary or statement, a party entitled to payment may by motion object to the sufficiency of a calculation and payment made by the plaintiff. The court shall thereupon appoint a qualified referee, who shall make an appraisal of any amount by which the value of the property has increased. The referee shall promptly report the

appraisal to the court, and the appraisal is conclusive in the proceeding. The fees of the referee shall be apportioned equally between the plaintiff and the moving party.

Comment. Section 1268.040 is added to remedy the deficiency in just compensation identified in Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984). This section applies only if full payment of the award is not made within one year of the date of valuation. Any remedies of a property owner for substantial increases in property value within one year of the date of valuation are judicial, not statutory.

The general rules of practice governing motions apply to a motion under this section. Section 1230.040. For general provisions governing referees, see Sections 638-645.1.

It should be noted that the plaintiff may avoid the effect of this section by paying the amount of the award to, or depositing it in court for, the benefit of the persons entitled to payment.

MISCELLANEOUS TECHNICAL ISSUES

While we are working in this area, the staff would also clean up several technical issues related to the date of valuation. These issues were identified in Memorandum 98-44, considered by the Commission at the July meeting. By statute the date of valuation is the date of filing the proceeding, unless trial is not commenced within a year, in which case the date of valuation is the earlier of the date of commencement of trial or of the condemnor's deposit of probable compensation.

Bifurcated Trial

The date of valuation is keyed to the date of trial, but it is not clear how this applies in the case of a bifurcated trial. It is common in an eminent domain proceeding to have a two-phase trial, the first phase involving the right to take and the second phase involving valuation. N. Matteoni & H. Veit, 1 Condemnation Practice in California § 4.25 at 116-117 (Cal. Cont. Ed. Bar, June 1997 Update). **The staff suggests that the law be made clear that “date of trial” refers to the valuation phase, in the case of a bifurcated trial:**

Code Civ. Proc. § 1263.105 (added). Date of commencement of trial

1263.105. As used in this article, “date of commencement” of a trial, new trial, or retrial means the date of commencement of the trial, new trial, or retrial of the issue of compensation.

Comment. Section 1263.105 recognizes the bifurcation that occurs in an eminent domain proceeding when the right to take is contested. See Section 1260.110 (objections to right to take shall be heard and determined prior to determination of the issue of compensation).

Increase in Prejudgment Deposit

“Though no appellate case has decided the issue, it would appear that a substantial increase in the deposit under CCP § 1255.030 shifts the date of value to the date the increase is deposited.” N. Matteoni & H. Veit, 1 Condemnation Practice in California § 4.23 at 112-113 (Cal. Cont. Ed. Bar, June 1997 Update). That interpretation would be consistent with the policy that supports fixing the date of valuation at the date a deposit of probable compensation is made. **The staff would make this clear in the statute:**

Code Civ. Proc. § 1263.110 (amended). Date of valuation fixed by deposit

1263.110. (a) Unless an earlier date of valuation is applicable under this article, if the plaintiff deposits the probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6 or the amount of the award in accordance with Article 2 (commencing with Section 1268.110) of Chapter 11, the date of valuation is the date on which the deposit is made.

(b) Whether or not the plaintiff has taken possession of the property or obtained an order for possession, if the court determines pursuant to Section 1255.030 that the probable amount of compensation exceeds the amount previously deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 ~~and~~, the date of valuation is the date on which the amount on deposit is not increased accordingly within the time allowed under Section 1255.030; otherwise, no deposit shall be deemed to have been made for the purpose of this section.

Comment. Section 1263.110 is amended to clarify the effect on the date of valuation of a court-ordered increase in the amount of the deposit. Cf. N. Matteoni & H. Veit, 1 Condemnation Practice in California § 4.23 at 112-113 (Cal. Cont. Ed. Bar, June 1997 Update) .

CONCLUSION

The prima facie interest concept has significant theoretical and political drawbacks that the staff believes make it a poor choice as a *Kirby* solution. The

motion procedure envisioned by Kirby, while theoretically unobjectionable, entails so many procedural complications that it is practically unworkable.

From the staff's perspective, a better approach would be to apply an automatic real estate index multiplier to the award. This would provide a rough measure of justice simply and without procedural complications. Unfortunately, we have so far been unable to locate a usable and readily-available index.

Given these drawbacks, the staff thinks the best way to proceed is to develop a sort of hybrid simplified procedure. We offer the one outlined above as a possibility, although certainly other procedures are imaginable.

In addition, we would make the technical clarifications in the date of valuation statutes suggested above.

Respectfully submitted,

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Executive Secretary