

Memorandum 98-70

Eminent Domain Law: Valuation Evidence

The owner of property taken by eminent domain is entitled to receive as compensation the fair market value of the property taken. Fair market value is defined as “the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.” Code Civ. Proc. § 1263.320(a).

The Evidence Code provides rules, enacted on recommendation of the Law Revision Commission, for proving the fair market value of property. Evidence of a previous sale of the subject property or of comparable property, for example, is generally admissible, and may be used as a basis for an opinion as to the value of property. Evid. Code §§ 815, 816.

Sales to Public Entities

Historically, a previous sale of the subject property or of comparable property to a public entity that could have taken the property by eminent domain cannot be used as valuation evidence in an eminent domain proceeding. Evidence Code Section 822 provides:

822. (a) In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Sections 814 to 821 inclusive, the following matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of property:

(1) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain ...

The reason for this exclusion is that a sale of property to a public entity is of doubtful validity as evidence of fair market value. “Such a sale does not involve

a willing buyer and a willing seller. The costs, risks and delays of litigation are factors that often affect the ultimate price. ... These sales, therefore, are not sales in the 'open market' and should not be considered in a determination of market value." Evidence in Eminent Domain Proceedings, 3 *Cal. L. Revision Comm'n Reports* A-1, A-7 (1961).

1987 Amendment of Evidence Code Section 822

Evidence Code Section 822(a)(1), precluding use of a sale of property to a public entity, was amended in 1987 to allow use of certain sales to public entities:

... the price or other terms and circumstances of an acquisition of property appropriated to a public use or a property interest so appropriated shall not be excluded under this section if the acquisition was for the same public use for which the property could have been taken by eminent domain.

What does this mind-numbing language mean? It has confused people since its enactment. Norm Matteoni, a former Commission consultant on eminent domain law, says that, "The statutory wording is confusing because the exception language follows very closely the rule itself." N. Matteoni, 1 *Condemnation Practice in California* § 4.29 at 120 (Cal. Cont. Ed. Bar 2d ed. 1998). Our current consultant, Gideon Kanner alludes to this "long-standing bit of confusion." He forwards a letter from Ronald J. Mulcare of San Mateo, who suggests that the Law Revision Commission take a look at the provision, which "has become complex and confusing ... Clarification is needed." Exhibit p. 1.

The confusion is more than academic. The Court of Appeal apparently misconstrued the provision in the only published appellate decision involving it to date. See *City and County of San Francisco v. Golden Gate Heights Investments*, 14 Cal. App. 4th 1203, 18 Cal. Rptr. 2d 467, 470 (1993) (allowing evidence of prices paid by condemnor for adjacent properties acquired for use as open space).

Intent of 1987 Language

The 1987 language was added by Chapter 1278 of the Statutes of 1987 in a bill sponsored by the California Department of Transportation. According to Chuck Spencer, an attorney for the Department of Transportation, the purpose and effect of this language is to prevent the automatic exclusion of evidence of an acquisition of property that, at the time of the acquisition, was already in use for the same public purpose for which it was acquired. Thus, for example, a

municipal water district's acquisition of the facilities of an existing water district may be a relevant comparable sale in valuing a similar acquisition by another water district. 11 CEB Real Property Law Rep. 29 (Jan. 1988).

As so construed, this is a very narrow exception indeed. Norm Matteoni gives as the reason for the exception that, "it is difficult to find market transactions comparable to an acquisition for a public use of property that is already subject to the same type of public use (e.g., a municipality's acquisition of the facilities of a water company). Thus the exception is considered most applicable to the condemnation of public utility properties or special districts." N. Matteoni, 1 Condemnation Practice in California § 9.54 at 433-34 (Cal. Cont. Ed. Bar 2d ed. 1998).

Suggested Clarification

The staff suggests clarification of the offending language along the following lines:

Evid. Code § 822 (amended). Matter inadmissible as evidence

822. (a) In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Sections 814 to 821 inclusive, the following matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of property:

(1) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain, ~~except that the~~ The price or other terms and circumstances of an acquisition of property that at the time of acquisition was already appropriated to a public use or a property interest so appropriated shall not be excluded under this section if the acquisition was for the same public use for which the property could have been taken by eminent domain was already appropriated.

(2) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which such property or interest was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding; but 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 813.

(3) The value of any property or property interest as assessed for taxation purposes or the amount of taxes which may be due on the property, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.

(4) An opinion as to the value of any property or property interest other than that being valued.

(5) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury.

(6) The capitalized value of the income or rental from any property or property interest other than that being valued.

(b) In an action other than an eminent domain or inverse condemnation proceeding, the matters listed in subdivision (a) are not admissible as evidence, and may not be taken into account as a basis for an opinion as to the value of property, except to the extent permitted under the rules of law otherwise applicable.

~~(c) The amendments made to this section during the 1987 portion of the 1987-88 Regular Session of the Legislature shall not apply to or affect any petition filed pursuant to this section before January 1, 1988.~~

Comment. Subdivision (a)(1) of Section is amended to clarify its meaning. Cf. Code Civ. Proc. § 1235.180 (“property appropriated to public use” in Eminent Domain Law means property already in use for, or set aside for, public purpose).

Subdivision (c) is deleted as obsolete.

Tentative Recommendation

If the Commission is in agreement with the staff’s proposed clarification, we would convert this memorandum into a tentative recommendation and circulate it for comment.

Respectfully submitted,

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Executive Secretary

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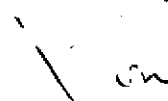
Dear Gideon:

Mort Schwartz has informed the Group that you are now working with the Law Revision Commission, which is taking a look at the Eminent Domain Law. I assume Evidence Code Section 810 et seq. is at least related.

As a result of an amendment, Evidence Code Section 822(a)(1) has become complex and confusing. As I understand this 1987 amendment (Stats. 1987, C. 1278), which commences with the word "except", was intended to allow consideration of sales of utility properties as comparable sales when valuing a utility being acquired in condemnation proceedings. Clarification is needed.

Hope this letter finds you in good health and spirits.

Sincerely,


Ronald J. Mulcare

RJM:n

cc: Mortimer Schwartz
Philip Lanzafame

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