

Memorandum 98-78

**Eminent Domain Valuation Evidence:
Comments on Tentative Recommendation**

The Commission has circulated for comment its tentative recommendation on eminent domain valuation evidence. The purpose of the tentative recommendation is to clarify the meaning of an obscure provision in Evidence Code Section 822(a)(1):

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.

The Commission received one comment on this proposal, from Charles B. Warren of San Francisco, an appraiser. See Exhibit p. 1. Mr. Warren questions the operation of this provision in the following circumstance.

Suppose a particular piece of land has no value in the open real estate market — it is marsh land that is zoned and master planned as open space, and for all practical purposes unsalable. If the state were to condemn the property, the award would be nominal. Now along comes an open space trust and pays \$10,000 an acre for the land, just to ensure that the property remains as open space in perpetuity, protecting it against possible future zoning changes. Does the tentative recommendation imply that if the state thereafter were to acquire the property by eminent domain, it would have to pay \$10,000 an acre even

though it is worthless on the open market? Mr. Warren says that the tentative recommendation “gets into, perhaps without intention, the area of environmental value.”

The staff can see that the area of environmental value is unique, though probably no more unique than valuation of any other type of “special use” property. In fact, Evidence Code Section 824 specifically provides that any just and equitable method may be used to determine the value of nonprofit, special use property for which there is no relevant, comparable market.

In any event, our purpose here is not to question the basis for Evidence Code Section 822(a)(1), which the Legislature has already adopted as the public policy of the state. We are in this recommendation merely clarifying the operation of the provision.

It is worth noting that, despite Mr. Warren’s assumption, Section 822(a)(1) would not come into play at all in his example. That is because Section 822(a)(1) only limits admissibility of evidence of an acquisition of property made under threat of condemnation. But open space trusts generally are private entities that do not have condemnation authority. Their acquisitions would be considered open market transactions, untainted by the threat of condemnation, and therefore admissible as evidence of value.

But let us assume for the sake of argument that the acquiring entity in Mr. Warren’s example does have eminent domain authority. The more disturbing question Mr. Warren’s comment raises is whether our attempted clarification is in fact clear. He predicates his example on the assumption that the \$10,000 an acre paid by the open space trust for privately-owned marsh land is “an acquisition of property that at the time of acquisition was already appropriated to a public use”, and therefore the transaction would be admissible evidence of value under Section 822(a)(1). But in fact in his example, at the time of acquisition the land was merely zoned as open space and was not “appropriated to a public use” within the intended meaning of the statute. Property “appropriated to a public use” is property already in use for a public purpose or set aside for a specific public purpose. Code Civ. Proc. § 1235.180.

Although we refer to the Code of Civil Procedure definition of “property appropriated to a public use” in the Comment to Evidence Code Section 822(a)(1), maybe we need to do more. Perhaps:

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

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(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. As used in this paragraph, “property appropriated to public use” has the meaning provided in Section 1235.180 of the Code of Civil Procedure.

The staff would finalize this proposal for submission to the Legislature, as so revised.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Date: Thu, 01 Oct 1998 19:15:52 -0700
From: Charles & Johanna Warren <cjwarren@slipnet.com>
MIME-Version: 1.0
To: feedback@clrc.ca.gov
CC: tbaker@appraisers.org
Subject: valuation
X-URL: <http://www.clrc.ca.gov/citoyen.html>
X-Rcpt-To: feedback@clrc.ca.gov

Your TR on valuation evidence is very interesting. It gets into, perhaps without intention, the area of environmental value.

Let us take a real world example. The Peninsula Open Space Trust buys Bair Island in San Francisco Bay for about \$10,000 per acre. This is land which has been zoned and master planned as open space and is, in fact, defunct salt evaporators. Not exactly prime for anything profitable, but scarce for environmental purposes because of its bay location and the possibility of marsh restoration.

At the federal level the Interagency Committee on Land Acquisition has opined that the only value admissible for eminent domain purposes is that which the for-profit market would pay for a private for-profit use. In this case - little or none, which might explain why this asset remained in the ownership of Redwood Shores Properties despite their financial difficulties in the last recession.

But, if I understand your proposed revision, now the State could pay \$10,000 per acre predicated on the previous transaction for preservation purposes... Now, I am in favor of preservation. I am also in favor of efficient use of government resources, if that isn't an oxymoron. As a practical matter I question the \$10,000 per acre. But I don't see how this rule helps to split the difference between nothing and ten grand.

I wonder if this issue was envisioned in the drafting of this TR?

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CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Eminent Domain Valuation Evidence: Clarification of Evidence Code Section 822

September 1998

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN November 15, 1998.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

Evidence Code Section 822(a)(1) provides that evidence of a sale 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.” The Law Revision Commission recommends clarification of this confusing language to effectuate its intended purpose.

This recommendation was prepared pursuant to Resolution Chapter 91 of the Statutes of 1998.

1 EMINENT DOMAIN VALUATION EVIDENCE:
2 CLARIFICATION OF
3 EVIDENCE CODE SECTION 822

4 The owner of property taken by eminent domain is entitled to receive as
5 compensation the fair market value of the property taken. Fair market value is
6 defined as “the highest price on the date of valuation that would be agreed to by a
7 seller, being willing to sell but under no particular or urgent necessity for so doing,
8 nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no
9 particular necessity for so doing, each dealing with the other with full knowledge
10 of all the uses and purposes for which the property is reasonably adaptable and
11 available.”¹

12 The Evidence Code provides rules for proving the fair market value of property.²
13 Evidence of a previous sale of the subject property or of comparable property, for
14 example, is generally admissible, and may be used as a basis for an opinion as to
15 the value of property.³

16 **Sales to Public Entities**

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

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

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

28 The reason for this exclusion is that a sale of property to a public entity is of
29 doubtful validity as evidence of fair market value. “Such a sale does not involve a
30 willing buyer and a willing seller. The costs, risks and delays of litigation are
31 factors that often affect the ultimate price. ... These sales, therefore, are not sales in

1. Code Civ. Proc. § 1263.320(a).

2. The rules were enacted on recommendation of the Law Revision Commission. See *Evidence in Eminent Domain Proceedings*, 3 Cal. L. Revision Comm’n Reports, at A-1 (1961); *Evidence of Market Value of Property*, 14 Cal. L. Revision Comm’n Reports 105 (1978); *Application of Evidence Code Property Valuation Rules in Noncondemnation Cases*, 15 Cal. L. Revision Comm’n Reports 301 (1980).

3. Evid. Code §§ 815, 816.

1 the 'open market' and should not be considered in a determination of market
2 value."⁴

3 **1987 Amendment of Evidence Code Section 822**

4 Evidence Code Section 822(a)(1), precluding use of a sale of property to a public
5 entity, was amended in 1987 to allow use of certain sales to public entities:⁵

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

10 The meaning of this language is unclear. "The statutory wording is confusing
11 because the exception language follows very closely the rule itself."⁶ The
12 confusion is more than academic — the court apparently misconstrued the
13 provision in the only published appellate decision involving it to date, allowing
14 evidence of prices paid by the same condemnor to acquire adjacent private
15 property for public use.⁷

16 **Intent of 1987 Language**

17 The 1987 language was sponsored by the California Department of
18 Transportation. According to a spokesperson for the Department of
19 Transportation, the purpose and effect of this language is to prevent the automatic
20 exclusion of evidence of an acquisition of property that, at the time of the
21 acquisition, was already in use for the same public purpose for which it was
22 acquired. Thus, for example, a municipal water district's acquisition of the
23 facilities of an existing water district may be a relevant comparable sale in valuing
24 a similar acquisition by another water district.⁸

25 This is a very narrow exception. The reason for it is that, "it is difficult to find
26 market transactions comparable to an acquisition for a public use of property that
27 is already subject to the same type of public use (e.g., a municipality's acquisition
28 of the facilities of a water company). Thus the exception is considered most
29 applicable to the condemnation of public utility properties or special districts."⁹

4. *Evidence in Eminent Domain Proceedings*, 3 Cal. L. Revision Comm'n Reports A-1, A-7 (1961).

5. 1987 Cal. Stats. ch. 1278, § 1.

6. N. Matteoni, 1 *Condemnation Practice in California* § 4.29 at 120 (Cal. Cont. Ed. Bar 2d ed. 1998).

7. See *City and County of San Francisco v. Golden Gate Heights Investments*, 14 Cal. App. 4th 1203, 18 Cal. Rptr. 2d 467, 470 (1993).

8. 11 CEB Real Property Law Rep. 29 (Jan. 1988).

9. N. Matteoni, 1 *Condemnation Practice in California* § 9.54 at 433-34 (Cal. Cont. Ed. Bar 2d ed. 1998).

1 **Recommended Clarification**

2 The Law Revision Commission recommends clarification of the language of
3 Evidence Code Section 822(a) to more clearly effectuate its intended purpose.

PROPOSED LEGISLATION

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

5 SECTION 1. Section 822 of the Evidence Code is amended to read:

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

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

18 (2) The price at which an offer or option to purchase or lease the property or
19 property interest being valued or any other property was made, or the price at
20 which such property or interest was optioned, offered, or listed for sale or lease,
21 except that an option, offer, or listing may be introduced by a party as an
22 admission of another party to the proceeding; but nothing in this subdivision
23 permits an admission to be used as direct evidence upon any matter that may be
24 shown only by opinion evidence under Section 813.

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

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

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

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

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

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

4 **Comment.** Subdivision (a)(1) of Section is amended to clarify its meaning. Cf. Code Civ. Proc.
5 § 1235.180 ("property appropriated to public use" in Eminent Domain Law means property
6 already in use for, or set aside for, public purpose). The amendment reverses the interpretation of
7 the provision in *City and County of San Francisco v. Golden Gate Heights Investments*, 14 Cal.
8 App. 4th 1203, 18 Cal. Rptr. 2d 467 (1993).

9 Subdivision (c) is deleted as obsolete.