

Memorandum 2001-48

AB 237 (Papan): Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain

This memorandum presents material relating to AB 237 (Papan). That bill would implement the Commission's recommendation on early disclosure of valuation data and resolution of issues in eminent domain.

Attached to this memorandum are the following items:

	<i>Exhibit p.</i>
1. AB 237 (Papan), as amended 5/7/01	1
2. New and Revised Comments to AB 237	14
3. Philip F. Lanzafame, Pasadena	16
4. Norman E. Matteoni, San Jose	19
5. Philip F. Lanzafame, Pasadena	21

Status of Bill

At the Commission's March meeting the staff presented issues that had arisen concerning AB 237 (Papan). The Commission directed the staff to develop appropriate amendatory language either to the bill or to Commission Comments addressing the issues that had been raised.

We developed amendments and Comment revisions in consultation with the author's office and with interested parties (including League of Cities, Caltrans, and private condemnation attorneys). The amended bill is attached as Exhibit pp. 1-13; the new and revised Comments are attached as Exhibit pp. 14-15.

The bill has been approved by the Assembly Judiciary Committee. At the time of the committee hearing, the staff agreed to bring back to the Commission the issue discussed below, which has not been resolved to the satisfaction of property owners' attorneys.

Costs and Litigation Expenses

Philip F. Lanzafame of Pasadena (Exhibit pp. 16-18) and Norman E. Matteoni of San Jose (Exhibit pp. 19-20) criticize the provision of the bill allowing costs and litigation expenses against a party who, following nonbinding arbitration, seeks a

trial de novo but fails to obtain a more favorable award. The provision is found in proposed Code of Civil Procedure Section 1250.420(c):

The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after service of the arbitrator's decision a party moves the court for a trial of the eminent domain proceeding. If the judgment in the eminent domain proceeding is not more favorable to the moving party, the moving party shall, notwithstanding any other statute, pay the costs and litigation expenses of the parties in the eminent domain proceeding.

Mr. Lanzafame states, "As presently drafted, the potential penalties for one electing arbitration, and then desiring a trial de novo, are so severe that no able practitioner would ever choose arbitration." He points out that the present proposal goes well beyond the sanctions imposed in judicial arbitration (Code Civ. Proc. § 1141.21) or under the offer of compromise statute (Code Civ. Proc. § 998). The present proposal would impose attorney's fees (the others do not); it also imposes costs and expenses for the entire proceeding (as opposed to those incurred after the request for a trial de novo); and it would give the court no discretion in the matter (the other statutes allow the court to exercise discretion in imposing the sanction).

Mr. Matteoni goes farther. He argues that the provision violates the constitutional protection of the property owner, noting that a property owner is guaranteed a jury trial in eminent domain, but the litigation expense penalty discourages that right. More importantly, to require the property owner to pay any portion of the costs of trial impairs the constitutional guarantee of just compensation. Finally, allowance of costs and litigation expenses in this situation undermines the general eminent domain litigation expense statute, which is designed to encourage adequate offers by condemners.

The staff disagrees with Mr. Matteoni's analysis. There is a constitutional right to a jury trial "unless waived". Cal. Const. art. I, § 19. Arbitration is completely voluntary under this bill, and an agreement by the property owner to arbitrate is a waiver of a jury trial. Moreover, the constitutional guarantee of just compensation does not require a condemner to pay a property owner's litigation costs where the property owner seeks a retrial and does not obtain greater compensation. *Los Angeles, Pasadena & Glendale Ry. v. Rumpff*, 104 Cal. 20, 24, 37 P. 859 (1894) ("The result of the second trial, however, shows that the first award, if not more than she was entitled to, was at least just and full compensation, and

that sum having been paid by the railroad company and received by her, she cannot complain if the costs of an unsuccessful effort to obtain greater compensation are taxed against her.”) Finally, the general litigation expense statute is largely irrelevant where a property owner seeks a trial de novo to obtain greater compensation than that awarded in arbitration; it is unlikely that a condemnor’s offer would be found to be unreasonable in light of an award by a neutral arbitrator in the condemnor’s favor.

The purpose of this bill is to encourage use of alternative dispute resolution techniques, including nonbinding arbitration. But we do believe there needs to be some disincentive for a party to simply take a second bite of the apple any time an arbitration award is not to that party’s satisfaction. Otherwise, the arbitration statute, instead of saving trial costs, will add to the total cost of eminent domain proceedings.

But we are impressed with Mr. Lanzafame’s point that the sanctions currently in the bill are too substantial and will deter all use of nonbinding arbitration. Mr. Matteoni concurs — “I would agree with Phil that any knowledgeable practitioner would reject making a request for non-binding arbitration in a condemnation setting, but if the provision remains, it could be a trap for the unwary.”

Mr. Lanzafame suggests that, if we keep the provision for awarding costs and attorneys fees after an unsuccessful trial de novo, they be limited along the lines provided in the judicial arbitration statute. He suggests the substance of the following amendment (revamped by the staff in an effort to simplify it somewhat without changing the concepts):

The arbitrator’s decision in a nonbinding arbitration is final unless within 30 days after service of the arbitrator’s decision a party moves the court for a trial of the eminent domain proceeding. If the judgment in the eminent domain proceeding is not more favorable to the moving party, ~~the moving party shall, notwithstanding any other statute, pay the costs and litigation expenses of the parties in the eminent domain proceeding.~~ the court shall order that party to pay to the other parties the following nonrefundable costs and fees, unless the court finds in writing and upon motion that the imposition of costs and fees would create such a substantial economic hardship as not to be in the interest of justice:

(i) All costs specified in Section 1033.5, limited to those incurred from the time of election of the trial de novo. Nothing in this subdivision affects the right of a defendant to recover costs otherwise allowable pursuant to Section 1268.710, incurred before

election of a trial de novo, except that a defendant may recover the costs of determining the apportionment of the award made pursuant to subdivision (b) of Section 1260.220 whenever incurred.

(ii) The reasonable costs of the services of expert witnesses who are not regular employees of any party, actually incurred or reasonably necessary in the preparation or trial of the case, limited to those incurred from the time of election of the trial de novo.

(iii) The compensation paid by the parties to the arbitrator.

The staff agrees with this suggestion. We have heard the same concerns about this provision from others. Our objective is to encourage use of alternative dispute resolution in eminent domain; it appears that the present draft would have the opposite effect.

If the Commission agrees with this analysis, we will seek to have the bill amended accordingly.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

AMENDED IN ASSEMBLY MAY 7, 2001

AMENDED IN ASSEMBLY APRIL 2, 2001

CALIFORNIA LEGISLATURE—2001-02 REGULAR SESSION

ASSEMBLY BILL

No. 237

Introduced by Assembly Member Papan

February 13, 2001

An act to amend the heading of Article 6 (commencing with Section 1250.410) of Chapter 5 of Title 7 of Part 3 of, to amend Sections 1250.410, 1255.010, *1255.030*, 1258.220, and 1258.260 of, and to add Sections 1250.420, 1250.430, and 1260.040 to, the Code of Civil Procedure, and to amend ~~Sections 7267.1 and~~ *Section 7267.2* of the Government Code, relating to eminent domain procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 237, as amended, Papan. Eminent domain.

Existing law, the Eminent Domain Law, provides a procedure to exercise the power of eminent domain to acquire property for a public use. It details the rules for the commencement of such a proceeding and for compensation of the owner of the property. Existing law requires, at least 20 days prior to the date of the trial on the issues relating to compensation, for the plaintiff to file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant to file and serve on the plaintiff its final demand for compensation in the proceeding.

This bill would require the final offer and demand to include all elements of required compensation, including compensation for loss of goodwill, and to indicate whether or not interest and costs are included.

The bill also would provide that the parties may by agreement refer a dispute that is the subject of an eminent domain proceeding for resolution by mediation or binding or nonbinding arbitration, as specified.

The bill would provide that, upon motion of a party, the court may postpone the date of trial in an eminent domain proceeding for a period that appears adequate to enable resolution of a dispute pursuant to alternative resolution procedures provided that the court is satisfied that certain conditions are met, as specified.

Existing law provides that at any time before entry of the judgment, the plaintiff may deposit with the State Treasury the probable amount of compensation, based on an appraisal, that will be awarded in the proceeding. Existing law requires the plaintiff, prior to making the deposit, to have an expert qualified to express an opinion as to the value of the property make an appraisal of the property and prepare a written statement of, or summary of, the basis for the appraisal.

This bill would require the statement or summary to contain detail sufficient to clearly indicate the basis for the appraisal, including the highest and best use ~~on which the appraisal~~ *and applicable zoning* of the property ~~is based, and if the appraisal is based on market data,~~ the principal transactions, *reproduction or replacement cost analysis, or capitalization analysis*, supporting the appraisal, and if the appraisal includes compensation for damages to the remainder, *the compensation for the property and for damages to the remainder stated separately*, and the calculations and a narrative explanation supporting the compensation, including any offsetting benefits.

Existing law requires the court, upon motion, to determine or redetermine whether the amount deposited is the probable amount of compensation that will be awarded.

This bill would specify the information necessary to support that motion.

Existing law defines the "date of exchange" for the purposes of the provisions relating to exchange of valuation data in eminent domain proceedings, as the date agreed to by the parties for the exchange of their lists of expert witnesses and statements of valuation data by the party who served a demand and the party on whom the demand was served, or, failing agreement, a date 60 days prior to commencement of the trial on the issue of compensation, or the date set by the court on noticed motion of either party establishing good cause therefor.

This bill would provide that failing agreement, the date of exchange is a date 90, rather than 60, days prior to the above specified events, and would provide that unless otherwise agreed to by the parties, the date of exchange shall not be earlier than 9 months after the date of commencement of the proceeding.

Existing law requires the statement of valuation data to provide the name and business or residence address of the witness and to include a statement whether the witness will testify to an opinion, as specified.

This bill would require the method used to determine a loss of good will and a summary of the data supporting the opinion to be included in the exchange of valuation data. Moreover, the bill would provide that either party may move the court for a ruling on a evidentiary or other legal issue affecting the determination of compensation, and would require the motion to be made 60 days before commencement of trial on the issue of compensation. The bill would authorize the court to postpone the date of final offers and demands of the parties and the date of trial for a period sufficient to enable the parties to engage in further proceedings before trial in response to the court's ruling on the motion.

~~Existing law requires a public entity that is attempting to acquire real property by negotiation to have the property appraised before the initiation of the negotiations, as specified.~~

~~This bill would provide that the public entity's appraisal, and any other valuation opinion expressed by or on behalf of a party prepared for the purpose of negotiation, is inadmissible in the trial of the issue of just compensation, as specified.~~

Existing law requires a public entity to establish an amount which it believes to be just compensation for the acquisition of real property and to provide the owner of real property with a written statement of, and summary of the basis for, the amount it established as just compensation. Existing law provides that where the property is owner occupied residential property and contains no more than 4 residential units, the homeowner shall, upon request, be allowed to review a copy of the appraisal upon which the offer is based.

This bill would ~~delete~~ *revise* the latter provision *to make it permissive, rather than mandatory*, and would ~~require the public entity to provide a copy of the appraisal on which the offer is based to the owner of real property~~ *specify the necessary detail required of the written statement and summary.*

The provisions of the bill would apply to any proceeding commenced on or after January 1, 2002.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

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

1 SECTION 1. The heading of Article 6 (commencing with
2 Section 1250.410) of Chapter 5 of Title 7 of Part 3 of the Code of
3 Civil Procedure is amended to read:

4
5 Article 6. Settlement Offers and Alternative Dispute
6 Resolution
7

8 SEC. 2. Section 1250.410 of the Code of Civil Procedure is
9 amended to read:

10 1250.410. (a) At least 20 days prior to the date of the trial on
11 issues relating to compensation, the plaintiff shall file with the
12 court and serve on the defendant its final offer of compensation in
13 the proceeding and the defendant shall file and serve on the
14 plaintiff its final demand for compensation in the proceeding. The
15 offer and the demand shall include all compensation required
16 pursuant to this title, including compensation for loss of goodwill,
17 if any, and shall state whether interest and costs are included. Such
18 offers and demands shall be the only offers and demands
19 considered by the court in determining the entitlement, if any, to
20 litigation expenses. Service shall be in the manner prescribed by
21 Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

22 (b) If the court, on motion of the defendant made within 30 days
23 after entry of judgment, finds that the offer of the plaintiff was
24 unreasonable and that the demand of the defendant was reasonable
25 viewed in the light of the evidence admitted and the compensation
26 awarded in the proceeding, the costs allowed pursuant to Section
27 1268.710 shall include the defendant's litigation expenses.

28 In determining the amount of such litigation expenses, the court
29 shall consider the offer required to be made by the plaintiff
30 pursuant to Section 7267.2 of the Government Code and any other
31 written offers and demands filed and served prior to or during the
32 trial.

33 (c) If timely made, the offers and demands as provided in
34 subdivision (a) shall be considered by the court on the issue of
35 determining an entitlement to litigation expenses.

1 SEC. 3. Section 1250.420 is added to the Code of Civil
2 Procedure, to read:

3 1250.420. The parties may by agreement refer a dispute that
4 is the subject of an eminent domain proceeding for resolution by
5 any of the following means:

6 (a) Mediation by a neutral mediator.

7 (b) Binding arbitration by a neutral arbitrator. The arbitration
8 is subject to Chapter 12 (commencing with Section 1273.010).

9 (c) Nonbinding arbitration by a neutral arbitrator. The
10 arbitrator's decision in a nonbinding arbitration is final unless
11 within 30 days after service of the arbitrator's decision a party
12 moves the court for a trial of the eminent domain proceeding. If the
13 judgment in the eminent domain proceeding is not more favorable
14 to the moving party, the moving party shall, notwithstanding any
15 other statute, pay the costs and litigation expenses of the parties in
16 the eminent domain proceeding.

17 SEC. 4. Section 1250.430 is added to the Code of Civil
18 Procedure, to read:

19 1250.430. Notwithstanding any other statute or rule of court
20 governing the date of trial of an eminent domain proceeding, on
21 motion of a party the court may postpone the date of trial for a
22 period that appears adequate to enable resolution of a dispute
23 pursuant to alternative resolution procedures, if it is demonstrated
24 to the satisfaction of the court that all of the following conditions
25 are satisfied:

26 (a) The parties are actively engaged in alternative resolution of
27 the dispute pursuant to Section 1250.420.

28 (b) The parties appear to be making progress toward resolution
29 of the dispute without the need for a trial of the matter.

30 (c) The parties agree that additional time for the purpose of
31 alternative dispute resolution is desirable.

32 SEC. 5. Section 1255.010 of the Code of Civil Procedure is
33 amended to read:

34 1255.010. (a) At any time before entry of judgment, the
35 plaintiff may deposit with the State Treasury the probable amount
36 of compensation, based on an appraisal, that will be awarded in the
37 proceeding. The appraisal upon which the deposit is based shall be
38 one that satisfies the requirements of subdivision (b). The deposit
39 may be made whether or not the plaintiff applies for an order for
40 possession or intends to do so.

1 (b) Before making a deposit under this section, the plaintiff
2 shall have an expert qualified to express an opinion as to the value
3 of the property (1) make an appraisal of the property and (2)
4 prepare a written statement of, or summary of the basis for, the
5 appraisal. The statement or summary shall contain detail sufficient
6 to indicate clearly the basis for the appraisal, including, but not
7 limited to, all of the following information:

8 ~~(1) The highest and best use on which the appraisal of the~~
9 ~~property is based.~~

10 ~~(2) If the appraisal is based on market data, the principal~~
11 ~~transactions supporting the appraisal.~~

12 ~~(3) If the appraisal includes compensation for damages to the~~
13 ~~remainder, the calculations and a narrative explanation supporting~~
14 ~~the compensation, including any offsetting benefits.~~

15 ~~(A) The date of valuation, highest and best use, and applicable~~
16 ~~zoning of the property.~~

17 ~~(B) The principal transactions, reproduction or replacement~~
18 ~~cost analysis, or capitalization analysis, supporting the appraisal.~~

19 ~~(C) If the appraisal includes compensation for damages to the~~
20 ~~remainder, the compensation for the property and for damages to~~
21 ~~the remainder separately stated, and the calculations and a~~
22 ~~narrative explanation supporting the compensation, including any~~
23 ~~offsetting benefits.~~

24 (c) On noticed motion, or upon ex parte application in an
25 emergency, the court may permit the plaintiff to make a deposit
26 without prior compliance with subdivision (b) if the plaintiff
27 presents facts by affidavit showing that (1) good cause exists for
28 permitting an immediate deposit to be made, (2) an adequate
29 appraisal has not been completed and cannot reasonably be
30 prepared before making the deposit, and (3) the amount of the
31 deposit to be made is not less than the probable amount of
32 compensation that the plaintiff, in good faith, estimates will be
33 awarded in the proceeding. In its order, the court shall require that
34 the plaintiff comply with subdivision (b) within a reasonable time,
35 to be specified in the order, and also that any additional amount of
36 compensation shown by the appraisal required by subdivision (b)
37 be deposited within that time.

38 SEC. 6. *Section 1255.030 of the Code of Civil Procedure is*
39 *amended to read:*

1 1255.030. (a) At any time after a deposit has been made
2 pursuant to this article, the court shall, upon motion of the plaintiff
3 or of any party having an interest in the property for which the
4 deposit was made, determine or redetermine whether the amount
5 deposited is the probable amount of compensation that will be
6 awarded in the proceeding. *The motion shall be supported with*
7 *detail sufficient to indicate clearly the basis for the motion,*
8 *including, but not limited to, the following information to the*
9 *extent relevant to the motion:*

10 (1) *The date of valuation, highest and best use, and applicable*
11 *zoning of the property.*

12 (2) *The principal transactions, reproduction or replacement*
13 *cost analysis, or capitalization analysis, supporting the motion.*

14 (3) *The compensation for the property and for damages to the*
15 *remainder separately stated, and the calculations and a narrative*
16 *explanation supporting the compensation, including any offsetting*
17 *benefits.*

18 (b) If the plaintiff has not taken possession of the property and
19 the court determines that the probable amount of compensation
20 exceeds the amount deposited, the court may order the plaintiff to
21 increase the deposit or may deny the plaintiff possession of the
22 property until the amount deposited has been increased to the
23 amount specified in the order.

24 (c) If the plaintiff has taken possession of the property and the
25 court determines that the probable amount of compensation
26 exceeds the amount deposited, the court shall order the amount
27 deposited to be increased to the amount determined to be the
28 probable amount of compensation. If the amount on deposit is not
29 increased accordingly within 30 days from the date of the court's
30 order, or such longer time as the court may have allowed at the time
31 of making the order, the defendant may serve on the plaintiff a
32 notice of election to treat ~~such~~ *that* failure as an abandonment of
33 the proceeding. If the plaintiff does not cure its failure within 10
34 days after receipt of such notice, the court shall, upon motion of
35 the defendant, enter judgment dismissing the proceeding and
36 awarding the defendant his *or her* litigation expenses and damages
37 as provided in Sections 1268.610 and 1268.620.

38 (d) After any amount deposited pursuant to this article has been
39 withdrawn by a defendant, the court may not determine or
40 redetermine the probable amount of compensation to be less than

1 the total amount already withdrawn. Nothing in this subdivision
2 precludes the court from making a determination or
3 redetermination that probable compensation is greater than the
4 amount withdrawn.

5 (e) If the court determines that the amount deposited exceeds
6 the probable amount of compensation, it may permit the plaintiff
7 to withdraw the excess not already withdrawn by the defendant.

8 (f) The plaintiff may at any time increase the amount deposited
9 without making a motion under this section. In such case, notice
10 of the increase shall be served as provided in subdivision (a) of
11 Section 1255.020.

12 *SEC. 7.* Section 1258.220 of the Code of Civil Procedure is
13 amended to read:

14 1258.220. (a) For the purposes of this article, the “date of
15 exchange” is the date agreed to for the exchange of their lists of
16 expert witnesses and statements of valuation data by the party who
17 served a demand and the party on whom the demand was served
18 or, failing agreement, a date 90 days prior to commencement of the
19 trial on the issue of compensation or the date set by the court on
20 noticed motion of either party establishing good cause therefor.

21 (b) Unless otherwise agreed to by the parties, the date of
22 exchange shall not be earlier than nine months after the date of
23 commencement of the proceeding.

24 ~~*SEC. 7.*~~

25 *SEC. 8.* Section 1258.260 of the Code of Civil Procedure is
26 amended to read:

27 1258.260. (a) The statement of valuation data shall give the
28 name and business or residence address of the witness and shall
29 include a statement whether the witness will testify to an opinion
30 as to any of the matters listed in Section 1258.250 and, as to each
31 matter upon which the witness will give an opinion, what that
32 opinion is and the following items to the extent that the opinion is
33 based on them:

- 34 (1) The interest being valued.
- 35 (2) The date of valuation used by the witness.
- 36 (3) The highest and best use of the property.
- 37 (4) The applicable zoning and the opinion of the witness as to
38 the probability of any change in zoning.
- 39 (5) The sales, contracts to sell and purchase, and leases
40 supporting the opinion.

- 1 (6) The cost of reproduction or replacement of the existing
2 improvements on the property, the depreciation or obsolescence
3 the improvements have suffered, and the method of calculation
4 used to determine depreciation.
- 5 (7) The gross income from the property, the deductions from
6 gross income, and the resulting net income; the reasonable net
7 rental value attributable to the land and existing improvements,
8 and the estimated gross rental income and deductions upon which
9 the reasonable net rental value is computed; the rate of
10 capitalization used; and the value indicated by the capitalization.
- 11 (8) If the property is a portion of a larger parcel, a description
12 of the larger parcel and its value.
- 13 (9) If the opinion concerns loss of goodwill, the method used
14 to determine the loss, and a summary of the data supporting the
15 opinion.
- 16 (b) With respect to each sale, contract, or lease listed under
17 paragraph (5) of subdivision (a), the statement of valuation data
18 shall give:
 - 19 (1) The names and business or residence addresses, if known,
20 of the parties to the transaction.
 - 21 (2) The location of the property subject to the transaction.
 - 22 (3) The date of the transaction.
 - 23 (4) If recorded, the date of recording and the volume and page
24 or other identification of the record of the transaction.
 - 25 (5) The price and other terms and circumstances of the
26 transaction. In lieu of stating the terms contained in any contract,
27 lease, or other document, the statement may, if the document is
28 available for inspection by the adverse party, state the place where
29 and the times when it is available for inspection.
 - 30 (6) The total area and shape of the property subject to the
31 transaction.
- 32 (c) If any opinion referred to in Section 1258.250 is based in
33 whole or in substantial part upon the opinion of another person, the
34 statement of valuation data shall include the name and business or
35 residence address of such other person, his business, occupation,
36 or profession, and a statement as to the subject matter to which his
37 or her opinion relates.
- 38 (d) Except when an appraisal report is used as a statement of
39 valuation data as permitted by subdivision (e), the statement of
40 valuation data shall include a statement, signed by the witness, that

1 the witness has read the statement of valuation data and that it
 2 fairly and correctly states his or her opinions and knowledge as to
 3 the matters therein stated.

4 (e) An appraisal report that has been prepared by the witness
 5 which includes the information required to be included in a
 6 statement of valuation data may be used as a statement of valuation
 7 data under this article.

8 ~~SEC. 8.~~

9 *SEC. 9.* Section 1260.040 is added to the Code of Civil
 10 Procedure, to read:

11 1260.040. (a) If there is a dispute between plaintiff and
 12 defendant over an evidentiary or other legal issue affecting the
 13 determination of compensation, either party may move the court
 14 for a ruling on the issue. The motion shall be made not later than
 15 60 days before commencement of trial on the issue of
 16 compensation. The motion shall be heard by the judge assigned for
 17 trial of the case.

18 (b) Notwithstanding any other statute or rule of court
 19 governing the date of final offers and demands of the parties and
 20 the date of trial of an eminent domain proceeding, the court may
 21 postpone those dates for a period sufficient to enable the parties to
 22 engage in further proceedings before trial in response to its ruling
 23 on the motion.

24 ~~SEC. 9.~~ Section 7267.1 of the Government Code is amended
 25 to read:

26 ~~7267.1. (a) The public entity shall make every reasonable~~
 27 ~~effort to acquire expeditiously real property by negotiation.~~

28 ~~(b) Real property shall be appraised before the initiation of~~
 29 ~~negotiations, and the owner, or the owner's designated~~
 30 ~~representative, shall be given an opportunity to accompany the~~
 31 ~~appraiser during his or her inspection of the property. However, the~~
 32 ~~public entity may prescribe a procedure to waive the appraisal in~~
 33 ~~eases involving the acquisition by sale or donation of property with~~
 34 ~~a low fair market value.~~

35 ~~(c) The public entity's appraisal, and any other valuation~~
 36 ~~opinion expressed by or on behalf of a party prepared for the~~
 37 ~~purpose of negotiation pursuant to this chapter, is inadmissible in~~
 38 ~~evidence in the trial of the issue of just compensation to the~~
 39 ~~following extent:~~

1 ~~(1) The appraisal or other opinion may not be given in evidence~~
2 ~~or referred to, nor shall the appraisal or other opinion be~~
3 ~~considered to be an admission of a party.~~

4 ~~(2) On objection of a party, the person who prepared the~~
5 ~~appraisal or expressed the opinion on behalf of that party may not~~
6 ~~be called at trial by an adverse party to give an opinion as to~~
7 ~~compensation. If the person who prepared the appraisal or~~
8 ~~expressed the opinion is called at trial to give an opinion as to~~
9 ~~compensation, the appraisal or other opinion may be used for~~
10 ~~impeachment of the witness.~~

11 *(c) This section supplements, and does not replace any other*
12 *pretrial or trial procedure otherwise available to resolve an*
13 *evidentiary or other legal issue affecting the determination of*
14 *compensation.*

15 SEC. 10. Section 7267.2 of the Government Code is amended
16 to read:

17 7267.2. (a) Prior to adopting a resolution of necessity
18 pursuant to Section 1245.230 of the Code of Civil Procedure and
19 initiating negotiations for the acquisition of real property, the
20 public entity shall establish an amount which it believes to be just
21 compensation therefor, and shall make an offer to the owner or
22 owners of record to acquire the property for the full amount so
23 established, unless the owner cannot be located with reasonable
24 diligence. The offer may be conditioned upon the legislative
25 body's ratification of the offer by execution of a contract of
26 acquisition or adoption of a resolution of necessity or both. In no
27 event shall the amount be less than the public entity's approved
28 appraisal of the fair market value of the property. Any decrease or
29 increase in the fair market value of real property to be acquired
30 prior to the date of valuation caused by the public improvement for
31 which the property is acquired, or by the likelihood that the
32 property would be acquired for the improvement, other than that
33 due to physical deterioration within the reasonable control of the
34 owner or occupant, shall be disregarded in determining the
35 compensation for the property.

36 ~~(b) The public entity shall provide the owner of real property~~
37 ~~to be acquired with a copy of the appraisal on which the offer is~~
38 ~~based. The appraisal shall also include a written statement of, and~~
39 ~~summary of the basis for, the amount it established as just~~
40 ~~compensation. Where appropriate, the just compensation for the~~

1 real property acquired and for damages to remaining real property
2 shall be separately stated.

3 (e)

4 (b) *The public entity shall provide the owner of real property to*
5 *be acquired with a written statement of, and summary of the basis*
6 *for, the amount it established as just compensation. The written*
7 *statement and summary shall contain detail sufficient to indicate*
8 *clearly the basis for the offer, including, but not limited to, all of*
9 *the following information:*

10 (1) *The date of valuation, highest and best use, and applicable*
11 *zoning of property.*

12 (2) *The principal transactions, reproduction or replacement*
13 *cost analysis, or capitalization analysis, supporting the*
14 *determination of value.*

15 (3) *Where appropriate, the just compensation for the real*
16 *property acquired and for damages to remaining real property*
17 *shall be separately stated and shall include the calculations and*
18 *narrative explanation supporting the compensation, including any*
19 *offsetting benefits.*

20 (c) *Where the property involved is owner occupied residential*
21 *property and contains no more than four residential units, the*
22 *homeowner shall, upon request, be allowed to review a copy of the*
23 *appraisal upon which the offer is based. The public entity may, but*
24 *is not required to, satisfy the written statement, summary, and*
25 *review requirements of this section by providing the owner a copy*
26 *of the appraisal on which the offer is based.*

27 (d) *Notwithstanding subdivision (a), a public entity may make*
28 *an offer to the owner or owners of record to acquire real property*
29 *for less than an amount which it believes to be just compensation*
30 *therefor if (1) the real property is offered for sale by the owner at*
31 *a specified price less than the amount the public entity believes to*
32 *be just compensation therefor, (2) the public entity offers a price*
33 *which is equal to the specified price for which the property is being*
34 *offered by the landowner, and (3) no federal funds are involved in*
35 *the acquisition, construction, or project development.*

36 ~~(d) As used in subdivision (e)~~

37 (e) *As used in subdivision (d), "offered for sale" means any of*
38 *the following:*

39 (1) *Directly offered by the landowner to the public entity for a*
40 *specified price in advance of negotiations by the public entity.*

1 (2) Offered for sale to the general public at an advertised or
2 published, specified price set no more than six months prior to and
3 still available at the time the public entity initiates contact with the
4 landowner regarding the public entity's possible acquisition of the
5 property.

6 SEC. 11. This act applies to any proceeding commenced on or
7 after January 1, 2002.

April 26, 2001

AB 237 (Papan) — New and Revised CLRC Comments

Code Civ. Proc. § 1250.420 (added). ADR authorized

Comment. Section 1250.420 is drawn from Government Code Section 11420.10 (ADR authorized in administrative adjudication). The section is intended to remove any question about the authority of a public entity to refer an eminent domain dispute for alternative dispute resolution. Alternative dispute resolution pursuant to this section is optional, applicable only on agreement of the parties. Nothing in this section limits any authority of parties in any other type of action or proceeding by agreement to refer a dispute that is the subject of the action or proceeding for resolution by alternative dispute resolution.

Under subdivision (a), the mediator may use any mediation technique.

Subdivision (c) parallels the procedure applicable in judicial arbitration. See Code Civ. Proc. §§ 1141.20-1141.21. A defendant who elects a trial de novo under this procedure may be subject to assessment of costs and litigation expenses; this is in effect a waiver of the defendant's general protection against assessment of costs and litigation expenses in an eminent domain proceeding. See, e.g., Code Civ. Proc. § 1268.710 (court costs).

Standard protections of confidentiality of communications made in alternative dispute resolution apply to alternative dispute resolution pursuant to this section. See, e.g., Evid. Code §§ 1115-1128 (mediation), 703.5 (testimony by arbitrator or mediator).

Code Civ. Proc. § 1250.430 (added). Stay of trial during ADR

Comment. Section 1250.430 is intended to allow waiver of trial court delay reduction programs and other case processing requirements in order to facilitate productive alternative dispute resolution. This provision may be applied to foster resolution of some or all of the issues between the parties. Nothing in this section limits any authority of the court in any other type of action or proceeding to postpone the date of trial to enable resolution of a dispute by alternative dispute resolution.

Code Civ. Proc. § 1255.010 (amended). Deposit of probable compensation

Comment. Subdivision (b) of Section 1255.010 is amended to prescribe the contents of the written statement or summary of the basis for the deposit appraisal. The detail prescribed is the same as that prescribed for the moving party under Section 1255.030 (increase or decrease in amount of deposit) and for the written statement and summary under Government Code Section 7267.2 (precondemnation offer). The requirement in subdivision (b)(3) that the statement or summary include detail relating to damages to the remainder applies equally in a situation where no compensation for damages to the remainder is provided due to a complete offset by benefits to the remainder.

Code Civ. Proc. § 1255.030 (amended). Increase or decrease in amount of deposit

Comment. Section 1255.030 is amended to prescribe the supporting data that may be required for a motion to increase or decrease the amount of the deposit. The detail prescribed is the same as that prescribed for the written statement or summary under Section 1255.010 (deposit of probable compensation) and for the written statement and summary under Government Code Section 7267.2 (precondemnation offer). It should be noted that the information provided by the moving party under this section is protected from use at trial to the same extent as other evidence related to the deposit or withdrawal. See Section 1255.060 (limitations on use of evidence in connection with deposit).

Code Civ. Proc. § 1258.220 (amended). Date of exchange

Comment. Section 1258.220 is amended to make the exchange date 90, rather than 60, days before trial on the issue of compensation (but not earlier than nine months after the case was filed). As used in subdivision (b), "months" refers to calendar months. See Section 17(4).

The statutory exchange date of 90, rather than 60, days before trial remains subject to the authority of the court to provide relief on motion of a party and showing of good cause. The practicalities of preparing sufficiently to enable a fair exchange within the prescribed period may, in the circumstances of a particular case, constitute good cause for a later exchange date. The need to commence trial within one year in order to preserve the date of valuation may, in the circumstances of a particular case (such as where the date of valuation is not otherwise established by a deposit of probable compensation), constitute good cause for an exchange date less than 90 days before commencement of trial on the issue of compensation. Cf. Sections 1263.110 (date of valuation fixed by deposit), 1263.120 (trial within one year).

Code Civ. Proc. § 1260.040 (added). Resolution of legal issues affecting valuation

Comment. Section 1260.040 is intended to provide a mechanism by which a party may obtain early resolution of an *in limine* motion or other dispute affecting valuation. It should be noted that the procedure provided in this section is limited to resolution of legal issues that may affect compensation, ~~such as what constitutes the larger parcel, or the probability of a zoning change;~~ it may not be used to ascertain just compensation. Cf. Cal. Const. art. I, § 19 (just compensation ascertained by jury unless waived).

Nothing in this section precludes the use of other procedures for the same purpose, including, without limitation, bifurcation of issues and control of the order of proof pursuant to statute, or other pretrial procedure pursuant to court rule.

Gov't Code § 7267.2 (amended). Precondemnation offer

Comment. Section 7267.2 is amended to ~~expand the requirement that the public entity provide the owner of property to be acquired with a copy of the appraisal. Under subdivision (b), the public entity must provide the owner of any type of property, not limited to owner-occupied residential property, with a copy of the appraisal. The appraisal is protected from admissibility in evidence under Section 7267.1.~~

~~Subdivision (b) is also amended to make the written statement and summary a part of the appraisal. As such, the written statement and summary are protected from admissibility under Section 7267.1 to the same extent as the appraisal.~~

~~It should be noted that the written statement and summary required by this section are in addition to the other statutory requirements for the appraisal — a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information. See Section 7260(k).~~

elaborate the written statement and summary requirement, and to make clear that the public entity may satisfy the requirement by providing the property owner a copy of the appraisal. The provision is drawn from California Code of Regulations, Title 25, Section 6182 (relocation assistance and real property acquisition guidelines). The detail prescribed is the same as that prescribed for the written statement and summary under Code of Civil Procedure Section 1255.010 (deposit of probable compensation) and for the moving party under Section 1255.030 (increase or decrease in amount of deposit). The elaboration provided in this section is not intended as an exclusive listing of the contents of the written statement and summary; other information may be required by law or may be otherwise necessary or desirable.

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May 4, 2001

VIA FACSIMILE AND U.S. MAIL

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Re: *Assembly Bill 237 - Papan*

Dear Mr. Sterling:

Further to our various discussions regarding the above referenced bill, I am pleased with the progress being made on it and the balance reached between governmental entity concerns and those of the property owners bar. I particularly look forward to the reprinting of the bill with the latest modifications that you said were in process. Those regard addition of cost of reproduction studies and income studies to the material that must be provided to a property owner at the time of the first offer. Also, the Law Revision Commission comments have been modified. You provided a copy of those to me previously.

One matter of major concern remains. That is proposed CCP § 1250.420 (Non-binding Arbitration) and the penalty to a party requesting a trial de novo if a more favorable result is not obtained.

As the statute is now proposed, and notwithstanding the amended comment that it "parallels the procedure applicable in judicial arbitration", it goes much beyond that by way of penalty. As presently drafted, the potential penalties for one electing arbitration, and then desiring a trial de novo, are so severe that no able practitioner would ever choose arbitration. If that be a correct assessment, the statute would be entirely superfluous.

CCP § 1141.21 (Costs in Judicial Arbitration) imposes liability on the party electing a trial de novo to pay certain costs of the other parties if the trial result is not more favorable than the arbitration award.

Those costs are compensation actually paid to the arbitrator, ordinary court costs per CCP § 1033.5 incurred by the other party, or parties (together with a prohibition on recovery of any costs by the party electing trial de novo), and the reasonable costs of the services of expert witnesses incurred by the other parties. *There is no provision that the unsuccessful party electing trial de novo pay attorney's fees incurred by the other parties.*

Further, and most significant, are that:

1. The penalty to the party electing the trial de novo is not mandatory. The trial court may order that costs not be imposed on the unsuccessful party if it determines, on motion, that the imposition of such costs and fees would create such a substantial economic hardship as not to be in the interest of justice; and

2. The costs and fees that are imposed, other than the compensation of the arbitrator, shall include *only those incurred from the time of election of the trial de novo.*

CCP § 998 is analogous. Pursuant to that section, a party in a civil action, other than an eminent domain action, may, prior to trial, make an offer of compromise. If the offer is not accepted and the rejecting party fails to obtain a more favorable judgment or award, costs not otherwise recoverable may be imposed against that unsuccessful party. As in the judicial arbitration statutory scheme, the costs awarded, or imposed, as a penalty for rejecting an offer, are essentially limited to those incurred from the time of the offer.

Additionally, the court may, in its discretion, as part of the penalty, require the unsuccessful party to pay costs of services of expert witnesses for the preparation, and conduct, of the trial.

As in Judicial Arbitration, no provision is made for an award of attorney's fees to be paid by the unsuccessful party. The award of costs of expert fees is discretionary.

In contrast to the statutory scheme in judicial arbitration, and, the analogous CCP § 998 scheme, the proposed eminent domain statute gives no discretion to the trial court to *not* impose costs against an unsuccessful party in an appropriate case. And the costs awarded against the unsuccessful party are *not* limited to those occurring from the election of the trial de novo. The costs awarded could include any amount of costs predating the election for a trial de novo, even back to, or before, the commencement of the eminent domain action.

Last, and most significant, the costs awarded against the unsuccessful party in the proposed eminent domain statute would, of necessity, have to include the attorneys' fees of the other party, or parties ("litigation expenses" as defined in CCP § 1235.140 include attorneys fees). That is not the case in either judicial arbitration or the CCP § 998 offer.

Nathaniel Sterling, Esq.
May 4, 2001
Page 3

My suggestion is that the proposed eminent domain statute, CCP § 1250.420, be modified to repeat, with appropriate contextual modifications, the language of CCP § 1141.21.

I will forward, under separate cover, in the next day or two, specific language that I think would accomplish the encouragement of arbitration, and, yet, not potentially impose so severe a penalty that no one would opt for arbitration.

Very truly yours,

Philip F. Lanzafame, jr
Philip F. Lanzafame

PFL/je

cc: Hon. Louis J. Papan
William C. George, Esq.
Norman E. Matteoni, Esq.
Roscoe D. Keagy, Esq.
Michael R. Nave, Esq.
Richard B. Williams, Esq.

Law Revision Commission
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MAY 9 2001

File: _____

SENT VIA FAX
650/494-1827

May 7, 2001

Nathaniel Sterling, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Rm. D-1
Palo Alto, CA 94303-4739

Re: Assembly Bill 237 - Papan

Dear Nat:

I have reviewed Phil Lanzafame's letter of May 4, 2001 commenting on the current language in the AB 237 concerning the penalty to a party requesting a trial de novo after non-binding arbitration. Proposed CCP § 1250.420(c).

Phil Lanzafame has proposed certain corrective language which, in his view, makes the provision more equitable and more in parallel with other analogous provisions. My take is much different. I think the proposed provision violates the constitutional protection of the property owner.

First, in a condemnation case, either party is constitutionally guaranteed a jury trial. But proposed section 1250.420(c) would discourage that right.

Second and more importantly, the law allows costs to the party defendant, because it is forced through condemnation to sell its property. In other words, the property owner is not to be penalized because its property is in the path of a public project. The court in *City & County of San Francisco v Collins* (1893) 98 Cal. 259, 262, reasoned that to require a condemnee to pay any portion of its costs or costs of the plaintiff would reduce the just compensation award. See Legislative Committee Comment to CCP § 1268.710.

Third, the provision could undercut the rationale for the award of

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May 7, 2001

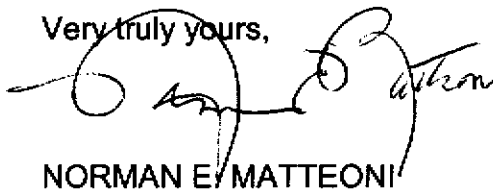
Page two

litigation expenses to a successful defendant based on the offer and demand. Section 1250.410 is intended to encourage the public agency to make the most reasonable offer to avoid litigation. It penalizes the public agency that does not meet that standard and forces litigation. While it is hard to imagine a situation in which the rejection of the decision of non-binding arbitration could produce a figure that would qualify for the award of litigation expenses, proposed section 1250.420(c) is inconsistent with the philosophy behind CCP §1250.410, whereby the defendant may be awarded litigation expenses.

I do agree with Phil that any knowledgeable practitioner would reject making a request for non-binding arbitration in a condemnation setting, but if the provision remains, it could be a trap for the unwary.

In a word, the property owner or any defendant should not be penalized for seeking a less expensive way to resolve the dispute in the setting of property condemned by a governmental agency.

Very truly yours,

A handwritten signature in black ink, appearing to read "Norman E. Matteoni", written over a horizontal line.

NORMAN E. MATTEONI

NEM:sd

cc: Philip F. Lanzafame, Esq. (via fax 626/304-2779)
William C. George, Esq. (via fax 916/319-2119)
Roscoe D. Keagy, Esq. (via fax 619/299-4268)

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May 9, 2001

VIA FACSIMILE AND U.S. MAIL

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Re: *Assembly Bill 237 - Papan*

Dear Mr. Sterling:

Following is my suggestion for modifications to proposed CCP § 1250.420. These suggestions are further to my letter to you of May 4, 2001. I believe the statute as presently proposed potentially imposes so severe a penalty on a party electing trial de novo after arbitration that this alternative dispute resolution process would be discouraged rather than encouraged.

I am in receipt of a copy of Norman Matteoni's letter to you of May 7, 2001. As I have previously expressed to you, I concur with Mr. Matteoni's view set forth in that letter. However, in light of the authors insistence that arbitration, but with some potential penalty for electing trial de novo, remain in the bill, and in light of the other beneficial aspects of the bill, I would suggest that it be modified to more closely track the provisions of Code of Civil Procedure § 1141.21 (Judicial Arbitration).

In that context, I suggest that subdivision (c) of proposed Code of Civil Procedure § 1250.420, be modified, to read in its entirety, as follows:

"(c) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after service of the arbitrator's decision a party moves the court for a trial of the eminent domain proceeding. If the judgment in the eminent domain proceeding, upon the trial de novo, is not more favorable to the moving party, the court shall order that party to pay the following nonrefundable costs and fees, limited, except for the compensation of the arbitrator, to only those incurred from the time of election of the trial de novo, unless the court finds in writing and upon motion that the imposition of such costs and fees would create such a substantial economic hardship as not to be in the interest of justice:

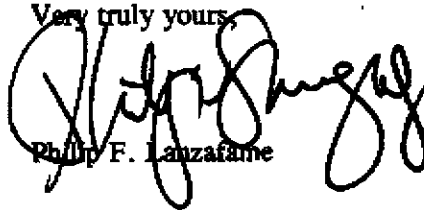
Nathaniel Sterling, Esq.
May 9, 2001
Page 2

- (i) To the county, the compensation actually paid by it to the arbitrator, if any, less any amount paid pursuant to paragraph (iv).
- (ii) To the other party or parties, all costs specified in Section 1033.5.
- (iii) To the other party or parties, the reasonable costs of the services of expert witnesses, who are not regular employees of any party, actually incurred or reasonably necessary in the preparation or trial of the case.
- (iv) To the other party or parties, the compensation paid by the other party or parties, if any, to the arbitrator.
- (v) If the party electing the trial de novo who then fails to recover a more favorable judgment is a defendant, that party shall be entitled to recover all costs to which that party would otherwise be entitled pursuant to Code of Civil Procedure Section 1268.710, but limited to those incurred up to the time of the election of the trial de novo, except that that party shall be entitled to recover the costs of determining the apportionment of the award made pursuant to subdivision (b) of Section 1260.220, no matter when incurred.

The suggested language is, essentially, a copy of Code of Civil Procedure § 1141.21, modified to fit the eminent domain context.

When you have a printed copy of the bill with the modifications previously agreed on concerning the cost of reproduction and income studies to be provided to the defendant, would you please forward to me.

Very truly yours,



Philip F. Lanzafame

PFL/je

cc: Hon. Louis J. Papan
William C. George, Esq.
Norman E. Matteoni, Esq.
Roscoe D. Keagy, Esq.
Michael R. Nave, Esq.
Richard B. Williams, Esq.