

Memorandum 98-39

Eminent Domain Law Update

BACKGROUND

The Eminent Domain Law was enacted on recommendation of the Law Revision Commission in 1975. The Commission has not reviewed the law for updating since that time.

At its September 1997 meeting, the Commission decided to study selected issues in eminent domain and inverse condemnation on a nonpriority basis. During 1998, background materials were to be compiled by the staff, via a consultant study, collection of relevant materials, or other appropriate techniques. The Commission would then be in a position to take up issues in eminent domain and inverse condemnation after its other priorities for 1998 were addressed.

IDENTIFIED ISSUES

The Commission initially noted the following issues that might be addressed:

(1) Conform California's date of valuation statutes to constitutional standards announced by the United States Supreme Court that require the date of valuation to approximate the value of the property at the time of taking.

(2) Adjust California's prejudgment deposit statutes to conform with date of valuation requirements.

(3) Review the statutes governing general and special benefits and severance damages in light of recent California Supreme Court decisions.

(4) Review the statutes governing offer and demand and the award of litigation expenses.

(5) Review the procedural prerequisites for an inverse condemnation action, particularly exhaustion of administrative remedies and ripeness requirements, and relevant limitations periods.

(6) Codify the law governing compensation for loss of goodwill.

(7) Generally review the eminent domain law for procedural defects and improvements.

(8) Consider reported public utilities condemnation abuses arising from utility industry restructuring.

Since that time, the Commission's consultant, Professor Gideon Kanner, has identified two additional issues that might be addressed:

(9) Admissibility of comparable sales to public bodies.

(10) Prejudgment possession under the Pedestrian Mall Law of 1960.

STATUS OF STAFF WORK ON ISSUES

The staff has requested Professor Kanner to provide case and statute references on a number of these issues. Meanwhile, the staff notes the following activity on them.

(3) General and Special Benefits and Severance Damages

Legislation was introduced this session to overturn the rule in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.*, 16 Cal. 4th 694 (1997). That case holds that damage to the remainder must be reduced by the amount of all benefits, special or general. See SB 1388 (Knight). A significant consequence of the bill would be to require public entities to pay more when acquiring property for public use.

The bill is supported by private property owner groups and opposed by public entities and the League of California Cities. The bill was heard in Senate Judiciary Committee on May 5 and failed passage on a straight party line vote. All three Republican members of the committee voted for it, and the three Democrat members at the hearing voted against it. Five affirmative votes are required to obtain approval of the committee.

(5) Procedural Prerequisites for Inverse Condemnation Action

Professor Kanner is preparing a background study on this matter for the Commission. He reports that the area is highly contentious, and involves greater complications than anticipated. The study will not be available for review by the Commission before Summer 1998.

(8) Public Utilities Condemnation Abuses

The staff has prepared an initial memorandum on this matter for consideration at the Commission's June 1998 meeting. See Memorandum 98-40 (condemnation by privately owned public utility).

(10) Prejudgment Possession under Pedestrian Mall Law of 1960

The Commission recommended a technical conforming revision of the Pedestrian Mall Law of 1960 in the Commission's Eminent Domain Law revision of 1975. However, the Commission did not propose to eliminate the prohibition on prejudgment possession of property under the Pedestrian Mall Law.

This was undoubtedly an oversight, since the Commission in 1975 generally recommended extension of the right of prejudgment possession to all condemnors. "The Commission accordingly recommends that any person authorized to acquire property by eminent domain should also be authorized to obtain possession of that property prior to judgment." *The Eminent Domain Law*, 13 Cal. L. Revision Comm'n Reports 1001, 1046 (1975).

Language to correct the situation was amended into a pending bill. See AB 2072 (Baugh), as amended May 4, 1998. However, the bill as so amended was not set for hearing, and the author is now in the process of amending the bill to delete the Pedestrian Mall Law provisions. The author's office informs us they are not aware of any particular opposition to the Pedestrian Mall Law provisions, they just need to use the bill for a different matter of more concern to the author.

GENERAL OBSERVATIONS

The staff believes that the fate of the general benefits/severance damages bill in Senate Judiciary Committee is great cause for concern. Work in the eminent domain/inverse condemnation field has always been contentious because it inherently implicates expenditures of public funds.

But the staff believes there is an additional element present now that was not necessarily in the forefront in 1975. That is the rise of environmentalism, and legislative concern about the ability of public entities to effectively plan and manage land resources. Every cost imposed in an effort to achieve fairness to property owners has as its flip side a fiscal constraint on the ability of public entities to act.

The argument can be made that public entities should be constrained, and the public should not take property for public use unless it is willing to fully and

fairly compensate the owner. But the politics of this issue are such that it is enormously controversial, and is likely to be resolved in the Legislature on a political basis.

The staff has raised this issue with our consultant, Professor Kanner, particularly in connection with the background study he is preparing for the Commission on procedural prerequisites for an inverse condemnation action. Professor Kanner will attempt to provide a neutral study in this highly controversial area, and indicates his belief that the Commission will need to use its best judgment and let politics do what it will. He points out that the forces arrayed against reform were formidable in 1975, but the Commission managed to achieve a remarkable degree of reform.

But the staff thinks the political landscape really has changed. Not only is environmentalism a more powerful force than it was in 1975, but the entire legislative process is now more highly politicized than it was then. In addition, the effect of term limits in the Legislature has eroded the Commission's goodwill in the Legislature, which traditionally enabled it to obtain enactment of otherwise controversial measures. Recent history has taught us forcefully that it is a mistake for the Commission to jump into an area it knows will be controversial.

The staff believes the Commission needs to proceed with caution in this area. We must be selective in the issues we address. Any recommendations to the Legislature must be seen as balanced — not particularly favoring one side or the other in the public entity v. property owner debate.

Respectfully submitted,

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Executive Secretary