

Memorandum 98-44

Eminent Domain Law: Date of Valuation

INTRODUCTION

Just Compensation and the Date of Valuation

The theory of just compensation in eminent domain law is that the owner of property taken for public use is entitled to be made whole. The owner should be able to take the amount of the eminent domain award and use it to replace the property taken with property of comparable value. Fairness and the Constitution demand no less. U.S. Const. amend. 5; Cal. Const. art. I, § 19.

The process of determining just compensation requires that a date certain be selected for valuing the property. The date selected should be close in time to the date of actual taking of the property. Most states, and the federal government, value the property as of the date of trial. California has a somewhat different scheme.

Generally speaking, California uses the date of commencement of the proceeding as the date of valuation. If the trial does not start until more than a year later, or if there is a new trial or retrial, the date of trial, new trial, or retrial is used as the date of valuation. The public entity may secure an earlier date of valuation by making a deposit of probable compensation for the property owner. Code Civ. Proc. §§ 1263.110-1263.150. (Unless otherwise noted, all further statutory references in this memorandum are to the Code of Civil Procedure.)

When the Law Revision Commission overhauled the Eminent Domain Law in 1975, it considered the possibility of moving to a date of trial scheme for all cases. The Commission's report states:

The Commission has considered the oft-made proposal that the date of valuation be, in all cases, the date of trial. Much can be said in favor of that change. Unless the condemnor deposits probable compensation and obtains possession of the property at that time, the date the proceedings are begun is not an entirely logical date of valuation. It would seem more appropriate to ascertain the level of the general market and the value of the particular property in that

market at the time the exchange of the property for “just compensation” actually takes place. Also, in a rapidly rising market, property values may have increased so much that the property owner cannot purchase equivalent property when he eventually receives the award. In other states in which the power of eminent domain is exercised through judicial proceedings, the majority rule is to fix the date of trial as the date of valuation.

The Eminent Domain Law, 13 Cal. L. Revision Comm’n Reports 1001, 1030 (1975).

Nonetheless, the Commission elected not to depart from the existing California scheme because (1) it appeared to have worked equitably in most cases, (2) a date of trial scheme might provide an incentive for property owners to delay proceedings, and (3) fixing the date of valuation at a date certain is more convenient than reference to the uncertain date that trial may begin.

Kirby Industries, Inc. v. United States

The California scheme predates the decision of the United States Supreme Court in *Kirby Industries, Inc. v. United States*, 467 U.S. 1 (1984). That case holds that, “However reasonable it may be to designate the date of trial as the date of valuation, if the result of that approach is to provide the owner substantially less than the fair market value of his property on the date the United States tenders payment, it violates the Fifth Amendment.” 467 U.S. at 17.

In *Kirby*, the government commenced proceedings to acquire timberland in 1978. The trial was commenced in 1979, and a sum of \$2,331,202 was awarded. It was not until 1982, however, after three years of appeals, that the government deposited the full amount of the award plus interest to the date of the deposit. The Supreme Court noted that the market value of property of this sort appeared to be “much higher” in 1982 than 1979, and that interest on the 1979 award would not be sufficient to make the property owner whole. The court concluded, “Solution of the problem highlighted by petitioner requires, not a rule compelling payment of interest by the Government, but rather a procedure for modifying a condemnation award when there is a substantial delay between the date of valuation and the date the judgment is paid, during which time the value of the land changes materially.” 467 U.S. at 17-18.

The court does not indicate what, in its opinion, would amount to a material change in value. The court implies that the change in value must at least exceed the cost of determining the change — “That he would be obliged to bear some

litigation costs in contesting a Rule 60(b) motion should dissuade a landowner from filing such a motion unless he had good reason to believe that the value of his property changed materially between valuation and payment.” 467 U.S. at 19, fn. 29.

Judged by these standards, California’s statutory date of valuation scheme is constitutionally deficient.

DATE OF VALUATION AS COMMENCEMENT OF PROCEEDING OR OF TRIAL

While California’s presumptive valuation date is the commencement of the proceeding for trials that commence within one year, it is not clear how frequently cases in fact get to trial within a year. Eminent domain proceedings “take precedence over all other civil actions in the matter of setting the same for hearing or trial in order that such proceedings shall be quickly heard and determined.” Section 1260.010. In many cases, however, as a result of trial court delay, the date of valuation is more likely to be the trial date than the commencement date. N. Matteoni & H. Veit, 1 Condemnation Practice in California § 4.23 at 113 (Cal. Cont. Ed. Bar, June 1997 Update).

The most recent statistics from the Administrative Office of the Courts indicate that for calendar year 1997, more than 50% of all superior court civil matters filed in California were disposed of in less than 12 months. These numbers are somewhat misleading, however, since they include cases that are settled or otherwise disposed of without trial.

San Diego County, for which good statistics are available, averaged 210 eminent domain filings a year in 1994, 1995, and 1996. Of these cases, 96% were settled or otherwise disposed of without trial. The approximately 3 to 4 jury trials per year resulting from these filings averaged 448 days to the date of trial, and the approximately 5 nonjury trials per year resulting from these filings averaged 512 days to the date of trial.

It is also not clear how the date of valuation rules apply 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).

Still, this will not satisfy *Kirby* where the property has increased materially in value between the date of trial and the date the amount of the judgment is deposited for the property owner.

Kirby requires that compensation to the property owner must approximate the value of the property on the date of the condemnor’s tender of compensation. The Just Compensation Clause of the Constitution will not tolerate a “substantial” or “material” difference in value. What are the options here?

Commencement of action versus date of trial. A partial solution would be to abandon California’s attempt to make the date of commencement of the action the date of valuation unless the trial occurs more than a year later. By pushing the date of valuation to the date of trial in all cases, the chances of a *Kirby* violation are diminished. In practice, there will be many cases in which the trial does not start within a year after the proceeding is filed, in any event.

This scheme has a number of drawbacks, including (1) it goes beyond the strict requirements of *Kirby*, and (2) it is not a complete solution to *Kirby*. It would improve the situation of the condemnor in a declining market. Although the Commission rejected this approach in 1975, the constitutional dimension of the date of valuation now suggests that we take another look at it.

Date of possession. Another partial solution would be to make the date of possession by the condemnor the date of valuation. The benefits of this scheme include (1) it makes theoretical sense in terms of the equivalence of compensation for dispossession; (2) it is consistent with existing law since the condemnor may take possession only after the court has determined the right to possession or the property owner has withdrawn the condemnor’s deposit; and (3) it minimizes *Kirby* problems by moving the valuation date later in time than existing law.

On the other hand, it has similar drawbacks to moving the valuation date to the date of trial — it goes beyond *Kirby*, nor does it solve *Kirby*.

Special procedure to redetermine the amount of compensation. The *Kirby* court envisions a special motion procedure to determine possible increases in value to the time the award is paid. This would be the cure with the least impact on the existing California date of value scheme.

The Supreme Court 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)

The staff questions whether this procedure is as expeditious and inexpensive as the court contemplates, or whether it in effect requires a full-blown second trial on valuation. The Court itself appears to be not completely comfortable with its own solution, noting that “Either Congress or a lower court might perceive a more easily administrable way of ensuring that the compensation paid to the owner of condemned land does not fall substantially below the fair market value of the property on the date of the taking.” 467 U.S. at 19, fn. 30.

Existing California law provides what is intended to be a simple procedure for court redetermination of probable compensation in the event of an inadequate prejudgment deposit:

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

1255.030. (a) At any time after a deposit has been made pursuant to this article, the court shall, upon motion of the plaintiff or of any party having an interest in the property for which the deposit was made, determine or redetermine whether the amount deposited is the probable amount of compensation that will be awarded in the proceeding.

However, experience would indicate that this procedure is not necessarily inexpensive or expeditious, and may not be a satisfactory model for a *Kirby* motion.

Interest on award. *Kirby* expressly holds that interest is not an adequate remedy. However, it is likely in most ordinary cases that interest would adequately compensate the property owner for any increase in value of the property between the date of valuation and the date the award is deposited. A statute allowing for such interest could minimize *Kirby* problems. Drawbacks with such a provision include: (1) it would raise acquisition costs in every case, and (2) it would apply regardless of changes in property value — even where the property had decreased in value after the date of valuation.

Date of deposit of award as date of valuation. Under existing law the condemnor can fix the date of valuation by depositing the amount of the award for the benefit of the property owner. Sections 1268.110, 1263.110. This provides a means whereby the condemnor can keep an early valuation date despite a subsequent retrial or new trial. This procedure has the drawback that the funds are not available to a property owner who wishes to contest the right to take. Section 1268.140(a). In order to satisfy *Kirby*, the procedure would require revision to provide that withdrawal of the award does not waive objections to the right to take. In the event of a successful appeal by the property owner, the condemnor would need some assurance of repayment. This could be done by means of a bond. (Or a lien on the property ...!)

DATE OF VALUATION BASED ON DEPOSIT OF PROBABLE COMPENSATION

California law provides that the condemnor's prejudgment deposit of probable compensation, available for withdrawal by the property owner, fixes the date of valuation. Withdrawal by the property owner entitles the condemnor to possession of the property. Section 1255.460.

This scheme makes theoretical sense, since the funds are available to the property owner at that time for use to obtain replacement property. It is consistent with the requirement of *Kirby* that there be no substantial delay between the date of valuation and the date payment is tendered by the government.

But in practice the procedure does not always work smoothly. The condemnor's deposit in some cases is inadequate. The property owner must then litigate to obtain a higher deposit. The procedure for increasing the amount of an inadequate deposit may require the equivalent of a nonjury valuation trial before the main valuation trial. Moreover, the funds are not in fact available to a

property owner who contests the right to take, since withdrawal of the deposit waives that defense.

Increase in Amount of Deposit

The property owner is entitled to have the deposit increased if it appears to be inadequate. Section 1255.030.

“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) .

Property Owner Contests Right to Take

The deposit of compensation scheme is problematic where the property owner contests the condemnor’s right to take. Under the prejudgment deposit statute, the property owner’s withdrawal of the deposit waives any objection to

the right to take. Section 1255.260. Thus a property owner who contests the right to take cannot withdraw the deposit.

If the property owner prevails on the right to take, the issue is moot and the date of valuation is no longer relevant. If the property owner fails on the right to take, however, the prejudgment deposit becomes available to the property owner. But if the value of the property by the time of the valuation phase of the bifurcated trial greatly exceeds its value on the date the deposit was made, this procedure would appear to run afoul of the Constitution as interpreted by *Kirby*.

What are the options? The staff can think of several.

Redetermine compensation. One option would be to do as *Kirby* suggests and provide a special procedure to redetermine compensation at the time the award is paid. The staff's concerns about the efficacy of such a scheme are discussed above in connection with the rules on date of valuation absent a deposit.

Provide that withdrawal of deposit does not waive objections to right to take. Another option would be to allow the property owner to withdraw the deposit without waiving objections to the right to take. This would solve the problem of any delay between the date of valuation and the availability of compensation for use by the property owner. However, there would need to be some assurance that the condemnor could recoup the funds if the property owner defeats the right to take or if the condemnor abandons the proceeding. There are existing mechanisms in place for an undertaking by the property owner, in certain circumstances, on withdrawing a deposit. Sections 1255.240, 1255.250. These provisions could readily be expanded to cover reimbursement of the amount of the deposit in case of a failure of the right to take.

CONCLUSION

The Supreme Court decision in *Kirby* presents challenges to California's existing date of valuation scheme. The staff suggests that the Commission at least consider the concept that the date of valuation is the date of trial (or alternatively the date of possession) rather than the date of commencement of the eminent domain proceeding. This would bring California law into conformity with the law of most other jurisdictions and would minimize the *Kirby* problems.

The Commission should also consider the options for curing *Kirby*. The obvious choices, as far as the staff can see, are:

- Provide a special motion and valuation update procedure. This is suggested by *Kirby*, but on the surface it looks alot like a new trial on valuation.

- Adjust the rules governing the effect of a prejudgment or postjudgment deposit to establish the valuation date. The staff can see providing that withdrawal does not waive objections to the right to take. This approach has drawbacks, nor will it cure all *Kirby* problems; moreover, it would alter the theoretical underpinnings of California's prejudgment and postjudgment deposit scheme.

- Provide for the running of interest from the date of valuation to the date of the deposit. This would not necessarily satisfy *Kirby*, but would take care of most problems. But because it would increase acquisition costs in every case, even where the value of the property does not increase, such an approach probably would not receive legislative acquiescence.

In any case, as long as we are working in the area, the staff would also do some minor statutory clarification. Specifically, the staff suggests that the statutes be revised to make clear that (1) a court-ordered increase in the amount of the deposit shifts the valuation date to the date of the increased deposit, and (2) statutory references to the date of commencement of trial mean, in the case of a bifurcated trial, the date of commencement of the valuation phase of the trial.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary