Study EmH-451, -452, -453, -454 December 10, 1998

First Supplement to Memorandum 98-77, -78, -79, -85

Eminent Domain Law: Comments on Memoranda

Attached are letters we have received from the following persons addressing issues raised in Memoranda 98-77, -78, -79, and -85, all relating to eminent domain law, on the agenda for the Commission's December 1998 meeting.

We will raise the points made in these letters in connection with the discussion of the relevant issue at the Commission meeting.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

California Western Railroad
Foot of Laurel Street, P.O. Box 907, Fort Bragg, CA 95437
Tel: (707) 964-6371 Fax: (707) 964-6754

December 2, 1998

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94808-4789

Dear Mr. Sterling:

We have reviewed the staff report (Memorandum 98-77) dated November 20, 1998, concerning "Condemnation by Privately Owned Public Utility" and wish to clarify a reference relating to California Western Railroad appearing on Page 13 of that report.

California Western Railroad **is** a part of the interstate rail network. As such, California Western Railroad is **not** subject to economic regulation by the California Public Utilities Commission.

California Western is an essential link in keeping state and interstate rail freight service available to and from Fort Bragg and intermediate points, and aggressively pursues rail freight business which helps support the Northwestern Pacific Railroad as well as other components of the interstate rail network. Enclosed is a summary of our waybills for November, 1998, which clearly demostrates that we are a part of the interstate rail network.

Insofar as passenger services are concerned, CWR's scheduled service is timed to connect with Amtrak's feeder buses and CWR's connecting service is shown in Amtrak's public timetables for the benefit of its interstate passengers. CWR is, within the limits of its resources, a significant contributor to the nation's rail net, and is a carrier subject to the jurisdiction of the Surface Transportation Board (STB).

Respectfully,

Gary D. Milliman
President

KUHS, PARKER & STANTON
ATTORNEYS AT LAW

WILLIAM C. KUHS
JAMES R. PARKER, JR.
DAVID B. STANTON
ROBERT G. KUHS
JOSEPH D. HUGHES

P. O. BOX 2205
BAKERSFIELD, CALIFORNIA 93303
(805) 322-4004

1200 TRUXTUN AVENUE, SUITE 200
BAKERSFIELD, CALIFORNIA 93301

TELECOPIER NO.
(805) 322-2906

December 2, 1998

OUR FILE NO.

Mr. Nathaniel Sterling
Executive Secretary
California Law Review Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Memorandum 98-85; Compensation For Loss of Goodwill

Dear Mr. Sterling:

While we concur with Staff's proposed amendment of section 1258.260 of the Code of Civil Procedure[1] as set forth in Memorandum 98-85, however, we believe that the memorandum errs at the bottom of page 3 to the extent it states that "capitalized value of net income or profits" is a separate method of valuing goodwill than the "excess income" method discussed in People ex rel. Dept. of Transportation v. Muller (1984) 36 Cal.3d 263, 271.

The memorandum cites People ex rel. Dept. of Transportation v. Leslie (1997) 55 Cal.4th 918 as authority for the proposition that "capitalized value of net income or profits" is a method of valuing business goodwill separate and apart from the excess earnings method. However, Leslie at pages 922 to 923 merely paraphrases Muller's statement that "[c]ourts have long accepted that goodwill may be measured by the capitalized value of the net income or profits of a business or by some similar method of calculating the present value of anticipated profits." (36 Cal.3d 263, 271.) The Court in Muller goes on to warn in a footnote that "[g]oodwill must, of course, be measured by a method which excludes the value of tangible assets or the normal return of those assets." (Ibid., n. 7) Therefore, capitalizing net income after excluding a normal return on tangible assets is nothing more than a restatement of the excess earnings method of valuing business goodwill.

The vice of Leslie's dictum is to suggest that lost business profits can be recovered in an eminent domain proceeding under the guise of "lost goodwill." Historically, lost business profits are not compensable in an eminent domain proceeding.

---

[1] All statutory references hereafter are to the Code of Civil Procedure.

(Community Redevelopment Agency v. Abrams (1975) 15 Cal.3d 813, 816-817; Oakland v. Pacific Coast Lumber etc. Co. (1915) 171 Cal. 3 92, 98.) Likewise, evidence of business profits is inadmissible to prove market value of real property. (Evid. Code, § 819.) The addition of section 1263.510 providing for the recovery of lost business goodwill has not altered the rule that lost business profits are not compensable in an eminent domain action. Leslie's dictum that capitalizing net income or profits is a "method" of calculating business goodwill must be read with Muller's warning that a normal return on the tangible assets of a business must be deducted before income due to intangibles is capitalized.

Respectfully submitted,

KUHS, PARKER & STANTON

James R. Parker, Jr.

C:\WPDOCS\JRP\STERLING.CO

MEYERS, NAVE, RIBACK, SILVER & WILSON
A PROFESSIONAL LAW CORPORATION

GATEWAY PLAZA
777 DAVIS STREET, SUITE 300
SAN LEANDRO, CALIFORNIA 94577
TELEPHONE: (510) 351-4300
FACSIMILE: (510) 351-4481

NORTH BAY OFFICE
555 FIFTH STREET, SUITE 230
SANTA ROSA, CA 95401
TELEPHONE: (707) 545-8009
FACSIMILE: (707) 545-8617

CENTRAL VALLEY OFFICE
5250 CLAREMONT AVENUE
STOCKTON, CA 95207
TELEPHONE: (209) 951-4080
FACSIMILE: (209) 951-3009

MICHAEL R. NAVE
STEVEN R. MEYERS
ELIZABETH H. SILVER
MICHAEL S. RIBACK
KENNETH A. WILSON
DAVID W. SKINNER
STEVEN T. MATTAS
MICHAEL F. RODRIGUEZ
CLIFFORD F. CAMPBELL
KATHLEEN FAUBION, AICP
RICK W. JARVIS
ARNE B. SANDBERG
BENJAMIN P. FAY
DANIEL A. MULLER
LIANE M. RANDOLPH
PATRICK WHITNELL
KATHARINE G. WELLMAN
JOHN W. TRUXAW
GARY A. WATT
JULIE L. HARRYMAN
ADAM U. LINDGREN
DIANE B. ROLEN
CLAIRE S. BARDOS

OF COUNSEL
ANDREA J. SALTZMAN
CERTIFIED APPELLATE SPECIALIST
STEFANIE Y. GANDOLFI

December 7, 1998

Reply To:
San Leandro

VIA FACSIMILE

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

Dear Mr. Sterling:

At the risk of being somewhat tardy, I am submitting my comments on various recommendations to be considered at the Commission meeting on December 10, 1998. I have specialized in eminent domain for more than 31 years, and although the overwhelming majority of my clients are public agencies, I occasionally have an opportunity to represent property owners. Since the recession of the early 1990s ended, the eminent domain section of this firm has filed an average of 40 new condemnation lawsuits annually.

The Commission agenda for its December 10th meeting lists four matters (items 7-10) pertaining to eminent domain. My comments address each matter in order.

7. **Condemnation By Privately Owned Public Utility**
Memorandum 98-77

For many years, California's larger public utilities (So Cal Edison, PG&E, etc.) have exercised their condemnation powers when in their judgment it was necessary to do so. In my experience representing property owners in Northern California, there have been no abuses of this power by the large utilities. Indeed, most, if not all, of the large utilities are so sensitive to public perception, that in my experience, they travel to great lengths to use

eminent domain only when absolutely necessary and then with an abundance of reasonableness or fair play.

My perspective on "small" private public utilities is based on my capacity as plaintiff's counsel for a gas corporation that has used its eminent domain power to acquire pipeline easements, road easement and mineral rights. In 1998, I have initiated five lawsuits to acquire property interests that my client was unable to acquire by negotiation.

In each of these lawsuits, before filing, the gas corporation followed the procedure required of public agencies with the exception of adoption of a resolution of necessity. To be specific, appraisals were obtained and offers were made to the owners, notwithstanding that public utilities are exempted from the requirements of *Government Code Section 7267.2*. In one instance only was the utility's right to take challenged, and that challenge was by writ summarily denied by the Court of Appeal. In short, as with most condemnation litigation, the overriding issue is the amount of the compensation, and not the fact of the taking.

Several members of this firm are city attorneys. The firm represents 14 cities in 8 Bay Area counties. None of these attorneys are aware of any eminent domain abuses by private public utilities in their jurisdictions.

Based on my experience and those of my colleagues, I would recommend that the Commission refrain from fixing something that is not broken.

8. Eminent Domain Valuation Evidence
Memorandum 98-78

The clarification of *Evidence Code Section 822* is very much overdue. The Commission is encouraged to adopt the version set forth in the November 20, 1998, Staff Memorandum.

9. Date of Valuation in Eminent Domain
Memorandum 98-79

Proposed *Code of Civil Procedure Section 1268.040* addresses a problem that, in my experience, is nonexistent in California--a period of substantial delay between the determination of compensation by a trier of fact (judge or jury) and payment of that compensation by the condemnor. As a matter of custom or practice, most California

condemnors deposit probable just compensation at, or soon after, the date upon which the condemnation complaint is filed.

The deposit is made as a condition precedent to a prejudgment possession order (*Code of Civil Procedure Section 1255.420(a)*) or to freeze the date of valuation (*Code of Civil Procedure Section 1263.110(a)*). The deposit may be withdrawn at any time prior to judgment by any defendant who follows the procedure set forth in *Code of Civil Procedure Section 1255.210, et seq.*, and interest accrues on the compensation awarded from the effective date of the order of possession (*Code of Civil Procedure Section 1263.310(c)*). Lastly, a condemnor in California is required to pay the defendant not later than 30 days after final judgment (*Code of Civil Procedure Section 1268.010*) or risk dismissal of the action (*Code of Civil Procedure Section 1268.020*) and the attendant obligation to pay the defendant's litigation expenses (*Code of Civil Procedure Section 1268.610*).

In addition to the above, and unlike Federal Rule of Civil Procedure 71A, Article 3 of Chapter 9 of the Eminent Domain Law (*Code of Civil Procedure Section 1263.110, et seq.*) contains very clear rules establishing dates of valuation which would prevent the *Kirby* scenario. In short, unless the condemnor has frozen the date of valuation by making a deposit (*Code of Civil Procedure Section 1263.110*), the date of valuation is either the date the complaint is filed (*Code of Civil Procedure Section 1263.120*) or the date of trial (*Code of Civil Procedure 1263.130*) if trial occurs one year or more after the complaint is filed.

Therefore, in the minority of cases in which no deposit has been made, the condemnee risks only the change in market value that can occur in the year following the filing of the complaint. And, because in virtually all trials, the court permits valuation evidence (comparable sales data) as recent as the date of trial (on the theory that recent sales "go to the weight" of the evidence), the trier of fact in virtually every eminent domain trial accounts for market fluctuations.

For the same reason, the result in trials where the date of valuation has been frozen customarily reflects current market conditions. While it is possible that a new trial after appeal could be several years after a frozen date of valuation, and the market value could substantially increase in this time, the property owner has had the ability to withdraw and invest the deposit from the date it was made, and it therefore cannot be argued that he suffered an unconstitutional deprivation of property.

Clearly, the acquisition scheme provided by Federal Rule 71A contains none of the safeguards provided by the California Eminent Domain Law. In 30 plus years of eminent

domain practice, I have never seen the problem arise which proposed *Section 1268.040* seeks to remedy. The recommendation to the Commission suggests application of the principle "if it ain't broke, don't fix it."

10. Issues Relating To Compensation For Loss Of Goodwill In Eminent Domain Memorandum 98-85

The purpose to be achieved by Memorandum 98-85 is laudable. In any eminent domain action in which goodwill loss is an issue, each party should be entitled to as much information as is possible pertaining to the other party's goodwill contentions.

I also support the staff's recommendation concerning the inclusion of goodwill loss as an item of compensation in the final offer and demand. The impression of staff that the problem, if any, is inchoate and should be left to case law development accurately reflects my sentiments regarding Memorandum 98-79 discussed above.

Very truly yours,

MEYERS, NAVE, RIBACK, SILVER & WILSON

Michael R. Nave

MRN:jm

J:\WPDATTY\MRN\BUSINESS.DEV\LAWREVIS.L07