Study EmH-452 November 3, 1998

Memorandum 98-79

Date of Valuation in Eminent Domain

INTRODUCTION

Attached is a staff draft tentative recommendation incorporating the Commission's decisions thus far on issues in California's eminent domain date of valuation scheme. That scheme appears to be constitutionally defective in failing to recognize material increases in the value of the property between the date of valuation of the property and the date the eminent domain award is paid by the condemnor. See *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984).

The staff will circulate this tentative recommendation for comment after approval by the Commission, with any necessary revisions.

DRAFT TENTATIVE RECOMMENDATION

Under the draft tentative recommendation, the date of valuation would be the date of commencement of trial on compensation issues. While this would not completely cure the *Kirby* problem, it would minimize the number of cases in which the problem would arise by bringing the date of valuation closer to the date of payment of the award. This, combined with the fact that interest accrues on the award from the date of entry of judgment, should eliminate the *Kirby* problem in all but the most unusual cases.

For the unusual case, the draft tentative recommendation provides a scheme for determining a property owner's demand to augment the award for a material increase in the value of the property. Under this scheme, the property owner may recover litigation expenses incurred to establish the demand, but must pay litigation expenses on failure to establish the demand. While this scheme may appear to be somewhat draconian, remember that (1) the costs of revaluation will be so substantial that sanctions should be designed to force the parties to act reasonably in their demands and responses, and (2) property owners

disappointed in the results of the original valuation trial should be deterred from routinely using this scheme as simply another bite of the apple.

Here is the scheme as set out in the draft tentative recommendation:

> **Code Civ. Proc. § 1268.040 (added). Augmentation of judgment for material increase in market value**
>
> 1268.040. (a) If there is a material change in the fair market value of property taken by eminent domain between the date of valuation and the date of payment or deposit by the plaintiff of the full amount required by the judgment, with the result that the amount of the judgment, including any interest on the compensation awarded in the proceeding, is substantially below the fair market value of the property on the date of the payment or deposit, the defendant may obtain an augmentation of the judgment pursuant to the procedure provided in this section.
>
> (b) Within 30 days after the plaintiff's payment or deposit of the full amount required by the judgment, the defendant may file with the court and serve on the plaintiff a demand for augmentation of the judgment. The demand shall be accompanied by the defendant's affidavit and supporting evidence demonstrating a material change in the fair market value of the property between the date of valuation and the date of the payment or deposit and establishing the fair market value of the property on the date of the payment or deposit.
>
> (c) Within 30 days after service of the defendant's demand, the plaintiff shall file with the court and serve on the defendant a response to the demand. Failure of the plaintiff to respond is an acceptance of the demand. On acceptance of the demand, the court shall augment the judgment by the amount demanded.
>
> (d) If, after a trial of the facts, the court determines that there is a material change in the fair market value of the property between the date of valuation and the date of payment or deposit of the full amount required by the judgment, with the result that the amount of the judgment, including any interest on the compensation awarded in the proceeding, is substantially below the fair market value of the property on the date of the payment or deposit, the court shall augment the judgment by the amount necessary to compensate for the change in value. If that amount equals or exceeds the demand of the defendant, the court shall in addition award the defendant litigation expenses required to establish the demand. If that amount does not equal or exceed the demand of the defendant, the court shall award the plaintiff litigation expenses required to contest the demand. Notwithstanding Section 1235.140, "litigation expenses" awarded to the plaintiff under this subdivision includes fees, or the monetary value of their equivalent,

reasonably and necessarily incurred to protect the plaintiff's interests in the proceeding.

Comment. Section 1268.040 is added to remedy the deficiency in just compensation identified in Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984). The general rules of practice governing motions apply to a demand under this section. Cf. Section 1230.040 (rules of practice in eminent domain proceedings). See also Section 1235.140 ("litigation expenses" defined).

It should be noted that the plaintiff may avoid the effect of this section by promptly paying the amount of the award to, or depositing it in court for, the benefit of the persons entitled to payment.

AUTOMATIC VALUE INDEX

The staff has also investigated a number of leads for an automatic real estate value index or multiplier that would enable us to update value without the need for a new trial. We have had limited success in this search.

The universal opinion of experts we have spoken with is that there is no published index that is regularly updated and specific and accurate enough to be usable to track real estate values for just compensation purposes.

The only promising approach we have encountered is a computerized updating scheme, known as "Computer-Assisted Review Assurance". This scheme has been developed to enable lending institutions to track values of properties used as security for loans. It has the potential for use to update appraisals for eminent domain purposes.

Computer-assisted mass appraisal techniques used to value real estate have developed in the context of updating real estate values for ad valorem tax purposes. Joseph K. Eckert, Ph.D., author of the text *Property Appraisal and Assessment Administration* (Chicago: IAAO, 1990), indicates that compared with less systematic methods of appraisal and assessment, computer-based models provide a number of clear advantages:

> Perhaps most important, these methods provide rigorous controls for the varying characteristics of properties. An important factor distinguishing the real estate market from most other economic markets is the heterogeneity of the product. This heterogeneity, or product differentiation, is particularly evident in the residential sector, where the sale of a property involves a simultaneous transaction in the markets for land, for structures, for neighborhoods, for locations, and for access to the local public

> goods produced by governments. These latter markets (neighborhoods, locations, and access to local public goods such as schools and police protection), include many trades in valuable attributes that are not even produced by landlords or developers. The computer-assisted models that have been developed to analyze real estate markets provide well-know methods to control for the joint influence of these important characteristics on the observed transaction prices of properties. In this way, they allow the investigation of price trends over time or the comparison of property standardized with respect to all but one physical or locational characteristic.

Dr. Eckert points out that the computer models are dynamic and can be updated easily. For an example of a computer model, see Eckert, O'Connor, & Chamberlain, Computer-Assisted Real Estate Appraisal: A California Savings and Loan Case Study, 4 *Appraisal Journal* 524 (1993), Exhibit pages 1-10. Dr. Eckert estimates that, using a computer model, it would take an appraiser two or three days to update property value established in an eminent domain proceeding. However, he cautions that this could be done with a high level of accuracy for only about one year after the original date of valuation. If more than one year has elapsed, a full reappraisal is necessary.

The staff is skeptical that computer-assisted review techniques offer any significant advantage for updating eminent domain values. First, their utility is limited to the first year after valuation; but this is the period of least concern in eminent domain. Second, it is probable that the results generated by computer models will differ wildly depending on the weight given different factors by the person creating the model. Thus the condemnor would subscribe to a computer model that minimizes value changes to a particular property while the property owner would rely on a computer model that maximizes those changes. Essentially, we can look forward to a courtroom battle of appraisal experts, fighting not over the specifics of the appraisal but over the validity of the computer model. We are not sure this is an improvement.

It is conceivable that a time may come when computer modeling techniques are so standardized that there is only one generally accepted model in the appraisal field, usable for an indefinite period after the original appraisal. Then the updating could be done automatically by a court-appointed referee without the need for an expensive valuation process.

In any event, there is nothing in the draft recommendation that would preclude a valuation expert from using computer modeling to assist in formulating an opinion, assuming the computer modeling meets general evidentiary requirements for admissibility.

Respectfully submitted,

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Executive Secretary

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FEATURES

Joseph K. Eckert, PhD, Patrick M. O'Connor, and Charlotte Chamberlain, PhD

Computer-Assisted Real Estate Appraisal: A California Savings and Loan Case Study

The reliability of manual appraisals is limited in two important respects. For one thing, the number of comparables used in the appraisal of a subject property is often insufficient and the dynamics of the surrounding real estate market are often ignored. In addition, an update of a property's value usually requires that another manual appraisal be performed. Computer-Assisted Review Appraisal (CARA), an econometric modeling and forecasting technique that provides statistically based quality-control measures to assist financial institutions in the effective risk management of their mortgage loan portfolios, can be useful in circumventing these limitations. An example of the CARA technique is presented here.

For many years the real estate appraisal profession has provided the mortgage finance industry with documented, objective valuations of the real estate properties that collateralize mortgages. Developed in the 1930s, these appraisal techniques are used to determine the value of local real estate based on the attributes of the "subject" property relative to those of recently sold "comparables." While these techniques have been refined, they are still basically manual operations whose reliability is limited in two important respects. First, appraisals of subject properties are based on a limited number of comparable properties and ignore the dynamics of the surrounding real estate market. Second, once a loan is made, any update of the value of the underlying property requires another manual review appraisal.

When mortgage collateral was confined to local real estate markets and loans remained in the portfolios of the original lenders, manual appraisals did not create excessive quality control problems because the regional economic factors that determined value were well understood. The growth of the secondary mortgage market, however, has forged a link between mortgage and underwriting. Both are now national in scope with more than 60% of all originations going through the secondary market. As a result, the appraisal techniques that were developed for local lending are no longer sufficient.

At the end of the first quarter of 1991, U.S. financial institutions held approximately $3 trillion in residential mortgages of which $1.1 trillion (i.e., 38%) was held as securities. As the savings and loan industry continues to shrink and mortgage

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bankers take on a larger share of originations, modern procedures are needed to provide effective risk management for mortgage portfolios. Even staff appraisers employed by portfolio lenders in local markets, however, must have greater access to economic and sale price information. Increased demands by bank supervisory agents for appraisal documentation and justification make access to such information critical.

One solution to the problem of providing more sale price information and quality control to the appraisal process is Computer-Assisted Review Appraisal (CARA). This econometric modeling and forecasting technique provides statistically based quality-control measures to assist financial institutions in the effective risk management of their mortgage loan portfolios. Fortunately, the data needed to calibrate a CARA model are readily available to financial institutions. The needed information comes from the appraisal reports that are required for all mortgage lending. The CARA modeling technique uses information from these files along with location measures provided by outside suppliers as the basis for an appraisal evaluation.

Standard estimates of value based on rational model structures are designed to provide accuracy. These estimates are then combined with location valuation techniques, allowing properties to be reviewed over large areas—statewide, regionwide, or even nationwide. Comparisons can then be made between the ratio of the original appraisal (or loan amount) and the estimated value of the subject property. These ratios will highlight problem appraisals, problem loans, and problem appraisers. The CARA estimates can provide accurate valuations for every underlying property in a portfolio. This is a significant improvement over the current quality control practices that involve property reviews through the use of small samples.

CARA can improve the risk management of mortgage portfolios in several ways. First, the model can be used to provide an automated, market-based valuation prior to an initial onsite inspection. CARA's most important risk management contribution, however, is its ability to provide an automated review appraisal based on the comparison properties cited in a subject appraisal as well as other subject and comparison properties. Finally, CARA can automatically update original sale prices to current market levels. This article concentrates on the quality-control and updating capacities of CARA modeling.

ESTIMATING A CARA MODEL FROM THE APPRAISAL RECORDS OF A CALIFORNIA THRIFT

The data file

The authors, in cooperation with NewAmerica Savings and Loan, developed a computer file of appraisals for residential mortgage loans originated by the thrift.[1] The properties that collateralized NewAmerica's mortgages ranged from single-family homes to large apartment complexes.

The data used came directly from the original appraisal reports in NewAmerica's files. Because the appraisers used the best comparable sale data available, there was enough information in the appraisals to do reviews similar to a manual review. As a result, sufficient information was available from NewAmerica's 87 subject properties and 250 comparable sale properties to construct statistically valid market comparisons. Two-thirds of the appraisal file consist of single-family residential properties and the remainder are apartment buildings. The locations of the mortgaged properties extend from San Francisco to San Diego and the appraisal dates begin in 1983 and end in late 1990. Table 1 provides a summary of the entire NewAmerica appraisal file, both subject properties and comparison properties.

Economic assumptions and general model structure

Both residential and commercial real estate values are determined by the principles of economics. In particular, the components of supply and demand that affect real estate value include the avail-

1. The data file consists of the appraisals done on all loans originated by NewAmerica from 1983 until March 1991. NewAmerica has sold its entire loan portfolio either to other thrifts or, in the case of the multifamily loans, to the Federal Home Loan Mortgage Corporation (Freddie Mac).

ability of land and structures of the same general utility, the cost of new construction, and the demand for a particular use of space (e.g., single-family housing, apartments, commercial structures). Further:

> Although real estate markets are not perfectly competitive, the forces of competition are important in determining the price of real estate. Parcels may not be identical but often they are close substitutes. Buyers of real estate may not be bound to one location, and real estate developers and builders move from market to market in response to profit opportunities.[2]

In addition, for residential (as well as nonresidential) properties the amenities of the surrounding neighborhood are important. "Quality-of-life" factors such as the caliber of the school system, the extent of personal safety, commuting distance, and (in Los Angeles) the level of air quality are important in explaining why some neighborhoods or regions command higher prices than others.

By using the information contained in NewAmerica's residential appraisal files on general area attributes, financial conditions, and market price characteristics, the market dynamics that affect all of the portfolio properties were estimated with a high degree of statistical accuracy.

By using the information contained in NewAmerica's residential appraisal files on general area attributes, financial conditions, and market price characteristics, the market dynamics that affect all of the portfolio properties were estimated with a high degree of statistical accuracy. These techniques allow the expansion of the neighborhood concept to a large scale. A typical appraiser selects comparables within a reasonable distance from the subject. The method used in this research separates the contribution of location from the other attributes of a property in the measurement of value. The use of geographic coordinates frees the analysis from the more restrictive areas used in traditional manual review appraisals.[3]

A hybrid additive-multiplicative model was used to examine both the quantitative and qualitative characteristics specific to each property. The additive part of the formulation measures contribution to value made by additional increments of land or building size. The multiplicative adjustments (i.e., percentage modifiers to land or building size) measure the value of categorical attributes such as condition of building, age, and quality of construction.[4]

The model's structure for land and building attributes follows the general outline:

$$\text{Sale price} = \alpha_1 \text{ general qualitative} \times (\alpha_2[\text{land quantitative} \times \text{qualitative}] + \alpha_3[\text{building quantitative} \times \text{qualitative}])$$

where the qualitative and quantitative variables are measured during the appraisal process and α_1, α_2, and α_3 are the coefficients estimated during the model's calibration.[5]

As a proxy for the quality-of-life factors that affect residential property values, a location value response surface (LVRS) was created to isolate the effect of location on property values. An LVRS is a three-dimensional surface in which location information is fixed in two dimensions (X, Y coordinates) and sale price is measured on the Z plane, or third dimension. The LVRS is created through an analysis of variance between estimated value excluding a location adjustment and sale price.[6] A geographic coordinate establishes spatial relationships between properties and Value Influence Centers (VIC).

Finally, the model also included adjustments to accommodate the eight-year time span over which the appraisals were done. The model's structure included separate time calibrations for single-family and apartment properties as well as several adjustments specific to local markets.

The estimation process involved seven iterations separated into three main cycles. In the initial cycle, basic land and building characteristics were used to generate

2. International Association of Assessing Officers, J. Eckert, ed., *Property Appraisal and Assessment Administration* (Chicago: International Association of Assessing Officers, 1990), 52.
3. Ibid., chap. 15, for a more detailed discussion of the measurement and estimation procedures.
4. Ibid., for a complete description of hybrid additive-multiplicative models. The model uses a structure for analysis similar to the cost approach used by appraisers. It is more general, however, in that it assigns a dollar value to all the components of the structure, including physical (e.g., internal dimensions, land area) location (e.g., Brea versus Oxnard), and attributes (e.g., view, overall condition). In contrast the cost approach for appraisal reconstructs the property using mean construction costs on a square-footage basis along with a price for land. The approach used in this research puts a dollar value on the attributes of the structure as currently situated.
5. The precise formulation of the model that was estimated as described here appears in the Appendix.
6. A graphical display of X-Y coordinates allows a reviewer to find trends of clustered ratios above or below 1.00. A mathematical formula is then prepared to replicate the perceived relationships until the remaining variance is acceptable.

TABLE 1 Summary of NewAmerica File (subject and comparison properties)

Characteristic	Type	Minimum	Maximum	Median
Sale price	Single family	$ 66,000	$ 860,000	$ 178,000
	Apartment	$327,000	$19,300,000	$2,350,000
Sale date	Single family	3-83	6-90	10-86
	Apartment	6-87	10-90	4-89
Size (sq. ft.)	Single family	790	5,334	1,776
	Apartment	4,400	214,064	31,155
Apt. units		6	320	38
Year built	Single family	1925	1988	1972
	Apartment	1922	1989	1967

an LVRS. The second cycle used a location-free sale price to calibrate property-specific characteristics. Subsequently these estimates were used to identify outlier properties. Outliers are defined as properties for which the ratio of price to standardized sale price is below the 5th percentile or above the 95th percentile.[7] The final cycle created the actual formula used to estimate a standardized market value at the time of the origination of a loan.

The first stage in each cycle was additive, measuring the additional value created by increments of building or land area. In this cycle the sale price of the property was used as the dependent variable and the two continuous variables were included as independent variables. The second stage was multiplicative, estimating the percentage increase in value derived from categorical variables (i.e., variables measured in discrete increments such as building condition or quality of construction). This second stage operated on a combination of 1) the additive estimate of market value; 2) the categorical variables; and 3) the nonlinear-derived variables.[8] The regression exponents from the additive stage were used as independent variables in the multiplicative stage. This estimation technique is similar to that of two-stage least squares in that the first stage derives estimates of some of the independent variables used in the final model estimation. In CARA, the linear values of the categorical variables were market derived and rescaled as necessary. In this case, log-linear regression was used to simulate the curvilinear relationship between the multiplicative variables and sale prices.[9]

In the first two stages, the models for multi- and single-family properties were estimated separately. This permitted the calibration of separate values for the attributes of each property type. For example, holding all other things equal, the estimated value of a swimming pool should be different for a single-family residence than for an apartment complex. The predicted values of the multiplicative stages were then combined into a multiplicative regression along with a number of location adjustment variables that served as proxies for differences in the quality of life among different areas.

Two location adjustments were calibrated. The first adjusted for large interregional differences. These are referred to as Super Value Influence Centers (SuperVICs). The second adjusted for more refined neighborhood differences, and are referred to as VICs. While both SuperVICs and VICs relate to the traditional appraisal concepts of neighborhood, for this research VICs and SuperVICs expand that concept to larger regions. Using the NewAmerica file, the estimated SuperVIC for San Francisco was about 15% less than the one for Los Angeles. Within the Los Angeles region, the neighborhood VIC for Santa Monica, which has good air quality and excellent schools, was about 80% more than the VIC for North Hollywood, which has comparatively less healthful air quality and inferior schools.

The products of these location ad-

7. None of the NewAmerica subject properties, however, was removed from the data set.

8. The nonlinear-derived variables are estimated from previous iterations of the estimation procedure and measure location adjustments and time adjustments.

9. See Patrick M. O'Connor, John G. Panos, and Siddhartha Som, "Manhattan Commercial Property: Development and Comparison of Valuation Models," *Property Tax Journal*, v. 10, no. 1 (1991): 3–23.

justment (i.e., proximity) variables define the LVRS. Because this surface is based on X, Y coordinates, location multipliers can be derived for all coordinate points (e.g., each city block). By virtue of the basic nature of VICs, the response surface generates smooth location multipliers without giving rise to abrupt changes in location value as generally found in fixed–neighborhood-based models. In this way, CARA modeling brings the information contained in the full data sample to bear on estimating the market value of each of the individual properties.

Time adjustments

Most of the properties contained in NewAmerica's appraisal files are located in the Los Angeles area. For modeling purposes, each of the Los Angeles properties was assigned to one of three subregions: northwest, central, and southeast. The passage of time was modeled so that its effect was different depending on whether they were single-family or multifamily properties. In addition, the effect of time was modeled so that it varied among the three subregions.

The single-family model

The single-family appraisal file contained 219 properties. As mentioned previously, the modeling was done in two stages. The first was additive and the second multiplicative. As shown in Table 2, the continuous measures of living area and lot square footage were the only variables used in the additive stage. The qualitative and derived variables used in the second, multiplicative stage are also listed in Table 2.

Measurements of the structure's condition, location, number of fireplaces, swimming pools, view, and overall appeal were entered as categorical variables (i.e., variables that take on a discrete integer value). For example, properties with good appeal were assigned a value of 103 while properties with poor appeal were assigned a value of 97. The variables used for lot size and age of structure for each property were scaled by the median value of each series. The variable labeled "land/building" measures the ratio of land area to a building's square footage. The final model does not include a variable for construction quality because several iterations in the estimation procedure showed no systematic relationship between sale price and quality for both the subject and comparable properties.

The multifamily model

The multifamily property file contained 143 cases whose sale dates span 1988 to 1990. These properties are also limited geographically: no apartments in this file are located in the northwestern greater Los Angeles area. Again, the continuous variables, living area and lot size, were the

TABLE 2 Single-Family Model

Additive Variables	Variable Type	Coefficient Estimates	*t* Value
Lot size	Land continuous	.8404	0.00
Living area	Building continuous	98.3906	47.41
Multiplicative Variables	**Variable Type**	**Coefficient Estimates**	***t*-Value**
Additive estimate	Piggybacked estimate	.8916	60.39
General time adjustment	General qualitative	.7321	4.64
LA time north	General qualitative	−.4962	3.36
LA time central	General qualitative	−.5466	3.84
LA time south	General qualitative	−.5014	−3.38
Lot size adjustment	Land qualitative	−.0994	−1.37
Land/building	Land qualitative	−.0867	2.07
Age	Building qualitative	−.0501	−3.05
Condition	Building qualitative	.2543	1.81
Fireplace	Building qualitative	−.1696	−0.70
Swim pool	Building qualitative	1.9773	1.46
Location	General qualitative	.1320	−0.70
View	General qualitative	.7846	2.78
Appeal	General qualitative	3.3200	3.65

TABLE 3 Multifamily Model

Additive Variables	Variable Type	Coefficient Estimates	*t*-Value
Lot size	Land continuous	3.8947	0.00
Living area	Building continuous	73.721	0.00
Multiplicative Variables	**Variable Type**	**Coefficient Estimates**	***t*-Value**
Additive estimate	Piggybacked estimate	.9834	29.69
General time adjustment	General qualitative	−.0423	−0.28
LA time central	General qualitative	.1322	2.58
LA time south	General qualitative	.3126	7.33
Land/building	Land qualitative	.0489	−1.44
Living area adjustment	Building qualitative	.0313	0.53
Age	Building qualitative	−.0623	−1.78
Condition	Building qualitative	.7879	2.11
Quality	Building qualitative	.5211	1.70

only ones used in the additive stage. For the second multiplicative stage, the qualitative and derived variables are also listed in Table 3.

The measurement of all variables used in this multifamily model is comparable with the single-family model described previously. In this model, however, a systematic and positive relationship was found between construction quality and sale price.

Location value response surface

The predictive accuracy of this model would be significantly diminished without the use of proxy variables to control for quality-of-life differences among large regions and more locally refined neighborhoods. This was accomplished by calibrating an LVRS. Without developing a measure of the spatial relationship between fixed property locations and their VICs, it would be impossible to provide a location adjustment for large portions of California from so few properties. In this model, large SuperVICs are created from a review of zip code maps. The original latitudes and longitudes were converted to X, Y coordinates to accommodate size limitations of the statistical software.[10] Additional VICs were generated by a review of the spatial relationships of the ratio of each property's second-stage estimate to the property's actual sale price. All sale ratios were compared in one analytical step.[11] The third stage of the final cycle creates the final location value modifier, as shown in Table 4.

The CARA estimation procedures indicate that the first eight cities, including surrounding regions, are all flat surface SuperVICs. The variables starting with Los Angeles NW1 through Los Angeles Cntr 9 are sloping-point VICs. The VICs represent interior adjustments or modifiers to the fixed-area flat surface SuperVICs.

STATISTICAL SUMMARY

As in all the regression calibrations, this model attempts to minimize the distance between the estimated values and the actual observations. In this analysis the mean squared error is 0.13 and the R^2 is 0.99. The estimates of value compared with actual sale prices are:

	Minimum	Maximum	Mean	Median
Actual	$66,000	$19,300,000	$1,647,341	$256,250
Estimate	$67,408	$18,843,430	$1,639,710	$264,424

The range of sale ratios for the comparison properties after the removal of the outliers is:

10. Geographic coordinates were purchased from an outside supplier.

11. See Patrick M. O'Connor, "Computer-Assisted Mortgage Review Assurance," *Property Tax Journal*, v. 8, no. 1 (1989): 3–14.

Minimum	Maximum	Mean	Median
0.70	1.33	1.01	1.00

With the subject properties included, the range is expanded to 0.65 to 1.59. At the 25th and 75th percentiles, the ratios are 0.91 to 1.08. The coefficient of variation (*COV*) is 13.16 and the coefficient of dispersion (*COD*) is 10.34. The estimates of value as of January 1990 compared with actual sale prices are:

	Minimum	Maximum	Mean	Median
Actual	$ 66,000	$19,300,000	$1,647,000	$256,000
Estimate	$102,000	$18,872,000	$1,674,000	$323,000

The range of sale ratios for the comparison properties after the removal of the outliers is:

Minimum	Maximum	Mean	Median
0.77	1.95	1.14	1.10

With the subject properties included, the range is expanded to 0.72 to 2.02. At the 25th and 75th percentiles, the ratios are 0.97 to 1.27. The *COV* is 19.86 and the *COD* is 12.36.

VALUATION PROBLEMS IDENTIFIED IN THE NEWAMERICA APPRAISAL FILE

The CARA model that was calibrated with NewAmerica's appraisal data (CARA-NA) was used to identify potential valuation problems in the NewAmerica loan portfolio. For the properties listed in Table 5, the model predicted that the original loan balance that NewAmerica (or Federal Home Loan Mortgage Corporation [Freddie Mac] in the case of the multifamily properties) advanced exceeded 80% of the CARA-NA estimated property value.

This information should generate several levels of review. First, these properties should be scheduled for manual review appraisals. Second, if a manual appraisal confirms the model's results, the loan should be closely monitored to prevent a loan with deficient equity from becoming a nonperforming loan. Examples of reasonable precautions are the submis-

TABLE 4 Final Location Value Modifier

Multiplicative Variables	Variable Type	Coefficient Estimates	*t*-Value
Intercept	Model intercept	-.3426	-2.13
Multiplicative estimate	Piggybacked estimate	.9890	104.70
San Francisco	General qualitative	.1940	3.51
Oxnard	General qualitative	.0959	5.79
Van Nuys	General qualitative	.1064	6.54
Glendale	General qualitative	.0765	4.89
Los Angeles	General qualitative	.1502	5.62
Inglewood	General qualitative	.1815	9.82
Long Beach	General qualitative	.1608	10.58
San Diego	General qualitative	.0429	2.63
Los Angeles NW 1	General qualitative	-.0001	0.01
Los Angeles Cntr 1	General qualitative	-.0481	-4.12
Los Angeles Cntr 3	General qualitative	-.0572	-3.69
Los Angeles Cntr 5	General qualitative	-.0643	1.51
Los Angeles NW 3	General qualitative	-.0261	-2.55
Los Angeles NW 4	General qualitative	-.0132	-1.17
Los Angeles Cntr 6	General qualitative	-.0461	3.74
San Francisco 1	General qualitative	-.1026	-1.71
Los Angeles Cntr 11	General qualitative	.11609	9.82
Los Angeles Cntr 12	General qualitative	-.0852	2.86
Los Angeles NW 5	General qualitative	.01916	-2.32
Los Angeles Cntr 10	General qualitative	.02349	1.16
Los Angeles SE 4	General qualitative	-.0876	-3.08
Los Angeles Cntr 9	General qualitative	.0534	3.63

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TABLE 5 CARA-NA Model

Name	Type	Sale Year	Loan Value	Estimated Value	Estimated *LTV* Ratio
Chatsworth	Single-family	1983	$ 149,950	$ 186,000	.81
Manhattan B.	Single-family	1983	$ 319,200	$ 330,000	.97
Canoga Park	Single-family	1983	$ 103,500	$ 107,000	.97
Sepulveda	Single-family	1983	$ 108,300	$ 130,000	.83
Camarillo	Single-family	1983	$ 180,000	$ 216,000	.83
Newbury Park	Single-family	1984	$ 103,500	$ 105,000	.99
Camarillo	Single-family	1988	$ 167,800	$ 162,000	1.04
Oxnard	Single-family	1987	$ 104,500	$ 127,000	.82
Los Angeles	Single-family	1987	$ 127,800	$ 149,000	.86
Ventura	Single-family	1988	$ 126,000	$ 156,000	.81
Moorpark	Single-family	1988	$ 144,000	$ 161,000	.89
Camarillo	Single-family	1988	$ 248,000	$ 306,000	.81
N. Hollywood	Apartment	1989	$1,700,000	$2,068,000	.82
N. Hollywood	Apartment	1989	$6,100,000	$6,688,000	.91
Los Angeles	Apartment	1989	$2,900,000	$3,509,000	.83

sion of annual or quarterly rent and expense reports from the borrower and annual onsite inspections. Finally, the work of the appraisers responsible for the faulty evaluations should be reviewed to check for a pattern of inflated valuations.

The CARA-NA model was then used to forecast single-family property values as of January 1990.[12] A new ratio of loan balance to 1990 estimated price was computed and compared to the 80% standard. The results reflect the fact that prices for single-family homes in NewAmerica's lending markets generally remained strong until late 1989. Therefore, it is not surprising that the loan-to-value ratios for most of the "problem" single-family properties improved. As a result, as of January 1990 the original loan balances on only 3 of the 12 single-family problem properties still exceeded 80% of the forecast value.

information to reliably assess the quality of the underlying appraisals. In addition, the research shows that econometric models can enhance the analytical capabilities of real estate appraisers. While individual properties are unique in many respects, most property sales reflect the economics of real estate supply and demand. Market comparisons should not be limited by use, age, condition, size, or any other property characteristics that artificially limit the universe of comparison to a small sample. An overall real estate market analysis such as CARA can be used to improve the quality of the mortgage loan process through computer-assisted statistical review.

In this study, the subject and comparison properties were combined to present an analytical picture of the condition of the real estate market across a large geographic section of California. The

Name	Type	Year	Loan Value	Estimated 1990 Value	1990 Estimated Loan-to-Value Ratio
Camarillo	Single family	1988	$167,800	$171,000	.98
Los Angeles	Single family	1987	$127,800	$155,000	.82
Moorpark	Single family	1988	$144,000	$168,000	.86

CONCLUSION

This research shows that appraisal reports from a financial institution's real estate loan portfolio can provide sufficient addition of other market comparison properties from other institutions or the local assessor's office could greatly improve the quality and definition of the analysis. Further, quality-of-life differ-

12. Forecasts were not done for the three "problem" multifamily properties because each was purchased during the last quarter of 1989. A forecast to January 1990 thus would not be meaningful.

ences among regions and neighborhoods can be successfully modeled through the calibration of an LVRS as a proxy for these factors. This proxy method permits the expansion of localized appraisals to state, regional, or national markets. Further, these models can be used to estimate individual property values at the time of loan origination as well as to update these estimates to reflect current or future market conditions.

In sum, CARA valuation analysis provides practical, rational, decomposable, structured models. This research demonstrates that the economic and quality-of-life factors that influence real estate markets can be modeled and quantified.

APPENDIX: MODEL FORMULATION

The complete model formulation tested is:

$$\begin{aligned}
&\ln(\text{Sale Price}) = \ln[b_0 \times \{(\ln[(b_1 \times \text{Res. Lot Size}) + (b_2 \times \text{Res. Living Area})]^{b3} \\
&\times \text{General Time Adj}^{b4} \times \text{LA Time North}^{b5} \times \text{LA Time Central}^{b6} \times \text{LA Time South}^{b7} \\
&\times \text{Lot Size Adj}^{b8} \times \text{Land/Bldg}^{b9} \times \text{Age}^{b10} \times \text{Condition}^{b11} \times \text{Fireplace}^{b12} \times \text{Pool}^{b13} \\
&\times \text{Appraiser's Location Gen}^{b14} \times \text{View}^{b15} \times \text{Appeal}^{b16}) + \{\ln[(b_{17} \times \text{Apt. Lot Size}) + (b_{18} \times \text{Apt. Living Area})]^{b19} \\
&\times \text{Gen. Time Adj}^{b20} \times \text{LA Time Central}^{b21} \\
&\times \text{LA Time South}^{b22} \times \text{Land/Bldg}^{b23} \times \text{Living Areas Adj}^{b24} \times \text{Age}^{b25} \\
&\times \text{Condition}^{b26} \times \text{Quality}^{b27}\}^{b28} \times \text{San Francisco}^{b29} \times \text{Oxnard}^{b30} \times \text{Van Nuys}^{b31} \times \text{Glendale}^{b32} \\
&\times \text{Los Angeles}^{b33} \times \text{Inglewood}^{b34} \times \text{Long Beach}^{b35} \times \text{San Diego}^{b36} \times \text{Los Angeles NW 1}^{b37} \\
&\times \text{Los Angeles Cntrl 1}^{b38} \times \text{Los Angeles Cntr 3}^{b39} \times \text{Los Angeles Cntr 5}^{b40} \\
&\times \text{Los Angeles NW 3}^{b41} \times \text{Los Angeles 4}^{b42} \times \text{Los Angeles Cntr 6}^{b43} \times \text{San Francisco 1}^{b44} \\
&\times \text{Los Angeles Cntr 11}^{b45} \times \text{Los Angeles Cntr 12}^{b46} \times \text{Los Angeles NW 5}^{b47} \\
&\times \text{Los Angeles Cntr 10}^{b48} \times \text{Los Angeles SE 4}^{b49} \text{ Los Angeles Cntr 9}^{b50}]
\end{aligned}$$

#EmH-452

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

TENTATIVE RECOMMENDATION

Date of Valuation in Eminent Domain

November 1998

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

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **March 15, 1999.**

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

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335 FAX: 650-494-1827

SUMMARY OF TENTATIVE RECOMMENDATION

DATE OF VALUATION IN EMINENT DOMAIN

California's scheme for the date of valuation in eminent domain fails to satisfy constitutional standards announced in *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984). That case requires that compensation paid to the property owner should approximate the property's value on the date of payment.

The Law Revision Commission recommends that California's date of valuation scheme be revised so that property is valued as of the date of commencement of the trial of valuation issues. This will bring California law into line with federal law and the law of most other states and, combined with existing provisions for interest on the award, will eliminate the constitutional issue in all but the most unusual cases.

For the unusual case, the Law Revision Commission proposes a valuation update procedure on demand of the property owner, with a litigation expense penalty for the owner's failure to establish the demand. Conversely, the property owner would be entitled to litigation expenses if the condemnor contests the demand without merit.

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

DATE OF VALUATION IN EMINENT DOMAIN

JUST COMPENSATION AND DATE OF VALUATION

The just compensation clause of the Constitution[1] requires that the owner of property taken for public use 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.

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.

California Date of Valuation Scheme

Generally speaking, California uses the date of commencement of the proceeding as the date of valuation.[2] If the trial does not start until more than a year later, or if there is a new trial or retrial more than a year later, the date of trial, new trial, or retrial is used as the date of valuation.[3] The public entity may secure an earlier date of valuation by making a deposit of probable compensation for the property owner.[4]

The Law Revision Commission, in its study of the Eminent Domain Law in 1975, considering proposing a date of trial valuation date for all cases. The Commission's report states:[5]

> 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.

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1. U.S. Const. amend. 5; Cal. Const. art. I, § 19.
2. Code Civ. Proc. § 1263.120.
3. Code Civ. Proc. §§ 1263.130-1263.150.
4. Code Civ. Proc. § 1263.110.
5. *The Eminent Domain Law*, 13 Cal. L. Revision Comm'n Reports 1001, 1030 (1975).

Nonetheless, the Commission recommended no departure 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 date of valuation scheme predates the 1984 decision of the United States Supreme Court in *Kirby Industries, Inc. v. United States*.[6] 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."[7]

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."[8]

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

DATE OF VALUATION AS COMMENCEMENT OF TRIAL

One step that would bring California law closer in line with the constitutional standards announced in *Kirby* is to make the valuation date the date of commencement of trial. This is already the rule in California cases that do not come to trial within one year after commencement of the proceeding.

Some Statistics

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

6. 467 U.S. 1 (1984).
7. 467 U.S. at 17.
8. 467 U.S. at 17-18.

or trial in order that such proceedings shall be quickly heard and determined."[9] 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.[10]

The most recent statistics from the Administrative Office of the Courts indicate that for the years 1995-1997, an average of 1,300 eminent domain cases were filed statewide annually. Of these, approximately 70% were settled or otherwise disposed of before trial. Of the cases that went to trial, the statistics do not indicate whether the trial date was within a year after filing. For all superior court civil matters filed in California, more than 50% of were disposed of in less than 12 months.

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.

Bifurcated Trial

A two-phase trial is common in eminent domain proceedings — the first phase involving the right to take and the second phase involving valuation.[11] For date of valuation purposes, it is the valuation phase, rather than the right to take phase, that is critical. The Law Revision Commission recommends that the law be made clear that statutory references to the "date of trial" mean, in the case of a bifurcated trial, the valuation phase of the trial.[12]

Prejudgment Deposit

There are several drawbacks to a scheme that sets the date of valuation as the date of trial. In a rapidly rising real estate market, the condemnor may have to pay substantially more for the property than anticipated. (On the other hand, in a declining market, the condemnor may realize some savings.) Moreover, a property owner could be motivated to cause delay in order to achieve the greatest value for the property.

California law provides a mechanism by which the condemnor can assure an early valuation date. The condemnor's prejudgment deposit of probable

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9. Code Civ. Proc. § 1260.010.

10. N. Matteoni & H. Veit, 1 Condemnation Practice in California § 4.23 at 113 (Cal. Cont. Ed. Bar, June 1997 Update).

11. N. Matteoni & H. Veit, 1 Condemnation Practice in California § 4.25 at 116-117 (Cal. Cont. Ed. Bar, June 1997 Update).

12. See proposed Code Civ. Proc. § 1263.105 ("date of commencement of trial" defined).

compensation, available for withdrawal by the property owner, fixes the date of valuation.[13]

This approach makes theoretical sense, since the funds are available to the property owner at that time for use to obtain replacement property. It is also 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.

The property owner is entitled to have the prejudgment deposit increased if it appears to be inadequate.[14] "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."[15] 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 Law Revision Commission recommends that it be made clear in the statute.[16]

INTEREST AND OTHER ADJUSTMENTS

Changing California's valuation date to the date of trial would take care of the constitutional problem in most cases. However, some adjustment is required where, as in *Kirby*, the property has substantially appreciated in value between the date of valuation and the date the award is paid.

Interest

Under California law, interest runs on the award from the earlier of the date of possession or entry of judgment until the date the condemnor deposits the award for the owner.[17] The statutory rate of interest for eminent domain proceedings is the earnings rate of the Surplus Money Investment Fund for the preceding six-month period.[18] It has been held that the rate is a statutory floor, and the courts may, under the just compensation clause, award a higher rate if necessary to conform to market rates.[19] Presumptively, however, the statutory rate is the market rate.[20]

Interest on the award should be adequate in all but the most unusual case to ensure that the owner receives just compensation for the taking of the property. There are unusual cases, however, such as *Kirby*. In that case the Supreme Court

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13. Withdrawal by the property owner entitles the condemnor to possession of the property. Code Civ. Proc. § 1255.460.

14. Code Civ. Proc. § 1255.030.

15. N. Matteoni & H. Veit, 1 Condemnation Practice in California § 4.23 at 112-113 (Cal. Cont. Ed. Bar, June 1997 Update).

16. See proposed amendment of Code Civ. Proc. § 1263.110 (date if valuation fixed by deposit).

17. Code Civ. Proc. §§ 1268.310, 1268.320.

18. Code Civ. Proc. § 1263.350.

19. People v. Diversified Properties Co., 14 Cal. App. 4th 442, 17 Cal. Rptr. 2d 676 (1993).

20. Id., 17 Cal. Rptr. 2d at 687.

expressly declared that interest was not an adequate remedy where the value of the property has increased at a rate substantially higher than the interest rate.[21]

Real Estate Index

The Law Revision Commission has explored the possibility of augmenting California law with a real estate index that would allow automatic adjustment of the amount of the award for subsequent changes in the real estate market. Among the indices considered by the Commission are county property tax assessor[22] and State Board of Equalization[23] multipliers, the California Association of Realtors' *Median Home Prices for Selected California Cities and Areas*,[24] and the consumer price index.[25] None of these is reliable for eminent domain purposes.

The Commission has also considered the possibility of using computer assisted mass appraisal techniques for updating value without the need of a trial of the issue. Such techniques have limited utility for purposes of eminent domain valuation due to (1) their relatively short period of reliability and (2) the likelihood of a battle of computer models at trial. Computer models may, however, serve a useful role in assisting a valuation expert in determining whether substantial changes in value may have occurred.

Valuation Update Procedure

The solution suggested by the Supreme Court in *Kirby* is a special procedure to redetermine the amount of compensation. The Court envisions a motion by the property owner to amend the condemnation award:[26]

> 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.

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21. 467 U.S. at 17-18.

22. But the county property tax assessor no longer annually reassesses neighborhood values based on market trends. This is a consequence of Proposition 13, which provides for reassessment of an individual property only on transfer.

23. The State Board of Equalization tracks ratios between assessed value and market value of commercial properties. These ratios do not provide a reliable basis for determining trends in market value.

24. The CAR index tracks median home prices for 330 cities in 26 counties, showing monthly and yearly changes. Its geographic coverage is not complete, and the residential index is not a reliable indicator for commercial properties.

25. However, the CPI does not parallel real estate prices, even though there is some relationship between the two.

26. 467 U.S. at 18-19 (fns. omitted).

Such a procedure would not be as expeditious or inexpensive as the court contemplates, particularly in California, where a jury trial of compensation issues is guaranteed.[27] 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."[28]

For the unusual case where a date of trial valuation plus interest on the award is inadequate, a valuation update procedure should be available. However, constraints are required to ensure that such a procedure is not abused. The Supreme Court suggests that the natural inclination of property owners not to waste money is sufficient — "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."[29]

The Law Revision Commission is not as sanguine about the prospects for restraint, and believes more is needed. The Commission recommends a procedure whereby a property owner who believes there has been a material increase in market value resulting in a substantial differential (considering also interest accrued on the award) may make a demand for an augmentation of the award. If a judicial determination of the matter becomes necessary and the augmentation equals or exceeds the amount demanded, the property owner would be entitled to recover litigation expenses. But if the augmentation does not equal or exceed the amount demanded, the property owner would be required to pay the condemnor's litigation expenses.

In any event, the condemnor may avoid the possibility of having to relitigate and pay a greater amount by making a prompt payment or deposit of the award.

CONCLUSION

The Supreme Court decision in *Kirby* presents challenges to California's existing date of valuation scheme. The Law Revision Commission recommends that the date of valuation be the date of trial 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 *Kirby* problems.

This change should be supplemented by a special motion and valuation update procedure. To ensure that the procedure is only used where the change in market value has been clear and substantial, if the property owner fails to prove the

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27. "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." Cal. Const. Art. I, § 19.

28. 467 U.S. at 19, fn. 30.

29. 467 U.S. at 19, fn. 29.

amount claimed, the property owner should be liable for the condemnor's litigation expenses. Conversely, to ensure that the condemnor does not deny compensation where the change in market value has been clear and substantial, the condemnor should be liable for the property owner's litigation expenses to prove the amount claimed.

Apart from these major changes in law, some minor statutory clarification of the date of valuation statutes is called for. Specifically, the statutes should 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.

Contents

PROPOSED LEGISLATION

An act to add Sections 1263.105 and 1268.040 to, to amend Sections 1263.110, 1263.130, 1263.140, and 1263.150 of, and to repeal Section 1263.120 of, the Code of Civil Procedure, relating to eminent domain law.

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

Code Civ. Proc. § 1263.105 (added). Date of commencement of trial

SECTION 1. Section 1263.105 is added to the Code of Civil Procedure, to read:

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).

Code Civ. Proc. § 1263.110 (amended). Date of valuation fixed by deposit

SEC. 2. Section 1263.110 of the Code of Civil Procedure is amended to read:

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) .

Code Civ. Proc. § 1263.120 (repealed). Trial within one year

SEC. 3. Section 1263.120 of the Code of Civil Procedure is repealed.

~~1263.120. If the issue of compensation is brought to trial within one year after commencement of the proceeding, the date of valuation is the date of commencement of the proceeding.~~

Comment. Former Section 1263.120 is not continued. The date of valuation is the date of trial. Section 1263.130 (date of trial).

Code Civ. Proc. § 1263.130 (amended). Date of valuation date of trial

SEC. 4. Section 1263.130 of the Code of Civil Procedure is amended to read:

1263.130. Subject to Section 1263.110, ~~if the issue of compensation is not brought to trial within one year after commencement of the proceeding,~~ the date of valuation is the date of the commencement of the trial ~~unless the delay is caused by the defendant, in which case the date of valuation is the date of commencement of the proceeding~~.

Comment. Section 1263.130 is amended to make the date of valuation the date of trial, regardless of the date of commencement of the proceeding. Cf. Section 1263.105 ("date of commencement of trial" defined).

Code Civ. Proc. § 1263.140 (amended). New trial

SEC. 5. Section 1263.140 of the Code of Civil Procedure is amended to read:

1263.140. Subject to Section 1263.110, if a new trial is ordered by the trial or appellate court ~~and the new trial is not commenced within one year after the commencement of the proceeding~~, the date of valuation is the date of the commencement of ~~such~~ the new trial unless, in the interest of justice, the court ordering the new trial orders a different date of valuation.

Comment. Section 1263.140 is amended to reflect repeal of former Section 1263.120 (trial within one year). Cf. Section 1263.105 ("date of commencement of trial" defined).

Code Civ. Proc. § 1263.150 (amended). Mistrial

SEC. 6. Section 1263.150 of the Code of Civil Procedure is amended to read:

1263.150. Subject to Section 1263.110, if a mistrial is declared ~~and the retrial is not commenced within one year after the commencement of the proceeding~~, the date of valuation is the date of the commencement of the retrial of the case unless, in the interest of justice, the court declaring the mistrial orders a different date of valuation.

Comment. Section 1263.150 is amended to reflect repeal of former Section 1263.120 (trial within one year). Cf. Section 1263.105 ("date of commencement of trial" defined).

Code Civ. Proc. § 1268.040 (added). Augmentation of judgment for material increase in market value

SEC. 7. Section 1268.040 is added to the Code of Civil Procedure, to read:

1268.040. (a) If there is a material change in the fair market value of property taken by eminent domain between the date of valuation and the date of payment or deposit by the plaintiff of the full amount required by the judgment, with the result that the amount of the judgment, including any interest on the compensation awarded in the proceeding, is substantially below the fair market value of the property on the date of the payment or deposit, the defendant may obtain an augmentation of the judgment pursuant to the procedure provided in this section.

(b) Within 30 days after the plaintiff's payment or deposit of the full amount required by the judgment, the defendant may file with the court and serve on the plaintiff a demand for augmentation of the judgment. The demand shall be accompanied by the defendant's affidavit and supporting evidence demonstrating a material change in the fair market value of the property between the date of valuation and the date of the payment or deposit and establishing the fair market value of the property on the date of the payment or deposit.

(c) Within 30 days after service of the defendant's demand, the plaintiff shall file with the court and serve on the defendant a response to the demand. Failure of the plaintiff to respond is an acceptance of the demand. On acceptance of the demand, the court shall augment the judgment by the amount demanded.

(d) If, after a trial of the facts, the court determines that there is a material change in the fair market value of the property between the date of valuation and the date of payment or deposit of the full amount required by the judgment, with the result that the amount of the judgment, including any interest on the compensation awarded in the proceeding, is substantially below the fair market value of the property on the date of the payment or deposit, the court shall augment the judgment by the amount necessary to compensate for the change in value. If that amount equals or exceeds the demand of the defendant, the court shall in addition award the defendant litigation expenses required to establish the demand. If that amount does not equal or exceed the demand of the defendant, the court shall award the plaintiff litigation expenses required to contest the demand. Notwithstanding Section 1235.140, "litigation expenses" awarded to the plaintiff under this subdivision includes fees, or the monetary value of their equivalent, reasonably and necessarily incurred to protect the plaintiff's interests in the proceeding.

Comment. Section 1268.040 is added to remedy the deficiency in just compensation identified in Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984). The general rules of practice governing motions apply to a demand under this section. Cf. Section 1230.040 (rules of practice in eminent domain proceedings). See also Section 1235.140 ("litigation expenses" defined).

It should be noted that the plaintiff may avoid the effect of this section by promptly paying the amount of the award to, or depositing it in court for, the benefit of the persons entitled to payment.