Study EmH-455 June 11, 1999

Memorandum 99-7

Attorney Fees in Eminent Domain: Clarification of the Law

BACKGROUND

Existing California law provides that attorney fees may be awarded to the property owner in an eminent domain proceeding if the final pretrial demand of the property owner was reasonable and the final pretrial offer of the condemnor was unreasonable. Code of Civil Procedure Section 1250.410 provides:

> **Code Civ. Proc. § 1250.410. Pretrial settlement offers**
>
> 1250.410. (a) At least 30 days prior to the date of the trial on issues relating to compensation, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff its final demand for compensation in the proceeding. Such offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation expenses. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.
>
> (b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses.
>
> In determining the amount of such litigation expenses, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed and served prior to or during the trial.
>
> (c) If timely made, the offers and demands as provided in subdivision (a) shall be considered by the court on the issue of determining an entitlement to litigation expenses.

("Litigation expenses", within the meaning of this section, includes reasonable attorney fees, appraisal fees, and fees for the services of other experts. Code Civ. Proc. § 1235.140.)

There is a substantial body of case law applying the standard that "the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding." In fact, this is one of the most regularly litigated provisions of the Eminent Domain Law.

The most recent Supreme Court case addressing the matter is *Los Angeles County Metro. Transp. Auth. v. Continental Dev. Corp.*, 16 Cal. 4th 694, 66 Cal. Rptr. 2d 121 (1997). In that case the condemnor's final offer was $200,000 and the property owner's final demand was $500,000; the total compensation awarded in the proceeding was in excess of $1 million. The trial court denied the property owner's motion for litigation expenses. This ruling was affirmed by the Supreme Court, which held that, based on the evidence adduced at trial and other considerations, the trial court did not exceed the bounds of reason in denying the property owner's motion.

Cases applying the statute do not always appear to provide a consistent interpretation of the standards announced in the statute. In light of the disparity between the statutory language and the case law application of it, the Commission decided, as part of the Eminent Domain Law update project, to look into the possibility of a better statutory formulation of the applicable law.

To assist in this project, the staff commissioned a review of the California cases by a University of Pennsylvania Law School student, Holly Olson Paz, who performed the research under the auspices of that institution's Public Service Program. The results of Ms. Paz' research are attached to this memorandum as Exhibit pp. 1-10.

EXISTING CASE LAW

Existing case law has developed three factors that a court must consider in determining whether the demand of the property owner was reasonable and the offer of the condemnor was unreasonable :

> (1) The amount of the difference between the offer and the compensation awarded.
>
> (2) The percentage of difference between the offer and award.
>
> (3) The good faith, care, and accuracy in how the amount of offer and the amount of demand were determined.

No one of these factors alone may serve as the basis for a determination of reasonableness or unreasonableness.

Thus in *Continental Development*, where the amount offered was $200,000 and the amount awarded exceeded $1 million, the court held that the difference between the offer and award was not the exclusive determinant of reasonableness and that, taking into account the weak testimony of the property owner's expert witness on a key issue in the case, the condemnor "cannot be said to have made its offer unreasonably or in bad faith." 66 Cal. Rptr. 2d at 648.

It appears to the staff that, on these facts, the decision could have gone either way. This illustrates the importance of the procedural posture of a particular case. The trial court has considerable discretion on whether to make an award of litigation expenses based on the facts in the case. The standard of review employed by the appellate court is whether the trial court has abused its discretion in awarding or denying litigation expenses. As the Supreme Court expressed it in *Continental Development*, the trial court did not "exceed the bounds of reason" in denying litigation expenses to the property owner. 66 Cal. Rptr. 2d at 648.

It will be useful to examine each of the factors that courts are required to consider in making a reasonableness determination.

Amount of Difference between Offer and Award

Although the absolute dollar difference between the condemnor's final offer and the amount awarded is to be considered by the court, this appears to be the least significant of the factors. Thus, a jury verdict that was $16,000 greater than the condemnor's offer was thought to be sufficiently great to justify an award of litigation expenses in *County of Los Angeles v. Kranz*, 65 Cal. App. 3d 656 (1977), but a difference of $800,000 in *Continental Development* was not. The most recent Court of Appeal decision features an absolute dollar difference of $950,000, but the court notes that it must go on to examine the reasonableness of the condemnor's behavior before concluding that an award of litigation expenses to the property owner is warranted. *Ventura County Flood Control District v. Campbell*, 83 Cal. Rptr. 2d 725 (1999).

Percentage of Difference between Offer and Award

Older cases adhere to a mathematical determination of reasonableness — an offer that is less than 60% of the compensation awarded is deemed unreasonable,

while an offer that is greater than 85% of the compensation awarded is per se reasonable. More recent cases reject such a strict mathematical approach:

> We need say little more about this issue other than to note our disapproval of any pronouncement purporting to find unreasonableness as a matter of law based purely on mathematical disparity, and to commend the lower courts in every case to consider not only the numerical figures, but also "'"the good faith, care and accuracy in how the amount of the offer and the amount of the demand, respectively, were determined." [Citations.]'" *Continental Development*, 16 Cal. 4th at 720-721.

Thus in *Continental Development*, a final offer that was less than 18% of the compensation awarded was found to be reasonable based on the condemnor's good faith, care, and accuracy in making the offer.

Good Faith, Care, and Accuracy in Determination of Offer and Demand

The dominant factor that has emerged in the courts' determination of reasonableness is the good faith, care, and accuracy in how the amount of the offer and the amount of the demand were determined. Offers that have been quite low in relation to the compensation awarded have been held to be sufficiently reasonable that litigation expenses should not be awarded.

Specific factors cited in the cases that have been the basis of a determination that a low offer was reasonable have included such matters as:

- Condemnor used well-qualified appraiser who employed comparable properties.
- Condemnor and appraiser did not try to keep appraisal low.
- Condemnor honestly believed that property owner's demand included noncompensable damages.
- Condemnor reviewed property owner's appraisal and met with appraiser to determine basis of demand.
- Property owner failed to offer expert support for demand.

Specific factors cited in the cases that have been the basis of a determination that an offer was unreasonable have included such matters as:

- Condemnor unwilling to compromise.
- Condemnor ignored expert opinion offered by property owner.
- Condemnor engaged in gamesmanship in timing of and basis for offer.
- Condemnor used artificial "legal issue" as basis for low offer.

HISTORY OF SECTION 1250.410

How did Code of Civil Procedure Section 1250.410 get to be this way, with its open-ended standard for award of litigation expenses?

The provision was first enacted in 1974, under sponsorship of the State Bar, as Code of Civil Procedure Section 1249.3. As enacted, it provided only that in determining reasonableness, the court was to consider the amounts offered and demanded in light of the compensation awarded.

In the Law Revision Commission's 1975 rewrite of the Eminent Domain Law, the Commission reenacted that provision as Section 1250.410, adding to it the requirement that reasonableness also be determined "in the light of the evidence admitted". This change was made during the legislative process at the request of the Department of Transportation. The Department pointed out that the litigation expenses provision is a one-way street — expenses can only be awarded against the condemnor, not against the property owner. Moreover, the provision fails to provide sufficient standards to guide the trial judge. As a practical matter, the condemnor can only offer the amount of its appraisal or slightly more — if the offer is accepted, there must be a justifiable basis for the expenditure of that amount of public funds. But the property owner is not bound by this constraint; in many cases the value testimony offered by the property owner will be substantially above the owner's demand. "Under these circumstances and considering the tendency of juries to 'split the difference' in complex cases, the condemning agency is at a distinct disadvantage." (Letter to Commission from Department of Transportation, May 5, 1975.)

The Commission agreed with this argument and added the language enabling the judge to consider the offer and demand in light of the testimony that was weighed by the jury in arriving at a determination of just compensation. The practical effect of this provision was correctly predicted by the Department of Transportation in its letter proposing it:

> With the suggested amendment and in cases where the difference between the defendant's demand and the defendant's testimony is substantial, a judge could conclude that a verdict in an amount in excess of plaintiff's offer and perhaps even in excess of defendant's demand would not warrant an allowance of costs and litigation expenses.

In all fairness, however, it should be pointed out that even without the "evidence admitted" language, the original Code of Civil Procedure Section 1249.3 gave no clear guidance to courts. The write-up of the provision as enacted in the Pacific Law Journal review of 1974 legislation concludes, "The statute does not contain guidelines to aid the parties or the courts in determining the reasonableness of the final offers." 6 Pac. L. J. at 381 (1975).

Moreover, the "good faith, care, and accuracy" standard currently used by the courts, and the broad discretion given the trial court, were first developed by the courts applying former Section 1249.3 as originally enacted. See, e.g., *City of Los Angeles v. Cannon*, 57 Cal. App. 3d 559, 562, 127 Cal. Rptr. 709 (1976) ("It seems to us that reasonableness depends not only on the monetary amounts or the percentage of difference. Reasonableness depends also on the good faith, care and accuracy in how the amount of the offer and the amount of the demand respectively, were determined. These are factual determinations best made by the trial court that heard the evidence relative thereto."); *County of Los Angeles v. Kranz*, 65 Cal. App. 3d 656, 659, 135, Cal. Rptr. 473 (1977) ("[R]easonableness depends on the proportional difference between offer and demand, the absolute monetary amounts, and the good faith, care, and accuracy in the method of determination of offer and demand."). The addition of the "evidence admitted" language is considered merely a codification of the pre-existing interpretation of the statute. See People *ex rel. Dept. of Transp. v. Societa Di Unione E Beneficenza Italiana*, 87 Cal. App. 3d 14, 23, 150 Cal. Rptr. 706 (1978).

OTHER JURISDICTIONS

It may be instructive to review what other jurisdictions do with respect to attorney fees in eminent domain litigation.

State Law

State laws vary tremendously in the extent to which the property owner's attorney fees are recompensable in eminent domain. Most typically litigation expenses are allowed only if the property owner defeats the right to take or the condemnor abandons the proceeding.

A number of states (like California) also allow the property owner to recover attorney fees in circumstances where the property owner is "inappropriately" forced to litigate property valuation issues. The approaches used in these states are summarized below.

Award exceeds condemnor's offer. Nine states provide for the property owner's attorney fees if the award exceeds the condemnor's offer. The amount by which the award must exceed the offer in order to trigger fees varies from state to state:

110% — Iowa

20% — South Dakota

10% — Alaska, Washington

Any amount — Indiana, Louisiana, Michigan, Montana, Oregon

(Note: Indiana limits recovery of litigation expenses to $2,500; Michigan limits recovery to 1/3 of overage;

Oregon also allows fees on a showing of condemnor's bad faith.)

Award exceeds condemnor's proof. One state — New York — provides for the property owner's attorney fees if the award exceeds the condemnor's proof in the case, provided that the court deems the award necessary in order to achieve just and adequate compensation for the property owner.

Award closer to property owner's demand than to condemnor's offer. If the amount awarded in the case is closer to the property owner's demand than to the condemnor's offer, South Carolina allows the property owner to recover litigation expenses.

Award equals or exceeds property owner's demand. One state — Florida — allows the owner to recover attorney fees if the amount awarded equals or exceeds the owner's demand in the case.

Prevailing party. Idaho applies its general civil attorney fee "prevailing party" rules to eminent domain litigation.

Condemnor's bad faith. Two states — Arkansas and Oregon — allow attorney fees on a demonstration of the condemnor's bad faith.

Federal Law

The rules governing attorney fees in federal condemnation proceedings are analogous to California law. Under the Equal Access to Justice Act, 28 USC § 2412, the property owner is allowed litigation expenses if the property owner is the "prevailing party" in the case, unless the court determines that the government's position was substantially justified or that special circumstances make the allowance unjust.

"Prevailing party" within the meaning of this statute is the party whose testimony in court is closest to the actual award in the case. But even if the property owner is the prevailing party, attorney fees are not awarded if there

was substantial justification for the condemnor's position. This issue has become highly litigated. The courts have applied a reasonableness test to determine whether the condemnor's position was "justified in law and fact", taking into account the totality of the circumstances. Factors entering into the reasonableness determination include:

- The condemnor's good faith efforts to settle.
- The reasonableness and reliability of the condemnor's appraisals introduced into evidence.
- A comparison of the condemnor's appraisal, the offer made, and proof of valuation at trial.
- Any other relevant evidence.

These factors are reminiscent of those applied in California.

There are other impediments to recovery of attorney fees under the federal Equal Access to Justice Act, including limitations on the types of parties who can recover and limitations on the amount of fees that can be recovered. The net effect is that the statute's threshold requirements "rarely allow attorney fee reimbursement in eminent domain," 8A *Nichols on Eminent Domain 3d* § 15.03[1] (1999). That treatise concludes with the following critique:

> The courts failure to make the standard clear and to give both attorneys and their clients notice, seems to undermine the legislative policy for enacting this statute. The Supreme Court has recognized that the specific purpose of the EAJA is to eliminate the financial disincentive for the average person to challenge unreasonable governmental actions. Interestingly, in other areas of the law the courts do directly address the issue of measure of attorneys' fees. Landowners should be entitled to the same due treatment as other citizens who have been deprived of a property right by the federal government. It would appear that the noble concept of equal access to the Courts has been robbed in its application of any practical benefit to the individual having to litigate with the sovereign as an involuntary defendant in eminent domain cases.
> 8A *Nichols on Eminent Domain 3d* § 15.03[2][d] (1999) [Citations omitted.]

The award of litigation expenses based on the reasonableness of the final offer and demand is among the most heavily litigated issues in California eminent domain law. This is due in part to the lack of bright-line standards in the law.

The lack of clear standards for an award of litigation expenses also has a more insidious effect — it undercuts the purpose of the statute to require the parties to temper their positions and perhaps achieve a resolution of the dispute without the need for an eminent domain trial. The statute is intended to motivate the parties to behave reasonably for fear of the litigation expense sanction. But if that sanction is readily avoided by application of a nebulous and unpredictable good faith, care, and accuracy standard, the purpose of the statute is frustrated.

On the other hand, a condemnor ought not to be coerced to make a higher than reasonable offer for fear of having to bear litigation expenses. A fuzzy line, such as "good faith, care and accuracy", gives the condemnor relief where the condemnor has acted properly but gotten burned in the verdict for some reason (e.g., an ineffective witness or an adverse ruling on a legitimate dispute of law).

Can anything be done? The staff can visualize a range of options:

(1) Codify current standards, with added guidance to the courts.

(2) Employ a higher standard of judicial review.

(3) Adopt a more mainstream approach to entitlement to attorney fees.

(4) Employ a more mechanical test.

Codify Current Standards

The most minimal clarification of the law would codify the standards currently employed by the courts. Ms. Paz, after digesting the cases on the point, suggests it would be useful to codify the three factor approach of (1) absolute difference, (2) percentage difference, and (3) good faith, care, and accuracy. The statute would make clear that the three factors are to receive equal weight, and that a formulaic determination of reasonableness or unreasonableness "per se" is not allowed. She recommends that, in order to provide the courts more guidance in making reasonableness determinations, the Comment should suggest the types of evidence courts should look to as demonstrations of good faith, care, and accuracy.

A provision along these lines might look something like this:

Code Civ. Proc. § 1250.420 (added). Standards for determination of reasonableness

1250.420. (a) In a determination pursuant to Section 1250.410 whether the offer of the plaintiff was unreasonable and the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the court shall consider the all of the following factors:

(1) The amount of the difference between the offer and the compensation awarded.

(2) The percentage of difference between the offer and award.

(3) The good faith, care, and accuracy in how the amount of offer and the amount of demand were determined.

(b) The court shall not consider any of the factors prescribed in subdivision (a) to the exclusion of the others.

Comment. Section 1250.420 codifies existing law. See, e.g., *Los Angeles County Metro. Transp. Auth. v. Continental Dev. Corp.*, 16 Cal. 4th 694, 66 Cal. Rptr. 2d 121 (1997).

Evidence of lack of good faith, care, and accuracy under subdivision (a)(3) may include, among other matters, a party's attempt to keep an appraisal unduly high or low, disregard of the other party's appraisal, failure to counter an appraisal with substantial evidence, and refusal to deviate from an appraisal. See, e.g., *County of Los Angeles v. Kranz*, 65 Cal. App. 3d 656, 135 Cal. Rptr. 473 (1977); *Community Redevelopment Agency v. Krause*, 162 Cal. App. 3d 860, 209 Cal. Rptr. 1 (1984); *California ex rel. State Pub. Works Bd. v. Turner*, 90 Cal. App. 3d 33, 153 Cal. Rptr. 156 (1979); *San Diego Gas & Elec. Co. v. Daley*, 205 Cal. App. 3d 1334, 253 Cal. Rptr. 144 (1988); *Glendale Redevelopment Agency v. Parks*, 18 Cal. App. 4th 1409, 23 Cal. Rptr. 2d 14 (1993);*Los Angeles County Metro. Transp. Auth. v. Continental Dev. Corp.*, 16 Cal. 4th 694, 66 Cal. Rptr. 2d 121 (1997).

Evidence of good faith, care, and accuracy may include, among other matters, use of a well-qualified appraiser and of comparable properties in the appraisal, heeding the professional appraisal of the other party, and disagreement caused by the complexity of a legal dispute between the parties. See, e.g., *Turner*; *San Diego Metro. Transit Dev. Bd. v. Cushman*, 53 Cal. App. 4th 918, 62 Cal. Rptr. 2d 121 (1997); *People ex rel. Dep't of Transp. v. Yuki*, 31 Cal. App. 4th 1754, 37 Cal. Rptr. 2d 616 (1995).

Standard of Review

A different approach would be to circumscribe the broad discretion given the trial court. Although the courts are all over the place on what behavior may be reasonable or unreasonable, the trial court's determination is rarely overturned. There is a broad presumption of validity on appeal; the trial court's decision is

presumed to be supported by substantial evidence, and is upheld so long as it does not exceed the bounds of reason. This has been the situation from the earliest cases construing the statute. See, e.g., *Kranz*, 65 Cal. App. 3d at 659 ("The measure of reasonableness is in the first instance a factual matter for the trial court. As in any finding by the trial court, however, if the uncontradicted evidence permits only one conclusion, the issue is legal, not factual. [Citations omitted.]")

The staff is not confident that a stricter standard of judicial review will help matters. By its nature, the determinations made under this section are factual in nature, and the trial court is closer to the facts than an appellate court.

On the other hand, greater appellate court involvement could help provide greater guidance for trial determinations of what types of factors are more or less important in determining reasonableness.

On balance, though, the staff is not convinced that providing the court of appeal greater leeway to overturn trial court factual determinations would lead to greater certainty. The staff recommends no change in this regard.

Mainstream Determination of Entitlement to Fees

The "good faith, care, and accuracy" criterion has been elevated by the courts to the point where it has become nearly the sole factor in determining entitlement to attorney fees. Absent a showing of bad faith, attorney fees will not be awarded, regardless of how great the discrepancy between offer and award.

The statute was originally intended "to promote settlement of valuation disputes in eminent domain proceedings and guarantee full recompense to the landowners in case of unnecessary litigation." *Kranz*, 65 Cal. App. 3d at 660. As currently construed, however, the statute provides little incentive for the parties to reach a fair settlement because the phrase "good faith, care, and accuracy" has been given such a broad interpretation.

The eminent domain standard for awarding attorney fees is unique among California (and federal) fee shifting provisions. More typically, fee shifting is provided if the plaintiff is not the "prevailing party" in the litigation. There is an extensive body of case law developing and applying this standard. See, e.g., R. Pearl, *California Attorney Fee Awards 2d* §§ 2.15-2.25 (Cal. Cont. Ed. Bar Sept. 1998).

Is there a good reason not to use the general "prevailing party" standard in eminent domain proceedings as well? Is eminent domain so unique among the

varieties of litigation that it requires its own special standards? Certainly property must be valued in other types of proceedings. And public funds are implicated in other types of proceedings.

The staff believes that it is at least worth investigating the possibility of bringing eminent domain law into the mainstream on this point. A simple revision might look something like this:

> **Code Civ. Proc. § 1250.410 (amended). Pretrial settlement offers**
>
> 1250.410. (a) At least 30 days prior to the date of the trial on issues relating to compensation, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff its final demand for compensation in the proceeding. Such offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation expenses. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.
>
> (b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the ~~offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded~~ plaintiff was not the prevailing party in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses.
>
> In determining the amount of such litigation expenses, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed and served prior to or during the trial.
>
> (c) If timely made, the offers and demands as provided in subdivision (a) shall be considered by the court on the issue of determining an entitlement to litigation expenses.
>
> **Comment.** Section 1250.410 is amended to substituted the "prevailing party" standard for the "reasonableness" standard in awarding litigation expenses under this section. A prevailing party determination under this section is based not on a determination of the plaintiff's right to take, but on a determination of compensation in relation to the offer of the plaintiff and the demand of the defendant.

A major drawback to this approach is that it would junk twenty-five years of case law interpretation of the standard, and start us off on a new cycle of interpretation. But if twenty-five years of interpretation has not yielded a

satisfactory result, and if the new cycle is based on principles generally applicable in the law, then the change in standards may be warranted.

One concern is that, although the "prevailing party" standard is more mainstream, it is also somewhat flexible. The end result of the substitution of standards could be uncertainty with the result that litigation is not discouraged. For further discussion of the "prevailing party" standard, please refer to Memorandum 99-32 (award of costs and contractual attorney's fees to prevailing party), scheduled for consideration at the Commission's June 1999 meeting.

Mechanical Test

A popular alternative in other jurisdictions is a mechanical test — if the award is higher than the condemnor's offer, or higher by a certain amount, or closer to the property owner's demand, etc. — the property owner is entitled to litigation expenses. Such a provision would certainly help eliminate litigation over the issue, as well as create a dramatic incentive to the condemnor to go a long way towards settling the case.

But would such a standard unfairly coerce the condemnor to be overly generous with public funds, or unfairly penalize the condemnor who has behaved reasonably in the case but gotten burned for some reason at trial? This is a particular concern because of the tendency of a jury to split the difference between the parties — the award will almost invariably be higher than the condemnor's offer.

One possible solution to this problem is to allow litigation expenses only where the award is closer to the property owner's demand than to the condemnor's offer. This could be supplemented by a provision that would categorize types of cases where the condemnor is legitimately exonerated from payment of litigation expenses.

A provision along these lines could look something like this:

> **Code Civ. Proc. § 1250.420 (added). Standards for determination of reasonableness**
>
> 1250.420. (a) For the purpose of Section 1250.410, the offer of the plaintiff was unreasonable and the demand of the defendant was reasonable if the compensation awarded in the proceeding is numerically closer to the demand of the defendant than to the offer of the plaintiff.
>
> (b) Notwithstanding subdivision (a), the offer of the plaintiff is reasonable in any of the following circumstances:

(1) The major reason for the difference between the offer of the plaintiff and the demand of the defendant is a good faith and legitimate dispute over a question of law involved in the determination of compensation.

(2) The major reason for the difference between the offer of the plaintiff and the demand of the defendant is the mistake, inadvertence, surprise, or excusable neglect of the plaintiff that was made in good faith and was not reasonably ascertainable by the plaintiff at the time of the offer or at any other time before the commencement of trial.

Comment. Section 1250.420 supersedes case law determinations of "reasonableness" based on a variety of factors, including the difference between the offer and award, and the good faith, care, and accuracy in the formulation of the offer and demand. See, e.g., *Los Angeles County Metro. Transp. Auth. v. Continental Dev. Corp.*, 16 Cal. 4th 694, 66 Cal. Rptr. 2d 121 (1997).

Under subdivision (a), reasonableness is to be determined instead by the mechanical test of whether the offer or the demand is closer to the compensation awarded. The mechanical test of subdivision (a) is tempered by the exonerating circumstances prescribed in subdivision (b).

Subdivision (b)(1) codifies existing law. See, e.g., *People ex rel. Dep't of Transp. v. Yuki*, 31 Cal. App. 4th 1754, 37 Cal. Rptr. 2d 616 (1995).

Subdivision (b)(2) is drawn from other statutory standards in California law. See, e.g., Code Civ. Proc. § 473(b) (relief of party from judgment, dismissal, order, or other proceeding). If the plaintiff discovers the error in the offer before the commencement of trial, the plaintiff may not be exonerated from payment of litigation expenses under this provision if the plaintiff fails to make a renewed settlement effort based on the discovery.

CONCLUSION

It could be argued that the property owner's litigation expenses should be reimbursable as a matter of constitutional right, since having to bear litigation expenses in effect reduces the just compensation to which the property owner is entitled. However, this issue has been decided against the property owner. See, e.g., *County of Los Angeles v. Ortiz*, 6 Cal. 3d 141, 148-149 (1971):

> In resolving this dilemma, as we must, we are impressed with the authorities which are almost unanimously in agreement that there is no constitutional compulsion to award litigation costs to a landowner in a condemnation proceeding; defendants have not

> offered any persuasive justification for overruling this virtually unbroken line of interpretive decisions. It follows that since allowable costs are of policy as distinguished from constitutional dimension, determination of costs which are permissibly recoverable remains with the Legislature rather than the courts. [fn]
>
> [fn]: The Legislature appears to be aware of the problems involved in the present cost-allocation system. The California Law Revision Commission has made a study of the issue and a number of imaginative solutions have been suggested to it.

The purpose of the California statute allowing the property owner to recover litigation expenses if the property owner's demand was reasonable and the condemnor's offer was unreasonable, is to encourage fair settlements and to make whole the property owner who is unreasonably required to litigate in order to obtain just compensation for the property taken.

That statute, as presently interpreted, is somewhat erratic in the accomplishment of its purposes because it does not provide clear guidelines for the parties. This memorandum suggests a number of possible ways to provide added certainty to California law on the matter. The Commission needs to consider whether any of these, or some other approach, is worth pursuing.

In this connection, the staff must point out that any change in the law that results in higher costs to public entities will face significant hurdles in the Legislature. Granted, tax revenues are currently up. But there will be a natural resistance to increasing any public entity's property acquisition costs.

Of course, it can be argued that if the condemnor acts reasonably to begin with, there will be no increased costs for payment of the property owner's litigation expenses. In fact, there may be savings, since there will be greater incentive to settle problem cases, thereby saving the condemnor its own litigation expenses.

Ultimately, the matter comes down to a tug or war between two competing public policies that informs the Commission's work in every aspect of eminent domain and inverse condemnation law — the need of the public to acquire property for public purposes and the function of the law to facilitate this, versus the right of the property owner whose property is forcibly applied to public use to full and fair compensation for it.

As these policies play out in the context of eminent domain litigation expenses, the staff thinks the Commission should be looking to a solution that encourages the parties to act reasonably in their effort to resolve the dispute.

While the current California law explicitly adopts a reasonableness standard for the award of litigation expenses, its application is nebulous. An effort to more precisely describe what behavior will be considered reasonable appears warranted.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Study EmH-455 June 4, 1999
Memo 99-7

Exhibit

MEMORANDUM

TO: NATHANIEL STERLING
CALIFORNIA LAW REVISION COMMISSION
FROM: HOLLY OLSON PAZ
SUBJECT: AWARD OF LITIGATION EXPENSES UNDER CAL. CIV. PROC. CODE § 1250.410
DATE: 4/21/99
CC: UNIVERSITY OF PENNSYLVANIA LAW SCHOOL PUBLIC SERVICE PROGRAM

I. GENERAL GUIDELINES TO DETERMINE WHETHER AN OFFER OR DEMAND IS REASONABLE

California courts have established a set of general guidelines to determine whether an offer and/or demand is reasonable under § 1250.410 and thus whether litigation expenses should by awarded to the condemnee. The caselaw, with unanimity, follows a three-prong analysis: (1) the difference in absolute numbers between the offer and the compensation awarded; (2) the percentage of difference between the offer and the compensation awarded; and (3) the good faith, care and accuracy in how the amount of the offer and the amount of the demand were determined. See Los Angeles County Metro. Transp. Auth. v. Continental Dev. Corp., 16 Cal. 4th 694, 941 P.2d 809, 66 Cal. Rptr. 2d 630 (Cal. 1997); San Diego Metro. Transit Dev. Bd. v. Cushman, 53 Cal. App. 4th 918, 62 Cal. Rptr. 2d 121 (Cal. Ct. App. 4 Dist. 1997); People ex rel. Dep't of Transp. v. Yuki, 31 Cal. App. 4th 1754, 37 Cal. Rptr. 2d 616 (Cal. Ct. App. 6 Dist. 1995); Glendale Redevelopment Agency v. Parks, 18 Cal. App. 4th 1409 , 23 Cal. Rptr. 2d 14 (Cal. Ct. App. 2 Dist. 1993); San Diego Gas & Elec. Co. v. Daley, 205 Cal. App. 3d

1334, 253 Cal. Rptr. 144 (Cal. Ct. App. 4 Dist. 1988); County of San Diego v. Woodward, 186 Cal. App. 3d 82, 230 Cal. Rptr. 406 (Cal. Ct. App. 4 Dist. 1986); Community Redevelopment Agency v. Krause, 162 Cal. App. 3d 860, 209 Cal. Rptr. 1 (Cal. Ct. App. 4 Dist. 1984); State of California ex rel. State Pub. Works Bd. v. Turner, 90 Cal. App. 3d 33, 153 Cal. Rptr. 156 (Cal. Ct. App. 4 Dist. 1979); Los Angeles Unified Sch. Dist. v. C.F. Bolster Co., 81 Cal. App. 3d 906, 146 Cal. Rptr. 789 (Cal. Ct. App. 2 Dist. 1978); County of Los Angeles v. Kranz, 65 Cal. App. 3d 656, 135 Cal. Rptr. 473 (Cal. Ct. App. 2 Dist. 1977).

A. ABSOLUTE DIFFERENCE BETWEEN OFFER AND COMPENSATION AWARDED

The first factor examined by the California courts is the absolute numerical difference between the offer and the compensation awarded. For example, the court in Kranz, 65 Cal. App. 3d at 658, held that the County of Los Angeles' offer was unreasonable and awarded litigation expenses to the landowner in part because, "county's offer was significantly lower in absolute terms ($16,000) than the jury verdict." In Community Redevelopment Agency v. Matkin, 220 Cal. App. 3d 1087, 272 Cal. Rptr. 1 (Cal. Ct. App. 4 Dist. 1990), the court relied on the fact that the landowners' demand was "nearly identical" to the award in affirming an order of litigation expenses; the landowners demanded $690,000, and the jury awarded $686,868.

B. PERCENTAGE DIFFERENCE BETWEEN OFFER AND COMPENSATION AWARDED

The court in Yuki, 31 Cal. App. 4th at 1763, noted that a survey of the cases addressing § 1250.410 litigation expenses indicates that final offers that are equal to or less than 60% of the compensation awarded are found unreasonable while final offers that are equal to or greater than 85% of the award are deemed "reasonable per se." Final offers that were less than 60% of the compensation awarded were held unreasonable in Redevelopment Agency v. First Christian Church, 140 Cal. App. 3d 690, 707, 189 Cal. Rptr. 749 (Cal. Ct. App. 2 Dist. 1983) (holding 41% unreasonable), City of Commerce v.

Nat'l Starch & Chem. Corp., 118 Cal. App. 3d 1, 20, 173 Cal. Rptr. 176 (Cal. Ct. App. 2 Dist. 1981) (holding 32% unreasonable under § 1249.3, the precursor to § 1250.410), and City of Gardena v. Camp, 70 Cal. App. 3d 252, 257, 138 Cal. Rptr. 656 (Cal. Ct. App. 2 Dist. 1977) (holding 52% unreasonable under § 1249.3). Final offers that exceeded 85% of the compensation awarded were found reasonable in Parks, 18 Cal. App. 4th at 1417-18 (holding the agency's final offer reasonable and thereby affirming denial of litigation expenses in part because the offer was 89% of the award), Bolster, 81 Cal. App. 3d at 916 (ruling that 87% was per se reasonable) and City of Los Angeles v. Cannon, 57 Cal. App. 3d 559, 562, 127 Cal. Rptr. 709 (Cal. Ct. App. 2 Dist. 1976) (finding 91% reasonable).

Debate exists in the caselaw as to the weight to be given to the percentage of difference between the offer and the compensation awarded. In Daley, 205 Cal. App. 3d at 1351, the first offer was 23.5% of the award and the second offer was 29.4% of the award. The court stated, "These enormous differences represent unreasonable offers as a matter of law. . . .Here, the percentage differential alone casts doubt on the reasonableness of SDG&E's offer." Id.

The Daley opinion was disapproved by the court in Continental,16 Cal. 4th at 720. The court noted, "Some Court of Appeal decisions have strayed from the principle that the mathematical disparity between the offer and the award is but one factor for the trial court to consider [citing Daley, 205 Cal. App. 3d at 1352]. . . .We need say little more about this issue other than to note our disapproval of any pronouncement purporting to find unreasonableness as a matter of law based purely on mathematical disparity." Continental,16 Cal. 4th at 720. The court went on to commend the lower courts to always consider the good faith, care and accuracy in how the amount of the offer and the amount of the demand were determined in addition to the numerical figures. See id.

Continental was not the first case to caution against the use of a purely mathematical approach to reasonableness analysis. See Redevelopment Agency v. Gilmore, 38 Cal. 3d 790, 700 P.2d 794, 214 Cal. Rptr. 904 (Cal. 1985); Cushman, 53 Cal. App. 4th at 933; Woodward, 186 Cal. App. 3d at 91; Krause, 162 Cal. App. 3d at 866. In Gilmore, 38 Cal. 3d at 808, the court affirmed a denial of litigation expenses although the jury awards of $500,000 for one parcel and $284,000 for the another parcel were significantly higher than the plaintiff's highest offers of $200,000 and $160,000. The court stressed, "the mathematical relation between the plaintiff's highest offer and the award is but one factor to be considered by the trial court under the new statute. Section 1250.410 requires the court to evaluate the reasonableness of the plaintiff's offer in light of the award and the evidence adduced at trial." Gilmore, 38 Cal. 3d at 808.

The court in Woodward, 186 Cal. App. 3d at 90, quoted the aforementioned language from Gilmore and went on to note:

> A purely mathematical examination of the offer, demand and award may be useful where the condemner is unwilling to compromise despite the condemnee's reasonable position. However, such is not the case here. This is not a case where the condemner's offer ignored a landowner's expert appraisal. This is not a case where the condemner engaged in "unyielding adherence" to its appraisal incompatible with the spirit of compromise.

Woodward, 186 Cal. App. 3d at 91 (citations omitted). In rejecting a "purely mathematical examination" of reasonableness, the court noted that the county had used a well-qualified appraiser with thirty-two years of experience, the appraiser had utilized the accepted market comparison and income approaches to valuation, and the appraiser had conducted extensive research of factors that might influence value. See id. In contrast, the court pointed out that landowner Woodward had no data with which to contradict the county's appraiser. Woodward was unable to do so because he had not sought an independent appraisal. See id. Rather, he had formulated his demand on the basis of his ownership of the property and his fifty years of experience in the rock and sand business,

as well as the price others told him they would pay for the property if it were for sale (a criterion the county's appraiser testified was unacceptable under general real estate appraisal principles). See id.

The court in Cushman, 53 Cal. App. 4th at 933, quoted Woodward, 186 Cal. App. 3d at 91, in upholding a denial of litigation expenses although the final offer was 37% of and $261,797 less than the award while the demand was 85% of and $60,797 less than the award. The Cushman court rejected a lone comparison of the numbers in favor of a greater focus on factors tending to establish the transit board's good faith, such as the facts that severance damages were the only issue at trial because the parties had settled all other issues prior to trial and the parties differed on the purely legal issue of whether severance damages were owed, not in numerical valuations. See id.

Similarly, in Krause, 162 Cal. App. 3d at 866, the court stated, "the cases stress a mathematical analysis alone is not sufficient to determine the issue [of reasonableness] and that the good faith, care and accuracy of the condemning agency's offer can be the deciding factor." The court then pointed to the agency's lack of accuracy and good faith, as demonstrated by the agency appraiser's use of noncomparable properties, the agency's refusal to negotiate, and the agency's disregard of the condemnee's well-qualified expert, in upholding the award of litigation expenses. See id.

C. GOOD FAITH, CARE AND ACCURACY IN HOW THE AMOUNT OF THE OFFER AND THE AMOUNT OF THE DEMAND WERE DETERMINED

As the Gilmore, Woodward, Cushman, and Krause courts have noted, a purely mathematical analysis of reasonableness does not suffice and has not been used in the middle range of cases. Final offers that fall in the middle range of 61% to 84% of the compensation awarded have been found both reasonable and unreasonable. See Yuki, 31 Cal. App. 4th at 1764. In such cases, the classification as reasonable or unreasonable depends on the courts evaluation of other factors. See id. These other factors include the

good faith, care and accuracy in how the amount of the offer and the amount of the demand were determined. See Krause, 162 Cal. App. 3d at 866 (holding an offer that was 82% of the award unreasonable because the agency refused to offer anything above its appraisal, and the appraiser used noncomparable properties as the basis for his opinion); Turner, 90 Cal. App. 3d at 36; Kranz, 65 Cal. App. 3d at 660.

In Turner, 90 Cal. App. 3d at 37, the court held that an offer that was 78% of the jury award was reasonable because, "The amount of the offer was clearly determined by the state with good faith, care and accuracy." The court pointed to the fact that the state used a well-qualified appraiser who employed comparable properties in making his valuation as evidence of accuracy. See id. There was also no evidence of bad faith in that there was no suggestion that the state or the appraiser tried to keep the appraisal low. See id. In addition, the court attributed the state's refusal to yield to an honest but mistaken belief that the landowner's demand included damages not properly attributable to the state; if the disputed category of damages is excluded, the state's appraisal is only $37,700 apart from the landowner's demand. See id. Finally, the court noted that the condemnee offered no "real" basis to the state to reevaluate its position in that he offered, "no expert assistance to counter the state's appraisal," as evidence of the state's good faith despite its refusal to yield. Id.

In Kranz, 65 Cal. App. 3d at 660, the court held an offer equivalent to 79% of the award was unreasonable. The court based its decision on the fact that the offer was "significantly disproportionate" to the jury award but also on the county's bad faith and lack of accuracy. Id. The county demonstrated bad faith by ignoring the landowners' expert's appraisal and because it, "stubbornly stuck to its own appraisal plus a small amount which would barely cover landowners' added costs of preparing the cause for trial," while, "[l]andowners came down more than half way on their demand." Id. In addition to bad faith, the county's disregard of the condemnees' expert appraisal also

reflected a lack of accuracy. See id. The court stated, "While experts often differ, the substantial difference between appraisals should have cast some doubt on the accuracy of county's appraisal. . . .County should have realized that a jury would give some weight to the opinion of each expert, and fix the fair market value of the property somewhere between the two." Id.

In Daley, 205 Cal. App. 3d at 1352, the court stated that, to determine if the public entity acted in good faith, "[it is] necessary to ascertain how the condemning agency considered the appraisal of the land owner's expert in preparing its final offer." The court cited the fact that the landowner voluntarily supplied the public entity with his appraisal reports three months before the exchange of valuation data was set to occur, but the public entity did not supply the landowner with its valuation data until the "last instant possible" before trial as evidence of the public entity's bad faith. Id. The court went on to find the public entity's offer unreasonable; it therefore sustained an award of litigation expenses. See id. Likewise, the Kranz, 65 Cal. App. 3d at 660, court cited the fact that the county ignored the condemnees' expert's appraisal as evidence of bad faith.

In contrast, in Parks, 18 Cal. App. 4th at 1418, the court pointed to the fact that both the condemning agency and its appraiser reviewed the landowners' appraisal and that representatives of the agency met with their appraiser to discuss his review of the condemnees' appraisal as evidence of good faith. The court stated, "The Agency did not ignore the landowners' appraisal and therefore did not violate one of the factors of a good faith inquiry." Id.

Daley, 205 Cal. App. 3d at 1352, Kranz, 65 Cal. App. 3d at 660, and Parks, 18 Cal. App. 4th at 1418, make it clear that the consideration given by the public entity to the landowners' appraisal is an important factor in the good faith analysis. However, a public entity has been found to have acted in good faith and thus reasonably in not giving

a great deal of consideration to the landowners' appraisal when the trial court found the appraiser's testimony "less than impressive" and the landowner itself evidently did not place much weight on the appraisal in formulating its demand. See Continental,16 Cal. 4th at 723.

In addition to the manner in which the condemning agency considers the appraisal of the land owner's expert in the preparation of its final offer, the nature of the areas of dispute between the parties is a factor in determining whether the parties acted in good faith. See Cushman, 53 Cal. App. 4th at 932. In Cushman, the parties, "differed not in their numerical valuations but on the purely legal issue of whether any severance damages was [sic] owed." 53 Cal. App. 4th at 932. The court cited the fact that the dispute between the parties was solely legal as evidence of the condemning agency's good faith and thus denied litigation expenses. See id. The court explained its decision and the decision of the lower court by noting, "Because the dispute was a legal one, the trial court was justified in giving greater importance to the good faith factor." Id.

Yet, reliance on the existence of a legal, as opposed to a numerical, dispute as indicative of good faith is apparently limited by the caveat that the legal dispute must be of some degree of complexity. See Yuki, 31 Cal. App. 4th at 1767. In Yuki, 31 Cal. App. 4th at 1767, the department of transportation argued it had demonstrated good faith despite its "unwavering reliance" on an appraisal which was $2 million lower than the award in that its appraisal was based on its interpretation of the legal issues of the statutory meaning of "larger parcel" and the legal effect of the condemnees' underpass. However, the court rejected the claim that the condemning agency had evidenced good faith in this manner because counsel for the department of transportation had conceded at the § 1250.410 motion that these issues were not complex. See id. In finding the agency's offer unreasonable, the court stated that the State's final offer, "was based on an unwavering reliance on an appraisal which was over $2 million low in its valuation of the

acquired land and incorrect in its evaluation of both severance damages and special benefits, issues which, though arguable, were concededly not complex." Id.

II. RECOMMENDATION TO CODIFY THE THREE-FACTOR ANALYSIS OF CASELAW

It would be useful to codify the three-factor test employed by the courts to determine reasonableness under § 1250.410. While the test has been employed by the vast majority of courts in § 1250.410 decisions, suggesting agreement on its use, the courts have disagreed on the relative weight to be attributed to each factor and have relied on different facts as evidence of the third, good faith, factor. Therefore, for clarity, it would be helpful to codify the test while proscribing that equal weight is to be given the three factors and suggesting the possible demonstrations of good faith, care and accuracy.

In regard to the second prong of the analysis, the percentage of difference between the offer and compensation awarded, the courts have debated the primacy it is to be given. The Daley, 205 Cal. App. 3d at 1351, court held final offers that were 23.5% and 29.4% of the eventual jury award to be "unreasonable as a matter of law." The courts in Continental, 16 Cal 4th at 720, Gilmore, 38 Cal. 3d at 808, Cushman, 53 Cal. App. 4th at 933, and Woodward, 186 Cal. App. 3d at 91, have rejected the concept of unreasonableness of offers as a matter of law and have stressed that a mathematical analysis of offer, demand and award is "but one factor" to be considered. This conflict should be resolved by adopting the three-prong analysis with the direction that the three prongs should be equally weighted without "per se" unreasonableness based upon the percentage the offer bears to the award.

In regard to the third prong of the analysis, the good faith, care and accuracy in how the amount of the offer and the amount of the demand were determined, the courts have cited various types of evidence. For example, the good faith analyses contain discussions of the condemning agency's refusal to offer more than its appraisal, attempt to keep the

appraisal low, and disregard of the condemnee's appraisal as evidence of bad faith on the part of the condemner. See Kranz, 65 Cal. App. 3d at 660; Krause, 162 Cal. App. 3d at 866; Turner, 90 Cal. App. 3d at 37; Daley, 205 Cal. App. 3d at 1351; Parks, 18 Cal. App. 4th at 1417; Continental, 16 Cal 4th at 720. The landowners' failure to counter the condemner's appraisal with "real" evidence and the complex legal nature of the dispute between the parties have been cited as evidence of good faith on the part of the condemner. See Turner, 90 Cal. App. 3d at 37; Cushman, 53 Cal. App. 4th at 933; Yuki, 31 Cal. App. 4th at 1764. The courts have pointed to the condemner's hire of a well-qualified appraiser as evidence of care. See Turner, 90 Cal. App. 3d at 37. Finally, the use of comparable properties by the condemner's appraiser in the appraisal and heeding the landowners' professional appraisal are deemed evidence of accuracy. See id.; Kranz, 65 Cal. App. 3d at 660. In order to provide more guidance to reviewing courts making reasonableness determinations, the codification of the three-factor test should contain advisory notes suggesting the types of evidence the courts should look to as demonstrations of good faith, care and accuracy.