Study EmH-455 January 28, 2000

First Supplement to Memorandum 2000-11

Litigation Expenses in Eminent Domain Cases: Comments on Draft

We have received the following letters relating to the draft tentative recommendation on litigation expenses in eminent domain cases.

Jury Bias in Favor of Condemnor

Sacramento County opposes the proposal to change the eminent domain litigation expense statute from a reasonableness standard to a mechanical "closer to the award" standard. The county takes the position that jury verdicts come in higher than the condemnor's offer not because the condemnor's offer is low but because juries are biased in favor of the property owner. While the condemnor is bound to make an offer based on a responsible appraisal with advance notice to the property owner, the obligation is not mutual and the property owner can manipulate its demand and supporting evidence to ensure a high award. The procedural requirements of the law, together with inherent jury sympathy for the property owner, create a litigation environment in which the property owner has "a substantial advantage." The existing statute mitigates these circumstances by requiring the court to consider reasonableness of behavior before making an award of litigation expenses; the draft tentative recommendation would inappropriately eliminate this safeguard.

Condemnor Low Ball Tactics

Norm Matteoni has a different perspective on the condemnor's "good faith" determination of probable compensation. His experience is that many agencies base both their prejudgment deposit and their final offer on a staff appraisal, but at trial they rely on an independent appraiser who comes in with a lower value. Moreover, agencies make every effort to withhold the independent appraiser's

supporting valuation data from the property owner to the greatest extent possible, providing only the minimum amount of data they can get away with.

The main focus of Mr. Matteoni's letter, however, is not the award of litigation expenses, but the effort to ensure that the amount of the prejudgment deposit is adequate. To this end he proposes full disclosure of the basis of the deposit and the availability of prompt judicial review. These are matters we will take up in another context. See the First Supplement to Memorandum 2000-12 (early disclosure of valuation data and resolution of issues in eminent domain).

Government Has Plenty of Money to Pay Litigation Expenses

In response to the staff's concern that any proposal that would have the effect of increasing condemnor costs would likely run into political problems in the Legislature, Professor Kanner indicates that this concern should be discounted. "These agencies seem to have lots and lots of money to waste or to sit idle, while lamenting the assertedly excessive cost of having to comply with the constitutional policy of making condemnees whole."

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Matteoni
Saxe
O'Laughlin
LAWYERS

1740 Technology Drive
Suite 250
San Jose, CA 95110
408 441-7800
Fax 408 441-7802

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File:

December 7, 1999

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

Norman E. Matteoni
Allan Robert Saxe
Peggy M. O'Laughlin
Bradley M. Matteoni
Barton G. Hechtman

RE: Condemnation; Study EmH-455, Memo 99-66

Dear Nat:

In Gideon Kanner's Memorandum to the Commission of November 10, 1999, he discusses the deposit of probable compensation.

I agree that the law regarding "good faith determination of probable compensation" by condemning agencies needs review, whether it be by making that the basis for determining the award of litigation expenses or other means to address the condemnor's obligation in making the deposit.

It is my experience that many agencies not only have the precondemnation offer determined by a staff appraisal, but also the deposit of probable compensation. But, it is highly unusual for a condemnor to go to trial with a staff opinion; and often times the independent appraiser is asked not to finalize an opinion until after trial is set. Further, there is the practice by some agencies of stripping an independent appraiser's opinion of certain valuation conclusions, such as severance damages, based on internal review by the agency. It is not necessary that the appraiser agree with the review. The agency may make portions of the independent appraiser's analysis its own for the purpose of deposit and have an in-house real estate agent (not an appraiser) sign a declaration that it represents the agency's determination of probable compensation.

It is standard practice for certain agencies to attach a declaration of an independent appraiser that states only that the appraiser reviewed the project,

inspected the property and made an appraisal. Then the appraiser states the appraisal figure. There is no explanation or data support in the statement. Other agencies simply file the one page summary supporting the Government Code §7267.2 precondemnation offer.

The Law Revision Commission Comment to CCP §1255.010(b) states the appraisal and statement or summary may be made by agency appraisal staff or independent appraiser.

But, it is my view that the above described practices do not comply with the intent of the law.

One means of addressing the problem is to modify CCP §1255.010(b) to make the written statement by a qualified appraiser more exacting in order that the basis is clearly set forth, not just as a summary one page statement. Professor Kanner is correct that the condemnee is put in a difficult position to make a motion to alter the amount of deposit. Thus, I think a full disclosure of the basis for the deposit and appropriate means of prompt judicial review are the type of safeguards that should be considered. The agency's appraisal data should not be precluded from review upon a motion to increase the deposit.

In my judgment, it is not necessary for the appraiser's statement to be a complete appraisal report, but where the value is based on market data, the primary sales should be identified; and where there is a partial take involving severance and benefits, there should be calculations and a narrative statement explaining the conclusions.

Very truly yours,

NORMAN E. MATTEONI

NEM:sd

COUNTY OF SACRAMENTO
OFFICE OF THE COUNTY COUNSEL

700 H Street, Suite 2650, Sacramento, California 95814 Telephone (916) 874-5544 Facsimile (916) 874-8207

COUNTY COUNSEL
Robert A. Ryan, Jr.

ASSISTANT COUNTY COUNSEL
Melvyn W. Price
John Whisenhunt

SUPERVISING DEPUTY COUNTY COUNSEL
Kathleen A. O'Connor
Michele Bach
Richard G. Hata
Ramona A. Armistead
John H. Dodds

DEPUTY COUNTY COUNSEL
J. Steven Burris
Elaine P. DiPietro
Lilly C. Frawley
Kathryn A. Shurtleff
Anthony L. Wright
Denis J. Zilaff
Renaldo Carbooi
James G. Wright
Martha E. Pottiriades
Laloni A. Montgomery
John T. Seyman
Ray C. Thompson
Timothy D. Weinland
Claire van Dam
Lawrence J. Duran
Krista C. Breuer
Joanne C. East
Henry D. Nanjo
Diane E. McElhern
M. Holly Gilchrist
Lisa A. Travis
Keith W. Floyd
Alan C. Campbell
Julieanne L. Hinrichsen

January 3, 2000

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

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Re: Study EmH-455; Memorandum 2000-11; Litigation Expenses in Eminent Domain

Dear Mr. Sterling:

The County of Sacramento opposes the Commission's Tentative Recommendation to amend section 1250.410 of the Code of Civil Procedure because it would eliminate the judgment and experience of the trial court, and make an award of litigation expenses in eminent domain proceedings dependent solely upon the amount awarded by the jury.

Currently, section 1250.410 provides for an award of litigation expenses if the court 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* . . .." (Emphasis added.) As the Commission has noted, section 1250.410 was enacted in 1975 to replace former section 1249.3, which provided for an award of litigation expenses if the court found that the plaintiff's final offer was unreasonable, and defendant's final demand was reasonable, *in light of the compensation awarded*. (Emphasis added.)

The Commission has based its proposal upon a perceived need for a more objective standard, contending that cases applying the statute do not always appear to provide a consistent interpretation of the statute's standard. As an illustration, It points to *Los Angeles County Metropolitan Transportation Authority* v. *Continental Development Corporation* (1997) 16 Cal.4th 630, in which the California Supreme Court affirmed the trial court's denial of litigation expenses on a verdict of $1,000,000 where the defendant's demand was $500,000, and the plaintiff's offer was $200,000.

The *Los Angeles County Metropolitan Transportation Authority* decision, however, does not support the Commission's contention that "cases applying the statue do not always appear to provide a consistent interpretation of the standard announced in the statute." In fact, *Los Angeles County Metropolitan Transportation Authority* contains an admonition to trial courts to not stray from the literal requirements of section 1250.410 as it has been construed for over twenty years.

Clearly, early decisions were characterized by confusion and inconsistent application of precedent. Part of the problem was with the statutory language. Former section 1249.3, as one court remarked, provided no guidelines for ". . . resolving the question of reasonableness." (*City of Gardena* v. *Camp* (1977) 70 Cal.App.3d 252, 256.) Courts developed a standard of reasonableness which compared the real and relative amounts of the final offer, final demand, and award, and took into account "the good faith, care and accuracy in how the amount of the offer and the amount of the demand respectively, were determined." (*City of Los Angeles* v. *Cannon* (1976) 57 Cal.App.3d 559, 562.)

While the "good faith, care and accuracy" formula was uniformly cited, it was not uniformly applied. For example, *County of Los Angeles* v. *Kranz* (1977) 65 Cal.App.3d 656 held that an offer of $63,000, at less than 80 percent of the award of $79,077.55, was unreasonable as a matter of law. (*Id.*, at pp. 659, 660.) In *People* ex rel. *Dept. of Transportation* v. *Patton Mission Properties* (1979) 89 Cal.App.3d 204, on the other hand, the court declined to hold ". . . that the mere existence of a substantial disparity between the condemning agency's final offer and the jury verdict is conclusive evidence that the offer was unreasonable . . .." (*Id.*, at 212-213.)

In *Redevelopment Agency* v. *Gilmore* (1985) 38 Cal.3d 790, the California Supreme Court provided trial courts and courts of appeal with much needed guidance. The opinion contrasted the standards of reasonableness under section 1250.410 and former section 1249.3, and explained that the Legislature, in repealing former section 1249.3 and enacting section 1259.410, had rejected mathematical evaluation as the sole criterion of reasonableness:

> . . . 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. The trial court's determination of that issue is a resolution of a question of fact and will not be disturbed on appeal if supported by substantial evidence. [Citation.]

(*Id.*, at pp. 808-809.)

In *Los Angeles County Metropolitan Transportation Authority*, the California Supreme Court reasserted the position it took in *Gilmore*, and took appellate courts to task for straying from the standard of section 1250.410 and relying for precedent upon cases which applied the standard of former section 1249.3. :

> . . . 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 . . ..

(*Id.*, at pp. 720-721.)

The "disparity between the statutory language and the case law application of it" perceived by the Commission is, in fact, a disparity between cases which applied the superseded standard of former section 1249.3, rather than the current standard of section 1250.410. *Los Angeles Unified Sch. Dist.* v. *C.F. Bolster Co.*, *Redevelopment Agency* v. *Gilmore*, and *Los Angeles County Metropolitan Transportation Authority* represent a consistent application of the correct standard of reasonableness under section 1250.410.

The Commission's proposal would not provide a "more objective standard." Under the proposed amendment, unreasonableness would be established, as a matter of law, solely upon the basis of mathematical relationship of the offer, award, and demand. While the Commission's proposal appears to create a purely objective standard, mathematical disparity, as the California Supreme Court has noted, is not always a reliable indicator of unreasonableness.

The taking of private property by a governmental entity seems inherently unfair to most jurors. That jury questionnaires, voire dire, and jury instructions cannot overcome this bias is reflected in the statistics cited at page 9 of the Commission's Memorandum 2000-11. Jury verdicts in eminent domain proceedings are on average ten percent higher that the midpoint between the plaintiff's offer and the defendant's demand, while bench verdicts average one percent below the midpoint.

Moreover, the midpoint more often than not is the product of the defendant's well planned litigation strategy, rather than a sober inquiry into values. Due to the procedural requirements of California's Relocation Assistance Act (Gov. Code, §§ 7260, et seq.), the defendant knows the amount of the plaintiff's appraisal well in advance of the time that the plaintiff learns anything about the defendant's appraisal. (See Gov. Code, § 7267.7, subd. (a).) Thus, the defendant is able to obtain an appraisal which establishes a favorable midpoint, and, in the words of the Department of Transportation letter cited at

page 4 of the Commission's memorandum, "substantially above the owner's demand."

In contrast, the plaintiff must rely upon an independent appraiser who is subject to the code of ethics of the Appraisal Institute or some other professional association, and the Uniform Standards of Professional Appraisal Practices. The plaintiff must not only offer to purchase the defendant's property for the appraised value, but must also provide the defendant with a written statement of, and summary of the basis for the appraisal. (Gov. Code, § 7267.2, subd. (a); Code Civ. Proc., § 1245.230, subd. (c)(4).)

The defendant, on the other hand, is not subject to these constrains. The defendant's appraiser's only written report may be a statement of valuation data which contains only the minimum information required by section 1258.250 of the Code of Civil Procedure. As a consequence, where the defendant has had many months in which to determine the amount of the final demand, the plaintiff has only ten days[1] in which to discover and evaluate the defendant's position, and formulate a final offer. (Cf. Code Civ. Proc., §§ 1240.510, subd. (a), and 1258.220.)

The standard of section 1250.410 represents an acknowledgement by the Legislature that the amount of a jury verdict, alone, is not necessarily a valid indicator of the reasonableness of a plaintiff's final offer. The procedural requirements of the Relocation Assistance Act and the Eminent Domain Law, together with the inherent jury sympathy for the defendant, create a litigation environment in which the defendant has a substantial advantage. The Legislature addressed the problem by requiring the trial court to make a finding of reasonableness in light of the evidence admitted, and well as the amount of the award. The Commission's proposal would discard the experience and judgment of the trial court, and return to the pre-1975 standard.

Yours truly,

ROBERT A. RYAN, JR., County Counsel

By _____
ALAN C. CAMPBELL
Deputy County Counsel

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[1] The Commission's proposed amendment would increase this time period to twenty days.

GIDEON KANNER
P.O. BOX 1741
BURBANK, CALIFORNIA 91507

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JAN 18 2000
File:

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Rd., Rm. D-2
Palo Alto, CA 94306

January 12, 2000

Dear Nat:

In light of your voiced concerns over the economic consequences of enactment of the proposed revision of attorney fees statutes, it seems appropriate that I call to the Commission's attention some recent news.

In connection with Governor Davis' recent transportation proposals the Los Angeles Times has reported that CalTrans is sitting on a $3-billion dollar surplus. In that context it's hard for me to entertain with a straight face lamentations that the law of eminent domain must continue to undercompensate condemnees because of an asserted lack of funds for public projects.

And it isn't just CalTrans. Recent news indicates that the L.A. Unified School District is wasting money in mind-boggling amounts. I assume that you and the Commission members already know about the Belmont fiasco in which the District will evidently have to blow some $200,000,000 which it spent on a "learning center" that cannot be safely operated because of soil contamination. Now, word comes that the District has decided also to abandon a 40-acre school site that it condemned in South Gate, also because of unremediated soil contamination. The District is also reported to have a renewed interest in the old Ambassodor Hotel on Wilshire Boulevard, which makes it an on-again/off-again/on-again condemnation. See **L.A. Unified School Dist. v. Trump Wishire**, 42 CA3d 1682 (1996).

The point of all this seems obvious to me. These agencies seem to have lots and lots of money to waste or to sit idle, while lamenting the assertedly excessive cost of having to comply with the constitutional policy of making condemnees whole. While I could say some unkind things about all this, I rise above temptation and suggest that any lamentations about the supposed lack of funds to provide fair compensation to people whose land is being taken, should be taken with a large grain of salt.

Sincerely,.

Gideon Kanner

PS - Please distribute copies of this letter to the Commissioners. Thank you.