

First Supplement to Memorandum 2000-39

Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain

Memorandum 2000-39 presents a draft of proposed eminent domain legislation that includes a revision of Code of Civil Procedure Section 1250.410 (pretrial settlement offers). The revision would make clear that the final offers and demands of the parties should include any claimed compensation for loss of goodwill.

Michael Nave has written to point out a problem in Section 1250.410 that would be aggravated by the proposed revision. Subdivision (b) of that section requires that, if the property owner is awarded litigation expenses due to the unreasonableness of the condemnor's final offer, the court must take into account the condemnor's initial offer under the relocation assistance act (Gov't Code § 7267.2).

(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.

But at the time the condemnor makes its prelitigation offer pursuant to Government Code Section 7267.2, the condemnor will not be aware that the property owner may claim a loss of business goodwill. It is unfair, therefore, to determine the amount of litigation expenses based on the condemnor's prelitigation offer, which will invariably be lower than the final offer where there is an issue of loss of business goodwill.

Mr. Nave suggests that Section 1250.410 be revised to eliminate the reference to the Government Code Section 7267.2 offer. He notes that, apart from the

goodwill issue, that prelitigation offer tends to be lower than the final offer in any event simply because of rapidly increasing property values and the fact that preliminary appraisals occur well before a resolution of necessity to condemn the property is adopted. He would revise the provision to read:

(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.

The requirement that the prelitigation offer be considered in determining the amount of litigation expenses was added to the law in 1982. The legislation was authored by Assembly Speaker Willie Brown and supported by both the State and the State Bar Condemnation Committee. It was part of a package to make the prelitigation offer a prerequisite to a condemnor's adoption of a resolution of necessity. The intent of the provision is to encourage reasonable offers and settlements by penalizing the condemnor for failing to act fairly up front, before things have moved to the point of litigation.

The staff would be reluctant to undercut the salutary intent of the provision by deleting it. Perhaps Mr. Nave's concern could be addressed by language in the Comment to the section. Something along the following lines might do the trick:

Comment. Subdivision (a) of Section 1250.410 is amended to counteract dictum in cases to the effect that the provision is not intended to require the offer and demand to cover items other than the value of the part taken and damage, if any, to the remainder. See, e.g., *Coachella Valley County Water Dist. v. Dreyfuss*, 91 Cal. App. 3d 949, 154 Cal. Rptr. 467 (1979); *People ex rel. Dep't of Transp. v. Gardella Square*, 200 Cal. App. 3d 559, 246 Cal. Rptr. 139 (1988).

The amendment makes clear that the final offer and demand should include all ~~statutorily or constitutionally required~~ elements of compensation, including compensation for loss of goodwill. Although interest and costs are not covered by this provision, the amendment also requires, for the purpose of clarity, that each offer

and demand also indicate whether or not interest and costs are included.

It should be noted that subdivision (b) requires the offer made by the plaintiff pursuant to Section 7267.2 of the Government Code to be considered in determining the amount of litigation expenses. In making the determination, the court should discount differences between that offer and the final offer under subdivision (a), to the extent matters such as claimed loss of business goodwill or eventual interest and costs in the proceeding would not have been known to the plaintiff at the time of the earlier offer.

We need to resolve this issue now, and forward any revised language to the Assembly Judiciary Committee staff. They are picking up this material for omnibus civil practice legislation.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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April 28, 2000

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Re: Memorandum 2000-39
Proposed Code of Civil Procedure Section 1250.410(b)

Dear Nat:

The purpose of this letter is to share my view, based upon experience, that proposed CCP § 1250-410(b) presents a problem for condemners that could have serious financial consequence. As written, subsection (b) provides that once entitlement to litigation expenses has been determined, the amount of the litigation expenses to be awarded will be influenced by the amount (I assume) of the 7267.2 offer.

The 7267.2 offer is clearly an offer of the compensation for the real property that the public agency desires to acquire. By definition, the offer does not include compensation for loss of goodwill. As a practical matter, at the time the 7267.2 offer is made, the public agency does not know if the property owner will claim a loss of goodwill for a business conducted on the property. The reasons are several: (1) the business may relocate with no loss; (2) the property/business owner may not satisfy the prerequisites to claim compensation (See CCP § 1263.510(a)); and, more importantly, (3) there is no way that the public agency can compel a business owner to produce financial records prior to litigation, and thus, no way for the public agency to determine if goodwill exists.

Despite the foregoing, proposed CCP § 1250.410(a) will require both parties to serve final settlement offers that include compensation for goodwill, and it is the amount of the 1250.410 offer that determines entitlement to litigation expenses. If the amount of the 7267.2 offer is to be considered by the court when determining the amount of the litigation expenses, the public agency will be in the unfair position of arguing why its 7267.2 offer was much lower than its 1250.410 offer.

For the reasons discussed above, it is impractical to require that a 7267.2 offer include compensation for goodwill. And, in view of this circumstance, it is neither fair or logical for the 7267.2 offer to be used as a measure for the amount of litigation expenses.

Apart from the goodwill problem, there is another reason that the 7267.2 offer should not be used as a measure. In the usual acquisition project, the 7267.2 offers are based on an appraisal that, by the time a

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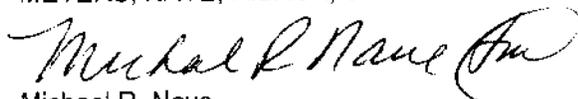
resolution of necessity is adopted, may be six months old. In an economy such as now exists, real estate values increase monthly, if not overnight. This is a fact, I might facetiously suggest, that is capable of Commission, rather than judicial, notice, given the Silicon Valley address of the Law Revision Commission.

As an example, a 7267.2 offer for the Middlefield Road office building that houses the Law Revision Commission could easily be \$500,000 lower than the 1250.410 offer made 10 months later in a theoretical condemnation lawsuit by the City of Palo Alto to acquire land to widen Middlefield Road. If the office building were also occupied by a business having goodwill that is damaged by the road widening, the disparity between the 7267.2 offer and the 1240.510 offer would be even greater, and would place the City of Palo Alto in a very poor posture if, after a trial, the court determined that the defendants were entitled to litigation expenses.

The solution is, I believe, obvious: subsection (b) should be modified by deleting the following language: "... the offer required to be made by the Plaintiff pursuant to Section 7267.2 of the Government Code ...".

Very truly yours,

MEYERS, NAVE, RIBACK, SILVER & WILSON


Michael R. Nave

c: Richard Williams (Caltrans)

J:\WPD\ATTY\MRN\letter.wpd