

First Supplement to Memorandum 2000-40

Offset of Benefits in Partial Taking in Eminent Domain

Attached is a letter from Jeffrey Polisner of Walnut Creek. Mr. Polisner sets out his opinion that *Continental Development* (analyzed in Memorandum 2000-40) has changed the law on severance damages. The court states in that case that general as well as special damages to the remainder are compensable.

Mr. Polisner notes, however, that while BAJI 11.86 has been revised to reflect this change in law, BAJI 11.87, 11.88, and 11.89 have not. Those instructions (access, diversion of traffic, and inconvenience of traffic regulations) appear to conflict with the proposition that any factor resulting in a decline in fair market value of the remainder is compensable. He believes some clarification of the law on this point is needed.

The staff discusses this issue in some detail in Memorandum 2000-40. See pp. 30-33. We agree with Mr. Polisner's assessment that *Continental Development* has changed the law on compensability of severance damages, and we set out in the memorandum possible clarifying statutory language:

Code Civ. Proc. § 1263.420 (amended). Damage to remainder

1263.420. Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:

(a) The severance of the remainder from the part taken.

(b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken and whether or not the damage is special to the remainder or general to the community, to the extent the damage affects the remainder's fair market value and is neither conjectural nor speculative.

Comment. Section 1263.420 is amended to codify the rule in *Los Angeles County Metropolitan Transit Authority v. Continental Development*, 16 Cal. 4th 634, 718, 66 Cal. Rptr. 630, 941 P.2d 809 (1997) ("We hold that in determining a landowner's entitlement to severance damages, the factfinder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value,

insofar as such evidence is neither conjectural not speculative.”).
See also Section 1263.430 (benefit to remainder).

The staff concludes in the memorandum, however, that codification at this time is inadvisable, since the matter appears to be under continuing case law development and we haven't yet thought through all the ramifications of the newly-announced rule.

If the current BAJI instructions are incorrect, they should be revised to accurately reflect the law. Communication between interested parties and the Los Angeles County Superior Court Committee on Standard Jury Instructions, Civil (the author of BAJI) should be satisfactory for that purpose.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

BOLD, POLISNER, MADDOW, NELSON & JUDSON

A PROFESSIONAL CORPORATION

ROBERT B. MADDOW
CARL F. A. NELSON
CRAIG L. JUDSON
THOMAS N. STEWART, III

500 YGNACIO VALLEY ROAD, SUITE 325
WALNUT CREEK, CALIFORNIA 94596-3840
TELEPHONE (925) 933-7777
TELEFAX (925) 933-7804

JEFFREY D. POLISNER
OF COUNSEL
FREDERICK BOLD, JR.
(RETIRED)

April 25, 2000

VIA TELEFAX

Sanford M. Skaggs
McCutchen, Doyle, et al.
P.O. Box V
Walnut Creek, Ca. 94596-1270

Re: Law Revision Commission

Dear Sandy:

In follow-up to our discussion on April 24, 2000, it is my opinion that there needs to be some clarification of the law following the Supreme Court's decision in *L.A. Met. Transit Auth. v. Continental Dev. Corp.* (1997) 16 Cal 4th 697.

BAJI 11.86 (1999 Revision) reflects the change in the law of recovery for severance damages (relying on *Continental*) and states:

...Severance damages can, however, be based on any factor, resulting from the project, that causes a decline in the fair market value of the property." (emphasis added)

The problem which now exists is that BAJI 11.87, 11.88 and 11.89 appear to be in conflict with the proposition that any factor which results in a decline in fair market value is compensable.

It is my opinion that *Continental* has reversed the old law relating to police power issues such as loss of access, diversion of traffic, and inconvenience of traffic regulation, if these issues result from a project for which real property is taken from a particular owner and makes these losses, if proved, compensable.

What do you think?

Very truly yours,

Jeffrey D. Polisner

JDP:jhj