Study Em-456 October 4, 2000

First Supplement to Memorandum 2000-64

Withdrawal of Prejudgment Deposit in Eminent Domain
(Additional Comments on Tentative Recommendation)

Memorandum 2000-64 indicates that representatives of the Caltrans Legal Division strongly oppose the tentative recommendation on withdrawal of the prejudgment deposit in an eminent domain proceeding. That recommendation would hold the condemnor liable to make good a property owner's overwithdrawal of the deposit. The staff concurs with the Caltrans position.

We have received two additional letters addressed to this matter.

Michael Nave of San Leandro "agree[s] completely" with the Caltrans and staff on this issue. A copy of his letter is attached to the First Supplement to Memorandum 2000-65 (early disclosure of valuation data and resolution of issues in eminent domain).

Michael Berger of Santa Monica believes the Caltrans letter is "wrong constitutionally, statutorily, and pragmatically." A copy of his letter is attached to this supplemental memorandum as an Exhibit. Mr. Berger makes a number of points, including:

(1) The constitution imposes the duty of compensation on the government, not on the property owner. It is the government, not the property owner that must bear the risk of loss associated with a forced taking of private property for public use.

(2) The condemnor has plenty of lead time to make an adequate deposit to cover all interests, and to determine what the appropriate allocation of the deposit among the interests should be. If there is a rush to judgment, the risk of error should fall on the condemnor, not the property owners who may not had have adequate time to conduct investigations and appraisals or to fully protect their rights.

(3) As a practical matter, the condemnor's prejudgment deposit is often inadequate to begin with, so there is little risk the condemnor will be exposed to liability for double payment.

(4) Although the problem dealt with here is not common, it is important in those cases in which it arises.

(5) The statutory bonding procedure provided for protection of property owners is inadequate, because the bond is discretionary with the judge and is so costly or has so many conditions attached that as a practical matter the property owner doesn't have access to the deposit.

Mr. Berger concludes that the Commission's tentative recommendation made sense and should be adopted as a final recommendation. "It closed a hole in the existing law and placed the burden of adequate compensation precisely where it belongs: on the condemning agency." Exhibit p. 5.

Respectfully submitted,

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Re: Tentative Recommendation EmH-456: Withdrawal of Prejudgment Deposit in Eminent Domain

Dear Mr. Sterling:

Gideon Kanner sent me a copy of the CalTrans letter to you dated September 14, 2000. As Professor Kanner is presently occupied as a juror in Los Angeles, I am taking the liberty of responding to that letter.

In a nutshell, the CalTrans letter is wrong constitutionally, statutorily, and pragmatically. It ignores the duty of the condemning agency to ensure that all property owners receive just compensation for property taken from them for the public good. It ignores the fact that the condemning agency has whatever lead time it desires to assemble information about the value of the various interests being condemned and the identity of all possible owners of those interests. And it ignores the burden the agency thrusts on property owners (particularly in cases where multiple interests are condemned simultaneously) to determine immediately both the value of their interests and the potential competitors to split the eventual judgment. It is not only fair, it is highly appropriate to place

any burdens arising in that context on the condemning agency, rather than the property owners.

The constitutional background is simple: property owners being dispossessed to improve the public weal are entitled to be placed in as good an economic position as they would have enjoyed if the government simply left them alone. (E.g., *Redevelopment Agency v. Gilmore*, 38 Cal.3d 790, 796-797 [1985].) Indeed, as our Supreme Court said recently — in a case involving CalTrans:

> ". . . all condemnation law, procedure and practice . . . is but a means to the constitutional end of just compensation to the involuntary seller, the property owner." (*People ex rel Dept. of Transportation v. Southern California Edison Co.*, 22 Cal.4th 791, 800 [2000] [quoting with approval].)

The idea that, in CalTrans' words, the proposed statute "would transfer *the condemnee's responsibility* to the taxpayers . . ." (Sept. 14, 2000 letter, p. 1; emphasis added) is thus out of sync with the law, which is designed to make property owners whole. Indeed, to say that the condemnees have some responsibility to compensate anyone is more a CalTrans pipe dream than an accurate statement of the law.[1]

First, the duty of compensation belongs to the government:

> "[T]he property owner may rest secure in the protection which the constitution affords him that his property shall not be taken or damaged without compensation first made. It is not incumbent upon him to demand that the authorities shall respect his rights; the duty is theirs to work no unlawful invasion of them." (*Beals v. City of Los Angeles*, 23 Cal.2d 381, 387-388 [1943] [quoting with approval].)

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1 Thus, comparing the situation to the relationship between a finance company and its borrower, as CalTrans does (letter, p. 2), is plainly beside the point. The issue before the Commission is constitutional, not commercial.

In a statute short-handedly referred to as The Relocation Act (Govt. Code § 7267 et seq.), the Legislature laid down (in addition to rules relating to relocation) a code of conduct for governmental agencies to follow in property acquisition cases. Violation of that code could result in a finding of unreasonable governmental conduct and financial liability. (See *City of Los Angeles v. Tilem*, 142 Cal.App.3d 694, 705 [1983].) The reason that code of conduct was established was because the responsibility for property acquisition and compensation is the government's, not the citizen's, and the government had failed to voluntarily shoulder its proper burdens. Just like CalTrans is trying to do here.

Second, the timing of a condemnation case is wholly within the government's control. The government is free to spend years planning its moves, and keeping its options open, before beginning the formalities leading to litigation and acquisition of a specific parcel. During that time, the government appraises the property and investigates all ownership interests (or, if it does not, that is its choice). Thus, when an action is filed, the government already knows what positions it will take and what the varied interests to be arrayed against it are.

The individual owners of the condemned property interests, by contrast, have little or no time to organize. Their first inkling may be when the government makes its initial offer to purchase the property immediately prior to adopting a resolution of necessity to condemn. At that point, the owners will need to seek out counsel and appraisers knowledgeable in condemnation law (a specialized field, as this Commission knows), and attempt to sort our their positions. If the property has multiple owners (for example, an office parcel with a land owner, a building owner, and numerous tenants under different leases), the problems associated with appraisal and coordination will mount.

If anyone is to bear the burden of being prepared to appear at hearings and declare who has the right to what amount of the initial deposit, it should be the party with the longest lead time.

Third, the idea repeatedly asserted in the CalTrans letter that the government's pretrial deposit constitutes *actual* just compensation, and the payment of anything more would be "double" compensation, bears little resemblance to the reality seen by the undersigned in more than 30 years of condemnation practice. An egregious — yet recent — illustration is provided by the *Southern California*

Edison case cited above. There, CalTrans made a pretrial deposit of its determination of "probable" compensation in the amount of $234,485. The jury's verdict was $49,500,000. In my experience, the notion that a condemnor's pretrial deposit will necessarily be so close to just compensation that adopting the proposed statutory amendments would expose the government to double payment is simply not true.

Fourth, the cases in which the amended procedure is needed may be statistically small, but they will be the conceptually difficult ones where help is sorely needed. The one thing CalTrans is right about is that run-of-the-mill cases will not be affected. However, in cases involving numerous interests (e.g., tenants) and ongoing businesses, the need is apparent. In those cases, there will undoubtedly be claims for lost business goodwill. Pretrial deposits by condemnors never include compensation for lost goodwill. Indeed, they rarely contain any clue as to how the government arrived at the amount and therefore how it believes the amount should be split — increasing the disputes among the owners. A lump sum simply arrives in court. In a typical multiple-owner case, the building owner will seek to withdraw all of the deposit, leaving the rest of the claimants to scramble to convince the judge to release something less than that (see the figures noted above from the *Edison* case for an indication of how large the shortfall can be).

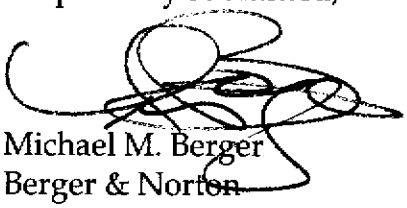
As noted earlier, however, all this will occur when none of the property owners has had the time to adequately investigate or engage the proper appraisers to evaluate the case. If the burden of this rush should fall somewhere, it ought to be on the government.

Finally, CalTrans ignores reality when it suggests that the present procedure, with the option of requiring the withdrawing party to post a bond, is a satisfactory resolution. Such a bond is discretionary with the trial judge (whose lack of knowledge at the early stage of a case rivals that of the property owners). If, however, the judge decides to require a bond, then the judge has effectively nullified the point of the withdrawal. Bonding companies routinely require (as security for the bond) that the entire amount of the withdrawal be locked up in a certificate of deposit, or that an equivalent amount be given to the bonding company as a letter of credit, or some similar arrangement. In any event, the owner who is permitted to withdraw under such circumstances winds up with a

victory in name only — not to mention the privilege of paying bond premiums. He or she cannot actually use the money until the case is concluded.

The proposal circulated by the Commission made sense. It closed a hole in the existing law and placed the burden of adequate compensation precisely where it belongs: on the condemning agency. It merits adoption.

Respectfully submitted,



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