

Memorandum 2000-65

**Early Disclosure of Valuation Data and Resolution of Issues
in Eminent Domain (Comments on Tentative Recommendation)**

The Commission has circulated for comment its tentative recommendation on early disclosure of valuation data and early resolution of legal issues in eminent domain proceedings. The tentative recommendation proposes a number of improvements in the law intended to facilitate resolution of eminent domain cases without the need for trial. Specific proposals include requiring an exchange of valuation data 90 days before trial, coupled with a process enabling early resolution of legal disputes and authorization of voluntary alternative dispute resolution. To the same end, the tentative recommendation requires more detailed disclosure of prelitigation appraisal information, together with disclosure of positions on loss of business goodwill.

Attached to this memorandum are the following comments on these proposals:

	<i>Exhibit p.</i>
1. Justin M. McCarthy, Riverside	1
2. Caltrans Legal Division	4
3. Norman E. Matteoni, San Jose	5

General Comments

Richard B. Williams and Maxine F. Ferguson of the Caltrans Legal Division, after consulting with the legal and right of way staff of Caltrans, indicate that they strongly support the changes proposed in the tentative recommendation. Exhibit p. 4.

Use of Precondemnation Offer as Admission

The tentative recommendation requires a public entity to provide the property owner a copy of the appraisal on which the public entity's precondemnation offer is based, but precludes the appraisal from being used against the condemnor at trial. The concept is that the condemnor should be encouraged to make an ample offer to the property owner. The proposal is based on a comparable provision protecting a condemnor's prejudgment deposit

appraisal from use at trial (designed to encourage more adequate prejudgment deposits).

Justin McCarthy does not disagree with this, but argues that the property owner should receive the same protection from adverse effects of disclosure that the condemning agency enjoys. Exhibit p. 2. **That sounds reasonable to the staff.** It would be consistent with the Commission's general policy in other areas to encourage settlement by protecting communications of the parties made in the effort to achieve a resolution of their dispute.

Such a bilateral provision might look something like this:

Gov't Code § 7267.1 (amended). Negotiations

7267.1. (a) The public entity shall make every reasonable effort to acquire expeditiously real property by negotiation.

(b) Real property shall be appraised before the initiation of negotiations, and the owner, or the owner's designated representative, shall be given an opportunity to accompany the appraiser during his or her inspection of the property. However, the public entity may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value.

(c) The public entity's appraisal, and any other valuation opinion expressed by or on behalf of a party for the purpose of negotiation pursuant to this chapter, is inadmissible in evidence in the trial of the issue of just compensation to the following extent:

(1) The appraisal or other opinion may not be given in evidence or referred to, nor shall the appraisal or other opinion be considered to be an admission of a party.

(2) On objection of a party, the person who prepared the appraisal or expressed the opinion on behalf of that party may not be called at trial by an adverse party to give an opinion as to compensation. If the person who prepared the appraisal or expressed the opinion is called at trial to give an opinion as to compensation, the appraisal or other opinion may be used for impeachment of the witness.

Comment. Subdivision (c) does not affect admissibility of written offers and demands of the parties in determining the amount of litigation expenses, to the extent provided in Code of Civil Procedure Section 1250.410.

Impeachment of Prejudgment Deposit Witness

We have received two communications addressed to a matter on which the tentative recommendation is silent — impeachment of a witness whose appraisal is the basis for a prejudgment deposit (as opposed to the precondemnation appraisal). Existing law protects such a witness from impeachment — “In the

trial of the issue of compensation, a witness may not be impeached by reference to any appraisal report, written statement and summary of an appraisal, or other statements made in connection with a deposit or withdrawal pursuant to this chapter, nor shall such a report or statement and summary be considered to be an admission of any party.” Code Civ. Proc. § 1255.060(b). See also *Community Redevelopment Agency v. World Wide Enterprises*, 77 Cal. App. 4th 1156, 92 Cal. Rptr. 2d 244 (2000) (statute prohibits use of deposit appraisal to impeach witness who prepared it).

Gideon Kanner has previously proposed that this provision be revised to allow for impeachment of an appraiser who later testifies as to a lower value. The Commission declined to recommend a change in this rule. It should be noted, however, that in the present tentative recommendation we are adopting a comparable change for the precondemnation appraisal. See proposed amendment of Gov’t Code § 7267.2(c)(2) (“the appraisal or other opinion may be used for impeachment”).

Professor Kanner has provided the staff with a copy of a relevant New Jersey case. “Although it is clear that the offers themselves are not evidential under the statute, judicial estoppel prevents the State from taking a different position at trial concerning the value of the property from that which it had assumed when it made its offers and deposited with the court clerk what it considered to be the property’s fair market value.” *State v. Fairweather*, 298 N.J. Super. 421, 425, 689 A.2d 817 (1997). Professor Kanner asks us to note that the court here invokes the doctrine of judicial estoppel, “which asserts the court’s interest in keeping its proceedings honest, irrespective of what sort of chicanery a party may find advantageous.”

Justin McCarthy essentially suggests that what’s sauce for the goose is sauce for the gander. If the condemnor is immunized from impeachment by its own prejudgment deposit, the property owner should likewise be immunized from impeachment by its own request for an increased deposit. Thus, “neither side will have to face at trial the concerns that your present proposal expresses on behalf of the condemnor only.” Exhibit pp. 1-2.

These questions go beyond the scope of the present recommendation, which is addressed to early exchange of valuation data, and early resolution of legal issues, in an effort to achieve a non-litigation resolution of the case. **If the Commission is interested in pursuing these issues relating to the prejudgment**

deposit and its admissibility at trial, the staff will prepare separate materials on the matter for Commission consideration.

Early Exchange of Valuation Data

Under the scheme proposed by the Commission in the tentative recommendation, exchange of valuation data by the parties would occur early in the proceedings, in order to allow sufficient time for the parties to learn each other's case and perhaps come to a settlement. The exchange of valuation data would occur at least 90 days before the date set for trial. (However, the parties would have a minimum of 9 months after the complaint is filed during which they would be able to put together their positions, before the exchange would occur.)

Justin McCarthy suggests a somewhat different approach to achieve the same effect, that he believes is simpler. His concept is to allow the court flexibility to set time periods appropriate to the circumstances of the particular case. As with the Commission's proposal, the valuation data exchange would not occur until at least 9 months after the complaint is filed. But the court would be able to allow additional time for the exchange on a showing that the facts of the particular case warrant it. A trial date would not be selected until after the exchange is accomplished. The court would also have authority to set a date for conclusion of discovery before trial.

The model proposed by Mr. McCarthy is somewhat analogous to the Los Angeles system, in which the court controls the pretrial proceedings to a greater extent than under the general eminent domain law. Mr. McCarthy acknowledges that his proposal "might not be satisfactory in all situations." Exhibit p. 2. **The Commission has previously considered adopting the Los Angeles system, but concluded, as Mr. McCarthy suggests, that it would not necessarily be appropriate for many counties and many cases, particularly smaller ones.**

This would not preclude a court, by local rule, from adopting a scheme such as the one Mr. McCarthy proposes. It should be noted, though, that the Eminent Domain Law attempts to limit the proliferation of local rules and to provide a structure for their promulgation:

Code Civ. Proc. § 1258.300. Applicability of article

1258.300. The superior court in any county may provide by court rule a procedure for the exchange of valuation data which shall be used in lieu of the procedure provided by this article if the Judicial Council finds that such procedure serves the same purpose

and is an adequate substitute for the procedure provided by this article.

Alternative Dispute Resolution

Mr. McCarthy raises the question whether it would be constitutionally permissible to require resolution of an eminent domain dispute by a nonjudicial decisionmaking process, given the constitutional right to a jury trial in an eminent domain proceeding. “Any attempt through legislation to alter or limit the property owner’s right to have his just compensation determined by a jury is suspect and it is our suggestion that the Commission give careful consideration as to whether the proposed procedures are constitutionally supportable.” Exhibit p. 3.

The staff notes that the constitutional right to a jury trial is subject to waiver by the parties — “Private property may be taken or damaged for public use only when just compensation, ascertained by a jury **unless waived**, has first been paid to, or into court for, the owner.” Cal. Const. Art. I, § 19 (emphasis added). The Commission’s proposal does not purport to require alternative dispute resolution except on agreement of the parties.

This should be reasonably clear in the tentative recommendation. The preliminary part states, “The Law Revision Commission believes the law should foster use of alternative dispute resolution if mutually agreed to by the parties.” The proposed legislation would provide, “The parties may by agreement refer a dispute that is the subject of an eminent domain proceeding for [alternative dispute] resolution.”. See proposed Code Civ. Proc. § 1250.420 (ADR authorized). This is reinforced in the Comment — “Alternative dispute resolution pursuant to this section is optional, applicable only on agreement of the parties.”

The only further clarification the staff can think to provide would be to add something like, “The parties may by agreement waive their right to have just compensation ascertained by a jury and refer a dispute that is the subject of an eminent domain proceeding for [alternative dispute] resolution.” **However, the staff would not favor this.** It does not appear to be necessary, and could be read to require waiver of a jury trial on compensation even if the only dispute the parties wish to refer for alternative resolution is a right to take issue or some question of law.

Resolution of Legal Issues

Norm Matteoni approves the provision of proposed Section 1260.040 requiring preliminary legal issues to be determined by the judge assigned for trial of the case.

Mr. Matteoni is concerned, however, that the procedure provided for early resolution of legal issues is “not taken as an opportunity to erode the guarantee of a jury trial on the issue of compensation.” Exhibit p. 5. He gives as an example *Kelly v. New West Federal Savings*, 49 Cal. App. 4th 659, 56 Cal. Rptr. 2d 803 (1996), a personal injury case in which abuse of in limine motions resulted in denial of a fair hearing.

Of course, we must rely on the judge to limit the use of this procedure to determination of questions of law. **The staff has no objection to adding admonitory language to the Comment.** For example, “It should be noted that the procedure provided in this section is limited to resolution of legal issues that may affect compensation, such as what constitutes the larger parcel, or the probability of a zoning change; it may not be used to ascertain just compensation. Cf. Cal. Const. Art. 1, § 19 (just compensation ascertained by jury unless waived).”

Technical Correction

Both Mr. McCarthy and the Caltrans Legal Division correctly point out an error in the draft at page 15, line 27 of the tentative recommendation. The reference should be to the Code of Civil Procedure, not the Government Code. **The staff will make this correction.**

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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August 9, 2000

REPLY TO:

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RECEIVED

AUG 11 2000

California Law Revision Commission
4000 Middlefield Rd., Room D-1
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File: _____

Re: Your tentative recommendations regarding Early
Disclosure of Valuation Data and Resolution of Issues
in Eminent Domain

Gentlemen:

The following comments are related to the subject matter
referenced above which was received by me July 31, 2000. They
are as follows:

1. On page 15, line 27, your reference to section 1245.230
of the Government Code (sic) is apparently a typographical error.
It probably references the Code of Civil Procedure but there is
no Government Code section of that number.

2. The following comments refer to those portions of your
proposal contained at the places following: Page 3, lines 7-10,
inclusive and page 16, lines 11-12, inclusive.

The purpose of these provisions are assertedly based on the
Commission's concern for the protection of the condemning
agencies. That protection would preclude their use except for
impeachment at the time of trial. The purpose of the original
provision is, at least in part, to determine the amount of the
original deposit as security for prejudgment possession. It
seems to be a reasonable provision, at least one that has been
sanctioned by long use. However, the property owner has a right
to seek similar protection. In the event a property owner feels
that the deposit is inadequate the Code provides that he may
apply to the court for further and additional deposits and
apparently the burden of proving the right to such an increase

lies with him. To support his request the property owner therefore must disclose to the court at the time of his request not only the name of the person who has determined the amount but the basis for that determination. (C.C.P. § 1255.030 - 1255.060 particularly the last.) It would appear to me that the property owner's request and the basis for it should receive the same protection as the condemning agency so that neither side will have to face at trial the concerns that your present proposal expresses on behalf of the condemnor only.

In this connection it is our feeling that the property owners pretrial (or pre-exchange) opinions, however disclosed, should receive the same protection and as to disclosure and the calling of witnesses that the condemning agency now enjoys.

3. Our next comment refers to the language which appears at page 4, lines 26-27, lines 34-35 and at page 13, lines 27-28, inclusive.

We certainly agree with the necessity as expressed by the Law Revision Commission for leaving sufficient time between the exchange of valuation dates and the date of trial to permit reasonable disclosure through discovery. We have a suggestion for a slightly different proposal which we would like the Commission to consider primarily because of its simplicity although we acknowledge that it might not be satisfactory in all possible situations. Our proposal is this: Use the 9 month provisions as you have proposed them but with the following changes:

A. That the valuation exchange be not sooner than 9 months after the date of filing but in addition the trial court should, at the request of either party, set a date of exchange for valuation data after a hearing for the purpose of determining in the specific factual constraints of any case whether additional time should be permitted to allow property owners to complete their investigation and obtain their opinions. Having done so, the court should then set a specific date for such an exchange based upon its knowledge of the progress and the difficulties both sides are experiencing. Such setting should consider the nature and status of the case, its legal and factual complications and the difficulty of obtaining necessary information. The case should not be set for trial until the exchange has been accomplished. The court can control that as part of its regular calendar. The court can also set in an

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individual case a cut off date appropriate to the factual situation for the conclusion of discovery after the valuation exchange.

4. These comments are directed to those portions of your proposal appearing at page 10, lines 4-6, inclusive and 926 and generally at page 10 under your subheading Encourage Alternative Dispute Resolution. We call your attention to the fact that the proper title for a proceeding in eminent domain is "A Special Proceeding in Eminent Domain". It is not a "action" as that is defined in section 22 of the Code of Civil Procedure but rather a special proceeding (C.C.P. § 23) created in Article 1, Section 19 of the California Constitution. A property owner's rights are defined by the constitutional provisions and not by statute. He is entitled to have his entire problem and the ultimate determination of his just compensation determined by a jury and not otherwise. We have serious concerns whether the various forms of alternative dispute resolution referred to in your proposal are constitutionally supportable or even applicable to a "special proceeding". Any attempt through legislation to alter or limit the property owner's right to have his just compensation determined by a jury is suspect and it is our suggestion that the Commission give careful consideration as to whether the proposed procedures are constitutionally supportable.

We thank you for the opportunity to furnish you with our comments.

Very Truly yours,

REDWINE AND SHERRILL,

By 
Justin M. McCarthy

JMM:jed

DEPARTMENT OF TRANSPORTATION

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September 14, 2000

VIA FACSIMILE AND FIRST-CLASS MAIL

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

Dear Mr. Sterling:

In re: Tentative Recommendation EmH-458, July 2000: Early Disclosure of Valuation
Data and Resolution of Issues in Eminent Domain

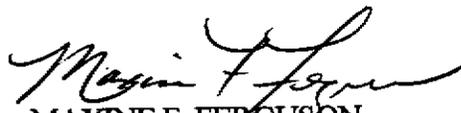
After consulting with the legal and right-of-way staff of the Department of
Transportation, we offer the following comments regarding the Commission's Tentative
Recommendation EmH-458:

We strongly support the changes to the Eminent Domain Law proposed by the
Tentative Recommendation. However, the Commission needs to make one editing
correction. The reference in the proposed amendment to Government Code section
7267.2 to "Section 1245.230 of the Government Code" should read "Section 1245.230 of
the Code of Civil Procedure."

We would like to thank you for the opportunity to participate in the Commission's
process in developing this proposed legislation and look forward to working with the
Commission on any future proposals to revise the provisions of the Eminent Domain
Law.

Very truly yours,


RICHARD B. WILLIAMS
Attorney


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Attorney

cc: Michael R. Nave

X-Sent: 18 Sep 2000 23:07:16 GMT
From: "Angela Goble" <angela@matteoni.com>
To: <nsterling@clrc.ca.gov>
Subject: Early Disclosure of Valuation Data and Resolution of Issues in
Eminent Domain (Tentative Recommendation, July, 2000)
Date: Mon, 18 Sep 2000 16:05:43 -0700
MIME-Version: 1.0

Dear Nathaniel:

I am sorry I missed the deadline of September 15th for the October 5th
Agenda concerning Memorandum 2000-65.

But, I do want to make some comments concerning the current tentative
recommendation for CCP §1260.040 on resolution of legal issues affecting
valuation. First, I am pleased that the Commission is recommending that the
motion be heard by the judge assigned for trial of the case. As you know
from prior correspondence, I think that is very important. There is an
additional concern, that is, to carefully consider this new statute's
mechanism so that it is not taken to encourage an abuse of in limine
motions. This should not be taken as an opportunity to erode the guarantee
of a jury trial on the issue of compensation. (See, for example, Kelly v.
New West Federal Savings (1996) 49 CA4th 659, a case which demonstrates
misuse and abuse of motions in limine which resulted in a denial of due
process for plaintiffs in a personal injury action).

Norman E. Matteoni
Matteoni, Saxe & O'Laughlin