

Memorandum 2000-79

Prejudgment Deposit Appraisal in Eminent Domain

BACKGROUND

At the October 2000 meeting the Commission approved its recommendation on early disclosure of valuation data and resolution of issues in eminent domain. In connection with that recommendation, the Commission received comments addressed to a parallel but unrelated matter — use of the condemnor's prejudgment deposit appraisal in the ensuing eminent domain trial. The Commission requested the staff to schedule the matter for the separate attention of the Commission.

EXISTING LAW

Article I, Section 19, of the California Constitution enables the condemnor in an eminent domain proceeding to take immediate possession of the property, even though valuation issues are yet to be tried and just compensation to be awarded. "The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."

The Legislature has implemented this constitutional authority by enactment of a detailed procedure governing deposit and withdrawal of probable compensation. The statutory scheme may be found at Code of Civil Procedure Sections 1255.010-1255.480. The statute was enacted on recommendation of the Law Revision Commission.

As a practical matter, it is routine for the condemnor to use this procedure. The condemnor in the ordinary case makes a prejudgment deposit of probable compensation. The deposit is based on the condemnor's appraisal of the property. The deposit enables the condemnor to take immediate possession of the property. The deposit also fixes the valuation date (which may be important to the condemnor in a rising market).

The law protects the condemnor from use of the prejudgment deposit appraisal against it at trial. The statute provides:

Code Civ. Proc. § 1255.060. Limitations on use of evidence in connection with deposit

1255.060. (a) The amount deposited or withdrawn pursuant to this chapter shall not be given in evidence or referred to in the trial of the issue of compensation.

(b) 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.

(c) Upon objection of the party at whose request an appraisal report, written statement and summary of the appraisal, or other statement was made in connection with a deposit or withdrawal pursuant to this chapter, the person who made such report or statement and summary or other statement may not be called at the trial on the issue of compensation by any other party to give an opinion as to compensation.

The reason for this provision is to encourage the condemnor to make a fully adequate prejudgment deposit, without fear of prejudicing its position at trial. The Commission's recommendation on the matter notes that, "This is a salutary rule because it encourages the plaintiff to make adequate deposits." *The Eminent Domain Law*, 13 Cal. L. Revision Comm'n Reports 1048 (1975). The Comment to this section states that the purpose of the provision:

is to encourage the plaintiff to make an adequate deposit by protecting the plaintiff from the defendant's use of the evidence upon which the deposit is based in the trial on the issue of compensation. If such evidence could be so used, it is likely that the plaintiff would make an inadequate deposit in order to protect itself against the use at the trial of evidence submitted in connection with the deposit.

PROBLEMS WITH EXISTING LAW

Issues have been raised concerning three aspects of existing law:

- (1) Whether the statute actually has the intended effect.
- (2) Whether protection of a valuation witness from impeachment is a denial of the constitutional guarantee of just compensation.

(3) Whether the statute should protect a property owner to the same extent it protects a condemnor.

Basic Policy of Statute

Gideon Kanner has informed the Commission that the policy of the statute, while perhaps sound in theory, has proved defective in practice. Condemnors do not make ample deposits in the hope of settling. Rather, a condemnor may make an inadequate deposit with the knowledge that (1) as a practical matter the property owner can do nothing about it, and (2) the condemnor can act with impunity, since the deposit, and the appraisal on which it is based, cannot be used against it at trial. He argues that the existing law creates injustice that could be curbed by allowing the deposit to be used against the condemnor — this policy, rather than the existing law — would be more likely to encourage adequate condemnor deposits.

Professor Kanner has also 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.”

The staff observes that there is another practical factor that could tend to keep the condemnor’s prejudgment deposit realistic — the potential for an award of attorney’s fees. Existing California law provides that litigation expenses may be awarded to the property owner in an eminent domain proceeding if the final pretrial demand of the property owner was reasonable and the final pretrial offer of the condemnor was unreasonable. Code Civ. Proc. § 1250.410. In determining the amount of litigation expenses to be awarded, “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.” Section 1250.410(b). This language was added to the statute in 1982. It is not clear whether the condemnor’s prejudgment appraisal and deposit are considered to be “other written offers and demands filed and

served prior to or during the trial” within the meaning of this provision. One option would be to make clear that the prejudgment appraisal and deposit are to be taken into account in determining the amount of litigation expenses that may be assessed:

Code Civ. Proc. § 1250.410 (amended). Pretrial settlement offers

1250.410. (a) At least 30 days prior to the date of the trial on issues relating to compensation, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff its final demand for compensation in the proceeding. Such These offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation expenses. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 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.

(c) In determining the amount of such litigation expenses allowed under this section, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code, any deposit made by the plaintiff pursuant to Chapter 6 (commencing with Section 1255.010), and any other written offers and demands filed and served prior to before or during the trial.

(e) (d) If timely made, the offers and demands as provided in subdivision (a) shall be considered by the court on the issue of determining an entitlement to litigation expenses.

Comment. Section 1250.410 is amended to make clear that the written offers and demands considered by the court in determining the amount of litigation expenses that may be allowed includes any deposit by the plaintiff of probable compensation in the proceeding.

The other changes in Section 1250.410 are technical.

Impeachment of Prejudgment Deposit Appraisal Witness

Subdivision (b) of Section 1255.060 protects an appraisal witness in an eminent domain trial from impeachment by the witness’ own earlier appraisal. Again, the policy of the statute is to encourage a more liberal appraisal, without fear that it may be used against the condemnor if the parties ultimately litigate the valuation issue.

This provision was construed in *County of Contra Costa v. Pinole Point Properties, Inc.*, 27 Cal. App. 4th 1105, 33 Cal. Rptr. 38 (1994). In that case, the condemnor called as a witness an appraiser who had prepared a prejudgment deposit appraisal for the condemnor. The property owner sought to impeach the testimony of the appraiser with evidence of the earlier appraisal. The condemnor argued that Section 1255.060(b) precludes impeachment of the witness. The court of appeal held that, despite the clear language of the statute, the statute could not have been intended to apply where the condemnor calls its own prejudgment deposit appraiser as a valuation witness at trial. The court held that, “when a condemnor calls an expert witness to testify at trial to valuation of the subject property, section 1255.060, subdivision (b) does *not* proscribe his impeachment by use of an appraisal that the witness theretofore made in connection with the condemnor’s deposit for pretrial possession of that property.” 27 Cal. App. 4th at 1113, 33 Cal. Rptr. 2d at 42 (emphasis in the original).

The court in *Pinole Point Properties* was concerned that otherwise the statute might violate the constitutional guarantee of just compensation — the essence of a condemnation action is to determine the fair market value of condemned property, and a rule that prohibits a landowner from questioning a witness about a prior inconsistent opinion interferes with the constitutional right to compensation in a very fundamental way. “If the condemnor elects to present the jury with an expert witness whose opinion previously expressed and sought by that condemnor for purposes of a condemnor’s deposit differs from the valuation testimony before the jury, that witness, it would seem, should be subject to the cross-examination expert witnesses customarily receive. Nothing produces the truth for fact finders weighing conflicting expert testimony better than vigorous and full cross-examination of those witnesses.” 27 Cal. App. 4th at 1112, 33 Cal. Rptr. 2d at 42.

A recent court of appeal case also addressed this issue. In *Community Redevelopment Agency v. World Wide Enterprises*, the court initially held that the statute prohibits use of a deposit appraisal to impeach the witness who prepared it (conflicting with the *Pinole Point Properties* holding). The court subsequently granted a rehearing of the matter and dismissed the appeal.

Professor Kanner has previously proposed that the statute be revised to allow expressly for impeachment of an appraiser who later testifies as to a lower value. His suggestion came in response to the *World Wide Enterprises* case, which was pending at the time. If we were to revise the statute to allow impeachment, that

would have the effect of codifying existing case law as expressed in *Pinole Point Properties*. It would also be consistent with the Commission's recommendation, approved in October 2000, that the prelitigation appraisal made by the condemnor under the Relocation Assistance Act should be available for impeachment of a valuation witness who prepared the appraisal. See proposed amendment of Gov't Code § 7267.2(c)(2).

An amendment along these lines might take the following form:

Code Civ. Proc. § 1255.060. Limitations on use of evidence in connection with deposit

1255.060. (a) The amount deposited or withdrawn pursuant to this chapter shall not be given in evidence or referred to in the trial of the issue of compensation.

(b) 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 shall not~~ be considered to be an admission of any party.

(c) Upon objection of the party at whose request an appraisal report, written statement and summary of the appraisal, or other statement was made in connection with a deposit or withdrawal pursuant to this chapter, the person who made ~~such the~~ report or statement and summary or other statement may not be called at the trial on the issue of compensation by any other party to give an opinion as to compensation. If the person who prepared the report, statement and summary, or other statement is called at trial to give an opinion as to compensation, the report, statement and summary, or other statement may be used for impeachment of the witness.

Comment. Section 1255.060 is amended to allow impeachment of a valuation witness who prepared an appraisal report, written statement and summary of an appraisal, or other statement made in connection with a deposit or withdrawal pursuant to this chapter. This codifies existing law. *County of Contra Costa v. Pinole Point Properties, Inc.*, 27 Cal. App. 4th 1105, 33 Cal. Rptr. 38 (1994).

Protection of Property Owner's Valuation Statements

It has been suggested that Section 1255.160 is a one-way street. It immunizes the condemnor from use of the condemnor's valuation statements against it in connection with the prejudgment deposit, but fails to immunize the property owner from use of the property owner's valuation statements against it. (For example, a property owner who applies to the court for an increase of the

deposit, based on the property owner's appraisal, should not have that appraisal used against it.) Thus, "neither side will have to face at trial the concerns that your present proposal expresses on behalf of the condemnor only." See Memo. 2000-65, Ex. pp. 1-2 (letter of Justin McCarthy).

The staff does not read Section 1255.060 as being one-sided in that way. Under subdivision (a) neither the amount deposited "or withdrawn" may be referred to at trial. Under subdivision (b), no "other statements" made in connection with a deposit or withdrawal may be considered to be an admission of "any party". Under subdivision (c), an appraiser who has made a valuation statement in connection with a prejudgment deposit may not be called over the objection of "the party" on whose behalf the valuation statement was made. All of these provisions would apply equally to the condemnor and the property owner.

It may be useful to point out this construction of the statute in the Comment:

Comment. It should be noted that Section 1255.060 protects an appraisal statement made by or on behalf of a property owner in connection with a deposit or withdrawal under this chapter to the same extent as one made by or on behalf of the condemnor.

CONCLUSION

Depending on what actions the Commission takes with respect to the issues that have been identified in this memorandum, we may be in a position to prepare a tentative recommendation on the matter, to be circulated for comment.

Respectfully submitted,

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Executive Secretary