Study Em-459 March 6, 2001

Memorandum 2001-24

Evidence of Prejudgment Deposit Appraisal in Eminent Domain: Comments on Tentative Recommendation

The Commission in December 2000 approved its tentative recommendation to revise the statutes governing evidence of the condemnor's prejudgment deposit appraisal. The revision would:

(1) Make clear that evidence of the appraisal may be used in determining the amount of litigation expenses for which a condemnor may be assessed.

(2) Codify case law that evidence of the appraisal may be used for purposes of impeaching a witness who prepared the appraisal.

(3) Emphasize that the protections against use of prejudgment deposit appraisal evidence apply equally to the property owner and the condemnor.

The Commission has received comments on this proposal from the following persons:

GENERAL COMMENTS

Mr. Mulcare indicates that his firm specializes in eminent domain law; they support the proposal. Mr. McCarthy believes the proposal generally seems to be appropriate.

Ms. Ailin notes that she has eleven years experience representing local public agencies; she finds fault with the proposal.

USE OF PREJUDGMENT DEPOSIT APPRAISAL TO DETERMINE ALLOWANCE OF LITIGATION EXPENSES

Ms. Ailin objects to somewhat misleading language in the part of the tentative recommendation relating to litigation expenses. **The staff agrees with her**

critique, and would revise the offending sentences (all of which appear on page 2 of the tentative recommendation between lines 4 and 23) to read:

> A more practical incentive is the possibility that the amount of litigation expenses ~~will be~~ assessed against a condemnor ~~that makes~~ may be influenced by an unduly low deposit.
>
> The Commission recommends that the statute be revised to make clear that the prejudgment ~~appraisal and~~ deposit ~~are~~ is to be taken into account in determining the amount of litigation expenses allowed.
>
> The law already requires that the offer under Government Code Section 7267.2 be taken into account in determining the amount of litigation expenses, and the prejudgment deposit ~~appraisal~~ is ordinarily based on that amount.

IMPEACHMENT OF PREJUDGMENT DEPOSIT APPRAISAL WITNESS

Ms. Ailin is critical of the proposal to allow use of a prejudgment deposit appraisal for impeachment of a trial witness who prepared the appraisal. She argues that the proposal could result in higher costs to public entities and lower prejudgment deposits for property owners. That is because:

(1) This change in law may motivate a public entity to retain a different trial appraiser than its prejudgment deposit appraiser, and pay less attention to the prejudgment deposit appraisal. This is particularly true in the case of a local entity that may have a limited trial budget.

(2) The deposit appraisal is like a settlement offer. The policy of the law is to encourage settlement discussions by protecting settlement offers from being used against the parties. Allowing use of the deposit appraisal for impeachment will impair settlement, without adding any real benefit to the determination of fair market value at trial.

This argument goes to the crux of the tentative recommendation. The argument made by Ms. Ailin recapitulates the argument made by the Law Revision Commission when it recommended enactment of the protection against impeachment in 1975. The current recommendation abandons this argument as mistaken, and takes the position that it is not clear whether the protection actually does any good in terms of ensuring an adequate deposit, and does harm in terms of allowing an adequate inquiry into the basis for an appraisal expert's valuation testimony. **The Commission needs to decide which of these positions is more persuasive.**

Ms. Ailin correctly notes that the Commission's pending bill — AB 237 (Papan) — is consistent with the present recommendation in subjecting an appraiser to impeachment by the appraiser's prelitigation appraisal under the relocation assistance statute.

TYPOGRAPHICAL ERROR

Mr. Mulcare suggests correction of a typographical error in one of the statute's being amended. **The staff would make the following correction:**

> 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, an appraisal report, written statement and summary of an appraisal, or other ~~statements~~ statement made in connection with a deposit or withdrawal pursuant to this chapter 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 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.

COMMISSION COMMENTS

Mr. McCarthy suggests that the Commission might expand the Comments to explain the reason for the changes — "I say this because without such comments judges have a nasty habit of misinterpreting what appears to us to be a relatively straight forward procedure." Exhibit p. 2.

Historically we have not included policy discussions in the Comments. The Comments have been confined to notes about the derivation of the section, its construction, how it changes the law, and its interrelation with other statutes. The supporting policy considerations are discussed in the preliminary part of the recommendation.

On occasion we have included in Comments a reference to the preliminary part — e.g., "See also, *Evidence of Prejudgment Deposit Appraisal in Eminent Domain*, 31 Cal. L. Revision Comm'n Reports xxx (2001)." We could do this here if the Commission is so inclined.

However, the staff is not sure how helpful this would be. The West Annotated Codes, besides reprinting the Comments, usually pick up references to the Commission recommendations themselves. (The Deerings Annotated Codes do not.)

There is also a logistical problem with including references to the Commission's printed report — often the final pagination of the printed report is not determined until after the Comments are finalized and sent to the law publishers.

On balance, the staff does not favor a change in the Commission's current practice as to the content of its Comments.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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January 11, 2001

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

Re: Tentative Recommendation of Proposed Legislation Amending Code of Civil Procedure Sections 1250.410 and 1255.060

Dear Commission:

Our law firm is dedicated to the practice of eminent domain law. Over 90% of our practice is the representation of parties in eminent domain actions.

We **support** your tentative recommendation dated December 2000 regarding Evidence of Prejudgment Deposit Appraisal in Eminent Domain, and specifically your proposed legislative changes to Code of Civil Procedure Sections 1250.410 and 1255.060.

Sincerely,

Ronald J. Mulcare

RJM:d

P.S. See enclosure regarding typo.

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February 20, 2001

REPLY TO:
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California Law Revision Commission
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Palo Alto, CA 94303-4739

Re: Proposed Revisions to Evidence Code re Judgment Deposit Appraisal in Eminent Domain

Gentlemen:

I have reviewed your material on the subject which is referenced above. The format which you have used generally seems to be appropriate and I recognize the perils and traps that are inherent in an endless tinkering with statutory procedures. Therefore, I have no substantive suggestions for additional changes to the relevant statutes.

The only specific suggestion I have to make at this point is to request the Commission consider whether it should enlarge its "comments" to call the attention of the courts and the Bar to the specific purpose of these changes as explained at greater length in your transmittal.

I say this because without such comments judges have a nasty habit of misinterpreting what appears to us to be a relatively straight forward procedure.

Thank you for your courtesy.

Very Truly yours,

REDWINE AND SHERRILL,

By: Justin M. McCarthy

JMM:jed

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February 27, 2001

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Evidence of Prejudgment Deposit Appraisal in Eminent Domain: Tentative Recommendation (December 2000)

To Whom It May Concern:

I am an attorney with eleven years experience representing local public agencies in property acquisition and eminent domain matters. This letter contains my comments on the Commission's tentative recommendation regarding the use of the prejudgment deposit appraisal as evidence in eminent domain cases.

Use of the Prejudgment Deposit Appraisal to Determine Allowance of Litigation Expenses

The tentative recommendation suggests that "the possibility that litigation expenses will be assessed against a condemnor that makes an unduly low deposit" would be an effective incentive to condemnors to make better prejudgment deposits. However, the proposed changes to Code of Civil Procedure § 1250.410 do not have anything to do with the possibility that litigation expenses will be assessed. At present, the question whether the condemnor will be ordered to pay the condemnee's litigation expenses turns on, among other things, the relationship between the jury verdict, the condemnor's final offer made at least 20 days prior to trial and the condemnee's final demand made at least 20 days prior to trial. This process works in part because the condemnor's offer and the condemnee's demand are made at roughly the same time and at the same point in the litigation process. The tentative recommendation would not change that analysis, nor should it.

Using the deposit appraisal, rather than the final offer and demand, to determine whether the condemnor should be liable for the condemnee's litigation expenses would be a terrible idea. Very often, the prejudgment deposit is based on the same appraisal used for purposes of making a precondemnation offer pursuant to Government Code § 7267.2. While the making of a deposit fixes the date of value for purposes of trial, the deposit appraisal nearly always predates the date of the deposit by weeks or months. During the gap between the date of the appraisal and the date of the deposit, there may be significant changes in the economy, announcements regarding other public or private development near the subject property, and additional sales of comparable properties or other transactions that would influence the appraiser's opinion of the value of the subject property. In addition, despite the fact that a public agency can request or seek a court order for access to property before filing a condemnation action, precondemnation offers and deposits are often based on appraisals made without a full inspection of the property. Accordingly, use of the amount of the deposit or the appraisal on which the deposit is based to decide whether litigation expenses should be awarded would not be fair to condemnors.

Although the tentative recommendation discusses using the deposit appraisal to influence the amount of litigation expenses awarded, the proposed changes to Code of Civil Procedure § 1250.410 refer to the amount of the deposit, not the appraisal on which the deposit is based. While I have no problem with using the deposit in this manner, which is consistent with the current statutory language, the inconsistency between the language and the background discussion on page 2 of the tentative recommendation could lead to confusion if someone were to delve into the legislative history of the proposed changes to Section 1250.410.

Impeachment of Prejudgment Deposit Appraisal Witness

In my opinion, the proposed change to Code of Civil Procedure § 1255.060(b) allowing impeachment of a valuation witness based on a prejudgment deposit appraisal is likely to backfire and result in local public agencies making less fair deposits, rather than more fair deposits.

Even with the proposed amendment, the use of a prejudgment deposit appraisal could be easily avoided. All the condemnor need do is retain one appraiser to do the prejudgment deposit appraisal, then retain a different appraiser to prepare an appraisal for trial. For local public agencies, which, for the most part, do not have the financial resources of State agencies such as the Department of Transportation, this creates a budgetary problem. As a

general rule, a local public agency will use the same appraisal for the precondemnation offer and the prejudgment deposit and will have the trial appraisal prepared by the same appraiser who did the first appraisal. By using the same appraiser at each phase of the acquisition process, a local public agency can reduce its costs because it only needs to pay once for certain appraisal ground work to be done -- inspection of the subject property, research regarding zoning and land use issues, etc. If a local public agency is going to have to pay multiple appraisers to do repetitive work, it is going to set a tighter budget for preparation of one of the necessary appraisals. Most likely the tighter budget would be applied to the precondemnation offer/prejudgment deposit appraisal on the theory that the trial appraisal will be subjected to greater scrutiny than the precondemnation offer/prejudgment deposit appraisal. The result is likely to be lower deposits, rather than higher deposits.

County of Contra Costa v. Pinole Point Properties, Inc., 27 Cal.App.4th 1105, is long on assumptions and short on analysis of why the protection for the prejudgment deposit appraisal was created in the first place. The court of appeal inexplicably expresses concern about "due process" without addressing the policy judgment made by the Legislature when it adopted Code of Civil Procedure § 1255.060 in the first place. The *Pinole Point* decision and the policy judgment behind § 1255.060 are discussed at some length in *Community Redevelopment Agency of the City of Los Angeles v. World Wide Enterprises*, 92 Cal.Rptr.2d 244, 246-249. The Court of Appeal granted a request for rehearing of the *World Wide Enterprises* case and while that request was pending the appeal was dismissed pursuant to the stipulation of the parties. Consequently, the opinion was depublished. Nevertheless, it reflects a better understanding of the purpose and effect of Code of Civil Procedure § 1255.060(b) than does *Pinole Point.*

It is well accepted that, in tort cases, repairs or changes made after the injury occurred are not admissible, because we do not want property owners to delay or refrain from making repairs or changes in order to avoid having the fact used as an admission that there was a problem. Evidence Code § 1151. Similarly, a policy judgment has been made that settlement offers should not be admissible in order to encourage settlement discussions. Evidence Code § 1152. No one would suggest that these rules of evidence are a denial of due process. Code of Civil Procedure § 1255.060, the purpose of which is similar to that of inadmissibility of settlement discussions, likewise is not a denial of due process. *World Wide Enterprises, supra*, 92 Cal.Rptr.2d at 248. The proposed change to Section 1255.060 that would allow prejudgment deposit appraisals prepared by the same appraiser who testifies at trial to be used for impeachment will not increase due process protection and may make settlement before trial less likely.

I would also like to call the Commission's attention to Assembly Bill No. 237, introduced by Assembly Member Louis J. Papan, which proposes changes to Government Code § 7267.1 that are similar in effect to the changes to Code of Civil Procedure § 1255.060 that the Commission is considering.

Very truly yours,

KANE, BALLMER & BERKMAN

June Ailin

cc: Joseph Vanderhorst, Esq.