

# CALIFORNIA LAW REVISION COMMISSION

## TENTATIVE RECOMMENDATION

### Eminent Domain Valuation Evidence: Clarification of Evidence Code Section 822

September 1998

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN November 15, 1998.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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## SUMMARY OF TENTATIVE RECOMMENDATION

Evidence Code Section 822(a)(1) provides that evidence of a sale of “property appropriated to a public use or a property interest so appropriated shall not be excluded under this section if the acquisition was for the same public use for which the property could have been taken by eminent domain.” The Law Revision Commission recommends clarification of this confusing language to effectuate its intended purpose.

This recommendation was prepared pursuant to Resolution Chapter 91 of the Statutes of 1998.

1                   EMINENT DOMAIN VALUATION EVIDENCE:  
2                                   CLARIFICATION OF  
3                   EVIDENCE CODE SECTION 822

4       The owner of property taken by eminent domain is entitled to receive as  
5       compensation the fair market value of the property taken. Fair market value is  
6       defined as “the highest price on the date of valuation that would be agreed to by a  
7       seller, being willing to sell but under no particular or urgent necessity for so doing,  
8       nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no  
9       particular necessity for so doing, each dealing with the other with full knowledge  
10      of all the uses and purposes for which the property is reasonably adaptable and  
11      available.”<sup>1</sup>

12      The Evidence Code provides rules for proving the fair market value of property.<sup>2</sup>  
13      Evidence of a previous sale of the subject property or of comparable property, for  
14      example, is generally admissible, and may be used as a basis for an opinion as to  
15      the value of property.<sup>3</sup>

16      **Sales to Public Entities**

17      Historically, a previous sale of the subject property or of comparable property to  
18      a public entity that could have taken the property by eminent domain cannot be  
19      used as valuation evidence in an eminent domain proceeding. Evidence Code  
20      Section 822 provides:

21                   822. (a) In an eminent domain or inverse condemnation proceeding,  
22                   notwithstanding the provisions of Sections 814 to 821 inclusive, the  
23                   following matter is inadmissible as evidence and shall not be taken into  
24                   account as a basis for an opinion as to the value of property:

25                   (1) The price or other terms and circumstances of an acquisition of  
26                   property or a property interest if the acquisition was for a public use for  
27                   which the property could have been taken by eminent domain ...

28      The reason for this exclusion is that a sale of property to a public entity is of  
29      doubtful validity as evidence of fair market value. “Such a sale does not involve a  
30      willing buyer and a willing seller. The costs, risks and delays of litigation are  
31      factors that often affect the ultimate price. ... These sales, therefore, are not sales in

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1. Code Civ. Proc. § 1263.320(a).

2. The rules were enacted on recommendation of the Law Revision Commission. See *Evidence in Eminent Domain Proceedings*, 3 Cal. L. Revision Comm’n Reports, at A-1 (1961); *Evidence of Market Value of Property*, 14 Cal. L. Revision Comm’n Reports 105 (1978); *Application of Evidence Code Property Valuation Rules in Noncondemnation Cases*, 15 Cal. L. Revision Comm’n Reports 301 (1980).

3. Evid. Code §§ 815, 816.

1 the ‘open market’ and should not be considered in a determination of market  
2 value.”<sup>4</sup>

3 **1987 Amendment of Evidence Code Section 822**

4 Evidence Code Section 822(a)(1), precluding use of a sale of property to a public  
5 entity, was amended in 1987 to allow use of certain sales to public entities:<sup>5</sup>

6       ... the price or other terms and circumstances of an acquisition of property  
7       appropriated to a public use or a property interest so appropriated shall not  
8       be excluded under this section if the acquisition was for the same public use  
9       for which the property could have been taken by eminent domain.

10 The meaning of this language is unclear. “The statutory wording is confusing  
11 because the exception language follows very closely the rule itself.”<sup>6</sup> The  
12 confusion is more than academic — the court apparently misconstrued the  
13 provision in the only published appellate decision involving it to date, allowing  
14 evidence of prices paid by the same condemnor to acquire adjacent private  
15 property for public use.<sup>7</sup>

16 **Intent of 1987 Language**

17 The 1987 language was sponsored by the California Department of  
18 Transportation. According to a spokesperson for the Department of  
19 Transportation, the purpose and effect of this language is to prevent the automatic  
20 exclusion of evidence of an acquisition of property that, at the time of the  
21 acquisition, was already in use for the same public purpose for which it was  
22 acquired. Thus, for example, a municipal water district’s acquisition of the  
23 facilities of an existing water district may be a relevant comparable sale in valuing  
24 a similar acquisition by another water district.<sup>8</sup>

25 This is a very narrow exception. The reason for it is that, “it is difficult to find  
26 market transactions comparable to an acquisition for a public use of property that  
27 is already subject to the same type of public use (e.g., a municipality’s acquisition  
28 of the facilities of a water company). Thus the exception is considered most  
29 applicable to the condemnation of public utility properties or special districts.”<sup>9</sup>

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4. *Evidence in Eminent Domain Proceedings*, 3 Cal. L. Revision Comm’n Reports A-1, A-7 (1961).

5. 1987 Cal. Stats. ch. 1278, § 1.

6. N. Matteoni, 1 *Condemnation Practice in California* § 4.29 at 120 (Cal. Cont. Ed. Bar 2d ed. 1998).

7. See *City and County of San Francisco v. Golden Gate Heights Investments*, 14 Cal. App. 4th 1203, 18 Cal. Rptr. 2d 467, 470 (1993).

8. 11 CEB Real Property Law Rep. 29 (Jan. 1988).

9. N. Matteoni, 1 *Condemnation Practice in California* § 9.54 at 433-34 (Cal. Cont. Ed. Bar 2d ed. 1998).

1 **Recommended Clarification**

2 The Law Revision Commission recommends clarification of the language of  
3 Evidence Code Section 822(a) to more clearly effectuate its intended purpose.

PROPOSED LEGISLATION

4 **Evid. Code § 822 (amended). Matter inadmissible as evidence**

5 SECTION 1. Section 822 of the Evidence Code is amended to read:

6 822. (a) In an eminent domain or inverse condemnation proceeding,  
7 notwithstanding the provisions of Sections 814 to 821 inclusive, the following  
8 matter is inadmissible as evidence and shall not be taken into account as a basis for  
9 an opinion as to the value of property:

10 (1) The price or other terms and circumstances of an acquisition of property or a  
11 property interest if the acquisition was for a public use for which the property  
12 could have been taken by eminent domain, ~~except that the~~ The price or other  
13 terms and circumstances of an acquisition of property that at the time of  
14 acquisition was already appropriated to a public use or a property interest so  
15 appropriated shall not be excluded under this section if the acquisition was for the  
16 same public use for which the property ~~could have been taken by eminent domain~~  
17 was already appropriated.

18 (2) The price at which an offer or option to purchase or lease the property or  
19 property interest being valued or any other property was made, or the price at  
20 which such property or interest was optioned, offered, or listed for sale or lease,  
21 except that an option, offer, or listing may be introduced by a party as an  
22 admission of another party to the proceeding; but nothing in this subdivision  
23 permits an admission to be used as direct evidence upon any matter that may be  
24 shown only by opinion evidence under Section 813.

25 (3) The value of any property or property interest as assessed for taxation  
26 purposes or the amount of taxes which may be due on the property, but nothing in  
27 this subdivision prohibits the consideration of actual or estimated taxes for the  
28 purpose of determining the reasonable net rental value attributable to the property  
29 or property interest being valued.

30 (4) An opinion as to the value of any property or property interest other than that  
31 being valued.

32 (5) The influence upon the value of the property or property interest being  
33 valued of any noncompensable items of value, damage, or injury.

34 (6) The capitalized value of the income or rental from any property or property  
35 interest other than that being valued.

36 (b) In an action other than an eminent domain or inverse condemnation  
37 proceeding, the matters listed in subdivision (a) are not admissible as evidence,  
38 and may not be taken into account as a basis for an opinion as to the value of  
39 property, except to the extent permitted under the rules of law otherwise  
40 applicable.

1     ~~(c) The amendments made to this section during the 1987 portion of the 1987-88~~  
2 ~~Regular Session of the Legislature shall not apply to or affect any petition filed~~  
3 ~~pursuant to this section before January 1, 1988.~~

4     **Comment.** Subdivision (a)(1) of Section is amended to clarify its meaning. Cf. Code Civ. Proc.  
5 § 1235.180 (“property appropriated to public use” in Eminent Domain Law means property  
6 already in use for, or set aside for, public purpose). The amendment reverses the interpretation of  
7 the provision in *City and County of San Francisco v. Golden Gate Heights Investments*, 14 Cal.  
8 App. 4th 1203, 18 Cal. Rptr. 2d 467 (1993).

9     Subdivision (c) is deleted as obsolete.