

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain

October 2000

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

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October 5, 2000

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

This recommendation proposes a number of statutory improvements 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 recommendation requires more detailed disclosure of prelitigation appraisal information together with disclosure of positions on loss of business goodwill.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

David Huebner
Chairperson

EARLY DISCLOSURE OF VALUATION DATA AND RESOLUTION OF ISSUES IN EMINENT DOMAIN

BACKGROUND

In almost all condemnation cases, the primary issue is the amount of compensation. Evidence is introduced in support of each party's contention of the value of the property taken and damages to the remainder. Valuation disputes may arise from such matters as differing interpretations of sales data and differing opinions of highest and best use, probability of changes in zoning, probability of dedication, feasibility of development, and legal compensability of loss.¹

Existing law seeks to encourage settlement of eminent domain valuation disputes by requiring the parties to make their final offers and demands before the commencement of trial.² Attorney fees and other litigation expenses may be awarded to the property owner if the final pretrial demand of the property owner was reasonable and the final pretrial offer of the condemnor was unreasonable.³

Other settlement inducements include special provisions for exchange of valuation data by the parties. As a general rule, conventional discovery techniques have been of little value in generating useful information concerning the key points of disagreement between the parties. This is because the critical evidence in eminent domain proceedings is expert opinion testimony, and valuation experts who may be called to testify at trial resist formulating an opinion for that purpose until the time of trial. For this reason, California has adopted special

1. See, e.g., Matteoni, *Trial Preparation and Trial*, in 1 *Condemnation Practice in California* § 9.2, at 364 (Cal. Cont. Ed. Bar, 2d ed. 2000).

2. Code Civ. Proc. § 1250.410(a).

3. Code Civ. Proc. § 1250.410(b).

discovery rules for eminent domain proceedings, which provide for an early exchange of valuation data on demand of a party.⁴

While the parties do not always take advantage of the exchange procedure for various tactical reasons, there is a strong incentive to use it due to the operation of the litigation expense statute.⁵ Because an award of litigation expenses is predicated on the reasonableness of the parties' valuation determinations, each party must make a good faith effort to understand and respond to the other's case. A party who does not seek to review the opponent's case in advance of trial is at risk of being determined not to have acted reasonably in the proceeding.

The various incentives for the parties to resolve the eminent domain dispute without the need for a lengthy and expensive trial have been reasonably successful. During the three-year period from July 1, 1996, to June 30, 1999, for example, there were 3,783 eminent domain cases filed statewide.⁶ Of the 3,477 pending eminent domain cases disposed of statewide during that period, 3,200 (92%) were either disposed of before trial or after trial as uncontested matters. Only 277 (8%) were disposed of after trial as contested matters.

The governing statutes, while salutary, are not free of problems. In particular, the provisions applicable to the exchange of valuation data could be improved, as well as pretrial procedures for resolving legal disputes affecting valuation. The Law Revision Commission proposes in this recommendation

4. Code Civ. Proc. §§ 1258.210-1258.300.

5. Code Civ. Proc. § 1250.410(a).

6. These numbers are drawn from Judicial Council statistics for the three-year period ending fiscal year 1998-99. See Judicial Council of California, Administrative Office of the Courts, 1999 Court Statistics Report 124-25 (1999); supplemental unpublished information provided by statistical staff of the Administrative Office of the Courts. All percentages are rounded to the nearest whole.

a number of revisions of the law intended to facilitate resolution of eminent domain cases without the need for trial.

MORE DETAILED PRETRIAL APPRAISAL INFORMATION

There are two statutorily-required appraisals performed by the condemnor before the litigation positions of the parties are solidified in their final pretrial offers and demands:

- Under the Relocation Assistance Act, before a condemnor commences proceedings it must appraise the property and provide the owner a written statement of, and summary of the basis for, the amount it offers as just compensation.⁷
- After the proceeding is commenced, the condemnor ordinarily makes a prejudgment deposit of probable compensation, based on the condemnor's appraisal of the property.⁸ The condemnor must give the property owner notice of the deposit and "a written statement or summary of the basis for the appraisal."⁹

The data provided to the property owner in these two instances lacks sufficient detail to enable a property owner to evaluate and act rationally in response to the condemnor's offer. For example, most condemning agencies do not provide a list or representative number of comparable sales. A requirement that the condemning agency provide the elementary data supporting the appraisal would engage the parties in early discussion, with a greater chance for a negotiated settlement.

Prelitigation Appraisal

Existing law requires that, in the case of a prelitigation offer, in addition to providing the statement and summary, the

7. Gov't Code §§ 7267.1–7267.2.

8. *Cf.* Code Civ. Proc. § 1255.010(a).

9. Code Civ. Proc. § 1255.020(a)-(b).

condemnor must also allow the property owner to review a copy of the appraisal itself.¹⁰ The review right is limited, however, to appraisals of owner-occupied residential property of not more than four dwelling units.

The small residential limitation substantially undercuts the usefulness of the review right. Valuation of small residential properties is the least difficult and least contested of eminent domain issues. The review right would be more useful if applied in the valuation of large residential and commercial properties. Those types of properties are more difficult to value, and full disclosure of appraisal information would assist in the understanding of opposing parties' positions.

Moreover, the scope of the "review" right is unclear. May the reviewing party make a copy of the appraisal?

The Commission recommends that a copy of the prelitigation appraisal be provided to the property owner outright, regardless of the type of property involved. To ensure that the condemnor is not harmed by this disclosure, the Commission further recommends that the appraisal be inadmissible as evidence of value or as an admission of the condemnor. Its use at trial would be strictly limited to impeachment of an expert who prepared the appraisal.

In the interest of full and open negotiations with a view towards settlement, the property owner should likewise be encouraged to share all appraisal information the property owner has developed. Just as with the condemnor's appraisal, a valuation opinion expressed by or on behalf of the property owner that is prepared for the purpose of negotiation should be inadmissible as evidence of value or as an admission of the property owner. Use of this type of material at trial should likewise be strictly limited to impeachment of the person who prepared the valuation, if called as a trial witness.

10. Gov't Code § 7267.2(a).

Prejudgment Deposit Appraisal

More adequate information about the basis of the prejudgment deposit appraisal is also appropriate. The summary of the appraisal prepared by the condemnor should contain basic information — the highest and best use of the property on which the appraisal is based, key comparable sales on which the appraisal is based, and if there are damages to the remainder, an explanation and calculations illustrating how the compensation for damages and offsetting benefits to the remainder were determined. The law should be revised to require this basic information.

EXCHANGE OF VALUATION DATA

The valuation exchange statute was first enacted in 1967 on recommendation of the Law Revision Commission.¹¹ The Commission pointed out the unique problems of eminent domain discovery, the effective use of exchange procedures in Los Angeles, and the need for uniformity throughout the state. The Commission explained that an early exchange of valuation data would provide a relatively inexpensive means of eminent domain discovery, reduce the necessity for interrogatories and depositions, and provide a number of other advantages:

First, it will tend to assure the reliability of the data upon which the appraisal testimony is based. The parties will have had an opportunity to test the data through investigation prior to trial. The opportunity for pretrial investigation should curtail the time required for the trial and in some cases may facilitate settlement. Second, if the exchange of information takes place prior to the pretrial conference, the conference may serve a more useful function. Having checked the supporting data in advance, the parties may be able to stipulate at the pretrial conference to highest and best use, to the comparability of other sales, to the admis-

11. 1967 Cal. Stat. ch. 1104, § 2.

sibility of other evidence, and perhaps even to the amounts of certain items of damage.¹²

Timing of Data Exchange

Since enactment of the valuation data exchange statute, there has been a consistent trend to push the data exchange ever earlier in the proceedings. As originally enacted, the statute provided for an exchange 20 days before trial¹³ — too close to the time of trial to be of practical use to the parties. The defect was corrected in 1975, providing for a mutual exchange 40, rather than 20, days before trial.¹⁴

Legislation enacted in 1999 pushes the exchange back to 60 days before trial.¹⁵ The time period was extended to give both parties an adequate opportunity to examine each other's valuation data and depose expert witnesses before making a final pretrial offer or demand. The intent was to facilitate reasonable offers and demands, resulting in a greater number of settlements; it could also yield reduced court costs.¹⁶

The purpose of the pretrial exchange of valuation data — to provide each party with the relevant facts on which the opposition will base its valuation opinion — is not always accomplished. Critics have noted a number of obstacles to effective exchange of data, including that further discovery following an exchange is ordinarily necessary. However, because the exchange does not occur until late in the pretrial process, dis-

12. *Recommendation Relating to Discovery in Eminent Domain Proceedings*, 8 Cal. L. Revision Comm'n Reports 19, 21 (1967)

13. Former Code Civ. Proc. § 1272.01(d) (repealed by 1975 Cal. Stat. ch. 1275, § 1).

14. Code Civ. Proc. § 1258.220.

15. 1999 Cal. Stat. ch. 102, § 2 (amending Code Civ. Proc. § 1258.220).

16. See Senate Rules Committee, Floor Analysis of SB 634, as amended June 9, 1999 (June 18, 1999).

covery may be needed very close to the commencement of trial.¹⁷

Proposed Revision

While the 60-day period allows more time for the parties to make an evaluation of the case and addresses some of the defects that have been noted in the exchange statute, the 60-day period does not allow adequate time for application of pretrial resolution techniques such as judicial determination of valuation-related legal issues and use of alternative dispute resolution.

The Commission recommends that the presumptive date for exchange of valuation data should be 90 days before trial. This period should more adequately facilitate pretrial resolution of eminent domain cases. In addition, absent pretrial resolution, the longer period will allow the parties to make better-reasoned final offers and demands.

In some cases, the 90-day exchange could occur so early in the proceedings that the parties will not have had sufficient time to retain appraisal experts, complete initial discovery, and obtain appraisals from their expert witnesses. To guard against that possibility, all parties should be provided a minimum of nine months after the case is filed before they may be required to exchange valuation data. The court should retain authority to provide further relief from the 90-day limit if the facts in the case so warrant.

17. See, e.g., Matteoni, *supra* note 1, § 9.14, at 389-90; Kanner, *Sic Transit Gloria: The Rise and Fall of Mutuality of Discovery in California Eminent Domain Litigation*, 6 Loy. L.A. L. Rev. 447 (1973).

BUSINESS GOODWILL ISSUES¹⁸

Exchange of Valuation Data

Where there is a pretrial exchange of valuation data, the parties must provide a statement of valuation data for each witness who will testify on (1) the value of the property taken, (2) any damage or benefit to the remainder, or (3) the amount of “any other compensation required to be paid” by specified statutes, including Chapter 9 (commencing with Section 1263.010).¹⁹ Chapter 9 includes provisions that require compensation to be paid for loss of business goodwill.²⁰

Thus the statutes on their face require goodwill valuation data to be included in the data exchange. However, a Court of Appeal opinion suggests that the statutes might be made clearer on this point. In *City of Fresno v. Harrison*,²¹ the city argued that its failure to provide goodwill valuation data did not violate the statute, “since it was ambiguous whether the special eminent domain discovery statutes applied to cases for recovery of goodwill under section 1263.510.”²² This interpretation derived from the city’s observation that the specific types of information required to be exchanged (which are listed in Code of Civil Procedure Section 1258.260) include factors more relevant to valuing tangible than intangible property and damage.

18. This discussion duplicates the Commission’s recommendation relating to claimed loss of business goodwill. *Compensation for Loss of Business Goodwill in Eminent Domain: Selected Issues*, 29 Cal. L. Revision Comm’n Reports 719 (1999).

19. Code Civ. Proc. § 1258.250(a)-(d).

20. Code Civ. Proc. §§ 1263.510-1263.530.

21. 154 Cal. App. 3d 296, 201 Cal. Rptr. 219 (1984).

22. 154 Cal. App. 3d at 302.

Code of Civil Procedure Section 1258.260 provides:

1258.260. (a) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in Section 1258.250 and, as to each such matter upon which he will give an opinion, what that opinion is and the following items to the extent that the opinion on such matter is based thereon:

- (1) The interest being valued.
- (2) The date of valuation used by the witness.
- (3) The highest and best use of the property.
- (4) The applicable zoning and the opinion of the witness as to the probability of any change in such zoning.
- (5) The sales, contracts to sell and purchase, and leases supporting the opinion.
- (6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or obsolescence the improvements have suffered, and the method of calculation used to determine depreciation.
- (7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements thereon, and the estimated gross rental income and deductions therefrom upon which such reasonable net rental value is computed; the rate of capitalization used; and the value indicated by such capitalization.

(8) If the property is a portion of a larger parcel, a description of the larger parcel and its value.

(b) With respect to each sale, contract, or lease listed under paragraph (5) of subdivision (a), the statement of valuation data shall give:

- (1) The names and business or residence addresses, if known, of the parties to the transaction.
- (2) The location of the property subject to the transaction.
- (3) The date of the transaction.
- (4) If recorded, the date of recording and the volume and page or other identification of the record of the transaction.

(5) The price and other terms and circumstances of the transaction. In lieu of stating the terms contained in any contract, lease, or other document, the statement may, if the document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

(6) The total area and shape of the property subject to the transaction.

(c) If any opinion referred to in Section 1258.250 is based in whole or in substantial part upon the opinion of another person, the statement of valuation data shall include the name and business or residence address of such other person, his business, occupation, or profession, and a statement as to the subject matter to which his opinion relates.

(d) Except when an appraisal report is used as a statement of valuation data as permitted by subdivision (e), the statement of valuation data shall include a statement, signed by the witness, that the witness has read the statement of valuation data and that it fairly and correctly states his opinions and knowledge as to the matters therein stated.

(e) An appraisal report that has been prepared by the witness which includes the information required to be included in a statement of valuation data may be used as a statement of valuation data under this article.

The *Harrison* decision notes that, of the factors listed in this section, those which may apply to goodwill are (1) the interest being valued, (2) the date of valuation, (3) the gross income, deductions and net income, and (4) the rate of capitalization and resulting value. The court states:²³

It is likely that section 1258.260 was written without contemplation of business goodwill valuation problems. If it is not explicit on the subject, as the trial court thought, it should be amended. However ill-fitting the words may be, the intent is clearly to expose fully the expert's opinion on the subject concerned.

23. *Id.* at 302-03.

It is a straightforward matter to remove any uncertainty, and the Commission recommends that this be done.

Calculation of Loss of Goodwill

There is no fixed method for valuing goodwill. The cases have held that the following techniques, among others, may be used:

- Market analysis.²⁴
- “Excess income” method.²⁵
- Capitalized value of net income or profits of business, or some similar method of calculating present value of anticipated profits.²⁶

It would be helpful to require that, in the exchange of valuation data, a goodwill valuation expert identify the method used to determine goodwill and summarize the data supporting the opinion.

Offer and Demand

The Eminent Domain Law requires that at least 20 days before trial, the parties file and serve on each other their final offers and demands of compensation in the proceeding.²⁷ The statute does not define what is included in the meaning of the term “compensation.” If the plaintiff’s offer is unreasonable and the defendant’s demand reasonable in light of the evidence admitted and the compensation awarded in the proceeding, the defendant is entitled to litigation expenses.²⁸

24. *Community Dev. Comm’n v. Asaro*, 212 Cal. App. 3d 1297, 261 Cal. Rptr. 231 (1989).

25. *People ex rel. Dep’t of Transp. v. Muller*, 36 Cal. 3d 263, 681 P.2d 1340, 203 Cal. Rptr. 772 (1984).

26. *People ex rel. Dep’t of Transp. v. Leslie*, 55 Cal. App. 4th 918, 64 Cal. Rptr. 2d 252 (1997).

27. Code Civ. Proc. § 1250.410(a).

28. Code Civ. Proc. § 1250.410(b).

At least two appellate cases have indicated that the compensation referred to in this section does not include prejudgment interest (or ordinary costs).²⁹ Unfortunately, these cases also include loose language (dictum) to the effect that the provision is not intended “to require the offer and demand to cover items other than the value of the part taken and damage, if any, to the remainder.”³⁰ This interpretation would seem to exclude from coverage of the section compensation for loss of goodwill.

Notwithstanding the language in the cases, the law intends that the offer and demand include compensation for loss of goodwill. The statute should be revised to make clear that the final offer and demand should include all compensation required by the Eminent Domain Law, including compensation for loss of goodwill. For purposes of clarity, each offer and demand should also indicate whether or not interest and costs are included.

EARLY RESOLUTION OF LEGAL ISSUES

Existing Law

It should become apparent at the pretrial conference whether there are questions of law on which the parties disagree that affect valuation of the property. Resolution of matters such as contentions over what constitutes the larger parcel, whether or not there is an impairment of access, or the probability of a zoning change, must be resolved before the jury trial on valuation. The pretrial conference can isolate many of these questions and provide for their determination

29. *Coachella Valley County Water Dist. v. Dreyfuss*, 91 Cal. App. 3d 949, 154 Cal. Rptr. 467 (1979); *People ex rel. Dep’t of Transp. v. Gardella Square*, 200 Cal. App. 3d 559, 246 Cal. Rptr. 139 (1988).

30. *Dreyfuss*, 91 Cal. App. 3d at 954; *Gardella Square*, 200 Cal. App. 3d at 568.

before trial and, ideally, before valuation data are exchanged and final offers and demands filed.³¹

Early resolution of legal issues can be accommodated because legal issues are for court rather than jury determination. Under existing law, bifurcation of legal issues may be achieved through the use of various procedural devices.³² The Eminent Domain Law provides structurally for early resolution of right to take issues.³³ However, there is nothing in the statute providing for early resolution of legal disputes affecting valuation.

It is common for courts to establish local rules to require that *in limine* motions to exclude evidence be filed and served in advance of the trial date. To expedite testimony before a jury, courts routinely conduct hearings *in limine* to determine the admissibility of evidence.³⁴ However, some courts resist *in limine* motions and bifurcation, preferring to hear the matter only once and sort things out at trial.³⁵ While this may be efficient for the judge hearing the case, it does not save the jury time, and does not foster early resolution of disputes and settlement of cases.

Statutory Procedure

The Law Revision Commission recommends an express statutory provision for early resolution of legal issues affecting valuation in an eminent domain case.

31. See Matteoni, *supra* note 1, § 9.12, at 384-85.

32. See, e.g., Code Civ. Proc. §§ 598 (court may order precedence in order of trial of issues where economy and efficiency of handling litigation would be promoted), 1048 (court may order separate trial of issues where conducive to expedition and economy, preserving the right to jury trial); Evid. Code § 320 (court's power to regulate order of proof). *Cf.* Code Civ. Proc. §§ 588-592 (trial of issues of law and fact).

33. Code Civ. Proc. § 1260.110.

34. For example, Rule 16.10(b)(4) of the Los Angeles County Superior Court rules endorses the process of a hearing before impaneling the jury.

35. See Matteoni, *supra* note 1, §§ 9.24-9.25, at 402-05.

A model for this approach already exists in the Eminent Domain Law, although its application is narrow. An “improvement pertaining to the realty” is an improvement installed for use on property taken by eminent domain that cannot be removed without a substantial economic loss; improvements pertaining to the realty must be taken into account in determining compensation.³⁶ The Eminent Domain Law provides for early resolution of a dispute over whether a particular improvement should be characterized as an improvement pertaining to the realty for compensation and other purposes.³⁷

The Commission recommends addition of a parallel but more general provision for disputes over legal issues affecting valuation. The procedure should be 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 should not be used to ascertain just compensation.³⁸

Timing Issues

There must be sufficient time for the parties to examine any valuation data exchanged, focus on the nature of their dispute, and obtain judicial resolution of any irreconcilable disagreements over legal issues. Resolution of legal issues in a timely fashion will help pave the way for a resolution of the proceeding without the need for a trial.

Assuming an exchange of valuation data 90 days before trial, a motion for resolution of legal issues should be permitted 30 days thereafter — i.e., 60 days before trial. There should be enough time during the 30-day period for the par-

36. Code Civ. Proc. §§ 1263.205-1263.210.

37. Code Civ. Proc. § 1260.030.

38. *Cf.* Cal. Const. art. I, § 19 (just compensation ascertained by jury unless waived).

ties to complete expert witness depositions and other necessary discovery, before the motion to resolve legal issues must be made.

With standard notice, preparation, and hearing times, in routine cases the resolution of legal issues will be completed well before the valuation trial. Ordinarily, this should leave sufficient time for the parties to prepare and exchange new appraisal data, and to develop their final offers and demands.

However, where the issues are complex, this schedule may not be possible to meet. The proposed statute would allow the court to extend time for trial, and for submission of final offers and demands, to the extent warranted by the court's resolution of legal issues.

Trial Judge

The legal issues involved in eminent domain valuation are highly technical and fact-oriented and require specialized knowledge. For this reason, resolution of the legal issues on the trial court's law and motion calendar may not be appropriate. The proposed law seeks to ensure an appropriate resolution of these legal issues by assigning them to the trial judge in the case.

ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution techniques, particularly mediation, may provide a constructive means for the parties to conclude the case without the time and expense of an eminent domain trial. The Law Revision Commission believes the law should foster use of alternative dispute resolution if mutually agreed to by the parties. The Commission has identified three potential impediments to use of alternative dispute resolution in eminent domain that should be addressed by statute — (1) condemnor reluctance to use alternative dispute resolution, (2) limited time available for alternative dispute

resolution, and (3) concern that a jury trial may be constitutionally required.

Condemnor Reluctance To Use ADR

Historically, some public agencies have resisted alternative dispute resolution.³⁹ This may in part be due to agency uncertainty whether it is permissible to relinquish control of public decision-making authority to a nonjudicial process.

Existing law explicitly establishes the authority of a public entity to engage in binding arbitration.⁴⁰ However, the law is silent as to mediation and nonbinding arbitration.

The proposed law makes clear that public agency condemnors may, but are not required to, agree to an alternative dispute resolution process, including mediation, binding arbitration, and nonbinding arbitration. This is analogous to the rule applicable in administrative adjudication involving state agencies.⁴¹

Limited Time Available for ADR

In order for mediation to be effective in eminent domain proceedings, it is important that pretrial discovery and resolution of legal issues first be completed. Mediation takes time, and the amount of time remaining after completion of these pretrial procedures may be inadequate for this purpose.

The proposed law would allow the court to waive fast track and other trial setting rules if the parties are actively engaged in alternative dispute resolution and agree that additional time would be beneficial.

39. The Commission's experience in its administrative procedure study was that state agencies may be unsure whether they have authority to engage in alternative dispute resolution, for various reasons. See *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55, 109-10 (1995).

40. Code Civ. Proc. §§ 1273.010-1273.050 (arbitration of compensation in acquisitions of property for public use).

41. Gov't Code § 11420.10.

Constitutional Requirement of Jury Trial

The California Constitution requires that just compensation in an eminent domain proceeding be determined by a jury, unless waived.⁴² Consistent with the waiver clause of the Constitution, the proposed law makes clear that alternative dispute resolution is available only by agreement of the parties.

42. Cal. Const. art. I, § 19 (“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.”).

PROPOSED LEGISLATION

Heading of Article 6 (commencing with Section 1250.410) (amended)

SECTION 1. The heading of Article 6 (commencing with Section 1250.410) of Chapter 5 of Title 7 of Part 3 of the Code of Civil Procedure is amended to read:

*Article 6. Settlement Offers and Alternative
Dispute Resolution*

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

SEC. 2. Section 1250.410 of the Code of Civil Procedure is amended to read:

1250.410. (a) At least 20 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. *The offer and the demand shall include all compensation required pursuant to this title, including compensation for loss of goodwill if any, and shall state whether interest and costs are included.* Such 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.

In determining the amount of such litigation expenses, 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.

(c) 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. Subdivision (a) of Section 1250.410 is amended to counteract dictum in cases to the effect that the provision is not intended to require the offer and demand to cover items other than the value of the part taken and damage, if any, to the remainder. See, e.g., *Coachella Valley County Water Dist. v. Dreyfuss*, 91 Cal. App. 3d 949, 154 Cal. Rptr. 467 (1979); *People ex rel. Dep't of Transp. v. Gardella Square*, 200 Cal. App. 3d 559, 246 Cal. Rptr. 139 (1988).

The amendment makes clear that the final offer and demand should include all elements of compensation, including compensation for loss of goodwill. Although interest and costs are not covered by this provision, the amendment also requires, for the purpose of clarity, that each offer and demand also indicate whether or not interest and costs are included.

It should be noted that subdivision (b) requires the prelitigation offer made by the plaintiff pursuant to Government Code Section 7267.2 to be considered in determining the amount of litigation expenses. In making the determination, the court should discount differences between that offer and the final offer under subdivision (a), to the extent matters such as claimed loss of business goodwill or eventual interest and costs in the proceeding would not have been known to the plaintiff at the time of the earlier offer.

Code Civ. Proc. § 1250.420 (added). ADR authorized

SEC. 3. Section 1250.420 is added to the Code of Civil Procedure, to read:

1250.420. The parties may by agreement refer a dispute that is the subject of an eminent domain proceeding for resolution by any of the following means:

(a) Mediation by a neutral mediator.

(b) Binding arbitration by a neutral arbitrator. The arbitration is subject to Chapter 12 (commencing with Section 1273.010).

(c) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after the arbitrator's decision a party moves the court for a trial of the eminent domain proceeding. If the judgment in the eminent domain proceeding is not more favorable to the moving party, the moving party shall, notwithstanding any other statute, pay the costs and litigation expenses of the parties in the eminent domain proceeding.

Comment. Section 1250.420 is drawn from Government Code Section 11420.10 (ADR authorized in administrative adjudication). This section is intended to remove any question about the authority of a public entity to refer an eminent domain dispute for alternative dispute resolution. Alternative dispute resolution pursuant to this section is optional, applicable only on agreement of the parties.

Under subdivision (a), the mediator may use any mediation technique.

Subdivision (c) parallels the procedure applicable in judicial arbitration. See Code Civ. Proc. §§ 1141.20-1141.21.

Standard protections of confidentiality of communications made in alternative dispute resolution apply to alternative dispute resolution pursuant to this section. See, e.g., Evid. Code §§ 703.5 (testimony by arbitrator or mediator), 1115-1128 (mediation).

Code Civ. Proc. § 1250.430 (added). Stay of trial during ADR

SEC. 4. Section 1250.430 is added to the Code of Civil Procedure, to read:

1250.430. Notwithstanding any other statute or rule of court governing the date of trial of an eminent domain proceeding, on motion of a party the court may postpone the date of trial for a period that appears adequate to enable resolution of a dispute pursuant to alternative resolution procedures, if it is demonstrated to the satisfaction of the court that all of the following conditions are satisfied:

(a) The parties are actively engaged in alternative resolution of the dispute pursuant to Section 1250.420.

(b) The parties appear to be making progress toward resolution of the dispute without the need for a trial of the matter.

(c) The parties agree that additional time for the purpose of alternative dispute resolution is desirable.

Comment. Section 1250.430 is intended to allow waiver of trial court delay reduction programs and other case processing requirements in order to facilitate productive alternative dispute resolution. This provision may be applied to foster resolution of some or all of the issues between the parties.

Code Civ. Proc. § 1255.010 (amended). Deposit of probable compensation

SEC. 5. Section 1255.010 of the Code of Civil Procedure is amended to read:

1255.010. (a) At any time before entry of judgment, the plaintiff may deposit with the State Treasury the probable amount of compensation, based on an appraisal, that will be awarded in the proceeding. The appraisal upon which the deposit is based shall be one that satisfies the requirements of subdivision (b). The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

(b) Before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property and (2) prepare a written statement of, or summary of the basis for, the appraisal. *The statement or summary shall contain detail sufficient to indicate clearly the basis for the appraisal, including but not limited to all of the following information:*

(1) The highest and best use on which the appraisal of the property is based.

(2) If the appraisal is based on market data, the principal transactions supporting the appraisal.

(3) If the appraisal includes compensation for damages to the remainder, the calculations and a narrative explanation supporting the compensation, including any offsetting benefits.

(c) On noticed motion, or upon ex parte application in an emergency, the court may permit the plaintiff to make a deposit without prior compliance with subdivision (b) if the plaintiff presents facts by affidavit showing that (1) good cause exists for permitting an immediate deposit to be made, (2) an adequate appraisal has not been completed and cannot reasonably be prepared before making the deposit, and (3) the amount of the deposit to be made is not less than the probable amount of compensation that the plaintiff, in good faith, estimates will be awarded in the proceeding. In its order, the court shall require that the plaintiff comply with subdivision (b) within a reasonable time, to be specified in the order, and also that any additional amount of compensation shown by the appraisal required by subdivision (b) be deposited within that time.

Comment. Subdivision (b) of Section 1255.010 is amended to prescribe the contents of the written statement or summary of the basis for the deposit appraisal. The requirement in subdivision (b)(3) that the statement or summary include detail relating to damages to the remainder applies equally in a situation where no compensation for damages to the remainder is provided due to a complete offset by benefits to the remainder.

Code Civ. Proc. § 1258.220 (amended). Date of exchange

SEC. 6. Section 1258.220 of the Code of Civil Procedure is amended to read:

1258.220. (a) For the purposes of this article, the “date of exchange” is the date agreed to for the exchange of their lists of expert witnesses and statements of valuation data by the party who served a demand and the party on whom the demand was served or, failing such agreement, a date 60 90 days prior to commencement of the trial on the issue of

compensation or the date set by the court on noticed motion of either party establishing good cause therefor.

(b) Unless otherwise agreed to by the parties, the date of exchange shall not be earlier than nine months after the date of commencement of the proceeding.

Comment. Section 1258.220 is amended to make the exchange date 90, rather than 60, days before trial on the issue of compensation (but not earlier than nine months after the case was filed). As used in subdivision (b), “months” refers to calendar months. See Section 17(4).

The statutory exchange date of 90, rather than 60, days before trial remains subject to the authority of the court to provide relief on motion of a party and showing of good cause. The practicalities of preparing sufficiently to enable a fair exchange within the prescribed period may, in the circumstances of a particular case, constitute good cause for a later exchange date.

Code Civ. Proc. § 1258.260 (amended). Contents of statement of valuation data

SEC. 7. Section 1258.260 of the Code of Civil Procedure is amended to read:

1258.260. (a) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in Section 1258.250 and, as to each such matter upon which *he the witness* will give an opinion, what that opinion is and the following items to the extent that the opinion ~~on such matter~~ is based ~~thereon~~ *on them*:

- (1) The interest being valued.
- (2) The date of valuation used by the witness.
- (3) The highest and best use of the property.
- (4) The applicable zoning and the opinion of the witness as to the probability of any change in such zoning.
- (5) The sales, contracts to sell and purchase, and leases supporting the opinion.
- (6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or

obsolescence the improvements have suffered, and the method of calculation used to determine depreciation.

(7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements thereon, and the estimated gross rental income and deductions therefrom upon which such *the* reasonable net rental value is computed; the rate of capitalization used; and the value indicated by such *the* capitalization.

(8) If the property is a portion of a larger parcel, a description of the larger parcel and its value.

(9) If the opinion concerns loss of goodwill, the method used to determine the loss and a summary of the data supporting the opinion.

(b) With respect to each sale, contract, or lease listed under paragraph (5) of subdivision (a), the statement of valuation data shall give:

(1) The names and business or residence addresses, if known, of the parties to the transaction.

(2) The location of the property subject to the transaction.

(3) The date of the transaction.

(4) If recorded, the date of recording and the volume and page or other identification of the record of the transaction.

(5) The price and other terms and circumstances of the transaction. In lieu of stating the terms contained in any contract, lease, or other document, the statement may, if the document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

(6) The total area and shape of the property subject to the transaction.

(c) If any opinion referred to in Section 1258.250 is based in whole or in substantial part upon the opinion of another

person, the statement of valuation data shall include the name and business or residence address of such other person, his business, occupation, or profession, and a statement as to the subject matter to which his opinion relates.

(d) Except when an appraisal report is used as a statement of valuation data as permitted by subdivision (e), the statement of valuation data shall include a statement, signed by the witness, that the witness has read the statement of valuation data and that it fairly and correctly states his opinions and knowledge as to the matters therein stated.

(e) An appraisal report that has been prepared by the witness which includes the information required to be included in a statement of valuation data may be used as a statement of valuation data under this article.

Comment. Paragraph (9) is added to Section 1258.260(a) to make clear that the basis for an opinion as to loss of goodwill is to be included in the exchange of valuation data. This codifies the rule in *City of Fresno v. Harrison*, 154 Cal. App. 3d 296, 201 Cal. Rptr. 219 (1984).

Technical revisions are also made for consistency with contemporary statutory drafting techniques.

Code Civ. Proc. § 1260.040 (added). Resolution of legal issues affecting valuation

SEC. 8. Section 1260.040 is added to the Code of Civil Procedure, to read:

1260.040. (a) If there is a dispute between plaintiff and defendant over an evidentiary or other legal issue affecting the determination of compensation, either party may move the court for a ruling on the issue. The motion shall be made not later than 60 days before commencement of trial on the issue of compensation. The motion shall be heard by the judge assigned for trial of the case.

(b) Notwithstanding any other statute or rule of court governing the date of final offers and demands of the parties and the date of trial of an eminent domain proceeding, the court may postpone those dates for a period sufficient to

enable the parties to engage in further proceedings before trial in response to its ruling on the motion.

Comment. Section 1260.040 is intended to provide a mechanism by which a party may obtain early resolution of an *in limine* motion or other dispute affecting valuation. 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. I, § 19 (just compensation ascertained by jury unless waived).

Nothing in this section precludes the use of other procedures for the same purpose, including, without limitation, bifurcation of issues and control of the order of proof pursuant to statute, or other pretrial procedure pursuant to court rule.

Gov't Code § 7267.1 (amended). Negotiations

SEC. 9. Section 7267.1 of the Government Code is amended to read:

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 prepared 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) of Section 7267.1 does not affect admissibility of 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.

Gov't Code § 7267.2 (amended). Precondemnation offer

SEC. 10. Section 7267.2 of the Government Code is amended to read:

7267.2. (a) Prior to adopting a resolution of necessity pursuant to Section 1245.230 *of the Code of Civil Procedure* and initiating negotiations for the acquisition of real property, the public entity shall establish an amount which it believes to be just compensation therefor, and shall make an offer to the owner or owners of record to acquire the property for the full amount so established, unless the owner cannot be located with reasonable diligence. The offer may be conditioned upon the legislative body's ratification of the offer by execution of a contract of acquisition or adoption of a resolution of necessity or both. In no event shall the amount be less than the public entity's approved appraisal of the fair market value of the property. Any decrease or increase in the fair market value of real property to be acquired prior to the date of valuation caused by the public improvement for which the property is acquired, or by the likelihood that the property would be acquired for the improvement, other than that due to physical deterioration within the reasonable control of the owner or occupant, shall be disregarded in determining the compensation for the property. The

(b) *The public entity shall provide the owner of real property to be acquired with a copy of the appraisal on which*

the offer is based. The appraisal shall also include a written statement of, and summary of the basis for, the amount it established as just compensation. ~~Where the property involved is owner-occupied residential property and contains no more than four residential units, the homeowner shall, upon request, be allowed to review a copy of the appraisal upon which the offer is based.~~ Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(b)

(c) Notwithstanding subdivision (a), a public entity may make an offer to the owner or owners of record to acquire real property for less than an amount which it believes to be just compensation therefor if (1) the real property is offered for sale by the owner at a specified price less than the amount the public entity believes to be just compensation therefor, (2) the public entity offers a price which is equal to the specified price for which the property is being offered by the landowner, and (3) no federal funds are involved in the acquisition, construction, or project development.

(e)

(d) As used in subdivision (b) (c), “offered for sale” means any of the following:

(1) Directly offered by the landowner to the public entity for a specified price in advance of negotiations by the public entity.

(2) Offered for sale to the general public at an advertised or published, specified price set no more than six months prior to and still available at the time the public entity initiates contact with the landowner regarding the public entity’s possible acquisition of the property.

Comment. Section 7267.2 is amended to expand the requirement that the public entity provide the owner of property to be acquired with a copy of the appraisal. Under subdivision (b), the public entity must provide the owner of any type of property, not limited to owner-occupied

residential property, with a copy of the appraisal. The appraisal is protected from admissibility in evidence under Section 7267.1.

Subdivision (b) is also amended to make the written statement and summary a part of the appraisal. As such, the written statement and summary are protected from admissibility under Section 7267.1 to the same extent as the appraisal.

It should be noted that the written statement and summary required by this section are in addition to the other statutory requirements for the appraisal — a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information. See Section 7260(k).
