

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

Evidence of Prejudgment Deposit  
Appraisal in Eminent Domain

March 2001

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.

Cite this report as *Evidence of Prejudgment Deposit Appraisal in Eminent Domain*, 31 Cal. L. Revision Comm'n Reports 109 (2001). This is part of publication #212 [2001-2002 Recommendations].

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CALIFORNIA LAW REVISION COMMISSION

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March 29, 2001

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

This recommendation would revise the statutes governing evidence of the condemnor's prejudgment deposit appraisal in order to:

- (1) Codify case law that evidence of the prejudgment deposit appraisal may be used for purposes of impeaching a witness who prepared the appraisal.
- (2) Emphasize that the protections against use of prejudgment deposit appraisal evidence apply equally to the property owner and the condemnor.
- (3) Make clear that evidence of the prejudgment deposit may be used in determining the amount of litigation expenses for which a condemnor may be assessed.

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

Respectfully submitted,

David Huebner  
*Chairperson*



## EVIDENCE OF PREJUDGMENT DEPOSIT APPRAISAL IN EMINENT DOMAIN

### **Introduction**

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 yet 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.”<sup>1</sup> The Legislature has implemented the constitutional authority by enactment of a detailed procedure governing deposit and withdrawal of probable compensation.<sup>2</sup>

As a practical matter, it is routine for the condemnor to use the prejudgment 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.

The law protects the condemnor from use of the prejudgment deposit appraisal against it at trial.<sup>3</sup> The intent of the law is to encourage the condemnor to make a fully adequate

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1. Cal. Const. art. I, § 19.

2. Code Civ. Proc. §§ 1255.010-1255.480. The statutory scheme was enacted on recommendation of the Law Revision Commission. All further statutory references are to the Code of Civil Procedure.

3. Section 1255.060.

prejudgment deposit, without fear of prejudicing its position at trial.<sup>4</sup>

Issues have arisen concerning several aspects of existing law:

- (1) Are the evidentiary rules effective in ensuring adequacy of the deposit, and can they be improved?
- (2) Does protection of a valuation witness from impeachment by a prejudgment deposit appraisal unduly impair the property owner's ability to prove fair market value?
- (3) Should the statute protect a property owner from use of preliminary appraisal data against the owner at trial to the same extent it protects a condemnor?

#### **Use of Prejudgment Deposit Appraisal to Determine Allowance of Litigation Expenses**

It is an unresolved question whether the protection afforded the condemnor from use against it of the prejudgment deposit appraisal realistically acts as an incentive for the condemnor. A more practical incentive is the possibility that the amount of litigation expenses assessed against a condemnor may be influenced by an unduly low deposit.

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

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4. The Commission's recommendation on the matter notes that, "This is a salutary rule because it encourages the plaintiff to make adequate deposits." *Recommendation Proposing the Eminent Domain Law*, 13 Cal. L. Revision Comm'n Reports 1007, 1048 (1975).

[The purpose] 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.

See Section 1255.060 Comment.

was unreasonable.<sup>5</sup> 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.”<sup>6</sup> 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.

The Commission recommends that the statute be revised to make clear that the prejudgment deposit is to be taken into account in determining the amount of litigation expenses allowed. This will help ensure the adequacy of the deposit.

This clarification will not have a detrimental effect on condemnors generally. 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 is ordinarily based on that amount.

### **Impeachment of Prejudgment Deposit Appraisal Witness**

One protection existing law provides the condemnor is that an appraisal witness may not be impeached at trial by the witness’ own earlier prejudgment deposit appraisal.<sup>7</sup>

This provision was construed in *County of Contra Costa v. Pinole Point Properties, Inc.*<sup>8</sup> In that case, the condemnor called as a trial witness the appraiser who had prepared the prejudgment deposit appraisal for the condemnor. The property owner sought to impeach the appraiser’s testimony with evidence of the earlier appraisal. The condemnor argued that Code of Civil Procedure Section 1255.060(b) precluded

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5. Section 1250.410.

6. Section 1250.410(b).

7. Section 1255.060(b).

8. 27 Cal. App. 4th 1105, 33 Cal. Rptr. 2d 38 (1994).

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.”<sup>9</sup>

The court in *Pinole Point Properties* was concerned that a literal interpretation of 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 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.<sup>10</sup>

The Commission has concluded that the statute should be revised to allow expressly for impeachment of an appraiser who later testifies as to a different value. An appraiser who testifies under oath at an eminent domain trial should be held to explain why that valuation differs from the valuation of the

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9. 27 Cal. App. 4th at 1113.

10. *Id.* at 1112.



same property made by the same appraiser earlier in the proceeding. The proposed revision would have the effect of codifying existing case law as expressed in *Pinole Point Properties*.

### **Protection of Property Owner's Valuation Statements**

If the condemnor is protected from use against it of valuation statements that it makes in connection with the prejudgment deposit, does not fairness demand that the property owner be protected to the same extent?<sup>11</sup> Existing law appears to accomplish this result already. Section 1255.060 prohibits reference at trial to the amount deposited "or withdrawn."<sup>12</sup> Likewise, no "other statements" made in connection with a deposit or withdrawal may be considered to be an admission of "any party."<sup>13</sup> 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.<sup>14</sup> All of these provisions would apply equally to the condemnor and the property owner. The Commission's Comment to Section 1255.060, as revised, emphasizes this point.

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11. For example, where a property owner applies to the court for an increase of the deposit, based on the property owner's own appraisal, the condemnor should not be allowed to use that appraisal against the property owner in the subsequent valuation trial.

12. Section 1255.060(a).

13. Section 1255.060(b).

14. Section 1255.060(c).



## PROPOSED LEGISLATION

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

SECTION 1. 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~~ *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 ~~those~~ 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 matters considered by the court in determining the amount of litigation expenses that may be allowed include any deposit by the plaintiff of probable compensation in the proceeding. The other changes in Section 1250.410 are technical.

**Note.** Section 1250.410 was amended by 2001 Cal. Stat. ch. 428, § 2, effective January 1, 2002. The proposed revisions set out above are directed to the amended version of Section 1250.410.

**Code Civ. Proc. § 1255.060 (amended). Limitations on use of evidence in connection with deposit**

SEC. 2. Section 1255.060 of the Code of Civil Procedure is amended to read:

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~~ *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, ~~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. 2d 38 (1994).

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.

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