Study EmH-455 February 9, 2000

Third Supplement to Memorandum 2000-11

Litigation Expenses in Eminent Domain Cases (Additional Comments)

We have received the letter attached as Exhibit pp. 1-4 from David Collins of Gordon & Rees in San Francisco. Mr. Collins writes in support of the draft tentative recommendation on litigation expenses in eminent domain cases.

He states that the existing requirement of a determination of reasonableness for an award of litigation expenses involves substantial litigation and deters settlements. The proposed revision would help alleviate these problems.

He goes on to argue that the proposed revision is only a partial remedy, and that justice requires that a person whose property is taken for public use should be made whole. This would require that the property owner recover litigation expenses in every case.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

GORDON & REES, LLP

ATTORNEYS AT LAW
EMBARCADERO CENTER WEST
275 BATTERY STREET
TWENTIETH FLOOR
SAN FRANCISCO, CA 94111
PHONE: (415) 986-5900
FAX: (415) 986-8054

DAVID COLLINS

February 9, 2000

Nathaniel Sterling, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94306
FAX: (650) 494-1827

TRANSMITTED BY FAX
AND FIRST CLASS MAIL

RE. Litigation Expenses In Eminent Domain
(Memorandum 2000-11/Study EmH-455)

Dear Mr Sterling.

I have practiced condemnation law for nearly fifteen years I am also a former member of the California State Bar's Attorneys Fees Task Force. I recently reviewed Staff Memorandum 2000-11, which proposes an amendment to Code of Civil Procedure Section 1250.410(b) The proposed amendment would entitle eminent domain defendants to recover their litigation expenses if the compensation awarded is closer to the defendant's final demand than it is to the plaintiff condemnor's final offer

I support the proposed amendment, which represents a vast improvement over the current state of the law. As the Commission recognizes, the present language of Section 1250.410 is so nebulous that it encourages unfair and unpredictable results (See, e.g., Los Angeles County Metropolitan Transportation Authority v. Continental Development Corporation (1997) 16 Cal.4th 694, 719-722 (litigation expenses denied on a $1 million dollar verdict even though the final offer was only $200,000 and the final demand was $500,000).) Under current law, litigation expenses have become a mini-trial on unworkably subjective factors such as the judge-made concept of "good faith, care and accuracy" in formulating the final offer and the final demand (Id at 720-721.) Contrary to what the California Department of Transportation says in its opposition letter, these proceedings typically involve months, not "a ten to fifteen minute hearing," and involve hundreds if not thousands of pages of briefs, declarations and other exhibits. (E.g., People ex rel Department of Transportation v. Yuki (1995) 31 Cal.App.4th 1754, 1762.) The Continental Development case is just one illustration of how egregiously present law has favored condemnors. This, in turn, has deterred settlements. Secure in the belief that they can escape litigation expenses liability simply by presenting colorable evidence of good faith,

Feb-09-00 01:32pm From-GORDON & REES,LLP + T-100 P.02/05 F-841

public entities, with their invariably greater resources, have no incentive to settle early. They instead unnecessarily prolong eminent domain cases, sometimes for years

Because the proposed amendment would help to alleviate these problems, I urge its adoption for presentation to the California Legislature I also concur in comments by Norman Matteoni and Professor Gideon Kanner in support of the proposed amendment I write separately to only point out, with utmost respect, that the proposed amendment does not fully remedy the injustice historically suffered by California's property owners in eminent domain cases

Constitutional values and basic fairness dictate that defendants in all eminent domain cases should be entitled to recover their litigation expenses, without reference to the mathematical relationship between the final offer, the final demand and the final award of just compensation. Section 1250.410(b) should be amended to read. "The court, as part of the judgment, shall award litigation expenses to the defendant."

Nothing less comports with the constitutional mandate to put the defendant property owner "in as good a position pecuniarily as if the property had not been taken." (United States v. Virginia Electric & Power Co. (1961) 365 U.S. 624, 633; Redevelopment Agency v. Gilmore (1985) 38 Cal.3d 790, 797, 801n.12.) Memorandum 2000-11 observes that, under present case law, attorneys fees and expert witness fees are not considered part of constitutionally required just compensation (County of Los Angeles v. Ortiz (1971) 6 Cal.3d 141, 145-149.) However, other litigation costs are part of just compensation. (San Francisco v Collins (1893) 98 Cal. 259, 262-263.) Compensation is not "just" under constitutional standards, moreover, if it is reduced by unreimbursed litigation expenses absorbed by the property owner. It neither makes the owner whole nor puts the owner in the same pecuniary position that the owner otherwise would have occupied. This is an injustice allowed for years by Section 1250 410, one which the amendment proposed by Memorandum 2000-11 does not completely eliminate.

If I may indulge in a baseball metaphor, it is important for the Commission to keep its eye on the constitutional ball Some staff comments, as well as letters submitted by the California Department of Transportation and the Sacramento County Counsel's Office, express concern for the protection of condemnors. This misplaced concern stands the California Constitution on its head California's Just Compensation Clause is intended to protect the people against the government, not the other way around. (Rose v. State (1942) 19 Cal.2d 713, 725 ("the constitutional provisions in question were not enacted to protect in any way the sovereign state, but were specifically enacted to protect and preserve the individual rights of the subjects of the sovereign.").) Constitutional policy and fundamental fairness require that the government, not the

Feb-09-00 01:33pm From-GORDON & REES,LLP + T-100 P.03/05 F-841

property owner, should bear the expense when the government hales the owner into court to take or damage the owner's property for the greater public good.

This is especially true given the heightened protection afforded to property rights under the California Constitution The very first section of the California Constitution prominently lists "acquiring, possessing and defending property" among the "inalienable rights" guaranteed to all Californians. (California Constitution, Article I, Section I.) This inalienable right "is as old as the Magna Charta. It lies at the foundation of our constitutional government, and 'is necessary to the existence of civil liberty and free institutions.'" (Miller v. McKenna (1944) 23 Cal.2d 774, 783; accord Lynch v. Household Financial Corp. (1972) 405 U.S. 538, 552 ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.").) The heightened importance of property rights under the California Constitution amply justifies their heightened protection under statutes such as Section 1250.410(b). The Legislature's power to provide such heightened statutory protection is beyond question. (Gilmore, 38 Cal.3d at 801.)

Finally, I would ask the Commission to view critically the commentary by the California Department of Transportation and the Sacramento County Counsel's Office, as well as any similar commentary by other public entities. With all due respect, this commentary reflects that many public entities have lost perspective about their proper role in condemnation litigation. Their role is not supposed to be an adversarial one calculated to maximize leverage over the beleaguered property owner, who never wanted to be in court to begin with. It is supposed to be a neutral role fulfilled with the objective of protecting the property owner as vigilantly as the public purse. The law on this point is clear:

> A government lawyer in a civil action...has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results. Occupying a position analogous to a public prosecutor, he is 'possessed ...of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.' The duty of a government attorney in an eminent domain action, which has been characterized as 'a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner' is of high order. 'The condemnor acts in a quasi-judicial capacity and should be encouraged to exercise his tremendous power fairly, equitably and with a deep understanding of the theory and practice of just compensation.'

(City of Los Angeles v. Decker (1977) 18 Cal.3d 860, 871 (citations omitted).)

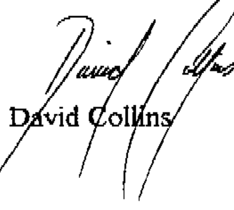
Nathaniel Sterling, Esq
February 9, 2000
Page Four

The reality today is unfortunately very different. Eminent domain litigation does not occur on a level playing field Public entities enjoy tactical advantages and greater resources which they typically exploit to the detriment of property owners. According to one government lawyer, these advantages now extend even to the composition of the appellate bench. (Frank, The California Supreme Court - A Tribunal Of Public Lawyers (1996) 20 Public Law J. (No. 1) 1,2.)

Legislative protection of property owners, through measures such as the proposed amendment to Section 1250.410(b), is more important now than ever before I strongly urge adoption of the amendment for presentation to the Legislature. It represents a long overdue step toward the more equitable treatment of defendants in eminent domain cases.

Very truly yours,

GORDON & REES, LLP



David Collins