Study Em-458 April 12, 2000

Second Supplement to Memorandum 2000-24

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

Attached to this memorandum is a letter from Norm Matteoni presenting the consensus positions of a number of property owners' attorneys on issues raised by Memorandum 2000-24. We will analyze their positions orally at the meeting.

Respectfully submitted,

Nathaniel Sterling
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April 10, 2000

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Re: Condemnation; Study Em-458, Memorandum 2000 - 24 (March 13, 2000)

Dear Nat:

I circulated the above-mentioned Staff Memorandum of March 13, 2000 to several members of the California Bar who primarily represent real property owners in condemnation actions. I received comments from several of those attorneys and submit, what I understand to be, the consensus of those attorneys concerning recommendations of Staff, as set forth in the March 13, 2000 Memorandum, to be considered on April 13.

First, there is general endorsement of the suggested changes to the procedure for deposit of probable compensation (CCP §1255.010) and the increase or decrease in the amount of deposit (CCP §1255.030). These attorneys adhere to the belief that in order to encourage early resolution of condemnation actions, the public agency should be required to be more specific in its statement of valuation explaining the probable compensation figure the agency asserts is applicable at the time of deposit. With more specifics provided at an earlier stage, the property owner can analyze the agency's figure and where it disagrees present information that it feels was not analyzed or fully considered. These attorneys also favor adding a requirement that the summary statement of valuation contain sufficient detail to explain the basis for the agency's determination of highest and best use and, for partial takes, severance damage and benefits.

On the other hand, they do not favor expanding the time for formal exchange of valuation data beyond the 60 days now provided by statute for the following reasons:

1. The property owner is forced to play a catch up game to the public agency which has initiated and completed its appraisal prior to filing the condemnation action.

2. Fast track rules put the property owner at a disadvantage, because usually experts are not retained until after the complaint has been filed.

3. Where there is a loss of goodwill claim, this issue requires the most time to analyze where a business is in the process of relocating. A track record of operation at the new location is the best evidence on the issue of loss of goodwill. At the beginning of the case, the business owner is involved looking for a new location and usually attempts to postpone the time of move as long as possible. From the agency's side, the goodwill issue is not analyzed until a claim is made. Thus, advancing the date of exchange will compromise the time for investigation and analysis of this issue.

4. Last year's legislation shortening time for exchange of statutory offer and demand to 20 days prior to trial works with the current 60 day time requirement for exchange of valuation data by providing 40 days for depositions. Under the prior rule, it was difficult to schedule and complete depositions before the time of statutory offer and demand and therefore attorneys for both parties were inclined to stipulate to a later date for the offer and demand.

5. In any case that has complicated valuation issues, the appraiser will require supporting opinions from land planners, civil engineers and environmental consultants.

The attorneys I talked to are not in favor of any legislation (proposed CCP §1260.040) to formalize an *in limine* procedure specifically designed for eminent domain actions. They feel that there are problems with the existing system where motions are often based on statements made by a witness in depositions by questions from the opposing side. These depositions frequently do not fully explore all the foundational basis for the witness's opinion. One attorney commented that

the proposed legislation is an erosion of the role of the jury in an eminent domain case. A jury trial is guaranteed and the jury is to determine the compensation issue. Another concern is that the trial judge should hear motions *in limine* at the time of trial, when all points concerning the evidence are available to the parties and the judge can understand the overall context of the objection in light of the evidence proposed to be elicited before the jury. It is likely under the proposal that these type of motions will end up on the law and motion calendar, the judge for which will not give them the necessary time required. Often times a trial judge will hear arguments on a motion *in limine* prior to the presentation of the evidence to the jury and, in the interest of efficient case management, not rule on the motion until foundational evidence is presented to the jury. The judge does not want to hear the evidence twice. To seriously consider this proposal, there would have to be a survey of the existing use of Evidence Code §402, the procedure for determining foundational and other preliminary facts. It is the belief of these attorneys that only the trial judge is sufficiently focused on the case at hand to give *in limine* motions and 402 hearings the time necessary. Further trial judges have a hard time understanding separate rules for condemnation actions in civil litigation.

Finally, as to encouraging alternative dispute resolutions, these attorneys generally believe that such efforts are not appropriate for eminent domain actions, but some of them have used mediation which they believe should remain the subject of mutual agreement between the parties. Those that accept mediation do think that there should be a procedure to allow waiver of trial court delay reduction programs to facilitate such mediation as proposed in CCP §1250.430.

Very truly yours,

NORMAN E. MATTEONI

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CALIFORNIA LAW REVISION COMMISSION
MEMORANDUM 2000-24

The following California lawyers devote a substantial portion of their law practice to eminent domain and have been surveyed by Norman E. Matteoni for the purpose of comment on the above referenced study and recommendations. By our signatures, we authorize Mr. Matteoni to communicate our consensus positions on the issues in the attached letter.