

#36

11/3/65

Memorandum 65-75

Subject: Study No. 36(L) - Condemnation Law and Procedure (Date of Valuation)

This memorandum concerns the question of what is and should be the appropriate date for ascertaining value and damages for the taking of property. This matter is covered on pages 67-82 of the research study on "Problems Connected With the Date of Valuation in Eminent Domain Cases."

Code of Civil Procedure Section 1249 provides in substance that the property to be taken shall be valued as of the date on which the summons is issued unless, without fault on the part of the defendant, the trial does not occur within one year. In the latter event, the property is valued as of the date of the trial even though possession of the property may have been taken by the condemner long before trial. People v. Murata, 55 Cal.2d 1 (1960), held that the date of valuation upon retrial of a condemnation case is the same as the date of valuation used in the original trial.

We list below four alternatives; one alternative is the existing law, the second is the Consultant's Recommendation, and the other two are alternatives which were considered and rejected by the consultant. Following those alternatives, we will give the staff's recommendation on this matter.

Alternative 1. Existing law. The existing law is stated above. The consultant and the staff believe that it is not a satisfactory provision. The reasons for this conclusion are indicated in the discussion of the Consultant's Recommendation and the Staff's Recommendation.

Alternative 2. Consultant's Recommendation. The consultant recommends retention of the existing law except in cases where possession is taken prior to the existing date of valuation, and in such cases the consultant recommends

that the property be valued as of the date of possession. The consultant also recommends a change in the existing law as it applies to new trials. In such cases, the consultant recommends that the property be valued as of the date of the new trial (unless, of course, possession was taken earlier or the new trial is within one year of the issuance of summons).

Alternative 3. Date of trial or date of possession, whichever is earlier.

An alternative that has been adopted in a number of states is to value the property as of the date of trial or the date of possession, whichever is earlier, in all cases. The consultant does not recommend adoption of this alternative, because it would make it difficult for appraisers to determine the value of the property and, in a rising market, it would encourage condemnees to seek to delay proceedings.

Alternative 4. Date of determination that property is to be condemned.

Another alternative mentioned by the consultant is to value the property as of the date of the determination by the condemning agency that the particular property is to be condemned. A recent Arizona statute expressed this policy; however, that statute has been held unconstitutional by the Supreme Court of Arizona and would be undesirable as a matter of policy.

Attached as Exhibit I (pink pages) is a letter from the Department of Public Works which was written in March 1961, commenting on the four alternatives listed above.

Staff Recommendation

The staff recommends that the date of valuation should be the date of the issuance of the summons unless, without fault on the part of the defendant, the trial does not occur within one year. In the latter event, the property should be valued as of the date of the trial or the date possession is taken,

whichever is the earlier. In the case of a new trial, the date of valuation should be the date of the new trial or the date possession is taken, whichever is the earlier. We believe that this recommendation is fair to both the property owner and the condemning agency. The recommendation facilitates trial preparation in the usual case that is tried within one year. This means that in the ordinary case, the appraisers can prepare their appraisal reports as of a specific known date. In cases that are delayed beyond one year, a condemning agency with the right of possession is better off than it now is because, by taking possession the agency can fix the date of valuation and stop any increased expense that may result from a general increase in market prices. In the case of a new trial, the recommendation would change the existing law to the detriment of the condemning agency, but the detriment is minimal for inasmuch as any condemner may take possession after judgment under C.C.P. § 1254, any condemning agency can fix the date of valuation at approximately the same date as the date of the original judgment and thus stop any cost increase that may result from a general inflationary spiral simply by taking possession under Section 1254. The recommendation would substantially improve the lot of the property owner. Primarily, it would improve his lot by giving him a later date of valuation in case of a new trial and thus remove a major defect in the existing law. It is not unfair to deprive a property owner of a later date of valuation in cases where possession is taken, for he can now draw down the entire deposit that must be made by the condemner.

The staff does not believe that the Department of Public Works took a reasonable position in their letter which is attached as Exhibit I. We hope that, upon reviewing this matter, the Department will conclude that the staff's recommendation is a reasonable solution to this problem.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

STATE OF CALIFORNIA
Department of Public Works
DIVISION OF CONTRACTS AND RIGHTS OF WAY
(LEGAL)

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March 13, 1961

PLEASE REFER TO
FILE NO.

California Law Revision
Commission

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University, California

Dear Mr. DeMouilly:

Re: Study of Problems Connected with the
Date of Valuation in Eminent Domain cases.

In Memorandum No. 101, dated December 5, 1960, which reviewed the Consultant's Study on Date of Valuation, the Law Revision Commission staff indicated that four policy questions must be resolved by the Commission before a proposed statute can be drafted. In order to assist the Commission in resolving these questions, the Department of Public Works desires to present its comments and suggestions on the policy matters.

1. What date should be taken as the date of valuation?

The staff's report indicates that there are four alternate dates at which the condemned property can be valued-- the existing law, the Consultant's Recommendation, and two other alternatives which were considered by the Consultant and rejected. The Department has considered all four methods of determining the date at which property can be valued and believes that the present method is satisfactory and does not present the problems that are inherent in the other alternatives. Each method will be commented on separately.

A. Code of Civil Procedure Section 1249 presently

provides that property to be taken shall be valued as of the date on which the summons is issued unless the trial does not occur within one year and the delay is not caused by the defendant; then the property is valued as of the date of the trial. This provision has worked well in the past and has provided an incentive to the condemnor, in a rising market, to bring eminent domain cases to trial as soon as possible and to take advantage of the priority given to condemnation cases (C.C.P. 1264). It has another advantage--in a declining real estate market, the property owner can file his answer and immediately move to set the case for trial to take advantage of the early valuation date--the issuance of summons.

We believe that the present provision, as to the date of valuation, should be retained since it has worked satisfactorily and equitably in the past. The one-year period for the change in valuation dates provides the needed incentive, in cases of rapidly falling or rising markets, for either the condemnor or condemnee to have the case tried within the one-year period.

The Consultant notes that the present law has one serious disadvantage in that the date of valuation can be the date of trial even though the condemnor has taken possession much earlier. This results in the property owner's receiving the advantage of the increase in market value between the time immediate possession is taken and the date of trial, and also receiving interest on the award for the possession of his property.

Both the Consultant and the staff have indicated that the date of valuation on new trial is uncertain. Since the writing of the Consultant's report and the staff's analysis, the Supreme Court, in the recent case of People v. Murata, 55 Cal.2d 1, has held that the date of valuation upon retrial of a condemnation case is the same as the date of valuation used in the original trial. We believe the Murata case correctly stated the law and no change is necessary. The equities of the situation require that the retrial be on the same issues as in the original trial.

The Department, as it indicated in its report to the Commission on the Title and Possession Study, still feels that where the retrial is had within eight months after the remittitur is filed in the lower court, the date of valuation should be the date used in the original trial. Where the retrial is not had within eight months after the remittitur is

issued, the trial date should be the date of the new trial or the date of taking of possession, whichever is earlier.

The change in wording of "not tried within one year" to "not brought to trial within one year" is a codification of the ruling of the Supreme Court in the Murata case in interpreting the present Code provision.

B. The Consultant's recommendation is fully stated in his Study on pages 78 and 79. He recommends that Section 1249 be retained where the condemnor does not take possession. However, where the condemnor takes possession, and the date of valuation would otherwise be the date of trial, the Consultant recommends that the date of valuation be the date of the order of possession. As pointed out above, this would not allow the property owner to receive the advantage of the increase in market value as well as interest on the award for the possession of his property.

As a part of the Consultant's recommendation, they suggest that in the case of new trials the property be valued as of the date of the new trial unless possession was taken earlier or a new trial is had within one year of the issuance of summons. This is contrary to the case of People v. Murata, 55 Cal.2d 1, wherein it was stated that any such construction "would entail results which we can only regard as unreasonable." (p. 7) The Supreme Court supported its ruling with three poignant reasons:

(1) "... through no fault of its own, for exercising successfully its right of appeal, plaintiff has been penalized by having the retrial, not on the issues which were tried before the court in the first trial but on new issues which are less favorable to it. We cannot agree to a construction of section 1249 which leads to such an unreasonable and inequitable result." (p. 7)

(2) "... if the date of fixing value and damages shifts from trial to trial, why should it become fixed if the delay in the first trial is caused by defendant and remain floating if the plaintiff exercises the diligence to bring the issue to its first trial within the one-year period? ..." (p. 9)

(3) "... Certainly we cannot suppose, if the

Legislature had intended that the section should have application in the case of second or subsequent trials, that, having provided that defendant should not have the benefit of the later valuation date if 'the delay is caused by the defendant,' it would not have made a similar provision depriving defendant of the right to valuation as of the date of a second trial where the plaintiff had secured a reversal of the first judgment. ... To hold otherwise, as we have indicated above, would be to hold that the Legislature had deliberately deprived the plaintiff of the right to an effective appeal." (p.10)

The Supreme Court recognized that the present rule on date of valuation would be thwarted by any other construction. The equities of the situation require that the retrial be on the same issues as in the original trial.

C. Another alternative for a date of valuation, as indicated in the Consultant's report and the staff's analysis, is to value property as of the date of the trial or the date of possession, whichever is earlier. No mention is made of the date of valuation upon new trial. Presumably, it would be the date of the new trial or the date of possession, whichever is earlier. We agree with the Consultant that this alternative should not be adopted because it would make it difficult for appraisers to determine the date of valuation and hence the value of the property, and in a rising market would encourage condemnees to delay the proceedings.

D. The last alternative is to value the property as of the date of determination by the condemnor that the particular property is to be condemned. The consultants object to this alternative in that it advances the commencement of the period that the condemnee is precluded from improving his property or otherwise dealing with it. This alternative would be inconsistent with present C.C.P. Section 1249 and with proposed Section 1249.1 in Senate Bill No. 206.

It is difficult to understand what is meant by "a determination ... that the particular property is to be condemned." Does it mean the date the condemnor commences a study of a particular project, or the date the public agency authorizes condemnation of the property? We would recommend retention of the present date of issuance of summons as being the most practicable date and the one which definitely indicates the condemnor's intentions to acquire a particular parcel of property. The adoption of a condemnation resolution does not necessarily commit the condemnor to follow a particular plan or to take a particular parcel of property.