

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Evidence of Prejudgment Deposit Appraisal in Eminent Domain

December 2000

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN February 28, 2001.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

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

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

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

EVIDENCE OF PREJUDGMENT DEPOSIT
APPRAISAL IN EMINENT DOMAIN

1 **Introduction**

2 The California Constitution enables the condemnor in an eminent domain
3 proceeding to take immediate possession of the property, even though valuation
4 issues are yet to be tried and just compensation yet to be awarded. “The
5 Legislature may provide for possession by the condemnor following
6 commencement of eminent domain proceedings upon deposit in court and prompt
7 release to the owner of money determined by the court to be the probable amount
8 of just compensation.”¹ The Legislature has implemented the constitutional
9 authority by enactment of a detailed procedure governing deposit and withdrawal
10 of probable compensation.²

11 As a practical matter, it is routine for the condemnor to use the prejudgment
12 procedure. The condemnor in the ordinary case makes a prejudgment deposit of
13 probable compensation. The deposit is based on the condemnor’s appraisal of the
14 property. The deposit enables the condemnor to take immediate possession of the
15 property. The deposit also fixes the valuation date.

16 The law protects the condemnor from use of the prejudgment deposit appraisal
17 against it at trial.³ The intent of the law is to encourage the condemnor to make a
18 fully adequate prejudgment deposit, without fear of prejudicing its position at
19 trial.⁴

20 Issues have arisen concerning several aspects of existing law:

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

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.

3. Code Civ. Proc. § 1255.060.

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.

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

2 It is an unresolved question whether the protection afforded the condemnor from
3 use of the prejudgment deposit appraisal against it realistically acts as an incentive
4 for the condemnor. A more practical incentive is the possibility that litigation
5 expenses will be assessed against a condemnor that makes an unduly low deposit.

6 Existing California law provides that litigation expenses may be awarded to the
7 property owner in an eminent domain proceeding if the final pretrial demand of
8 the property owner was reasonable and the final pretrial offer of the condemnor
9 was unreasonable.⁵ In determining the amount of litigation expenses to be
10 awarded, “the court shall consider the offer required to be made by the plaintiff
11 pursuant to Section 7267.2 of the Government Code and any other written offers
12 and demands filed and served prior to or during the trial.”⁶ It is not clear whether
13 the condemnor’s prejudgment appraisal and deposit are considered to be “other
14 written offers and demands filed and served prior to or during the trial” within the
15 meaning of this provision.

16 The Commission recommends that the statute be revised to make clear that the
17 prejudgment appraisal and deposit are to be taken into account in determining the
18 amount of litigation expenses allowed. This will help ensure the adequacy of the
19 deposit.

20 This clarification will not have a detrimental effect on condemnors generally.
21 The law already requires that the offer under Government Code Section 7267.2 be
22 taken into account in determining the amount of litigation expenses, and the
23 prejudgment deposit appraisal is ordinarily based on that amount.

24 **Impeachment of Prejudgment Deposit Appraisal Witness**

25 One protection existing law provides the condemnor is that an appraisal witness
26 may not be impeached at trial by the witness’ own earlier prejudgment deposit
27 appraisal.⁷

28 This provision was construed in *County of Contra Costa v. Pinole Point*
29 *Properties, Inc.*⁸ In that case, the condemnor called as a trial witness the appraiser
30 who had prepared the prejudgment deposit appraisal for the condemnor. The
31 property owner sought to impeach the appraiser’s testimony with evidence of the
32 earlier appraisal. The condemnor argued that Code of Civil Procedure Section
33 1255.060(b) precluded impeachment of the witness. The court of appeal held that,
34 despite the clear language of the statute, the statute could not have been intended
35 to apply where the condemnor calls its own prejudgment deposit appraiser as a
36 valuation witness at trial. The court held that, “when a condemnor calls an expert
37 witness to testify at trial to valuation of the subject property, section 1255.060,

5. Code Civ. Proc. § 1250.410.

6. Code Civ. Proc. § 1250.410(b).

7. Code Civ. Proc. § 1255.060(b).

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

1 subdivision (b) does *not* proscribe his impeachment by use of an appraisal that the
2 witness theretofore made in connection with the condemnor’s deposit for pretrial
3 possession of that property.”⁹

4 The court in *Pinole Point Properties* was concerned that a literal interpretation
5 of the statute might violate the constitutional guarantee of just compensation. The
6 essence of a condemnation action is to determine the fair market value of
7 condemned property, and a rule that prohibits a landowner from questioning a
8 witness about a prior inconsistent opinion interferes with the constitutional right to
9 compensation in a fundamental way.

10 If the condemnor elects to present the jury with an expert witness whose
11 opinion previously expressed and sought by that condemnor for purposes of a
12 condemnor’s deposit differs from the valuation testimony before the jury, that
13 witness, it would seem, should be subject to the cross-examination expert
14 witnesses customarily receive. Nothing produces the truth for fact finders
15 weighing conflicting expert testimony better than vigorous and full cross-
16 examination of those witnesses.¹⁰

17 The Commission has concluded that the statute should be revised to allow
18 expressly for impeachment of an appraiser who later testifies as to a different
19 value. An appraiser who testifies under oath at an eminent domain trial should be
20 held to explain why that valuation differs from the valuation of the same property
21 made by the same appraiser earlier in the proceeding.

22 The proposed revision would have the effect of codifying existing case law as
23 expressed in *Pinole Point Properties*. It is consistent with the Commission’s
24 recommendation that the prelitigation appraisal under the Relocation Assistance
25 Act¹¹ should be available for impeachment of a valuation witness who prepared
26 the appraisal for the condemnor.¹²

27 **Protection of Property Owner’s Valuation Statements**

28 If the condemnor is protected from use against it of valuation statements that it
29 makes in connection with the prejudgment deposit, does not fairness demand that
30 the property owner be protected to the same extent?¹³ In fact, existing law appears
31 to accomplish this result already. Section 1255.060 prohibits reference at trial to
32 the amount deposited “or withdrawn.”¹⁴ Likewise, no “other statements” made in
33 connection with a deposit or withdrawal may be considered to be an admission of

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

10. *Id.* at 1112.

11. Gov’t Code § 7267.1.

12. *Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain*, 30 Cal. L. Revision Comm’n Reports ____ (2000).

13. 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.

14. Code Civ. Proc. § 1255.060(a).

1 “any party.”¹⁵ And an appraiser who has made a valuation statement in connection
2 with a prejudgment deposit may not be called over the objection of “the party” on
3 whose behalf the valuation statement was made.¹⁶ All of these provisions would
4 apply equally to the condemnor and the property owner. The Commission’s
5 Comment to Section 1255.060, as revised, emphasizes this point.

15. Code Civ. Proc. § 1255.060(b).

16. Code Civ. Proc. § 1255.060(c).

PROPOSED LEGISLATION

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

2 SECTION 1. Section 1250.410 of the Code of Civil Procedure is amended to
3 read:

4 1250.410. (a) At least 20 days prior to the date of the trial on issues relating to
5 compensation, the plaintiff shall file with the court and serve on the defendant its
6 final offer of compensation in the proceeding and the defendant shall file and serve
7 on the plaintiff its final demand for compensation in the proceeding. ~~Such~~ These
8 offers and demands shall be the only offers and demands considered by the court
9 in determining the entitlement, if any, to litigation expenses. Service shall be in the
10 manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of
11 Part 2.

12 (b) If the court, on motion of the defendant made within 30 days after entry of
13 judgment, finds that the offer of the plaintiff was unreasonable and that the
14 demand of the defendant was reasonable viewed in the light of the evidence
15 admitted and the compensation awarded in the proceeding, the costs allowed
16 pursuant to Section 1268.710 shall include the defendant's litigation expenses.

17 (c) In determining the amount of such litigation expenses allowed under this
18 section, the court shall consider the offer required to be made by the plaintiff
19 pursuant to Section 7267.2 of the Government Code, any deposit made by the
20 plaintiff pursuant to Chapter 6 (commencing with Section 1255.010), and any
21 other written offers and demands filed and served ~~prior to~~ before or during the
22 trial.

23 (e)

24 (d) If timely made, the offers and demands as provided in subdivision (a) shall
25 be considered by the court on the issue of determining an entitlement to litigation
26 expenses.

27 **Comment.** Section 1250.410 is amended to make clear that the matters considered by the court
28 in determining the amount of litigation expenses that may be allowed include any deposit by the
29 plaintiff of probable compensation in the proceeding. The other changes in Section 1250.410 are
30 technical.

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

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

34 1255.060. (a) The amount deposited or withdrawn pursuant to this chapter shall
35 not be given in evidence or referred to in the trial of the issue of compensation.

36 (b) In the trial of the issue of compensation, ~~a witness may not be impeached by~~
37 ~~reference to any~~ an appraisal report, written statement and summary of an
38 appraisal, or other statements made in connection with a deposit or withdrawal

1 pursuant to this chapter, ~~nor shall such a report or statement and summary~~ shall not
2 be considered to be an admission of any party.

3 (c) Upon objection of the party at whose request an appraisal report, written
4 statement and summary of the appraisal, or other statement was made in
5 connection with a deposit or withdrawal pursuant to this chapter, the person who
6 made such the report or statement and summary or other statement may not be
7 called at the trial on the issue of compensation by any other party to give an
8 opinion as to compensation. If the person who prepared the report, statement and
9 summary, or other statement is called at trial to give an opinion as to
10 compensation, the report, statement and summary, or other statement may be used
11 for impeachment of the witness.

12 **Comment.** Section 1255.060 is amended to allow impeachment of a valuation witness who
13 prepared an appraisal report, written statement and summary of an appraisal, or other statement
14 made in connection with a deposit or withdrawal pursuant to this chapter. This codifies existing
15 law. *County of Contra Costa v. Pinole Point Properties, Inc.*, 27 Cal. App. 4th 1105, 33 Cal. Rptr.
16 2d 38 (1994).

17 It should be noted that Section 1255.060 protects an appraisal statement made by or on behalf
18 of a property owner in connection with a deposit or withdrawal under this chapter to the same
19 extent as one made by or on behalf of the condemnor.
