

EMINENT DOMAIN

I. INTRODUCTION AND OVERVIEW

Eminent Domain or, as it is sometimes referred to “Condemnation,” is the power to take real or personal property for a public use. California courts have found the power of eminent domain is an inherent attribute of state sovereignty.

The process by which real property is condemned for public use is governed primarily by statute. (Code of Civil Procedure sections 1230.010, et seq.) The legal authority for educational entities to condemn property is contained in Education Code sections 1047 (independent county boards of education), 35270.5 (K-12 districts), and 94500 (community college districts). The California Constitution limits the exercise of eminent domain. This limitation is found in Article 1, section 19 which provides that the taking be for a public use and that just compensation be paid to the property owner.

Condemnation involves much more than merely filing a lawsuit. It is a complex area of the law involving a number of pre-litigation steps and potential pitfalls. These materials are not intended to be an exhaustive discussion of the subject, but merely an introduction to the major considerations involved where the eminent domain process may be used to acquire property.

II. PRE-CONDEMNATION ISSUES

A. Title Report

A preliminary title report must be obtained in order to determine who owns the property and those who possess some other interest in the property (e.g., judgments, liens, etc.). This is necessary because all persons possessing an interest in the property must be named as defendants if the eminent domain lawsuit is subsequently filed. If, ultimately, it is not possible to negotiate a purchase of the property, it is usually advisable to obtain a litigation guarantee from the title company. This document is in the form of a title report but it is also an assurance from the title company that all record interest holders have been identified. If it is ultimately determined that an interest holder was not included in the lawsuit, the title company is liable for the oversight up to the amount of the litigation guarantee.

B. Appraisal

An appraisal of the property is necessary in order to determine its fair market value. This is a necessary prelude to both negotiations or possible condemnation. If condemnation is even a remote possibility, the owner of the property must be given written notice and an opportunity to accompany the appraiser during the inspection of the property. It is important to employ an appraiser with the necessary qualifications and expertise to prepare a comprehensive appraisal and be able to effectively defend it in court. Care must be taken to utilize an appraiser with the designation MAI, (Member Appraisal Institute). It is also critical that the appraiser be instructed to utilize the definition of Fair Market Value found in CCP section 1263.320. A further discussion of Fair Market Value is contained in section IV.A below.

C. Offer to Purchase

Prior to adopting a Resolution of Necessity, the district must make a written offer to purchase the property to the owner(s) which cannot be less than the fair market value reflected in the appraisal. (Government Code section 7267.2.) In addition, the district must provide the owner(s) with a written statement and summary of the basis for the amount established as just compensation. The written statement and summary must contain detail sufficient to indicate clearly the basis for the offer, including but not limited to, all of the following information:

- The date of valuation, highest and best use, and applicable zoning of property.
- The principal transactions, reproduction or replacement cost analysis, or capitalization analysis, supporting the determination of value.
- Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated and shall include the calculations and narrative explanation supporting the compensation, including any offsetting benefits.

Further, if the property is owner-occupied residential property (containing no more than four residential units), the homeowner, upon request, must be allowed to review a copy of the appraisal upon which the offer is based. The district may, but is not required to, satisfy the written statement, summary, and review requirements by providing the owner a copy of the appraisal on which the offer is based. (Government Code section 7267.2.)

Lastly, the condemning agency must offer to pay up to \$5,000.00 towards an appraisal commissioned by the property owner as well as provide the property owner with a pamphlet describing his/her/its rights in connection with an eminent domain action.

D. Resolution of Necessity

As a prelude to commencing an eminent domain action, the district must pass a Resolution of Necessity. (Code of Civil Procedure section 1245.220.) However, prior to adoption, the district must notify all persons with an interest in the property of the date, time, and place of the hearing at which the governing board plans to adopt the Resolution of Necessity. (Code of Civil Procedure section 1245.235.) Appendix II to these materials contains examples of resolutions typically used in a condemnation matter, including a "Resolution Establishing Just Compensation," a "Resolution Setting Hearing to Adopt Resolution of Necessity for Acquisition of Real Property" and a "Resolution of Necessity." While there is no specific time requirement between the notice and the hearing, Code of Civil Procedure section 1245.235 requires that the notice include a statement that the right to appear and be heard is waived if the property owner (including other interest holders) does not file a written request to be heard within 15 days after the notice was mailed. Therefore, the board hearing on adoption of a Resolution of Necessity cannot be held until 15 days after the notice is mailed. Failure to institute suit and serve the defendant(s) within six months of passage of the Resolution of Necessity makes the district liable for pre-condemnation damages and a lawsuit against it in inverse condemnation from the landowner.

E. California Environmental Quality Act (CEQA)

The acquisition of real property by a public agency has been determined, with limited exceptions, to be a "project" under CEQA. (See, *McQueen v Board of Directors* (1988) 202 CA 3rd 1136). As such, an initial study must be completed and, most likely, a Negative Declaration prepared. If it is determined that the project will have a significant effect on the environment, the preparation of an Environmental Impact Report ("EIR") will be required. The failure to conduct a CEQA review of an acquisition by eminent domain prior to filing the lawsuit could provide the landowner a defense against the action requiring the district to dismiss the suit and refile once CEQA compliance has been achieved.

F. Williamson Act

The Williamson Act was passed by the California legislature in 1965 to preserve agricultural land by discouraging its premature and unnecessary conversion to

urban use. The Act creates an arrangement whereby landowners contract with counties and cities to voluntarily restrict their land to agricultural use for a minimum of ten years in return for taxation at a rate consistent with its actual use rather than its market value.

The State makes up for the lower tax revenues received by the local entities. The Department of Conservation (“DOC”) administers the Williamson Act for the state.

Before a district can condemn a property enrolled in the Williamson Act, the district must notify the DOC of its intentions and provide proof satisfactory to the DOC that: (1) the property was not selected based primarily on a consideration of the lower cost of acquiring land in an agricultural preserve; and (2) there is no other land within or outside the preserve on which it is reasonably feasible to locate the public improvement. (Government Code sections 51291(b), 51292.)

In practice, the DOC has focused on requiring proof that there is no other land outside the preserve on which it is reasonably feasible to locate the public improvement. The process to substantiate this fact can be time consuming and should be started well before the Resolution of Necessity is passed.

A Williamson Act contract is deemed null and void if the entire parcel of land subject to the contract is condemned or acquired in lieu of eminent domain. The contract is deemed null and void as of the date that the action is filed. When an action is commenced to condemn less than an entire parcel of land the contract is deemed null and void only as to the portion condemned.

III. RIGHT TO TAKE ISSUES

A. Public Use

Public use is always an issue that can be raised by the landowner during the litigation. Public use refers generally to actual or intended use of the property by the agency for the benefit of the public. In order to prevail, the challenger must show that the determination of public use is clearly in error. Other challenges to public use can be alleged as:

- No intent to put property to designated use
- No intent to use property within a reasonable time

- Excess property taken
- Prior public use

B. Necessity

Public necessity consists of three elements that must be established before the power of eminent domain can be exercised:

1. Public interest and necessity require the project
2. The project is planned and located in a manner that will be most compatible with greatest public good and least private injury
3. The property sought for the project is necessary for the project

These elements are established by a proper Resolution of Necessity. In litigation, the third element of necessity, the need for taking a particular parcel, is the most frequently contested right to take issue.

IV. VALUATION ISSUES

A. Just Compensation – Fair Market Value (FMV)

The fundamental rule used by California courts for measuring “just compensation” for property taken by eminent domain is the concept of “fair market value.” Fair market value is defined in CCP section 1263.320 as:

- (a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by the seller, being willing to sell but under no particular or urgent necessity for so doing nor obligated to sell, and a buyer, being ready, willing, and able to buy but under no particular or urgent necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.
- (b) The fair market value of the property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.
(Emphasis added.)

Appraisers, unless instructed otherwise, may use another common definition of fair market value that substitutes the words “most probable price” for “highest price” in the first line of the definition. This seemingly inconsequential variation could be enough to invalidate the appraisal and require that the lawsuit be dismissed and re-filed once the discrepancy has been corrected.

B. Date of Valuation

The date of value for the determination of fair market value can vary depending on the circumstances. In a rising real estate market, a condemning agency will want to fix the date of valuation as early as possible by making a Deposit of Probable Compensation (the amount specified in a properly worded appraisal) with the court or the County Treasurer as soon after filing the lawsuit as possible. Other dates of valuation can include the date of filing the complaint when no deposit is made and trial commences within one year; or the commencement of trial if it is not begun within one year.

C. Highest & Best Use

The condemnee is entitled to the price his property is worth assuming it will be put to its highest and best use. In the case of farmland, if water and sewer are reasonably available, its highest and best use may be for future residential development. If the property is at a busy intersection, part of the property may have a highest and best use as commercial (shopping center) property with the remainder for residential development. This can have a substantial impact on the price ultimately paid for the property when commercial property sells for approximately three times residential and 10 times agricultural property.

D. Severance Damages

When only a portion of a parcel is condemned, the landowner may suffer damage to the remainder of the parcel. Severance damages are compensation for injury to the remainder in a partial taking. They are measured by the reduction in market value of the remainder or the “cost to cure” and are assessed separately from the value of the property taken. Some examples of typical types of severance damages are:

1. Loss of access rights
2. Loss of use
3. Loss of highway frontage
4. Loss of view

5. Loss of freedom from noise
6. Increased cost of development
7. Expenses incurred in mitigating damages

V. RELOCATION ASSISTANCE BENEFITS

Public entities are required to adopt regulations governing relocation assistance. The local rules must conform to the rules and regulations adopted by the Department of Housing and Community Development. (Government Code section 7267.8; 25 California Code of Regulations, sections 6000-6198.) This is usually accomplished by the District adopting the Housing and Community Development Department's regulations by reference as the District's relocation regulations.

Although not technically a part of the condemnation award, relocation advisory and financial assistance benefits are available to any person, business or farm operation displaced as a result of the condemnation or purchase in-lieu of condemnation. (Government Code sections 7260-7277.)

Some examples of the types of assistance payments that can be required would be:

- Reasonable and necessary moving and related expenses incurred in displacement from and relocation of a residence, business, or farm operation
- Loss of tangible personal property
- Expenses in searching for a replacement property not to exceed \$1000
- Expenses to reestablish a displaced farm, nonprofit organization or small business not to exceed \$10,000
- \$22,500 to lease or acquire a comparable replacement dwelling to an owner of a dwelling being condemned who has lived there for a minimum of 180 days

VI. HOW LONG DOES IT TAKE

- Pre-Condemnation Activities 4-6 Months
- Possession 1-3 Months after complaint filed
- Condemnation Trial 12 Months
- Appeal 12-18 Months

VII. CASE STUDIES

- *San Diego Gas and Electric v. Goss*
- *Solana Beach School District v. Pardee Homes*