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February 19, 2013

Hon. Tani Cantil-Sakauye, Chief Justice
Associate Justices of the Supreme Court of California
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: **Request for Depublication:** *County of Glenn v. Foley* (2012) 212 Cal.App.4th 393, 151 Cal.Rptr.3d 8, Court of Appeal Case No. C068750

Dear Chief Justice Cantil-Sakauye and Associate Justices:

We write on behalf of the Sacramento Area Flood Control Agency and the League of California Cities to respectfully request depublication of the Third District Court of Appeal's opinion in *County of Glenn v. Foley* (2012) 212 Cal.App.4th 393, 151 Cal.Rptr.3d 8 ("*Foley*" or "the opinion").

Foley adopted a new evidentiary rule that would effectively abrogate a critical limitation on opinion evidence admissible in eminent domain trials. Section 822(a)(4) of the Evidence Code prohibits the introduction of opinion evidence about the value of comparable property for the purpose of valuing a property being acquired by eminent domain ("subject property"). This rule against "appraising a comparable" maintains efficiency in highly technical eminent domain trials by preventing undue jury focus on collateral matters such as the value of properties *other* than the subject property. By limiting opinion evidence about the value of comparable property, section 822(a)(4) also reduces the subjectivity in appraisers' testimony.

Foley's new categorical rule would undermine section 822(a)(4)'s text and purpose by permitting an appraiser to appraise the improvements on a comparable property, subtract that appraised value of the improvements from the sale price of the comparable, and compare the residual land price derived from the appraisal of the comparable with the vacant subject property. *Foley* does not identify any exception, but rather allows the appraisal of improvements on a comparable property whether they be an office building, a toolshed, landscaping, or an orchard.

Foley's broad rule arises from the unusual facts before the Court of Appeal. First, the improvements at issue in the case were comparatively simple: olive orchards, not complex structures. Second, the trial court's order overturned by *Foley* had the unusual effect of excluding *all* of the defendant's evidence of value on a motion in limine. Rather than narrowly tailor its opinion to these facts, the court adopted a broad rule that would allow opinion evidence on the value of improvements on comparable properties in *all* eminent domain proceedings, including those with much more complicated—and more commonplace—facts. The court's rule deprives trial courts of the ability to exclude such evidence in cases in which appraisers use complex improved properties to value vacant land.

Foley could have serious consequences for public agencies throughout the state, which rely on the power of eminent domain to acquire property for important public undertakings, from flood control and water supply projects to high speed rail and other transit projects to construction of public buildings. If it remains a precedent, *Foley* could potentially undermine these projects by needlessly complicating eminent domain trials and allowing appraisers to inflate the value of condemned properties. We therefore respectfully request that the Court exercise its authority under Rule 8.1125 to depublish the opinion.

Interests of the Parties

The undersigned parties are concerned that the opinion could have far-reaching impacts on public agencies' ability to acquire property for public purposes.

SAFCA is a Joint Exercise of Powers Agency that is vested with the power of eminent domain to acquire property for uses including the construction and maintenance of flood control works. SAFCA's mission is to provide the Sacramento metropolitan region with at least a 100-year level of flood protection as quickly as possible, while seeking a 200-year or greater level of flood protection over time.

The League of California Cities is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Proceedings Below

In *Foley*, Glenn County sought to expand a landfill that the County had been operating since 1971 on nearly two hundred acres of rented property. (151 Cal.Rptr.3d at 10.) The landfill was reaching capacity, and the County Board of Supervisors determined that the County should acquire a fee interest in the existing leased land plus acreage around it for use as a buffer zone. (*Id.*) The County therefore initiated eminent domain proceedings to acquire unimproved property in which defendant Foley owned an interest. (*Id.*)

The County's appraiser based his valuation of the vacant subject property on the sales price of nine comparable plots of vacant grazing land, which he believed was the highest and best use of the subject property. (*Id.* at 11.) The County appraiser's comparable sales had the potential for olive orchard development, but were not improved with orchards. The County appraiser's valuation of the subject property was $637,000. (*Id.*)

The defense appraiser, House Agricultural Consultants ("House"), identified seven allegedly comparable properties. (*Id.* at 10-11.) Although the subject property was unimproved, all of House's comparables were improved with orchards (as well as various structures and other improvements) because House maintained that "the highest and best use of the subject [property] is orchard land such as olives." (*Id.* at 10.) House appraised the value of the orchards and other improvements on the comparable properties, deducted these values from the sale prices of the comparables, and arrived at a value for the subject property of approximately $1.7 million. (*Id.* at 11.)

The trial court granted a motion in limine to exclude *all* of House's testimony. (*Id.* at 9.) The court agreed with the County that House's valuation of the improvements on the comparables violated section 822(a)(4) of the Evidence Code, which prohibits opinion evidence about the value of any property other than the subject property. (*Id.* at 11.) The trial court further agreed in an amended ruling that, in the alternative, section 816 excluded House's valuation of the comparables because the properties were not comparable to the subject property. (*Id.*) Because the trial court had excluded all of the defendant's evidence of value, the parties stipulated to the County appraiser's valuation, and the trial court entered judgment accordingly. (*Id.* at 9.) The defendant appealed. (*Id.*)

The Court of Appeal reversed and remanded with direction to deny the County's motion in limine. (*Id.* at 15.) The Court of Appeal reviewed the County's

motion de novo rather than under the ordinary abuse of discretion standard because the motion to exclude *all* of the defendant's evidence was more like a demurrer to the evidence than a traditional motion in limine. (*Id.* at 12.)

The Court of Appeal rejected the County's argument that Evidence Code section 822(a)(4) excluded House's opinion testimony about the value of improvements on allegedly comparable properties. (*Id.* at 14, 16.) The court held that the rule against appraising a comparable prohibits only opinion evidence about the value of a comparable property "as a whole" to prove the value of the subject property. (*Id.* at 13 [quoting *State of Cal. ex rel. State Public Works Bd. v. Stevenson* (1970) 5 Cal.App.3d 60, 65].) Accordingly, as long as the appraiser has a sale price for the comparable property, the court held, the appraiser may opine about the value of any of the various components of that sale price. (*Id.*) The appraiser could use these opinion-based values to "adjust" the value of the comparable property by increasing or decreasing the comparable property's sale price. (*Id.*)

Grounds for Depublication

I. *Foley* Is Inconsistent with Evidence Code Section 822(a)(4) Because It Authorizes the Appraisal of Comparable Properties to Value Subject Property.

A. *Foley* Is Inconsistent with the Text of Evidence Code Section 822(a)(4).

Foley adopted a categorical rule allowing the introduction of opinion evidence about the component parts of the value of a comparable property as long as they are based on an underlying sale price for the property. This rule violates Evidence Code section 822(a)(4).

Section 822(a) reads in relevant part as follows:

> In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Sections 814 to 821, inclusive, the following matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of property: . . . (4) *An opinion as to the value of any property or property interest other than that being valued.*

(Emphasis added.)

Foley contends that this prohibition applies solely to the use of naked opinion evidence of the value of a comparable property *as a whole*. (151 Cal.Rptr.3d at 13.) In other words, *Foley* contends, it does nothing more than prevent an appraiser from offering an opinion of the likely sale price of a comparable property that has not been sold. *Foley* holds that as long as the comparable property has been sold, and thus the objective evidence of a sale price exists, the appraiser may offer opinion about any component of that sale price, such as the value of improvements on the property, or make any "adjustment" to that price that he or she believes necessary to make it comparable to the subject property.

Under *Foley*'s narrow reading, section 822(a)(4) would not prohibit the following scenario. To establish the value of bare land sought to be acquired by the condemnor, an appraiser could use as a comparable the sale of a nearby property fully developed as a shopping mall—with extensive and varied buildings, parking structures, and landscaped gardens. The appraiser could subtract his or her *opinion* of the value of the extensive improvements from the sale price. The appraiser could then offer the residual value of the *improved* mall property as evidence of the value of the *vacant* land being acquired. In such a case, the value of the improvements might well be a majority of the value of the comparable property as a whole, but *Foley* would allow opinion testimony about that component of the comparable's value notwithstanding the prohibition on appraising a comparable in section 822(a)(4). This result makes a mockery of section 822(a)(4)'s command.

B. *Foley* Is Inconsistent with the Policies Behind Section 822(a)(4).

Foley undermines both of the policies underlying section 822(a)(4): preventing the complication and multiplication of trial proceedings and minimizing subjectivity in the appraisal process.

First, section 822(a)(4) prevents the expansion and complication of eminent domain proceedings by prohibiting the introduction of complex opinion evidence about the value of properties other than the property being acquired. In its 1960 study that formed the basis for an earlier version of the evidentiary rules in eminent domain proceedings, the California Law Revision Commission stated that opinion testimony about the value of comparable property should be excluded "on the principle of remoteness." (*Recommendation and Study: Evidence in Eminent Domain Proceedings* (October 1960) 3 Cal. L. Revision Com. Rep. (1961) p. A-8.) Consideration of such opinions "would require the determination of many other collateral questions involving the weight to be given such opinions[,] which would unduly prolong the trial of condemnation cases." (*Id.*)

By permitting complex appraisals of any component of the value of comparable property, *Foley* raises the precise concern with "collateral questions" the Commission sought to avoid. The opinion would frustrate judicial economy in technical eminent domain proceedings by requiring extensive proof of multiple appraisals of comparable properties and requiring juries to deliver verdicts on those multiple appraisals. Other states' courts have recognized this danger and the important public policy in avoiding it. (See, e.g., *Pinczkowski v. Milwaukee County* (2005) 706 N.W.2d 642, 649 [general rule of inadmissibility is one of sound public policy and judicial economy]; see also *Aladdin, Inc. v. Black Hawk County* (1997) 562 N.W.2d 608, 616 [valuing contaminated subject property by admitting evidence of comparable contaminated property would cause additional delay and expense due to complexity of comparing contamination].)

Second, the prohibition in section 822(a)(4) minimizes unnecessary subjectivity in the appraisal process. Appraisal of property necessarily involves the application of the appraiser's judgment, but one of the goals of the Eminent Domain Law and the Evidence Code is to minimize subjectivity in the valuation process. Section 822(a)(4)'s rule against appraising a comparable serves that goal. It prohibits the multiplication of subjectivity that would occur if an appraiser could use his subjective judgment to appraise a comparable property and its components in appraising the subject property. "It is [the] *exchange of values* which defines the market and provides an objective benchmark for other exchanges of comparable properties." (*Emeryville Redevelopment Agency v. Harcros Pigments, Inc.* (2002) 101 Cal.App.4th 1083, 1101.)

C. *Foley* Is Inconsistent with Existing Case Law Restricting the Appraisal of Comparable Properties.

Foley also runs counter to the decisions of several courts of appeal, as well as accepted eminent domain practice. In *Emeryville*, the Emeryville redevelopment agency brought eminent domain proceedings against a landowner, and both parties attempted to establish the value of the condemned property through comparable sales. (*Id.* at 1091, 1094.) Both parties identified the sale of a comparable retail property that straddled the boundary between Emeryville and Oakland. (*Id.* at 1100.) The city divided the total sales price by the total area to reach the price per square foot, but the defense appraiser based his valuation on a recital to the purchase contract for the property, which purported to allocate specified proportions of the purchase price between the portion of the property in each city. (*Id.*) The court applied section 822(a)(4) to reject the defense appraiser's method, as the recital did not concern a matter of fact but rather one of opinion that one part of the property

was more valuable than the other. (*Id.* at 1101-02.) The method was "inconsistent with the purpose for which comparable sales are admitted, which is to giv[e] the jury the benefit of some *objective market evaluation* against which to check an appraiser's evaluation." (*Id.* at 1101 [emphasis added].)

Foley inaccurately distinguishes *Emeryville* on the basis that there the appraiser "guessed" as to the comparable's value based on a vague contract recital, whereas in *Foley* the appraiser used "university cost studies" and consultation with other appraisers. (See *Foley*, 151 Cal.Rptr.3d at 14.) *Foley* overlooks the critical issue in both cases: the value used for the comparables did not represent the "*consideration actually given* for the property purchased," and thus their use directly conflicted with section 822(a)(4). (*Emeryville*, 101 Cal.App.4th at 1101.) *Foley* would give appraisers virtually unlimited discretion to modify the "objective market valuation" reflected in a comparable property's sale price based on the appraiser's subjective opinion of portions of its value.

Foley is also inconsistent with several cases rejecting the use of the sale of improved property to value unimproved property. (See *Los Angeles County v. Union Distrib. Co.* (1968) 260 Cal.App.2d 125; *People ex rel. State Park Com. v. Johnson* (1962) 203 Cal.App.2d 712, 719 ["Because the alleged comparables have substantial improvements located upon them, it becomes immediately necessary for the real estate expert to separate the land values from the improvement values, sometimes not an easy or scientific task."]; *Pacific Gas & Electric v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1130 ["Property cannot be considered comparable where it includes various fixtures, rights, improvements, and personal property which the property being condemned does not include."].) In *Union Distributing Co.*, the defendants attempted to offer evidence of a sale of a property with brick buildings even though the subject property was vacant. (260 Cal.App.2d at 126-28.) The court held that the sale was properly excluded because it would have been necessary for the defendants to present evidence about the value of the buildings on the property. (*Id.*) The primary treatise on eminent domain in California likewise suggests that an appraiser's valuation of improvements on a comparable property, and deduction of that value from the comparable's sale price, is inconsistent with section 822(a)(4) and these cases. (See 1 CEB, *Condemnation Practice in California* § 4.33, at 159 (3d ed. 2012).)

Foley concluded that *Union Distributing Co.,* which squarely rejected the use of improved property to value an unimproved subject property, was "implicitly disapproved" by this Court's decision in *Merced Irrigation District v. Woolstenhulme* (1971) 4 Cal.3d 478. (See *Foley*, 151 Cal.Rptr.3d at 13 fn.8.) This Court recognized in

Woolstenhulme that some "adjustments" to the sale prices of comparable properties are necessary to make those properties truly comparable to the subject, and recognized that such adjustments "do[] not *normally* raise collateral issues of great magnitude." (4 Cal.3d at 502 [emphasis added].) However, the Court was not confronted with the question whether an improved comparable property could be appraised to compare it with an unimproved subject property, nor did *Woolstenhulme* adopt a rule, as *Foley* did, that such an appraisal is permissible per se.

Foley also did not address a further line of cases inconsistent with its holding. The methodology upheld in *Foley* is similar to another valuation technique, the so-called "developer's approach" or "residual land value approach," which California courts of appeal have soundly rejected as involving excessive subjectivity. (See *Contra Costa Water Dist. v. Bar-C Props.* (1992) 5 Cal.App.4th 652, 657; *City & County of San Francisco v. Coyne* (2008) 168 Cal.App.4th 1515, 1525-26; *San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 929 fn. 4.) Under the developer's approach, an appraiser starts from an opinion of the value of a desired end-use of the subject property, such as an office building or residential subdivision, then works backward by deducting the appraiser's estimates of the development expenses, costs of completion, and expected profit to reach a "residual land value." (See *Contra Costa Water Dist.*, 5 Cal.App.4th at 655-56.)

In *Contra Costa Water District*, the court held that the sale price of improved land could not be used to compute the value of the unimproved subject property because the costs of carrying out a similar development plan on the unimproved property were "far too uncertain and conjectural." (*Id.* at 658.) The court reasoned that allowing evidence of the costs of hypothetical development would "open wide the door" to speculation about the price that the land *might* bring if sold, and distract the jury from the one important question: "the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use." (*Id.*)

In *Foley*, House determined that olive orchards would be the highest and best use of the subject property. He then worked backward from this hypothetical use to value the unimproved subject property using his estimates of the value of existing improvements, such as the orchards and irrigation systems, on the properties he concluded were comparable. (151 Cal.Rptr.3d at 10-11.) *Foley* would reintroduce into appraisals the very same speculation that California courts have rejected in prohibiting the developer's approach.

Appraisal is an art and a science. It is an art because it requires judgment in determining the highest and best use of property, selecting appropriate comparables, and adjusting the comparables. It is a science insofar as opinions of value are required to be based on relevant market transactions from which objective data can be derived. By allowing unlimited appraisal of the components of the value of comparable properties, including appraisal of complex improvements, *Foley* would compound the degree of subjectivity in appraisal of property. Although the improvements appraised in *Foley* were comparatively straightforward, in other cases, such as the hypothetical mall property discussed above, improvements may be quite complex and require the appraiser to make a host of judgment calls. *Foley* does not distinguish between these circumstances and would allow equally the valuation of olive orchards and massive buildings.

II. *Foley*'s Facts Are Not Representative of the Typical Eminent Domain Case in Which Its Holding Will Be Applied.

Foley involved exceptional circumstances that are unlikely to be repeated in the run-of-the-mill cases in which its holding will be applied, yet its holding is not limited to those facts. *Foley*'s broad rule—that section 822(a)(4) prohibits only opinion evidence of the value of comparable property *as a whole*—would prevent trial courts from concluding that section 822 prohibits the introduction of opinion evidence where the improvements or other components of the property's value are so substantial as to be the property itself.

First, the trial court had granted a motion in limine excluding *all* of the defendant's evidence of value, a draconian and unusual result. (151 Cal.Rptr.3d at 14.) The Court of Appeal stated that when a motion in limine "strays beyond its traditional confines and results in the *entire elimination* of a cause of action or a defense, we treat it as a demurrer to the evidence and review the motion de novo." (*Id.* at 12.) The Court of Appeal's reluctance to uphold a decision to exclude *all* of the defendant's evidence is plain on the face of the opinion, which was written to avoid such a "drastic remedy." (*Id.* at 14; see also *Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 228 [plaintiff's willful noncompliance merited "drastic" sanction of exclusion of all evidence of economic loss by grant of motion in limine].) Yet, the court failed to narrowly craft its opinion to this end.

Second, the improvements at issue—orchards—were not nearly as difficult to accurately value as more common improvements, such as dwellings and other buildings. (See, e.g., *Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d 690 [weighing competing

valuation methods to establish value of church on condemned property].) The court could have adopted a holding limited to the facts of the case, concluding that the improvements were so minimal and readily valued that House's appraisal of them was not inconsistent with section 822(a)(4).

If *Foley* remains a precedent, courts will be faced with cases in which appraisers attempt to deduct the value of complex buildings from the sale price of a comparable. The *Foley* court noted that House's valuation of the orchards was supported by "university cost studies." (151 Cal.Rptr.3d at 14.) No such off-the-shelf source will allow an appraiser to value an office building or gas station, which would require a multiplicity of subjective judgments. Moreover, such valuation involves numerous "collateral questions" of the sort the Law Revision Commission recognized would "unduly prolong" condemnation trials. (See 3 Cal. L. Revision Com. Rep. at p. A-8.)

Foley's broad rule belies the Court of Appeal's failure to look beyond the atypically simple facts placed before it. The rule contains no logical stopping point to illustrate when and how it applies to the more typical factual scenarios that arise in eminent domain proceedings. The absence of any guidance for applying *Foley*'s rule means that lower courts may apply *Foley* in any comparable sale situation to allow appraisals of nearly *all* the value of developed, comparable property.

Conclusion

For the foregoing reasons, SAFCA and the League of California Cities respectfully urge this Court to depublish *County of Glenn v. Foley*.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Matthew D. Zinn

PROOF OF SERVICE

County of Glenn v. Foley
Case No. C068750
California Court of Appeal, Third Appellate District

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, California 94102.

On **February 19, 2013**, I served true copies of the following document(s) described as:

REQUEST FOR DEPUBLICATION

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **February 19, 2013**, at San Francisco, California.

Cynthia Jawad

SERVICE LIST

County of Glenn v. Foley
Case No. C068750
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