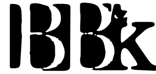


**BEST BEST & KRIEGER**
ATTORNEYS AT LAW

Indian Wells
(760) 568-2611
Irvine
(949) 263-2600
Los Angeles
(213) 617-8100
Ontario
(909) 989-8584

655 West Broadway, 15th Floor, San Diego, CA 92101
Phone: (619) 525-1300 | Fax: (619) 233-6118 | www.bbklaw.com

Riverside
(951) 686-1450
Sacramento
(916) 325-4000
Walnut Creek
(925) 977-3300
Washington, DC
(202) 785-0600

**James B. Gilpin**
(619) 525-1341
james.gilpin@bbklaw.com
File No. 09998.00058

July 20, 2012

**VIA FEDERAL EXPRESS**

The Honorable Tani Gorre Cantil-Sakauye
and the Associate Supreme Court Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

**Re: Amicus Curiae Letter Supporting Petition for Review (Cal. Rules of Court, rule 8.500(g)) – *City of Livermore v. Baca*, California Supreme Court Case No. S203534**

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rules of Court, rule 8.500(g), the League of California Cities ("League") respectfully submits this letter as *amicus curiae* in support of the City of Livermore's Petition for Review in *City of Livermore v. Baca* (Cal.App. 6th Dist. 2012) 205 Cal.App.4th 1460; 141 Cal.Rptr.3d 271; Supreme Court Case No. S203534 ("Opinion").

**1. Interest of *Amicus Curiae*.**

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, which is 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.

**2. Review Should be Granted to Secure Uniformity with Prior Decisions of this Court and to Settle Important Questions of Law Pursuant to Rule 8.500(b)(1).**

As the courts have recognized over the years, "[a] condemnation trial is a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner." (*Sacramento, etc. Drainage Dist. ex rel. State Reclamation Bd. v. Reed* (1963) 215 Cal.App.2d 60, 69.) The League believes that review of the Opinion is of vital

importance to maintain the balance between the economic interests of the public and those of the landowner.

**A. The Opinion Erodes the Evenhanded Treatment of Damages and Benefits.**

The Opinion undermines this Court's decision in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694 ("*Continental Development*") in which this Court determined to end the disparity between the rules for admitting evidence of remainder damages and those for offsetting benefits. In *Continental Development*, this Court acknowledged that "[f]airness requires parity of treatment." (*Id.* at p. 718.) As such, it adopted a rule to effectuate the evenhanded treatment of "damages" and "benefits" in determining severance damages in eminent domain proceedings. (*Id.* at p. 718.)

Before *Continental Development*, although a condemnee could generally introduce evidence about any decrease in market value from a project, the condemning entity that wished to show offsetting increases had a restricted menu of potential benefits from which to choose. To qualify as offsetting special benefits, project features had to confer market value increases that were both "reasonably certain to result from construction of the work" and "peculiar to the land in question." (*Beveridge v. Lewis* (1902) 137 Cal. 619.) For evidence of offsetting benefits, admissibility under this rule turned not on relevance to the remainder's fair market value but on the degree to which those benefits were or were not shared by the remainder and other nearby property. (*Compare, City of Hayward v. Unger* (1961) 194 Cal.App.2d 516 (holding increased traffic past retail store to be special benefit offsetting severance damages), *with Pierpont Inn, Inc. v. State of California* (1969) 70 Cal.2d 282 (holding freeway off-ramp near commercial property not to be special benefit offsetting severance damages).)

The *Continental Development* court concluded that the distinction between special and general benefits was both outmoded and unworkable. Accordingly, this Court adopted a new rule to treat severance damages and offsetting benefits "evenhandedly" and reflect their parallel definitions in the Eminent Domain Law. Under *Continental Development*, courts could consider "all reasonably certain, immediate and nonspeculative benefits." (*Continental Development Corp., supra,* 16 Cal.4th at p. 717.) According to this Court, adoption of the rule had "the virtue of treating benefits and severance damages evenhandedly." (*Ibid.*)

Now, instead of limiting damages to those which are "reasonably certain, immediate and nonspeculative," the Opinion tips the balance by allowing the jury to consider evidence of damages that are "arguably possible." The Opinion also unwinds this evenhanded treatment by holding that evidence of the project's benefits may be excluded if those benefits are created on property that is not being taken. The Opinion holds that any benefits from separate contracts may not be considered to offset severance damages because "the work included in [the] contract [i]s not in an area affecting Baca's commercial properties that were the subject of the takings." There is no authority for the Opinion's conclusion that the benefits that may be considered must be confined to either the property taken or the area immediately surrounding that property. In

sum, the Opinion conflicts with clear statutory direction regarding consideration of project benefits and the evenhanded treatment of damages and benefits.

**B. The Opinion Effectively Eliminates the Preclusion of Speculative Damages in Eminent Domain Proceedings.**

The Opinion, through misapplication of the principles set forth by this Court in *Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 971 ("*Campus Crusade*"),[1] adopts a new "at least arguably" evidentiary standard for the admissibility of opinion evidence on the subject of damages to the remainder parcel. (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1468 ("*Baca*").) This new "at least arguably" evidentiary standard will have the unintended consequence of opening the door for virtually any damage claim, even if the purported damage is based on mere speculation, being admitted.

The *Baca* court derived its "at least arguably" standard from language included in this Court's *Campus Crusade* decision. In *Campus Crusade*, this Court stated:

> The factors Campus Crusade identified below--e.g., fear that the pipeline will rupture in an earthquake, negative visual and aesthetic impacts on the landscaping, and limitations on potential development caused by grading restrictions and placement of the pipeline--at least arguably have the potential of affecting the market value of the remaining property. [Footnote 4 omitted.] As long as the effect of these factors on market value is not conjectural, speculative, or remote, it is for the jury to decide the extent to which they may affect the value of the property. (*Campus Crusade, supra*, 41 Cal.4th at pp. 972-973 [emphasis added].)

In applying *Campus Crusade*, however, the *Baca* court failed to recognize the implication of Footnote 4. In Footnote 4, this Court noted that: "[w]e need not decide whether *Campus Crusade* satisfied its burden of production with respect to these factors inasmuch as that issue was not included in our grant of review." (*Campus Crusade, supra*, 41 Cal.4th at p. 973.)

In discussing the burden of production, the *Campus Crusade* court concluded effects that "at least arguably [had] the potential of affecting the market value of the remaining property" warrant consideration by the trial court under the burden of production test to determine whether the evidence tends to show that some aspect of the taking "naturally tends to and actually does decrease the market value" of the remaining property, before it is given to the jury to weigh its effect on the value of the property. (*Campus Crusade*, *supra*, 41 Cal.4th at p. 973 [emphasis added].) Thus, the proper test for the trial court as articulated by *Campus Crusade* is whether

---

1 In *Campus Crusade*, this Court adopted a burden of production requiring the proponent to produce evidence which tends to show that some aspect of the taking "naturally tends to and actually does decrease the market value" of the remaining property, the Opinion adopts a new rule that allows property owners to go to a jury with damages that "at least arguably" have an effect on market value to be considered by the jury. (*Campus Crusade, supra*, 41 Cal.4th at p. 973 [emphasis added].)

there is evidence tending to show that "some ... aspect of the taking ... 'naturally tends to and actually does decrease the market value' of the remaining property . . . ." (*Ibid.*) Only upon such showing to the trial court does the severance damage claim go to "the jury to weigh its effect on the value of the property." (*Ibid.*)

The Opinion's adoption of an "arguably possible" standard blurs the discernable line between consideration of future events which are "reasonably certain, immediate and nonspeculative" and exclusion of events which are speculative, remote, imaginary, contingent, or merely possible. (*Continental Development Corp.*, *supra*, 16 Cal.4th at p. 717) This Court has had a historical and well-founded antipathy to speculative damages like those now admissible under the *Baca* Opinion. (*City of San Diego v. Neumann*, (1993) 6 Cal.4th 738, 748-749 ("*Neumann*".) Damages which were "merely possible" were not sufficient to support a severance damage claim. (*Ibid.* [quoting from *Arnerich v. Almaden Vineyards Corp.* (1942) 52 Cal.App.2d 265, 272].) The Opinion now allows recovery based upon effects which "arguably possible" have an impact on value, opening the door to the admission of remote and speculative damages previously excluded under *Continental Development Corp.*.

The Opinion's "arguably possible" standard essentially eviscerates the trial court's role as "gatekeeper" and places little to no limit on imaginative damage claims based on no more than speculative assumptions regarding a prospective buyer's mental reactions. In the end, implementation of the "arguably possible" standard will give unbridled freedom to the admission of opinion testimony on limitless damages a "prospective buyer" might consider, even when the basis of the opinion is built on speculation and conjecture. Under the "arguably possible" standard, the balance of interests required by the law of eminent domain will be disturbed and the government, i.e. taxpayers, will be required to pay compensation for speculative claims. (*See*, *Neumann*, *supra*, 6 Cal.4th at p. 758.)

Bifurcated trials are commonly used and even encouraged in eminent domain proceedings to resolve issues, including evidentiary issues, before the issue of compensation is submitted to the jury. (*Redev. Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, 80; see also Code Civ. Proc. § 1260.040 [providing mechanism by which a party may obtain early resolution of an in limine motion or other dispute affecting valuation in eminent domain actions].) Historically, when a valuation expert in a condemnation case employs an unsanctioned methodology, the trial court has discretion to exclude the opinion, in part or in whole. (Evid. Code § 801(b); *City of Stockton v. Albert Brocchini Farms, Inc.* (2001) 92 Cal.App.4th 193, 198 (*"Brocchini Farms"*).) If the trial court excluded an expert testimony on the ground that there was no reasonable basis for the opinion, the exclusion of evidence was reviewed under the abuse of discretion standard. (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564 (*"Lockheed"*); *Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1310-1311.)

The Opinion departs from this long standing precedent. Instead of applying the abuse of discretion standard, the *Baca* court reviewed the trial court's evidentiary rulings *de novo.*

Misapplication of this precedent will sideline the trial court from dealing with evidentiary issues in eminent domain proceedings. Review should be granted to restore the appropriate deference to the trial court's factual findings in evaluating whether expert opinions should go to the jury.

**C. The Opinion is Contrary to Settled Opinions of this Court Regarding Temporary Severance Damages.**

The Opinion is also inconsistent with opinions of this Court in *Campus Crusade, supra,* 41 Cal.4th 954, and *People ex rel Dep't of Pub. Works v. Ayon*, 54 Cal. 2d 217 (1960) ("*Ayon*"), as well as numerous appellate court decisions applying these cases, regarding the necessary showing to assert a claim for temporary severance damages related to project construction.

To go to a jury, the property owner must produce evidence of <u>actual</u> injury. As this Court has recognized, damages a property owner believes may occur in the future during construction are not sufficient as a matter of law and should be excluded. (*See Ayon*, *supra,* 54 Cal.2d 228.) For instance, in *Ayon*, the defendants tried to assert entitlement to damages for any alleged injuries they <u>might</u> suffer during project construction. The proposed construction plan was that the street would be torn up around the defendants' property for approximately 90 days; the defendants' anticipated construction would be much longer – from six to 12 months. (*Ibid.*). The court rejected the defendants' damages claim, primarily because construction had not yet begun, and thus the defendants alleged damages were speculative.

Similarly, in *Campus Crusade*, this Court concluded that the property owner's temporary severance damages claim based on the "allegedly adverse impact of the project on its ability to use develop and market its property during the seven year period of construction" failed given the absence of any specificity or evidence to support the alleged damages. *See Campus Crusade,* 41 Cal.4th at 974. As this Court explained,

> <u>If</u> [the property owner] had sold the property during the construction period and <u>if</u> the ongoing construction had temporarily lowered the sale price of the property, it would appear that [the property owner] would be entitled to recover that loss from [the condemning agency]. But the mere fact of a delay associated with construction of the pipeline did not, without more, entitle [the property owner] to temporary severance damages relating to the financing or marketing of the property in this eminent domain action.

(*Ibid.* at p. 975 [emphasis added].) The property owner's proper course for asserting damages based on actual construction when the condemnation action is tried before the project is constructed is to file a subsequent action for such damage occurring during construction. (*Ibid.*). Until actual damage is shown, evidence of temporary severance damages should not be allowed to go to the jury.

Moreover, even assuming a property owner can produce evidence of actual injury, impaired access to property caused by a public works project is not a compensable taking unless the temporary impairment is both "unreasonable" and "substantial." (*Ayon, supra,* 54 Cal. 2d at p. 228.) Likewise, "temporary injury resulting from actual construction of public improvements is generally noncompensable," absent evidence of complete access impairment. (*Ibid.*) As the *Ayon* court explained:

> Personal inconvenience, annoyance or discomfort in the use of property are not actionable types of injuries. It would unduly hinder and delay or even prevent the construction of public improvements or interference attendant upon the ownership of private real property because of the presence of machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement. [Business owners] are not entitled to compensation for temporary interference with their right of access, provided such interference is not unreasonable, that is, occasioned by actual construction work. It is often necessary to break up pavement, narrow streets and provide inconvenient modes of ingress and egress to abutting property during the time streets are being repaired or improved. Such reasonable and temporary interference with the property owner's right of access is noncompensable.

(*Ibid.*) (*See also Liontos v. County Sanitation Dist.* (1998) 61 Cal.App.4th 726 ["Thus [business owner] cannot recover simply because access to [the business] was temporarily impeded by reason of the presence of construction barriers and heavy equipment, *provided that this interference was occasioned by actual construction work.*"]).

The temporary severance damages alleged in *Baca* were no more than <u>anticipated</u> damages the property owner thought might occur during project construction related to temporary loss of landscaping, temporary driveway closures, and traffic detours. Further, the evidence before the courts showed that during construction two of the four driveways would be unusable, but at least one driveway would be available. And with respect to the loss of landscaping and traffic detours, there was no evidence that these anticipated construction impacts actually resulted in lost tenants or precluded leasing of the property. Such temporary impairments of access or interference with business use caused by anticipated construction work, like that the property owner alleged in *Baca,* are *per se* not unreasonable under *Ayon* and were properly excluded by the trial court. (*See, e.g., Border Bus. Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1554 [holding that alleged damages in inverse condemnation action by business park that claimed city substantially impaired access to business park by diverting truck traffic for six to nine months while improvements were made to nearby streets along the new permanent truck route, resulting in "gridlock," were insufficient as a matter of law because "street alterations which cause significantly increased traffic or which reduce but do not eliminate access to a property do not give rise to a compensable taking."] [citing *Ayon,* 54 Cal. 2d at p. 223-24 and *Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152, 167 ].)

The Opinion calls *Ayon* and its progeny into question, again opening the door to endless temporary severance damages claims that if allowed to stand will unduly hinder and delay or even prevent the construction of public improvements. As this Court warned nearly a century ago, if such speculative evidence of severance damages were permitted, "it would be quite permissible for the witnesses to say, 'if oil were discovered upon the land it would be worth twenty thousand dollars an acre,' 'if a gold mine were discovered upon it, it would be worth ten thousand dollars an acre,' 'if a man wanted to buy it and establish a town site it would be worth three thousand dollars an acre,' and so on, until such inquiry in a condemnation suit would bear a close affinity to Lord Dundreary's famous question, 'If you had a brother would he like cheese?'" (*Oakland v. Pacific Coast Lumber etc. Co.,* (1915) 171 Cal. 392, 400.)

## CONCLUSION

Under the law, the constitutional requirement for the payment of just compensation is not only for the landowner's benefit, but also for the public's benefit. (*City of Fresno v. Cloud* (1972) 26 Cal.App.3d 113, 123.) "Just as the landowner should not be shortchanged, the public should not be burdened with paying a king's ransom for a squire." (*San Diego County Water Authority v. Mireiter* (1993) 18 Cal.App.4th 1808, 1817.) Review of the *Baca* Opinion is necessary to maintain the appropriate balance as established in *Campus Crusade, Continental Development Corp,* and *Ayon* between the interests of the public and that of the individual land owner – securing uniformity with prior decisions and settling important questions of law regarding the appropriate function of the trial court in reviewing evidence in eminent domain actions and the appropriate standard of review employed by the reviewing courts to ensure that evidence of severance damages is not speculative and "naturally tends to and actually does decrease (or increase) the market value" of the remaining property before it is given to the jury.

For all of the foregoing reasons and for all of the reasons set forth in the Petition for Review, the League respectfully requests that the City of Livermore's Petition for Review be granted. Thank you for your consideration.

Sincerely,

James B. Gilpin and Kimberly Hood
of BEST BEST & KRIEGER LLP

JBG:lmg

## PROOF OF SERVICE

*(City of Livermore v. Dennis E. Baca, et. al*
Supreme Court Case No. S203534.
Court of Appeal, Sixth Appellate District Case No. H034835
Santa Clara County Superior Court Case No. 108CV-119575)

I, Lisa Grennon, declare:

I am a citizen of the United States and employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 655 West Broadway, 15th Floor, San Diego, California 92101. On July 12, 2012, I served a copy of the within document(s):

**AMICUS CURIAE LETTER SUPPORTING PETITION FOR REVIEW**

XX **BY U.S. MAIL**

By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below **(as indicated).**

XX **OVERNIGHT COURIER**

By placing the document(s) listed above in a sealed overnight courier envelope with an affixed pre-paid air bill, and caused the envelope to be delivered to an overnight courier agent for delivery to the addressees as indicated.

**VIA OVERNIGHT COURIER**
Raymond Edward Awa Kong, Jr.
Law Offices of Catherine Fisher
1970 Broadway, Suite 1040
Oakland, CA 94612
Attorneys for Defendant and Appellant
Dennis E. Baca, et. al.

**VIA OVERNIGHT COURIER**
Jeffrey A. Leon, Esq.
Leon & Leon
1970 Broadway, Suite 1250
Oakland, CA 94612
Attorneys for Defendant and Appellant
Dennis E. Baca, et. al.

**VIA OVERNIGHT COURIER**
Christine Carin Fitzgerald
345 Lorton Avenue #302
Burlingame, CA 94010
Attorneys for Plaintiff and Respondent

**VIA OVERNIGHT COURIER**
Jason Rudy Alcala
Office of the City Attorney
1052 South Livermore Avenue
Livermore, CA 94550
Attorneys for Plaintiff and Respondent

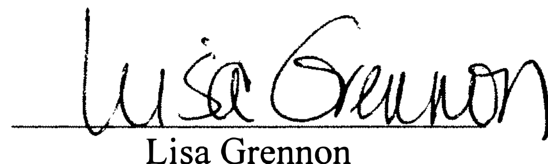
**VIA OVERNIGHT COURIER**
Benjamin Louis Stock
Burke, Williams & Sorenson, LLP
1901 Harrison Street., Suite 900
Oakland, CA 94612
Attorneys for Plaintiff and Respondent

**VIA U.S. MAIL**
Clerk, Court of Appeal
Sixth Appellate District
333 West Santa Clara Street
San Jose, CA 95113

**VIA U.S. MAIL**
The Honorable Carie Zepeda
Santa Clara County Superior Court
191 N. First Street
San Jose, CA 95113

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on July 12, 2012, at San Diego, California.



Lisa Grennon