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TRENDS & CURRENT ISSUES IN EMINENT DOMAIN

Scope of Paper

This paper addresses three eminent issues of current interest. Only in recent years have they surfaced as significant concerns to public entity counsel. The three issues this paper will explore are:

I. Challenges to the *Right to Take;*

II. *Nexus* and *Rough Proportionality:* Valuation of acquisitions subject to required dedications under *Nolan* and *Dolan*;

III. Avoiding having the price paid for an acquisition purchased by the city at a compromise price used against the city in other acquisitions.

I. Challenges to the Right to Take: adopting an attack-proof *resolution of necessity.*

With increasing frequency, Owners' counsel are challenging the condemnor's *right take.* If successful, the Owner can terminate the *order of possession* and obtain a dismissal of the condemnation action.

Owner's counsel will sometimes challenge the right to take even when the Owner favors and wants the proposed public project for which Subject Property is being acquired. This is because even the threat of a successful challenge to the City's *right to take* can give the Owner immense bargaining power where a project

must go forward on a fixed time schedule.

Fundamental to the *right to take* is a valid *resolution of necessity.* An eminent domain complaint cannot be filed until the City Council has adopted a *resolution of necessity* [Code of Civ. Proc.§1240.040]. Until *Redevelopment Agency v. Norm's Slauson* (1986) 173 Cal.App.3d 1121, 1125-1127, the adoption of a *resolution of necessity* was often considered a routine matter often placed on the City Council's consent calendar with no supporting administrative.

In today's litigious environment, to assure that the City's *right to take* will not be dereated, public entity counsel must:

(i) check that all of the *taking* requirements have been met;

(ii) avoid the reality (or appearance) of the City pre-committing to the taking prior to the hearing on the *resolution of necessity;* and

(iii) be certain that there is an *administrative record* before the City Council which contains factual *substantial evidence* to support each finding that the Council makes in the *resolution of necessity.*

There follows a check-list of what public entity counsel should review prior to the adoption of the *resolution of necessity.*

A. Advise Staff to Avoid the Reality and Appearance of Pre-Committing the City to an Acquisition Before the adoption of the *Resolution of Necessity*.

Owner's counsel must not be able to successfully contend that the hearing on the adoption of the *resolution of* necessity was a "sham", in that the decision to acquire had already been irrevocable made prior to the hearing. *Redevelopment Agency v. Norm's Slauson* (1986) 173 Cal.App.3d 1121, 1125-1127.

Staff must be advised to speak and write of the acquisition in conditional terms, e.g the "staff recommended acquisition" or "the acquisition to be recommended to the City Council" until the *resolution of necessity* is adopted In all contacts with Owner, staff should always advise the Owner that "staff has no authority to acquire the property -- only the City Council can

authorize the acquisition and they have not yet acted." This is particularly important when making the required Government Code §7267.2 offer which precedes the hearing on the adoption of the *resolution of necessity*-- the Owner should be advised that the acquisition as well as the offer is subject to approval by the City Council.

B. Mandatory Offer. Has an *adequate* mandatory Government Code §7267.2 Offer been made to the owner?

Be certain that the required *Appraisal Summary* used by the City is not a questionable "one- page 'Appraisal-Acquisition Summary Statement'" that states no more than what the appraiser found to be the fair market value of the property. *City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005,1009, 1012-1014.[1]

C. Adequate Descriptions. Do the property descriptions which accompany the *resolution of necessity* properly describe the interest to be acquired? Are *easement* acquisitions (e.g. slope easements; temporary construction easements) separately described and not included in the *fee simple* acquisitions. Are all access rights to be acquired described? Where access to the remainder is taken but mitigating access openings provided to the remainder is a reservation of access to remainder described?

A condemnor cannot latter decide to take more or less than what the *resolution of necessity* says the City is taking (without going through an amendment to the *resolution* and the *complaint* which may delay the acquisition and result in the award of substantial costs as a condition to

[1] Government Code §7267.2(a) requires that the owner be provided with a "written statement of, and summary of the basis for, the amount it established as just compensation." While the "written statement" should contain some analysis, it should not disclose the detailed content of the otherwise potentially privileged appraisal. In addition to the appraiser's opinion of the fair market value of the take, and, where appropriate, the severance damages, if any, the author recommends that the statement describe appraisal appoaches used (e.g. where appliable: *the sales comparison approach, the income approach,* and *the cost approach*) and the appraiser's conclusion as to the *highest and best use* of the property. The author recommends against disclosing sales data. However, he has disclosed one or two sales "as examples of the sales data used" in special cases.

allowing the amendment).

D. CEQA Compliance. Has the California Environmental Quality Act been complied with for the project?

CEQA compliance may be essential in order to have a valid *resolution of necessity*. Burbank-Glendale-Pasadena Airport Auth. v. Hensler (1991) 233 Cal.App.3d 577,596, 284 CR 498,509; City of San Jose v. Great Oaks Water Co. (1987) 192 Cal.App.3d 1005,1017, 237 CR 845,852; CEQA Guidelines Calif.Code or Regulations, Tit.14,§15000 et seq. §15004(b)(1); [See also City of Los Angeles v. Chadwick, (1991) 233 Cal.App.3d 1296 (***de-published*** 12-12-91)].

Has the project changed since the environmental document was prepared? If so, was a *Supplemental EIR* or *Addendum* adopted which considered the change. If not,consider supplementing the original document. [e.g consider adopting an *Addendum* (which does not require circulation) where the change is not significant.

E. Is the Taking of a Kind That Requires That Both the *Resolution of Necessity* and the *Complaint* Specifically Refer to the Specific Statute Authorizing the Taking?

Code of Civ. Proc. §1245.230(a) requires that the *resolution of necessity* contain a general reference to the statute that authorizes the public entity to acquire the property by eminent domain.

In addition, the Code of Civil Procedure requires that for some types of takings that both the *resolution of necessity* and the *complaint* make specific reference to the authorizing statute [as distinguished from merely reciting the public entity's general statutory power to condemn.} Failure to make the mandatory reference could result in a dismissal of the *complaint.* [See *PG&E v. Superior Court* (1986) 180 Cal.App.3d 770]

There follows a listing of those types of taking wherein the Resolution and Complaint must refer to a specific code section and include a general statement that the property is necessary for the specific type of taking:

1. Future use beyond seven years (10 years for taking pursuant to Federal Aid Highway Act of 1973). Code of Civ. Proc. §§1240.220(b), 1240.25;

. Acquisition of Substitute Property. Code of Civ. Proc. §§1240.320, 1240.330;

2. Acquisition to Provide Either Public Utility Service or Road Access to a property not taken, but cut off from utility service or access to a public road;

3. Excess Condemnation/Acquisition of a Remnant. Code of Civ.Proc. §1240.240;

4. Condemnation of Property Devoted to a Public Use for a Compatible Public Use. Code of Civ. Proc. §1240.510; and

5. Condemnation of Property Devoted to a Public Use For a More Necessary Public Use. §1240.610.

6. Acquisition Beyond Territorial Limit. Code of Civ. Proc. §1240.125. Conservative practice dictates that both the *Resolution of Necessity* and *Complaint* recite one of the uses for which "a local public entity may acquire property by eminent domain outside its territorial limits."

F. Has an Administrative Record Been Prepared Which Supports the Required *Public Interest and Necessity* and *Compatibility With the Greatest Public Good and Least Private Injury* findings that the City Council Must Make? Code of Civil Proc. §1245.230(c) requires that the governing board find and the *Resolution of Necessity* contain:

i. Public Interest and Necessity. The *finding* that the public interest and necessity require *the proposed project.*

ii. Most Compatible With the Greatest Public Good and Least Private Injury. The *finding* that *the proposed project* is planned or located in the manner that will be most compatible with the greatest public good

and the least private injury.

iii. Subject Property Necessary for *the Proposed Project.* The *finding* that Subject Property is necessary for *the proposed project.*

iv. Mandatory Government Code §7267.2 Offer Requirement Has Been Complied With. The *finding* that the required Government Code §7267.2 offer has either (i) been made to the record owner, or (ii) that it has not been made because the record owner cannot be located with reasonable diligence, or that the project is an *emergency project.*

1. Substantial Evidence.[2]

Before the City Council can make the required findings, there must be an administrative record containing substantial supporting evidence before them. The governing board must have "engaged in a good faith and judicious consideration of the pros and cons of the issue and that the decision to take be buttressed by substantial evidence of the existence of the three basic requirements set forth in *Code of Civil Procedure, section 1240.030 . . ." San Bernardino County Flood Control Dist. v. Grabowski* (1988) 205 Cal.App.3d 885,897, 252 CR 676,682, *Redevelopment Agency v. Norm's Slauson* (1986) 173 Cal.App.3d *supra* at 1125, 219 CR *supra* at 368; See Par., *infra*

Public Entity counsel must be certain that staff is prepared to present either or both documentary and oral evidence to the Board directed at each of the required Code of Civ. Proc. §1245.230(c) findings.

2. The Adequate Hearing and Administrative Record

Don't treat the hearing on the Resolution of Necessity as routine, or, in the absence of a request to be heard, as a consent calendar matter.

Advise staff of the required Code of Civil Procedure §1245.230 findings. Insist that staff include in their written report to the Board the facts

[2] The Author recommends that a written presentation be prepared and be placed in the Governing Board's meeting packet. Legal Counsel should review the presentation to be certain that it adequately addresses each of the required findings.

which premise findings that:

(a) the public interest and necessity require the project.
(b) the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. and
(c) the property sought to be acquired is necessary for the project." [Streets & Highways Code §1245.230(c)]

3. Factual Basis.

To the greatest extent possible ask Staff to base its report recommendations on facts, as distinguished from a summary opinions.

Examples:

Poor: The public interest and necessity require the project because it will improve traffic flow.

Better: The public interest and necessity require the Grand Avenue widening project for the following reasons:

Grand Avenue now experiences peak hour congestion with delays and average speed below 10 miles per hour. The accident rate is higher on this segment than all but two city streets. Anticipated growth and development over the next 10-years will further congest this segment. By widening Grand Avenue from four to six lanes, the capacity will be increased resulting in average speeds in excess of 20 miles per hour during peak hours. Because of a more even flow of traffic and the installation of left-hand turn storage lanes, traffic conflicts will be reduced which will result in an anticipated reduction of the accident rate.

4. Include Project Alternatives.

Wherever possible ask staff to include in the Board Report alternatives which would have avoided the proposed acquisition or minimized the taking as well as the reason why staff rejected them.

Poor: The property sought to be acquired is necessary for the project because there are no feasible alternatives.

Better: The property sought to be acquired is necessary for the project for the following reasons:

> The most feasible way to widen Grand Avenue is to: (i) maintain its existing straight alignment for safety purposes and (ii) to minimize the impact on private property by acquiring one of the two additional lanes from each side of Grand. Staff considered acquiring the additional right of way entirely from the North side of Grand Avenue which alternative would not have acquired the acquisition of all of Subject Property However, staff concluded that (a) such an alternative would have caused Grand to curve at the two ends of the project resulting in a traffic safety and traffic flow problems and (b) such an alternative would have required a significant additional taking of private property rather than a less intrusive twenty foot strip on both sides of Grand. Additional project alternatives which would not have required the acquisition of the Subject Property were considered but not recommended in the Environmental Impact Report previously reviewed and considered when this City Council approved the Grand Avenue Widening project.

Do not give as the primary reason that the cost of the project is reduced by this particular acquisition. See San Bernardino County Flood Control Dist. v. Grabowski (1988) 205 Cal.App.3d 885 at p.899, 252 CR 676 at p. 684 for a discussion of the content of an adequate administrative record.

Consider, broadening the notice of issues to be heard by the City Council at the hearing on the adoption of the *resolution of necessity* to include CEQA compliance, the adequacy of the Government Code §7267.2 offer, and the statutory authority under which the City is acquiring. Then if no objections are raised at the hearing on the *resolution of necessity* by

Owners, the City can contend that these issues cannot be raised in the eminent domain action because the Owners have failed to exhaust their administrative remedy.

San Bernardino County Flood Control Dist. v. Grabowski (1988) 205 Cal.App.3d 885, 252 CR 676 *Grabowski* suggests that where the owner had an opportunity to appear at the hearing on the Resolution of Necessity to object to the adoption of the Resolution and did not, could not latter contend that there was not substantial evidence to support the Board's required findings that the exercise of the power of eminent domain was invalid. id. at p. 898,899

The court in Grabowski, distinguishes Norm's Slauson because there the owner did not appear because he was purportedly mislead about the impact of the project on his property, whereas Grabowski was not mislead. Most important, the Grabowski court points out that at the hearing on the Resolution of Necessity adopted in Grabowski, staff put on substantial evidence of the necessity for acquiring the Grabowski property, so the condemnor had a complete administrative record.

Also see *Peo. v. Cole* (1992) 7 Cal.App.4th 1281, 1286 for the general proposition that failure to appear and object at the hearing on the *resolution of necessity* results in a loss of judicial review as to the adequacy of the Resolution.

In any event consider including in the administrative record before the City Council facts which support the following findings:

i. the public entity has fully complied with the California Environmental Quality Act for this proposed project.[3]

ii. the offer required by Government Code Section 7267.2 was made to

[3] If the governing board has previously: (a) certified that (i) an environmental document has been completed in compliance with CEQA and (ii) that the public entity reviewed and considered the information within the document prior to approving the project; and (b) filed and posted a Notice of Determination ("NOD") then only the dates on which the governing board so certified and the NOD was filed need be recited in the supporting administrative record.

Owner and that offer full complied Government Code Section 7267.2.

iii. the public entity has statutory authority to acquire the property by eminent domain pursuant to the applicable authorizing code sections.

G. Do Not Limit the Owner at the Hearing to Addressing the City Council On the Narrow Issues of *Public Use and Necessity*.

It is tempting on a crowded City Council meeting agenda to limit an Owner to be heard on the narrow Code of Civil Proc. §1245.230(c) *public use and necessity* issues.

However, if City Council hearings are recorded, what the Owner says or does not say about issues which the Owner latter raises to attack the *right to take* may latter be helpful. Consequently, it is in the City's self-interest to allow a broad hearing.

II. *Nexus* and *Rough Proportionality:* Valuation of acquisitions subject to required dedications under *Nolan* and *Dolan*

A. **The *City of Porterville v. Young*[4] valuation rule:**

Where an acquisition includes property which would have been subject to a future dedication for a public use (e.g. a street widening) in order to develop the property to its highest and best use, the portion which [but for the taking] would have been dedicated *must be valued for that lesser use which would not have triggered the required dedication*.

1. The Problem: How do you instruct an appraiser, as a matter of law, to appraise a property when a portion may be required to be dedicated as a condition to developing the property to its highest and best use?

Example/Assume:

a. Subject Property is either vacant or under-improved and best use, and a some land-use permit (e.g. zone change, conditional use permit, building permit) would be required for development to its highest and best use;

Example: Subject Property is improved with a small residence. The *highest and best* use of the property would be commercial if the appropriate land-use approvals could be obtained (e.g. subdivision map approval, general plan amendment or zone change, and/or issuance of a building permit).

b. There is a reasonable probability that a City would require a dedication of a portion of the property as a condition of

[4] *City of Porterville v. Young* (1987) 195 Cal.App.3d 1260, 1269; *Contra Costa Co. Flood Control Dist. v. Lone Tree Investments* (1992) 7 Cal.App.4th, 934-936

making granting the requisite land-use approval

Example: To develop Subject Property to an intense commercial use the City would require dedication of the front 20 feet for street widening plus an additional 15-feet for a left-hand storage lane for turning in and out of the property.

2. *Porterville* holds that when there is a *reasonable probability* that a portion of Subject Property must be dedicated as a condition to development of the *larger parcel* to its *highest and best use*, then portion which must be dedicated has a lower market value than the parcel not encumbered by the required dedication.

3. How Much is Land Reduced in Value When it is Encumbered by a Required Dedication?

At first blush a rational person might assume that if an Owner knows that a piece of a larger parcel must be conveyed to the City without compensation because of a required dedication, that the portion has no market value. Wrong say our courts!

***City of Porterville v. Young* held that where property could not be developed to its highest and best use without dedication of all or a portion of the parcel being taken:**

the area which would be dedicated must be valued for the legal land-use which would not trigger a required dedication (e.g. existing use))

Example: Using the above example, the front 30-foot strip would be valued as residential property because no dedication would be required to continue its existing under-developed residential use. The remainder of the *larger parcel* would be valued as commercial property if that was its *highest and best use* and there was a reasonable probability that land-use approvals could be

obtained conditional upon dedication.

In *Porterville*, the permitted land-use without required dedication was agricultural and the highest and best use that would have required dedication was commercial. Therefore the area which would have been dedicated in *Porterville* was valued as agricultural land.

4. Before the appraiser can apply *Porterville* to a portion of Subject Property that s/he believes may be subject to dedication, the appraiser must conclude that:

> There is a Reasonable Probability that the City Will Require a Dedication.[5]

The Public Entity's dedications ordinances, policies and demonstrable practices are such that it is reasonably probable that the dedication would have been required;

> Example. The appraiser might find that the public entity has required similar dedications under similar circumstances, i.e. "comparable" required dedications and that the jurisdiction has a consistent policy setting out when dedications will be required and the measure of the extent of the dedications.

[5] Public entity counsel should consider taking a pro-active role in developing a written dedication policy for their jurisdiction. Adoption of a dedication policy will be helpful in defending challenges to required dedications as well as being helpful in condemnation cases. An adopted dedication policy will bear on the *Dolan and Nolan nexus* and *rough proportionality* issues as well as the question of *reasonable probability of dedication.* City of Vacaville (City Attorney: Charles Lamoree) and Contra Costa County Department of Public Works are developing such a written policy.

B. The Additional Constitutional Requirements of *Nexus* and *Rough Proportionality*: *Porterville* and the *Nolan*[6]*/Dolan* [7] doctrine.

1. *Nolan* adds an additional *Nexus* requirement to the *Porterville* rule which probably existed in California case law before the United States Supreme Court decided *Nolan*.[8]

There must be a *nexus*: There must be a logical connection (a *nexus*) between the more intensive land-use and the public need for dedication.

Example. If the owner proposes to develop a commercial center a public entity may require dedication of off-site street right of way if the need for the street was generated by the new proposed use. Conversely, the public entity could not require dedication of a City Hall site unrelated to the burden created by the proposed project.

2. *Dolan* adds still an additional *rough proportionality* requirement to the *Porterville* rule.

There must be "rough proportionality." The City must establish that the exaction is roughly directly proportional to the specifically created need. [See *Ehrlich v. City of Culver City, supra* 96 C.D.O.S. at p.1549] A public entity cannot require more land to be dedicated for public use than is required or generated by the proposed project.

Example: If the proposed commercial project on Subject

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6 *Nollan v. California Costal Commission* (1987) 483 U.S. 825

7 *Dolan v. City of Tigard* (1994) 512 U.S. ___, 114 S.Ct. 2309; See *Ehrlich v. City of Culver City* (March 5, 1996) ___ Cal.App.4th ___, 96 C.D.O.S. 1542 summarizing *Nolan/Dolan*. See also *City of Hollister v. McCullough* (1994) 26 Cal.App.4th 289, 298-300; *Rohn v. City of Visalia* (1989) 214 C.A.3d 1463

8 *Mid-Way Cabinet etc. v. County of San Joaquin* (1967) 257 Cal.App.2d 181

Property generated a need for an additional lane of for traffic [because of the new turning movements in and out of the project which would otherwise be unsafe and impede the free flow of traffic] the public entity could require the dedication of one-lane. However the City may not be able to require the dedication of a second-lane unless that it was prepared to demonstrate that the need for the second-lane was also created by the proposed commercial use (e.g. a left-hand storage lane).

Summary of the Present-Day *Porterville* Rule.

1. Reasonable Probability. Before land can be considered to have a lesser value because it is subject to a required dedication, there must be a factual basis for the conclusion that there is a reasonable probability that the City would require such a dedication.

2. Nexus. In addition, there must be a logical connection between the dedication requirement and the burden of the new land use.

3. Rough Proportionality. The area to be dedicated must be roughly proportional to that which is required to mitigate the impact generated by the proposed land-use.

C. Instructing the Appraiser on the *Porterville* Rule.

Where there is a good possibility that the appraiser may encounter a *Porterville* issue, public entity counsel should instruct the appraiser on the rule. A proposed instruction follows:

APPRAISING PROPERTY WHEN A PORTION OF SUBJECT PROPERTY MAY BE REQUIRED TO BE DEDICATED AS A CONDITION TO DEVELOPING THE PROPERTY TO ITS HIGHEST AND BEST USE (The "Porterville" Issue).

In the event that you find that before Subject Property can be

developed to its highest and best use, a dedication of a portion of the property might be required as a condition of approval, then you are to form an opinion of whether or not there is a *reasonable probability* that such a dedication would be required.

City of Porterville v. Young[9] held that where property could not be developed to its highest and best use without dedication of all or a portion of the parcel being taken, the area which would be dedicated must be valued for the legal land-use which would allow development without dedication. In *Porterville*, the permitted land-use without required dedication was agricultural and the highest and best use that would have required dedication was commercial. Therefore the area which would have been dedicated in was valued as agricultural land.

Before the appraiser can reach the conclusion to value all or a portion of the parcel being acquired pursuant to *Porterville*, the appraiser must conclude that:

i. <u>There is a Reasonable Probability of Required Dedication</u>. The Public Entity's dedications ordinances, policies and demonstrable practices are such that it is reasonably probable that the dedication would have been required;

<u>Example</u>. The appraiser might find that the public entity has required similar dedications under similar circumstances, i.e. "comparable" required dedications and that the jurisdiction has a policy setting out when dedications will be required and the measure of the extent of the dedications.

ii. <u>*Nexus* and *Rough Proportionality*</u>. In addition there are two other requirements that must be met:

(a) There must be a "nexus" between the dedication requirement and the more intense *land-use; and*

(b) the area of land required to be dedicated must be "roughly proportional" to the area required to mitigate

[9] *City of Porterville v. Young* (1987) 195 Cal.App.3d 1260, 1269; *Contra Costa Co.Flood Control Dist. v. Lone Tree Investments* (1992) 7 Cal.App.4th, 934-936

the burden created by the more intense land-use.

What constitutes a sufficient *nexus* and *rough proportionality* are questions of law. Based on a factual investigation, the City Attorney will determine as a matter of law whether or not these requirements have or have not been met. Ultimately this question is for the Court if this matter precedes to trial.

In order that you may focus on the presence or absence of the factual *nexus* and *rough proportionality* foundation, I am advising you on the law.

ii. There must be a required "nexus." There is a logical *connection* (a "nexus") between the more intensive land-use and the public need for dedication.[10]

Example. If the owner proposes to develop a commercial center a public entity may require dedication of off-site street right of way if the need for the street was generated by the new proposed use. Conversely, the public entity could not require dedication of a City Hall site unrelated to the burden created by the proposed project.

iii. There must be "rough proportionality." The amount of land that is required to be dedicated must be roughly proportional to the impact of the use that the Owner proposes. A public entity cannot require more land to be dedicated than the area generated by the proposed project for public use. *Dolan v. City of Tigard* (1994) 512 U.S. , 129 LED 2d 304, 114 S.Ct.

Example: If the proposed commercial project generated a need for an additional lane of for traffic because of the new turning movements in and out of the project, the public entity could require the dedication of one-lane, but not two-lanes unless it could be shown that the need for the second lane was roughly proportional to the traffic burden created by the

[10] *City of Hollister v. McCullough* (1994) 26 Cal.App.4th 289, 298-300, See also *Rohn v. City of Visalia* (1989) 214 C.A.3d 1463; *Mid-Way Cabinet etc. v. County of San Joaquin* (1967) 257 Cal.App.2d 181.

new project.

You are instructed to investigate and independently determine whether there was a reasonable probability that the public entity would require a dedication of a portion of subject property.

Whether or not there is a "nexus" and "rough proportionality, however, are legal conclusions. Consequently this judgment must be made by legal counsel, rather than an appraiser. However, to assist legal counsel in making this judgment If you find that the public entity would require a dedication, then you are instructed to investigate the factual relationship between the acquisition and the project.

Before you reach your valuation conclusions you are to advise legal counsel of your factual conclusions. Legal Counsel will provide you with a legal opinion of whether or not, premised on the foundational facts, a Court would conclude that there is both a "nexus" and "rough proportionality." Legal Counsel will advise you on the law. You will reach your valuation conclusions consistent with the law.

D. Adopted Dedication Policy.

Because *exactions* in the form of required dedications are coming under increasing Court scrutiny whether or not related to a City's power of eminent domain, City Attorneys would be wise to administer the development of uniform written policies for *dedications.* Having in mind that only *rough* proportionality is required, it would seem that general standards, tied to different land-uses and building sizes, could be developed, incorporating an administrative appeal process for an developer that believed the general standards did not have a sufficient relationship to the public burden imposed by the development. The City of Vacaville and Contra Costa County are in the process of developing standards and policies for dedications. [See footnote 5]

III. Avoiding Being Sandbagged by an Owner Who Seeks to Use as a Comparable Sale, the *Above-Market Value Price* Paid by the City for Another Acquisition as a Compromise.

A. Factual Illustration of the Problem.

The City is acquiring 40 parcels for a street widening project. One of the parcels was a small parcel critical to starting the project.

The City's appraiser valued the property at $4 a square foot. The City commenced early negotiations with the owner of the critical parcel and ultimately acquired the property at $6 a square foot. The payment of $2 a square foot above the appraisal seemed reasonable because the parcel was small and the need to acquire was great.

The City has now filed an eminent domain action on the other 39 parcels, all of which are quite large. The Owners contend that the purchase by the City at $6 a square foot is a *comparable sale*. The Owners claim their properties are worth $8 a square foot.

B. *Golden Gate Heights Investments* and the Law

Prior to 1993, most condemnation lawyers thought that it was legally improper for an appraiser to rely upon the price paid by a public agency for land purchased under the threat of condemnation. Evidence Code §822(a)(1) clearly states that ". . . 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 the property:

> (1) the price or other terms and circumstances of an acquisition of property . . . if the acquisition was for a public use for which the property could have been taken by eminent domain . . . "

In 1987 then Assemblyman Elihu Harris (now Mayor of Oakland) introduced Assembly Bill 616 which was to become an exception to Evidence Code §822(a)(1). The now enacted AB616 which qualified the rule that price paid for property acquired for a public use could not be taken into account reads:

> " . . . except that the price or other terms and circumstances of an acquisition of property *appropriated to a public use* . . . shall not be

excluded under this section *if the acquisition was for the same public use for which the property could have been taken by eminent domain.*"

The AB616 exception was the invention of California's private water companies. Local government was acquiring private water companies or their facilities such as reservoirs by eminent domain to provide publicly-owned water service. The trade association for the water companies wanted to use the price paid by other public agencies throughout the State to prove the value of their property. The exception was carefully tailored to be limited to acquisition of property *already appropriated to a public use.*

The *Author's Statement* accompanying AB616 stated:

"AB616 will allow the purchase price of a public property to be used as a "comparable *only when the same public use will be continued,* i.e. a School for a school or a water district for a water district."

However in *City & County of San Francisco v. Golden Gate Heights Investments* (1993) 14 Cal.App.4th 120, the City(!) over objection introduced evidence of the price it had paid for other parcels in the same project. On appeal, the Court read the "water district" exception as wiping out the rule that purchases by public entities cannot be considered. Apparently the appellant had not offered evidence of the legislative history of AB616 because the court states at p. 1210:

"GGHI [appellant] contends that the . . . exception, added by amendment in 1988 . . . , applies only to condemnation of utility properties. (See Matteoni & Veit, Condemnation Practice in California (Cont. Ed.Bar. Supp. 1992) §9.49, p.1610. We do not read the statute as so limited. *Nor does GGHI's cited authority so state."* (*italics* added).

Since the price paid by public agencies is often higher than their appraisal, it is important that cities limit the reach of *Golden Gate Heights.*

<u>Recommendation</u>.

1. Place the following language in any contract to purchase land for a public

purpose:

> Grantee requires Parcel_____ , a property not now appropriated to a public use, for the construction of _____ , for which Grantee may exercise the power of eminent domain. Grantor is compelled to sell, and Grantee is compelled to acquire Parcel _____ .
>
> Both Grantor and Grantee recognize the expense, time, effort and risk to both Grantor and Grantee in resolving a dispute over compensation for Parcel _____ by eminent domain litigation; and the compensation set forth herein for Parcel _____ is in compromise and settlement, in lieu of such litigation.

2. If confronted with evidence of the price paid by the City in an eminent domain trial then make a *Motion in Limine* to exclude the sale and contend:

   a. *Golden Gate Heights:*

      i. applies, if at all, to purchases by the City for the same project; and any purchases made by the City for *this* project were inadmissible as made in compromise and settlement, in lieu of litigation.

      ii. is only an alternative holding since the court makes clear that the admission of the City purchases was not prejudicial error. *supra* at p. 1210; and

      iii. points out that the appellant failed to put on evidence of the legislative history of the 1988 amendment.

      Then put on evidence of the legislative history or make an offer of proof. Legislative Intent Service at 712 Main Street, Woodland, CA 95695 (916) 666-1917 performs this expert witness service.