

SECTION I

PRE-ACQUISITION PLANNING, OFFERS, NEGOTIATIONS, AND RESOLUTIONS OF NECESSITY

A. PRE-ACQUISITION PLANNING

1. In most instances, the process begins with the approval of a “project” by a public entity. However, depending on the complexity of the proposed project, a significant amount of time may have gone into planning the project. Such planning activities do not generally constitute the initiation of the condemnation process, or rise to the level of a “public announcement” of an intent to condemn. A claim for pre-condemnation damages may be raised by a property owner if they show that the public entity placed obstacles in their path relating to the use of the property. *Jones v. City of Los Angeles* (1979) 88 CA3d 965.
2. However, if there has been a public announcement of an intent to condemn, the public entity may be liable for pre-condemnation damages. *Klopping v. City of Whittier* (1972) 8 C3d 39.
3. The public entity should consider whether it has the in-house capacity to oversee and conduct the pre-acquisition process. For instance, appraisers, environmental consultants, acquisition agents, relocation agents, and eminent domain counsel may be necessary to effectuate the acquisition of the real property identified as necessary for the proposed public project. If the public entity does not have the internal resources necessary to either oversee or conduct the process, then it should follow its internal procedures to hire the necessary consultants.
4. Another very important initial element of the process is to conduct a thorough CEQA review. Once a project has been identified by the public entity, it should begin its CEQA review. The approval of an EIR or Negative Declaration and the filing of a Notice of Determination starts a 30 day statute of limitations period within which CEQA challenges can be raised. (Public Resources Code §21167). The public entity should be cautioned that if it proceeds with the acquisition process before its CEQA review has been completed, and the project is challenged on that ground, the project may be delayed. *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577. At its most extreme, a court could dismiss the condemnation action entirely. *City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005.
5. As part of the planning phase the public entity may want to obtain permission from the property owner to go onto the property to conduct some preliminary surveys or testing on the site. (Code of Civil Procedure §1245,110). If the property owner does not grant the public entity permission to enter onto the real

property for these purposes, it may petition the Court for an Order Permitting Entry. The property owners must be provided with sufficient notice of the petition. The court will then determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use. Once the amount of probable compensation has been deposited with the court, the public entity will be allowed to enter onto the property, subject to any limitations imposed by the court. (Code of Civil Procedure §1245.030).

6. At this point, it would be advisable to order litigation guarantees from a title company so that you can see what encumbrances are on the property. There may be tax liens, utility easements, judgments, and deeds of trust, which will have to be dealt with in order to obtain clear title to the real property. The public entity can then decide if it is willing to take title subject to any of the existing encumbrances or exceptions to title.
7. In order to make an offer of just compensation, the public entity must obtain an appraisal of the real property to be acquired. The appraisal should be performed by someone with expertise in the area of eminent domain. The report should conform to the requirements of Government Code §7260, the HCD Guidelines, 24 Cal.Admin. Code §6080 *et seq.*, and any local court guidelines (e.g. L.A. Superior Court Eminent Domain Policy Memorandum, Orange County Eminent Domain Policy, etc.).
8. A Notice of Decision to Appraise letter should be sent by the public entity to the property owner. This letter should advise them that the public entity has decided to appraise their property, but that a decision to acquire their property has not yet been made. The letter should identify the name of the appraiser and advise the property owner that the appraiser will be contacting them to see if they would like to accompany the appraiser on a tour of the property. (Government Code §7267 and 7267.1).
9. Once the appraisal has been completed, it should be reviewed to determine whether it complies with the statutory requirements. If it does, the governing body of the public entity can meet in closed session to approve the amount of just compensation to be offered and to instruct its negotiators on issues to be discussed with the property owners. (Government Code §§ 7267, 7267.2, and 54956.8). The amount offered can not be less than the appraised value of the real property. (Government Code §§ 7267.2(a)).
10. However, if the real property is listed for sale on the open market before the public entity extends an offer to purchase, the public entity may purchase the property for the asking price, even if it is less than its appraised value. *Melamed v. City of Long Beach* (1993) 15 Cal.App.4th 70.

B. OFFERS AND NEGOTIATIONS

1. The public entity should then send an offer letter to the property owner, setting forth the amount of its offer and the basis of the offer. Government Code §7267 now requires that virtually all of the analysis contained in the appraisal be attached as part of the offer letter to the property owner. This means that the public entity must provide the property owner with the comparable sales information, as well as the explanation and analysis used by the appraiser in arriving at his/her opinion of value. If either the Income Capitalization approach or the Replacement Cost approach to valuation was utilized by the appraiser, then all of the data relied upon by the appraiser, as well as their analysis, must be included in the offer letter.
2. The public entity must negotiate with the property owner in “good faith”. As a matter of perception, giving the property owner less than 30 days to respond to the public entity’s offer is not considered “good faith” negotiation. The use of coercion or delay to compel settlement is also strictly forbidden. (Government Code §7267.5).
3. Also, it is usually during this negotiation period that relocation assistance benefits are discussed with residential or business occupants of the real property. (Government Code § 7262).
4. If the parties are able to reach an agreement on the terms of the acquisition, a Purchase and Sale Agreement should be prepared. Generally, escrow is also opened to facilitate the transfer of title. Any due diligence, such as environmental testing, should be conducted during the escrow period.
5. If the parties are unable to reach an agreement on the terms of the acquisition, or if clear title cannot be conveyed by the property owner, then upon the expiration of the offer period, the public entity would send out a letter to the property owner providing them Notice of Hearing to Consider Adoption of a Resolution of Necessity. The public entity must provide the property owner with at least 15 days notice of the hearing. The letter must be sent by First Class mail or personal delivery to the name and address listed on the last tax assessor’s roll. (Code of Civil Procedure §1245.235).
6. Prior to the hearing on the Resolution of Necessity, a staff report is prepared which sets forth the purpose of the proposed acquisition, explains the CEQA review process completed and establishes the three elements necessary for a public entity to exercise its power of eminent domain.. The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established: (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. (Code of Civil Procedure § 1240.030).

7. It should be noted, that if the parties are unable to reach an agreement during the negotiation process, they can continue to negotiate the terms of a mutually agreeable acquisition, even after a lawsuit has been filed.

C. **RESOLUTIONS OF NECESSITY**

1. A public entity may not commence an eminent domain action until its governing body has adopted a resolution of necessity that meets certain statutory requirements. (Code of Civil Procedure §1245.220).
2. The hearing to consider the adoption of a Resolution of Necessity is a public hearing. Anyone who has advised the City Clerk that they wish to be heard on the issue of the adoption of the Resolution of Necessity or who has filed written objections, may be heard. (Code of Civil Procedure §1245.235(b)(3)). In reality, most public entities allow anyone who wants to speak on the adoption of the Resolution of Necessity to do so.
3. If a party fails to file written objections, or to voice their objections at the public hearing, they have waived their right to challenge the public entity's right to take based on the adoption of the Resolution of Necessity. *People ex rel Department of Transportation v. Cole* (1992) 7 CA4th 1281.
4. The Resolution of Necessity must contain certain specific information. It must contain a general statement of the public use for which the property is to be taken and a reference to the statute that authorizes the public entity to acquire the property by eminent domain. It must also include a description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification. Finally, it must include a declaration that the governing body of the public entity has found and determined that (a) the public interest and necessity require the proposed project; (b) 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; (c) that the property described in the resolution is necessary for the proposed project; and (d) that the offer required by Government Code §7267.2 has been made to the owner or owners of record. (Code of Civil Procedure §1245.230).
5. Generally, the Resolution of Necessity must be approved by a 2/3 vote of the governing body. (Code of Civil Procedure §1245.240).

6. A Resolution of Necessity adopted by the governing body of the public entity as previously described, conclusively establishes the four findings referenced above. (Code of Civil Procedure §1245.250(a)).
7. However, the Resolution of Necessity can be challenged upon a showing of “gross abuse of discretion”. (Code of Civil Procedure §1245.255). This can be done by showing a lack of substantial evidence to support the Resolution of Necessity. *Huntington Park Redevelopment Agency v. Duncan* (1983) 142 CA3d 17. It can also be accomplished by showing that, at the time of the hearing to determine the necessity of the taking, the condemnor had irrevocably committed itself to the taking of the property regardless of the evidence to be presented. *Redevelopment Agency v. Norm’s Slauson* (1985) 173 CA3d 1121.
8. The Resolution of Necessity is valid for six months. Failure to proceed after adoption of the Resolution may subject the public agency to liability for inverse condemnation. (Code of Civil Procedure §1245.260).

SECTION II

PLEADINGS, ORDER FOR POSSESSION, AND STEPS TO PRESERVE THE VALUATION DATE

A. THE COMPLAINT

1. Statutory requirements. Code Civ. Proc. § 1250.310.
 - a. “The names of all plaintiffs and defendants” (Code Civ. Proc. § 1250.310(a)), clarified by Code Civ. Proc. §§ 1250.210 and 1250.220). “Defendants” includes “those persons who appear of record or are known by the plaintiff to have or claim an interest in the property described in the complaint.” The title report is a crucial source of information here.
 - b. “A description of the property sought to be taken.” (Code Civ. Proc. § 1250.310(b).) This requires a legal description.
 - c. The “project map” requirement (§ 1250.310(e)) may take considerable lead time to prepare.
 - d. Consult section 1250.310 for other specific pleading requirements.
2. The condemning agency must file a notice of *lis pendens* with the county recorder upon the commencement of the eminent domain proceeding. (Code Civ. Proc. § 1250.150.)

B. RESPONDING TO THE COMPLAINT

1. The answer. (Code Civ. Proc. § 1245.320.)
 - a. Must state the nature and extent of the defendant’s interest in the property.
 - b. Must state any claim for compensation for loss of goodwill.
 - c. The specific grounds for objecting to the right to take must be alleged, including the specific facts upon which the objection is based. (Code Civ. Proc. §§ 1250.350-1250.370; *County of San Mateo v. Bartole* (1960) 184 Cal.App.2d 422, 433; *People v. Lagiss* (1958) 160 Cal.App.2d 28, 33; *People v. Thomas* (1952) 108 Cal.App.2d 832, 836.)
2. Disclaimer. (Code Civ. Proc. § 1250.325.)
3. Demurrers, motions to strike.

C. DEMURRING TO THE ANSWER

1. Virtually unheard of in normal litigation but not unusual in eminent domain proceedings.

D. NOTICE OF DEPOSIT OF PROBABLE COMPENSATION (Code Civ. Proc. §§ 1255.010 *et seq.*)

1. Purpose/effect:
 - a. Fixes the valuation date (Code Civ. Proc. § 1263.110; but see *Saratoga Fire Protection District v. Hackett* (2002) 97 Cal.App.4th 895, discussed *infra.*)
 - b. Prerequisite for an order for possession. (Code Civ. Proc. §§ 1255.410 *et seq.*)
2. Procedure:
 - a. Generally must be based on appraisal by a qualified appraiser. (Code Civ. Proc. § 1255.010(b).)
 - (1) Emergency exception in subdivision (c) where the appraisal “cannot reasonably be prepared before making the deposit.”
 - b. Recommendation: make deposit to the State Condemnation Deposits Fund in Sacramento.
 - c. The notice must:
 - (1) be served “on all parties who have appeared in the proceeding”; and
 - (2) be supported by a written statement of the appraiser containing sufficient detail to indicate clearly the basis for the appraisal, and it must include the items specified in Code of Civil Procedure section 1255.010(b) (recently amended).
 - d. Any defendant can apply to withdraw all or any portion of the deposit. (Code Civ. Proc. § 1255.210.)
 - (1) Application must be verified. (*Id.*)
 - (2) Application must be served upon the plaintiff, and plaintiff must make any objection within 20 days. (Code Civ. Proc. § 1255.230.)

- (3) Withdrawal waives all claims and defenses “except a claim for greater compensation.” (Code Civ. Proc. § 1255.260.)
- e. Any party may make a motion to increase or decrease the amount of the deposit at any time. (Code Civ. Proc. § 1255.030.)

E. ORDER FOR POSSESSION (Code Civ. Proc. §§ 1255.410 *et seq.*).

- 1. *Ex parte* application; issuance is mandatory if “[agency] is entitled to take the property” and agency has made deposit of probable amount of compensation. (Code Civ. Proc. § 1255.410(a).)
- 2. Required documents
 - a. Application.
 - b. Memorandum of points and authorities.
 - c. Declaration of counsel setting forth the basic facts supporting the condemnation, attesting to the requisite notice for the *ex parte* proceeding and attaching the notice of deposit of probable compensation.
 - d. Declaration of the appraiser re value.
 - e. Order for Immediate Possession.
- 3. Service of the order (Code Civ. Proc. § 1255.450):
 - a. Record owner (owner of the legal or equitable title to the fee or any lesser interest, as shown by recorded deeds or other recorded interests), and
 - b. Any occupants.
 - c. Personal service is required, except
 - (1) Mail service is permitted upon a party or attorney of record for a party who has been served with a summons
 - (2) Registered or certified mail is permitted for a person who resides outside of the state or cannot be located with due diligence
 - (3) Court authorization for good cause; and
 - (4) Single service is authorized to one of several persons with a common business or residence address.

- d. Effective date of possession (Code Civ. Proc. § 1255.450):
 - (1) 90 days from service of the order for property lawfully occupied by a person dwelling thereon or by a farm or business operation;
 - (2) 30 days from service of order for unoccupied property;
 - (3) 3 days from service or order where plaintiff has an urgent need for possession and will not displace or unreasonably affect any person in actual and lawful possession of the property to be taken or the larger parcel of which it is a part. (Code Civ. Proc. § 1255.410(c).)
- e. Challenges to order of possession:
 - (1) Motion for relief based on hardship (Code Civ. Proc. § 1255.420). Must be brought within 30 days after service of order for possession.
 - (2) Motion to stay based on right-to-take challenge (Code Civ. Proc. § 1255.430.) Defendant must have objected on this ground through demurrer or affirmative defense, and must show a reasonable probability of success.

F. ORDER FOR CERTIFICATION BY TAX COLLECTOR (Code Civ. Proc. § 1260.250.)

- 1. Requires the tax collector for the county to certify to the court the amount of any unpaid taxes on the property, the daily prorated taxes and the estimate of any taxes that will become a lien on the property. This certification allows the taxes to be apportioned between the tax payer and the condemning agency as of the date of possession.
- 2. Based on the certification, the court, at the time of judgment, orders any amounts owing from the tax payer to be deducted from the judgment and paid to the tax collector.

G. PRESERVING THE VALUATION DATE

- 1. Prior to *Saratoga Fire Protection District v. Hackett* (2002) 97 Cal.App.4th 895, the valuation date was one of three dates set by statute: (1) the date of filing of the complaint if the compensation issue was brought to trial within one year of that date, unless the owner caused the delay (Code Civ. Proc. §§ 1263.120-1263.130); (2) the date of the agency's deposit of probable compensation (Code Civ. Proc. § 1263.110); or (3) the date of trial. (Code Civ. Proc. § 1263.130.)

2. Under *Saratoga Fire*, where a party alleges an “unusual” or “substantial” change in the value of the property between the applicable statutory date of valuation and the trial date, the date of valuation is the date of trial. It is not clear whether this new rule applies where a deposit of probable compensation has been made, but the logic of the holding is applicable to deposit cases. Nor is it clear what “unusual” and “substantial” mean.

SECTION III

PRE-TRIAL PROCEEDINGS, TRIAL, POST-TRIAL AND ABANDONMENT

A. PRE-TRIAL PROCEEDINGS

1. Pre-trial conferences are required for purposes of case management and calendaring. Cal Rules of Ct 204.1. Case Management conferences are scheduled in “fast track” cases at the time of the filing of the complaint. Cal Rules of Ct 212.
2. Pre-trial conferences allow the parties to define issues and narrow scope of trial attorney’s preparation of issues. The trial judge prior to the jury trial may decide disputes concerning evidentiary or other legal issues concerning compensation. Code of Civ. Proc. § 1260.040. *People ex rel Dep’t of Pub. Works v. Volz* (1972) 25 Cal.App.3d 480.
3. Los Angeles County has a special department in the Superior Court for pre-trial disposition of eminent domain cases. Many counties provide greater flexibility/latitude in the processing of these cases compared to regular civil cases.
 - a. First Pre-trial Conference – List issues to be determined in case, set dates for exchange of appraisal reports or statements of value, settlement conference and trial.
 - b. Final Pre-trial Conference – Exchange appraisal reports in court. Parties can arrange for exchange out of court. Trial courts in other counties allow for exchange of statements of value outside of court.
 - c. Mandatory Settlement conference takes place 30 days before trial. Final offers and demands are exchanged pursuant to Code of Civ. Procedure §1250.410 (a). The reasonableness of the offer determines whether litigation expenses are awarded during post-trial proceedings. (*See infra.*)
4. Discovery – While necessary for the production of documents especially to substantiate claims for goodwill and to flesh out other legal issues, its application is generally limited since opinions of value are usually the subject of expert witness testimony and such information becomes available only after exchange date.
5. Alternative Dispute Resolution – Effective January 1, 2002, parties in eminent domain proceedings can agree to engage in arbitration (binding

and non-binding) or mediation to resolve disputed issues. Code of Civ. Proc. § 1250.420.

- a. Litigation expenses can be awarded after arbitration if trial de novo is filed and party electing to go to trial does not do as well, plus costs and fees paid to expert witnesses and the arbitrator. Code of Civ. Proc. § 1250.420 (c)(1), (2), (3).
 - b. Trial dates can be postponed if parties elect ADR or the matter is proceeding toward settlement. Code of Civ. Proc. § 1250.430.
6. Eminent domain proceedings are given priority for trial over other civil matters. Code of Civ. Proc. § 1260.010.

B. TRIAL

1. The amount of just compensation is to be decided by a jury. The court must decide all other issues of fact and law. *People v. Ricciardi* (1943) 23 Cal.2d 390, 402-03.
2. Special provisions of the Evidence Code govern the presentation of evidence in an eminent domain proceeding. Evid. Code § 810, et seq.
 - a. Potential witnesses can include real estate appraisers and/or owners of the property in question who can give the opinions of the property's value. Evid. Code § 813(a)(1), (a)(2).
 - b. More complex cases may require the testimony of planners, engineers, economists, specialty real estate brokers/salespersons, construction experts, etc.
 - c. Valuation methodology is provided in the Evid. Code §§ 818 (comparable sales), 819 (capitalization of income), and 820 (reproduction less depreciation).
3. Generally, in an eminent domain proceeding, there is no burden of proof concerning compensation. Code of Civ. Proc. § 1260.210 (a).
 - a. Where a defendant claims goodwill, precondemnation damages, etc., they have a burden of proof solely on the issue of entitlement.
 - b. Similarly, where the agency claims there is a reasonable probability of dedication, the burden of proof is on the condemning agency. *Dolan v. City of Tigard* (1994) 512 US 374.
 - c. These matters are generally resolved in a special issues trial before the judge pursuant to Code of Civ. Proc. § 1260.040.

4. Jury verdicts must be within the limits established by expert witness testimony at trial. Verdicts above or below said testimony can result in a mistrial being declared by the trial court.

C. POST-TRIAL PROCEEDINGS

1. Code of Civ. Proc. § 1268.010 provides that the judgment award must be deposited by the agency within 30 days of entry of judgment.
 - a. Failure to do so will result in the defendant's ability to move for dismissal of the lawsuit. Code of Civ. Proc. § 1268.020.
2. If two defendants claim an interest in the award, the Code provides for an apportionment trial to decide the respective rights of each in and to the amount of compensation after it is determined. Code of Civ. Proc. § 1260.220.
3. Interest is due on the amount of the award less any amount previously withdrawn by defendant(s) or paid directly. Interest accrues beginning the earliest of:
 - a. The date the condemning agency assumes possession of the property, or
 - b. The date it was legally entitled to do so. Code of Civ. Proc. §1268.010.
 - c. Interest ceases on any amount withdrawn or when the agency pays the award. Code of Civ. Proc. §1268.010(b)(2).
 - d. Interest rate is determined by the highest rate State gets on its Surplus Money Investment Fund. Code of Civ. Proc. §1268.350.

Practice tip: It is wise for agency practitioners to insist that monies for deposit be deposited with State Condemnation Fund. Witness: Orange County bankruptcy in December 1994 that resulted in billion dollar losses due to risky investment schemes by County Treasurer. Due to the higher yield of these investments prior to the bankruptcy, many counsel for property and business owners insisted on money being deposited with the county treasurer's office.

4. Litigation fees, including attorney and appraisers fees, can be awarded to the property owner by the trial court if it is determined that the final offer was unreasonable and that the property owner's demand was reasonable. A motion for litigation expenses must be filed within thirty (30) days of the award. Code of Civ. Proc. §1250.410(b).

5. Costs are reimbursed by the condemnor, including filing fees and other litigation costs, apart from the motion for fees. Code of Civ. Proc. § 1268.710.
6. The Final Order of Condemnation transfers title to the condemnor once signed by the judge. It is a recordable instrument and serves as a deed of title.
7. A notice of appeal must be filed within 60 days of the entry of judgment. Code of Civ. Proc. §664.5.

D. ABANDONMENT

1. Acquisition of property can be terminated by an agency by filing a notice of abandonment. Code of Civ. Proc. §1268.510.
 - a. If Agency abandons acquisition proceedings, it must pay attorney's fees and damages that occur as the result of the commencement of the action.
 - b. If court finds that owner has acted in reliance on the acquisition, and cannot be made whole, it can disallow abandonment. *City of Torrance v. Superior Court* (1976) 16 Cal.3d 195.
 - c. Agency can abandon at any time, even 30 days after entry of judgment.

Practice tip. If Agency believes there is a remote chance of abandonment of an acquisition for any reason, staff should be instructed to abandon early to avoid higher future expenses associated with attorney's and appraiser's fees, etc.