Case No. S132251

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

MT. SAN JACINTO COMMUNITY COLLEGE DISTRICT,

Petitioner,

v.

THE SUPERIOR COURT OF THE COUNTY OF RIVERSIDE,

Respondent,

AZUSA PACIFIC UNIVERSITY,

Real Party in Interest.

After a Published Opinion of the California Court of Appeal,
Fourth Appellate District, Division Two, Case No. E035868

From an Order of the Riverside County Superior Court, State of California
Honorable Robert George Spitzer, Judge, Case No. RIC 349900

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA IN SUPPORT OF MT. SAN JACINTO COMMUNITY COLLEGE DISTRICT

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

To the Honorable Ronald M. George, Presiding Justice of the California Supreme Court:

Pursuant to Rule 29.1(f) of the California Rules of Court, the League of California Cities ("League"), the California State Association of Counties ("CSAC") and the Metropolitan Water District of Southern California ("MWD") respectfully request leave to file the accompanying brief *amici curiae* in support of Mt. San Jacinto Community College District ("Mt. San Jacinto").

The League is an association of all 476 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing the 16 divisions of the League from all parts of the state. The Committee monitors appellate litigation affecting municipalities and identifies those cases that are of statewide significance. The League has determined that the outcome of this case will be important to all California cities.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case raises issues affecting all counties.

MWD IS A SPECIAL DISTRICT ORGANIZED AND EXISTING UNDER THE PROVISIONS OF AN ACT OF THE CALIFORNIA STATE LEGISLATURE, THE METROPOLITAN WATER DISTRICT ACT (STATS.

1969, CH. 209, AS AMENDED; WEST'S WATER APP. §§ 109-1, *ET SEQ.*) ON BEHALF OF THE 26 CITIES AND WATER DISTRICTS THAT ARE ITS MEMBER AGENCIES, MWD IS THE PRINCIPAL PROVIDER OF WATER TO APPROXIMATELY 18 MILLION PEOPLE WHO LIVE AND WORK IN LOS ANGELES, ORANGE, VENTURA, RIVERSIDE, SAN BERNARDINO, AND SAN DIEGO COUNTIES. THE LEGISLATURE HAS AUTHORIZED MWD TO EXERCISE THE POWER OF EMINENT DOMAIN TO ACQUIRE PROPERTY NECESSARY TO CARRY OUT ITS PURPOSES OF DEVELOPING, STORING AND TRANSPORTING WATER FOR MUNICIPAL AND DOMESTIC USE. (*ID.*, §§ 130, 141.) AS A CONDEMNING AGENCY, MWD IS AFFECTED BY JUDICIAL DECISIONS INTERPRETING THE EMINENT DOMAIN LAW SUCH AS THIS CASE.

The League, CSAC and MWD appear frequently before this Court and the courts of appeal as *amici curiae* on matters affecting local government.

Amici have examined Azusa Pacific University's ("Azusa Pacific") opening and reply briefs on the merits and Mt. San Jacinto's answer brief on the merits and are familiar with the issues involved and the scope of their presentation. *Amici* respectfully submit there is a need for additional briefing on the following issues:

1. Whether valuation on the date of deposit of probable compensation for a "quick take" provides for just compensation.

2. Whether the waiver of defenses provision for a "quick take" violates the

federal or state constitution.

Respectfully submitted,

DATED: March ____, 2012

KATHERINE E. STONE
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By: _____
KATHERINE E. STONE
Attorneys for *Amici Curiae*

***AMICI CURIAE* BRIEF**

INTEREST OF *AMICI*

Cities, counties and special districts frequently exercise the power of eminent domain for essential public works projects such as wastewater treatment plants, water storage and conveyance systems, drainage facilities, roadways and civic buildings. The League of California Cities ("League"), the California State Association of Counties ("CSAC") and Metropolitan Water District of Southern California ("MWD") have determined that if the date of valuation for a "quick take" is made uncertain, important public works projects and capital improvement programs would be severely jeopardized. The rule advocated by Azusa Pacific University ("Azusa Pacific"), permitting the date of value to remain in flux until the time of trial, would create uncertainty in the budgeting and planning of public projects. Moreover, that rule would threaten fundamental goals of the California Eminent Domain Law. An uncertain date of valuation would undermine the legislative policy strongly encouraging early settlement of eminent domain actions by requiring reappraisal on the eve of trial and increasing the cost of litigation. In addition, such uncertainty would create incentives for condemnees to delay the date of trial in a rising real estate market, and for condemnors to do so in a falling market. As a result, condemnees would be unfairly rewarded when property values are rising and disadvantaged when values are falling.

ISSUES BRIEFED

1. Whether valuation on the date of deposit of probable compensation for a

"quick take" provides for just compensation.

2. Whether the waiver of defenses provision for a "quick take" violates the federal or state constitution.

PROCEDURAL AND FACTUAL BACKGROUND

The Court of Appeal, Fourth District, Division 2, granted an original writ of mandamus directing the trial court to set the valuation date in an eminent domain "quick take" proceeding as the date that a deposit of probable compensation was made. (*Mt. San Jacinto Community College v. Superior Court* (2005) 126 Cal.App.4th 619, 623.)

The parties do not identify any material factual dispute. The relevant facts are set forth in the Court of Appeal's opinion and Mt. San Jacinto Community College District's ("Mt. San Jacinto") brief. They are summarized below.

In October 2000, Mt. San Jacinto commenced an eminent domain action against Azusa Pacific seeking to condemn approximately 30 acres of vacant land in the Menifee area of Riverside County. On December 15, 2000, Mt. San Jacinto deposited $1.789 million as probable compensation for the property. (§§ 1255.010, *et seq.*[1]) Azusa Pacific did not withdraw any portion of the deposited funds as permitted by Eminent Domain Law. (§§ 1255.210, *et seq.*) In October 2001, Mt. San Jacinto applied for a prejudgment order for possession (§ 1255.410), which the trial court issued.

Mt. San Jacinto took possession of the property in January 2002. Azusa Pacific did

[1] Unless otherwise specified, all references are to the eminent domain statutory scheme. (Code of Civ. Proc. §§ 1230.010, *et seq.*)

not move to stay the order for possession on hardship grounds (§ 1255.420) or pending the trial court's adjudication of Mt. San Jacinto's right to take the property (§ 1255.430). In February 2002, Azusa Pacific petitioned the trial court to increase the deposit of probable compensation from $1.789 million to $4.2 million, on the ground the property was worth $4.2 million on December 15, 2000. (§ 1255.030.) The trial court denied the petition, and determined that the amount of Mt. San Jacinto's deposit was the probable amount of compensation that would be awarded.

Following a bifurcated court trial addressing issues of law, the trial court ruled in June 2002 that Mt. San Jacinto had a right to take the property. Azusa Pacific did not argue that the take was not for a public use.

After the exchange of valuation data in the Fall of 2002, the appraisers were deposed in May 2003. All four appraisers used the December 15, 2000 date of value. On the eve of trial, Azusa Pacific asserted, for the first time, that the date of trial should be the date of valuation. In mid-June 2003, the parties filed cross-motions *in limine* regarding the date of valuation which were noticed for hearing on June 30, 2003, the date set for the valuation trial.

Initially, the trial court did not rule on the date of valuation issue, but indicated it was "a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." (Code Civ. Proc. § 166.1.) At the trial court's suggestion, Azusa Pacific petitioned the court of appeal for a writ of mandate requesting that it resolve the issue.

In November 2003, the Court of Appeal denied Azusa Pacific's petition, without prejudice.

Following remand, further briefing by the parties, and an evidentiary hearing, the trial court issued an order on April 23, 2004, setting the valuation date on December 6, 2004, the date of trial. In making this ruling, the trial court considered a number of factors, including the factors listed in the Court of Appeal's November 2003 order. Mt. San Jacinto then petitioned the Court of Appeal for a writ of mandate, requesting that the court direct the trial court to vacate its April 23, 2004, order and enter a new order setting the valuation on December 15, 2000, the date of the deposit of probable compensation. The Court of Appeal issued an alternative writ, and granted Mt. San Jacinto's petition.

SUMMARY OF ARGUMENT

California's Eminent Domain Law properly requires that the condemned property be valued as of the date of taking. Under California's "quick take" procedure, this date is the date the condemnor deposits the amount of probable compensation and thereby obtains the authority for early possession.

The condemnee should not be entitled to challenge the taking, while simultaneously receiving the benefit of the deposit of probable compensation. The statutory waiver of statutory defenses to the taking do not violate the constitutional requirement that the deposit be promptly released to the owner.

SCOPE OF JUDICIAL REVIEW

The interpretation and application of a statute presents a question of law. (*California Teacher's Association v. San Diego Community College District* (1981) 28 Cal.3d 692, 699; *Emeryville Redevelopment Agency v. Harcros Pigments, Inc. ["Emeryville"]* (2002) 101 Cal.App.4th 1083, 1095; *Estate of Madison* (1945) 26 Cal.2d 453, 456.) In such a case, the appellate court exercises independent review and the trial court's rulings are not binding. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687.)

The issues briefed by *Amici* require the interpretation and application of Eminent Domain Law. Consequently, they present pure questions of law. (*Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 129; *see also, Crocker National Bank v. City and County of San Francisco ["South San Francisco"]* (1989) 49 Cal.3d 881, 888.) As a result, this Court's review of the Court of Appeal's ruling is *de novo.*

ARGUMENT

I. OVERVIEW OF EMINENT DOMAIN LAW

Eminent domain is the power of government to take private property for a public purpose without the owner's consent. (*Kelo v. City of New London* (2005) 125 S. Ct. 2655, 2668.) The power of eminent domain is inherent in governmental sovereignty and is not constitutionally conferred. (*People ex rel. Department of Public Works v.*

Chevalier (1959) 52 Cal.2d 299, 304.) The only limitations imposed by the United States and California constitutions are that the taking be for a *public use* and that *just compensation* be paid. (*Kelo,* 125 S. Ct. 2655, 2668; Cal. Const. Art. I, § 19.)

In California, the power of eminent domain is further legislatively limited by the California Eminent Domain Law. (§§ 1230.010 - 1273.050.) In 1974, the Eminent Domain Law was comprehensively revised. The statutory scheme provides for several defenses to the right to take that are not constitutionally required. (*See*, §§ 1250.360, 1250.370.) It also provides for limited categories of compensation beyond "just compensation" (*e.g.*, loss of goodwill). (§ 1263.510.)

California provides for a "quick take." Anytime after the complaint is filed, the condemnor may make a deposit of probable compensation, based on an expert appraisal and apply for an order of immediate possession. (§ 1255.410.) This enables agencies to timely construct important public projects. The order may be stayed if the defendant objects to the right to take until the court has ruled on the objections. (§ 1255.430.) Code of Civil Procedure section 1263.110 provides that the latest date of value for the property being acquired is the date of deposit of probable compensation. The law also provides that, if they disagree with the court's initial finding of probable compensation, owners may apply for an increase in the deposit. (§ 1263.110(b).) At any time prior to entry of judgment, the owner has the right to apply for withdrawal of the deposited funds. If the owner withdraws the deposit, the receipt of the money constitutes by operation of law a waiver of "all claims and defenses in favor of persons receiving such payment except a claim for greater compensation." (§ 1255.260.) If the owner does not

withdraw the deposit, the condemnor must pay prejudgment interest on the money not withdrawn. (§§ 1268.310-1268.360.) If the fair market value exceeds the amount deposited, the condemnor must also pay prejudgment interest on the balance owed. (Cal. Const., Art. 1, § 19.)

If the condemnor abandons the condemnation (§ 1268.510), the landowner is entitled to compensation and litigation expenses (§§ 1268.610, 1268.620.)

II. VALUATION ON THE DATE OF DEPOSIT OF PROBABLE COMPENSATION PROVIDES FOR JUST COMPENSATION

A. Just Compensation Is Based On Property Value At The Time Of The Taking.

Azusa Pacific is entitled to "just compensation" for its property, but it is only entitled to receive "the value of what [it] has been deprived of, and no more." (*City of Carlsbad v. Rudvalis ["City of Carlsbad"]* (2003) 109 Cal.App.4th 667, 678.) While an owner is entitled to just compensation for property taken for public use, the compensation must be "just not merely to the individual whose property is taken, but the public that is to pay for it." (*City of Carlsbad*, 109 Cal.App.4th 667, 678, citation omitted.) The concept of just compensation cannot be interpreted expansively.

"Just compensation" means the value of the property at the time of the taking. (*See, Kirby Forest Industries Inc. v. United States ["Kirby"]* (1984) 467 U.S. 1, 16; *Redevelopment Agency v. Gilmore ["Gilmore"]* (1985) 38 Cal.3d 790, 801.) Because property is valued on the date it is "taken", the question here is *when* Azusa Pacific's

property was taken.

B. Property Is Taken When Probable Compensation Is Deposited.

Under both federal and state authorities, property is "taken" when the condemning agency tenders payment. In *Kirby*, the United States Supreme Court held that the date of the taking in a federal "straight-condemnation" procedure is the date on which the federal government tenders payment by deposit of the award in court for the property owner and takes title to the property. (*Kirby*, 467 U.S. 1, 11.) Similarly, in *Gilmore*, this Court held that the date of the taking under California's condemnation procedure is the date on which the condemning agency tenders payment by depositing probable compensation with the court thereby permitting an order for early possession. (*Gilmore*, 38 Cal.3d 790, 801.) This Court explained that the "just compensation" due a landowner is the "'full and perfect' monetary equivalent of the fair market value of the land paid at the time the taking occurred." (*Ibid.*, citation omitted.) Observing that "a landowner in California is permanently deprived of all his rights in property sought by a public agency when the agency exercises its option to deposit estimated value and obtain early possession," the Court held that "*a constitutional taking occurs at this time*." (*Ibid.*, emphasis added.)

Here, Mt. San Jacinto tendered payment when it deposited probable compensation with the court and took possession of the property in accordance with Code of Civil Procedure section 1263.110. Consequently, the correct date of valuation in this case is December 15, 2000, the date Mt. San Jacinto deposited probable compensation.

C. The *Hackett* Decision Is Inapposite.

While *Amici* believe that *Saratoga Fire Protection District v. Hackett ["Hackett"]* (2002) 97 Cal.App.4th 895 was wrongly decided, the decision in that case does not compel a different conclusion here. Unlike the situation in this case, the condemning authority in *Hackett* had not made a deposit of probable compensation. The court of appeal concluded that Code of Civil Procedure section 1263.120, which establishes the date of valuation as the date on which the action was commenced *where no deposit of probable compensation is made*, could not be applied because it deprived the defendant of just compensation. (*Hackett*, 97 Cal.App.4th 895, 905-906.) The *Hackett* court's ruling that just compensation must be determined no earlier than the date of trial was based squarely on the fact that the taking did not occur before the date of trial.

This reasoning does not apply where, as here, the condemning authority has made a deposit of probable compensation, because as noted, "just compensation" refers to the value of the property at the time of the taking, and property is "taken" when payment is tendered by the deposit of probable compensation.

D. The Possibility of Abandonment Does Not Affect The Date Of Valuation.

Under California Eminent Domain Law, the condemnor may abandon the taking at any time until thirty days after entry of judgment. (§ 1268.510.) Azusa Pacific suggests that this creates an unequal process in which condemnors can take advantage of falling markets by abandoning the taking, while condemnees are forced to sell in a rising market. Azusa Pacific's proposed solution is to allow condemnees to move the valuation date at will to take full advantage of swings in the real estate market. This argument fails to

account for the protections provided to landowners in the event of abandonment. Furthermore, it creates a false sense of inequality to justify an unrelated remedy.

The Legislature has provided for abandonment to protect property owners in the event the condemnor cannot pay the final judgment, and to allow state and local agencies to avoid squandering scarce resources on properties that are no longer affordable. To abandon an eminent domain action, the condemnor must pay all damages caused to landowners who are dispossessed by prejudgment possession and all of the landowners' litigation expenses. (§§ 1268.610, 1268.620.) In addition, the condemning agency will bear the costs it has incurred in preparing and prosecuting the eminent domain action. In return, the agency has nothing to show for its expenditures and must identify alternative properties to acquire for the public project it seeks to build.

The remedies provided to landowners in the event of abandonment protect them against loss. If the landowner cannot be returned to his prior position, the abandonment may be set aside by the court. (§ 1268.510(b).) Regardless of whether the abandonment occurs in a rising or falling market, the landowner is in no different a position than if the eminent domain action had not been commenced.

For the reasons stated, abandonment is an inherently impractical means for a public agency to control its land acquisition costs. The fact that a condemning agency may abandon the taking is certainly not a valid basis for creating uncertainty in the valuation dates in eminent domain actions. For the purposes of providing just compensation, this Court has held that when the deposit of probable compensation has been tendered to the landowner and prejudgment interest is paid for any delay or shortfall

in payment of the money, the condemnee has received what the constitution requires. (*Gilmore*, 38 Cal.3d 790, 800-801.)

E. When The Deposit Is Inadequate, The Remedy Is To Order An Additional Deposit.

When an eminent domain action is not brought to trial within one year, the date of value is the date of trial unless the condemnor deposits the probable compensation, in which case the date of value is the date of deposit. (§ 1263.110.) If the deposit is inadequate, the remedy is to order an additional deposit, not to change the date of valuation. (*See*, § 1263.110(b).) When the deposit of probable compensation is insufficient to acquire replacement property, the owner is entitled to additional compensation based on the property value at the time of the taking, with interest. (*Gilmore*, 38 Cal.3d 790, 801; *see also, County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1067 [holding that an award of interest is appropriate where the original deposit of probable compensation was inadequate and interest was necessary to provide full compensation].) The owner is *not* entitled to have the valuation date changed to a date long after the actual taking occurred. (§ 1263.110.)

The date of valuation in a "quick take" case may be changed *only* if the entity fails to deposit additional compensation within the time allowed. (§ 1263.110(b).) In that case, "no deposit shall be deemed to have been made ...." (*Ibid*.) The 1975 Legislative Committee Comment to Code of Civil Procedure section 1263.110 states that while the date of valuation "may be earlier than the date of deposit," the "date of valuation established by the deposit *cannot be shifted* by any of the circumstances

mentioned in the following sections." (Emphasis added.) The "following sections" include Code of Civil Procedure section 1263.130. That provision sets the valuation date as the date of trial if the matter is not brought to trial within one year. That later date of valuation does not apply where a deposit of probable compensation was made. Azusa Pacific is entitled to the difference (if any) between the deposit of probable compensation and the fair market value of its property at the time of the taking, with interest. This provides for just compensation.

F. Shifting The Date of Value Would Undermine The Eminent Domain Law.

It would be manifestly unfair to shift the date of valuation. A public agency simply cannot engage in effective budgeting under such circumstances. The eminent domain process starts with an appraisal. (Gov't Code § 7267.1(b).) The agency must then decide whether it wants to pay a price in that range, consider a different site, or forgo the project. If the agency decides to proceed and cannot acquire the property by negotiation, the agency commences the condemnation action, relying on the Eminent Domain Law for assurance as to the date on which the property will be valued. (§§ 1263.110, *et seq*.) These provisions are undermined if a trial court may nonetheless shift the date of value. The possibility of a later valuation date would discourage settlement and speedy resolution of eminent domain cases.

The earliest possible determination of the date of valuation is crucial to the efficient resolution of eminent domain actions. No appraisal can be completed until the valuation date is known, and without appraisals there can be no exchange of valuation

data (§§ 1258.210, *et seq*.), no settlement offers and demands (§ 1250.410), and no trial. The delays inherent in a shifting valuation date are compounded in a case where that date can only be established following a legal issues trial on the condemnor's right to take the property. This case reflects the procedural problems that result. After the legal issues trial on the right to take, the unsuccessful property owner alleged, on the eve of the valuation trial, that changed market conditions required a change in the date of value to satisfy the constitutional requirement for just compensation. Azusa Pacific proposes that this claim be resolved by a further court hearing to determine if using the statutory date of value, under the facts of the case, would constitute a constitutional violation sufficient to justify a new date of value. Only after this further court "trial" would the parties be in a position to complete appraisals of the property and set the trial on the issue of compensation.

The problems created by such an approach are the reason that the *Hackett* decision has been criticized. "The uncertainty created by this process [of changing the date of valuation] makes it difficult to comply with other statutory requirements of exchange of valuation data and statutory offer and demand of settlement." (1 Matteoni & Veit, Condemnation Practice in California, § 4.23, p. 116 (2d ed., C.E.B.).) These commentators also note that an uncertain date of value is an invitation to the parties on both sides to engage in delaying tactics to take advantage of a rising or falling market. (*Id*. at 115-6.)

Azusa Pacific suggests that its theory of a constitutional requirement to change the date of value applies only to condemnees in a rising market. However, the amount

of compensation must be just to both the owner and the public. (*City of Carlsbad*, 109 Cal.App.4th 667, 678.) If the eminent domain action were delayed in a falling real estate market, the public would have the same constitutional argument to change the date of value to avoid a windfall payment to the owner. (See, Matteoni & Veit, § 4.23, p. 116.1 ["Further, note that Hackett's rationale applies equally to a decrease in value as a basis to change the date of value."].)

If the price for the land is unreasonable because of a changed date of valuation, an agency cannot always abandon the suit (§ 1268.510(b)), and even if the court permits it to abandon, the agency must pay from its public funds all of the landowner's attorneys' and experts' fees and costs (§ 1268.610(a)(1)) as well as its own, and possible damages to the landowner (§ 1268.620), receiving nothing in return. For these reasons, *Hackett* should not be extended to cases where the agency has deposited probable compensation.

The statutory provisions for setting the valuation date were carefully considered by the Law Revision Commission. (12 Cal. Law Rev. Comm. Reports (1974) pp. 1645-6.) The benefits of using the statutory rules to establish the valuation date include avoiding "an undesirable incentive . . . to delay the proceedings to obtain the latest possible date of valuation." (*Ibid.*) Establishing the date of deposit of probable compensation as the "default" valuation date serves to provide "a needed incentive to condemnors to deposit approximate compensation" and "would accord with the view that the property should be valued as of the time payment is made." (*Id.* at 1646.) The Commission's recommendations were accepted by the Legislature when it adopted the

date of valuation provisions of the Eminent Domain Law.

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III. THE WAIVER OF DEFENSES PROVISION FOR A "QUICK TAKE" IS NOT UNCONSTITUTIONAL

A. Challenges To The Right To Take.

Both the United States and California Constitutions require that a taking be for a "public" use. (*Kelo*, 125 S. Ct. 2655, 2551; *City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60, 64.) The constitutional public use limitation is justiciable in an eminent domain proceeding and can be raised as a defense to the proceeding. (*People ex rel. Department of Public Works v. Chevalier*, 52 Cal.2d 299, 304.) "But 'all other questions involved in the taking of private property are of a legislative nature.' [citation omitted.]" (*Ibid., see also, Kelo,* 125 S.Ct. 2655, 2668.) The Legislature remains free to place additional restrictions on the exercise of eminent domain. (*Kelo*, 125 S.Ct. 2655, 2668.)

In California, the Legislature has provided condemnees with additional statutory grounds to challenge the right to take. (§§ 1250.360, 1250.370.) In exercising its power to create non-public use grounds for objecting to the condemner's right to take, the Legislature has also placed restrictions on when such challenges can be made. One such limitation is found in the provisions of section 1255.260 which states:

"If any portion of money deposited pursuant to this chapter is

> withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation."

B. The Waiver Of Defenses Provision Does Not Violate The Prompt Release Requirement Of Article I, Section 19.

Azusa Pacific argues that a landowner must choose between challenging the condemnor's right to take and access to the funds deposited as probable compensation. They argue further that the imposition of this choice by the Eminent Domain Law violates the "prompt release" provision of Article I, Section 19. One fallacy of this argument is that, with the exception of the "public use defense" which is not raised in this case, the defenses which are waived by operation of law when a property owner withdraws the deposited funds are creatures of statute, not derived from the state or federal constitutions.

Further, the Legislature has provided that an order of possession may be stayed while the landowner litigates objections to the right to take. Section 1255.430 provides:

> "If the plaintiff has been authorized to take possession of property under Section 1255.410 and the defendant has objected to the plaintiff's right to take the property by eminent domain, the court, if it finds there is a reasonable probability the defendant will prevail, shall stay the order for possession until it has ruled on the defendant's objections." (*See also, Gilmore*, 38 Cal.3d 790, 800.)

Azusa Pacific did not take advantage of this remedy. Instead, it waited until shortly before trial to challenge the date of valuation.

The defenses raised by Azusa Pacific are wholly statutory and therefore may be limited by the Legislature. Article I, section 19 does not proscribe the Legislature

from procedurally limiting the assertion of statutory defenses to the right to take. (*Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691 [the Legislature "may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the constitution"].) The legislation is presumed to be consistent with the constitution. (*Id.* at 692.) Basic principles of separation of powers preclude the courts from declaring legislation unconstitutional where it can be construed to be constitutional. (*Id.* at 693.) Inasmuch as the case does not involve the *public use* requirement of Article I, section 19, this Court would be issuing an unnecessary advisory opinion if it buys into Azusa Pacific's argument that waiver of statutory defenses raises a constitutional issue. As a practical matter, the public use defense is seldom raised, especially since the Supreme Court's decision in *Kelo*, 125 S. Ct. 2655.

C. Remedy.

As discussed above, *Amici* contend that there is not an irreconcilable conflict between the constitutional requirement for "prompt release" of the deposit of probable compensation and the statutory provision that withdrawal of the deposit waives all defenses other than a claim for greater compensation. However, if this Court concludes otherwise, the remedy of changing the date of value as proposed by Azusa Pacific is not appropriate.

For the reasons stated in Section II.F, above, allowing the condemnee to seek a change in the date of valuation would create unnecessary delays and inefficiencies in eminent domain actions. In addition, this Court would have to establish judicially created rules to replace the legislative standards in the Eminent Domain Law. Trial

courts and parties would require direction as to how great a change in the market would require a constitutionally mandated change in the date of valuation, what evidence is proper to determine whether the change has actually occurred, what factors should be considered in selecting a replacement date for the statutorily-prescribed date, and what procedures should be followed in making the determination. (*See*, Matteoni & Veit, § 4.23, p. 116.)

The appropriate remedy would be to declare that the waiver provision of the Eminent Domain Law must bow to the constitutional requirement and allow a condemnee to withdraw the deposit of probable compensation without waiving its constitutional defense. Only this remedy would preserve the procedural provisions that are the basis for the efficient processing of eminent domain cases.

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CONCLUSION

For the foregoing reasons and those set forth in Mt. San Jacinto's brief, the date of valuation should not be subject to change in a "quick take."

Respectfully submitted,

DATED: March ____, 2012

KATHERINE E. STONE
MYERS, WIDDERS, GIBSON,
JONES & SCHNEIDER, L.L.P.

By:_____
KATHERINE E. STONE
Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using double-spaced 13 point Times New Roman typeface. According to the properties feature in my WordPerfect software, this brief contains 5080 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March ____, 2012.

KATHERINE E. STONE
MYERS, WIDDERS, GIBSON,
JONES & SCHNEIDER, L.L.P.

By: _____
KATHERINE E. STONE
Attorneys for *Amici Curiae*

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I am employed in the County of Ventura, State of California. I am over the age of eighteen (18) and not a party to the within action; my business address is 5425 Everglades Street, Post Office Box 7209, Ventura, California 93006.

On March ____, 2012, I served the foregoing document described as APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA on the interested parties in this action

[ ] by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:
[×] by placing [ ] the original [×] a true copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

[×] BY MAIL: I caused such envelope to be deposited in the mail at Ventura, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with United States postal service on that same day 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.

[ ] BY FACSIMILE: I caused the above-referenced document to be delivered by facsimile to the facsimile number(s) of the addressee(s).

[ ] BY OVERNIGHT MAIL: I caused such copies of the above documents be deposited in a box or other facility regularly maintained by UPS, an envelope or package designated by UPS with delivery fees paid or provided.

[ ] BY PERSONAL SERVICE: I personally delivered such envelope to the offices of the above-listed addressee.

[×] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
[ ] (Federal) 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 March ____, 2012, at Ventura, California.

_____

Maria E. Russell

SERVICE LIST

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