

RESOLUTION 12-02-2016

DIGEST

Real Property: Standard for Adequacy of Final Offer in Eminent Domain Cases

Amends Code of Civil Procedure section 1250.410 to provide a standard for the adequacy of the final offer in eminent domain cases and parameters for the award of costs if it is not met.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1250.410 to read as follows:

§1250.410

1 (a) At least 20 days prior to the date of the trial on issues relating to compensation, the
2 plaintiff shall file with the court and serve on the defendant its final offer of compensation in the
3 proceeding and the defendant shall file and serve on the plaintiff its final demand for
4 compensation in the proceeding. The offer and the demand shall include all compensation
5 required pursuant to this title, including compensation for loss of goodwill, if any, and shall state
6 whether interest and costs are included. These offers and demands shall be the only offers and
7 demands considered by the court in determining the entitlement, if any, to litigation expenses.
8 Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title
9 14 of Part 2.

10 (b) If the court, on motion of the defendant made within 30 days after entry of judgment,
11 finds that the offer of the plaintiff was lower than 90% of unreasonable and that the demand of
12 the defendant was reasonable viewed in the light of the evidence admitted and the compensation
13 awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the
14 defendant's litigation expenses. If the offer of the plaintiff was at least 90% and lower than 100%
15 of the compensation awarded in the proceeding, the costs allowed under Section 1268.710 may
16 include the defendant's litigation expenses.

17 (c) In determining the amount of litigation expenses allowed under this section, the court
18 shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the
19 Government Code, any deposit made by the plaintiff pursuant to Chapter 6 (commencing with
20 Section 1255.010), and any other written offers and demands filed and served before or during
21 the trial.

22 (d) If timely made, the offers and demands as provided in subdivision (a) shall be
23 considered by the court on the issue of determining an entitlement to litigation expenses.

24 (e) As used in this section, "litigation expenses" means the party's reasonable attorney's
25 fees and costs, including reasonable expert witness and appraiser fees.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: California is lacking when it comes to making property owners whole in eminent domain cases. The government takes property and gives a lowball estimate, and the owner is stuck in a difficult spot: either accept the money, or hire an attorney for a lawsuit where, even if he or she wins, he or she will be out lots of attorney fees. An exception exists if the offer was unreasonable, which courts have defined as 60% or below. To put that in \$, someone with a \$500,000 house who gets offered \$300,001 could be out tons of attorney fees even though he or she gets a judgment for \$500,000. If the final offer was 85% or greater (or \$425,000 on a \$500,000 house), attorney fees are all but certain to be borne by the owner. If it's between 60% and 85%, courts do a balancing test. In short, property owners have a strong chance of not getting justly compensated, and even if they get awarded truly just compensation, they are likely to still be out a lot of attorney fees and therefore less than whole. This provides both an unjust result, and deterrence to seeking justice.

The Solution: This resolution would guarantee litigation costs whenever the government's offer was under 90% of the amount ultimately awarded. For those between 90% and 99.9%, the court has discretion to award attorney fees. This will provide a greater incentive for government to offer an amount that avoids trial, and for property owners to seek just compensation when government is being unreasonable. Finally, it will ensure that litigation expenses will not offset an owner's just compensation.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

SB 1210 (2006).

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RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 1250.410 to provide a standard for the adequacy of the final offer in eminent domain cases and parameters for the award of costs if it is not met. This resolution should be approved in principle because it will provide guidance to the trial court and enhance the potential for meaningful settlement negotiations short of trial.

This resolution would deem a final offer inadequate if it is less than 90% of the ultimate award, require the award of costs to the owner in such cases, and allow discretionary award of costs if the offer exceeds 90% but is less than the ultimate award. Although it is not clear that 90% would be the appropriate benchmark, this resolution should be approved in principle because there is currently no set standard or set of parameters for the determination of the reasonableness of the final offer.

Under current law, if the property owner contends that the final offer by the condemner was inadequate, the property owner must file a post-judgment motion to seek litigation costs, which are available if the final offer was unreasonable and the final demand of the property owner was reasonable. The problem is that except in egregious cases, there are no fixed parameters for determination of what is reasonable, as it is entirely within the discretion of the judge, exercised after the jury verdict on compensation. This leads to uncertainty in pre-trial negotiations, increasing the difficulty of settlement.

In *San Diego Gas & Electric Company v. Schmidt* (2014) 228 Cal.App.4th 1280, the parties disputed the highest and best use of the property, resulting in dramatically different opinions of value. The parties exchanged their final offer and demand for settlement with SDG&E offering \$829,000 and defendants demanding \$5.5 million. By the eve of trial, SDG&E increased its offer to \$954,000 and defendants lowered their demand to \$4.5 million. The jury determined that SDG&E owed defendants just compensation of \$8,034,000 based on mining as the highest and best use of the property. Defendants moved to recover their litigation expenses under Code of Civil Procedure section 1250.410, seeking \$656,839 in expert fees and attorney fees and \$19,504 in costs. The trial court found Defendants' demand was reasonable, but denied the motion as it could not say SDG&E's final offer was unreasonable, based on the legal theory it had espoused, which had denied the mining use potential the defendants asserted. The Court of Appeal reversed, rejecting SDG&E's "implied suggestion" that it had carefully researched the defendants' theory of highest and best use and their valuation method.

Most of these cases involve contingency fee arrangements which, by definition, leave the property owner less than whole. The implementation of objective standards of reasonableness would help resolve that difficulty and enhance the likelihood of reasonable pre-trial settlements by encouraging the parties to more realistically evaluate their cases.