Case No. S248141

IN THE SUPREME COURT OF CALIFORNIA

EVAN WEISS, BELINDA HENRY, MICHAEL HAYES, MICHEALE HAYES, ROSS SHAW, DEBBIE SHAW, and 1819 MSC, LLC,
Plaintiffs and Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Transportation; and ORANGE COUNTY TRANSPORTATION AUTHORITY,
Defendants, Respondents, and Petitioners.

OPENING BRIEF ON THE MERITS

After a Published Decision by the Court of Appeal
Fourth Appellate District, Division Three, Case No. G052735

Appeal from the Superior Court of the State of California
for the County of Orange
Superior Court Case No. 30-2012-00605637
Honorable Kirk H. Nakamura, Judge Presiding

*Gary C. Weisberg (State Bar No. 132092)
Laura A. Morgan (State Bar No. 202745)
Esther P. Lin (State Bar No. 252569)
WOODRUFF, SPRADLIN & SMART, APC
555 Anton Boulevard, Suite 1200
Costa Mesa, California 92626-7670
Tel.: (714) 558-7000
Fax: (714) 835-7787

Attorneys for Defendants, Respondents, and Petitioners
ORANGE COUNTY TRANSPORTATION AUTHORITY, a public entity, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the DEPARTMENT OF TRANSPORTATION

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES

Page

STATE STATUTES

TABLE OF AUTHORITIES

Page

LAW REVISION COMMISSION COMMENTS

LEGISLATIVE HISTORY

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

1. STATEMENT OF ISSUE IN PETITION FOR REVIEW

Was the decision below correct in disagreeing with established inverse condemnation practice, following *Dina v. People ex rel. Dept. of Transportation* (2007) 151 Cal.App.4th 1029, using Code of Civil Procedure section 1260.040 to determine in advance of a bench trial whether a taking or damaging of private property has occurred?

2. AN OVERVIEW

Orange County Transportation Authority ("OCTA") and the People of the State of California, acting by and through the Department of Transportation ("Caltrans") (sometimes collectively, the "Agencies") built two sound walls along the west-side shoulder of the Interstate 5 freeway in response to noise complaints by residents on the west side of the freeway. Property owners on the east side of the freeway sued complaining that the sound walls reflect noise, dust and vibrations. The Agencies filed a motion to dismiss the property owners' inverse condemnation cause of action using Code of Civil Procedure section 1260.040. The trial court granted the Agencies' motion, and the Court of Appeal reversed, holding that section 1260.040 does not apply in inverse condemnation cases to decide issues of liability.

A. Overview of Code of Civil Procedure section 1260.040

Code of Civil Procedure section 1260.040[1] was adopted in 2001 as part of a larger statutory scheme designed to encourage eminent domain cases to settle pretrial. Subdivision (a) of the statute provides, in part:

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[1] All further statutory references are to the Code of Civil Procedure, except where noted.

> "If there is a dispute between plaintiff and defendant over an evidentiary or other legal issue affecting the determination of compensation, either party may move the court for a ruling on the issue."

Section 1260.040 is contained within Title 7 of Part 3 of the Code of Civil Procedure, which is entitled and referred to as the Eminent Domain Law. The law of inverse condemnation is not governed by the Eminent Domain Law but has been left for determination by judicial development. (Cal. Law Revision Com. com., 19 West's Ann. Code Civ. Proc. (2007 ed.) foll. §1230.020, p. 229.) The Legislature developed an "elaborate and lengthy process" condemning agencies must follow to acquire property through eminent domain (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 188), but it chose not to develop a parallel statutory scheme for inverse condemnation.

The Fourth District Court of Appeal in *Chhour v. Community Redevelopment Agency* (1996) 46 Cal.App.4th 273, established the test for when statutes from the Eminent Domain Law may be imported into or applied in an inverse condemnation setting. In short, the *Chhour* court held that absent an obstacle, courts are empowered to decide whether importation serves the same policy objectives in inverse as it does in direct condemnation. (*Chhour, supra,* 46 Cal.App.4th at pp. 281-82.)

The Second District Court of Appeal, in *Dina*, *supra*, also assumed that the provisions of the Eminent Domain Law could be adopted into inverse condemnation law absent legislative intent or good reason to the contrary. (*Dina, supra,* 151 Cal.App.4th at pp. 1041, fn. 3.) Applying that standard, the *Dina* court approved the use of section 1260.040 in inverse condemnation actions to resolve issues of liability and any attendant causes of action. (*Id.* at p. 1029.) This Court cited the *Dina* decision favorably in

City of Perris v. Stamper (2016) 1 Cal.5th 576, 596.

In the ten years since *Dina*, *supra*, the Legislature has amended other sections of the Eminent Domain Law three times (Code Civ. Proc., §§1240.055, 1245.245, 1255.410) and has made no effort to unwind the holding in *Dina*.

B. Summary of Argument

Continued use of section 1260.040 to decide issues of liability in inverse condemnation is warranted. The Court of Appeal's reversal of the trial court judgment in favor of the Agencies was wrong and should be reversed for four main reasons.

1. The lower court did not apply the test developed in *Chhour*, *supra*, which provides a reasonable framework for when an eminent domain statute may be applied in inverse condemnation. Instead, the court applied an impossibly high bar for importation. It recognized that the Legislature had delegated the development of inverse condemnation to the judiciary. That notwithstanding, the court asserted that it could only import an eminent domain statute into inverse condemnation upon express manifestations of intent in the statutory language or legislative history – expressions that are virtually guaranteed not to be there because of the Legislature's delegation.

2. The Court of Appeal did not recognize that the motion procedure created by section 1260.040 was something more than a motion *in limine*. The phrase "or other legal issue" and subdivision (c) demonstrate the Legislature's intent to create a new motion procedure that is different from a motion *in limine*, and for that reason, the case law disfavoring dispositive motions *in limine* does not apply here.

The lower court reached a conclusion about what the procedure in section 1260.040 is not without analyzing the parameters of what the procedure is. Undertaking a statutory interpretation analysis of what

section 1260.040 is in the eminent domain context, where it is undisputed that it applies, is a necessary first step in determining whether this provision can or should apply in inverse condemnation.

3. The lower court misunderstood how section 1260.040 liability motions have served to promote settlement in inverse condemnation cases. The misunderstanding was two-fold. The court overlooked the significance of section 1036. Section 1036 provides that a court shall award the successful inverse plaintiff his or her reasonable litigation expenses, including attorney's fees. Public entities know that once inverse liability is found, settlement should be aggressively pursued. Under *Dina*, *supra*, adept property owner lawyers routinely filed section 1260.040 motions in their inverse cases to obtain an early ruling on liability and force the government to dramatically increase its settlement offer or face the certainty of an ever increasing fee award.

The lower court also misread the meaning of a ruling in favor of the inverse plaintiff on a section 1260.040 liability motion. The court mistakenly asserted that the grant of a section 1260.040 brought by the property owner would only establish that the owner was able to make a *prima facie* showing and that trial on the issue would still be required. (Opn. p. 36.)[2] However, the purpose of section 1260.040 is to obtain a ruling from the trial judge on an issue that is for the trial judge to decide. Were it not for section 1260.040, the same issue would be decided at a bifurcated bench trial. The ruling on a section 1260.040 motion has the same effect. It is legally binding on the parties at the compensation trial. The Court of Appeal seemed to believe there was an unfairness in how

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[2] "Opn." will refer to the decision of the Court of Appeal, a copy of which was attached as Exhibit A to the Petition for Review. "CT" will refer to the Clerk's transcript on appeal, with references to the applicable volume and page number.

section 1260.040 could be used in inverse cases, but the procedure is equally available to both sides and, if anything, is more useful to the property owner lawyer because of the government's exposure to a fee award under section 1036.

4. No good reason exists to treat the nonjury legal issues that arise in eminent domain differently than the same legal issues that arise in inverse condemnation. Section 1260.040 should be available in inverse cases to determine the nonjury legal issues that arise in both contexts. The issues that fall within the bounds of "other legal issue," as that phrase is used in section 1260.040, include issues of liability. These issues are generally not amenable to resolution through motion for summary judgment because they present mixed questions of fact and law. Absent the availability of section 1260.040, parties to an inverse action will only be able to decide these issues at a bench trial, which may or may not be bifurcated from the jury trial. Fewer inverse cases will settle pretrial because there will be no vehicle that allows for an early determination of the legal issues that are standing in the way of an apples-to-apples comparison of case value.

3. FACTUAL AND PROCEDURAL BACKGROUND

A. Summary of Facts

Interstate 5 (I-5) is a freeway that runs north and south through a residential area in the City of San Clemente ("City"). (1 CT 513.) This residential neighborhood is near the freeway on-ramp and off-ramp at El Camino Real, a major thoroughfare in the City. (1 CT 40: 15-22.) The freeway bridges over El Camino Real. (*Ibid.*) In this part of the City, the terrain gently slopes up to the east of I-5, and the terrain gently slopes down to the Pacific Ocean to the west of I-5.

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1) Construction of sound walls

Two sound walls were built along the west-side of I-5 opposite Plaintiffs' properties. (1 CT 293:9-12; 1 CT 291:7-10.) The first sound wall is located on the shoulder of the southbound on-ramp from El Camino Real. (1 CT 293:9-11.) The second sound wall is located on the shoulder of the southbound I-5 and traverses the bridge of El Camino Real. (1 CT 293:11-12.) The first sound wall is a 14- to 16-foot tall masonry wall. (1 CT 293:9-21; 2 CT 514-515.) The second sound wall is 14-feet tall and is constructed of masonry block before and after it crosses the freeway's bridge over El Camino Real. (1 CT 293:11-21; 2 CT 514-515.) The portion of wall on the bridge is constructed of Paraglass, which is a clear Plexiglass-type material. (1 CT 293:12-21.)

Plaintiffs[3] own four properties on the east side of I-5 near its intersection with El Camino Real. (1 CT 39:4-22.) Three of the properties are single-family homes and the fourth is a small hotel. (*Ibid.*) Plaintiffs allege that the sound walls reflect "noise, vibration, glare and dust" onto their properties. (1 CT 40.) The sound walls interfere with and, in some cases, block what was before Plaintiffs' view of the ocean. (1 CT 40:21-22.)

The sound walls were constructed on Caltrans property as part of an OCTA retrofit sound wall program, which is a program designed to address noise complaints associated with existing freeways or highways. (1 CT 295:8-12, 296:17-19; 2 CT 371, ¶1.) Streets and Highways Code section 215.5 authorizes Caltrans to "develop and implement a system of priorities for ranking the need for installation of noise attenuation barriers along freeways in the California freeway and expressway system." Deciding

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[3] Plaintiffs are Evan Weiss, Belinda Henry, Michael Hayes, Micheale Hayes, Ross Shaw, Debbie Shaw, and 1819 MSC, LLC (collectively, "Plaintiffs").

whether a location is right for the construction of a retrofit sound wall is a multi-step process whereby Caltrans conducts progressively more detailed studies of the location on issues such as feasibility and cost effectiveness. (1 CT 295:13-296:16.) More communities request sound walls than financial resources exist. (1 CT 295:8-10, 296:15-16.) And so, locations deemed worthy of a sound wall are placed on a prioritized waiting list for funding. (1 CT 296:13-16.)

Residents on the west side of I-5 opposite Plaintiffs' properties started complaining of freeway noise in 1999. (3 CT 818:22-819:17.) West-side residents continued to complain, and Caltrans noise measurements exceeded the threshold for further study in 2001. (*Ibid.*; 3 CT 827:6-18.) Caltrans referred the location to OCTA, which placed it on a waiting list for further noise and engineering analysis. (1 CT 296:17-19.)

In August 2004, Caltrans completed and approved the Noise Barrier Scope Summary Report ("NBSSR") for the west side of the I-5. (1 CT 296:22-28.) The NBSSR analyzes and compares wall locations, wall heights, cost estimates and which combination will result in the maximum benefit to the largest number of households. (1 CT 296:7-12.) The report approved the construction of the two sound walls at this location and at these heights. (1 CT 296:22.) The report assumed that the sound walls would be built of masonry block, which is the most common material chosen for sound walls on California highways. (1 CT 293:18-19; 2 CT 515.) The NBSSR did not consider any possible reflective noise impacts on the area east of I-5 where Plaintiffs' properties are located. (3 CT 840:15-841:13, 842:11-16.) Following the approval of the NBSSR, the Agencies placed the sound wall project ("Project") on the waiting list for funding. (1 CT 296:13-16.)

In 2008, funding for the Project became available (1 CT 297:1-4), and the Agencies entered into a cooperative agreement to undertake the

design phase (2 CT 270-384). OCTA hired a contractor to design the plans for the Project consistent with the location and height of the sound walls approved in the NBSSR. (1 CT 292-294.) The design plans deviated from the NBSSR in one respect. (1 CT 293:20-294:4; 2 CT 515.) The design team determined that the bridge could not safely withstand the weight of masonry block material, and that traffic vibrations on the steel bridge would compromise the setting mortar, which could only be prevented via multiple lane closures for several months. (1 CT 293:20-294:4.) The Agencies and the City approved the use of Paraglass, a lighter material than masonry block, on the sound wall that traversed the bridge. (*Ibid.*) Construction of the sound wall Project was completed in September 2012 as designed. (1 CT 291:7-10.)

2) <u>East-side residents complain of increased traffic noise</u>

In 2011, before the sound walls were completed, Plaintiffs and other east-side residents complained at City Council meetings that the sound walls blocked their ocean views and increased noise levels in their community. (1 CT 216-217, 247-248.) In response to these complaints, the City hired a noise consultant, Weiland Acoustics, to measure whether the sound walls were causing an increase in traffic noise levels within the east-side neighborhood. (1 CT 248.)

Weiland Acoustics took noise level readings at five locations, three of which were Plaintiffs' properties and two of which were not. (1 CT 39; 4 CT 963-866.) Those noise level readings were taken before the sound walls were constructed and again afterward. (4 CT 963.) Weiland Acoustics reached the following conclusion:

> "[I]t appears that the presence of the soundwall has increased the freeway noise level in the residential community by 0.9 to 2.1 dBA

> [abbreviation for decibels]. However, as discussed above, there were a number of factors that could not be accounted for in the analysis, such as variations in traffic flow, speed and vehicle mix, as well as the inability to discriminate between freeway traffic noise and noise from other sources. Therefore, it cannot be definitively concluded that the soundwall on the I-5 freeway overcrossing of El Camino Real has increased freeway traffic noise levels in the residential community."

(4 CT 966.)

Not only were the Weiland Acoustics findings indeterminate, the reported increase was too small to be detected by the human ear. (*Ibid.*) A Caltrans technical manual explained: "It is widely accepted that the average healthy ear, however, can barely perceive noise level changes of 3 dBA." (4 CT 971; see also, 4 CT 966.)

B. Procedural History

In October 2012, Plaintiffs filed a complaint alleging three causes of action: inverse condemnation, trespass and nuisance. (1 CT 38-44.) The Agencies filed demurrers and motions to strike portions of the complaint alleging loss of an ocean view. (1 CT 45-62 [Caltrans]; 1 CT 71-91 [OCTA].) The trial court sustained without leave to amend the demurrers to the trespass cause of action and granted the motion to strike the language pertaining to a claimed loss of view. (1 CT 139-160.) The trial court overruled the demurrers on all other grounds. (*Ibid.*)

In November 2014, a separate lawsuit was filed against the Agencies by twenty members of the east-side community (who were not Plaintiffs) alleging the same theories of liability and the same types of impacts from

the sound walls at El Camino Real. (1 CT 255-262.) The second lawsuit, *Hill v. People of the State of California, by and through its Department of Transportation*, Orange County Superior Court Case Number 30-2014-00757025-CU-EI-CJC, was virtually a carbon copy of Plaintiffs' lawsuit except for the names of the parties suing the Agencies. (Compare 1 CT 255-262 [*Hill* complaint] with 1 CT 38-44 [Plaintiffs' complaint].) The *Hill* complaint was later voluntarily dismissed with prejudice. (4 CT 922.)

In January 2015, the Agencies filed two motions under section 1260.040. In one, the Agencies moved to dismiss the nuisance cause of action as barred by the immunity found in Civil Code section 3482, or alternatively, design immunity as provided in Government Code section 830.6.[4] (1 CT 265-285, 286-300; 2 CT 301-533.) The trial court granted the motion to dismiss the nuisance action (4 CT 1033-1035, 1062-1066), but the Court of Appeal reversed (Opn. p. 39). The Agencies do not appeal the Court of Appeal's decision regarding the nuisance motion.

The second motion, filed under section 1260.040, attacked the inverse condemnation cause of action. (1 CT 186-264, 286-300; 2 CT 301-533.) The second motion argued that Plaintiffs could not prove that the sound wall created a burden on them that was direct, peculiar and substantial. (1 CT 188:12-14, 200-206.) The trial court granted the motion. (4 CT 1033-1035, 1071-1075.) The Court of Appeal held that section 1260.040 could not be used in an inverse case to decide issues of liability and reversed the trial court's decision and remanded the case for further proceedings. (Opn. pp. 18-19.) The Court of Appeal did not reach the merits of Plaintiffs' inverse claim or the Agencies' defense. (*Ibid.*)

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[4] The Agencies simultaneously filed a motion for leave to amend the answer to add design immunity under Government Code section 830.6 as an affirmative defense (2 CT 534-551), which the trial court granted (4 CT 1033, 1067-1070).

4. THE COURT SHOULD REAFFIRM THE RULE IN *DINA*

The rule announced in the Second District Court of Appeal's decision in *Dina*, *supra*, regarding the use of section 1260.040 motions to decide issues of liability in inverse condemnation should prevail.

A. Cross-pollination between inverse and direct condemnation is the general rule

Cross-pollination between inverse and direct condemnation actions is the general rule. (*Chhour*, *supra*, 46 Cal.App.4th 273, 280; see also *Jefferson Street Ventures LLC v. City of Indio* (2015) 236 Cal.App.4th 1175, 1198.) In both types of proceedings, the owner is entitled to just compensation under Article I, section 19 of the California Constitution. (*Mt. San Jacinto Community College Dist. v. Superior Court* (2004) 117 Cal.App.4th 98, 104-105 ["The principals which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action"].) Because inverse condemnation is the flip-side of the coin of eminent domain, statutes and cases dealing with direct condemnation may usually be cited and relied on in inverse actions and vice versa. (e.g., *Stamper*, *supra*, 1 Cal.5th at p. 596; *Jefferson Street Ventures, supra,* 236 Cal.App.4th at p. 1198.) There are differences between eminent domain and inverse condemnation actions, but "such distinctions should not yield different results in terms of compensation." (*Mt. San Jacinto Community College Dist., supra,* 117 Cal.App.4th at p. 105.)

The Fourth District Court of Appeal in *Chhour, supra,* 46 Cal.App.4th 273, recognized this history when it developed a framework to determine when an eminent domain statute can be adopted or imported into the body of inverse condemnation law. In *Chhour*, the court was presented with a case involving a business owner who sued a redevelopment agency in inverse condemnation for loss of business goodwill under section 1263.510. The agency argued that the business was not entitled to goodwill

damages because section 1263.510 applies only in eminent domain. And because goodwill is not compensable as a matter of constitutional law, the agency argued that the business owner was barred from recovering lost goodwill under any theory. (*Id.* at p. 278.)

The question before the court in *Chhour* was under what circumstances an eminent domain statute could and should be imported into the body of inverse condemnation law. The court examined the legislative commission minutes to the Eminent Domain Law, which stated that the law "is drafted with the intent to provide rules for Eminent Domain Law and that the title is neutral with respect to the applicability of any of its provisions to inverse condemnation actions." (*Chhour, supra,* 46 Cal.App.4th at p. 279.)

According to the *Chhour* court: "'Neutral' does not mean antagonistic." (*Ibid.*) The court reasoned that the Legislature's neutrality and delegation meant that the courts had the power to import any provisions of the Eminent Domain Law unless the Legislature had created obstacles to importation. (*Id.* at pp. 280-281.) A good example of such an obstacle is found in section 1263.530, which states: "Nothing in this article is intended to deal with compensation for inverse condemnation claims for temporary interference with or interruption of business." The *Chhour* court held that absent an obstacle, courts are empowered to decide whether importation serves the same policy objectives in inverse as it does in direct condemnation. (*Id.* at pp. 281-82; see also, *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1038, fn. 10 [importing section 1265.110, citing *Chhour*].)

As in *Chhour*, the *Dina* court assumed that provisions of the Eminent Domain Law could be imported into the body of inverse condemnation absent an obstacle to importation. (*Dina, supra,* 151 Cal.App.4th at p. 1041, fn. 3.) The property owners in *Dina* claimed that

the extension of the I-215 freeway caused unacceptable noise levels, audible vibrations, which were affecting the structural integrity of their homes and erosion beneath their foundations, and increased levels of air pollution. Caltrans argued, in part, that the inverse action failed for lack of evidence that the plaintiffs suffered harm, which was direct, peculiar and substantial sufficient to impose inverse liability. (See e.g., *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 298.) The trial court weighed the evidence and dismissed the inverse claim.

On appeal, the plaintiffs argued that section 1260.040 does not authorize a trial court to decide issues of liability in a motion procedure, that the trial court was not allowed to weigh evidence under this procedure, and that the trial court denied them the right to a jury trial. Notably, the parties in *Dina* assumed that section 1260.040 applied to inverse actions.[5]

The *Dina* court held that section 1260.040 can be used to obtain a pretrial ruling on liability. (*Id.* at p. 1051.) The court reviewed the legislative history and considered the language of the statute. The *Dina* plaintiffs argued "that the statute cannot be construed to operate to terminate an action because it does not contain language suggesting that it was intended to allow the trial court to adjudicate liability or enter judgment." (*Id.* at p. 1044.) The court adopted the same standard that was applied in *Chhour*, holding:

> "But neither does the statute contain any limiting language indicating that the resolution of an evidentiary or legal issue cannot dispose

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[5] The Second District noted that section 1260.040 likely did apply to inverse actions: "Appellants, however, do not challenge the applicability of section 1260.040 on the ground that this action involved inverse condemnation rather than eminent domain, and we see no basis for declining to apply the statute to an inverse condemnation action." (*Dina, supra,* 151 Cal.App.4th at p. 1041, fn. 3.)

> of an action. We will not read into the statute a restriction that is not there."

(*Ibid.*)

The *Dina* court held that "[n]othing in section 1260.040 or its legislative history bars a party from seeking an order on a legal issue that disposes of an inverse condemnation action." (*Ibid.*) The court declined to decide whether section 1260.040 authorizes trial courts to weigh evidence (as was done by the trial court below in that case) and, instead, applied a stringent standard of review, requiring the appellate court to view all evidence in the light most favorable to the plaintiff. (*Id.* at p. 1045.) The court likened this standard of review to that applicable to a motion for nonsuit. (*Ibid.*)

This Court cited the decision in *Dina* with approval in *City of Perris v. Stamper*, *supra*, 1 Cal.5th at pp. 576, 596. *Stamper* was a direct condemnation case involving the taking of a strip of vacant land. By taking the strip, the city divided the landowners' property into two irregularly shaped parcels. The property owners claimed that they intended to develop the property as light industrial and that it should be valued accordingly. The city argued that had the owners developed the property, they would have been required to dedicate the strip to the city and the strip should be valued in its undeveloped state.[6] (*Id.* at p. 585.)

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[6] The city moved under section 1260.040 for a bifurcated bench trial on the dedication issue. (*Stamper, supra,* 1 Cal.5th at p. 589 [referred to as "pretrial motions" without reference to section 1260.040]; 218 Cal.App.4th 1104, 1119 [lower court opinion identified section 1260.040 as the pretrial motion].) The trial court granted the motion and decided both dedication issues (i.e., the likelihood the agency would impose the condition and its validity if imposed). (*Stamper, supra,* 1 Cal.5th at p. 589.) The Court of Appeal reversed, in part, holding that the trial court improperly decided the dedication issues, issues it held were for the jury. (*Id.* at p. 589-90.)

At the time of the *Stamper* opinion, there was well-established case law on how to analyze this type of dispute. (*Porterville v. Young* (1987) 195 Cal.App.3d 1260, 1269.) To prove that the property is subject to the lower valuation requires a showing that not only would the agency have imposed the dedication condition but also that the proposed dedication requirement would have been constitutionally permissible under *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (*Dolan*). Those cases hold that in order to satisfy the Fifth Amendment to the United States Constitution, a dedication requirement must have an "essential nexus" to the valid public purpose that would be served by denying the development permit outright and must be "roughly proportional" to "the impact of the proposed development" at issue. (*Stamper*, *supra,* 1 Cal.5th at p. 585.) If a dedication would be unconstitutional if imposed, the landowner is entitled to be compensated based on the property's highest and best use, not its unimproved state. (*Id.* at p. 596.)

One of the questions in *Stamper* was whether both requirements (i.e., the reasonable likelihood that the agency would have imposed the dedication condition and the constitutionality of that dedication condition) were issues for the trial judge or jury. (*Id.* at p. 586.) This Court analyzed and identified many of the legal issues that are for the trial judge to decide in an eminent domain action. (*Id.* at pp. 593-94.) The Court held that the *Nollan* and *Dolan* inquiries are "questions that must be answered in order to determine whether a dedication requirement would be a lawful taking if actually imposed as a condition of developing the property." (*Id.* at p. 596.)

In that context, the Court cited *Dina*, among others, as examples of "other procedural contexts" where "the court would undoubtedly decide such a question." (*Ibid.*) This Court's citation to *Dina* in *Stamper* was

unqualified and impliedly approved the trial judge's authority to decide issues of liability in an inverse condemnation setting using section 1260.040. The Court's citation to *Dina* in *Stamper* also validated the long-standing practice of cross-pollination between inverse and direct condemnation.

B. The Court of Appeal rejected *Dina*

In this case, the Court of Appeal rejected *Dina*. The court held that the Agencies' motion, brought under section 1260.040 and the holding in *Dina*, was improper because it sought a determination of liability in an inverse condemnation case.

The lower court did not apply the same standard that it had applied in *Chhour*, *supra*. Instead, the Court of Appeal looked for expressions of intent that section 1260.040 could be applied in the inverse condemnation setting to decide issues of liability. Finding none, the court declined to import section 1260.040.

The court did not find that the use of section 1260.040 would promote settlement. (e.g., Opn. p. 32.) The court assumed that a section 1260.040 motion to decide liability would be limited to an assessment of the property owner's *prima facie* case. And that a grant of the motion in favor of the property owner would not avoid trial but a grant of the motion in favor of the condemning agency would terminate all settlement discussions.

The Court of Appeal found that the phrase "other legal issue" in section 1260.040 was not enough "to create a new dispositive procedure reproducing the safeguards, entire statutory framework, and extensive caselaw governing either a nonsuit motion or a summary judgment motion." (Opn. p. 34.) Having ruled out "other legal issue" as a potential source of authority for a dispositive motion on liability, the court found that the preceding phrase "evidentiary [issue]" included only motions *in limine*.

The court cited the case law disfavoring the use of dispositive motions *in limine* and held that section 1260.040 could not be used as a dispositive motion to decide issues of liability in inverse condemnation. (Opn. p. 38.)

As set forth below, the rule in *Dina*, which allowed for the use of section 1260.040 motions in inverse condemnation cases to decide issues of liability, is the better rule.

5. THE COURT OF APPEAL'S DECISION WAS WRONG

The Court of Appeal's analysis contains four fundamental flaws: (1) the court applied the wrong standard to decide whether section 1260.040 can be applied in inverse condemnation, (2) section 1260.040 created a new motion procedure; the question is whether that new motion procedure should be available in inverse condemnation and what issues can be decided under that procedure, (3) the phrase "other legal issues" includes issues of liability, and (4) the court failed to appreciate how a decision on these "legal issues" has worked to foster settlement in the inverse context for ten years. As a matter of judicial development, section 1260.040 should be made available to parties to an inverse condemnation action.

A. The Court of Appeal's bar for allowing the importation of an eminent domain statute into inverse condemnation was insurmountable

Ignoring the standard adopted by the *Chhour* court, the lower court, here, did not look for obstacles of importation. It looked for the opposite: indicia of intent that the Legislature contemplated importation, either in the words of the statute or its legislative history. (Opn. pp. 29-30.) The appellate court recognized the Legislature's delegation of inverse condemnation law to the judiciary but then, in a circular fashion, reasoned that section 1260.040 could not be imported into inverse condemnation because the statutory language and legislative history were silent about its application in inverse condemnation. (*Ibid.*)

The court applied the wrong standard. The court should have applied the *Chhour* framework. It recognizes the judiciary's broad power, granted by the Legislature, to fashion procedures and substantive developments in inverse condemnation law. It recognizes, too, that provisions of the Eminent Domain Law will not typically contain indicia of intent allowing for importation because of the Legislature's delegation.

The Court of Appeal's approach ignored the general practice of cross-pollination between inverse and direct condemnation. And it significantly limited the judiciary's power to develop inverse condemnation law. The Court of Appeal's approach imposed a needlessly-high bar for importation. If the Court of Appeal's standard, rather than the one set forth in *Chhour* stands, then it is highly unlikely that any eminent domain statute will ever be imported into inverse condemnation again.

B. What is the meaning of the phrase "other legal issue" as it is used in section 1260.040?

The Court of Appeal did not attempt to interpret the phrase "other legal issue" as it is used in section 1260.040. (Opn. pp. 33-34.) Rather, the court found that three-word phrase was not enough to create a new dispositive procedure akin to a motion for summary judgment or motion for nonsuit. (*Ibid.*) These three words cannot be ignored. Before deciding whether section 1260.040 should apply in inverse condemnation, it is important to figure out what the Legislature meant by those three words in eminent domain.

1) Words of the statute

A court's primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose, considering first the words of the statute as the most reliable indicator of legislative intent. (*John v. Superior Court* (2016) 63 Cal.4th 91, 95.) Courts are bound to give the words of the statute "their usual and ordinary meaning." (*Bernard*

v. Foley (2006) 39 Cal.4th 794, 807.) And courts are not permitted to "insert what has been omitted, or . . . omit what has been inserted." (Code Civ. Proc., § 1858.)

Subdivision (c) of section 1260.040 expressly provides that the Legislature was intentionally creating a new motion procedure. Subdivision (c) states:

> "This section supplements, and does not replace any other pretrial or trial procedure otherwise available to resolve an evidentiary or other legal issue affecting the determination of compensation."

(Code Civ. Proc., §1260.040, subd. (c).)

"The use of the word 'or' in a statute indicates an intention to use it disjunctively so as to designate alternative or separate categories." (*Moore v. Hill* (2010) 188 Cal.App.4th 1267, 1280.) The Legislature's use of the word "or" in subdivision (a) means that the new procedure applies to two classes of issues: "evidentiary" and "other legal."

The Law Revision Commission Comments to section 1260.040 also characterize the new procedure as applying to two distinct classes of motions. The Comments to section 1260.040 state, in part:

> "Section 1260.040 is intended to provide a mechanism by which a party may obtain early resolution of an *in limine* motion or other dispute affecting valuation. It should be noted that the procedure provided in this section is limited to resolution of legal issues that may affect compensation; it may not be used to ascertain just compensation. *Cf.* Cal. Const. art. I, 19 (just compensation ascertained by jury

unless waived)."

(Cal. Law Revision Com. com., 19 West's Ann. Code Civ. Proc. (2007 ed.) foll. §1260.040 p. 623; emphasis added.)

The first class of issues subject to the new motion procedure is an evidentiary or *in limine* motion that can be brought well in advance of trial. The type of motion that falls within this first class of issues is well-established: a preliminary motion to exclude evidence relating to matters that the moving party considers improper and prejudicial. An example of a motion *in limine* in eminent domain is one to exclude the opinion of a valuation expert that does not comply with the established evidentiary standards for appraisal methods. (See *County of Glenn v. Foley* (2012) 212 Cal.App.4th 393, 398.)

The Legislature intended to allow both classes of issues to be resolved through this new motion procedure. The statute does not read, "[i]f there is a dispute between plaintiff and defendant over an evidentiary issue, either party may move the court for a ruling on the issue." The phrase "other legal issue affecting the determination of compensation" cannot be overlooked or glossed over. The Legislature added that language to indicate that a motion under section 1260.040 included more than purely evidentiary issues. There is something more to this type of motion, and the phrase "other legal issues" is the key.

2) Legislative history

The meaning of statutory language can be derived through context, considering the nature and purpose of the statutory enactment and the statutory framework, with consideration given to the policies and purposes of the statute. (*Gund v. County of Trinity* (2018) 24 Cal.App.5th 185, 194.) The legislative history reveals two clues about the meaning of "other legal issue affecting the determination of compensation." First, the phrase "other legal issue affecting the determination of compensation" is intended to

distinguish the issues subject to the new motion procedure from the nonjury legal issues that are right to take challenges. Second, section 1260.040 is not limited to the determination of evidentiary issues and includes mixed questions of fact and law that are for the trial judge to decide.

Section 1260.110 provides that when a property owner objects to the condemning agency's power to condemn, those objections shall be heard at a bifurcated bench trial, which can be specially set on motion by either party. Section 1260.110 predates section 1260.040, and its relationship to the motion procedure is described in the Law Revision Commission Report:

> "Early resolution of legal issues can be accommodated because legal issues are for the court rather than jury determination. Under existing law, bifurcation of legal issues may be achieved through the use of various procedural devices. The Eminent Domain Law provides structurally for early resolution of right to take issues. However, there is nothing in the statute providing for early resolution of legal disputes affecting valuation."

(Recommendation: Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain (Oct. 2000), 30 Cal. L. Revision Com. Rep. 571 (2000), p. 103.)[7]

Gleaned from this excerpt is that the new motion procedure was

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[7] Reference to legislative history documents is made to the legislative history that was the subject of Plaintiffs' motion for judicial notice made to the Court of Appeal, which the lower court granted. For the convenience of this Court, those excerpts referenced herein are attached collectively hereto as Exhibit A. The pagination of the legislative history as it was when attached in full to Plaintiffs' request for judicial notice has been preserved. If necessary, the Agencies renew Plaintiffs' motion for judicial notice of the legislative history documents to section 1260.040.

intended to provide a vehicle for "[e]arly resolution of legal issues" that "are for the court rather than jury determination." This excerpt also shows that the phrase "affecting the determination of compensation" is intended to describe those nonjury legal issues that are not right to take issues because the right to take issues are already provided for in section 1260.110.

The second clue about the meaning of "other legal issue" is found on the cutting-room floor. The Legislature originally tried to develop a list of issues subject to the motion procedure or as examples of "other legal issues affecting the determination of compensation." But, in the end, a list of issues ripe for a section 1260.040 motion was not included in the statute or the Law Review Commission comments.

That discussion hints at what kinds of issues the Legislature had in mind when it adopted section 1260.040. The examples were: what constitutes the larger parcel, substantial impairment of access, probability of a zoning change (Recommendation: Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain (Oct. 2000) 30 Cal. L. Revision Com. Rep. 571 (2000), p. 102), differing interpretations of sales data, differing opinions of highest and best use, probability of dedication, feasibility of development and legal compensability of loss. (Assem. Com. on Judiciary on Assem. Bill No. 237 (2001-2002 Reg. Sess.) as amended April 2, 2001, p. 71.)

None of the issues identified are purely evidentiary. Some are purely legal issues, but the rest are either fact questions or mixed questions of fact and law. What constitutes the larger parcel is a legal question. (*Metropolitan Water District of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 971; *Stamper, supra,* 1 Cal.5th at p. 593.) The probability of a zoning change is a fact question. (*Campus Crusade, supra,* 41 Cal.4th at p. 967.) The probability that development would be conditioned on dedication is fact question. (*Stamper, supra,* 1

Cal.5th at p. 598.) Whether a taking has substantially impaired access to the remaining property is a legal question. (*Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 664.) The feasibility of aggregating and developing separate parcels as a larger parcel is a legal question. (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 757.) It is unclear what the Assembly Committee meant by "legal compensability of loss," but the determination as to whether the preconditions to recovery of a particular type of compensation have been met is a mixed question of fact and law. (*Emeryville Redevelopment v. Harcros Pigments, Inc.* (2002) 101 Cal.App.4th 1083, 1116.)

At bottom, the history shows that the issues the Legislature had in mind included mixed questions of fact and law.

3) Process of elimination: the language and the history only show what "other legal issue" is not

In sum, the phrase "or other legal issue" means something different than evidentiary. It is designed to capture only issues that are for the trial judge to decide. And the use of the phrase "affecting the determination of compensation" to qualify "other legal issue" means legal issues that are not right to take issues.

The statutory language and legislative history only serve to rule out what "other legal issue" is not. To determine what kinds of issues are contained within the phrase "other legal issue" requires an examination of the eminent domain case law regarding nonjury legal issues.

4) Nonjury legal issues in eminent domain are mixed questions of fact and law and include takings liability

In an eminent domain proceeding, only one issue is for the jury. The jury decides the amount of compensation. The trial judge determines all other issues. (*Campus Crusade, Supra,* 41 Cal.4th at p. 971; *Hensler v.*

City of Glendale (1994) 8 Cal.4th 1, 15.) "It is only the 'compensation,' the 'award,' which our constitution declares shall be found and fixed by a jury. All other questions of fact, or of mixed fact and law, are to be tried, as in many other jurisdictions they are tried, without reference to a jury." (*Stamper, supra,* 1 Cal.5th at p. 593, citing *Campus Crusade, supra,* 41 Cal.4th at p. 971; emphasis added.)

The California Supreme Court, in *Stamper*, *supra*, 1 Cal.5th at p. 585, explained and provided examples of legal questions that affect compensation and are for the trial judge to decide in eminent domain.

The Court enumerated the following examples: what constitutes the larger parcel, whether separate parcels may be aggregated and considered as one larger parcel, whether a taking has substantially impaired access to the remaining property, whether a party has acquired an avigation easement over a neighboring property, whether a party has a cognizable legal interest in the condemned property. (*Id.* at p. 593-94.) The Court recognized that these legal questions belong to the trial court:

> "Such questions belong to the trial court even when answering them may require the court to examine factual circumstances – i.e., when the legal question is really a 'mixed issue of law and fact where the legal issues predominate.'"

(*Id.* at p. 594, citing *Campus Crusade*, *supra*, 41 Cal.4th at p. 973.)

The Court contrasted these nonjury "legal issues" with pure questions of fact like whether it is reasonably probable a city would change the zoning status of the landowners' property in the near future. (*Id.* at p. 595.) Pure questions of fact "directly pertaining to the proper amount of compensation," the Court explained, are for the jury. (*Ibid.*)

Recall that the issue before the *Stamper* court was who decides the constitutionality of a dedication requirement (the *Nollan/Dolan* "essential

nexus" and "roughly proportional" analysis). The Court held that whether the dedication requirement meets constitutional muster is a task for the court. But the Court recognized, too, that the constitutionality of a dedication condition is an issue that affects the amount of compensation because that decision determines whether the land will be valued at its highest and best use or in its unimproved state. (*Id.* at p. 596.) That notwithstanding, the Court explained:

> "But *all* of the legal questions or mixed questions of fact and law discussed above similarly affect the landowner's compensation by permitting the jury to consider or preventing it from considering certain types of recovery. Those questions are nonetheless reserved to the court because of their legal character and because they are questions that frame the ultimate factual inquiry into the amount of compensation owed."

(*Ibid*, emphasis in original.)

Within that list of examples, two require the trial court to decide whether a taking of property has occurred or may occur: the constitutionality of a dedication exaction and liability for unreasonable precondemnation conduct. The constitutionality of a dedication exaction is an issue that requires the court "to determine whether a dedication requirement would be a lawful taking if actually imposed as a condition of developing the property." (*Stamper*, *supra*, 1 Cal.5th at p. 596.) To decide the question of liability for unreasonable precondemnation conduct, the court must decide whether the condemning agency's conduct was reasonable planning to implement its public project or whether the conduct was so unreasonable that it amounts to a taking. (*Id.* at p. 594; see also

Dryden Oaks, LLC v. San Diego County Regional Airport Authority (2017) 16 Cal.App.5th 383, 404-405.)

The identity of issues subject to a motion under section 1260.040 was not at issue in *Stamper*, but the Court's analysis directly addresses the complexity of nonjury "legal issues" in the eminent domain context. Under *Stamper*, all of the examples listed are legal questions or mixed questions of fact and law "that frame the ultimate factual inquiry into the amount of compensation owed." Under *Stamper*, nonjury legal issues in the eminent domain context include takings liability issues. It is this class of issues that are for the trial court to decide and are amenable to determination by motion under section 1260.040.

Section 1260.040 allows trial courts to rule on the *Stamper* nonjury "legal issues." As such, in eminent domain, section 1260.040 is issue-dispositive. On the issue presented in the section 1260.040 motion, the trial court's ruling is definitive because it was always the trial court's decision to make. For example, a condemning agency brings a motion to decide whether a business owner is entitled to make a claim for loss of business goodwill. The trial court's ruling will dispose of the issue. If the court rules in favor of the agency, the business owner cannot present evidence of lost goodwill to the jury. If the court rules in favor of the business owner, such evidence is fair game. Either way, the issue is resolved.

The reason it is dispositive is because these issues are for the trial judge to decide, and section 1260.040's function is that it allows the trial court to decide these issues using a law and motion procedure in lieu of a bench trial.

C. Adoption of section 1260.040 into the body of inverse condemnation law will promote settlement

The Court of Appeal failed to recognize how section 1260.040 motions have been working to promote settlement over the past ten years.

Most notably, the court failed to appreciate the significance of Code of Civil Procedure section 1036.

Section 1036 allows a successful inverse plaintiff to recover litigation expenses (including attorney's fees). Notwithstanding the availability of section 1260.040, section 1036 is a driving force pushing public entities sued in inverse to settle not just undisputed cases of liability but colorable cases of liability as well and to settle them as soon as possible. The more invested an inverse plaintiff's attorney gets into litigation, the harder it can be to settle the case for a figure close to the value of the damages because the attorney's fees incurred can overwhelm the settlement value of the case.

If the parties cannot get a ruling on liability until after a bench trial, the inverse plaintiff's attorney will have incurred substantial litigation expenses, which can make it harder to settle the case. And before the bench trial, the respective parties will have widely divergent assessments of the value of the case (i.e., the government believes there is no liability and the owner believes there is liability), which will also make it harder to settle the case. What section 1260.040 does in inverse cases is allow the parties to get an early ruling from the trial judge on an issue that affects the parties' respective case value. The timing of the ruling matters because of section 1036.

In addition, the Court of Appeal misunderstood the effect of a ruling on a section 1260.040 motion. The court indicated that a ruling on a section 1260.040 motion in favor of a property owner only establishes that the plaintiff can make a *prima facie* showing. (Opn. p. 36.) This is not the effect of a ruling under section 1260.040. A ruling on a section 1260.040 motion would be a legal finding by the trial court ("either party may move the court for a ruling on the issue"), binding on the parties at the compensation trial. The ruling is binding because the liability

determination in inverse condemnation is a decision for the trial judge. (*Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 555, fn. 1.)

For these reasons, since *Dina*, it has become common practice for property owner and government lawyers alike to file section 1260.040 motions early in the case to get a determination on liability. Property owner lawyers use section 1260.040 motions to get a determination that the public entity is liable. A finding by the trial judge that the government is liable incentivizes the government to increase its settlement offer. Likewise, in cases where the public entity believes liability is questionable, the entity can bring a motion under section 1260.040 to determine pretrial whether it will face exposure to an award of litigation expenses. If the motion is denied, the public entity will be more motivated to increase its settlement offer. If the motion is granted, the property owner will be more motivated to decrease its settlement demand. Either way, a section 1260.040 motion can be an effective tool for promoting settlement in inverse condemnation.

6. GOOD REASONS SUPPORT CONTINUED USE OF SECTION 1260.040 IN INVERSE CONDEMNATION

The language of the statute, the applicable case law, and principles of parity merit the application of section 1260.040 in inverse condemnation.

Applying the *Chhour* standard, all signposts indicate that section 1260.040 may be imported into inverse condemnation law. Section 1260.040 leaves open the possibility of use in inverse condemnation. There is no statutory impediment here. Either party may move to resolve a dispute. The terms used to describe the parties can apply equally in inverse actions, i.e., "plaintiff" could mean either property owner or the government.

Subdivisions (b) and (c) also leave open the possibility of importation of the procedure to inverse. Subdivision (b) grants the trial

judge discretion to postpone the trial, and related dates, in order to give the parties' space to mediate the amount of compensation once legal issues affecting compensation are decided. The reference in subdivision (b) to "eminent domain proceeding" is an acknowledgement that the trial court is constrained by eminent domain-specific provisions that limit the court's otherwise well-established authority to manage trial and related dates. (See, e.g., Code Civ. Proc., § 1260.010 [eminent domain actions entitled to trial preference].) Subdivision (b) provides flexibility to the trial judge faced with a section 1260.040 motion in an eminent domain action. It does not prohibit the use of subdivision (a) in inverse actions.

Subdivision (c) is equally neutral. It makes no reference to eminent domain nor does it preclude application to inverse condemnation. Rather, subdivision (c) provides that subdivision (a) is a supplementary procedure. The language of section 1260.040 is not an impediment to applying this procedure in inverse.

There is no good reason to require that different procedural devices be used to resolve nearly identical legal issues. Many of the nonjury disputes (i.e., legal issues and mixed questions of fact and law) to be resolved in eminent domain have identical counterparts or analogous partners in inverse condemnation. For example, substantial impairment of access (*Breidert, supra,* 61 Cal.2d at p. 664 [inverse]; *San Diego Metropolitan Transit Development Board v. Price Co.* (1995) 37 Cal.App.4th 1541, 1545 [direct]), entitlement to loss of business goodwill (*Chhour*, *supra*, 46 Cal.App.4th at p. 282 [inverse]; *People ex rel. Dept. of Transp. v. Dry Canyon Enterprises, LLC* (2012) 211 Cal.App.4th 486, 491-92 [direct]), entitlement to precondemnation damages (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 52 [inverse]; *Redevelopment Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, 79 [direct]), and the constitutionality of a dedication exaction (*Jefferson Street Ventures, supra,*

236 Cal.App.4th at p. 1203 [inverse]; *Stamper*, *supra*, 1 Cal.5th at p. 595 [direct]) are legal issues affecting the determination of compensation that can arise through both direct and inverse condemnation. These issues should be treated substantively and procedurally with parity.

For example, the *Stamper* court recognized that entitlement to precondemnation damages is mixed question of fact and law that is for the trial court to decide in an eminent domain case. (*Stamper, supra,* 1 Cal.5th at p. 594.) The seminal case that identified a property owner's right to precondemnation damages was an inverse condemnation case, *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 58. The Court of Appeal's decision would preclude the use of section 1260.040 to decide whether the government should be held liable for precondemnation damages in an inverse condemnation case, but the same issue could be decided on a section 1260.040 motion if presented in a direct condemnation case.

The Court of Appeal's decision elevates the nature of the proceeding over the substance of the issues. Consider the following hypothetical. A condemning agency is widening a freeway and files an eminent domain action to acquire a portion of property owned by George. Located on the property being condemned is a tenant business: Harry's Hats. Under Scenario 1, the agency names both George and Harry's Hats as defendants, and the agency is permitted to bring a motion under section 1260.040 to obtain a ruling on whether Harry's Hats is entitled to make a claim for loss of business goodwill.[8] Under Scenario 2, the agency names only George in the condemnation action, and Harry's Hats files an inverse condemnation complaint alleging loss of business goodwill damages. The Court of

[8] It is appropriate for the agency to raise the issue in a section 1260.040 motion because the business owner has the burden of proving entitlement to goodwill recovery. (*Galardi Group Franchise & Leasing, LLC v. City of El Cajon* (2011) 196 Cal.App.4th 280, 254.)

Appeal's decision would preclude the agency from filing a section 1260.040 motion under Scenario 2, but the same motion would be allowed under Scenario 1. Common sense demands that the identical issues be subject to the same procedural devices.

Depriving parties to an inverse action of the tool provided in section 1260.040 will not encourage the use of defense motions for summary judgment because most liability determinations in inverse involve mixed questions of fact and law. Any questions of fact would defeat summary judgment. Without the availability of section 1260.040, parties will be forced to go to trial whenever legal issues affecting compensation, including issues of liability, stand in the way of an apples-to-apples comparison of the case value. This would undercut the legislative priority to foster early settlement.

On the flip side, allowing section 1260.040 to be used in inverse cases to decide liability will encourage settlement. Parties can get early rulings from the trial court before significant litigation expenses have been incurred. And even in cases where the government is successful in getting a cause of action or case dismissed, the parties will be more able to settle the matter because the ruling will serve to bring the parties' estimate of case value closer together. This is the product of section 1036. Either side can use section 1260.040 to close the gap in the respective parties' assessment of case value before the property owner has invested significant fees and costs that would otherwise complicate settlement negotiations. An early ruling greatly enhances the chances that an inverse case will settle pretrial.

7. CONCLUSION

Analyzing whether section 1260.040 should be imported into the body of inverse condemnation law requires an analysis of what section 1260.040 does in the eminent domain context. Section 1260.040 allows parties to obtain a pretrial ruling from the judge on legal questions and

mixed questions of fact and law that are not for the jury to decide. The issues subject to a section 1260.040 motion in eminent domain include issues of liability, issues of entitlement to a type of damage, and determinations about whether a government entity has acted in a way that amounts to an unconstitutional taking of property. A section 1260.040 motion is issue-dispositive in eminent domain. Once the trial judge makes a ruling, that issue has been decided and becomes the rule of the case, even if that means that the property owner is deprived a right to advance a particular item of damage at the compensation trial before the jury.

Deciding whether any provisions of the Eminent Domain Law should be imported into the body of inverse condemnation does not require clear legislative expressions that the statute be used in inverse condemnation. Rather, the proper framework for making this decision is found in *Chhour*, *supra*, 46 Cal.App.4th at pp. 280-81, approved of in *Kong v. City of Hawaiian Gardens*, *supra*, 108 Cal.App.4th at p. 1038, fn. 10, and applied in *Dina*, *supra*, 151 Cal.App.4th at p. 1041, fn.3. That framework assumes that the eminent domain statute and legislative history will not contain express statements contemplating an application to inverse condemnation. That framework looks for obstacles to importation. Absent statutory impediments or good reasons to the contrary, *Chhour* holds that provisions of the Eminent Domain Law can and should be applied in inverse condemnation. (46 Cal.App.4th at pp. 280-81.)

There are no obstacles here, and good reasons merit application of section 1260.040 to inverse condemnation. The Legislature agrees that the decision in *Dina* is consistent with their intent. In the ten years since the decision in *Dina*, the Legislature has amended the Eminent Domain Law three times (Code Civ. Proc., §§1240.055, 1245.245, 1255.410), yet it has left section 1260.040 unchanged. In 2016, this Court cited that the decision in *Dina* without qualification or reservation. (*Stamper*, *supra*, 1 Cal.5th at

p. 596.) And parties to inverse condemnation cases have regularly used section 1260.040 as a vehicle to settle cases pretrial.

The dispositive nature of a section 1260.040 motion when applied in the inverse condemnation context is no different than the dispositive nature of the motion in eminent domain. The protection against Draconian results flowing from deciding these issues in the law and motion setting is found within the discretion granted to the trial judge under section 1260.040. Section 1260.040 allows "either party to move the court for a ruling on the issue," but it does not require that the trial judge make its ruling based solely on declarations and documents. If the judge finds that witness testimony is required, the judge may set an early bench trial. If the judge finds that the declarations and documents are sufficient to make a decision, then the parties obtain an early decision on a dispute between the parties that had previously precluded settlement.

Based on the foregoing, the Agencies respectfully request that this Court reverse the decision of the Court of Appeal and affirm the trial court's dismissal of Plaintiffs' inverse condemnation cause of action.

DATED: August 10, 2018

WOODRUFF, SPRADLIN & SMART

By: _____

GARY C. WEISBERG
LAURA A. MORGAN
ESTHER P. LIN
Attorneys for Defendants,Respondents, and Petitioners,
Orange County Transportation Authority, a public entity, and The People of the State of California, acting by and through the Department of Transportation

CERTIFICATE OF WORD COUNT

The text of the brief, including footnotes, consists of 9,852 words as counted by the Microsoft Word 2016 word processing program used to generate the brief.

DATED: August 16, 2018

WOODRUFF, SPRADLIN & SMART

By: _____

GARY C. WEISBERG
LAURA A. MORGAN
ESTHER P. LIN
Attorneys for Defendants/Respondents, Orange County Transportation Authority, a public entity, and The People of the State of California, acting by and through the Department of Transportation

2) Requires that just compensation in an eminent domain proceeding be determined by a jury unless waived. (Cal. Const. Art. I, sec. 19.)

3) Permits the plaintiff to deposit the probable amount of compensation, based on an appraisal, at any time before entry of judgment and requires the plaintiff to prepare a written statement of summary of the basis for the appraisal. (Section 1255.010.)

4) Requires parties to exchange valuation data 60 days prior to commencement of trial on the issue of compensation. (Section 1258.220.)

FISCAL EFFECT: The bill as currently in print is not keyed fiscal.

COMMENTS: This bill, sponsored by the Law Revision Commission, is intended to facilitate resolution of eminent domain cases through the authorization of ADR and revise procedures in eminent domain proceedings. In its Recommendation on the measure, the Commission states:

> In almost all condemnation cases, the primary issue is the amount of compensation. Evidence is introduced in support of each party's contention of the value of the property taken and damages to the remainder. Valuation disputes may arise from such matters as differing interpretations of sales data and differing opinions of highest and best use, probability of changes in zoning, probability of dedication, feasibility of development, and legal compensability of loss.
>
> Existing law seeks to encourage settlement of eminent domain valuation disputes by requiring the parties to make their final offers and demands before the commencement of trial. Attorney fees and other litigation expenses may be awarded to the property owner if the final pretrial demand of the property owner was reasonable and the final pretrial offer of the condemnor was unreasonable.
>
> Other settlement inducements include special provisions for exchange of valuation data by the parties. As a general rule, conventional discovery techniques have been of little value in generating useful information concerning the key points of disagreement between the parties. This is because the critical evidence in eminent domain proceedings is expert opinion testimony, and valuation experts who may be called to testify at trial resist formulating an opinion for that purpose until the time of trial. For this reason, California has adopted special discovery rules for eminent domain proceedings, which provide for an early exchange of valuation data on demand of a party.
>
> While the parties do not always take advantage of the exchange procedure for various tactical reasons, there is a strong incentive to use it due to the operation of the litigation expense statute. Because an award of litigation expenses is predicated on the reasonableness of the parties' valuation determinations, each party must make a good faith effort to understand and respond to the other's case. A party who does not seek to review the opponent's case in advance of trial is at risk of being determined not to have acted reasonably in the proceeding.

The various incentives for the parties to resolve the eminent domain dispute without the need for a lengthy and expensive trial have been reasonably successful. During the three-year period from July 1, 1996, to June 30, 1999, for example, there were 3,783 eminent domain cases filed statewide. Of the 3,477 pending eminent domain cases disposed of statewide during that period, 3,200 (92%) were either disposed of before trial or after trial as uncontested matters. Only 277 (8%) were disposed of after trial as contested matters.

The governing statutes, while salutary, are not free of problems. In particular, the provisions applicable to the exchange of valuation data could be improved, as well as pretrial procedures for resolving legal disputes affecting valuation. The Law Revision Commission proposes in this recommendation a number of revisions of the law intended to facilitate resolution of eminent domain cases without the need for trial.

Author's Amendments. In order to address the concerns of public entities, the author and sponsor agreed to amend the bill as noted below:

1) Require the written statement or summary of the appraisal of property by the plaintiff to contain detail sufficient to clearly indicate the basis for the appraisal, including the date of valuation, highest and best use, and applicable zoning of the property, the principal transactions, reproduction or replacement cost analysis, or capitalization analysis supporting the appraisal, and if the appraisal includes compensation for damages to the remainder, the compensation for the property and for damages to the remainder separately stated, and the calculations and a narrative explanation supporting the compensation, including any offsetting benefits.

2) Provide that, at any time after a deposit has been made, the motion of a plaintiff or any party having an interest in the property shall be supported with detail sufficient to indicate clearly the basis for the motion, including, but not limited to the information noted above.

3) On page 8, delete lines 32-40 and on page 9, delete lines 1-17.

4) On page 9, delete lines 39-40 and on page 10, delete lines 1-5 and insert language providing that the public entity shall provide the property owner with a written statement and summary of the basis for the amount established as just compensation. The amendments also require that the written statement and summary shall contain detail sufficient to indicate clearly the basis for the offer and include specified information.

REGISTERED SUPPORT / OPPOSITION:

Support

California Law Revision Commission (sponsor)
Civil Justice Association of California
California Chamber of Commerce

At least two appellate cases have indicated that the compensation referred to in this section does not include prejudgment interest (or ordinary costs).[29] Unfortunately, these cases also include loose language (dictum) to the effect that the provision is not intended "to require the offer and demand to cover items other than the value of the part taken and damage, if any, to the remainder."[30] This interpretation would seem to exclude from coverage of the section compensation for loss of goodwill.

Notwithstanding the language in the cases, the law intends that the offer and demand include compensation for loss of goodwill. The statute should be revised to make clear that the final offer and demand should include all compensation required by the Eminent Domain Law, including compensation for loss of goodwill. For purposes of clarity, each offer and demand should also indicate whether or not interest and costs are included.

EARLY RESOLUTION OF LEGAL ISSUES

Existing Law

It should become apparent at the pretrial conference whether there are questions of law on which the parties disagree that affect valuation of the property. Resolution of matters such as contentions over what constitutes the larger parcel, whether or not there is an impairment of access, or the probability of a zoning change, must be resolved before the jury trial on valuation. The pretrial conference can isolate many of these questions and provide for their determination

29. Coachella Valley County Water Dist. v. Dreyfuss, 91 Cal. App. 3d 949, 154 Cal. Rptr. 467 (1979); People *ex rel.* Dep't of Transp. v. Gardella Square, 200 Cal. App. 3d 559, 246 Cal. Rptr. 139 (1988).

30. *Dreyfuss*, 91 Cal. App. 3d at 954; *Gardella Square*, 200 Cal. App. 3d at 568.

before trial and, ideally, before valuation data are exchanged and final offers and demands filed.[31]

Early resolution of legal issues can be accommodated because legal issues are for court rather than jury determination. Under existing law, bifurcation of legal issues may be achieved through the use of various procedural devices.[32] The Eminent Domain Law provides structurally for early resolution of right to take issues.[33] However, there is nothing in the statute providing for early resolution of legal disputes affecting valuation.

It is common for courts to establish local rules to require that *in limine* motions to exclude evidence be filed and served in advance of the trial date. To expedite testimony before a jury, courts routinely conduct hearings *in limine* to determine the admissibility of evidence.[34] However, some courts resist *in limine* motions and bifurcation, preferring to hear the matter only once and sort things out at trial.[35] While this may be efficient for the judge hearing the case, it does not save the jury time, and does not foster early resolution of disputes and settlement of cases.

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31. See Matteoni, *supra* note 1, § 9.12, at 384-85.

32. See, e.g., Code Civ. Proc. §§ 598 (court may order precedence in order of trial of issues where economy and efficiency of handling litigation would be promoted), 1048 (court may order separate trial of issues where conducive to expedition and economy, preserving the right to jury trial); Evid. Code § 320 (court's power to regulate order of proof). *Cf.* Code Civ. Proc. §§ 588-592 (trial of issues of law and fact).

33. Code Civ. Proc. § 1260.110.

34. For example, Rule 16.10(b)(4) of the Los Angeles County Superior Court rules endorses the process of a hearing before impaneling the jury.

35. See Matteoni, *supra* note 1, §§ 9.24-9.25, at 402-05.

Statutory Procedure

The Law Revision Commission recommends an express statutory provision for early resolution of legal issues affecting valuation in an eminent domain case.

A model for this approach already exists in the Eminent Domain Law, although its application is narrow. An "improvement pertaining to the realty" is an improvement installed for use on property taken by eminent domain that cannot be removed without a substantial economic loss; improvements pertaining to the realty must be taken into account in determining compensation.[36] The Eminent Domain Law provides for early resolution of a dispute over whether a particular improvement should be characterized as an improvement pertaining to the realty for compensation and other purposes.[37]

The Law Revision Commission recommends addition of a parallel but more general provision for disputes over legal issues affecting valuation. The procedure should be limited to resolution of legal issues that may affect compensation, such as what constitutes the larger parcel, or the probability of a zoning change; it should not be used to ascertain just compensation.[38]

Timing Issues

There must be sufficient time for the parties to examine any valuation data exchanged, focus on the nature of their dispute, and obtain judicial resolution of any irreconcilable disagreements over legal issues. Resolution of legal issues in a timely fashion will help pave the way for a resolution of the proceeding without the need for a trial.

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36. Code Civ. Proc. §§ 1263.205-1263.210.

37. Code Civ. Proc. § 1260.030.

38. *Cf.* Cal. Const. art. I, § 19 (just compensation ascertained by jury unless waived).

Assuming an exchange of valuation data 90 days before trial, a motion for resolution of legal issues should be permitted 30 days thereafter — i.e., 60 days before trial. There should be enough time during the 30-day period for the parties to complete expert witness depositions and other necessary discovery, before the motion to resolve legal issues must be made.

With standard notice, preparation, and hearing times, in routine cases the resolution of legal issues will be completed well before the valuation trial. Ordinarily, this should leave sufficient time for the parties to prepare and exchange new appraisal data, and to develop their final offers and demands.

However, where the issues are complex, this schedule may not be possible to meet. The proposed statute would allow the court to extend time for trial, and for submission of final offers and demands, to the extent warranted by the court's resolution of legal issues.

Trial Judge

The legal issues involved in eminent domain valuation are highly technical and fact-oriented and require specialized knowledge. For this reason, resolution of the legal issues on the trial court's law and motion calendar may not be appropriate. The proposed law seeks to ensure an appropriate resolution of these legal issues by assigning them to the trial judge in the case.

ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution techniques, particularly mediation, may provide a constructive means for the parties to conclude the case without the time and expense of an eminent domain trial. The Law Revision Commission believes the law should foster use of alternative dispute resolution if

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of 18 and not a party to the within action; I am employed by WOODRUFF, SPRADLIN & SMART in the County of Orange at 555 Anton Boulevard, Suite 1200, Costa Mesa, CA 92626-7670.

On August 10, 2018, I served the foregoing document(s) described as **OPENING BRIEF ON THE MERITS**

☒ 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:

☒ **(BY MAIL)** I placed said envelope(s) for collection and mailing, following ordinary business practices, at the business offices of WOODRUFF, SPRADLIN & SMART, and addressed as shown on the attached service list, for deposit in the United States Postal Service. I am readily familiar with the practice of WOODRUFF, SPRADLIN & SMART for collection and processing correspondence for mailing with the United States Postal Service, and said envelope(s) will be deposited with the United States Postal Service on said date in the ordinary course of business.

☒ **(BY OVERNIGHT DELIVERY)** I placed said documents in envelope(s) for collection following ordinary business practices, at the business offices of WOODRUFF, SPRADLIN & SMART, and addressed as shown on the attached service list, for collection and delivery to a courier authorized by GSO Overnight to receive said documents, with delivery fees provided for. I am readily familiar with the practices of WOODRUFF, SPRADLIN & SMART for collection and processing of documents for overnight delivery, and said envelope(s) will be deposited for receipt by GSO Overnight on said date in the ordinary course of business.

☐ **(BY ELECTRONIC SERVICE)** by causing the foregoing document(s) to be electronically filed using the Court's Electronic Filing System which constitutes service of the filed document(s) on the individual(s) listed on the attached mailing list.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 10, 2018, at Costa Mesa, California.

Vilay Lee

Vilay Lee

SERVICE LIST

Weiss, et al. v. Orange County Transportation Authority, et al.

John S. Peterson, Esq. Peterson Law Group 19800 MacArthur Blvd., Suite 290 Irvine, CA 92612 Tel: (949) 955-0127 Fax: (949) 955-9007	Attorney for Plaintiffs EVAN WEISS, BELINDA HENRY, MICHAEL HAYES, MICHEALE HAYES, ROSS SHAW, DEBBIE SHAW, AND 1819 MSC, LLC **VIA OVERNIGHT MAIL**
Office of the Attorney General 1300 "I" Street Sacramento, CA 95814	**VIA MAIL**
Clerk of the Court California Court of Appeal Fourth District, Division Three 601 W. Santa Ana Boulevard Santa Ana, CA 92701	**VIA MAIL**
Hon. Kirk H. Nakamura Department C1 Orange County Superior Court 700 Civic Center Drive West Santa Ana, CA 92701	**VIA MAIL**