SUPREME COURT
FILED

OCT 11 2018

Jorge Navarrete Clerk

Deputy

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 its Department of Transportation; and ORANGE COUNTY TRANSPORTATION AUTHORITY,

Defendants, Respondents, and Petitioners.

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

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

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Did the Court of Appeal correctly rule that the Eminent Domain Law's special pretrial motion procedure for deciding "an evidentiary or other legal issue affecting the determination of compensation" (Code of Civil Proc., § 1260.040)[1] only applies to issues affecting the determination of compensation in eminent domain proceedings, and should not be judicially imported into inverse condemnation law to decide liability issues for an alleged taking of property?

INTRODUCTION

The Court of Appeal correctly ruled that section 1260.040 by its terms only applies to issues affecting the determination of compensation in eminent domain proceedings, not liability issues in inverse condemnation actions. The statute does not authorize a case-dispositive motion to resolve *liability* issues for an alleged taking of property in an inverse condemnation action. The Court of Appeal also properly declined to "import" section 1260.040 into inverse condemnation jurisprudence, because doing so would permit summary disposition of liability issues never authorized or contemplated by the

[1] All further references are to Code of Civil Procedure unless noted otherwise.

Legislature, and would not serve the Legislature's narrow purpose of promoting settlement of eminent domain actions. Accordingly, the Court of Appeal's judgment should be affirmed, and this Court should disapprove the contrary holding of *Dina v. People ex rel. Dept. of Transportation* (2007) 151 Cal.App.4th 1029.

FACTS AND PROCEDURAL HISTORY

The Court of Appeal's opinion accurately summarizes the factual and procedural background of the case in the trial court. (Opn. at pp. 3-8.) As the Court of Appeal noted, the trial court granted the defendants' motion for dismissal of plaintiffs' inverse condemnation and nuisance claims using the pretrial motion procedure of section 1260.040. The trial court found that: (1) as to the inverse condemnation claim, plaintiffs purportedly could not prove the injuries suffered were "peculiar" to their property; and (2) as to the nuisance claim, the agencies had immunity under Civil Code section 3482. (Opn. at pp. 6-8.)

In reversing the trial court's judgment, the Court of Appeal concluded that section 1260.040 does not authorize such a case-dispositive motion on liability issues in inverse condemnation or

nuisance actions. The Court of Appeal noted that the statute by its terms applies only in eminent domain proceedings (Opn. at p. 10), and "the words the Legislature chose to employ in section 1260.040 do not reflect an intent to create a procedure for determining a public entity's *liability* in eminent domain or inverse condemnation proceedings." (Opn. at p. 12.) "Instead, the statute is plainly aimed at 'issue[s] affecting the determination of compensation.'" (*Ibid.*, quoting § 1260.040, subd. (a)

The Court of Appeal also declined to "import" section 1260.040 into inverse condemnation jurisprudence as a matter of judicial development. (Opn. at p. 14.) The Court of Appeal explained: "In our view, the language, legislative history, and purpose of section 1260.040's three brief clauses do not support the Agencies' request for a novel summary mechanism on an issue – liability, rather than compensation – in actions the Legislature did not intend to address." (*Ibid.*) "This is particularly true where the Code of Civil Procedure already provides an extensive statutory framework and well-developed body of law on summary judgment as a dispositive motion." (*Id.* at pp. 10-11.)

The defendants acknowledge that they "do not appeal the Court of Appeal's decision regarding the nuisance motion." (Opening Brief on the Merits ("OBM"), at p. 16.)

ARGUMENT

1. The Court of Appeal Correctly Declined to Apply Section 1260.040 to Liability Issues in Inverse Condemnation Actions

The plain language, legislative history, and purpose of section 1260.040 all demonstrate that the Legislature did not intend it to apply to liability issues in inverse condemnation actions. Section 1260.040 is a narrow statutory mechanism designed solely for pretrial resolution of *compensation-related* legal issues in eminent domain actions. As the Court of Appeal ruled, it should not be judicially imported wholesale into inverse condemnation jurisprudence and used to determine issues involving *liability* for a taking of property.

A. The Plain Language of the Statute Applies Only to Issues Affecting the Determination of Compensation in Eminent Domain Proceedings

Statutory interpretation requires application of the statute's plain language. (*Kavanaugh v. West Sonoma County Union High*

School Dist. (2003) 29 Cal.4th 911, 919.) If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary. (*Ibid.*) Section 1260.040 is not ambiguous. It is part of the Eminent Domain Law, which governs eminent domain proceedings. (§ 1230.010, *et seq.*) Section 1260.040 provides in relevant part:

> (a) 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. The motion shall be made not later than 60 days before commencement of trial on the issue of compensation. The motion shall be heard by the judge assigned for trial of the case.
>
> (b) Notwithstanding any other statute or rule of court governing the date of final offers and demands of the parties and the date of trial of an eminent domain proceeding, the court may postpone those dates for a period sufficient to enable the parties to engage in further proceedings before trial in response to its ruling on the motion. (§ 1260.040.)

The plain language of this section, interpreted in the context of the Eminent Domain Law into which it was written, makes clear that it was only intended to apply in eminent domain proceedings. "The law of inverse condemnation is not governed by the Eminent Domain Law, but has been 'left for determination by judicial development.'" (*Mt. San Jacinto Community College Dist. v. Superior Court* (2004)

117 Cal.App.4th 98, 104, quoting *Chhour v. Community Redevelopment Agency* (1996) 46 Cal.App.4th 273, 279.)

The language of section 1260.040 cannot reasonably be construed to permit a pretrial motion on *liability* issues in an inverse condemnation action. As noted, the statute by its specific language only applies to issues "affecting the determination of compensation" in an eminent domain proceeding. (§ 1260.040, subd. (a).) In an ordinary eminent domain proceeding, there is no liability phase, because "[w]hen a public entity exercises its power of eminent domain to condemn private property, there is ordinarily no question that it has 'taken or damaged' that property." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 939.) "But the same is not true of inverse condemnation ...." (*Ibid.*)

Long before section 1260.040 was enacted in 2001, it was settled that an action for inverse condemnation is a bifurcated, two-part proceeding. First, *the court* determines whether the governmental entity is liable for taking or damaging property. Second, if there is liability, *a jury* then determines the amount of compensation to be awarded. (*Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1170, citing cases.) Only the compensation phase of an inverse

condemnation proceeding is parallel to an eminent domain proceeding.

To apply section 1260.040 to the *liability* phase of an inverse condemnation action would be contrary to its plain language. The statutory phrase "affecting the determination of compensation" refers to issues affecting how the *amount* of the compensation is determined. (§ 1260.040, subd. (a).) The Legislature adopted this statute for eminent domain proceedings, where "'the focus is usually limited to the amount of compensation owed the property owner under the 'just compensation' clause" of the California Constitution. (*San Diego Gas & Electric Co.*, *supra*, 13 Cal. 4th at pp. 939-940.) The statutory language does not suggest that it may be applied to issues affecting the determination of *liability* for the taking or damaging of private property.

Defendants argue that the statutory phrase "other legal issue" as used in section 1260.040 is broad enough to "include issues of liability." (OBM, at p. 11.) But this interpretation reads the qualifying language "affecting the determination of compensation" right out of the statute. The statute does not apply to *any* legal issue, or even any legal issue affecting *the right* to compensation; it applies

only to an "evidentiary or other legal issue *affecting the determination of compensation*" in an eminent domain proceeding. (§ 1260.040, subd. (a), emphasis added.)

As the Court of Appeal noted (Opn. at p. 15), the Legislature enacted section 1260.040 against the backdrop of a statutory scheme that already distinguished between (1) "right to take" issues, and (2) "determination of the issue of compensation." (§ 1260.110, subd. (a) [statutory procedure allowing "right to take" issues to be "heard and determined prior to the determination of the issue of compensation"].) By limiting section 1260.040 to issues affecting "the determination of compensation," the Legislature clearly manifested its intention *not* to apply the statute to liability issues such as the right to take. Courts must presume that the Legislature intended similar phrases to be accorded the same meaning within a statutory scheme. (*People v. Wells* (1996) 12 Cal.4th 979, 986.)

The Court of Appeal also correctly rejected the contrary holding of *Dina*. As the Court of Appeal explained, "*Dina* did not analyze whether the Legislature intended section 1260.040 to apply to inverse condemnation cases, possibly because the appellants there

'd[id] not challenge the applicability of section 1260.040 on the ground that the action involved inverse condemnation rather than eminent domain.'" (Opn. at p. 13, quoting *Dina*, supra, 151 Cal.App.4th at p. 1041, fn. 3.)

The *Dina* court seems to have accepted the notion that section 1260.040 applies to case-dispositive liability issues because their resolution could "affect the determination of compensation" by mooting such cases entirely. (See, e.g., *Dina*, *supra*, 151 Cal.App.4th at p. 1041 ["What could affect the determination of compensation more than whether or not the plaintiffs have a valid cause of action?"].) But a "determination *of* compensation" means a decision on the *amount* of compensation, not a decision on the plaintiff's threshold *right to receive* compensation. Indeed, if the Legislature had intended the statute to address both liability and compensation issues, there would have been no point in adding the limiting phrase "affecting the determination of compensation." The Legislature could have just said that the statute applies to the determination of any "evidentiary or other legal issue" and left it at that. But it did not; it added the limiting phrase "affecting the determination of compensation." Statutes should be interpreted to give each word

operative effect, and to avoid rendering language superfluous. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22.)

Subdivision (b) of the statute further indicates that it was *not* intended to authorize case-dispositive motions. Subdivision (b) allows courts to postpone the trial of an eminent domain proceeding after the ruling on a section 1260.040 motion "to enable the parties to engage in *further proceedings before trial in response to its ruling on the motion*." (§ 1260.040, subd. (b), emphasis added.) The "further proceedings" referred to in subdivision (b) logically refers to the alternative dispute resolution and trial postponement provisions authorized as part of the same 2001 bill. (§ 1250.420 [authorizing arbitration or mediation in eminent domain proceedings]; § 1250.430 [authorizing postponement of trial of an eminent domain proceeding when parties are engaged in alternate dispute resolution proceedings].) Thus, the Legislature intended that pretrial resolution of discrete issues "affecting the determination of compensation" would result in subsequent settlements (via arbitration, mediation, or otherwise) and avoid the need for eminent domain trials, not wholesale disposal of the case by way of law and motion.

B. The Legislative History Confirms that the Legislature Only Intended to Apply the Statute to Issues Affecting the Determination of Compensation in Eminent Domain Proceedings

The legislative history does not suggest the Legislature intended to apply section 1260.040 to liability issues or inverse condemnation actions. The Law Revision Commission Comment "introducing the original Eminent Domain Law explicitly states that 'The provisions of the Eminent Domain Law are intended to supply rules only for eminent domain proceedings. The law of inverse condemnation is left for determination by judicial development.' (Cal. Law Revision Com. com., 19 West's Ann. Code Civ. Proc. (1982 ed.) § 1230.020, p. 395.)" (*Chhour, supra,* 46 Cal.App.4th at p. 279).

The Legislature added section 1260.040 to the Eminent Domain Law in 2001 as part of a package "of revisions of the law intended to facilitate resolution *of eminent domain cases* without the need for trial." (Cal. Law Revision Com., Recommendation: Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain (Oct.

2000) 30 Cal. Law Revision Com. Rep. (2000) ("Recommendation"), Legislative History at pp. 374-373.) (emphasis added.)[2]

These revisions included new provisions intended to facilitate early disclosure of valuation data and resolution of evidentiary valuation issues *in eminent domain cases*. (Assem. Bill No. 237 (2001-2002 Reg. Sess.) as introduced February 13, 2001; Statutes of 2001, Ch. 428 [LH, pp. 1-10 and 58-67].) The Legislature set an earlier exchange date for valuation data and other expert lists (90 days before trial) (§ 1258.220, subd. (a) [LH, pp. 6, 64]); it created an early motion in limine procedure for determining evidentiary and other legal issues affecting determination of compensation contemplated to occur after the exchange of valuation data and expert lists to be made at least 60 days before trial; (§ 1260.040 [LH, pp. 8, 65-66]); and it modified the offer and demand statute (§ 1250.410 [LH pp. 3, 60-61]) to be made 20 days prior to trial to improve the prospects of reasonable offers and demands, taking into account that the parties

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[2] Plaintiffs filed a Motion for Request for Judicial Notice of the legislative history of Assembly Bill 237 (Stats 2001, ch. 428, sec. 9), which enacted section 1260.040 and related provisions ("LH"), on November 3, 2017 in the Court of Appeal. It was granted by the Court in its Opinion at page 14, fn. 5. Out of an abundance of caution, plaintiffs have concurrently filed a Motion Requesting Judicial Notice of the same legislative history with this Court.

and their counsel would be better informed based on the other statutory revisions so that offers and demands would lead to more settlements of eminent domain cases prior to trial. (*See* Assem. Bill No. 237 (2001-2002 Reg. Sess.) as introduced February 13, 2001; Statutes of 2001, Ch. 428 [LH, pp. 1-10 and 58-67]; and the Recommendation, [LH, p. 377].)

The legislative history repeatedly refers to the Legislature's intent to facilitate settlement of eminent domain proceedings brought by governmental entities against private property owners, not inverse condemnation actions brought by private property owners against governmental entities. For example, the Law Revision Commission advised that the bill "proposes a number of statutory improvements intended to facilitate resolution *of eminent domain cases* without the need for trial" including "an exchange of valuation data 90 days before trial, coupled with a process enabling early resolution of legal disputes" and authorizing voluntary alternative dispute resolution to "substantially improve *eminent domain procedure* . . . in a way that fairly balances the interests of all parties." (Law Revision Commission Letter to Hon. Darrell Steinberg, April 26, 2001 [LH, p. 74], emphasis added.)

Similarly, the Assembly Committee on Judiciary ("Assembly Committee") summarized the bill as seeking "to facilitate resolution *of eminent domain cases* through the authorization of ADR and revise procedures *in eminent domain proceedings*. . . ."] (Report of the Assembly Committee following its May 2, 2001 hearing ["Assembly Report"], [LH, pp. 70, 71], emphasis added.)

The legislative history also confirms that the Legislature only intended section 1260.040 to apply to issues affecting the amount of compensation awarded for a taking or damaging of private property. The Law Revision Commission noted that although section 1260.110 of the Eminent Domain Law already "provide[d] structurally for early resolution of right to take issues," there was "nothing in the statute providing for early resolution of legal *issues affecting valuation*." (Recommendation [LH, p. 383].) Thus, the Commission "recommend[ed] an express statutory provision for early resolution of legal issues *affecting valuation in an eminent domain case*." (*Ibid.*, emphasis added.) The Commission emphasized: "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." (*Id.* at p. 384, emphasis added.)

The Commission also made clear that the statute was designed to facilitate settlements *after* the trial court's ruling on these legal issues, not to authorize a dismissal of the action. It stated: "Resolution of legal issues in a timely manner will help pave the way for a resolution of the proceeding without the need for a trial." (*Ibid.*) It was intended to "help pave the way for a resolution" not "resolve" the proceedings without a trial. The Commission explained: "In order for mediation to be effective in eminent domain proceedings, it is important that pretrial discovery and resolution of legal issues first be completed... The proposed law would allow the court to waive fast track and other trial setting rules if the parties are actively engaged in alternative dispute resolution and agree that additional time would be beneficial." (*Id.* at p. 386.)

The Senate Judiciary Committee reviewed the Recommendation and noted "that in almost all condemnation cases, the primary issue is *the amount of compensation*. Existing law seeks to encourage settlement *of compensation disputes* before trial in various ways, such as requiring the parties to exchange valuation data early in the process, and to make their final offers and demands for compensation before trial." (Senate Judiciary Committee report, [LH,

p. 343], emphasis added.) Although "the various incentives for pretrial settlement have been 'reasonably successful,' . . . . the report concludes that various provisions could be improved to increase the number of cases settled without trial." (Senate Judiciary Committee report [LH, p. 344].)

Following Assembly and Senate passage, the 2001 Enrolled Bill Memorandum to Governor summarized the bill as requiring additional compensation-related information in final offers and demands and allowing resolution through mediation or arbitration. (LH, p. 739.) The Enrolled Bill Memorandum reported that statutory improvements intended to facilitate resolution without trial included authorization of voluntary alternative dispute resolution and "exchange of valuation data 90 days before trial, coupled with a process enabling early resolution of legal disputes[.]" (LH p. 739.)

Respondent California Department of Transportation ("Caltrans") prepared its own Enrolled Bill Report, which made no mention of any motion to determine liability issues in inverse condemnation. (LH, pp. 740-743.) Rather, Caltrans identified nine changes to existing law, found that determination of compensation was the primary issue in most eminent domain actions, and noted that

valuation disputes may arise over "a variety of issues including differing interpretations of sales data or highest and best use, probability of changes in zoning, probability of dedication, and feasibility of development." (Caltrans Enrolled Bill Report, [LH, pp. 740-741].) Caltrans argued "[t]he ability to challenge by pretrial motion improper valuation methods used by appraisers would encourage trial judges to resolve evidentiary issues that, under current practice, are often improperly sent to juries." (Caltrans Enrolled Bill Report [LH, p. 742].)

Furthermore, other changes to the Eminent Domain Law enacted as part of the same 2001 legislation plainly do not apply to inverse condemnation actions. For example, the 2001 legislation also modified a preexisting provision of the Eminent Domain Law which makes fee awards discretionary in eminent domain proceedings, based on the trial court's determination that the owner's demand was reasonable and the condemning agency's offer was unreasonable in light of the "evidence admitted and the compensation awarded in the proceeding . . . ." (§ 1250.410, subd. (b).) This did not impact the mandatory fee recovery provisions applicable to inverse condemnation actions under section 1036.

The offer and demand statute by which a condemnee may obtain litigation expenses in an eminent domain action at the court's discretion (§ 1250.410) does not apply in inverse condemnation; instead, section 1036 *requires* payment to the successful inverse condemnation plaintiff of attorney's fees and costs and disbursements, including fees for appraisers and engineers. (*Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694, 710 [§ 1036 is "a clear manifestation of the Legislature's desire to prevent property owners from being forced to bear the cost of expensive litigation in order to protect their property interests against unreasonable governmental conduct."]; see also *Greater Westchester Homeowners Assn v. City of Los Angeles* (1979) 26 Cal.3d 86, 104 [recognizing difference between discretionary fee awards in eminent domain cases under section 1250.410 and mandatory fee awards in inverse condemnation cases under section 1036].)

In sum, both the language and legislative history of section 1260.040 reflect that the Legislature intended the statute to apply only to issues affecting the determination of compensation in eminent domain actions, not liability issues in inverse condemnation actions.

C. The Purpose of the Statute Was Only to Facilitate Settlement of Eminent Domain Proceedings

The stated purpose of section 1260.040 is "to facilitate resolution *of eminent domain cases* without the need for trial," not to facilitate disposition of inverse condemnation proceedings. (Recommendation, emphasis added [LH pp. 372-373].)

As the Court of Appeal noted, there are significant differences between an eminent domain action and an inverse condemnation action. "A property owner initiates an inverse condemnation action, while an eminent domain proceeding is commenced by a public entity. [Citation.] Eminent domain actions typically focus on the amount of compensation owed the property owner, since by initiating the proceeding the government effectively acknowledges that it seeks to 'take or damage' the property in question." (*Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 530.) "In an inverse condemnation action, by contrast, 'the property owner must first clear the hurdle of establishing that the public entity has, in fact, taken [or damaged] his or her property before he or she can reach the issue of 'just compensation.' [Citation]." (*Ibid.*)

Because the government in an eminent domain action acknowledges taking or damaging private property for a public purpose (§ 1250.310), all parties, including the public and the defendant, have an interest in proceeding expeditiously to resolve the compensation issue. Once the government admits that it is taking or damaging someone's private property for a public use, and that the owner is therefore entitled to just compensation as a matter of constitutional law, the law favors a speedy determination of the amount owed so that the owner can be promptly compensated and go on with life without being mired in years of litigation because of the government's action. This is the same policy that prompted the Legislature to mandate that eminent domain proceedings "take precedence over all other civil actions in the matter of setting the same for hearing or trial in order that such proceedings shall be quickly heard and determined." (§ 1260.010.) When the government knowingly confiscates or otherwise devalues private property for a public purpose, public policy demands an expeditious resolution of the compensation due to the owner.

Likewise, the government and the public also have an interest in swift resolution of eminent domain proceedings so that the property

can be put to its intended public use, particularly in cases where the government is not yet in possession of the property during the litigation. (See § 1268.210 [allowing order for possession *after* judgment if the condemnor is *not* already in possession during the eminent domain proceedings].) The Legislature had good policy reasons to adopt special procedures to facilitate early resolution of eminent domain proceedings when it enacted section 1260.040 in 2001.

By contrast, in an inverse condemnation action initiated by the property owner *against* the government, the government is usually contesting both liability *and* compensation. In most inverse cases, the government has not admitted doing anything that requires just compensation to the owner. The court may therefore have to resolve complex liability issues before even getting to the issue of compensation. For example, liability in an inverse condemnation case may turn on complicated expert testimony involving issues such as causation of landslides, subsidence, fires, frequencies of storms causing floods, debris flows, sediment flows, amplification or reflection of noise, vibration, and the like. Such issues are not susceptible to easy resolution through summary disposition

procedures such as a section 1260.040 motion. Inverse condemnation actions are also not legislatively entitled to trial preference, as are eminent domain cases. (§ 1260.010). The unique policy reasons for adopting special procedures to facilitate early resolution of eminent domain proceedings do not carry over to inverse condemnation proceedings. (See *Regency Outdoor Advertising, supra*, 39 Cal.4th at p. 530 [discussing differences between eminent domain and inverse condemnation and stating "[w]e doubt that these differences have been lost on the Legislature"].)

D. The Leading Commentator Agrees that Section 1260.040 does not Apply to Inverse Condemnation Actions

The Law Revision Commission's Recommendation referenced Matteoni, *Trial Preparation and Trial,* in 1 Condemnation Practice in California (Cal. Cont. Ed. Bar. 2d ed. 2000) in no fewer than four footnotes, i.e., fn 1, 17, 31, 35. (LH, pp. 371, 377, 383.) Matteoni is in accord with the positions argued in this brief regarding the inapplicability of section 1260.040 to inverse condemnation. Matteoni states in an updated edition:

> The motion in limine procedure of CCP § 1260.040, which was enacted to determine key disputed evidentiary points

> before trial in a direct condemnation (see § 9.49) was used to address liability in an inverse case in *Dina v People ex rel Dep't of Transp.* (2007) 151 CA4th 1029. Although a motion for summary judgment may have been appropriate in that case, in the author's view the motion in limine was not the proper vehicle to dispose of the case.
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> (2 Matteoni, Condemnation Practice in California (Cont.Ed.Bar. 3d ed., Oct 2016 update) § 17.8, p. 17-17).

E. Section 1260.040 Should Not be "Imported" Into Inverse Condemnation Law by Judicial Directive

Defendants argue that even though section 1260.040 by its terms applies only to eminent domain proceedings, it should be "imported" into inverse condemnation law by judicial mandate. For multiple reasons, the Court of Appeal correctly rejected this invitation.

1. Based on the holding of *Chhour v. Community Redevelopment Agency* (1998) 46 Cal.App.4th 273, defendants seem to suggest that there is some type of presumption in favor of "cross-pollination" between eminent domain and inverse condemnation law. (OBM at p. 17.) But *Chhour* merely held that "*where appropriate*, eminent domain law should be followed in inverse condemnation actions." (*Id.* at p. 278, emphasis added.)

As *Chhour* recognized, it makes sense to import substantive principles on issues such as the right to recover damages for lost business goodwill, because the recoverable damages for a taking should not differ depending on whether it is litigated in an eminent domain or inverse condemnation action. (*Chhour*, *supra*, 46 Cal.App.4th at p. 279 [finding "no rationale for a rule that would treat an indirect condemnee differently from a direct one where compensation for goodwill is concerned"]; see also *Mt. San Jacinto Community College Dist. v. Superior Court* (2004) 117 Cal.App.4th 98, 105 [recognizing "important legal and practical distinctions" between eminent domain and inverse condemnation actions, but stating that "such distinctions should not yield different results in terms of compensation" because "[j]ust compensation to the property owner is the overriding principle to be applied in both types of proceedings"].)

Neither *Chhour* nor any other case cited by Defendants established any presumption or general rule in favor of applying purely procedural provisions of the Eminent Domain Law to the litigation of inverse condemnation actions.

2. On the contrary, this Court has acknowledged that procedural statutes applicable to eminent domain actions do *not* necessarily apply to inverse condemnation actions. (*Regency Outdoor Advertising, supra*, 39 Cal.4th at p. 530 [holding that a provision of Code of Civil Procedure section 998 referring to "eminent domain" actions did not apply to inverse condemnation].) The Legislature "perceives a difference between eminent domain and inverse condemnation." (*Ibid.*; see also *Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 559 ["the Legislature plainly does not equate the two procedures for all purposes"]; *Beaty v. Imperial Irrigation Dist.* (1986) 186 Cal.App.3d 897, 903-904 [discussing differences between inverse condemnation and eminent domain].)

The Legislature could easily have made section 1260.040 applicable to inverse condemnation actions, but chose not to. The Court should not extend section 1260.040's reach to inverse condemnation by judicial command. "The Legislature is fully capable of referring to inverse condemnation actions by name" when it wants to. (*Regency Outdoor Advertising, supra*, 39 Cal.4th at p. 530.)

3. The Legislature contemplated section 1260.040 as a speedier and more efficient procedural mechanism for resolving only one narrow category of issues, i.e., those "affecting the determination of compensation" in an eminent domain proceeding. (§ 1260.040, subd. (a).) To extend this summary disposition procedure to complex *liability* issues in inverse condemnation proceedings would go far beyond anything the Legislature ever considered. Proving a taking involves issues completely different from determining the valuation of the property taken. The Court should not judicially expand a statute the Legislature designed for one limited use in eminent domain cases so that it applies to a much different use in inverse condemnation cases. "[C]ourts must observe the limits set by the applicable statutory scheme. If those limits are too confining, then it is the function of the Legislature, not the courts, to expand them." (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1176.)

4. The Court should be especially reluctant to extend the reach of a procedural statute that allows summary disposition of issues without a trial. Section 1260.040 authorizes what is essentially an early in limine motion to resolve legal or evidentiary issues affecting the amount of compensation in an eminent domain action. To apply

the statute more broadly to issues affecting liability in inverse condemnation actions would conflict with settled policies.

Longstanding rules and policies hold that a motion in limine should not be used to make case-dispositive rulings. "What in limine motions are *not* designed to do is to replace the dispositive motions prescribed by the Code of Civil Procedure. It has become increasingly common, however, for litigants to utilize in limine motions for this purpose." (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1593 (emphasis in original); *Johnson v. Chiu* (2011) 199 Cal.App.4th 775, 780.) "The disadvantages of such shortcuts are obvious. They circumvent procedural protections provided by the statutory motions or by trial on the merits; they risk blindsiding the nonmoving party; and, in some cases, they could infringe a litigant's right to a jury trial." (*Amtower, supra,* 158 Cal.App.4th at p. 1594).

The Court of Appeal correctly decided that the narrow reach of section 1260.040 should not be judicially expanded to allow potentially outcome-determinative *liability* issues to be determined by pretrial motion in an inverse condemnation action. Such an expansive view would deprive the litigants of a fair trial, by allowing a law-and-motion judge to "adjudicate" the merits of the case and resolve issues

based only on the papers, without so much as evaluating witness credibility, hearing cross-examination, or conducting a proper trial. In the absence of any legislative authorization to apply this unique summary procedure to decide liability issues in inverse condemnation cases, the Court should not simply declare that the statute applies to such issues.

5. The Legislature's decision not to apply section 1260.040 to inverse condemnation cases reflects its intention that such cases should remain subject to the usual procedural rules applicable to all other civil actions. Specifically, the summary judgment statute (§ 437c) is the appropriate pretrial mechanism for determining the types of taking issues decided by the trial court in this case. (See, e.g., *Harding v. Department of Transportation* (1984) 159 Cal.App.3d 359, 366-367 [reversing summary judgment on inverse condemnation claim and finding triable issue of fact whether plaintiffs' property "suffered a direct, peculiar and substantial burden" as a result of government's action].) Because the Legislature has already enacted procedural mechanisms for pretrial determination of these types of issues in inverse condemnation proceedings, the Court should not "import" a different pretrial mechanism that the Legislature has

expressly limited to compensation-related issues in eminent domain proceedings.

The Court of Appeal got it right: "We find it difficult to conceive that in three brief words ('other legal issue'), the Legislature intended to create a new dispositive procedure reproducing the safeguards, entire statutory framework, and extensive case law governing a nonsuit motion or a summary judgment motion." (Opn. at pp. 17-18.)

6. Applying section 1260.040 to inverse condemnation proceedings would not serve its purpose. The stated purpose of the statute is to facilitate early resolution of eminent domain proceedings, not inverse condemnation proceedings. As noted, the Legislature had good reasons to distinguish between the two, just as it did when it decided to give trial preference to eminent domain proceedings, but not inverse condemnation actions (§ 1260.010), or when it decided to apply the expert witness fees provision of section 998 to one, but not the other (*Regency Outdoor Advertising, Inc.*, *supra*, 39 Cal.4th at p. 530), or when it enacted a mandatory fees provision for inverse condemnation actions, but not eminent domain proceedings. (§ 1036.)

Notably, the statute at issue in *Regency Outdoor Advertising*, Code of Civil Procedure section 998, also had a purpose like section

1260.040—"to encourage the settlement of lawsuits prior to trial." (*T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280.) This Court declined to import a provision of section 998 excluding "eminent domain" actions to similarly exclude inverse condemnation actions from the statute. (*Regency Outdoor Advertising*, *supra*, 39 Cal.4th at pp. 529-530.) The Court reasoned that the Legislature "perceives a difference between eminent domain and inverse condemnation." (*Ibid.*) The same logic applies here.

Defendants argue at length that applying section 1260.040 will promote settlement of inverse condemnation actions. (OBM at pp. 32-34.) But again, the Legislature's purpose was only to promote settlement of eminent domain actions, not to promote settlement of civil cases generally. Thus, extending the statute to other types of actions would not promote its policy objectives.

Moreover, the Court of Appeal correctly concluded that "the manner in which a section 1260.040 motion functions does not lend itself to promoting settlement in the liability context. Instead, it operates either as a bludgeon to end the plaintiff's case or a nullity that does nothing to reduce the scope of a trial if the plaintiff establishes a prima facie case of liability." (Opn. at p. 16.) Either the

public entity will be successful in challenging liability, and thus have no incentive to negotiate at all, or the plaintiff will be successful in defeating the motion, and the case will be in the "identical posture" as before. (Opn. at p. 20.)

Defendants insist without foundation that *Dina* promotes settlement because "adept property owner lawyers routinely file[] 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." (OBM at p. 10.) But defendants cite nothing to support this assertion. Although courts like *Dina* have used section 1260.040 to make case-dispositive findings of *no* liability, defendants have not cited any published authority in which a court has used the statute to make a finding of inverse condemnation liability without a trial. Even if such a case exists, however, nothing in the statute or its legislative history suggests that the Legislature intended such a use to promote early settlement of inverse condemnation cases. This is simply not the purpose of the statute.

7. The general public policy in favor of settlement does not justify taking the drastic step of judicially extending the reach of a

statute to liability issues and proceedings beyond what the Legislature contemplated. California's policy to encourage settlements applies to *all* types of cases. (See, e.g., *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 110.) The California Legislature has already enacted other generally applicable measures to encourage settlement of cases, including Code of Civil Procedure sections 877 and 998. (*Ibid.* [section 877]; *Martinez v. Brownco Const. Co., Inc.* (2013) 56 Cal.4th 1014, 1173 [section 998].) When the Legislature enacted section 1260.040, however, it decided that the policy favoring settlements was particularly compelling for eminent domain cases brought by a public entity taking private property for a public purpose.

The Legislature has made no such policy determination as to inverse condemnation actions. Defendants give no logical reason why California's policy to encourage settlements is any more compelling for inverse condemnation cases than it is for nuisance or trespass cases, dangerous condition cases, or other property damage tort actions. Just as the Court would not adopt a special dispositive motion procedure to replace a proper trial for property damage or nuisance cases, it should not do so for inverse condemnation cases

without authorization from the Legislature. If the Legislature believed that a summary procedure was appropriate to resolve liability issues and encourage settlement of inverse condemnation cases, it would have made the statute applicable to inverse condemnation cases. It did not do so.

8. Judicial importation of eminent domain principles into inverse condemnation law is most appropriate when the issue is one that could have been arisen in either type of proceeding. (See, e.g., *Mt. San Jacinto Community College Dist.*, *supra*, 117 Cal.App.4th at pp. 105-106 [applying eminent domain statute in inverse condemnation action where same compensation issue had already been decided in prior eminent domain proceeding].) But the liability phase of an inverse condemnation action has no counterpart in eminent domain proceedings. Other than *Dina*, defendants cite no decision in which the California courts have imported a purely procedural provision of the Eminent Domain Law and used it to decide liability issues in inverse condemnation actions.

For all these reasons, the Court of Appeal correctly declined to import section 1260.040 into inverse condemnation law, and properly

rejected the contrary holding of *Dina*, *supra*, 151 Cal.App.4th at pp. 1043-1044.

F. Neither the Legislature nor this Court has Endorsed the Holding of *Dina*

Defendants suggest that the Legislature has approved the holding of *Dina* by amending the statute three times since *Dina* was decided, without altering section 1260.040. (OBM 9, 38.) Defendants also claim that this Court has endorsed *Dina* by citing it with approval in *City of Perris v. Stamper* (2016) 1 Cal.5th 576, 596 (*Stamper*). (OBM 20-22.) Neither of these arguments has any merit.

1. The three amendments to the Eminent Domain Law cited by defendants had absolutely nothing to do with section 1260.040 or pretrial determination of issues. (§ 1240.055 [acquisition of property subject to conservation easement]; § 1245.245 [amendment of provision relating to the public use of property subject to resolution of necessity]; § 1255.410 [amendment of provision governing order for prejudgment possession].) Moreover, two of these amendments were actually introduced before *Dina* was even decided on June 5, 2007. (See Assembly Bill 299, amending section 1245.245, introduced February 9, 2007 (2007-2008 Reg. Sess., ch. 130, 2007 Cal. Stats.;

2007 Bill Tracking CA A.B. 299.) See also Senate Bill 698, amending section 1255.410, introduced February 23, 2007 (2007-2008 Reg. Sess., ch. 436, 2007 Cal. Stats.; 2007 Bill Tracking CA S.B. 698.) Because these bills were introduced before *Dina* was decided, they cannot reflect any legislative approval of *Dina*.

Even if the timing made sense, however, the Legislature's failure to amend section 1260.040 when it made unrelated changes to other aspects of the Eminent Domain Law still would not constitute an endorsement of *Dina*. "Arguments based on supposed legislative acquiescence rarely do much to persuade." (*Scher v. Burke* (2017) 3 Cal.5th 136, 147.) Legislative inaction "'may indicate many things others than approval of a judicial construction of a statute: the sheer pressure of other and more important business, political considerations, or a tendency to trust the courts to correct their own errors.' [Citation.]" (*People v. Whitmer* (2014) 59 Cal.4th 733, 741.) Thus, legislative inaction is considered useful only if "there exists both a well-developed body of law interpreting a statutory provision and numerous amendments to a statute without altering the interpreted provision ...." (*Olson v. Automobile Club of California* (2008) 42 Cal.4th 1142, 1156.)

A "single decision" like *Dina* is not a "well-developed body of law." (*Scher*, *supra*, 3 Cal.5th at p. 147.) Nor has section 1260.040 been the subject of "numerous amendments." (*Ibid.*) "Indeed, section [1260.040] has not been amended once since it was first enacted ...." (*Ibid.*) Moreover, "there is no indication the Legislature even considered [the *Dina* issue] when it amended [the Eminent Domain Act] in other areas." (*People v. Anderson* (2002) 28 Cal.4th 767, 780.) Thus, the Legislature's inaction does not reflect any approval of *Dina*.

2. Nor did this Court approve the holding of *Dina* in *Stamper*. The only two questions decided in *Stamper* were: (1) whether certain issues in an eminent domain proceeding are to be decided by the court or the jury; and (2) whether the so-called "project effect rule" applied in determining just compensation. (*Stamper*, *supra*, 1 Cal.5th at p. 1225.) *Stamper* had nothing to do with section 1260.040, and the Court did not even cite the statute in its opinion. The Court did cite *Dina* once in passing, but only for *Dina*'s reference to the settled proposition that there is no right to jury trial on whether there has been a taking in an inverse condemnation action. (*Id.* at p. 596, citing *Dina*, *supra*, 151 Cal.App.4th at pp. 1044-1045.)

As the Court of Appeal concluded, *Stamper* did not "express[] any opinion on section 1260.040, let alone endorse[] using it to determine liability in inverse condemnation cases, rather than compensation issues in eminent domain proceedings." (Opn. at p. 19.) A Supreme Court decision is only authority "'for the points *actually involved* and actually decided.'" (*Trope v. Katz* (1995) 11 Cal.4th 274, 284, quoting *Childers v. Childers* (1946) 74 Cal.App.2d 56, 61.) "[A] case is not authority for a point that was not actually decided by the court." (*Consumer Lobby Against Monopolies v. Public Utilities Com.* (1992) 25 Cal.3d 891, 902.)

CONCLUSION

The Legislature knew what it was doing when it passed section 1260.040 solely to authorize pretrial resolution of issues "affecting the determination of compensation" in eminent domain proceedings. Issues affecting the determination of *liability* in inverse condemnation actions are not covered by the statute. This procedural provision of the Eminent Domain Law should not be judicially "imported" into inverse condemnation law because that would permit summary disposition of liability issues never authorized or contemplated by the

Legislature, and would not serve the Legislature's narrow purpose of promoting settlement of eminent domain actions.

Accordingly, the judgment of the Court of Appeal should be affirmed and *Dina* should be disapproved. Otherwise, the judgment on the nuisance claim should be affirmed and the matter remanded to the Court of Appeal to consider the other issues raised by plaintiffs in their appeal as to the inverse condemnation claim.

Dated: October 10, 2018

PETERSON LAW GROUP
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Certificate of Compliance

Pursuant to rule 8.204(c) of the California Rules of Court, I certify that the foregoing Answer Brief on the Merits was produced on a computer in 14-point type. The word count, including footnotes, as calculated by the word processing program used to generate the Answer, is 7,015 words, exclusive of the matters that may be omitted from the count pursuant to the rules.

Dated: October 10, 2018

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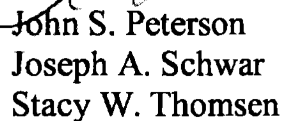

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CERTIFICATE OF SERVICE

I, Mi Tran, am employed in the County of Orange, California. I am over the age of 18 years and not a party to the within action. My business address is 19800 MacArthur Boulevard, Suite 290, Irvine, California 92612.

On October 10, 2018, I served the **ANSWER BRIEF ON THE MERITS** by sending one copy by US Mail addressed to each of the following recipients:

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I also submitted a PDF copy of the brief on the Supreme Court of California by electronic submission via the Supreme Court's e-submission website.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 10, 2018, at Irvine, California.

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Mi Tran