SUPREME COURT
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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.

REPLY BRIEF ON THE MERITS

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

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

1. INTRODUCTION

Plaintiffs advance two main points. First, Plaintiffs ask this Court to affirm the Court of Appeal's decision because Code of Civil Procedure section 1260.040[1] and its legislative history are silent about whether the provision applies to inverse actions. That silence is undisputed. But that silence is not fatal. Were that the case, no eminent domain statutes would ever be applied in the inverse setting. The test for importation is not whether this Court can uncover indicia of intent that inverse condemnation was contemplated: the test is whether applying section 1260.040 to inverse condemnation would advance the same underlying policy reasons that prompted the adoption of section 1260.040 in eminent domain.

Plaintiffs' second main point is that although they agree that "[j]udicial importation of eminent domain principles into inverse condemnation law is most appropriate when the issue is one that could have . . . arisen in either type of proceeding" (Answer Brief on the Merits ["Ans."], p. 39), Plaintiffs found no issues of liability in eminent domain that are parallel to the issues of liability in an inverse case. However, as set forth below, issues of liability do exist in eminent domain. They may be called issues of "entitlement" or "compensability" or "a right to damages," but they are issues of liability that have identical counterparts in inverse condemnation. Section 1260.040 should be available to decide these issues of liability whenever they arise, be it eminent domain or inverse condemnation.

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

2. THE ABSENCE OF INDICIA OF LEGISLATIVE INTENT THAT SECTION 1260.040 SHOULD APPLY IN INVERSE CONDEMNATION IS NOT THE END OF THE ANALYSIS

Everyone agrees that the statutory language and legislative history express no intent that section 1260.040 should apply in inverse condemnation cases. Plaintiffs argue that this legislative silence prohibits the use of section 1260.040 in the inverse setting. Plaintiffs are asking for a presumption against importation absent express language or legislative intent to the contrary. This is inconsistent with the case law and the Legislature's delegation of authority to the judiciary to develop inverse condemnation law.

None of the statutes in the Eminent Domain Law expressly state that they may apply in inverse condemnation actions. This is true because, as the Law Revision Commission Comments to section 1230.020 and 1263.010 explain, the provisions "supply rules only for eminent domain proceedings" (section 1230.020) and that the "law of inverse condemnation is 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; Cal. Law Revision Com. com., 19A West's Ann. Code Civ. Proc. (2007 ed.) foll. §1263.010, p. 5.) If the rule is, as Plaintiffs argue, that eminent domain statutes may apply in inverse only if the Legislature expressly so provides, in the statute itself or in the legislative history materials, then none of the provisions from the Eminent Domain Law may be used in the inverse condemnation setting. And the following cases would need to be overruled for allowing for the use of eminent domain statutes in the inverse context without express legislative intent: *Mt. San Jacinto Community College Dist. v. Superior Court* (2004) 117 Cal.App.4th 98, 106 [§1263.240]; *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1038, fn. 10 [§1265.110]; *San Diego*

Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999) 73 Cal.App.4th 517 [§1263.510]; *Langer v. Redevelopment Agency of City of Santa Cruz* (1999) 71 Cal.App.4th 998, 1003 [§1263.205]; *Chhour v. Community Redevelopment Agency* (1996) 46 Cal.App.4th 273, 282 [§1263.510], *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 948-49 [§1263.330].

Plaintiffs mischaracterize the Agencies' position regarding importation. Plaintiffs argue that the Agencies are advancing a presumption in favor of importation. But that overstates the Agencies' position. The Agencies submit that no presumption exists - no presumption in favor of or against. *Chhour*, *supra*, 46 Cal.App.4th at pp. 279-282, held that the Legislature was neutral about the application of eminent domain statutes to the body of inverse condemnation and that express legislative statements allowing for importation are not prerequisites to importation. *Chhour* provided a framework for courts to consider importation. That framework is not a presumption but a process.

Plaintiffs argue that the Legislature could have made section 1260.040 applicable to inverse actions but chose not to. (Ans., p. 31.) Plaintiffs' argument ignores the Legislature's decision to delegate the development of inverse condemnation law to the courts. (Cal. Law Revision Com. com., 19 West's Ann. Code Civ. Proc. (2007 ed.) foll. §1230.020, p. 229.) If the Legislature had intended the Eminent Domain Law to apply to inverse condemnation only upon specific reference, the Legislature would have added language to the introductory provisions of the Eminent Domain Law, stating that the provisions only apply to eminent domain proceedings "except as herein provided," or words to that effect. Instead, the Legislature decided to remain neutral and <u>not</u> expressly prohibit the application of Eminent Domain Law in inverse condemnation cases.

This interpretation is consistent with balance of the statutory scheme. There is only one place in the Eminent Domain Law that expressly mentions the application of the provision to inverse condemnation. In section 1263.530, the Legislature expressly prohibits a certain type of claim for damages in an inverse case. Section 1263.530 provides:

> "Nothing in this article is intended to deal with compensation for inverse condemnation claims for temporary interference with or interruption of business." (Code Civ. Proc., § 1263.530.)

This provision is superfluous if express reference to inverse condemnation is required for application in inverse.

3. RIGHT TO TAKE ISSUES ARE NOT LIABILITY ISSUES

Plaintiffs argue that section 1260.040 cannot be read to allow for the determination of liability because liability is not an issue in an eminent domain proceeding except as part of the right to take trial. (Ans., pp. 12-13, 14.) This argument mischaracterizes the nature of a right to take trial and ignores the issues of liability that do exist in eminent domain, separate and apart from the right to take.

A. Right to take trials assess the condemning agency's power to condemn

In an eminent domain proceeding, the property owner can object to the condemning agency's power to condemn or "right to take." (Code Civ. Proc., §1250.350.) Objections to the right to take can challenge the agency's statutory authority to condemn (Code Civ. Proc., § 1250.360, subd. (a)), the public use proposed for the condemned property (§ 1250.360, subd. (b)), the condemning agency's compliance with CEQA (*City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005,

1017, fn. 5), or the condemning agency's compliance with statutory prerequisites, like making a valid pre-condemnation offer. (*Id.* at p. 1013; see, Code Civ. Proc., §1250.360 [list of available grounds, including "[a]ny other ground provided by law"].)

Objections to the right to take are decided at a separate bench trial before the jury trial on the amount of just compensation. (Code Civ. Proc., §§1260.010, 1260.120.) The taking occurs when the condemning agency files the eminent domain action. (*Mt. San Jacinto Community College Dist., supra,* 117 Cal.App.4th at p. 105.) Thus, the right to take trial is not about whether a taking has occurred but rather about whether the agency has the statutory authority to condemn and whether the agency has met the statutory prerequisites for condemnation. Together, this assessment by the trial judge is about whether the condemning agency has the *power* to condemn and has followed the requisite procedural steps.

B. Liability issues exist in eminent domain

Though not at issue in the right to take trial, liability issues do exist in eminent domain. In eminent domain, the condemning agency admits that it is responsible for just compensation to the property owner, but the parties often dispute the agency's liability for different types of damage or diminution in value to the property taken. Put another way, eminent domain parties fight over not only the total amount of just compensation, but also which sticks in the bundle of rights are being acquired. Courts interchangeably describe this process as one of assessing liability for a type of damage (e.g., *Redevelopment Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, 79), compensability of a type of damage (e.g., *People ex rel. Dept. of Public Works v. Ayon* (1960) 54 Cal.2d 217, 228), and/or entitlement to make a claim for damages. (e.g., *People ex rel. Dept. of Transportation v. Hansen's Truck Stop, Inc.* (2015) 236 Cal.App.4th 178, 197.) In *City of Perris v. Stamper* (2016) 1 Cal.5th 576, this Court

characterized these issues as questions that affect the "type" of compensation (p. 593) as opposed to the "amount" of compensation (p. 595).

Historically, these preliminary issues of liability are decided after the right to take trial, if there is one, and before the compensation trial. Before the adoption of section 1260.040, this liability phase was conducted by the trial judge oftentimes in a bifurcated trial or its equivalent. For example, in *Ayon, supra,* 54 Cal.2d at p. 220, the parties did not dispute the market value of the real estate being taken or the value ascribed to severance damages. The parties submitted a stipulation as to those amounts, and the property owners reserved their right to introduce evidence of damage caused by loss of goodwill at trial. The property owners made offers of proof that they were entitled to make a claim for damages associated with alleged access impairment and another claim for temporary damages anticipated during construction. (*Ibid.*) Without a jury trial, the trial court entered judgment for the amount of the stipulation, and this Court affirmed. The court held that the other claims for damages were not compensable. (*Id.* at pp. 223 [no right to compensation for impairment of access claim under these facts], 225 [lost business goodwill damages are "noncompensable" under the then-applicable law], 228 ["Temporary injury resulting from actual construction of public improvements is generally noncompensable."].) No jury trial was needed to assess their value, and the parties had already agreed as to the value of the compensable claims.

Similarly, in *Contra Costa Theatre, supra,* 135 Cal.App.3d 73, the property owner claimed it suffered damages, in part, because the condemning agency had engaged in unlawful precondemnation conduct. The trial court ordered a bifurcated bench trial on the agency's liability for unreasonable precondemnation conduct. (*Id.* at p. 77.) The property owner challenged the bifurcation and the exclusion of precondemnation damages

at the compensation trial. (*Id.* at p. 78.) The appellate court affirmed, explaining:

> "[T]he threshold question of liability for unreasonable precondemnation conduct is to be determined by the court, with the issue of the amount of damages to be thereafter submitted to the jury only upon a sufficient showing of liability by the condemnee." (*Id.* at p. 79; emphasis in original.)

The court held that bifurcation of the liability for unlawful precondemnation conduct was not error because all issues in a condemnation proceeding, except the amount of compensation, are decided by the trial judge. (*Id.* at pp. 79-80.)

Another example of how courts were handling these issues before section 1260.040 is found in *Handlery Hotel, supra,* 73 Cal.App.4th 517. At issue was the compensability of the hotel owner's precondemnation damages claim and its claim for loss of business goodwill. The transportation agency's motion for summary adjudication was denied, and a bifurcated trial was scheduled to address these liability issues. (*Id.* at p. 527.) At trial, the agency moved for nonsuit, which the court granted, concluding that the agency's actions were not unreasonable precondemnation conduct nor an inverse taking and that the agency's actions did not cause the hotel to lose any goodwill. (*Ibid.*) The appellate court affirmed. (*Id.* at pp. 533-34 ["Handlery's hypothetical lease resting on a speculative expectation of renewal is not compensable."], 537-38 [not "entitled to compensation for loss of goodwill"].) The granting of the nonsuit motion was dispositive as to the hotel. The hotel was entitled to no compensation because of the rulings on entitlement/liability. (*Id.* at pp. 522-23.)

Trial courts do assess issues of liability in eminent domain proceedings. And the decisions made about those issues of liability determine what type of evidence may be considered at the jury trial on valuation. Before the adoption of section 1260.040, trial courts did not consistently make these liability decisions far enough in advance of the valuation trial to allow parties to reach a settlement before all involved had expended significant resources. In *Ayon*, the trial court decided the liability issues on the eve of the jury trial based on offers of proof. In *Handlery Hotel*, the trial court declined to decide the liability issues on motion for summary adjudication but later ruled on them on a motion for nonsuit. Only in *Contra Costa Theatre* did the trial court set a bifurcated bench trial on the liability issues. The legislative history shows that section 1260.040 was adopted to improve upon this hodge-podge approach to deciding these issues of liability.

C. Section 1260.040 was drafted with these liability issues in mind

The legislative history demonstrates that section 1260.040 was adopted to create a more efficient vehicle to resolve the very class of liability issues discussed above – issues about the type of compensation for which the condemning agency is liable.

The Legislature added section 1260.040 based, in part, on the recommendation of the Law Revision Commission, which proposed "a number of statutory improvements intended to facilitate resolution of eminent domain cases without the need for trial." (Legislative History ["LH"], Letter of Transmittal, Recommendation: Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain ["Recommendation"] (Oct. 2000), 30 Cal. L. Revision Com. Rep. 571

(2000), p. 89.)[2] The portion of the Recommendation pertaining to section 1260.040 is found under the heading entitled, "Early Resolution of Legal Issues." Under the subheading "Existing Law," the Recommendation set forth its rationale:

> "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. . . .
>
> "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. 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.
>
> ". . . However, some courts resist *in limine* motions and bifurcation, preferring to hear the matter only once and sort things out at trial. 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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[2] Reference to legislative history documents ("LH") is to the documents that were the subject of Plaintiffs' motion for judicial notice made on November 3, 2017 in the Court of Appeal. The motion was granted in the Court of Appeal's opinion at page 14, fn. 5. Page numbers referenced herein correspond to the page numbers affixed by Plaintiffs to the entire body of legislative history.

(LH, Recommendation, pp. 102-103.)

The Recommendation was distinguishing between the three possible phases in an eminent domain trial: right to take, valuation and this third phase that falls in between, which affects the determination of value but is not the valuation process itself. The Recommendation recognized that right to take challenges have their process under section 1260.110, and that the jury decides the amount of compensation. The Recommendation was aimed at improving the then-existing and inconsistent procedure for deciding liability issues, like those described in *Ayon* (access impairment, business goodwill, temporary damages due to construction), *Contra Costa Theatre* (precondemnation damages), and *Handlery Hotel* (precondemnation damages and lost business goodwill).

Such questions of liability are for the trial judge to decide. And under section 1260.040, such questions may be decided by noticed motion made at least 60 days before trial rather than by motion *in limine* on the eve of trial, at a discretionary bifurcated bench trial or other ad hoc means established by the trial judge. This new process was viewed as an improvement over the then-existing law because "[r]esolution of legal issues in a timely fashion will help pave the way for a resolution of the proceeding without the need for a trial." (LH, Recommendation, p. 104.)

D. <u>Parity merits application of section 1260.040 in inverse</u>

Many of the same questions of liability that arise in eminent domain arise in the inverse condemnation context. These issues should be subject to the same procedural tools. However, under the Court of Appeal's decision, the availability of section 1260.040 would depend on whether the issue arose in a direct or inverse condemnation case. That should not be the law.

Assume, hypothetically, that impairment of view was a compensable item of damage (it is not under *Regency Outdoor Adver. Inc. v. City of Los*

Angeles (2006) 39 Cal.4th 507, 522). And assume further that the Agencies had filed an eminent domain action to condemn a view easement possessed by Plaintiffs so that the Agencies could construct the sound walls on the opposite side of the freeway. In their hypothetical answer, Plaintiffs could assert claims for injury caused by noise, dust, and vibration caused by the sound walls. The Agencies could bring a section 1260.040 motion for a determination on whether the noise, dust and vibration caused by the sound walls was a compensable item of damage. Yet, under the Court of Appeal's decision, the Agencies would not be permitted to bring a section 1260.040 motion to decide the exact same issue where it arises in an inverse action.

Instead, the rule should be that if the issue is about the compensability of a claim or entitlement to advance a claim and the issue is one for the trial court to decide, then the issue is a proper subject of a section 1260.040 motion regardless of whether it arises in a direct or inverse condemnation action. This rule should stand even if the decision on the issue is case-dispositive. A section 1260.040 motion can be case-dispositive in an eminent domain action.[3] For example, any person can make a claim for compensation in an eminent domain case even where that person is not named. (Code Civ. Proc., §1250.230.) An adjacent property owner could claim that the construction and use of the project will substantially impair his or her access. A business owner and tenant on the remainder property could make a claim for lost business goodwill. Either situation can arise in an eminent domain action whereby the claimant is seeking compensation for only that claim, and a section 1260.040 motion seeking a determination on the compensability of that claim could be

[3] The determination on issues of liability in eminent domain in a bifurcated bench trial or motion *in limine* can also be dispositive. (See, e.g., *Handlery Hotel*, *supra*, 73 Cal.App.4th at pp. 522-23.)

dispositive.

Nothing about the language of section 1260.040 limits its scope to claims that are not case-dispositive. Section 1260.040 is focused on the decision-making process regarding a certain class of issues. If the issue is present, then section 1260.040 should be available as a way for the court to decide the issue.

In addition, the procedural nature of section 1260.040 is not a bar to importation. Plaintiffs cited *Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, *Regency Outdoor, supra*, 39 Cal.4th 507, and *Beaty v. Imperial Irrigation Dist.* (1986) 186 Cal.App.3d 897, for the proposition that procedural statutes applicable to eminent domain actions do not necessarily apply to inverse condemnation actions. Plaintiffs' argument creates a false dichotomy - procedural vs. substantive. None of the cited cases so hold.

Goebel and *Regency Outdoor* were about whether section 998, a statute applicable to general civil litigation matters, applied in inverse condemnation when section 998 specifically excepted eminent domain actions. (*Goebel, supra*, 92 Cal.App.4th at pp. 558-59; *Regency Outdoor, supra*, 39 Cal.4th at p. 530.) Neither *Goebel* nor *Regency Outdoor* considered whether and/or under what circumstances an eminent domain statute can be applied in the inverse condemnation setting.

Beaty was about whether an inverse condemnation plaintiff was entitled to relocation benefits under the Relocation Assistance Act, under Government Code section 7260, *et seq.* The public entity argued that the Act did not apply to inverse condemnees under any circumstances. The *Beaty* court disagreed, holding that under some circumstances, inverse condemnees may, indeed, fall within the Act's definition of "displaced person" due to an "acquisition" of private property for public use. (*Id.* at pp. 905, 907.) Furthermore, the *Beaty* court held that entitlement to

relocation benefits should not depend on whether the public entity initiated condemnation proceedings. (*Id.* at p. 907.) *Beaty*, too, did not consider whether and/or under what circumstances an eminent domain statute can be applied in the inverse condemnation setting. There is no general rule of prohibition against application of procedural provisions of the Eminent Domain Law.

4. PLAINTIFFS ARE ASKING THE COURT TO RE-WRITE THE STATUTE

Plaintiffs argue that section 1260.040 "is a narrow statutory mechanism designed solely for pretrial resolution of *compensation-related* legal issues in eminent domain actions." (Ans., p. 10; emphasis in original.) Plaintiffs further characterize the issues subject to section 1260.040 as pertaining to "the *amount* of compensation" as opposed to the "threshold *right to receive* compensation." (Ans., p. 15; see also, pp. 15, 32; emphasis in original.) Plaintiffs would have this Court re-write the statute to read:

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

Or perhaps:

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

It is well-established that courts may not add provisions to statutes. (Code Civ. Proc., §1858.) Yet, not only would Plaintiffs' interpretation require the re-writing of the statute but Plaintiffs' interpretation cannot be harmonized with the balance of eminent domain law. The phrase "issues

relating to compensation" is already a well-defined phrase in eminent domain. It refers to the jury's process for deciding valuation. Section 1260.040 cannot be read to apply only to "issues relating to compensation" because that interpretation would impermissibly purport to usurp the jury's role in valuation.

A. "Issues relating to compensation" are for the jury to decide

Issues "relating to compensation" and issues "related to the amount of compensation" are issues for the jury to decide at its compensation trial. (e.g., *Stamper, supra,* 1 Cal.5th at p. 593 [The jury's role, in an eminent domain case, is to determine "the appropriate amount of compensation"]; *People v. Ricciardi* (1943) 23 Cal.2d 390, 402 ["all issues except the sole issue relating to compensation [ ] are to be tried by the court"].) Indeed, the phrase "trial on issues relating to compensation" is used elsewhere in the Eminent Domain Law, and the court in *Hansen's Truck Stop, supra,* 236 Cal.App.4th 178, agreed that this phrase refers to the jury trial to determine the amount of compensation.

In *Hansen's Truck Stop*, the issue was whether the property owners were entitled to recover their litigation expenses under Code of Civil Procedure section 1250.410. Under that provision, the parties to an eminent domain action are required to exchange formal settlement proposals prior to trial. If, after trial, the property owner's statutory demand for compensation is found to have been reasonable and the condemning agency's statutory offer unreasonable, then the property owner is entitled to recover litigation expenses. (§1250.410, subd. (b).) In making this decision, the judge may only consider the final offer and demand that were made "[a]t least 20 days prior to the date of the trial on issues relating to compensation." (§1250.410, subd. (a).)

In that case, the proceedings were bifurcated. The first trial was a bench trial on whether the condemning agency was liable for the property owners' damages relating to impaired access and loss of business goodwill. (*Id.* at pp. 182-83.) The second trial was the jury trial on valuation. (*Id.* at p. 183.) A statutory offer and demand were made prior to the first trial. The property owners also made a second and lower statutory demand before the jury trial, but the agency made no additional offer. (*Id.* at pp. 182-83.) At issue was which of the property owners' demands to consider in assessing their right to litigation expenses: the one made before "the trial in which the right to damages is adjudicated" or the one made before "the trial in which the amount of compensation is adjudicated." (*Id.* at p. 183.) The appellate court held:

> "It thus appears that in the parlance of eminent domain, 'issues relating to compensation' are those pertaining to the amount of compensation, that is, the fair market value of the property plus the amount of any other damages resulting from the condemnation. The compensation issues do not include other issues of fact or law, such as whether the property owner is entitled to severance damages because the parcel being taken is part of a larger parcel, whether the condemnor has the legal authority to condemn the property or whether the property owner is entitled to damages for impairment of access." (*Id.* at p. 198; internal citations omitted.)

Hansen's Truck Stop affirmed the existence of a phase of an eminent domain trial between right to take and valuation whereby the trial judge "adjudicates" "preliminary issues" of "entitlement to various categories of damages." (See also, *Stamper*, *supra*, 1 Cal.5th at pp. 593-94 [identifying other examples of preliminary issues of entitlement or liability].) And *Hansen's Truck Stop* held that the phrase "issues relating to compensation"

refers to the jury trial to determine the value of the property interests the trial court determines are compensable.

B. <u>"Issue[s] affecting the determination of compensation" is not the equivalent of "issues relating to compensation"</u>

As outlined above, the phrase "issues relating to compensation" has a specific meaning in eminent domain. As a general rule, the Legislature's decision not to use that phrase in section 1260.040 must be given a different effect. (See, e.g., *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) But in this case, there is even more evidence that the Legislature meant to describe something different when it used the phrase "issue affecting the determination of compensation." Section 1260.040 was adopted at the same time that the litigation expense statute under review in *Hansen's Truck Stop, supra,* (section 1250.410) was amended. (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's decision to use a different phrase in section 1260.040 than that found in section 1250.410 should be interpreted as purposeful.

More importantly, Plaintiffs' view of section 1260.040 would result in absurdity because "issues relating to compensation" cannot be decided by the trial judge. Section 1260.040 made plain that it does not apply to the issues of compensation that are for the jury. (Cal. Law Revision Com. com., 19 West's Ann. Code Civ. Proc. (2007 ed.) foll. §1260.040, p. 623 ["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."].) Yet, Plaintiffs' position is that section 1260.040 only applies to "issues relating to compensation" or "issues related to the amount of compensation." Under the applicable law, these issues are not within the trial judge's purview. If Plaintiffs' interpretation were to prevail, no issues would ever be decided using section 1260.040

because none would fit into a nonexistent category of "legal issues relating to compensation."

The Agencies submit that the phrase "evidentiary or other legal issue affecting the determination of compensation" means those issues that are for the trial judge to decide in connection with "the trial in which the right to damages is adjudicated." (*Hansen's Truck Stop*, *supra*, 236 Cal.App.4th at p. 183.) The phrase "evidentiary or other legal issue" means those issues that are for the trial judge to decide as opposed to those issues that are for the jury to decide. The qualifying phrase "affecting the determination of compensation" limits the class of legal issues subject to section 1260.040 to those related to the type of injury (e.g., loss of goodwill) a property owner can claim compensation for.

This interpretation harmonizes section 1260.040 with section 1250.410; it acknowledges the two categories of legal issues that are for the trial judge to decide, and it gives significance to every word within the statute. Moreover, this interpretation is consistent with the purpose of the statute.

In *Hansen's Truck Stop*, *supra*, the court explained why it believed its interpretation of section 1250.410 – that the trial court must examine the reasonableness of the final offer and demand that occur before the valuation trial and not the preliminary issues trial – "more effectively advances the statute's central purpose of encouraging settlement." (236 Cal.App.4th at p. 200.) That explanation sheds light on why section 1260.040 should be read to allow for the determination of those preliminary legal issues about the right to damages:

> "In a bifurcated proceeding, such as here, settlements are less likely to occur if the parties are required to make their one and only statutory final demand and offer prior to the trial in which the court adjudicates, for example, the property

owner's entitlement to various categories of damages. It can be safely assumed that the disputed preliminary issues will usually result in dramatically divergent assessments of the amount of just compensation." (*Ibid.*)

The court recognized the usefulness of encouraging a final offer and demand after the court adjudicates any issues of liability or entitlement to a particular type of damage. Were section 1250.410 interpreted such that the final offer and demand are served before those preliminary decisions are made, the parties would have "dramatically divergent assessments" of case value, which would make settlement much less likely.

Section 1260.040 capitalizes on the same window of time by creating a new procedural vehicle that allows an efficient means whereby parties can obtain a ruling on which types of damages will be included in any award of just compensation. Until the court provides some degree of clarity about which types of damages that will be compensated, the parties will have a difficult time reaching a consensus on the settlement value of the case. Section 1260.040 achieves this goal by requiring that the motion be made well before trial, the issues be raised by noticed motion, and by granting the trial judge more flexibility to advance the trial date and related dates to allow for further proceedings and/or settlement conferences before the jury trial. (LH, Recommendation, p. 105.)

5. APPLYING SECTION 1260.040 IN INVERSE CONTEXT WILL PROMOTE SETTLEMENT

Plaintiffs argue that the Legislature set aside eminent domain proceedings for special treatment in the form of trial priority under section 1260.010, which does not apply to inverse condemnation cases. On that basis, Plaintiffs speculate that the law does not favor early settlement in inverse condemnation more than the law favors early settlement in any other civil actions generally. (Ans., pp. 25-28, 35-36.)

Trial preference advances the goal of prompt disposition, not early settlement. Various grounds give rise to trial priority, and Plaintiffs cite no authority for the proposition that trial priority under section 1260.010 was motivated by a legislative desire to promote pre-trial settlement. The more likely reason for the legislative priority to facilitate pre-trial settlement in eminent domain is article I, section 19 of the California Constitution, a mandate underpinning both direct and inverse actions. The same policy considerations that merit a legislative priority for early settlement in a direct condemnation case exist with equal force in an inverse condemnation case.

Allowing section 1260.040 to be used in inverse condemnation to decide issues of liability will foster more early settlements. Regardless of who brings the motion or who prevails, the trial court's decision identifies for the parties which types of damages are compensable and/or allowable. That decision forces the parties to value the case assessing the same classes of damages, which, in turn, enhances the chances for settlement.

Moreover, neither Plaintiffs nor the Court of Appeal gave section 1036 the weight it was entitled to, especially when combined with the power of a section 1260.040 motion on liability. Without a decision by the court on issues of liability, the parties will have "dramatically divergent assessments" of case value, and settlement will be unlikely. (*Hansen's Truck Stop*, *supra*, 236 Cal.App.4th at p. 200.) However, after the court makes a decision on liability, both sides' case value assessments will converge and make settlement far <u>more</u> likely. A condemning agency will still be motivated to settle cases even if it prevails on a dispositive section 1260.040 motion. The motivation to settle stems from the continued exposure to an award of fees and costs if the trial court's decision is reversed on appeal.

The Court of Appeal appeared to discount the possibility that section 1260.040's use in inverse condemnation would foster settlement because no pre-trial settlement occurred here. The absence of settlement in this case should not serve as evidence that section 1260.040 would never foster settlement in inverse condemnation generally. The key obstacle to settlement in this case is not about case value, which is unusual. Here, the settlement obstacle is the Agencies' concern about how settling with Plaintiffs will invite similar claims wherever sound walls are constructed alongside a freeway. Not only are there hundreds of other homeowners besides Plaintiffs opposite these sound walls, but Caltrans owns and/or constructs countless sound walls up and down the state. Applying section 1260.040 in inverse condemnation will not always result in pre-trial settlements but it will encourage pre-trial settlements notwithstanding the fact that it was unable to do so here.

6. <u>SECTION 1260.040 IS NOT A MOTION *IN LIMINE*</u>

Plaintiffs argue that if a section 1260.040 motion is used to decide issues of liability, then such a motion would be a dispositive motion *in limine* in disguise. (Ans., pp. 32-33.) And, according to Plaintiffs, the case law disfavoring dispositive motions *in limine* should caution against allowing section 1260.040 to be used to decide dispositive issues of liability. (*Ibid.*) The comparison is inapt.

A typical motion *in limine* seeks to exclude a particular item of evidence for legal reasons and/or to avoid prejudice to the moving party. (e.g., *People v. Morris* (1991) 53 Cal.3d 152, 188, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal. 4th 824, 830, fn. 1.) It is brought at the beginning of trial or even during trial. (*Ibid.*) It is not a regularly noticed motion. (*Ibid.*) It usually has only a minimum of evidentiary support and can even be made orally. (*Ibid.*) A court's ruling

on a motion *in limine* is not binding and is subject to reconsideration as the evidence unfolds at trial. (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 90, fn. 6.) A motion *in limine* is an early ruling on objections to anticipated evidence.

A motion brought under section 1260.040 is not the equivalent of a motion *in limine*. A section 1260.040 motion must be filed at least 60 days before trial. It is a regularly noticed motion. The motion seeks to adjudicate a legal issue or mixed question of fact and law that is for the trial judge to decide, and not simply an evidentiary ruling on evidence relevant to an issue to be decided by a jury. As a substitute for a bench trial, the court's decision on a section 1260.040 motion is binding on the parties.

The case law disfavoring dispositive motions *in limine* pertains to situations where the motion asks the court to exclude all evidence pertaining to a cause of action that is for the jury to decide. The aim of a section 1260.040 liability motion is to allow the trial judge to make an early determination of the type of injury that is compensable, which will then dictate the evidence to be presented to the jury on the question of compensation for that injury.

But even assuming a section 1260.040 motion to decide issues of liability could be characterized as a dispositive motion *in limine*, Plaintiffs' reliance on the case law disfavoring such motions is misplaced. The main reason that dispositive motions *in limine* are disfavored is that the standard motion *in limine* procedure (i.e., a not regularly noticed motion made on the eve of trial) is not designed to afford the procedural protections of other statutory procedures and that this unorthodox use presents as though the moving party is attempting to avoid compliance with those statutory procedures. The explanation provided in *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, summarizes the issue:

"In purpose and effect, the foregoing nonstatutory procedures

> are merely substitutes for the dispositive motions authorized by statute. Appellate courts are becoming increasingly wary of this tactic. 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. Adherence to the statutory processes would avoid all these risks." (*Id.* at p. 1594; internal citations omitted.)

But here, the Legislature created a new statutory process in section 1260.040. It created this process against the backdrop of eminent domain cases that were deciding these liability issues in an ad hoc fashion, by way of offers of proof on the eve of trial (*Ayon*, *supra*, 54 Cal.2d at p. 220) or following motions for nonsuit at a bifurcated bench trial. (*Handlery Hotel*, *supra*, 73 Cal.App.4th at p. 527.) It created the process in recognition of the reality that waiting to resolve legal issues related to entitlement to a specific type of damages until the eve of trial or during trial is counter-productive to settlement. And it created this process knowing that trial judges often "resist *in limine* motions and bifurcation, preferring to hear the matter only once and sort things out at trial." (LH, Recommendation, p. 103.)

The statutory process of section 1260.040 avoids the disadvantages described in *Amtower*, *supra*, by limiting the procedure to issues that are those for the trial judge to decide and by requiring the issues be heard by way of a regularly-noticed motion made at least 60 days before trial. Procedural protections are provided. No one's right to a jury trial is infringed, and no one is blindsided or deprived an opportunity to substantively respond.

The issue for this case is not whether section 1260.040 provides a new procedure that allows for a dispositive motion on liability. It does.

The issue is whether that procedure should be available in an inverse condemnation case to decide the very same issues of liability.

Plaintiffs argue that rather than a dispositive motion *in limine*-like procedure, the proper vehicle to decide issues of liability in an inverse case is a motion for summary judgment, as used by the government agency in *Harding v. State of California ex rel. Dept. of Transportation* (1984) 159 Cal.App.3d 359. (Ans., p. 34.) But that case illustrates why summary judgment is not well-suited to address issues of liability that arise in both direct and inverse condemnation cases. There, the trial court granted summary judgment on the inverse cause of action, but the appellate court reversed and remanded, explaining, in essence, that the issues were too fact-dependent to be decided on summary judgment. (*Id.* at p. 367.)

It is true that summary judgment can be a useful tool in inverse condemnation when the plaintiff is pursuing one claim for damages and where there are no questions of fact. As a supplementary procedure, section 1260.040 can fill in the gaps. A section 1260.040 motion can seek a determination on the viability of one of many claims for damages sought in an inverse condemnation case – a claim for damages that could have been the subject of an eminent domain action but arose in inverse instead. A similar motion is not available under section 437c to seek a determination on one of many claims for damages. Section 437c, subdivision (f)(1), does not allow motions for summary adjudication that seek a ruling on a non-punitive damages claim or where the motion is directed at something less than disposition of an entire cause of action. (*Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 97.) Moreover, any question of fact would defeat a motion under section 437c. Without section 1260.040, successful motion practice in inverse condemnation will be limited to those cases where there are no questions of fact and where all of the plaintiff's claims are defective as a matter of law.

7. **CONCLUSION**

An eminent domain proceeding can be comprised of three phases: a right to take trial, a valuation jury trial and, in between, a trial court determination of the condemning agency's liability for each of the defendant's claims for damages. Prior to the adoption of section 1260.040, these preliminary issues of liability were sometimes disposed of at a bifurcated bench trial, eve-of-trial motions *in limine*, or offers of proof. Section 1260.040 creates a new supplementary procedure that allows trial courts to decide these mixed issues of law and fact by noticed motion in advance of trial. Section 1260.040 offers parties a process for an early decision on liability issues that stand as obstacles to an apples-to-apples comparison of case value, and therefore an obstacle to settlement. The timing provided for in section 1260.040 aids this cause as well. Having the motion made at least 60 days before trial creates a window of time for possible settlement between the determination of liability for a particular type of injury and the subsequent trial on the amount of damages the property owner is entitled to for that injury.

Courts have allowed the importation of eminent domain statutes into inverse condemnation law when the subject matter of the statute is a subject matter that arises in both contexts. Section 1260.040 is one of those situations. In both direct condemnation and inverse condemnation cases, one of the key questions the court has to answer is the type of alleged injuries to property that is compensable. In both cases, the jury decides the amount of compensation only after the trial court determines that an alleged injury is, in fact, compensable. The procedure for resolving that legal issue should be available in both contexts.

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: November 19, 2018 WOODRUFF, SPRADLIN & SMART

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CERTIFICATE OF WORD COUNT

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PROOF OF SERVICE

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Kathleen Moore

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