S188128

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY
Plaintiff and Appellant
v.
ALAMEDA PRODUCE MARKET, LLC, et al.
Defendants and Respondents

After a Decision by the Court of Appeal,
Second Appellate District, Division Four, Case No. B212643

Los Angeles County Superior Court, Case No. BC 313010
Honorable James R. Dunn, Judge

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND OTHERS TO FILE *AMICUS* BRIEF IN SUPPORT OF APPELLANT; PROPOSED BRIEF OF *AMICI CURIAE*

David W. Skinner SBN: 146285
Neli N. Palma, SBN: 203374
Eugenia Amador, SBN: 236521
MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500, Oakland, CA 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for *Amici Curiae*
League of California Cities
California State Association of Counties
California School Boards Association
and its Education Legal Alliance
Association of California Water Agencies
City of Long Beach
Exposition Metro Line Construction Authority
Pasadena Metro Blue Line Construction Authority

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

Evidence Code sections

Government Code sections

Public Utilities Code sections

APPLICATION FOR PERMISSION TO FILE *AMICUS* BRIEF

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Rules of Court, Rule 8.520(f), *amici curiae* League of California Cities; California State Association of Counties; California School Boards Association and its Education Legal Alliance; Association of California Water Agencies; City of Long Beach; Exposition Metro Line Construction Authority; and Pasadena Metro Blue Line Construction Authority (collectively, the "*amici*") respectfully request leave to file the accompanying brief of *amicus curiae* in support of the Los Angeles County Metropolitan Transportation Authority. This application is timely made within 30 days after the filing of the reply brief on the merits.

THE *AMICI CURIAE*

The League of California Cities ("League") is an association of 476 California cities united in promoting the general welfare of cities and their residents. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing all 16 geographical divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the matter at hand, that are of statewide significance.

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

The California School Boards Association ("CSBA") is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board governance and advocates on behalf of school districts and county offices of education. As part of CSBA, the Education Legal Alliance ("Alliance") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The Alliance represents its members, over 750 of the state's 1,000 school districts and county offices of education, by addressing legal issues of statewide concern to school districts. The Alliance's activities include joining in litigation where the interests of public education are at stake. Such is the case here. California K-12 school districts are in the midst of a long-overdue renovation and expansion process, under which state and local funding in the billions of dollars have been expended and have been set aside for the future. During the period 2009-2014 the five-year need for new school construction is projected by the California Department of Education at $7.8 billion/ $1.58 billion per year. Reliance on the waiver provided by Code of Civil Procedure section 1255.260 is critical to those school districts exercising their power of eminent domain as it helps expedite completion of school construction projects, already subjected to both a time consuming and heavily regulated process, and limits legal uncertainty. Failure to bind the property owner to the waiver following withdrawal of the deposit by a lender to ultimately benefit the landowner will only serve to bring further delay to much needed school construction.

//

//

Association of California Water Agencies ("ACWA") is the largest statewide coalition of public water agencies in the country. Its nearly 450 public agency members collectively are responsible for 90 percent of the water delivered to cities, farms, and businesses in California. ACWA's mission is to assist its members in promoting the development, management and reasonable beneficial use of high quality water at the lowest practical cost and in an environmentally balanced manner. ACWA has a significant interest in supporting the timely implementation of important regional water supply and reliability projects that are developed by its member public water agencies.

The City of Long Beach is a California municipality. It is Los Angeles County's second largest city and the seventh largest city in California. The City of Long Beach and its various departments enter into substantial public works projects, some of which require the condemnation of private property for public use. The outcome of this appeal will therefore have a direct impact on the City of Long Beach and its residents.

The Exposition Metro Line Construction Authority ("Authority") is a single purpose public agency established by Public Utilities Code sections 132600, *et seq*. The Authority was formed for the purpose of awarding and overseeing final design and construction of the Exposition Metro Line, a light rail line that will run from downtown Los Angeles to Santa Monica.

The Pasadena Metro Blue Line Construction Authority, more commonly known as the Metro Gold Line Foothill Extension Construction Authority, is a single purpose entity created by Public Utilities Code section 132400.

THE INTERESTS OF *AMICI CURIAE*

Amici have a substantial interest in the outcome of this eminent domain case. In this case, the Los Angeles County Metropolitan Transportation Authority advocates that the Supreme Court affirm the

analysis adopted by the Court of Appeal and hold that a property owner who foregoes the statutory opportunities to object and instead receives the benefit of a lender's withdrawal waives all challenges to the taking other than a claim for greater compensation.

The issues presented in this case have significant implication on the ability of public entities to timely plan and construct public projects. For this reason, *amici* have a substantial interest in the outcome of this case.

THE NEED FOR FURTHER BRIEFING

The League of California Cities and the other *amici* believe their perspective on this matter is worthy of the Court's consideration and will assist the Court in deciding this matter. Representing the interests of California public entities, *amici* are uniquely positioned to explain the practical ramifications on public entities and public projects if this Court does not affirm the analysis adopted by the Court of Appeal.

Counsel for *amici* has examined the briefs on file in this case and is familiar with the issues involved and the scope of their presentation and does not seek to duplicate that briefing. We believe there is a need for additional briefing on this issue, and hereby request that leave be granted to allow the filing of the accompanying *amici curiae* brief.

CONCLUSION

In compliance with subdivision (c)(3) of Rule 8.200, the undersigned counsel represent that they wrote this brief in its entirety in a pro bono capacity. Their firm is paying for the entire cost of preparing and submitting this brief, and that no party to this action or any other person either wrote this brief or made any monetary contribution to fund the preparation or submission this brief. For the foregoing reasons, the *amici*

curiae respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: May 26, 2011

MEYERS NAVE RIBACK SILVER & WILSON

By: _____

David W. Skinner
Neli N. Palma
Eugenia Amador
Attorneys for *Amici Curiae*
League of California Cities
California State Association of Counties
California School Boards Association
and its Education Legal Alliance
Association of California Water Agencies
City of Long Beach
Exposition Metro Line Construction Authority
Pasadena Metro Blue Line Construction Authority

AMICUS CURIAE BRIEF

IN SUPPORT OF APPELLANTS

I. INTRODUCTION: PERTINENT EMINENT DOMAIN LAW PROVISIONS AND STATEMENT OF THE ISSUE

Under Code of Civil Procedure section 1255.010(a), "[a]t any time before entry of judgment, the plaintiff [in an eminent domain proceeding] may deposit with the State Treasury the probable amount of compensation, based on an appraisal, that will be awarded in the proceeding." A deposit of probable amount of compensation is required if the condemning agency seeks an order for prejudgment possession. (Code Civ. Proc. §§1255.410(d)(1)(b), (d)(2)(B).) A deposit of the probable amount of compensation also sets the "date of valuation" for purposes of valuing the property. (Code Civ. Proc. §1263.110(a); see also *Mt. San Jacinto Community College Dist. v. Superior Court* (2007) 40 Cal.4th 648, holding that the statutory date of valuation at the time the probable compensation is deposited is constitutional.)

Under section 1255.210, "[p]rior to the entry of judgment, *any defendant* may apply to the court for the withdrawal of all or any portion of the amount deposited." (Emphasis added.) Section 1255.260 (the statute at issue in this case) then provides:

> If *any portion* of the money deposited pursuant to this chapter is withdrawn, *the receipt of any such money shall constitute a waiver by operation of law* of all claims and defenses in favor of *the persons receiving such payment* except a claim for greater compensation. (Emphasis added.)[1]

[1] See also *Mt. San Jacinto Community College Dist., supra*, 40 Cal.4th 648 where this Court held that the requirement of a waiver of claims and defenses for receipt of deposited probable compensation is constitutional.

Section 1255.210 does not limit "the receipt of any such money" to the party who actually files an application for withdrawal of the deposit. Clearly, the party who files the application will - - assuming the application for withdrawal is granted - - at least initially receive the funds from the State Treasury. Under section 1255.220, "[s]ubject to the requirements of this article, the court shall order the amount requested in the application, or such portion of that amount as the applicant is entitled to receive, *to be paid to the applicant.*" (Emphasis added.)

The applicant in this case is a lender. The lender obtained a court order authorizing the withdrawal, and then used the withdrawn funds to reduce Alameda Produce Market, LLC's ("APMI") loan. The collateral used to secure APMI's loan is the very same property as is the subject of the eminent domain action. APMI had notice of the lender's motion to withdraw, but did not object to the withdrawal.

The issue here is simply whether the lender's withdrawal of a portion of a deposit *and* subsequent use of the funds to pay off its loan to APMI amounts to "the receipt of any such money" by APMI for purposes of section 1255.260. If section 1255.260 does apply to APMI, then APMI would be legally deemed to have waived its "right to take" objections under section 1255.260.

APMI argues that it is not one of "the persons receiving such payment" under section 1255.260 and, as such, did not *waive* any potential "right to take" objections. APMI suggests that, by arguing otherwise, Plaintiff Los Angeles County Metropolitan Transportation Authority ("MTA") has somehow run afoul of the standards governing a condemnor under *City of Los Angeles v. Decker* (1977) 18 Cal.3d 680. (Reply, p. 38.)[2]

---

[2] For instance, APMI attempts to take MTA to task for arguing that APMI should have affirmatively objected to the lenders' withdrawals in order to preserve its own "right to take" objections. (See MTA's Answer Brief on

Of course, MTA cannot reasonably be accused of violating any legal or ethical standards for condemning agencies. MTA is perfectly entitled and expected to argue that the lenders' withdrawal of a portion of the deposit here amounts to a waiver of APMI's "right to take" objections. Section 1255.260 provides that such waiver, to the extent it applies, is "by operation of law." As has been extensively briefed by MTA and APMI, the Court of Appeal in *Redevelopment Agency of the City of San Diego v. Mesdaq* (2007) 154 Cal.App.4th 1111, held that a lender's withdrawal of a portion of a deposit *did* amount to a waiver of the landowner's right to take objections. The Court of Appeal *in this case* relied on the holding in *Mesdaq*.

On behalf of the Los Angeles County Metropolitan Transportation Authority, the *amici* urge the Supreme Court to affirm the Court of Appeal's decision. Public entities closely track landowners' potential right to take objections in eminent domain proceedings. If landowners either do not properly assert right to take objections, or if landowners waive them, public entities can proceed with the knowledge that they will be able to acquire the property for the public project. They can then plan to litigate only the question of the value of the property.

It would contradict public policy to allow a landowner who has a lien extinguished because the lender withdrew the deposit, to then be allowed to litigate its right to take objections.

---

the Merits, p. 19: "Yet, APMI – like every other property owner in California – has the right to object to a withdrawal on the grounds that the owner challenges the right to take and wants to preserve the status quo." See also APMI's Reply, p. 36: "MTA should have heeded its own advice and sought a court hearing before it stipulated to the lenders' withdrawal of the funds if it was of the opinion that there was both a risk of the owner prevailing on its challenge to the take and MTA not recovering the withdrawn deposit funds.")

II. PUBLIC POLICY FAVORS PROVIDING PUBLIC AGENCIES WITH AS MUCH CERTAINTY AS POSSIBLE IN THE EMINENT DOMAIN ACQUISITION PROCESS

A. Planning for Large-Scale Public Projects Can Be Extremely Complex and Take Years to Complete

Courts have repeatedly recognized that the planning for and approval of public projects often take many years. For example in *Johnson v. State of California* (1979) 90 Cal.App.3d 195, 198, the Court of Appeal stated:

> The actions described in the pleadings are part of the legitimate planning process for a public improvement.... Throughout the design phase of a highway project, alterations and modifications of the proposed project may occur; in recent years, with considerable frequency, route location adoptions have been rescinded by the highway commission as a result of public disapproval of a project, environmental problems, or fiscal constraints. In some cases, routes have been deleted from the state highway system by the Legislature after considerable design work has been done on a proposed project and substantial amounts of right-of-way have been acquired.

In *Contra Costa Water District v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, moreover, the Court of Appeal addressed the issue of whether the condemning agency engaged in unreasonable precondemnation delay under *Klopping v. City of Whittier* (1972) 8 Cal.3d 39. The court stated: "The Water District's evidence revealed that it was engaged in a project of immense proportions, totaling roughly the square mileage of San Francisco, requiring acquisition of property from many separate ownerships and obtaining numerous permits and approvals legally required to implement such a project. Water District personnel testified that the acquisition of Vaquero's property was the most difficult and complex property acquisition for the entire project." (58 Cal.App.4th at 896.)

B. Public Agencies Must Plan Carefully to Ensure Properties Needed for Public Projects Can (if Necessary) be Acquired by Eminent Domain in a Timely Manner

Public entities must engage in extensive and costly planning and preparation to acquire property by eminent domain for public projects. Some of the actions which must be taken are summarized below.

1. Pre-Filing Requirements

Government Code §7267.2(a)(1) requires that the public entity make an offer to purchase the property at its full approved appraised value. To do this, the public entity must first retain a real estate appraiser to value the property and/or property interests needed for the proposed public project.

After the property needed has been appraised, the public entity must make a written offer to the owner of record for the full-appraised value of the property to be acquired. (Government Code §7267.2(a)(1), (b).) At the time of making the offer, the public entity must also provide the property owner with an Informational Pamphlet "detailing the process of eminent domain and the property owner's rights under the Eminent Domain Law." (Government Code §7267.2(b).) A public entity must "offer to pay the reasonable costs, not to exceed five thousand dollars ($5,000), of an independent appraisal ordered by the owner of the property that the public entity offers to purchase under the threat of eminent domain. . . ." (Code of Civ. Proc. §1263.025.)

Further, Government Code sections 7267 and 7267.1 provide that a public entity shall make every reasonable effort to expeditiously acquire property by negotiation and agreement. For this reason, the public entity will typically allow for some period of time to try and negotiate a mutually acceptable purchase and sale before going forward with eminent domain proceedings.

If the negotiations are unsuccessful, the public entity must give notice of its intent to adopt a resolution of necessity at a public hearing of it governing body. (Code of Civ. Proc. §1245.235(a).)[3] The public entity must plan in advance to make sure the notice of intent is sent by first-class mail to each person whose property is to be acquired and whose name and address appears on the last equalized county assessment roll notice. (Code of Civ. Proc. §1245.235(a).) Failure by the landowner to file a written request to appear and be heard within 15 days after the notice of intention was mailed will result in waiver of the right to appear and be heard. (Code of Civ. Proc. §1245.235(b)(3).) For this reason, most eminent domain practitioners on behalf of public entities take the position that the notice of intent must be mailed at least 15 days before the hearing on the resolution. (Code of Civ. Proc. §1245.235(b)(3).)

In order to adopt a resolution of necessity, the public entity must make certain factual findings and set those forth in its resolution of necessity. (Code of Civ. Proc. §§1245.030, 1245.230(c).) Specifically, the resolution of necessity must include a declaration that the governing body of the public entity has found and determined each of the following:

(1) The public interest and necessity require the proposed project;

(2) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and

---

[3] Under Code Civil Procedure section 1240.040, "[a] public entity may exercise the power of eminent domain only if it has adopted a resolution of necessity that meets the requirements of Article 2 (commencing with Section 1245.210.)" Under Code of Civil Procedure section 1245.220, moreover, "[a] public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article."

(3) The property described in the resolution is necessary for the proposed project.

As a practical matter, in order to ensure that these findings are properly considered, staff for the public entity will spend a substantial amount of time and effort preparing a "staff report" which sets forth the facts supporting the findings. Such staff report is particularly important where a landowner objects to a public entity's resolution of necessity on grounds that the resolution's adoption or contents were allegedly influenced or affected by "gross abuse of discretion" by the governing body. (Code of Civ. Proc. § 1245.255(b).) In that case, the trial court's review of whether adoption of the resolution of necessity was arbitrary, capricious, or entirely lacking in evidentiary support will be "based on the record at the hearing on the resolution." (*Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 Cal.App.4th 141, 148-151.)

2. Filing Complaint in Eminent Domain and Obtaining Order for Prejudgment Possession

Assuming the public entity adopts a resolution of necessity, it may then file a complaint in eminent domain. Under Code of Civil Procedure section 1250.110, an eminent domain proceeding is commenced by filing a complaint with the court.

If the public entity requires prejudgment possession of the property for its project, it must file a formal motion for an order for possession. (Code Civ. Proc. §1255.410(a).) As pointed out in MTA's Answer Brief on the Merits, prior to legislative changes to the Eminent Domain Law in 2006, an order for prejudgment possession could be obtained on an *ex parte* basis - - with just 24 hours' notice to the landowner. (See MTA's Answer Brief, p. 18, fn. 8.) The legislative changes to the Eminent Domain Law in 2006 made it much more time-consuming and costly for public entities to obtain prejudgment possession.

Now, if the property is "unoccupied," the hearing on a motion for possession cannot be "less than 60 days after service of the motion on the record owner." If the property is "lawfully occupied by a person dwelling thereon or by a farm or business operation," the hearing on the motion cannot be less than 90 days" after service of the motion. (Code Civ. Proc. §1255.410(b).)

If the motion for the order for possession is not opposed within 30 days of service of the motion, the court may grant the order if the public entity is entitled to take the property by eminent domain and has made a deposit of the probable amount of just compensation. (Code Civ. Proc. §1255.410(d)(1).) In that case, the effective date of the order for possession is "not less than 30 days" for property that is "lawfully occupied by a person dwelling thereon or by a farm or business." (Code Civ. Proc. §1255.450(b).) In "all other cases," the order for possession can become effective in "not less than 10 days" after service of the order. (Code Civ. Proc. §1255.450(b).)

If, on the other hand, the motion for the order for possession is opposed within 30 days of service of the motion, the court may grant the motion only if it makes the following additional findings: (1) "There is an overriding need for the plaintiff to possess the property prior to the issuance of the final judgment in the case, and the plaintiff will suffer substantial hardship if the application for possession is denied or limited, and (2) "The hardship that the plaintiff will suffer if possession is denied or limited outweighs any hardship on the defendant or the occupant that would be caused by the granting of the order for possession." (Code Civ. Proc. § 1245.410(d)(2).)

If the public entity can support these additional findings, the general rule is that the effective date of the order for possession is the same as for an "unopposed motion," i.e., "not less than 30 days" for property that is

unlawfully occupied by a person dwelling thereon or by a farm or business;" and "not less than 10 days" in "all other cases."

As a practical matter, as a result of the legislative changes to motions for possession, a public entity must engage in extensive and costly planning prior to filing a motion for prejudgment possession. The public entity must not only determine *when* it needs possession, but must also now carefully choreograph this need with section 1255.410(b)'s timing requirements. Moreover, if the motion is opposed, the public entity must assess the relative "hardship" to the public entity and the landowner, and explain to the trial court why the hardship that the public entity will suffer, if possession is denied or limited, "outweighs" any hardship on the landowner or occupant if possession is granted. This assessment can involve significant analysis, discovery, briefing, time, effort, and cost.

3. Trial Preparation and Trial

If the parties are unable to settle, it could take one year from the date of the complaint to get to trial. While eminent domain cases are entitled to statutory precedence over all other civil actions (Code Civ. Proc. §1260.010), it is not uncommon for a trial in an eminent domain case to start approximately one year (and sometimes more) after the Complaint in Eminent Domain is filed.[4]

---

[4] The Eminent Domain Law assumes that, if trial on the issue of compensation has not occurred within one year, there has been a "delay." In particular, if a public entity did *not* make a deposit of probable compensation with the State Treasury, the "date of valuation" will be the date of the commencement of trial so long as "the issue of compensation is brought to trial within one year after commencement of the proceeding...." (Code Civ. Proc. §1263.120.) If the issue of compensation is not brought to trial within one year, the date of valuation will be the date of trial unless the "delay" in getting the case to trial is caused by the defendant. If the delay is caused by the defendant, the date of valuation will be the date of commencement of the proceeding. (Code Civ. Proc. §1263.130.)

If a landowner properly asserts, and does not waive, right to take objections, the trial will be bifurcated. Pursuant to Code of Civil Procedure section 1260.110, the Court shall hear and determine all objections to the right to take prior to the determination of the issue of compensation. If the right to take objections are overruled, a jury will determine the value of the property. (*People v. Ricciardi* (1943) 23 Cal.2d 390, 402.) Assuming a public entity need not address any potential right to take objections, it can focus on the jury trial regarding valuation.

In which case, there are several important pre-trial dates, including the date of exchange of statements of valuation data, and the final offer and demand. Absent stipulation or court order to the contrary, the parties must exchange their respective statements of valuation data 90 days prior to the trial date. (Code Civ. Proc. §1258.220.) In addition, the public entity must make a final written offer, and the property owner must make a final written demand, 20 days prior to the trial date. (Code Civ. Proc. §1250.410.) The final offer and final demand are important because the court can refer to them, after the trial, and compare them with the jury verdict in determining whether the public entity should be required to reimburse the owner for his attorneys' fees and litigation expenses. (Code Civ. Proc. §1250.410.)

C. Because of These Extensive Substantive and Procedural Requirements, a Landowner's Waiver of Potential Right to Take Objections (Through the Withdrawal of a Deposit) Dramatically Affects the Public Entity's Eminent Domain Planning Process

Knowledgeable eminent domain practitioners know, going into a particular case, that their public entity client must comply with the lengthy and costly substantive and procedural requirements relating to making a written offer to acquire the property; attempting to negotiate in good faith to purchase the property; sending a notice of intent to adopt a resolution of

necessity; preparing staff report supporting the findings in the resolution of necessity; holding a public hearing on the resolution of necessity; filing a complaint in eminent domain; coordinating the timing on the need for the property with the timing requirements for an order for possession; assessing the relative "hardship" on a motion for possession and preparing a motion for possession; and preparing for trial.

If a public entity has gone so far as to obtain an order for possession, it will closely monitor whether the landowner will attempt to litigate any right to take objections. First, if a landowner seeks to raise a right to take objection to a public entity's resolution of necessity in an eminent domain proceeding, the landowner must set forth the basis of his/her objection as part of the "record" at the hearing on the resolution. (See, e.g., *People ex rel. Dept. of Transp. v. Cole* (1992) 7 Cal.App.4th 1281, 1284-1286, holding that the landowners "waived" their right to seek judicial review of whether the Department of Transportation complied with Government Code section 7267.2's pre-condemnation offer requirement; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1228-1229, holding that "[a] landowner who objects to a taking must exhaust remedies by appearing and making his objection at the appropriate stage, here at the public hearing on [the resolution of necessity]".) The public entity will thus look to whether the landowner properly raised right to take objections at the resolution hearing.

Second, Code of Civil Procedure section 1245.255(a)(2) provides that, after a public entity has commenced an eminent domain proceeding, a person having an interest in the subject property may obtain judicial review of a public entity's resolution of necessity "by objecting to the right to take pursuant to this title." Code of Civil Procedure §1250.350 further provides:

> A defendant may object to the plaintiff's right to take, by demurrer or answer as provided in Section 430.30,

> on any ground authorized by Section 1250.360 or Section 1250.370. The demurrer or answer shall state the specific ground upon which the objection is taken and, if the objection is taken by answer, the specific facts upon which the objection is based. Any objection may be taken on more than one ground, and the grounds may be inconsistent.

The public entity will thus also carefully review the landowner's answer to the complaint in eminent domain.

Even if a landowner has satisfied these requirements, a public entity will pay close attention to whether the landowner subsequently waived any right to take objection. The public entity will pay particularly close attention to whether there was a withdrawal of the deposit amounting to a waiver of right to take objections under section 1255.260. If there is such a waiver, the public entity can then proceed with the eminent domain case knowing that there is no question that it can acquire the property for the public project. The only issue is how much the public entity has to pay for the property. The last thing a public entity wants or needs is to discover, after expending the time and effort to obtain an order for prejudgment possession, and just before trial, that the landowner will attempt to litigate right to take objections after all.

D. Requiring a Public Entity to Guess at Whether a Landowner Intended to Waive Potential Right to Take Objections Would Create Uncertainty and Delay

1. "Intent" is Not Required for a Waiver Under Section 1255.260

As previously stated, the landowner has the affirmative obligation to raise any potential right to take objection early in the eminent domain process. APMI maintains that it could not have waived its right to take objections under section 1255.260 because it lacked "the requisite intent" to do so. (Petitioner's Opening Brief, pp. 31-36, and Petitioner's Reply, pp.

19-20.) APMI argues that MTA had an affirmative obligation to clarify whether APMI was agreeing to waive its right to take objections when APMI did not object to the lenders' withdrawal. (See fn. 2 herein.) These arguments are misplaced.

Section 1255.260 provides for a waiver by "operation of law." The action triggering the waiver is "the receipt" of any portion of the deposit of probable compensation. Section 1255.230 does not require the condemning agency to notify the applicant that a withdrawal will amount to a waiver of any potential right to take objections.[5] Nor does section 1255.260 condition the waiver on the applicant's "intent."

2. APMI and the Lenders are Not True "Adversaries" in the Eminent Domain Action

(a) The *Dunn* Case Has Long Been Superseded

APMI cites just one case, *Pomona College v. Dunn* (1935) 7 Cal.App.2d 227, as an alleged example of how landowners and lenders "are typically adversaries in a condemnation action." This is simply not the case.

Dunn was decided over 75 years ago, and is legally and factually distinguishable from the instant action. In September 1925, Dunn executed a promissory note in the amount of $10,000 in favor of Pomona College, secured by a mortgage on real property located in Los Angeles. In August 1927, the City of Los Angeles filed an eminent domain action involving a "partial taking" of property. Both the landowner (Dunn) and mortgagee (Pomona College) had been named as defendants in the eminent domain

[5] Under section 1255.230(c), if a condemning agency files an objection to a defendant's application for withdrawal of all or any portion of the deposit, the condemning agency must only provide notice to other parties who are known or believed to have interests in the property that their own "failure to object [to the withdrawal] will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn."

action, but Pomona College defaulted in appearance. The trial court awarded Dunn the sum of $5,568, and specifically found that Pomona College "is not entitled to receive compensation herein." (7 Cal.App.2d at 231.)

Dunn actually involved Pomona College's subsequent foreclosure action against Dunn, where Pomona College sought to collect the $5,578 condemnation award. The issue was whether Pomona College's foreclosure action was barred by the doctrine of *res judicata* due to Pomona College's failure to appear in the City of Los Angeles' prior eminent domain action. Ultimately, the Court of Appeal held that - - for the limited purpose of Pomona College's attempt to recover the $5,568 condemnation award in its foreclosure action - - Pomona College and Dunn could be regarded as "adversaries" in the prior eminent domain action.

Approximately 40 years after *Dunn* was decided, the California Eminent Domain Law (Code of Civil Procedure §§1230.010 – 1273.050) was enacted. (The Eminent Domain Law was enacted in 1975, and became operative on July 1, 1976.) The Eminent Domain Law has long since set forth a lender's rights to compensation in an eminent domain action. In particular, section 1265.225(a) provides:

> Where there is a partial taking of property encumbered by a lien, the lien holder may share in the award only to the extent determined by the court to be necessary to prevent an impairment of the security, and the lien shall continue upon the part of the property not taken as security for the unpaid portion of the indebtedness.[6]

Dunn in no way supports the statement that landowners and lenders "are typical adversaries" in a condemnation action.

---

[6] Of course, unlike *Pomona College*, the instant case involves a "full take," not a "partial take" of property.

(b) In Practice, a Potential Adversarial Relationship Between Co-Defendants in an Eminent Domain Action Typically Occurs in a Landlord-Tenant Context

APMI correctly points out that a plaintiff in an eminent domain proceeding "shall name as defendants, by their real names, those persons who appear of record or are known by the plaintiff to have or claim an interest in the property described in the complaint" (Code Civ. Proc. §1250.220); that the term "interest" means "any right, title, or estate in property" (Code Civ. Proc. §1235.125); that the term "property" includes "real and personal property and any interest thereon" (Code Civ. Proc. §1235.170.) There is no dispute that APMI and the lenders are separate parties in the eminent domain action. (Petitioner's Opening Brief, pp. 21-22; Petitioner's Reply, p. 21, fn. 5.)

However, APMI reaches too far in stating that "the owner and the lenders have competing interests in the condemnation action."

Co-defendants in an eminent domain action are generally regarded as "adversaries" when they dispute how much of the condemnation award they should each receive. The Eminent Domain Law expressly addresses the manner in which potentially adverse "divided interests" in property should be valued:

- The value of each interest and the injury, if any, to the remainder of such interest shall be separately assessed and compensation awarded therefor (Code Civ. Proc. §1260.220(a)); and

- The plaintiff may require that the amount of compensation be first determined as between plaintiff and all defendants claiming an interest in the property. Thereafter, in the same proceeding, the trier of fact shall determine the respective rights of the defendants in and to the amount of compensation awarded and shall apportion the award accordingly. (Code Civ. Proc. §1260.220(b).)

Where a dispute as to the appropriate "allocation" of compensation arises between co-defendants (causing the plaintiff to consider the two-staged trial procedure under section 1260.220(b)), it typically does so between landlords and tenants. For example, in *City of Vista v. Fielder* (1996) 13 Cal.4th 612, this Court acknowledged that a lessee may - - separate from the value of a landowner's fee interest in property - - be entitled to "leasehold bonus value," i.e., where the contract rent is less than the market rent in an eminent domain proceeding. (See also *New Haven Unified School District v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473.) This Court held that a lessee's right to recover leasehold bonus value is not negated by a provision in the lease which provides that the lease terminates if all the property subject thereto is acquired for public use.[7]

Disputes between a landlord and lessee as to whether a lessee can obtain leasehold bonus value in an eminent domain case often turn on whether there is a "condemnation clause" in a commercial lease. A condemnation clause typically sets forth the landlord and lessee's rights in and to a condemnation award. (Code Civ. Proc. §1265.160 provides that "[n]othing in the article affects or impairs the rights and obligations of the parties to a lease to the extent that the lease provides for such rights and obligations in the event of the acquisition of all or a portion of the property for public use.") In this regard, landlords and tenants may have a different interpretation of the condemnation clause and what elements (if any) of compensation each is entitled to recover under the condemnation clause. The landlord and/or lessee may dispute the meaning of the condemnation

[7] It has long been commonly understood by eminent domain practitioners that while section 1265.110 provides that a lease terminates where all the property subject to it is acquired for a public use, such provision does not preclude lessees from seeking compensation in an eminent domain action.

clause, and seek to litigate the issue. Such a dispute was at issue in *New Haven Unified School Dist., supra*, 24 Cal.App.4th 1473.

Another area where there could be competing interests in a condemnation action between a landlord and a tenant is in context of a tenant's claim for "loss of business goodwill" under section 1263.510. In particular, section 1263.510(a)(4) provides that "[c]ompensation for loss will not be duplicated in the compensation otherwise awarded to the owner."

This potential dispute is illustrated by the court's ruling in *Emeryville Redevelopment Agency v. Harcos Pigments, Inc.* (2001) 101 Cal.App.4th 1083, 1114-1121. In that case, the property owner was denied damages for loss of goodwill because the trial court held that the loss was not caused by the taking, but "by the inevitable transition of the property to the higher and better use to which both sides agreed it was destined, and with which the continued operation of defendant's business was incompatible." (101 Cal.App.4th at 1119.) The court of appeal upheld the ruling because the owner was being compensated for the land at the value based on the higher and better use, rather than at a lower value consistent with the continued business operation. (*Id.*) Any further claim for goodwill would be a windfall and duplication of compensation contrary to statute. (*Id.*) Thus, a potential conflict in claims for damages could arise when the owner's compensation for the land based on the highest and best use is in conflict with the tenant's continued use of the business thereon.

(c) Lenders and Landowners Do Not Have "Competing Interests" in Eminent Domain Litigation

It is difficult to imagine a similar type of dispute between a landowner and a lender. A lender's "interest" in the property is limited to the outstanding amount of the loan. The well-settled measure of

compensation for property taken in an eminent domain proceeding is "the fair market value of the property taken." (Code Civ. Proc. §§ 1263.310, 1263.320.) Depending on the type of property involved, this value can be determined by the market data (or comparable sales) method of valuation (Evid. Code § 816); by the capitalization of income approach (Evid. Code §819); or by the reproduction cost approach (Evid. Code § 820). Lenders simply do not make independent claims in eminent domain actions for compensation based on an argument that there is a "fair market value" of their lien. Nor do they make claims against landowners for a higher allocation of a condemnation award on the grounds that their "interest" has not been properly valued.

This is perhaps best demonstrated by APMI's own statement that it did not object to the lender's application for withdrawal because it believed it would risk liability for substantially impairing the mortgagee's security under Civil Code section 2929.[8] APMI concedes that it had no dispute with the lender regarding the lender's right to withdraw a portion of the deposit, and/or the specific amount the lender was entitled to withdraw. Certainly, there is no "adversarial" relationship between APMI and the lender.

In practice, lenders simply make appearances (by filing answers) in eminent domain cases solely to ensure that the condemnation award will first be applied to the outstanding loan amount before any excess amounts are paid to the landowner. Lenders do not ask the trier of fact to "value" their liens. As a practical matter, unlike the types of allocation disputes that

---

[8] See Petitioner's Opening Brief, pp. 7-8: "But, there was no legal or factual basis to object to the lenders' application for withdrawal. Accordingly, APMI did not go on record with an objection, recognizing the lenders were entitled, under their respective deeds of trust, to the funds on deposit to satisfy the outstanding liens secured by the property. APMI did not dispute the amounts owed to the lenders as set forth in their respective applications for withdrawal, which amounts were consistent with their deeds of trust." See also Petitioner's Reply, pp. 17-19, "Lenders' Potential Action Against the Owners for Impairment of Security."

can arise between a landowner and lessee, the landowner-lender relationship in an eminent domain case is not "adversarial."

3. Landowners Should Not be Able to Delay Public Projects by Attempting to Litigate Right to Take Objections After the Deposit Funds Have Been Withdrawn and Used to Pay Down the Landowner's Debt

As previously mentioned, a public entity's case planning and trial strategies carefully take into account whether it will have to litigate right to take objections and potentially risk not being able to acquire the property for the public project. If a withdrawal of a deposit occurs and there is a waiver of right to take objections, a public entity can then plan to litigate only the question of the value of the property. The significance of this cannot be overstated. If landowners are permitted - - based upon their own alleged subjective intent - - to argue that they did not intend to waive right to take objections, and are then allowed to proceed with them on the eve of trial, the taxpayers' costs of the eminent domain litigation will certainly increase. Moreover, if the trial court sustains the right to take objections, the public project will be substantially delayed, if not scrapped altogether.

APMI admits that the lender used the funds to pay off APMI's loan secured by the subject property. APMI admits it did not object to the withdrawal. But, notwithstanding the fact that section 1255.210's waiver provision is by "operation of law," APMI claims that MTA should have been the one to "seek a court hearing before it stipulated to the lenders' withdrawal...." In fact, under this theory, APMI effectively suggests that MTA should have affirmatively asked APMI: "By agreeing to the lender's withdrawal, do you intend to waive your right to take objections?"

This is untenable. Public entities have *no obligation* to advise, ask, or warn *any* parties that a withdrawal of a deposit will result in a waiver of right to take objections. If a public entity files an objection to a withdrawal

on grounds that "[o]ther parties to the proceeding are known or believed to have interests in the property" (Code Civ. Proc. §1255.230(b)(1)), it need *only* provide notice to the other parties "that their failure to object will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn." (Code Civ. Proc. §1255.230(c)).

After having gone through so much time, effort, and expense to plan a large public improvement project, obtain an order for possession and to prepare for trial, public entities cannot - - on the eve of trial - - be put in the position of having to "guess" at whether a defendant really intended to waive right to take objections. If a defendant is allowed to raise, litigate, and potentially prevail on right to take objections so late in the process, public improvement projects will certainly be substantially delayed. If funding for a particular project is no longer available, the project may be abandoned altogether. Such a consequence would obviously run counter to public policy.

//

//

//

//

//

//

//

//

//

//

//

//

//

//

III. CONCLUSION

The issue presented in this appeal is of significant statewide importance as the outcome of this case will affect every public entity with the authority to acquire property for public use through the eminent domain process. Accordingly, for the foregoing reasons, the League of California Cities and joining *amici*, respectfully request that this Court affirm the analysis adopted by the Court of Appeal and hold that a property owner who foregoes the statutory opportunities to object and instead receives the benefit of a lender's withdrawal of the deposit waives all challenges to the taking other than a claim for greater compensation.

Respectfully submitted,

Dated: May 26, 2011

MEYERS NAVE RIBACK SILVER & WILSON

By: _____

David W. Skinner
Neli N. Palma
Eugenia Amador
Attorneys for *Amici Curiae*
League of California Cities
California State Association of Counties
California School Boards Association
and its Education Legal Alliance
Association of California Water Agencies
City of Long Beach
Exposition Metro Line Construction Authority
Pasadena Metro Blue Line Construction Authority

9999-002\1640234

CERTIFICATE OF COMPLIANCE

California Rules of Court, 8.204(c) (1)

For Case Number S188128

I hereby certify that the Application of the League of California Cities and other *amici* for Leave to File Brief as *Amicus Curiae* has been prepared using proportionately one-and-a-half-spaced 13 point-roman style. According to the "word count" feature in Word software, this brief contains 7,119 words up to and including the signature lines that follow the Brief's Conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on May 26, 2011.

MEYERS NAVE RIBACK SILVER & WILSON

By: _____

David W. Skinner
Neli N. Palma
Eugenia Amador
Attorneys for *Amici Curiae*
League of California Cities
California State Association of Counties
California School Boards Association
and its Education Legal Alliance
Association of California Water Agencies
City of Long Beach
Exposition Metro Line Construction Authority
Pasadena Metro Blue Line Construction Authority

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, California 94607.

On May 26, 2011, I served true copies of the following document(s) described as:

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND OTHERS TO FILE *AMICUS* BRIEF IN SUPPORT OF APPELLANT; PROPOSED BRIEF OF *AMICI CURIAE*

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

(X) **(BY FIRST CLASS MAIL)** I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Oakland, California. I am readily familiar with the business practice for collection and processing of mail in this office; and that in the ordinary course of business said document would be deposited with the U.S. Postal Service in Oakland on that same day. I understand that service shall be presumed invalid upon motion of a party served if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this declaration.

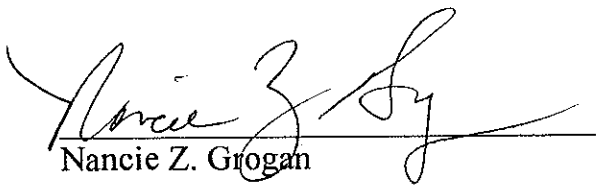
(X) **(BY PERSONAL DELIVERY)** I caused such document to be hand delivered to the designated addressee named below.

( ) (BY FACSIMILE) By use of facsimile machine, I served a copy of the within document(s) on the above interested parties at the facsimile numbers listed above. The transmission was reported as complete and without error.

(X) **(BY FEDERAL EXPRESS OVERNIGHT DELIVERY)**: I caused each envelope, with delivery fees provided for, to be deposited in a box regularly maintained by Federal Express. I am readily familiar with my firm's practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course the document(s) described above will be deposited in a box or other facility regularly maintained by Federal Express, or delivered to an authorized courier or driver authorized by Federal Express to receive documents on the same date that it is placed at Meyers Nave Riback Silver & Wilson for collection.

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

Executed on May 26, 2011, at Oakland, California.



Nancie Z. Grogan

Los Angeles County Metropolitan Transportation Authority
Plaintiff and Appellant
v.
Alameda Produce Market, LLC, et al.
Defendants and Respondents

Supreme Court Case No. S188128
Court of Appeal, Second Appellate District,
Division Four, Case No. B212643
Los Angeles County Superior Court, Case No. BX 313010

SERVICE LIST

Supreme Court of California
Office of the Clerk
350 McAllister Street
San Francisco, CA 94102
(Via Personal Delivery:
Original + 13 copies)

Clerk of the Court
Department of Appeals
Superior Court of California
County of Los Angeles
111 N. Hill Street
Los Angeles, CA 90012
(Via Federal Express)

California Appellate court
Second Appellate District
300 S. Spring St., Fl. 2, N. Tower
Los Angeles, CA 90013
(Via Federal Express)

Joyce L. Chang, Deputy County Counsel
Office of County Counsel
One Gateway Plaza, 25th Floor
Los Angeles, CA 90012
Attorneys for Plaintiff and Appellant
Los Angeles County Metropolitan Transportation Authority
(Via Federal Express)

David Graeler, Esq.
Nossman, LLP
445 S. Figueroa St., 31st Floor
Los Angeles, CA 90071
Attorneys for Plaintiff and Appellant
Los Angeles County Transportation Authority
(Via Federal Express)

Elwood Lui
Brian Matthew Hoffstadt
Jones Day
555 S. Flower St., 50th Floor
Los Angeles, Ca 90071
Attorneys for Plaintiff and Appellant
Los Angeles County Metropolitan Transportation Authority
(Via Federal Express)

Cynthia Colleen Miller
Connie Cooke Sandifer
Oliver Sandifer & Murphy
281 S. Figueroa Street, 2nd Floor
Los Angeles, CA 90012
Attorneys for Defendant and Respondent
Alameda Produce Market, LLC.
(Via Federal Express)

Patrick A. Hennessey
Michael D'Angelo
Palmeiri, Tyler, Wiener, Wilhelm & Waldon
2603 Main Street
East Tower, Suite 1300
Irvine, CA 92614
Attorneys for Defendant and Respondent
American Apparel, Inc.
(Via Federal Express)

Norman E. Matteoni
Margaret Mary O'Laughlin
Matteoni, O'Laughlin & Hechtman
848 The Alameda
San Jose, CA 95126
Attorneys for Defendant and Respondent
Alameda Produce Market, LLC.
(Via Personal Delivery)

Bruce W. Beach
Steven Charles Debaun
Kendall Holmes Macvey
Best Best & Krieger LLP
3750 University Avenue, Ste. 400
Riverside, CA 92502
Attorneys for Riverside County Transportation Commission:
Amicus Curiae
(Via U.S. Mail)