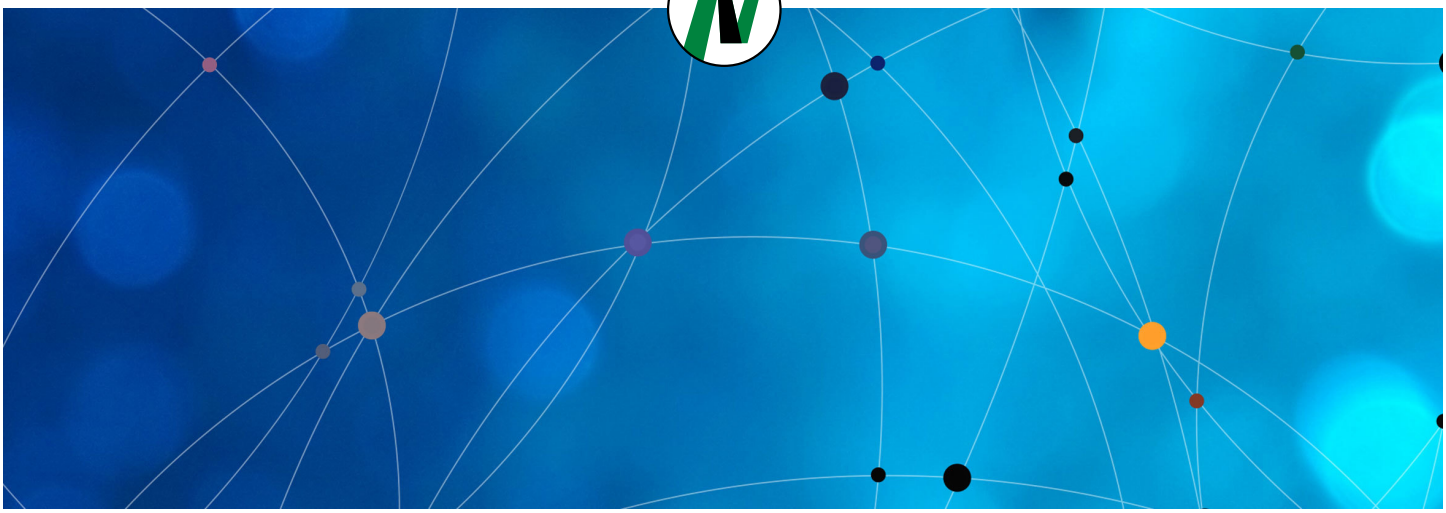

California to Consider Significant Change to Eminent Domain Law Regarding a Condemnee's Right to Recover Litigation Expenses

02.21.2017 | By David Graeler

On February 9, 2017, California Assembly Member Phillip Chen (a Republican from the 55th district) introduced Assembly Bill 408 (AB 408). AB 408 is styled as an act to amend Section 1250.410 of the Code of Civil Procedure relating to eminent domain. There is very little history available on AB 408 and it appears that the next action is for it to be heard in committee on March 12, 2017. If AB 408 is ultimately approved in its current form, it would radically change the standards by which courts decide whether or not to award litigation expenses in eminent domain actions. This, in turn, could drastically impact public projects in California because property owners may have less incentive to settle pre-litigation or during early litigation. This could lead to increased costs, more trials, less judicial discretion, and more opportunity for mischief. Fundamentally, it could cause right-of-way costs to go up dramatically and projects may take longer to build.

Current Law

Currently, Code of Civil Procedure section 1250.410 enables a condemnee to recover litigation expenses (including attorneys' and experts' fees) only if a court finds that the condemning agency's final offer of compensation was unreasonable and that the final demand of the condemnee was reasonable viewed in light of the evidence admitted at trial and the compensation awarded in the proceeding. Section 1250.410 was originally enacted by the California Legislature in 1975. In the time that section 1250.410 has been on the books, a body of case law has developed that instructs a trial court to define reasonableness by looking at (1) the amount of the difference between the offer and the compensation awarded, (2) the percentage of the difference between the offer and the award, and (3) good faith, care, and accuracy in how the amount of

the offer and the amount of the demand, respectively, were determined. (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694.)

In other words, the California Legislature trusted the courts to not only look at the numbers but also to look behind the numbers. It also imposed on a condemnee the obligation to make its demand in good faith and with care and accuracy. The idea that final offers that are less than 90 percent of the compensation awarded are per se unreasonable is an entirely new concept in California. Indeed, prior to Continental Development (which requires an analysis of good faith, care and accuracy), appellate courts at times applied a bright line numeric test. At least one court actually performed a survey of appellate cases and noted that final offers which are 60 percent or less of the jury's verdict are found to be unreasonable while offers which are above 85 percent have been considered reasonable per se. (*People ex rel. Dept. of Transportation v. Yuki* (1995) 31 Cal.App.4th 1754, 1764.)

Changes Proposed by AB 408

AB 408 proposes to change section 1250.410 by essentially establishing a bright-line mathematical test. If the condemnor's offer is lower than 90 percent of the compensation awarded in the proceeding, the court shall award litigation expenses. If the court finds that the condemnor's offer was at least 90 percent and less than 100 percent of the compensation awarded in the proceeding, then litigation expenses may be awarded by the court. In other words, the court only has discretion when the ultimate compensation awarded is not more than 10 percent of the condemnor's final offer. Presumably, the trial courts would then be able to look at the good faith, care, and accuracy of the offer and demand. Notably, if the condemnor's offer is lower than 90 percent of the compensation awarded in the proceeding, the condemnee's final demand would appear to be irrelevant to the determination.

Is AB 408 a Good Idea?

In order to assess the possible impacts caused by new legislation, it is often good to look at the proponents of the new law. Assemblyman Chen represents the 55th district, which encompasses parts of Los Angeles, Orange, and San Bernardino counties. Prior to being elected to the state assembly, he was a school board trustee for the Walnut Valley Unified School District. In other words, he worked for a public agency. His website, however, indicates that he is currently a small business owner who owns and operates a property management company overseeing commercial and residential properties. As more details emerge concerning AB 408, it will be interesting to see who is supporting it monetarily. As they say, follow the money.

For now, I provide my thoughts based on my experience as an eminent domain practitioner in California. One of the common questions we should always ask when it comes to public projects and eminent domain is whether society is placing too large of a burden on an individual citizen in order to promote the general welfare. Naturally, there are constitutional, statutory, and regulatory protections to afford condemnees with just compensation and rights to relocation assistance. But it is good to ask whether these protections are doing enough.

In my experience, section 1250.410 has worked well for many years to ensure that public agencies do not unreasonably low ball their final offers. It also ensures that property owners meet agencies half way by structuring their offers in good faith and with care and accuracy. This seems like the best way to promote settlement. AB 408 would appear to go too far in giving rights to condemnees. To best illustrate this, I'll

provide three personal anecdotes.

The first involves an eminent domain action that I took to trial roughly 15 years ago. I represented the public agency in the case. The condemnee was a business tenant who was seeking compensation for lost business goodwill. The agency's expert believed that the business lost $75,000 due to the taking. Conversely, the business's expert opined that there was a goodwill loss in excess of $1.5 million. The agency's final offer totaled $150,000 and the condemnee's final demand totaled $700,000. The jury's verdict awarded compensation of $298,000. Clearly, the jury believed the agency's position was far more credible and its verdict resulted in the agency paying far less than the condemnee's final demand. The Court in this case denied litigation expenses because it found that the agency made its offer in good faith and with care and accuracy. Under AB 408, the agency's offer was only 50 percent of the compensation awarded, so the condemnee would have recovered its litigation expenses. Settlements are a two-way street. If a condemnee does not make a reasonable demand, it is forcing the case to go to trial. Should the condemnee be entitled to its litigation expenses under those circumstances?

In another trial involving a business's claim for loss of goodwill, my client prevailed at trial where the business received no compensation because it failed to prove its entitlement to compensation. The case was procedurally unusual because the court rendered its decision on goodwill entitlement after there had been a jury trial on compensation. The jury's verdict was higher than the business's final demand. Had there been no legal issue on entitlement, the business clearly would have been entitled to its litigation expenses. The trial court's decision on entitlement was later reversed on appeal, which meant the jury's verdict on compensation was reinstated. The business then filed a motion to recover its litigation expenses. While the agency's position on entitlement was wholly reasonable (indeed, it was accepted by the trial judge) and, thus, reflected in its final offer, the business was still awarded its litigation expenses. The court was able to use its sound discretion to look behind the numbers and to factor into consideration the total situation to arrive at what it believed was an equitable result.

More recently, I had a trial involving a goodwill claim that was made by a fast food restaurant. Once again, I represented the public agency in the case. The agency's expert believed the restaurant did not lose any goodwill. The business's expert testified that it would lose $550,000 in goodwill. The agency's final offer totaled $30,000, and the business's find demand actually exceeded $550,000 because it included numerous items that were not compensable under California law. In other words, the agency was presented with a choice of: (a) paying more than the best the business could hope for in trial, or (b) trying the case. This wasn't a difficult decision. The jury's verdict ultimately awarded the business $50,000. This was less than 10 percent of the business's total claim and even less than its final demand. But it was also 40 percent higher than the agency's final offer. Under AB 408, the business would have automatically been entitled to its litigation expenses. Under existing law, our trial judge denied the request by using her sound discretion. Clearly, the agency's offer was made with far greater care and accuracy than the condemnee's.

Final Thoughts

From a policy standpoint, a fundamental question that must be answered by our Legislature is whether it wants to eliminate virtually all discretion from the judiciary to reach a fair and equitable determination concerning litigation expenses. Generally speaking, this is not a good idea. Judges are in the best position to assess the facts and circumstances of a particular case to ensure that justice is achieved.

AB 408 carries a real risk that condemnees will simply refuse to make a reasonable final demand because their demands may be ignored if they beat the agency's final offer by 10 percent. Because jurors tend to compromise verdicts in eminent domain actions, we will likely see larger and larger claims for compensation because public agencies will have to effectively split the baby in order to avoid liability for litigation expenses. Even a relatively small partial acquisition of agricultural land worth $20,000 to widen a highway could result in wildly high claims for compensation because the property owner need only convince a jury to award 10 percent more than the offer in order to recover legal fees. Thus, instead of paying a nominal sum for the property, the agency may have to pay substantially more than the property is worth. These problems will likely be compounded by the reality that many, if not most, condemnees engage their counsel on contingency fees. Thus, there is very little downside for a condemnee to roll the dice. The net impact is that public projects will become far more expensive to build because public agencies will have to offer far more money for claims that have no merit.

If the California Legislature wants to award litigation expenses in eminent domain actions more frequently, there must be a better way to achieve that goal.