



# The Cross-Fire Continues Over the Judge's Role in Limiting Appraisal Opinions in Eminent Domain Cases

12.28.2012 | By **Bernadette Duran-Brown, Bradford B. Kuhn**

It has been quite a busy year for takings cases. While our readers can soon expect our annual "Year in Review E-Alert," the California Court of Appeal decided to grace us with one more published eminent domain opinion just before 2012 winds to a close. This new decision, *County of Glenn v. Foley*, continues this year's trend of opinions focusing on the trial court's role as gatekeeper in deciding what valuation evidence can be presented to a jury for consideration in determining just compensation.

The trial court in *Foley* overstepped its role by concluding that none of the property owner's appraiser's comparable sales were in fact comparable because they required material adjustments for items such as buildings, personal property, and existing fruit orchards, while the subject property was vacant, grazing land. By refusing to admit any of the owner's appraiser's sales, the court eviscerated the property owner's case. The Court of Appeal disagreed with this approach, explaining that admitting the owner's appraiser's sales "did not present the risk of comparing apples with oranges," and instead the sales at least shed some light on the value of the subject property sufficient to make it a jury question.

## Background

The County of Glenn had been leasing a 200 acre portion of Foley's property for a landfill since 1971. In 2008, the County sought to acquire a fee interest in the leased property along with additional acreage to both expand the landfill and prevent creating landlocked portions of Foley's property.

According to the owner's appraiser, the property's highest and best use was orchard land, such as olives. The appraiser relied on seven comparable sales, adjusting them for both quantitative and qualitative variances. For example, while Foley's property was vacant, grazing land, the appraiser's comparable sales included properties with buildings, personal property, and existing fruit orchards. In order to address these

differences, the appraiser relied on (i) orchard cost studies from the University of California and (ii) conversations with other appraisers and then deducted these values from the respective comparable's sales price. He valued the property at \$1.7 million.

The County's expert opined that the highest and best use was as grazing land because of the property's topography and soil quality. He did not discuss whether a conversion to orchards was feasible. Using nine grazing land comparable sales, the County's appraiser reached a property value of \$637,000.

Before trial, the County filed a motion in limine seeking to exclude the owner's appraiser's opinion on the grounds that it violated: (i) Evidence Code section 822 because the appraiser's quantitative adjustments demonstrated he valued items other than the property in question (i.e., the orchards and improvements on the comparable sales); and (ii) Evidence Code section 816 because it was based on comparable sales that were not sufficiently comparable. The trial court agreed on both grounds and excluded the owner's appraiser's opinion of value in its entirety. Thereafter, the parties stipulated to the valuation proffered by the County and judgment was entered, from which Foley appealed.

### **The Appeal**

The property owner contended that the trial court's evidentiary rulings were incorrect and the owner's appraiser's valuation opinions should have been admitted for jury consideration. The Court of Appeal agreed.

With respect to the trial court's exclusion of the appraiser's opinions under Evidence Code section 822, the Court of Appeal explained that while this section excludes *opinions* regarding the value of any property or property interest other than the one being valued, its purpose "was to exclude a party who produces an expert appraiser from using his opinion of the value of property X *as a whole* as a prop in proving the value of the subject property." However, testimony regarding the *adjustments* made to a comparable sale is allowed. That is what the owner's appraiser undertook, and his opinions should not have been excluded under this section.

Regarding the trial court's exclusion of the owner's appraiser's comparable sales under Evidence Code section 816, the Court explained that "the essence of comparability is recent and local sales '*sufficiently* alike in respect to character, size, situation, usability and improvements' so that the price 'may fairly be considered as *shedding light*' on the value of the condemned property." The key is whether the comparable sale sheds light on the value of the property. While the judge determines whether a comparable sale does indeed *shed light* on the value of the property, the test is whether the sale has "some tendency in logic to prove the value of the subject property sufficient to make it a jury question." In other words, the admissibility of a comparable sale is not subject to a relatively high threshold, and the Court concluded the comparable sales used by the owner's appraiser met this bar and should not have been excluded.

The Court reversed and remanded directing the trial court to deny the County's motion in limine in its entirety, meaning the case will proceed to a jury trial to determine just compensation.

### **Conclusion**

The *Foley* case reaffirms that a trial court judge must act cautiously in performing his or her role as gatekeeper. At the same time, the Court made clear that the judge is not to take this role lightly, explaining that when a valuation expert employs an unsanctioned or improper methodology, the opinion should be excluded and there would be no constitutional guarantee to a jury trial in such an instance.

*Foley* also provides guidance on an appraiser's application of quantitative adjustments to comparable sales. Such adjustments do not amount to valuing a property other than the one in question. Instead, such adjustments are a natural and necessary tool to prove the fair market value of the subject property since no two properties are going to be exactly comparable.