IRWA SACRAMENTO CHAPTER 27

Depositions of Pre-Condemnation Appraisers for a Right to Take Trial

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California law requires condemning agencies to make an offer of just compensation to a property owner before adopting a resolution of necessity and initiating an eminent domain lawsuit. The offer must be provided with a written summary identifying (1) the date of value, (2) the highest and best use and zoning of the property, (3) the principal sales transactions, (4) cost or capitalization analyses, when applicable, and (5) calculations and a narrative for any damages and/or benefits. (Gov. Code § 7267.2.) These offers and written summaries are, of course, based on appraisals that agencies perform, either in house or through a retained appraiser. The purpose of this law is to promote negotiation over litigation. However, if negotiation is unsuccessful and litigation ensues, can the property owner take the deposition of the appraiser who performed the pre-condemnation appraisal? There is nothing in the law that prohibits a property owner from doing so, and many owners' attorneys now are taking such depositions as part of a challenge to the agency's right to take the property.

This raises questions/challenges that public agencies and their appraisers must consider. First, if an owner's counsel issues a subpoena and takes such a deposition as part of a right to take challenge, who will defend the appraiser at the deposition? Will the agency's attorney do so, or will the appraiser retain his/her own attorney? Technically, the owner's attorney is not deposing the appraiser in his/her capacity as an expert, and the appraiser would not be designated as an expert for the right to take trial in any event, as valuation is not relevant in a right to take trial. Like any third party witness who is subpoenaed for a deposition, the appraiser has a right to an attorney of his/her choice. However, in most cases it would probably make sense for the agency's attorney to defend the deposition. This is particularly so if the agency is considering using the appraiser for the valuation trial, assuming the right to take challenge is defeated.

A second question concerns the scope of work product protection. While the law requires that agencies provide a summary of the appraisal with the pre-condemnation offer, agencies are not required to produce the appraisal reports themselves. Furthermore, as stated, the appraiser will not have been designated as an expert at the time of such a deposition, and if the agency is contemplating using the appraiser for the valuation trial, his/her work in assisting the agency's attorney would be privileged. The agency's attorney and the appraiser need to mindful of the work product privilege in the event the owner's attorney attempts to probe beyond the pre-condemnation appraisal and inquire into what the appraiser has done to assist in the litigation.

A third, and related question concerns the proper subject of inquiry at the deposition. The owner's counsel should be limited to inquiring into whether the appraiser met the statutory requirements that are contained within the written summary. The relative strength of the appraiser's opinion of value should be off limits at such a deposition because it is not relevant in the right to take trial. Moreover, unless the owner's attorney agrees to pay the appraiser for his/her time, it would be unfair and inappropriate for the owner's attorney to elicit opinion testimony from the appraiser. If the agency is planning to use the same appraiser at the valuation trial, the owner's attorney will have another chance to depose the appraiser at that time, and all such questions regarding the merits of the appraisal will be fair game. However, for a deposition for a right to take trial, the area of examination should be limited. The attorney defending the deposition will need to mindful of this, and control the deposition accordingly.