

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG

Alternative Dispute Resolution

❖ Resolution Arts Building ❖

2630 J Street, Sacramento, CA 95816

ph: (916) 442-6739 • fx: (916) 442-4107

elong@ernestalongadr.com • www.ernestalongadr.com

Tracy Joint Unified School District v Pombo (10/29/2010)

Inverse Condemnation; Settlement Negotiations

Defendants own over 200 acres of undeveloped land just east of the Tracy city limits. Plaintiff school district initiated condemnation proceedings to acquire 61 acres in the middle of the parcel, for purposes of constructing a high school. The District filed two complaints in eminent domain to acquire two tracts of land within the parcel, and deposited probable compensation totaling just over \$3,000,000 with the State Treasurer, based on estimates by its appraiser. Before trial the parties exchanged valuation data prepared by their appraisers. The District valued the property at \$3,081,500 while defendants' appraiser valued the taking at \$12,406,000, including \$3,081,000 in severance damages. Prior to trial, the parties exchanged their final offer and demand for settlement. The District offered to settle for \$3,181,500, while defendants' final demand was \$7,995,000.

The case went to trial before a jury, and each appraiser testified in support of his valuation. The jury returned with a verdict of \$7,085,150, in favor of defendants, to compensate for the fair market value of the property and \$900,000 in severance damages. Defendants then moved to recover their litigation expenses under section 1250.410 of the Code of Civil Procedure, seeking \$574,000 in expert and attorney fees and costs. Defendants alleged their demand was reasonable and the District's offer was unreasonable.

The trial court denied the motion for fees and costs, finding that given the rapidly changing real estate market in the area, valuation of the subject property was particularly difficult. The court noted it would have been hard to predict which expert would be more credible before the jury prior to trial. The trial court found the District exercised care and accuracy in its valuation, and concluded the District's offer was reasonable. Defendants appealed.

The Third District Court of Appeal turned to CCP 1250.410 which requires each side in an eminent domain action to file with the court its final offer/demand of compensation in the proceeding. These offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation expenses. If the court, on motion of the defendant finds the offer of the plaintiff was unreasonable and the demand of the defendant reasonable in light of the compensation awarded in the proceeding, the allowable costs shall include the defendant's litigation expenses. The court is to view the reasonableness of the offer and demand in the light of the evidence presented and the compensation awarded. (*Escondido Union School Dist. v Casa Suenos de Oro, Inc.* (2005) 129 Cal.App.4th 944) The court is to make an assessment of reasonableness based on all the evidence admitted, not just the numerical amounts of the offer, demand and award. (*Glendale Redevelopment Agency v Parks* (1993) 18 Cal.App.4th 1409) The statute is designed to protect the property owner from being forced unnecessarily to litigate the value of the property sought to be condemned.

The Justices clarified the statutory analysis: if the offer of the plaintiff is unreasonable and the demand of the defendant is reasonable, in light of the evidence admitted and the compensation awarded, it **shall** award defendant its litigation expenses. Here, defendants' settlement demand of \$7,995,000 was approximately midway between the two expert appraisals and came within one percent of duplicating the eventual jury award. Accordingly, the property owners' demand was manifestly reasonable.

There are three factors to consider in evaluating the condemner's offer. First is the difference between the offer and the compensation awarded. Here the difference is over \$4.8 million. The difference is especially large considering the District offered only a token amount above the appraisal figure. The second factor is the percentage difference between the offer and the jury verdict. Reported cases have generally found offers amounting to less than 60 percent of the jury verdict have generally been found unreasonable. The offer here was just 39.8% of the compensation awarded. The jury's award was more than two and a half times the District's offer. Under both of the above factors, the District appears to have acted unreasonably.

The third, and key factor is the "...good faith, care and accuracy" in how the offer and demand, respectively were determined. This requires a look beyond mere numbers to all evidence admitted at trial. Thus, even where the

offer and the award are not close, a trial court may properly deny litigation expenses where there is significant countervailing evidence that the condemner's offer was made in good faith with reasonable care.

Here, the defendants' expert did more to show the property had potential for development of residential growth. He testified that the Tracy general plan had been amended, making the property a viable location for multiple-density unit development. He compared properties from the Sacramento metro area that were in similar stages of planning development. This supported his finding of \$151,000 per acre. He also showed that the construction of a high school in the middle of the owners' property would produce congestion, noise and parking issues, making the land less desirable for residential units. This supported his severance damages claim of just over \$3 million.

The trial court noted that both appraisals had problems. The defendants' appraiser may have underestimated the effect of a local measure to limit growth within city limits, as well as the uncertainty that property values would increase. The District's appraiser had miscalculations, and poorly chosen comparables. But the Appellate Court pointed out that both appraisers had serious problems with their appraisals and those weaknesses were *apparent before the trial began*. Yet despite this state of affairs, only one party, the defendants, displayed any willingness to compromise.

The property owners displayed a reasonable compromise position. Although their appraiser was prepared to testify that fair compensation exceeded \$12 million, they made a final demand below \$8 million. In contrast, the District's offer barely exceeded their appraisal and carried the implicit message that its own appraisal was the only valid one and audaciously assumed that the jury would totally reject the defendants' expert testimony. This type of conduct was not indicative of "good faith, care and accuracy." On the contrary, wrote the Justices, "...it evinced an arrogant and unyielding approach to settlement negotiations." Although one party was entitled to have confidence in its expert, unyielding adherence thereto was incompatible with the spirit of a reasonable negotiator. (*City of Gardena v Camp* (1977) 70 Cal.App.3d 252) While one side lowers its demands by more than half way the other side sticks stubbornly to its own appraisal.

Justice Kathleen Butz offered the following: "A good faith settlement offer carries with it the implicit recognition that proceeding to trial always carries an element of risk. In a case ...which came down to a credibility contest between

two respected experts, an eight million dollar difference between the two appraisals should have prompted a reasonable condemner to submit an offer that, at a minimum, took into account the cost of litigation as well as the risk that the jury will not accept its own expert's testimony as gospel."

The District argued that its pretrial analysis and work-up was extensive, attempting to validate its appraiser's work. The statute considers the evidence admitted at trial, and the 3rd DCA commented that pretrial preparation is irrelevant to the question of reasonableness. Where the mathematical factors favored the defendants and the evidence failed to support a finding of good faith, the District's offer could not be found reasonable.

The Justices concluded: "It is the duty of the attorney responsible for the case to consider all aspects of the litigation which may possibly affect the result. In addition to the information furnished by an expert, the good faith, care and accuracy of an offer requires the intellectual and thoughtful analysis by counsel. He does not fulfill that function when he is merely a conduit for the expert's conclusion." (*State of California ex rel. State Pub. Works Bd. v Turner* (1979) 90 Cal.App.3d 33)

The trial court's order denying defendants their litigation expenses was plainly inconsistent with the legislative intent behind section 1250.410. The court erred in refusing to grant the motion. The order is reversed and the matter is remanded to the trial court to grant the motion and award reasonable litigation expenses. Defendants shall also recover their costs.

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