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Split affects California inverse condemnation practice

By Jill Casselman

For over a decade, it has been settled California law that inverse condemnation litigants may invoke a unique statutory mechanism allowing for early resolution of legal issues affecting compensation, up to and including a determination of liability. This procedure, set forth in Code of Civil Procedure Section 1260.040, can be a critical tool in the inverse practitioner's playbook, spurring quick determinations of key evidentiary disputes and issues, ultimately leading to faster case resolution. But following a recent appellate court decision, the availability of this valuable mechanism to inverse litigants is no longer secure.

On March 1, the Court of Appeal issued a decision in *Weiss v. People ex rel. Department of Transportation*, 2018 DJDAR 196, in which the court held that the provisions of Section 1260.040 are inapplicable to inverse condemnation cases. This decision directly conflicts with the only prior appellate court interpretation of Section 1260.040 in the inverse context, *Dina v. People ex rel. Department of Transportation*, 151 Cal. App. 4th 1029 (2007), which explicitly held that the section does apply to inverse cases.

This new authority split calls into question the availability of Section 1260.040 legal issue motions, leaving inverse condemnation litigants in limbo. Unless and until the California Supreme Court steps in to resolve the conflict, inverse condemnation practitioners will face an additional challenge in when invoking this key procedure.

Section 1260.040

Section 1260.040 is a unique statutory procedure that allows a litigant to bring a legal issues motion on any issue affecting compensation. It was enacted in 2001 as a part of California's eminent domain law, and provides in pertinent part: "If there is a dispute between plaintiff and defendant over an evidentiary or other legal issue affecting the determination of compensation, either party may move the court for a ruling on the issue. The motion

shall be made not later than 60 days before commencement of trial on the issue of compensation. The motion shall be heard by the judge assigned for trial of the case."

Eminent domain (or direct condemnation) is a proceeding brought by a public entity against a private property owner seeking to take private property for public use in exchange for just compensation. Inverse condemnation (or indirect condemnation) is in a sense the reverse: A private property owner sues a public entity seeking just compensation for property that has *already* been converted to public use.

Procedural differences notwithstanding, both types of condemnation proceedings involve public takings of private property, and so implicate the same policy concerns. It is for this reason that eminent domain statutes are often borrowed or applied in the inverse condemnation context. *See, e.g., Chhour v. Community Redevelopment Agency*, 46 Cal. App. 4th 273, 279 (1996) ("the judiciary and the Legislature frequently cross-pollinate in this area for a good reason: '[...] condemnation and inverse condemnation are merely different forms of the same limitation on governmental power.'")

Since the statute's enactment, Section 1260.040 motions have been available in both types of condemnation proceedings, although taking different forms. It is only in the inverse context, for example, that liability for a taking arises as an issue affecting compensation, since all takings are admitted in eminent domain.

Dina vs. Weiss

In 2007, the court in *Dina* explicitly held that Section 1260.040 legal issue motions are available in inverse proceedings as well as in eminent domain. The *Dina* court stated: "Nothing in the language of section 1260.040 or its legislative history bars a party from seeking an order on a legal issue that disposes of an inverse condemnation action." In reaching its conclusion, the *Dina* court studied the statute and its legislative history, and was persuaded that "it would be contrary to legislative intent not to permit a party to move for a ruling on the legal issue of liability in

an inverse condemnation proceeding."

Dina's holding has stood unchallenged until *Weiss*.

The *Weiss* plaintiffs sued Caltrans and the Orange County Transportation Authority for damages resulting from the construction of a sound wall along

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the I-5 freeway. The plaintiffs claimed that the sound wall increased noise and other impacts on their homes and led to a diminution in their property values.

Caltrans and OCTA filed a motion under Section 1260.040 to argue that the plaintiffs could not establish liability. (Under *Dina*, such liability determination motions are commonly brought by inverse plaintiffs and defendants alike.) The court found that plaintiffs could not establish liability and granted the motion. On appeal, the plaintiffs argued that Section 1260.040 should only apply to issues impacting compensation in eminent domain actions, and not to inverse condemnation cases or determinations of liability.

The appellate court in *Weiss* relied on rules of statutory construction to find, contrary to *Dina*, that Section 1260.040 does not apply to inverse condemnation cases. The court stated, "In our view, the language, legislative history, and purpose of section 1260.040's three brief clauses do not support the Agencies' request for a novel summary mechanism on an issue — liability, rather than compensation — in actions the Legislature did not intend to address." The court also concluded that case-dispositive issues such as liability determinations are qualitatively different from issues involving compensation. Since the text of Section 1260.040 makes no mention of the former, no such determinations ought to be permitted under the statute.

There is reason to think that the *Weiss* court's construction of Section

1260.040 is unduly rigid in light of *Dina* and the frequent importation of eminent domain law provisions into the inverse condemnation context. Indeed, there are other eminent domain statutes that specify that they do not apply in inverse condemnation. For example, Section 1263.530 (regarding business goodwill provisions) expressly states that "[n]othing in this article is intended to deal with compensation for inverse condemnation claims for temporary interference with or interruption of business." There is no similar carve out for inverse condemnation cases in Section 1260.040.

What happens now?

It is clear that the *Weiss* opinion is in stark conflict with *Dina*. It remains to be seen whether the *Weiss* decision will be appealed to the California Supreme Court so that this split of authority can be resolved.

As long as the authority split exists, however, inverse condemnation practitioners are going to face an additional procedural challenge in pursuing relief under Section 1260.040. And while there are other, less specialized legal mechanisms that can be used to raise and adjudicate liability issues, (e.g., summary judgment motions, motions for judgment on the pleadings, etc.), these are not adequate replacements. Courts ruling on summary judgment motions, for example, cannot weigh conflicting evidence, as can courts ruling on a Section 1260.040 motion.

In short, until the conflict between the *Weiss* and *Dina* courts is resolved, the availability of Section 1260.040 legal issue motions in inverse condemnation cases will be contested before the merits are determined.

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