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BEFORE THE COMMISSION ON STATE MANDATES

OF THE STATE OF CALIFORNIA

CITY OF SAN DIEGO, Claimant, v. COMMISSION ON STATE MANDATES, Respondent.	)))))))))	**CSM No. 97-TC-01** Senate Bill 821 re Nonprofit Special Use Property Acquisition and Valuation in Condemnation Proceedings

RESPONSE OF THE EPISCOPAL CHURCH OF ST. MARK'S TO

THE COMMISSION'S DRAFT STAFF ANALYSIS

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I.

INTRODUCTION

The Draft Staff Analysis attacks the test claim submitted by the City of San Diego on two points. First, the Staff Analysis argues that an agency's exercise of its eminent domain power is always discretionary and therefore never "state mandated." Next, the Analysis argues that the test claim legislation neither represents a "new program" nor requires a "higher level of service" in an existing program.

St. Marks' brief will first demonstrate that the new statutory framework is a state mandate because it causes an increase in the level of service in an existing program. Next, St. Marks will demonstrate that an agency's exercise of the power of eminent domain is not in itself "discretionary" and that costs incurred in an eminent domain proceeding due to the new statutory framework can therefore properly be the subject of a reimbursement claim before this Commission.

II.

THE NEW STATUTORY FRAMEWORK INCREASES THE LEVEL OF SERVICE REQUIRED IN AN EXISTING PROGRAM

Section Six of Article XIIIB of the California Constitution states that,

> [w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service.

The statutory framework for the reimbursement required by the California Constitution is set out in Government Code section 17500, et. seq. Government Code section 17561 provides:

> [t]he state shall reimburse each local agency and school district for all "costs mandated by the state," as defined in Section 17514.

Cal. Govt. Code § 17561 (1998). Section 17514 of the Government Code defines these costs as,

> "Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980 as a result of any statute enacted on or after January 1, 1975 . . . which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Cal. Govt. Code § 17514 (1998).

By its express terms, Government Code section 17514 contemplates two distinct circumstances in which the State shall reimburse a public agency which assumes increased costs in complying with a statute enacted after January 1, 1975. These two circumstances are: (1) where the statute requires a "new program;" and, (2) where the statute requires a "higher level of service of an existing program." Id.

The legislation at issue in the test claim filed by the City of San Diego is Senate Bill 821, enacted into law in February 1992. Stats. 1992, Ch. 7 (p. 38). This bill both amended and added statutes to the Evidence Code, Government Code and Code of Civil Procedure. The principal laws at issue in the test claim are two new statutes, Government Code, section 7267.9 and Evidence Code section 824. These statutes added new procedural and substantive

burdens to local agencies acquiring "nonprofit, special use property" through the exercise of their eminent domain power.

"Nonprofit, special use property" is defined in the Code of Civil Procedure section 1235.155 as,

> property which is operated for a special non-profit, tax exempt use such as a school, church, cemetery, hospital or similar property.

Once it is established that the realty to be acquired by an agency includes "nonprofit, special use property," the new burdens of these two new statutes are triggered.

First, the procedural requirements of Government Code section 7267.9 must be met by the acquiring agency. That statute requires,

> prior to the initiation of negotiations for acquisition . . . of nonprofit, special use property [the public agency is] to make <u>every reasonable effort to seek alternative property</u> which is other than nonprofit special use property.

Cal. Govt. Code § 7267.9 (1998) (emphasis added).

Next, if nonprofit, special use property must be acquired, the requirements of Evidence Code section 824 must be met by the experts retained by the condemning agency to appraise the property. That statute provides in part,

> . . .
>
> (b) Notwithstanding any other provision of this article, a witness providing opinion testimony on the value of nonprofit, special use property, as defined by [Code of Civil Procedure] Section 1235.155 . . . for which there is no relevant, comparable market, shall base his or her opinion on the value of reproducing the improvements <u>without taking into consideration any depreciation or obsolescence of the improvements</u>.

Cal. Evid. Code § 824 (1998) (emphasis added).

Thus, Government Code section 7267.9 adds a new procedural hurdle to the condemnation process, requiring the condemnor to take additional new steps to ensure compliance with the statutory mandate. Next, Evidence Code section 824 adds a new substantive burden to the condemnation process, requiring the condemnor to expend significantly more funds than previously necessary due to the elimination of the previously lawful offset for depreciation and obsolescence.

These two new statutes, acting in concert, clearly mandate a "higher level of service" in an "existing program" within the meaning of Government Code section 17514 and Section 6, Article XIIIB of the California Constitution. Therefore, pursuant to the requirements of Government Code section 17561, the City of San Diego must be reimbursed for the additional costs it incurred solely because of the two new statutes at issue.

A.

The New Statutory Framework Represents a "Higher Level of Service to an Existing Program"

The State is constitutionally required to reimburse local governments for costs incurred in complying with a new statute, or statutory framework, if the statute mandates a "new program or higher level of service of an existing program." Cal. Govt. Code §§ 17514, 17561 (1998); Cal. Const. Art. XIIIB, § 6.

The seminal case interpreting this phrase is County of Los Angeles v. State of California, 43 Cal. 3d 46, 233 Cal. Rptr. 38 (1987). In County of Los Angeles, the Court analyzed whether a

state-mandated increase in worker's compensation benefits required reimbursement to local agencies of the additional monies they were required to expend in complying with the new law. Id. at 49-50, 233 Cal. Rptr. at 39.

The Supreme Court first determined that the term "program" as it appears in the statutes and the Constitution, has two alternative meanings, first,

> programs that carry out the governmental functions of providing services to the public, or [second,] laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

Id. at 56, 233 Cal. Rptr. at 43. Applying this standard to the worker's compensation program, the Court held that the state-mandated increase in benefits was not reimbursable as a "new program." Id. at 57-58, 233 Cal. Rptr. at 44. In rejecting the reimbursement claim, the Court noted that the statutory intent,

> was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of law that apply generally to all state residents and entities.

Id. at 56-57, 233 Cal. Rptr. at 44 (emphasis added). Noting that the increased worker's compensation benefits were payable by both public and private employers, the Court held that,

> the state need not provide subvention for . . . the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive. Worker's compensation is not a program administered by local agencies to provide services to the public.

Id. at 57, 233 Cal. Rptr. at 44.

The County of Los Angeles analysis was followed by the court in Carmel Valley Fire Protection Dist. v. State of California, 190 Cal. App. 3d 521, 234 Cal. Rptr. 795 (1987). However, in this case, the court did find a "new program" subject to reimbursement.

In Carmel Valley, the particular mandate before the court was an addition to the California Administrative Code requiring local agencies to purchase certain protective equipment and clothing for fire fighters. Id. at 530, 234 Cal. Rptr. at 799. The court framed the issues as "whether the executive orders constitute the type of 'program' that is subject to the constitutional imperative of subvention." Id. at 537, 234 Cal. Rptr. at 804. Noting that "fire protection is a particularly governmental function," the court held that the first prong of the County of Los Angeles analysis was satisfied. Id., 234 Cal. Rptr. at 804.

Next, the Court determined that the second, alternative, prong of the County of Los Angeles "new program" analysis was met, holding that,

> the executive orders manifest a state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive order is compulsory. The requirements imposed on local governments are also unique because fire fighting is overwhelmingly engaged in by local agencies. Finally, the orders do not apply generally to all residents and entities in the State but only to those involved in fire fighting.

Id. at 538, 234 Cal. Rptr. at 804. Thus, the Court determined that the additional burden was a "state-mandated cost" and subject to reimbursement from the State. Id. at 537, 234 Cal. Rptr. at 804.

Here, Code of Civil Procedure section 7267.9 and Evidence Code section 824 are the statutes principally at issue. Senate Bill

821, the legislation which enacted this new framework, states that "[t]he changes made by this act shall apply to eminent domain actions or proceedings commenced on or after January 1, 1993." Stats. 1992, Ch. 7, § 7 (p. 39). Thus, the bill itself makes clear that, in the context of Government Code section 17514, the "program" is the agency's exercise of the power of eminent domain. Clearly, eminent domain meets the County of Los Angeles requirements for the definition of a "program."

It is indisputable that exercise of the eminent domain power carries out a function peculiar to government in its role of providing services to the public. First, condemnation proceedings can only be initiated following a finding by government of "public necessity." Next, exercise of the eminent domain power is, with few exceptions, exclusively within the domain of government--there truly is no private right of condemnation. Finally, condemnation proceedings are designed to accomplish the goals of the government's property acquisition programs. As these acquisition programs are for the benefit of the citizens, eminent domain is clearly a program carrying out a function unique to government; a "program" within the meaning of the first prong of the County of Los Angeles analysis. See 43 Cal. 3d at 56, 233 Cal. Rptr. at 43.

Given its history and foundations, that eminent domain is an "existing program" rather than a "new program" is not subject to dispute. Accordingly, the issue here is whether or not the new statutory framework mandates a "higher level of service" to be performed by government in exercising its power of eminent domain.

The phrase "higher level of service" has been defined as "state mandated increases in the services provided by local agencies in existing 'programs.'" Id. In Long Beach Unified School Dist. v. State of California, a school district challenged an executive order which required that districts,

> shall, no later than January 1, 1979, and each four years thereafter, develop and adopt a reasonably feasible plan for the alleviation and prevention of racial and ethnic segregation of minority students in the district.

225 Cal. App. 3d 155, 165, 275 Cal. Rptr. 449 (1990). Opposing the district's reimbursement claim, the State argued that the executive order did not mandate a higher level of service because school districts were already constitutionally required to make an effort to eliminate racial segregation in the public schools. Id. at 172, 275 Cal. Rptr. at 460. The Long Beach Unified court rejected this argument because,

> a review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. . . . school districts are to conduct mandatory biennial racial and ethnic surveys, develop a "reasonably feasible" plan every four years to alleviate and prevent segregation, include certain specific elements in each plan, and take mandatory steps to involve the community, including public hearings which have been advertised in a specific manner. . . . these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts.

Id. at 173, 275 Cal. Rptr. at 460-461 (emphasis added). Thus, the court determined that the executive orders constituted a "higher level of service" in an existing program within the meaning of Government Code section 17514. Id.

Both Government Code sections 7267.9 and Evidence Code section 824 require a "higher level of service" in an existing program (eminent domain) as that phrase is discussed in the Long Beach Unified case.

B.

Government Code section 7267.9

Though the Draft Staff Analysis relegates its impact to a mere footnote (Analysis, p. 7, fn. 11), the new burden of Government Code section 7267.9 is substantial. The statute mandates that,

> prior to the initiation of negotiations for acquisition . . . of nonprofit, special use property [the public agency is] to make every reasonable effort to seek alternative property which is other than nonprofit special use property.

Cal. Govt. Code § 7267.9 (1998) (emphasis added). Contrary to the Staff's position, section 7267.9 does not merely result in some minor increased expense.

First, the statute requires a significantly higher expenditure of time, money and staff resources than previously necessary in order to meet its new mandate. In requiring "every reasonable alternative" to be investigated, staff must change its focus from how to best implement the project to how to best avoid the non-profit, special use property. Legal counsel must be brought in at the planning stage, rather than the later acquisition stage, in order to advise and monitor the agency's compliance. Indeed, even project planners and designers must literally return to the "drawing board" to determine if some alternative design is reasonably feasible which would avoid the acquisition of the

nonprofit, special use property. This aspect of statutory compliance alone can involve such extensive tasks as re-orienting the boundaries of the project or even going so far as to seek out alternative sites for the project. Thus, the statute does have a significant impact on the agency's available resources. It was similar evidence of increased resource outlay that persuaded the court in the Long Beach Unified case that the new regulations at issue therein did mandate a "higher level of service" requiring reimbursement.

Further support for the fact that section 7267.9 does represent a "higher level of service" is found in the fact that compliance with its mandate is not merely aspirational, but instead appears to create a right or liability enforceable by the property owners against the local agency. See Cal. Govt. Code § 7274 (1998). The court in Long Beach Unified specifically notes that mandatory compliance was an element supporting the fact that the executive orders in that case did represent a "higher level of service." Long Beach Unified, 225 Cal. App. 3d at 173, 275 Cal. Rptr. at 460-461.

Thus, many of the elements identified in Long Beach Unified which led to the determination that the orders therein constituted a "higher level of service" are also present in Government Code section 7267.9. This new mandate does not merely result in some increased costs. Rather, it requires significantly higher expenditures of time and staff resources, it can trigger extensive re-planning and re-design to planned projects, and a perceived

failure to adequately comply with the statute appears to create a right or liability enforceable against the agency seeking to acquire the property. See Cal. Govt. Code § 7274 (1998). Accordingly, the enactment of Government Code section 7267.9 does require a "higher level of service" in an existing program within the meaning of Government Code section 17514.

C.

Evidence Code section 824

Evidence Code section 824 was enacted with the same legislation implementing Government Code section 7267.9. The new Evidence Code statute provides, in part,

> . . .
>
> (b) Notwithstanding any other provision of this article, a witness providing opinion testimony on the value of nonprofit, special use property, as defined by [Code of Civil Procedure] Section 1235.155 . . . for which there is no relevant, comparable market, shall base his or her opinion on the value of reproducing the improvements without taking into consideration any depreciation or obsolescence of the improvements.

Cal. Evid. Code § 824 (1998) (emphasis added). Evidence Code section 824 is to be contrasted with section 820, a statute dealing generally with the "reproduction cost" method of valuing property. That statute states that the ultimate determination of reproduction value shall be "less whatever depreciation or obsolescence the improvements have suffered." Cal. Evid. Code § 820 (1998) (emphasis added). New Evidence Code section 824 modifies this rule where the subject property is "nonprofit, special use property" by eliminating the depreciation and obsolescence deduction required under Evidence Code section 820.

The Draft Staff Analysis appears to argue that Evidence Code section 824 represents only an "increased cost" not an increased level of service (Analysis, pp. 6-7), or, alternatively, that the statute merely implements existing federal law requiring "just compensation" for the acquisition of private property (Analysis, p. 9). These contentions are incorrect.

i.

Evidence Code Section 824 Does Not Merely Result in Increased Costs

This claimant agrees that the sole fact of additional costs accruing to a local agency as the result of a new statutory mandate is not, in itself, "tantamount to an increased level of service" within the meaning of Government Code section 17514. County of Los Angeles, 43 Cal. 3d at 55, 233 Cal. Rptr. at 43; Long Beach Unified, 225 Cal. App. 3d at 173, 275 Cal. Rptr. at 460 ("A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service"). However, the issue in County of Los Angeles was whether a mere incremental increase in the amount of benefits payable to worker's compensation recipients was subject to a reimbursement claim. Id. at 51, 233 Cal. Rptr. at 40. In fact, the law at issue did not change the "terms or conditions under which benefits were to be awarded," the law simply increased the amount of the benefit. Id. By contrast, while acknowledging that increased costs alone do not justify reimbursement, the court in Long Beach Unified found that the increased costs to the school

district, when coupled with new procedural requirements, did require reimbursement as a "higher level of service" within an existing program. Long Beach Unified, 225 Cal. App. 3d at 173, 275 Cal. Rptr. at 460-461.

The mandate of Evidence Code section 824 is clearly different from the statute increasing worker's compensation benefits in County of Los Angeles. First, the worker's compensation statute merely directed the local agency to, in essence, pay $10.00 where they had formerly paid $8.00; the statute at issue therein merely required a different amount of compensation. In contrast, Evidence Code section 824 mandates a different measure of compensation. Thus, rather than asking a computer to merely add a few more dollars to a benefit check, Evidence Code section 824 mandates a new procedure and methodology to be implemented by the appraisers hired by the agency to perform the valuation of nonprofit, special use properties.

Further, in the context of the entire statutory framework enacted in Senate Bill 821, Evidence Code 824 is effectively a "penalty" clause. In other words, if all reasonable alternatives to the non-acquisition of nonprofit, special use property are exhausted (Government Code section 7267.9), then the price to be paid by the public is substantially increased from what it previously would have been pursuant to Evidence Code section 820. Accordingly, in order to avoid this penalty, the local agency is required to perform many more procedural steps in the planning process. In this regard, all of the additional procedures

previously identified to prove that Government Code section 7267.9 mandates a "higher level of service" are applicable to the discussion herein of Evidence Code section 824. In essence, the "sanction" of Evidence Code section 824 provides the impetus for the dramatic increase in time and cost to the public agency pursuant to Government Code section 7267.9 in the planning and acquisition stage of the proceeding. It was this same evidence of additional procedural burdens, coupled with increased costs, present before the court in Long Beach Unified that led that court to find that the local agency was entitled to reimbursement. See 225 Cal. App. 3d at 173, 275 Cal. Rptr. at 460-461.

Therefore, the mandate of Evidence Code section 824, coupled with the requirements of Government Code section 7267.9, does not represent a mere increase in costs payable by a local agency.

ii.

Evidence Code Section 824 Does Not Merely Implement Existing Federal Law determining Just Compensation

The Draft Staff Analysis next argues that the new valuation methodology of Evidence Code section 824, eliminating deduction for depreciation and obsolescence, is "federally mandated by the U.S. Constitution" Analysis, p. 7, under the "just compensation" clause of the Fifth Amendment. This assertion is unsupported by existing law.

Insofar as the new measure of value adopted by the California

legislature in Evidence Code section 824 deletes deduction for depreciation and obsolescence, it is unique. Instead, while most jurisdictions allow recourse to the replacement or reproduction cost methods, they allow deduction for depreciation and obsolescence:

> Where a building is a specialty, and, in a sense, unique, Constructed [sic] for a special use, the valuation cannot be predicated on the same basis as a building constructed for general or usual dwelling or commercial use. In the case of a specialty there is a limited market and the customary testimony of market price is not available. It has been held under such circumstances that reproduction cost, or replacement cost, minus depreciation may be considered.

Nichols, The Law of Eminent Domain, § 12C.01(3)(b) (p. 12C-27) (1998). Further, the treatise notes that in the few situations where depreciation has not been deducted, primarily in the condemnation of property owned by public entities (i.e., a school), the failure to account for depreciation has been heavily criticized. Id. (p. 12C-33). Clearly, the new California law goes beyond Federal requirements and offers greater compensation than mandated by the U.S. Constitution. Though the California legislature may deem the section 824 methodology to be a "just and equitable" method of valuing nonprofit, special use property, the United States Supreme Court has yet to hold that deducting for depreciation and obsolescence violates the U.S. Constitution.

The Draft Staff Analysis also cites Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach, 140 Cal. App. 3d 690, 189 Cal. Rptr. 749 (1983) in support of the proposition that the Evidence Code section 824 deduction for

depreciation and obsolescence is required to meet the "just compensation" requirements of the Fifth Amendment to the U.S. Constitution. Analysis, p. 9. Staff has misread this important case.

First, the court in First Christian Church approved the application of the valuation method of Evidence Code section 820. As noted previously, Evidence Code section 820 expressly requires the value of the property to be determined, "less whatever depreciation or obsolescence the improvements have suffered." Cal. Evid. Code § 820 (1998). In fact, while the redevelopment agency's appraiser had deducted seventy-five percent for depreciation, the church's own appraiser had deducted forty percent. Id. at 696-697, 189 Cal. Rptr. at 752-753. Clearly then, the court determined that some depreciation was in fact necessary to avoid a windfall to the property owners.

Next, Staff does correctly note that the First Christian Church court stated that "depreciation and obsolescence should not be used as a 'back door' method of nullifying the reproduction and replacement approach to valuation." Id. at 698, 189 Cal. Rptr. at 754. However, it is first important to note that this statement in the case is mere dicta, irrelevant to the decision in the case and therefore not precedential. More to the point, the court's statement was clearly directed at the public agency's appraisal which had deducted seventy-five percent as "depreciation," id. at 696, 189 Cal. Rptr. at 752, and was itself based on the agency's appraiser's study to the effect that "the Church buildings had been

depreciated 100% or 'at least 80% in all cases studied'" id. at 699, 189 Cal. Rptr. at 754 (emphasis added). Clearly, the First Christian court was concerned with instances where the public agency was attempting to completely nullify the replacement cost valuation by implementing an excessive depreciation. However, given that the Court approved the church's own use of a 40% depreciation, it is clear that the Court was not disapproving all depreciation deductions. See id. at 696-697, 189 Cal. Rptr. at 752-753.

Therefore, it is clear that Evidence Code section 824 far exceeds the existing requirements of Federal Law. More importantly, by implementing a whole new measure and method of valuation, Evidence Code section 824 does not merely result in "increased costs." Rather, in concert with Government Code section 7267.9 and the rest of the Senate Bill 821 framework, it is clear that this new statutory mandate does require a "higher level of service" in an existing program within the meaning of Government Code section 17514 and is therefore properly the subject of a reimbursement claim before this Commission.

III.

EXERCISE OF THE GOVERNMENT'S EMINENT DOMAIN POWER IS NOT ALWAYS DISCRETIONARY

The second and more sweeping argument in the Draft Staff Analysis is that government's exercise of the power of eminent domain is always a discretionary act. Analysis, p. 4-6. In

support of this assertion, staff principally relies on two authorities, one statute (Code of Civil Procedure section 1230.030) and one appellate court case (City of Merced v. State of California, 153 Cal. App. 3d 777, 200 Cal. Rptr. 642 (1984)). Notably, the holding in City of Merced is itself principally based on that court's interpretation of Code of Civil Procedure section 1230.030.

Staff's reliance on two authorities to "settle" a critical element to this test claim is extreme, especially where the decision on this single issue will have a broad impact on the future ability of local agencies to seek reimbursement for any additional costs or burdens arising from their exercise of the eminent domain power. More importantly, the Staff Analysis is incorrect in its interpretation of these "authorities."

A.

Code of Civil Procedure Section 1230.030

First, staff relies principally on one statute, Code of Civil Procedure section 1230.030. That statute states,

> Nothing in this title [i.e., The Eminent Domain Law] requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.

Cal. Code Civ. Pro. § 1230.030 (1998). Based on this language, the Analysis states,

> the statutory provisions clearly spell out that the exercise of eminent domain is a discretionary act and not state mandated.

Analysis, p. 5. This is error.

The sole import of Code of Civil Procedure section 1230.030 is to make clear the obvious: not <u>every</u> acquisition of property by the government requires the exercise of the power of eminent domain. As the law review commission noted at the time of its study on the proposed eminent domain law,

> A public agency is not required to exercise the power of eminent domain in pursuance of its property acquisition program; the statute provides that any agency authorized to exercise the power of eminent domain to acquire property for a particular purpose may also acquire the property by grant, purchase, lease, gift, devise, contract or other means. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is left to the discretion of the agency authorized to acquire the property.

11 Cal. Law Rev. Comm. 1007, 1011 (1976). In fact, clarification that eminent domain is but one additional tool available to government to acquire property is made clear in Code of Civil Procedure section 1240.130. That statute states,

> Subject to any other statute relating to the acquisition of property, any public entity authorized to acquire for a particular use by eminent domain may also acquire such property for such use by grant, purchase, lease, gift, devise, contract or other means.

Cal. Code Civ. Pro. § 1240.130 (1998). Analyzing the same statutes and law review commission commentary, one court has stated that,

> These sections of the Eminent Domain Law reflect [that] the Legislature is well aware of the existence of <u>alternatives</u> to acquisition by eminent domain.

<u>Melamed v. City of Long Beach</u>, 15 Cal. App. 4th 70, 80, 18 Cal. Rptr. 2d 729 (1993) (requirement of payment of "just compensation"

inapplicable to ordinary purchase and sale agreement between public entity and private individual).

Moreover, as compared to acquiring property by gift, contract, or purchase, exercise of the power of eminent domain is a tool of last resort, from both a practical and legal standpoint. First, condemnation proceedings are an extremely costly and inefficient means to acquiring property. Whereas a purchase and sales agreement can typically be negotiated by a mid-level employee of the acquiring agency, condemnation proceedings frequently require recourse to outside specialty attorneys, generating costs and legal fees in the tens of thousands of dollars. Moreover, whereas an owner's price in the open market might be set at one level, the price to be paid for the property through condemnation proceedings can be substantially higher. See Melamed, 15 Cal. App. 4th at 78-79, 18 Cal. Rptr. 2d at 734-735.

In addition to these practical constraints, there are severe legal restrictions to the exercise of eminent domain. Government Code section 7267 states,

> In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the public programs, and to promote public confidence in public land acquisition programs. public entities shall, to the greatest extent practicable, be guided by the provisions of Sections 7267.1 to 7267.7, inclusive.

Immediately thereafter, Government Code section 7267.1(a) states that,

> The public entity shall make every reasonable effort to acquire expeditiously real property by negotiation.

(emphasis added). Thus, not only do practical realities limit a public entity's recourse to eminent domain, so do legal constraints restrict the exercise of this power.

The preceding authorities make it clear that the sole import of Code of Civil Procedure section 1230.030 is that eminent domain is but one of several alternatives, or tools, available to government to implement its property acquisition program. In essence, the statute simply clarifies that there is no difference between title acquired by eminent domain and property acquired by "gift," "purchase," "contract," or any other means. Moreover, in regard to eminent domain, analysis indicates that, if anything, practical and legal constraints severely limit any supposed "discretion" available to a local agency when choosing which means it shall employ in a given circumstance to achieve its property acquisition program goals.

Nonetheless, scrutiny reveals that there is one critical difference between eminent domain and the other statutory alternatives to property acquisition. Specifically, all of the alternatives to eminent domain <u>require owner consent</u> to the government's acquisition. Eminent domain is the <u>sole means</u> by which the government can operate its property acquisition program where a land owner refuses to "grant," "lease," "gift," "devise," or "contract" for the transfer of his property to the agency.

Accordingly, if a land owner refuses to transfer his property, eminent domain is the sole "alternative" remaining to the government. In fact, absent owner consent, the exercise of the

government's eminent domain power is not discretionary, it is mandatory to effectuate the acquisition.

This is the point that the Analysis fails to grasp. Absent owner consent, the only "discretion" available to the government is whether or not to abandon the project for which the property is being sought. It is incorrect to rely on Code of Civil Procedure section 1230.030, as the Staff Analysis does, for the sweeping proposition that the exercise of eminent domain is a "discretionary act, not a state mandate." Such a broad assertion is unsupported by the preceding authorities. The phrase "discretion," as it is used in the Eminent Domain Law at section 1230.030 is clearly not meant to connote that the use of the eminent domain power is always a "choice;" rather, it is meant to convey the fact that use of the eminent domain power is not the exclusive means by which property can be acquired by the government. See Melamed, 15 Cal. App. 4th at 80, 18 Cal. Rptr. 2d at 735.

If a local agency is required to pursue a project requiring the acquisition of private property, and a property owner refuses to sell, gift, donate, or otherwise transfer his property to the agency, then the agency's exercise of its eminent domain power is mandatory, not discretionary.

B.

The City of Merced Decision

In addition to relying on Code of Civil Procedure section 1230.030, the Analysis principally relies on one case, City of Merced v. State of California, 153 Cal. App. 3d 777, 200 Cal. Rptr.

642 (1984). The issue before the court in City of Merced was whether condemnation damages paid by local agencies for a property owner's loss of business goodwill should be reimbursed by the state as an unfunded mandate. Id. at 779, 200 Cal. Rptr. at 643. Prior to the 1975 enactment of Code of Civil Procedure section 1263.510, loss of goodwill was not compensable in an eminent domain proceeding. Id. at 780, 200 Cal. Rptr. at 643. The court held that the City of Merced was not entitled to be reimbursed for amounts it paid for loss of business goodwill, stating that,

> the above authorities reveal that whether a city or county decided to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.

Id. at 783, 200 Cal. Rptr. at 646. Thus, the premise for the Court's decision in City of Merced is that a local agency is not "required" to exercise the power of eminent domain--though it is notable that the Court qualifies this statement with the phrase "essentially." Id. Nonetheless, analysis of the "above authorities" cited by the City of Merced court demonstrates that this case suffers from the same errors in the Draft Staff Analysis. Accordingly, this Case does not provide the legal support that Staff would lead the Commission to believe.

First, the principal authority cited by the court in the City of Merced decision is Code of Civil Procedure section 1230.030. However, as this claimant has shown at length (see pp. 18-22,

supra), the legislature's enactment of section 1230.030 does not stand for the proposition that all eminent domain actions are discretionary. Rather, that statute merely is a legislative acknowledgement that there are "alternatives" to the exercise of the power of eminent domain available to carry out government's property acquisition programs. Melamed v. City of Long Beach, 15 Cal. App. 4th at 80, 18 Cal. Rptr. 2d at 735. Thus, the sole "discretion" that can be tangentially related to the agency's exercise of its eminent domain power is the decision to acquire the property. Once that decision has been reached, then the "discretion" language in Code of Civil Procedure section 1230.030 stands solely for the proposition that all of the tools (gift, purchase, contract, eminent domain) are available to the agency. See Cal. Code Civ. Pro. § 1240.130 (1998).

Accordingly, in focusing on the decision as to which tool to use to effectuate the acquisition, rather than the original decision to perform the acquisition, the analysis in the City of Merced based on Code of Civil Procedure section 1230.030 is incorrect. While the agency's decision to acquire the property may in fact have been discretionary, rather than pursuant to state mandate, the decision did not reach that issue and is therefore not entitled to the support of this Commission.

The second "authority" relied upon by the Court in the City of Merced decision is the legislature's enactment in 1981 of a bill instructing the Board of Control (this Commission's predecessor) to stop approving reimbursement for goodwill loss claims under Code of

Civil Procedure 1263.510. Stats. 1981, Ch. 1090, § 3 (p. 4193). The City of Merced court cites this enactment as demonstrating legislative intent that payments for goodwill were non-reimbursable. Merced, 153 Cal. App. 3d at 783, 200 Cal. Rptr. at 645. Thus, the discussion by the Court of discretionary versus mandatory is not relevant. The legislature had spoken and the Court was merely following its pronouncement.

Finally, while the City of Merced decision seems to be based on that court's interpretation of Code of Civil Procedure section 1230.030, the court does also look to Revenue and Taxation Code section 2207(h) for support. Id. at 783-784, 200 Cal. Rptr. at 646. That statute stated,

> "Costs mandated by the state" means any increased costs which a local agency is required to incur as a result of the following:
>
> . . .
>
> (h) Any statute enacted after January 1, 1973 . . . which adds new requirements to an existing optional program or service and thereby increases the cost of such program or service if the local agencies have no reasonable alternative other than to continue the optional program.

Id. at 783, 200 Cal. Rptr. at 646 (emphasis added). In City of Merced, the court stated that "[s]ubdivision (h) appears to have been included in the bill to provide for reimbursement of increased costs in an optional program such as eminent domain." Id. at 784, 200 Cal. Rptr. at 646. However, given that the claim filed by City of Merced arose prior to the effective date of Revenue and Taxation Code section 2207(h), the City of Merced court determined that the City had no recourse to the new provision. Id. In fact, the Court

determined that Revenue and Taxation Code section 2207(h) appeared to "expand the definition of reimbursable costs." Id. Therefore, the Court held that since this new statute represented an expansion of liability, then the City of Merced's pre-2207(h) claim was properly denied under the former law since the new statute would only have been enacted if the remedy had not been available under the former law. Id. at 785, 200 Cal. Rptr. at 647.

The problem with this aspect of the analysis in City of Merced is that Revenue and Taxation Code section 2207, the statute relied on by the court, was repealed in 1989. Accordingly, insofar as this basis for the court's decision has since been repealed, City of Merced is no longer of persuasive effect.

Revenue and Taxation Code section 2207 was enacted in 1975. Stats. 1975, Ch. 486, § 1.8 (p. 997). This statute defined "costs mandated by the state." See Rev. & T. Code § 2207 (repealed). The statute was subsequently repealed in 1989. Stats. 1989, Ch. 589, §§ 7, 8 (p. 1978).

While this Revenue and Taxation Code statute was in effect (1975-1989), Government Code sections 17561 and 17514 were also enacted. Government Code section 17561, enacted in 1986, states that,

> [t]he state shall reimburse each local agency and school district for all "costs mandated by the state," as defined in Section 17514.

(emphasis added). Government Code section 17514, enacted in 1984, states that,

> "Costs mandated by the state" means any increased costs which a local agency or school district is required to

> incur after July 1, 1980 as a result of any statute enacted on or after January 1, 1975 . . . which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Thus, during the same period as the relevant sections of the Revenue and Taxation Code were in effect (1975-1989), parallel provisions in the Government Code were in effect (1984-Present). According to the Legislative Counsel, the legislation that eliminated Revenue and Taxation Code section 2207 and 2207.5 was designed in part to "repeal obsolete definitions contained in the Revenue and Taxation Code." Summary Digest, Stats. 1989, Ch. 589 (p. 193). Thus, in deleting Revenue and Taxation Code sections 2207 and 2207.5 on the basis that the definitions therein were "obsolete," it is clear that the legislature believed these definition were already subsumed in the language of Government Code section 17514.

Based on the foregoing, it is clear that City of Merced is not the proper case on which the Commission can base a denial of the City of San Diego's claim for reimbursement. First, City of Merced misconstrued the import of Code of Civil Procedure section 1230.030 and that statute's reference to "discretion." Regrettably, as has been shown in this brief, Staff has perpetuated this erroneous analysis in its own Draft Staff Analysis.

Second, City of Merced is based on the interpretation of Revenue and Taxation Code section 2207, since repealed. A case that is based on a statute since repealed is not entitled to be given precedential effect in this complex area. Moreover, even if

City of Merced is still to be deemed "good law," it is undeniable that the case would have been decided differently had the claimant's claim for reimbursement been based on a post-1981 (i.e., post enactment of section 2107(h)) claim. Therefore, since section 2207 was repealed based on "obsolescence" rather than the legislature's disagreement with subsection (h) of that statute, the definitions in that statute must have been deemed to be encompassed within the meaning of Government Code section 17514.

Accordingly, though St. Marks believes it to be clear that there is no "discretion" in the exercise of an agency's eminent domain power as opposed to the discretion to implement a property acquisition program, nonetheless, the City of San Diego's claim still survives this initial "discretion" hurdle because of the repeal of Revenue and Taxation Code section 2207 in favor of Government Code section 17514.

The Commission cannot adopt the Staff Analysis of the City of San Diego's test claim, nor can the Commission rely on the holding in City of Merced for the proposition that all exercise of the power of eminent domain is automatically a discretionary, non-reimbursable function of local government.

C.

The Legislative History Of Senate Bill 821 Indicates The Legislature Believed The Bill Imposed State-Mandated Costs

Further support for the fact that Senate Bill 821 imposes state-mandated costs subject to reimbursement is found in the text

of the Bill. Specifically, the bill states,

> Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to . . . the Government Code.

Stats. 1992, Ch. 7, § 9 (p. 40). Moreover, the legislative counsel's digest for Senate Bill 821 states that,

> This bill would also impose a state-mandated local program by requiring public entities (including local agencies and school districts), and would also require public utilities, prior to acquiring nonprofit, special use property, to make reasonable efforts to seek alternative property, unless the property is to be acquired for transportation purposes.

Summary Digest, Stats. 1992, Ch. 7 (p. 6). These provisions in the legislative record of Senate Bill 821 result from the Legislative Counsel's exercise of its statutory duty to analyze new bills and "determine whether the bill mandates a new program or higher level of service." Cal. Govt. Code § 17575 (1998).

In the present case, the Legislative Counsel's Office did determine that Senate Bill 821 represented a "state mandated local program." Summary Digest, Stats. 1992, Ch. 7 (p. 6); Stats. 1992, Ch. 7, § 9 (p. 40). However, rather than acknowledging that this language in Senate Bill 821 is probative and relevant to this Commission's decision, the draft staff analysis urges this legislative finding to be completely disregarded on the basis of City of San Jose v. State of California, 45 Cal. App. 4th 1802, 53 Cal. Rptr. 2d 521 (1996).

While the facts of City of San Jose are somewhat unclear, it would appear that the City was arguing that the Commission should

absolutely defer to the Legislative Counsel's determination that the statute imposed a state-mandated local program. Id. at 1817, 53 Cal. Rptr. 2d at 530. However, the court rejected this argument, holding that the Commission has the sole and exclusive authority to determine whether or not a state mandate exists. Id. at 1818, 53 Cal. Rptr. 2d at 530.

Saint Mark's does not argue that the Legislative Counsel's determination is binding and dispositive of the issue. It may be that the Commission alone has the authority to determine whether or not a given statute creates a state-mandated local program. Nonetheless, Saint Mark's Church and the City of San Diego are in agreement that the Legislative Counsel's determination and the legislative language is entitled to consideration by this Commission. Counsel's opinion on this critical issue should be persuasive authority in support of the claimant's position on the test claim legislation.

IV.

CONCLUSION

The new statutory framework implemented by Senate Bill 821, mandates a "higher level of service" in an existing program. Government Code section 7267.9 requires significant increases in cost, time and staff resources, in order to meet its new mandate. Evidence Code section 824, in addition to implementing a whole new measure of compensation, also represents the "sanction" for failure to meet those requirements.

While "discretionary" activities of public agencies may not be "state mandated" and therefore not reimbursable under Government Code section 17514, Staff's reliance on the City of Merced case and Code of Civil Procedure section 1230.030 is in error. As this respondent has demonstrated, scrutiny of the "authorities" underlying the City of Merced decision, as well as analysis of Code of Civil Procedure section 1230.030, demonstrates that this decision is not entitled to the persuasive value which the Staff Analysis attributes to it.

Accordingly, insofar as Senate Bill 821 clearly mandates a "higher level of service" in an existing program, the City of San Diego's reimbursement claim should be approved because the assertion in the Staff Analysis to the effect that the exercise of the power of eminent domain is always "discretionary" is unsupported by law.

Dated October 5, 1998

Respectfully Submitted.

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