



- Board of Directors
Communications and Legislation Committee

6/10/2014 Board Meeting

8-9

Subject

Express opposition to AB 2023 (Wagner, R-Villa Park) – Eminent domain: compensation: loss of goodwill

Executive Summary

Eminent domain law provides that the owner of a business located on property condemned for public use may be compensated for loss of business goodwill resulting from the taking. Under current law the owner of the business has the burden of proving that the business will suffer a loss of goodwill as a result of the taking of the property and that the loss of goodwill cannot be avoided or mitigated by relocation of the business or other means. Under current law the judge determines whether the business owner is entitled to compensation for loss of goodwill, and the jury decides only the amount of compensation.

AB 2023 (Wagner, R-Villa Park) ([Attachment 1](#)) would amend the law to provide that all decisions relating to the loss of business goodwill will be made by the jury. The bill would limit the role of the trial judge to determining if there is sufficient “credible evidence” to establish that the business has goodwill. Once the judge has made that determination, the jury would determine whether the taking results in a loss of goodwill that cannot be avoided or mitigated and, if so, the amount of compensation the business owner is entitled to.

Jury trials are longer and more costly than court trials. In accordance with Metropolitan policy on eminent domain law opposing measures that impose significant additional requirements on public agencies such as shifting responsibility from judges to juries, it is recommended that Metropolitan take an oppose position on the bill.

Details

Prior to 1975, the owners of businesses located on property condemned for public use had no right to compensation for business losses. The California courts followed the rule adopted by the United States Supreme Court that the condemnation of physical property does not constitute a taking of the business operated on the property, which is free to move elsewhere. For that reason, the Just Compensation clauses in the federal and state constitutions do not compel payment for business losses suffered as a result of the condemnation of property.

As part of the comprehensive overhaul of eminent domain law in 1975, the state legislature accepted the recommendation of the Law Revision Commission to adopt a statutory remedy for business owners. The new statute allows compensation for the loss of goodwill, but only if the owner proves that the loss could not be reasonably prevented by relocating the business or taking other measures to preserve the goodwill, and only to the extent that the compensation is not duplicated by other compensation paid to the owner (e.g., in an award of compensation for the value of a below-market leasehold or in relocation assistance benefits).

The California Constitution provides for the right to a jury trial on the issue of the amount of just compensation for the taking of property for public use. The courts have adopted a rule that preliminary decisions related to entitlement to compensation, rather than the amount, are to be decided by the trial judge. In the context of the goodwill statute, this rule has been applied to require that the judge decide the statutory elements of causation for the loss, inability to avoid the loss by relocation or other measures, and absence of duplication of compensation.

In 2012, the Second District Court of Appeal issued a decision that interpreted the goodwill statute to require the business owner to prove, as an “implicit, but essential, precondition to recovery” that the business had goodwill prior to the condemnation. The court followed the rule that decisions in eminent domain cases on all issues other than the amount of compensation are for the trial judge, not the jury, to decide.

In response to this court decision, Assembly Member Wagner introduced AB 374 in 2013. That bill would have amended the goodwill statute by adding the requirement that the owner produce evidence that the business had goodwill prior to the condemnation, but it also shifted from the judge to the jury the decision on whether the statutory elements had been proven.

AB 374 was passed by the legislature, but vetoed by Governor Brown. In his veto message, the governor stated: “This measure would reverse several appellate court decisions allowing judges, in eminent domain claims for loss in business goodwill, to decide facts before a jury decides on compensation. In this case, I think the appellate courts got it right. Judges are in the best position to decide whether businesses had goodwill to lose before proceeding to costly jury trials.”

Assembly Member Wagner has now introduced AB 2023 that is substantively similar to the vetoed bill. AB 2023 provides that if the owner introduces “credible evidence” that goodwill existed before the condemnation, then all of the statutory elements required to recover for loss of goodwill “shall be presented to the trier of fact.” The new legislation would change the existing procedures for litigation of goodwill claims by limiting the role of the judge to determining if the evidence presented meets the minimal standard of credibility. If so, the jury would be tasked with deciding both entitlement to compensation and the value of the loss. Furthermore, the bill does not expressly identify the burden on the business owner, but the implication is that there is no burden except as to the existence of goodwill. Thus, the bill could eliminate the current burden on the owner to prove by a preponderance of the evidence that there is a loss that could not be avoided or mitigated by relocation and is not included in other compensation available to the owner.

Metropolitan’s policy on eminent domain law is to oppose measures that would add requirements on public agencies in the exercise of their eminent domain powers, such as shifting responsibilities in litigation from judges to juries. By requiring that juries make decisions that are currently made by trial judges, AB 2023 would increase the time and complexity of eminent domain trials. The legislation is also confusing, in that it fails to specify the underlying burden of proof the owner must meet despite a statement of legislative intent that it is intended to set the burden as not “more than a preponderance of the evidence.” For these reasons, it is recommended that Metropolitan take an oppose position on AB 2023.

Policy

Policy Principle on Eminent Domain, M.I. 46781, August 15, 2006

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not subject to CEQA because it involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to CEQA pursuant to Section 15378(b)(2) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options

Option #1

Adopt the CEQA determination that the proposed action is not subject to CEQA and authorize the General Manager to express opposition to AB 2023.

Fiscal Impact: Undeterminable potential for increased costs in future eminent domain actions involving claims for loss of business goodwill if the legislation is enacted into law

Business Analysis: Metropolitan faces potential loss of goodwill claims when it exercises its eminent domain powers to acquire property for public use. The legislation would change current litigation procedures in ways that would increase the costs of such litigation.

Option #2

Do not express a position on AB 2023.

Fiscal Impact: Undeterminable potential for increased costs in future eminent domain actions involving claims for loss of business goodwill if the legislation is enacted into law

Business Analysis: Metropolitan faces potential loss of goodwill claims when it exercises its eminent domain powers to acquire property for public use. The legislation would change current litigation procedures in ways that would increase the costs of such litigation.

Staff Recommendation

Option #1

	5/30/2014
Dee Zinke	Date
Deputy General Manager, External Affairs	

	6/3/2014
Jeffrey Knightlinger	Date
General Manager	

Attachment 1 – Assembly Bill 2023, as amended April 21, 2014

Ref# ea12631346

AMENDED IN ASSEMBLY APRIL 21, 2014

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 2023

Introduced by Assembly Member Wagner

February 20, 2014

An act to amend Section 1263.510 of the Code of Civil Procedure, relating to eminent domain.

LEGISLATIVE COUNSEL'S DIGEST

AB 2023, as amended, Wagner. Eminent domain: compensation: loss of goodwill.

Existing law provides that an owner of property taken by eminent domain is entitled to compensation for loss of goodwill if the owner proves certain specified elements.

This bill would require than an owner additionally prove that goodwill existed before the taking. ~~If the court determines that it is more likely than not~~ *The bill would provide that goodwill did exist*, evidence of the other elements would be presented to the trier of fact *only if there is credible evidence that goodwill existed*.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1263.510 of the Code of Civil Procedure
- 2 is amended to read:
- 3 1263.510. (a) (1) The owner of a business conducted on the
- 4 property taken, or on the remainder if the property is part of a

1 larger parcel, shall be compensated for loss of goodwill if the
2 owner proves all of the following:

3 (A) Goodwill existed in the business before the owner's property
4 was taken.

5 (B) The loss is caused by the taking of the property or the injury
6 to the remainder.

7 (C) The loss cannot reasonably be prevented by a relocation of
8 the business or by taking steps and adopting procedures that a
9 reasonably prudent person would take and adopt in preserving the
10 goodwill.

11 (D) Compensation for the loss will not be included in payments
12 under Section 7262 of the Government Code.

13 (E) Compensation for the loss will not be duplicated in the
14 compensation otherwise awarded to the owner.

15 (2) ~~The court shall first determine whether the owner has~~
16 ~~presented evidence sufficient to establish the matter described in~~
17 ~~subparagraph (A). If the court determines that it is more likely~~
18 ~~than not~~ *If there is credible evidence* that goodwill existed before
19 the taking, evidence of the matters described in subparagraphs (B)
20 through ~~(F)~~ (E), inclusive, of *paragraph (1)* shall be presented to
21 the trier of fact.

22 (b) Within the meaning of this article, "goodwill" consists of
23 the benefits that accrue to a business as a result of its location,
24 reputation for dependability, skill or quality, and any other
25 circumstances resulting in probable retention of old or acquisition
26 of new patronage.

27 (c) If the public entity and the owner enter into a leaseback
28 agreement pursuant to Section 1263.615, the following shall apply:

29 (1) No additional goodwill shall accrue during the lease.

30 (2) The entering of a leaseback agreement shall not be a factor
31 in determining goodwill. Any liability for goodwill shall be
32 established and paid at the time of acquisition of the property by
33 eminent domain or subsequent to notice that the property may be
34 taken by eminent domain.

35 SEC. 2. It is the intent of the Legislature, in amending
36 subdivision (a) of Section 1263.510 of the Code of Civil Procedure,
37 to overrule *People ex rel. Dept. of Transp. v. Dry Canyon*
38 *Enterprises, LLC*. (2012) 211 Cal.App.4th 486 to the extent that

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- 1 decision requires that an owner establish preexisting goodwill by
- 2 more than a preponderance of the evidence.

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