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RE: CITY OF NORTH LAS VEGAS; ASSEMBLY BILL 397

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April 2, 2003

Via Facsimile [(775) 684-8886]

Honorable Bernard Anderson
Chairman, Assembly Committee on Judiciary
Nevada Legislature
401 S. Carson St.
Carson City, NV 89701-4747

Re: ***Assembly Bill No. 397 Relating to Offers of Judgment in Condemnation Matters***

Dear Mr. Anderson:

In connection with the AB 397 workshop scheduled for April 3, Leslie Nielsen, Chief Deputy City Attorney for the City of North Las Vegas, asked me to provide comments on AB 397 and respond to certain factual statements made by the proponents of the bill at your March 25, 2003, Assembly Judiciary Hearing. As I have been involved in condemnation matters for most of my 11-year legal career, I am interested in the bill not only as a representative of the City of North Las Vegas in condemnation matters from time to time, but also having represented landowners in cases against Clark County, the City of Las Vegas, Nevada Power Company, and the State of Nevada. My belief is that AB 397 is not good policy and should not be made into law.

AB 397 BENEFITS LAWYERS ON BOTH SIDES OF CONDEMNATION LITIGATION MATTERS, NOT LANDOWNERS

Eliminating the parties' ability to encourage settlement through thoughtful offers of judgment will result in more condemnation matters proceeding to and through trial. I have difficulty imagining any other legislative change that could ensure more effectively the viability of my condemnation practice and that of other attorneys in the state. On the other hand, foreclosing the possibility of using offers of judgment in condemnation litigation will disproportionately disadvantage landowners. Generally, landowners have a much easier time making an offer of judgment than do condemning

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authorities because landowners need not appear before a governing body in a public forum to justify or otherwise obtain approval to make an offer. Consequently, the existing laws generally provide the landowner with a greater ability to impose pressure upon a condemning authority than the reverse.

OFFERS OF JUDGMENT REDUCE LITIGATION COSTS FOR BOTH SIDES, AND THEIR EFFECTIVE USE IN CONDEMNATION MATTERS RESULTS IN COMPENSATION THAT IS BOTH "JUST" AND WELL-REASONED

While attorneys might relish the prospect of more condemnation matters proceeding through judgment, to do so requires the public – in the case of condemning authorities – and landowners to pay attorneys, court reporters, and experts a great deal of money. Landowners must also take valuable time away from business and family matters to press claims through trial. I believe AB 397 is a step backward if our objective is to determine the amount of compensation that is just for a taking while at the same time trying to minimize costs to the litigants and the public.

The attorneys, parties, and experts that are intimately familiar with the facts and law of a particular matter are in the best position to know the risks involved in proceeding to trial. If a risk of a certain verdict or decision is remote, little weight is given to that potential result in either formulating or responding to an offer of judgment as compared with results that are more likely to occur. The reason for this is that the Nevada Supreme Court has determined that a trial court deciding whether to award attorneys' fees based upon an offer of judgment must consider the following factors: (1) whether plaintiff's claim was brought in good faith; (2) whether the offeror's offer of judgment was brought in good faith; (3) whether the offeree's decision to reject the offer and proceed to trial is grossly unreasonable or in bad faith; and (4) whether fees sought by the offeror are reasonable and justified in amount. *See, e.g., Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318 (1995). In practice, therefore, only offers that are reasonable can be enforced by an offeror seeking attorneys' fees. Offers that contain one side's best-case scenario (i.e., that are predicated upon remote theories of law or questions of fact) are rarely enforced. Consequently, enforceable offers of judgment normally provide a rational, thought-out estimate of just compensation, based upon legal or factual theories of the case having merit. Under the circumstances, the offer of judgment tool is not coercive in nature as has been its characterization before this Committee and in the newspapers, but instead is an effective way to reach a settlement for compensation that is both just and less expensive than proceeding through judgment.

TO THE EXTENT THE OFFER OF JUDGMENT MECHANISM REDUCES TRIAL COURT CASE LOADS WHILE ADVANCING THE GOALS OF LESS EXPENSIVE JUST COMPENSATION FOR CONDEMNEES, THE TOOL SHOULD REMAIN IN THE BOX

Without belaboring the point, even with our new Clark County courthouse nearing completion, our local judges lament the length of their trial calendars. Existing offer of judgment provisions help promote judicial economy by reducing the number of cases proceeding to trial.

THE *CITY OF NORTH LAS VEGAS v. DONNA AIMEE TUCKER* CASE IS A GOOD EXAMPLE OF WHY THE RULE SHOULD NOT BE CHANGED

While I did not attend your Committee's March 25, 2003, hearing on AB 397, and do not yet have the benefit of the transcript of the proceedings, it appears based upon articles I have read in the Las Vegas Sun and Las Vegas Review-Journal that much of the testimony relating to the case of *City of North Las Vegas v. Donna Aimee Tucker, et al.*, was either inaccurate or misunderstood by the reporters. Our law firm represented the City of North Las Vegas in the matter, and has provided Leslie Nielsen with the details of the proceedings, which we understand she will use at your workshop tomorrow. Here, I wish to elaborate on just a few matters to demonstrate that Ms. Tucker's case provides no basis for stripping other landowners and the government of a very important settlement tool.

North Las Vegas filed suit in 2001 to acquire 3,529 sq. ft. of Ms. Tucker's property in connection with the flood control portion of the Craig Road widening project in North Las Vegas. The March 26, 2003, Review-Journal reported that "Tucker told the Assembly Judiciary Committee, she accepted a $34,000 offer for the more than one acre of property because if she went to court and failed to get more compensation from a jury, she might have to pay the City's fees and legal costs." Ms. Tucker's purported statement is interesting for several reasons. North Las Vegas sought to take less than one-tenth of an acre of her property. For the 3,529 sq. ft. taken, and for a temporary easement of approximately one-ninth of an acre for construction, she received $70,000, not the $34,000 she apparently indicated she accepted. Her claim that the City took greater than an acre apparently derives from her arguments in court papers that the City also took a one-acre area north of her property. As the City believed, having owned the acre for some 17 years prior to filing the suit to acquire a different portion of Ms. Tucker's property, that the City need not pay for the property it already owned, the City did not put much stock into Ms. Tucker's claims. Apparently neither did she, ultimately, as in her settlement agreement she acknowledged that the City had complete, absolute fee title to the one-acre parcel to which the Review-Journal article refers since March 1, 1984.

Finally, the *Tucker* case actually demonstrates why offers of judgment can be valuable tools for assessing the merits of a case, as I have discussed above. On November 22, 2002, the City made an offer of judgment to Ms. Tucker in the amount of $22,000. On the same date, Ms. Tucker made an offer of judgment to the City for $125,000. Neither offer was accepted (thus rendering her apparent statement that she accepted an offer of judgment in the matter very misleading). On December 3, 2002, as the parties gathered to select a jury, Ms. Tucker initiated further settlement discussions that resulted in a settlement amount of $70,000. Interestingly, after having well thought out offers of judgment from both sides, the ultimate disposition was only $3,500 away from an average of the two offers of judgment. Ms. Tucker very likely saved a week's worth of attorneys' fees and time in determining to settle the matter. Moreover, she probably did better in the settlement than she would have at trial, given that her own appraiser believed that the 3,529 sq. ft. acquisition area was worth $35,290, and that the temporary easement was worth $6,148 (a total of $41,438). What becomes clear in reviewing these numbers is that Ms. Tucker's claimed damages of $219,494

in the case resulted from her theory that she owned property dedicated to the City some 17 years earlier, and which she ultimately admitted in her settlement agreement was owned in fee simple by the City on March 1, 1984. If Ms. Tucker settled her case because of the City's offer of judgment, I believe the offer resulted in her being in a better position today than she would have been in absent the offer.

For the foregoing reasons, I respectfully submit that the Assembly Committee on Judiciary not recommend AB 397 for approval. If you have any questions about these matters, please feel free to call at any time.

Very truly yours,

Gregory J. Walch, Esq.

GJW/lfl

cc: Hon. Barbara Buckley, Assembly Judiciary
Hon. John Oceguera, Assembly Judiciary
Hon. Jerry Claborn, Assembly Judiciary
Hon. Marcus Conklin, Assembly Judiciary
Hon. William Horne, Assembly Judiciary
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S 5 of 5