2014 Eminent Domain Year in Review & 2015 Forecast

03.06.2015 | By Rick E. Rayl

At first it seemed 2014 had been a relatively slow year for eminent domain cases. But looking back, there was more activity than we initially recalled. There were few decisions that provided any dramatic shift in the landscape (which is probably why it felt like a slow year), but several decisions refined and clarified the law.

One exception was the challenge to the right-of-entry statutes, which is now before the California Supreme Court. That decision could be a real game-changer.
While we wait to see what happens in 2015, here are some of the highlights of 2014. And of course, you can continue to keep up to date by checking out our blog, the California Eminent Domain Report.

Regulatory Takings/Inverse Condemnation

After two decades of uncertainty, the California Court of Appeal finally provided guidance on what standard of review applies to beneficial spot zoning. In *Foothill Communities Coalition v. County of Orange*, the County had added a new zoning district applicable to a specific parcel of land. By creating an island of property with less restrictive zoning than the surrounding property, the County had engaged in classic spot zoning – but in an unusual twist, this "spot zoning" actually benefited the affected parcel. Nonetheless, the Court held that even beneficial spot zoning will be upheld only if the record supports the conclusion that it is in the public interest.

In the *Foothill Communities* case, the Court held that the beneficial zoning, which granted less restrictive zoning for a parcel intended for use as a senior housing project, was "in the public interest," and, therefore, was permissible.

In *Powell v. County of Humboldt*, the California Court of Appeal appears to have added an initial inquiry to a regulatory takings analysis. The property owners applied for a building permit to make some improvements

to their property. The County required them to dedicate an overflight easement, which the owners challenged as violating the nexus standard set out by the US Supreme Court in *Nollan v. California Coastal Commission*.

But here, the Court determined the easement did not constitute a taking as a threshold matter, because it did not deprive the owners of all beneficial use of their property or interfere with their investment backed expectations. Thus *Nollan's* nexus standard did not apply. This seems contrary to the prevailing understanding, which was that *Nollan* applied to determine whether there had been a taking exactly when there had been no loss of all economically beneficial use.

Unlike in Hollywood, we rarely see a sequel to a US Supreme Court decision, let alone a takings case, but it looks like we will now. In June 2013, the Supreme Court held in *Horne v. Department of Agriculture* that California raisin handlers could assert a takings claim as an affirmative defense to an enforcement action.

The case went back to the Ninth Circuit for a decision on whether there had been a taking. This year, the Ninth Circuit issued its opinion that there had not been a regulatory taking. Surprisingly, the US Supreme Court has granted review again. The next decision, probably sometime later this year, will likely contain a substantive decision on the takings issue.

Many California regulatory takings cases arise from actions taken by the California Coastal Commission.

This year, there were at least two. In *Bowman v. Cal. Coastal Comm'n*, the California Court of Appeal held that the Commission had gone too far when it imposed a lateral public access easement as a condition for work on a private residence a mile from the coast. And in *Lynch v. Cal. Coastal Comm'n* the Court of Appeal found an applicant who builds its project, even under protest, waives any challenge to the permit conditions.

The California Supreme Court has granted review in *Lynch*.

Finally, in *Pasadena v. Superior Court*, the Court of Appeal found the City of Pasadena was potentially liable in inverse condemnation when a tree blew down and damaged a residence. The court found there was enough evidence that the tree was part of the city's forestry program, which could show the tree was an improvement owned or controlled by the government. The court also said there was evidence that showed the tree was part of a public improvement, because the tree was part of a program to maintain trees along public roads.

Title to Rail Corridors

Title to railroad rights of way took center stage in the US Supreme Court's decision in *Brandt v. United States*.

As we reported last year, the Court struck a blow to the "Rails to Trails" program when it found the United States did not retain a reversionary interest over property granted to railroads under an 1875 statute. This case is significant for all owners of property occupied by an abandoned railroad right of way.

In *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines*, the California Court of Appeal held that a railroad cannot charge rent to other users of a rail corridor where the railroad's title arises from 19th century land grants. The Court found that the grants limited the railroad's use of the right of way to railroad use. The subsurface rights were not being used for railroad use and, therefore, the railroad company did not own it

and had no right to lease it to a pipeline company. This decision will surely be of interest to the utility industries, which often pay rent to railroads for using their rights-of-way.

Right to Take / Public Use

One of the fundamental tenets of takings law is the government may only take private property for a "public use." While many courts have taken a broad view of public use or, as often described, "public purpose," a federal district court has drawn a line, going so far as to call one particular stated public purpose a "sham." In *US v. 1.41 Acres of Land*, the United States sought to condemn access rights to increase the profitability of adjacent, vacant federal land. While the Court did not strike down profitability as a public purpose, the actual stated basis for the taking was "continued operations" of federal facilities, for which the easement was not necessary.

Relocation Act

In *Pacific Shores Property Owners Assoc. v. FAA*, a federal district court held that the Uniform Relocation Act (URA) does not provide property owners with a private right of action. The association argued that the FAA was obligated to oversee a local airport authority's compliance with the URA. However, the Court agreed with the FAA that the FAA's only obligation under the URA was to receive assurances from the local agency, and that the URA does not provide a right of action for owners.

Valuation of Mineral Rights

On an issue that may become a hot topic as more local agencies ban or regulate fracking, an unpublished California Court of Appeal decision may provide some guidance on the valuation of mineral rights. In *San Diego Gas & Electric Co. v. Schmidt*, the court found that a discounted income approach which included the capitalized value of the income stream from the potential lease of the property to a mining operator was appropriate, even though it necessarily involved some speculation.

Right of Entry

The California Court of Appeal's decision in *Property Reserve v. Superior Court* sent shockwaves through the public agency world. The Court held that any notable physical intrusion onto private property – even through the statutory right of entry procedure – constituted a taking and required an agency to initiate an eminent domain proceeding. But things have settled down – at least for now – because the California Supreme Court granted review of the case. For now, agencies can arguably continue to use the right of entry procedure for early testing and investigation, but at a risk. If the Supreme Court agrees with the Court of Appeal, this will become a landmark decision of 2015.

Transferring Base Year Property Tax

In *Olive Lane Industrial Park v. County of San Diego*, the court was faced with the question of what to do when an owner of condemned property fails to file for a transfer of base value within four years of the recording of the final order of condemnation. The Court found the owner could not apply to retroactively transfer the tax base, but would not lose the right to transfer the base year prospectively if it misses the four year filing window.

Procedural Issues

As attorneys, we know the importance of filing deadlines. But the California Court of Appeal's decision in *Excelaron, LLC v. County of San Luis Obispo* reminds us that timely service of a complaint is equally important. The plaintiffs filed an inverse condemnation complaint and petition for writ of mandate within the 90 day period for review, but did not serve the County until more than 120 days from the final decision. The Court held that the applicable statutes required service to occur within 90 days, and the owners lost out on their chance to pursue a claim seeking $6.24 billion in damages.

Typically, motions *in limine* involve briefs filed shortly before trial seeking to limit the introduction of evidence to the jury. An unpublished California Court of Appeal decision suggests *in limine* motions can also be used for broader purposes. In *Verizon of California v. Carrick*, the Court approved the use of an *in limine* motion to determine whether a party – in that case, a home owner's association – had a compensable interest in the property being condemned.

Forecast for 2015

In 2015, we expect to see some important sequels to 2013-2014. In particular, the California Supreme Court may hear and decide a couple of important decisions. From 2013, the Court is set to decide the *City of Perris v. Stamper* case on the role of judge and jury in eminent domain trials. The Court may also issue its decision in *Property Reserve v. Superior Court*, interpreting the Right of Entry statutes, a decision which could significantly change how agencies implement their projects. And the US Supreme Court may issue its (second) decision in Horne (the raisin case), which could change the scope of regulatory takings law.

We will likely continue to see an uptick in regulatory takings decisions at the state level and, in particular, we may start to see lawsuits arising from the surge of opposition to hydraulic fracturing, or fracking. We expect that proponents of the method will challenge the constitutionally of the locally enacted bans on fracking.