



2021 Eminent Domain Case Law Year in Review

01.11.2022 | By **Bradford B. Kuhn, Jillian Friess Leivas**

2023 Update: Summary of Major Eminent Domain Cases & Legislation: January 1, 2023-June 30, 2023

Throughout all of the ups and downs in 2021, there have been multiple developments on the eminent domain front, including the special occasion where the U.S. Supreme Court heard a takings case. Outside of case law, 2021 saw the Infrastructure Investment and Jobs Act passed, which aims to provide federal funding for infrastructure projects for many years to come. All in all, 2021 was a fairly busy year for right-of-way and eminent domain practitioners.

For your convenience, we've compiled summaries of the prominent cases and developments in eminent domain from 2021.

Infrastructure Bill

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (P.L. 117-58). The bipartisan infrastructure bill provides for \$1.2 trillion in federal spending over the next five years. The funding will be allocated to roads, bridges, major infrastructure projects, transit, rail, broadband upgrades, airports, ports, waterways, electric vehicles, improving power and water systems and environmental remediation. Some of the funds are allocated to provide existing programs with higher funding levels in the near term, while other parts of the funds will be allocated to create entirely new programs.

California Cases

Felkay v. City of Santa Barbara, 2021 Cal.App. LEXIS 225 (Mar. 18, 2021) - Regulatory Taking

In *Felkay*, a property owner applied to build a house on a property that had (i) physical characteristics that precluded any building on a portion of the property and (ii) coastal plan policies that prohibited development on the remaining portion. The application to build on the physically compatible portion of the land was rejected by the City of Santa Barbara at both the planning commission and city council levels—despite staff recommendations of a policy waiver—because it violated the coastal policy. This rejection eliminated all development options on the property. The owner did not attempt to submit multiple applications, as the City had “made plain” it would not allow any development within that physically compatible portion of the property. After the initial denial, the owner filed an inverse condemnation action. The trial court found there had been a taking for inverse condemnation.

On appeal, the City argued that the property owner should have submitted a revised application, thereby making the inverse condemnation claim unripe. The court found that the inverse claim was ripe based on the “futility exception.” Under the futility exception, multiple applications are not needed where the first rejected application makes it clear that no project, under any submission, will be approved. The court found that the City would not permit any development on the portion of the property covered by the coastal policy, thus the futility exception was valid.

City of Escondido v. Pacific Harmony Grove Dev., 2021 Cal. App. LEXIS 706 (Aug. 26, 2021) - Property Dedication

In *Pacific Harmony Grove*, the City of Escondido filed an eminent domain action to acquire a strip of land for a road extension. The road extension had long been on the City’s circulation element of its general plan, and a city ordinance required any owner developing property to dedicate public improvements to conform to the general plan. In the condemnation action, the City argued that the strip of land had nominal value (\$50,000) since it would have been required to be dedicated as part of any future development. The owner claimed the road was not necessary, as it could utilize an existing road which had sufficient capacity, and therefore the strip of land should be valued based on its industrial highest and best use, resulting in compensation of nearly \$1 million. The trial court concluded that the strip of land should be valued at its unimproved value since it would have been required to be dedicated as part of any future development, and such a dedication requirement was constitutional (it was roughly proportional and rationally related to any future development impacts). The court also concluded that the “project-effect rule” did not apply since the dedication was not put in place to impact the value of the property, but instead to mitigate the traffic burdens created by a future development. The owners appealed.

On appeal, the court was asked to determine which valuation methodology should apply—the dedication doctrine or the project influence rule. The court held that (i) the dedication requirement was constitutional, as the City did the work to demonstrate the dedication requirement was proportional to the impacts, and (ii) the project influence rule did not apply because the dedication requirement arose as part of the general plan and circulation element, which were in place long before the date of probable inclusion.

Foley Investments, LP v. Alisal Water Company dba Alco Water Service, 2021 Cal.App. LEXIS 1026 (Nov. 16, 2021) – Inverse Condemnation

In *Foley Investments*, a water main underneath an apartment complex burst and caused damage to the complex, and the property owner sued the water supplier for inverse condemnation and tort claims. The water supplier argued no liability because the pipeline connection was not a public improvement, and it was immune from tort claims under Public Utilities Code section 774. While the water supplier provided water mains in public streets, property owners were responsible for the service lines that connect at the property boundaries and run into the property. The trial court found no liability.

On appeal, the court was asked to determine whether the water utility was operating its facilities for “public use” and therefore potentially liable for inverse condemnation damages. The court affirmed the finding of no inverse condemnation liability. First, the water main was installed pursuant to a private contract and not via eminent domain. Second, this water line was intended to serve an individual need—meeting the flow requirements for the fire hydrants that only served this one property—and it did not provide service to the public at large. Further, while approximately 400 people lived at the property, it consisted of only 81 units and there was actually only one water customer, the property owner. Finally, as this was an installation under private contract, the risk-spreading policy considerations underlying inverse condemnation were inapplicable. Therefore, the court concluded the water main served a private use and inverse condemnation liability was inapplicable.

Federal Cases

Cedar Point Nursery v. Hassid, 2021 U.S. LEXIS 3394 – Regulatory Taking

In *Cedar Point Nursery*, a California regulation allowed labor organizations the right to access, for a certain amount of hours and days, agriculture property in order to solicit support for unionization. The property owners sought to enjoin this activity as an easement taken without compensation.

The court was asked to determine whether a California regulation granting labor organizations a right of access to an agriculture employer’s property for purposes of soliciting support for unionization was an unconstitutional *per se* physical taking—specifically, whether an uncompensated appropriation of an easement that is limited in time effects a *per se* physical taking. The U.S. Supreme Court held that California’s union organizing access regulation is a *per se* physical taking. The issue of duration bears only on the amount of compensation, not on whether or not there has been an invasion.

PennEast Pipeline Co., LLC v. New Jersey, 2021 U.S. LEXIS 3564 (2021 WL 2653262) – Power of Eminent Domain

In *PennEast Pipeline*, a pipeline company applied for a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC) to build a pipeline. The company intended to use the power of eminent domain granted by FERC to acquire the right-of-way. Some of the necessary land was owned in part by the State of New Jersey.

The court was asked to determine whether the federal government could constitutionally confer on pipeline companies the authority to condemn necessary rights of way in which a state has an interest. The U.S. Supreme Court held that a private pipeline granted the power of eminent domain under the Natural Gas Act may condemn property owned by the State of New Jersey. While nonconsenting states are generally

immune from suit, the states surrendered this immunity from the exercise of federal eminent domain power when they ratified the Constitution.

Outfront Media v. City of San Diego, 2021 U.S. Dist. LEXIS 103728 - Inverse Condemnation

In *Outfront Media*, a billboard owner had been leasing property to display a billboard for many years when it was converted to a month-to-month lease in 2005. In 2010, a redevelopment agency proposed to acquire the whole property for a future project and made offers to purchase to both the property owner and the billboard owner. The offers indicated that formal condemnation approval had not yet been obtained. The property owner sold, but the billboard owner refused the offer. After the abolishment of redevelopment agencies, the City of San Diego became the owner of the property and, in 2019, the City terminated the billboard lease. The billboard owner filed an inverse condemnation suit in federal court and argued that the lease termination was connected to the 2010 underlying purchase of the property and that eminent domain was threatened. The City argued that the lease terminated naturally, that eminent domain was never threatened and that the City never manifested an intention to exercise eminent domain.

The district court needed to determine whether the lease termination was merely a consequence of a month-to-month lease or whether the termination was connected to a taking. In making its determination, the court pointed to the original offer to purchase and the language that it was only recommended that the billboard be purchased, not that eminent domain had been approved. The key distinction that kept this from being an inverse condemnation claim was that there was no “unequivocal action or intent to condemn” by the City.

Thus, the billboard owner was not entitled to any damages, including loss of goodwill, as there was never a “taking” of the billboard’s property interests.

Looking Ahead

Not only did 2021 produce interesting case law from both California courts and the U.S. Supreme Court, but the infrastructure bill is likely to keep eminent domain attorneys and the right-of-way industry busy for multiple years as long-awaited infrastructure projects start to take off. Stay tuned to our blog, *California Eminent Domain Report*, for updates in 2022!