2011 Eminent Domain Year in Review

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Looking back over the past few years, we've seen a significant uptick in right of way projects and important case decisions. Following a relatively quiet 2009, we saw increased activity in 2010, with regulatory takings issues in particular (think *Guggenheim*) garnering significant attention. As we rolled into 2011, the momentum continued, with the status of redevelopment agencies across California dominating the headlines.

As we look to 2012, we expect another exciting year. As has become our custom, what follows is an eminent domain recap of 2011, along with our thoughts on what the Right-of-Way profession can expect in 2012.

The Elimination of Redevelopment Agencies
Still fresh in our minds, 2011 ended with a bang (to put it mildly), as the California Supreme Court issued a landmark decision – *California Redevelopment Association v. Matosantos*, 2011 Cal. LEXIS 13325 – eliminating redevelopment agencies in California. The decision sets the stage for the dissolution of California's redevelopment agencies and the establishment of "successor agencies" with elaborate "oversight committees" to dispose of redevelopment assets, satisfy existing redevelopment obligations, and funnel all remaining redevelopment funds back into the property tax system.

The first part of 2012 will be focused on the aftermath of the decision and cleaning up the rubble. We will be paying close attention to whether legislation is adopted to reach a compromise – or at least to clean up some inconsistencies created by the new law. In the meantime, we will track just how successor agencies begin the process of disposing assets and managing liabilities.

Regulatory Takings/Inverse Condemnation
While successful regulatory takings claims are few and far between, 2011 saw one such case in *Avenida San Juan Partnership v. City of San Clemente*, 201 Cal.App.4th 1256. The Court held that the City had engaged in spot zoning by treating the property's zoning differently than other similarly-situated properties for an improper purpose, and ultimately found a taking under the *Penn Central* factors despite the property's not suffering a complete elimination of an economically viable use. That the court found a taking under *Penn*

Central is particularly significant, as the decision represents the first reported case in California imposing liability under *Penn Central*.

In *Wardany v. City of San Jacinto*, 2011 U.S. Dist. LEXIS 57148, the agency placed a center median in the street, preventing left turns in and out of the owner's property. The owner claimed the business lost over half its sales as a result. Despite this impact, the Court concluded that there was no compensable taking because (1) the property retained an economically viable use and (2) the impairment did not qualify as substantial, as a matter of law, as the measure of "substantial" depends on the physical impairment, not the impact that impairment has on the property.

In *Colony Cove Properties v. City of Carson*, 640 F.3d 948, the owner of a mobile home park filed suit in federal court, alleging that the City's rent control ordinance deprived the owner of the value of its property while allowing park residents to sell their mobile homes at a premium (an argument similar to that put forth in *Guggenheim*). The owner asserted both a facial and an as applied challenge to the ordinance, claiming it violated the Fifth Amendment's Taking Clause. As is often the case, the Ninth Circuit Court of Appeals declared the owner's facial claim time barred since it was asserted after the statute of limitations had run. By contrast, the court held the as-applied claim unripe since the owner failed to first file an inverse condemnation action in state court, which was a prerequisite to bringing the claim in federal court.

In *Butte Equipment Rentals, Inc. v. California Air Resources Board*, a property owner unsuccessfully challenged several regulations that it claimed resulted in a taking of its ability to mine its property. In an unpublished decision, the Court held that because the regulations impaired only one portion of the owner's rock quarrying business and the owner was still free to mine, quarry, and sell rock for many other unregulated purposes, the owner was still able to make an economically viable use of its property.

In *Gurrola v. City of Los Angeles*, the Court issued an unpublished decision declaring that a subsequent purchaser knowingly acquiring property potentially impacted by a government taking does not have standing to pursue an inverse condemnation claim since the price paid for the property reflected the known taking.

Business Goodwill

In *Galardi Group Franchise & Leasing, LLC v. City of El Cajon*, 196 Cal.App.4th 280, the Court held that despite a franchisor's involvement in a business, the franchisor still fails to qualify for recovery of goodwill unless it has an ownership interest in that business because recovery of goodwill is expressly limited to those "operating a business on the property." However, the Court also held that a franchisee's waiver of its rights to compensation can effect an assignment of those rights to the franchisor, including rights to goodwill losses (which, as a result, allows the franchisor to recover for the franchisee's – but not its own – loss of goodwill).

Property Valuation

In *Charter Communications Properties v. County of San Luis Obispo*, 198 Cal.App.4th 1089, the Court held that when assessing the fair market value of a private utility's possessory interest in the public right-of-way, the County tax assessor can disregard the utility's agreed-upon remaining term of possession and instead assume a much longer anticipated term of possession to match reality. This may result in private utility companies experiencing much higher assessed values for their leasehold interests in public roads and highways.

In *People ex rel. Department of Transportation v. 927 Indio Muerto*, the Court issued an unpublished opinion in which the primary valuation dispute centered on an interpretation of the resolution of necessity. The Court held that the resolution could not be interpreted as broadly as the owner hoped, and therefore significantly reduced the owner's damages claim. The Court also held that it was appropriate for the judge – as opposed to the jury – to determine the scope of the resolution.

In *People ex rel. Department of Transportation v. Bakker*, the Court issued an unpublished opinion concluding that when condemned property is subject to a roadway easement, it ordinarily warrants an award of only nominal value. The court explained that absent a showing that the property possesses "something special" that creates a particular value, nominal value applies.

In reaching this conclusion, the *Bakker* court acknowledged that such property may well have measurable value in the market, particularly in areas where value is measured by gross acreage. Even so, the court affirmed a directed verdict which reduced the award for the portion of the property subject to the easement by more than 99 percent: "[i]f the fact that a parcel is usually sold based on gross acreage proved that the portion of the property subject to a roadway easement has special value, the rule [establishing nominal value for such property] would never apply."

Precondemnation Damages
In *City of Los Angeles v. Superior Court (Plotkin)*, 194 Cal.App.4th 210, a number of property owners sued the City for inverse condemnation, alleging that the City created "condemnation blight" by buying nearby properties in their neighborhoods, relocating the residents, demolishing the structures, and leaving the properties vacant. The court held that the City was not liable for inverse condemnation because the City's acquisitions were voluntary and unrelated to a public project.

In *Joffe v. City of Huntington Park*, 201 Cal.App.4th 492, the Court declared that in determining a property and business owner's entitlement to precondemnation damages, the appropriate analysis focuses on the agency's conduct, not the impacts suffered by the owner. Thus, despite the fact that the business was forced to close, meaning the property's owner lost its only tenant, the agency was not liable for precondemnation damages because it had neither acted unreasonably nor engaged in unreasonable conduct.

Right to Take/Procedural Missteps
In *Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market*, 2011 Cal. LEXIS 12171, the California Supreme Court held that one party's withdrawal of a condemnation deposit does not result in the waiver of any other party's right-to-take challenge, despite the general rule that withdrawal of a condemnation deposit effects such a waiver pursuant to Code of Civil Procedure section 1255.260.

In *DFP, LTD v. Sacramento Regional County Sanitation District*, the agency recorded a final order of condemnation stating it had acquired an easement in the property when it had actually acquired fee title. The agency thereafter corrected the final order, but not before a new buyer had acquired the property. The Court issued an unpublished decision holding that the buyer, if determined to be a bona fide purchaser for value, is not bound by the "corrected" final order (i.e., as to the buyer, the agency's acquisition is limited to the easement interest stated in the final order that was recorded at the time of the sale).

In *City of Gardena v. Rikuo Corporation*, 192 Cal.App.4th 595, the parties reached a settlement through a stipulated judgment and left $750,000 on deposit to address ongoing environmental remediation, agreeing

that the trial court would retain jurisdiction over the disbursement of the funds. When a dispute arose over the court's distribution of the funds, the property owner sought to appeal the court's post-judgment order. The Court dismissed the appeal, concluding that the order was not appealable because post-judgment orders are only appealable if they follow a judgment that is itself appealable. Since a stipulated judgment typically is not appealable, any post-judgment orders arising from such a judgment are similarly not appealable.

In *Cobb v. City of Stockton*, 192 Cal.App.4th 65, a condemnation action was dismissed after nine years of failing to make its way to trial. The property owner then filed an inverse condemnation action against the City. The owner's inverse action was initially dismissed on the grounds that it was time-barred (the City took the property over nine years ago, well outside the statute of limitations for an inverse condemnation claim). On Appeal, the Court reversed, holding that the inverse claim did not accrue until the City's occupation of the property became wrongful, which occurred when the eminent domain action was dismissed.

Themes for 2012

In (at least) the first part of 2012, most attention will continue to be focused on the redevelopment saga. Either through efforts to reincarnate some version of redevelopment, simple clean-up legislation and/or the winding down process, this is sure to be an area in the news. We expect at least some clean up legislation to address some procedural inconsistencies in the existing law, and it is likely that there will be efforts to restore at least the affordable housing component of the redevelopment law. Indeed, legislation (1) to stay the effect of the law while further compromise is explored and (2) to reinstate the affordable housing funding are already circulating in Sacramento. Any effort to restore redevelopment as a whole is both speculative, potentially subject to the Governor's veto even if it occurs, and potentially subject to attack under Proposition 1A even if it avoids a veto.

We also expect regulatory takings decisions to be in the news. The shift towards greater scrutiny of government regulation and the renewed focus on the *Penn Central* test will likely be themes throughout 2012.

Finally, we expect to see an increasing split in the way the public perceives the use of eminent domain. As *Kelo* recedes in many people's minds, the general "eminent domain abuse" mentality also recedes from the mainstream public. And, with the economy continuing to falter and major infrastructure projects providing large numbers of jobs, we expect more public support for traditional uses of eminent domain for public works projects.

On the other hand, if agencies find ways to implement redevelopment-type strategies and/or otherwise engage in questionable uses of eminent domain, the *Kelo* torch-bearers will likely surface quickly, and in mass.

In other words, the public relations side of eminent domain will be huge in 2012. If agencies can convince the public that they are using eminent domain for "good," they will likely receive considerable support – especially where the project is viewed as something that will create jobs. If agencies are viewed as using eminent domain for "bad," public outcry will be swift, and agencies may find that they have trouble obtaining Board support for projects that will vilify the Board members approving them.

While we've tried to highlight the important case decisions from 2011, it's impossible to cover everything. Our blog, *California Eminent Domain Report*, had over 100 posts in 2011, as we try to keep our followers up

to date on everything right-of-way related, such as announcements of major projects, eminent domain news stories, trial court decisions, legislative updates, and industry events across California. We expect 2012 to bring much of the same, and we hope you'll subscribe to the blog (if you haven't already) to make sure you're on top of important topics as soon as the news breaks.