2012 Eminent Domain Year in Review & 2013 Forecast

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As we look back on 2012, it was unquestionably a busy year. Federal funds continued to make their way to local projects and shovels continued to break ground for infrastructure projects. The potential use of eminent domain to acquire underwater mortgages made headlines across the country, although the plan remains purely theoretical, having not been attempted in any jurisdiction. And, many in California were left scratching their heads trying to figure out just how to deal with the dissolution of redevelopment agencies.

As we look forward to 2013, we expect another exciting year. As has become our custom, what follows is an eminent domain recap of 2012, along with our thoughts on what the Right-of-Way profession can expect in 2013. With so many published decisions in 2012, we have not included any unpublished decisions in our review.

However, there were several interesting unpublished decisions and other stories this year. To keep up to date, we invite you to follow our blog, the California Eminent Domain Report, which covers issues in far more detail than we have time for in our year-end summary.

The Role of the Judge in Eminent Domain Trials

In *County of Glenn v. Foley* (Case No. C068750), the Court held it was improper for the trial court to grant the agency's *in limine* motion to exclude all of the owner's appraiser's opinions because the appraiser's comparable sales required material adjustments. The Court explained that an appraiser's quantitative adjustments to comparable sales do not amount to valuing a property other than the one in question (something that is not allowed under Evidence Code section 822). Instead, such adjustments are a natural and necessary tool to prove the fair market value of the subject property since no two properties are going to be exactly alike. Similarly, the Court held that even if comparable sales have different characteristics than the subject property (such as improvements, personal property, or orchards), these sales are admissible so long as they *shed light* on the value of the subject property.

In *City of Corona v. Liston Brick Company of Corona* (2012) 208 Cal.App.4th 536, the condemning agency sought to acquire an easement over a portion of a larger parcel. In valuing the part taken, the owner sought to rely on (1) another public agency's appraisal of the entire larger parcel, (2) the resulting purchase and sale agreement between the owner and that agency for the portion of the property not being acquired by the condemning agency, and (3) the option price offered by the other agency for the entire parcel in the event the condemning agency did not complete its acquisition. The Court held that all three types of evidence were inadmissible under Evidence Code section 822: the appraisal because it valued a different property than the one being condemned; the purchase and sale agreement because it was a sale to a public agency which could have acquired the property through eminent domain; and the option price for the larger parcel because the option was never exercised. The *Liston Brick Company* and *Foley* decisions, read together, provide some good lessons on the admissibility limits imposed by section 822.

In *City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, a property owner sought to recover severance damages caused by he agency's partial acquisition, including damages caused by changes in curb appeal, impacts to drainage, and temporary impacts to circulation and access. The trial court refused to admit any of the evidence, finding it speculative and non-compensable. The Court of Appeal disagreed, allowing evidence of temporary severance damages to be presented to the jury since they interfered with the owner's actual, intended use of the property. More generally, the Court suggested that as long as an expert can identify specific damages arising from a taking or public project, such damages generally are not inadmissibly speculative, and thus can be presented to the jury.

Business Goodwill

In *People ex rel. Department of Transportation v. Dry Canyon Enterprises* (2012) 211 Cal.App.4th 486, the Court of Appeal held that before a jury can determine the amount of a business' goodwill loss, in addition to demonstrating that the loss (i) is caused by the taking, (ii) cannot be prevented by relocation or other reasonable mitigation efforts, and (iii) will not be covered through another form of compensation, the business must also prove to the judge that it had goodwill before the taking. While this requirement already exists as implicit in the very concept of "loss of business goodwill" (one cannot lose someone one never had in the first place), the opinion also (1) arguably limits significantly a business goodwill appraiser's ability to utilize the cost to create approach to valuation, and (2) serves as a warning to appraisers using untested or non-traditional valuation methodologies.

Right to Take/Procedural Missteps

In *Council of San Benito County Governments v. Hollister Inn* (2012) 209 Cal.App.4th 473, the government's acquisition resulted in the taking of a hotel's key access point, leaving it with only an admittedly inferior secondary access point. The owner challenged the agency's right to take on the grounds that the agency did not analyze whether it should condemn substitute access in an effort to mitigate damage to the hotel. The Court held that where the condemning agency acquires only a portion of property, Code of Civil Procedure section 1240.350 allows the agency to condemn alternative access for the remainder parcel only if the taking results in the remainder becoming landlocked. In other words, if the taking leaves the remainder with *any* access, however inferior it might be, section 1240.350 does not provide the agency with any right to condemn substitute access. As a result, the Court overruled the owner's right to take challenge.

In *California Department of Transportation v. Menigoz* (2012) 203 Cal.App.4th 1505, Caltrans accepted the property owner's final demand of compensation five days before trial, and the parties entered into a stipulated judgment that did not mention litigation expenses. The owner then filed a motion to recover its

attorneys' fees. The Court held that if the matter settles at any time before the jury is empanelled, the agency has no liability for litigation expenses, regardless of how unreasonable its pre-settlement conduct may have been. On the other hand, once trial commences, the agency could face liability for litigation expenses – even if the parties reach a settlement before the trial ends.

Regulatory Takings/Inverse Condemnation
In *West Washington Properties v. California Department of Transportation* (2012) 210 Cal.App.4th 1136, the Court rejected an inverse condemnation claim arising from Caltrans' requiring the removal of an 8,000 square foot "wallscape" advertising space on a property owner's building, explaining that general regulations restricting the use of property – such as Caltrans' enforcement of the Outdoor Advertising Act – constitute an exercise of the police power for an authorized purpose and do not constitute takings. The Court also held that Caltrans was not estopped from demanding the removal of the wallscape due to its failure to enforce its regulations for a number of years, explaining that government inaction cannot form a proper basis to estop the government from enforcing a law intended to benefit the public.

In *Pacific Bell Telephone Company v. Southern California Edison Company* (2012) 208 Cal.App.4th 1400, one private utility company sued another private utility company for inverse condemnation arising from damage to the company's telephone cable. At issue was whether a private utility company could be held liable for inverse condemnation and, if so, whether it was a strict liability standard or a reasonableness standard. The Court held that a privately owned utility company could be liable in inverse condemnation, and that the same strict liability standard applicable to public agencies also applied to the utility company.

Other Valuation-Related Litigation
In *Duea v. County of San Diego* (2012) 204 Cal.App.4th 691, a redevelopment agency threatened to acquire an owner's property under eminent domain. Prior to the filing of a condemnation action, the owner sold the property to the private developer working with the redevelopment agency on the redevelopment project. When the owner then sought to transfer his Proposition 13 base year value to a replacement property (a beneficial tax treatment available to condemnees and owners who sell under threat of eminent domain), the County Assessor denied his request because the sale was to a private developer – not a public entity. The Court upheld the County assessor's decision on a number of procedural issues. In doing so, the Court implied that if a property owner faces condemnation by anyone other than apublic entity, the owner loses the ability to transfer the Proposition 13 base year value to a replacement property if the owner sells before the condemnation action is filed.

In *Western States Petroleum Association v. State Board of Equalization* (2012) 202 Cal.App.4th 1092, the State Board of Equalization adopted a new rule for petroleum refineries, directing county tax assessors to start treating their land, improvements, and all fixtures and equipment as a single appraisal unit. This meant that in a traditional real estate market, all the depreciation of the fixtures and equipment would be wiped out by increasing property tax values (and refineries' property taxes would increase). Petroleum refineries filed suit challenging the rule, and the Court of Appeal agreed with the refineries, holding that the Board of Equalization could not adopt new valuation formulas in an attempt to manipulate the restrictions on the taxation of property under Propositions 13 and 8. Recently, however, the California Supreme Court agreed to hear the case, so the Court of Appeal opinion is superseded by the grant of review. Stay tuned.

United States Supreme Court Interested in Takings
After passing on a number of Fifth Amendment issues in recent history, the U.S. Supreme Court finally issued a takings decision in 2012, and is scheduled to issue two more in 2013.

In *Arkansas Game and Fish Commission v. United States* (2012) 133 S.Ct. 511, the Court held that there was no categorical exclusion by which the government could avoid paying just compensation under the Fifth Amendment for the temporary flooding of private property. The Court explained that relevant factors in determining whether a temporary flooding rises to the level of a compensable taking include: (i) the degree to which the invasion is intended or is a foreseeable result of authorized government action; (ii) the character of the land at issue and the owner's reasonable investment-backed expectations regarding the land's use; and (iii) the severity of the interference.

In 2013, be on the lookout for the Court's decision in *Koontz v. St. Johns River Water Management Dist*. (2012) 133 S.Ct. 420, in which the Court will decide whether the essential nexus and rough proportionality tests required to be satisfied for government land-use exactions also apply to government demands for property owners to dedicate money, services, labor, or any other type of personal property to a public use. Oral argument is scheduled for January 15, 2013.

Finally, while no oral argument date has yet to be set, it's also worth following *Horne v. U.S. Department of Agriculture* (2012) 133 S.Ct. 638, in which the Court will decide whether a federal government program requiring raisin "handlers" to turn over a percentage of their raisin crops violates the takings clause.

Status of Redevelopment Dissolution

One of the major themes of 2012 was the fallout from the Supreme Court's December 2011 decision allowing the dissolution of California's redevelopment agencies. In 2012, the Legislature enacted some "clean up" legislation – AB 1484 – which corrected some of the obvious deficiencies of AB XI 26, but created other problems and uncertainties. More significantly, successor agencies, developers, and bond holders all fought back, filing more than a dozen lawsuits challenging the new law.

Eminent Domain and Underwater Mortgages

One other longstanding news story from 2012 involved the efforts by Mortgage Resolution Partners, a company formed to convince government agencies to condemn underwater mortgages in an effort to stabilize housing markets in areas particularly hard hit by the decline in property values. While generating tremendous media attention and at least an initial analysis by a number of local governments, we're not aware of the plan being implemented in any jurisdiction.

Themes for 2013

In 2013, we expect to see a lot of attention on the continuing redevelopment-dissolution saga. The lawsuits described above (and, in all likelihood, others like them) will make their way through the system, and the outcome will determine both how the dissolution process moves forward and who ends up with the redevelopment funds the state was so keen to capture when it initiated the dissolution. In addition, as successor agencies obtain a "Finding of Completion" under AB 1484, they will embark on the Long Range Management Plans that will eventually effect the disposal of the former redevelopment assets. In other words, we'll likely see a flurry of property sales within former redevelopment areas as we move into the second half of 2013.

We will likely see additional efforts from the "condemn underwater mortgages" proponents, but the plan appears to have some fundamental flaws that we expect will prevent it from being implemented with any meaningful success.

We expect the two takings decisions from the U.S. Supreme Court to make headlines; it is not often that we anticipate more than one takings decision in a single year.

Here in California, it's likely that the 2012 trend of increasing numbers of published eminent domain decisions will continue. More projects are moving forward, which means more eminent domain, which means more appellate rulings. Regulatory takings decisions will likely to make more news in 2013, and we may finally have a clearer picture of whether a few recent decisions really do portend a pendulum swing in favor of property owners in this area so traditionally stacked in favor of the government.

Finally, we will likely see additional decisions exploring the role of judge and jury in eminent domain, where the tension between the jury's role to determine compensation and the Court's role to determine all other issues – including issues of fact – continues to confound litigants and judges.