



Overly Broad Resolution of Necessity = Victory for Property Owner?

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Likely the worst case scenario a condemning agency can face is for it to pass a resolution of necessity, file a condemnation action, obtain prejudgment possession, build its improvement, and subsequently lose in court on a property owner's right to take challenge. The specter of the agency losing a vital public project by being ordered to surrender possession of property that it spent millions of dollars improving is enough to send shudders through even the most seasoned right-of-way professionals.

This is precisely what the City of Stockton (City) faced when the Court of Appeal in *City of Stockton v. Marina Towers LLC, et al.* (February 13, 2009, C054495) __ Cal.App.4th __, held that the project description in the resolution of necessity adopted by the City was so vague, uncertain and sweeping in scope that it failed to specify the "public use" for which the City sought acquisition of the property. That the City's resolution of necessity was stated so broadly was not surprising, as the City did not decide how it was going to use the property until after it decided to condemn it. According to the Court of Appeal, however, it wasn't just unsurprising, it was improper and qualified as a gross abuse of discretion, which defeated the City's right to take.

Now what? The property owner, Marina Towers LLC (Marina), argued that the City's action should be unconditionally dismissed, and the property, which had since been put to public use, should revert back to Marina. The City argued for a conditional dismissal, which would enable it to pass a new resolution of necessity while maintaining possession of the property. The Court of Appeal sided with the City given that an unconditional dismissal would cause a tremendous waste of taxpayer money and massive disruption in what had become a legitimate public use of the property. However, the City was ordered to pay Marina's litigation costs, including attorneys' fees.

Factual Background:

Marina's property in downtown Stockton was part of the City's revitalization plan, which called for the eventual development of private apartments on a portion of Marina's property. After preparing a draft environmental impact report, the City proceeded with a hearing on whether to adopt a resolution of necessity to condemn Marina's property. At the hearing on the resolution, Marina argued that there was no defined project that necessitated the taking of its property for a public use, and there was no identification of a specified public project that was the object of the proposed taking. Regardless, the City Council unanimously passed a resolution of necessity to acquire Marina's two parcels.

The City then filed a complaint in eminent domain less than a week after the resolution of necessity was adopted, and it also sought an order for prejudgment possession. Marina answered by raising a number of affirmative defenses including that the proposed project was not a public use. Marina also contended that the resolution of necessity was defective on its face because it failed to sufficiently identify the public use for which the property was to be condemned. Marina moved to stay the order for prejudgment possession, but the trial court denied the motion, finding that Marina had not established a probability of prevailing on its objections.

Three months after the resolution was passed, the City Council approved an EIR that called for a ball park and residential apartments on the property. The City subsequently decided to designate the west parcel of the property for public parking, and the east parcel for a ball park. By the time trial commenced on Marina's objections to the City's right to take, the projects had been built. The City moved for a nonsuit at the conclusion of Marina's opening statement at the trial over Marina's right to take. The trial court granted the City's motion. At the valuation phase of trial, the jury found that Marina was entitled to just under \$2 million as compensation for City's acquisition of the property. Marina appealed.

Holding on the City's Right to Take:

On appeal, the Court noted that the City's resolution of necessity described the project as the "acquisition of additional land" in "conjunction with potential development." According to the Court of Appeal, the City's defined "project" was essentially the condemnation itself. In fact, the City conceded that it did not have any specific purpose in mind when it initiated its condemnation proceedings against Marina. The Court held that the City's broad statement of purpose failed to meet Code of Civil Procedure section 1245.230's requirement of a stated public use.

The Court of Appeal also held that a governing body's post-resolution conduct is not relevant to whether a resolution's project description complies with Code of Civil Procedure section 1245.230. Thus, the Court concluded that if a resolution of necessity does not contain an adequate project description, the agency cannot make the findings required by Code of Civil Procedure section 1240.030 (public interest and necessity require the project; the project is most compatible with the greatest public good and least private injury; and the property is necessary for the project). Without these findings, an agency has no right to condemn, and any complaint founded on such a defective resolution should be dismissed. The Court held that the City had no right to take the property.

Remedy:

Having ruled against the City on its right to take, the Court of Appeal had to select one of two potential remedies. Code of Civil Procedure section 1260.120 provides that a court may order either: (1) immediate dismissal of the proceeding as to that property; or (2) conditional dismissal of the proceeding as to that

property unless such corrective and remedial action as the court may prescribe has been taken. The court also has discretion to order that the plaintiff pay the reasonable litigation expenses incurred by the property owner because of the condemning agency's missteps. (Code Civ. Proc., § 1260.120, subd. (c)(2).)

Marina sought an unconditional dismissal requiring the City to surrender possession of the property. The City, naturally, argued for a conditional dismissal so it could correct the problem. The Court of Appeal concluded that there is no dispute that the City put Marina's property to a public use, and an unconditional dismissal would result in Marina regaining possession of the property that had possibly increased in value by hundreds of thousands of dollars as a result of improvements Marina did not make. Because such a dismissal would involve enormous costs to the taxpayers and cause significant disruption to ongoing City-run operations, the Court found such a result inequitable and unnecessary. Thus, the Court ordered a conditional dismissal, affording the City an opportunity to adopt a new resolution of necessity for Marina's property that contained an adequate description of the proposed project. The court awarded Marina its reasonable litigation expenses in defending the action. However, it denied Marina's request for consequential damages under Code of Civil Procedure section 1268.620 because the section is only triggered if an action is dismissed or a final judgment entered.

Implication of Court's Ruling

Did the property owner, Marina, really win? While it prevailed on its challenge to the City's right to take and will recover litigation expenses, the City will most certainly adopt a new resolution of necessity with a proper project description. Thus, Marina will remain dispossessed of its property and will be required to proceed through another valuation trial to determine compensation. Marina has also undoubtedly been unable to access any funds paid for the property's possession or acquisition, as receipt of such funds would have constituted a waiver of its right-to-take challenge. (Code of Civ. Proc. §1255.260.) While an unconditional dismissal may in any event have resulted in another resolution by the City, Marina would arguably reap the benefits of the added value created by the City's improvements. However, a new eminent domain action would have a current date of value, which given a declining market, may eat up much of the value added by the improvements. And what if the City decided not to pursue a new resolution? Marina has effectively had its property held hostage during the condemnation process. Will Marina be able to recover its "consequential damages" under Code of Civil Procedure section 1268.620?

From the City's perspective, its project just got more expensive. It may now be responsible for several hundred thousand dollars in attorneys' and expert fees incurred by Marina, and the City has to go back through the entire resolution of necessity process. But clearly the City will gladly pay Marina's litigation expenses in order to avoid surrendering possession of the property.

One issue that was not addressed by the Court of Appeal in *City of Stockton* is whether Marina would have an opportunity to challenge the validity of the City's new resolution of necessity. Due process would suggest that Marina must be given such an opportunity. Could Marina argue that the City's adoption of a new resolution of necessity is a foregone conclusion, and thus a hearing over the adoption of such a resolution is a sham? In *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1127, the agency contracted with a private developer to build condominiums on the property to be condemned before holding a hearing to adopt its resolution of necessity. The appellate court held that the hearing was an empty formality because the condemnation was a foregone conclusion. (*ibid.*) If contracting with a developer to build a project results in the condemnation being a foregone conclusion, then what happens when the City tries to condemn property for a project that it already built?

Perhaps the real winner and loser remain to be seen.