



When Adopting a Resolution of Necessity, Can Failing to Consider a Substitute Condemnation Constitute a Gross Abuse of Discretion?

09.24.2012 | By **Bradford B. Kuhn, Rick E. Rayl**

While most lawsuits typically start with the filing of a complaint, eminent domain cases really start one key step earlier, with the condemning agency's adoption of a Resolution of Necessity. The Resolution establishes (i) the agency's right to take the property and (ii) the scope of the acquisition. In order to adopt a Resolution, the agency must make a set of findings, including finding that "[t]he proposed Project is planned and located in the manner that will be most compatible with the greatest public good and the least private injury." In *Council of San Benito County Governments v. Hollister Inn, Inc.*, No. H036629 (Sept. 19, 2012) the Court of Appeal grappled with a trial court's ruling that the agency's finding on this subject constituted a gross abuse of discretion because the agency purportedly had not properly analyzed whether it should condemn substitute access for a property that was losing its key access point because of the project.

At issue was whether Code of Civil Procedure section 1240.350 provided the agency with the authority – and, potentially, the obligation – to condemn substitute access as a result of the project's taking of the Hollister Inn property's main access point. At the hearing on the Resolution of Necessity, the agency declined to consider the owner's request that it secure alternative access for the owner across an adjacent property, concluding that it had no authority to condemn access rights from one private owner in order to convey them to another private owner. The owner argued that this decision constituted an abuse of discretion, arguing that section 1240.350 provided the agency with the authority to do the very thing it claimed it could not do.

The trial court agreed with the owner, concluding that the agency's refusal to consider the condemnation of alternative access qualified as a gross abuse of discretion. The court explained that if the agency did not consider condemning substitute access, it could not truly weigh whether its acquisition would create the

least private injury. The court issued a conditional dismissal, providing the agency with an opportunity to hold another public hearing to cure the defect in its Resolution. The court also awarded the owner more than \$200,000 in attorneys' fees. The agency held another hearing, and the case was ultimately settled, but the agency reserved its right to appeal the abuse of discretion finding.

On appeal, the court analyzed in detail the basis for condemning substitute property and the standards applicable when reviewing the findings contained in a Resolution of Necessity. In the end, the court reversed the abuse of discretion finding, wiping out the attorneys' fees award. But the path it took to reach that conclusion contained several interesting stops along the way.

Standard of Review for Resolution of Necessity

Most eminent domain practitioners can quickly state the basic rule on the findings for a Resolution of Necessity. Under Code of Civil Procedure section 1245.250, subdivision (a), a public agency's findings of public use and necessity conclusively establish those things. In other words, once the agency makes a finding that "[t]he proposed project is planned and located in the manner that will be most compatible with the greatest public good and the least private injury," the property owner usually may not dispute that finding.

But there is a twist that rarely gets mentioned. If the agency's findings are "influenced or affected by gross abuse of discretion," the conclusive presumption of section 1245.250, subdivision (a), will not apply. (See Code Civ. Proc., § 1245.225, subd. (b).) The *Hollister Inn* court explained the standard for finding gross abuse of discretion as follows:

A gross abuse of discretion may be established by showing that adoption of a resolution of necessity by the governing board of a public entity was arbitrary, capricious, or entirely lacking in evidentiary support, the governing body failed to follow the mandated procedure, or the governing body was irrevocably committed to taking the property regardless of the evidence presented at the resolution of necessity hearing.

In this case, the trial court had found a gross abuse in the fact that the agency apparently refused even to consider condemning a substitute access right for the property owner, despite the owner's (apparently undisputed) contention that the project would result in the taking of the hotel's primary access point – and the only access point to the main highway upon which the hotel was located.

Condemnation of Substitute Access

Code of Civil Procedure section 1240.350 applies when a part take of one property creates an access issue for the remainder. It allows the agency to condemn alternative access to that remainder parcel. This is precisely what the owner in *Hollister Inn* wanted the agency to do there.

The Court of Appeal examined the language of section 1240.350 and the legislative history leading to its enactment. The court concluded that section 1240.350 applied only where the taking resulted in the remainder parcel being totally landlocked. In other words, if the taking left the remainder with **any** access, however inferior it might be, section 1240.350 did not provide the agency with any right to condemn substitute access. This is important, for two reasons.

First, in *Hollister Inn*, the remainder retained access to a secondary street. Thus, section 1240.350 did not apply, and the agency could not have condemned substitute access. This effectively ended the court's analysis in that case. Because the agency had no power to condemn substitute access, its refusal to do so

could not possibly qualify as an abuse of discretion. The court thus reversed the abuse of discretion finding and the award of attorneys' fees that flowed from that finding.

Second, the conclusion highlights the limitations on an agency's right to condemn property from one private owner in order to give it to another private owner. This happened regularly under the redevelopment powers, but the December 2011 California Supreme Court decision in *California Redevelopment Association v. Matosantos* (2011) 53 Cal.4th 231, upholding the legislature's elimination of California's redevelopment agencies, ended that practice. Now, when an agency wants to condemn property from one private owner for the purpose of transferring it to another private owner, it must rely on a small group of statutory provisions, including section 1240.350.

The Court's decision in *Hollister Inn* construes those statutory rights quite narrowly. Indeed, in *Hollister Inn* itself, it appears undisputed that (1) the taking resulted in the loss of the hotel's primary access, (2) the loss of that access would be devastating to the business, and (3) it would have been quite easy to create replacement access to solve the problem using a small portion of a neighboring property. If one really wanted to focus on the "least private injury" prong of the public use and necessity findings, there likely would be no dispute that the project would cause considerably less private injury if the agency had condemned that substitute access.

But the Court held that section 1240.350 applied only when the taking rendered the remainder parcel completely landlocked. Any access remaining after the take, regardless of its viability, removed the agency's option under section 1240.350 to condemn substitute access. Moreover, in reading the Court's rationale for its decision, it seems clear that at least that court would similarly constrain each of the "substitute condemnation" statutes. This could ultimately impact agencies' efforts to condemn substitute property when the taking causes the displacement of an existing public use. (See Code Civ. Proc., §§ 1240.320-1240.330.) It could also impact agencies' attempts to condemn "remnant" parcels. (See Code Civ. Proc., § 1240.410.)

What if the *Hollister Inn* Parcel Had Been Landlocked?

In holding that section 1240.350 did not apply, the *Hollister Inn* court did not have to analyze whether the agency's conduct could have qualified as an abuse of discretion if substitute condemnation were available to it. Reading between the lines, it seems pretty clear that if section 1240.350 did apply in that case (i.e., if the take had left the property completely landlocked), the court might well have upheld the trial court's gross abuse of discretion finding.

But that does not mean that the agency would have been required to condemn substitute access for *Hollister Inn*. Rather, in order to avoid a gross abuse of discretion finding, the agency likely would only need to show that it considered the possibility. On its face, section 1240.350 is permissible, **not** mandatory. Thus, even if the taking rendered the property landlocked, the agency could have rejected substitute condemnation, made a finding of "least private injury," and not been subject to an abuse of discretion ruling. It is only the failure to consider the option that might have subjected the agency to such a ruling.