2013 Eminent Domain Year in Review & 2014 Forecast

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It's become our custom this time of year to provide our readers with an eminent domain recap from last year along with our thoughts on what to expect in 2014. 2013 felt a bit like déjà vu, as much of the year was dominated by recurring themes: redevelopment dissolution issues; headlines on the condemnation of underwater mortgages; the U.S. Supreme Court showing interest in takings; and eminent domain court cases focused on the role of judges and juries and inverse condemnation liability.

As always, we simply cannot cover everything in our yearly summary, so we invite you to keep up to date by following our blog, the California Eminent Domain Report.

The Role of the Judge & Jury in Eminent Domain Trials
In *City of Perris v. Stamper* (2013) 213 Cal.App.4th 1104, the City filed an eminent domain action to acquire a portion of vacant, industrially-zoned property necessary for a truck route. For purposes of valuing the acquisition, the City determined that the owner would be required to dedicate the truck-route property as a condition of any future development and therefore appraised the take as undevelopable agricultural land. The property owner claimed the dedication requirement should not be considered in determining fair market value because it was not reasonably probable that the City would impose the dedication requirement and, if imposed, the dedication would be unconstitutional. While the trial court judge determined the dedication was reasonably probable and constitutional, the Court of Appeal reversed, holding that because these questions involve factual determinations impacting the property's fair market value, they must be decided by a jury -- not the judge. Note that the California Supreme Court has agreed to take up this case, so it will be interesting to see whether the Court of Appeal decision stands.

Business Goodwill
While 2013 did not bring any reported decisions involving loss of business goodwill, we did see Governor Brown veto AB 374, a bill that was designed to make it harder for the judge to deny business owners the

right to claim loss of goodwill. While the bill passed both houses without a single "no" vote, Governor Brown felt the bill would have stripped judges of the right "to decide facts before a jury decides on compensation," and that judges are the ones best able to make those decisions.

Right to Take

In *Golden Gate Land Holdings, LLC v. East Bay Regional Park District* (2013) 215 Cal.App.4th 353, an agency proceeded to file an eminent domain action for a public project prior to its complying with the California Environmental Quality Act ("CEQA"). When the property owner challenged the agency's right to take on this ground, the Court of Appeal rejected the right-to-take challenge, thereby allowing the condemnation action to proceed. The Court held that CEQA regulations provide flexibility in tailoring a remedy to fit a specific CEQA violation, and the equities favored allowing the agency to proceed with its eminent domain action but not "actually acquire" the property until it complied with CEQA.

While not exactly a "right-to-take" case in the traditional sense, a very recent Court of Appeal decision could have wide-reaching implications for agencies' precondemnation planning efforts. In *Property Reserve, Inc. v. Superior Court* (March 13, 2014), the Court struck down an agency's efforts to conduct precondemnation investigation and testing pursuant to California's statutes allowing agencies to obtain a right of entry to conduct such activities. The key to the decision was that the Court held that any significant physical intrusion onto private property constituted a taking for which just compensation must be paid. This meant that the agency was required to proceed with an "eminent domain proceeding," which, in turn requires that the property owner be provided with certain protections, including the right to a jury trial – something the "right of entry" statutes do not provide. While not striking down all efforts to enter onto property for precondemnation investigation and testing, the decision calls into doubt the viability of California's right of entry statutes, which could have significant implications for agencies. The decisions following *Property Reserve* will garner significant attention, and it would not be surprising if agency seeks Supreme Court review given the stakes involved in the decision.

Regulatory Takings/Inverse Condemnation

In *Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, the County adopted a growth control initiative that generally prohibited the development of storage facilities in a certain area. When the County refused to allow a previously approved storage facility development to move forward, the owner filed an inverse condemnation action. The Court held that (i) the initiative did not apply to the owner's previously approved development, and (ii) the County's actions resulted in a compensable temporary regulatory taking entitling the owner to nearly one million in damages and over $725,000 in attorneys' fees. The Court applied the *Penn Central*-test and concluded the County unreasonably impaired the value or use of the property.

In *Powell v. County of Humboldt* (2014) 222 Cal.App.4th 1424, the court examined whether an aircraft over-flight easement required as a condition of development qualified as a taking under the "nexus" and "rough proportionality" tests from *Nollan* and *Dolan*. The court focused on whether the exaction at issue (the over-flight easement) would constitute a taking outside the exaction context. Concluding that it would not, the court held that the "nexus" and "rough proportionality" tests from *Nollan* and *Dolan* therefore did not apply and, as a result, no taking had occurred.

In *TrinCo Investment Co. v. United States* (2013) 722 F.3d 1375, the government intentionally burned over 1,700 acres of private timberland in an effort to eliminate the further spread of a wildfire. The impacted property owner filed an inverse condemnation action against the government for taking $6.6 million of its

timber. The government sought to dismiss the action under the "doctrine of necessity." The Court concluded that the necessity exception protects the government from liability only where "there is an imminent danger and an actual emergency giving rise to actual necessity." The Court remanded the case for further proceedings to determine whether the requisite "imminent danger" and "actual emergency" in fact existed.

In *Stueve Bros. Farms, LLC v. United States* (2013) 737 F.3d 750, the Court dismissed a property owner's inverse condemnation and de facto takings claims arising from a flood plain map issued by the U.S. Army Corps of Engineers, which increased the flood inundation line on an owner's property. While the owner claimed that the government's actions effected a taking of a 10-foot flowage easement over its property, the Court concluded that because there was never any actual flooding, and because the federal government had not implemented restrictions on the owner's property, no taking had occurred.

Precondemnation Damages

In *People ex rel. Dept. of Transportation v. McNamara* (2013) 218 Cal.App.4th 1200, Caltrans sought to acquire a portion of property necessary for a freeway bypass project. The property owner claimed that Caltrans unreasonably delayed in acquiring the property, and during the delay, the real estate market suffered a significant decline. As a result, the owner sought compensation based on the property's value before the market decline. While the trial court found Caltrans liable for precondemnation damages and therefore awarded compensation based on the property's pre-market-decline-value, the Court of Appeal reversed, clarifying that for precondemnation damages claims, the date of value does shift; rather, damages are recoverable between the date on which the agency commenced the "wrongful" conduct and the date of value solely to the extent that the agency caused the damages. Because the damages sought by the owner were solely due to market declines, and not Caltrans' wrongful conduct, the owner's precondemnation damages claim was thrown out. (Note that in a de facto takings claim, the date of value can move.)

United States Supreme Court Continues its Interest in Takings

In 2012, the United States Supreme Court issued its first takings decision in quite some time in *Arkansas Game and Fish Commission v. United States*, holding that government-induced flooding of limited duration may be compensable. In 2013, the lower courts upheld an award of $5.7 million in favor of the property owner, holding that the temporary flooding in that case did in fact rise to the level of a compensable taking. (736 F.3d 1364.)

In *Koontz v. St. Johns River Water Management Dist.* (2013) 186 L.Ed.2d 697, a property owner was involved in an 18-year battle over the development of a nearly 15-acre parcel of land. The owner requested a permit to develop 3.7 acres of the property, much of which was designated as protected wetlands. The owner offered to dedicate the remaining property for conservation in an effort to mitigate any environmental impacts from the proposed development. The government agreed to the owner's offer of dedication, but also insisted that the owner pay for improvements to government-owned property miles away. The owner refused and a development permit was never issued. The owner filed an inverse condemnation action, and the Court held that *Nollan* and *Dolan*'s "essential nexus" and "rough proportionality" standards that apply to government attempts to exact land in exchange for a land use permit also apply to the government's attempt to demand monetary exactions. The Court also held that a property owner need not accept a government permit in order to challenge it. (Note that the California Supreme Court currently has pending before it the first significant post-*Koontz* case in California involving this issue. *California Building Industry Association v. City of San Jose* (2013) 216 Cal.App.4th 1373, involves a challenge to inclusionary housing rules.)

In *Horne v. U.S. Department of Agriculture* (2013) 186 L.Ed.2d 69, the United States Department of Agriculture initiated an enforcement action against California raisin "handlers" for their failure to comply with certain regulations requiring handlers to pay assessments and contribute to raisin reserves. The handlers asserted as a defense to the enforcement action that the regulations would result in a taking of their property. Addressing the procedural issue of whether the handlers could raise such a claim, the Court concluded it was appropriate. Although the Court declined to address the actual merits of the takings claim, the decision is noteworthy as it potentially represents a crack in prior Supreme Court precedent limiting what constitutes a regulatory taking.

In early 2014, the Supreme Court issued yet another takings decision, *Marvin M. Brandt Irrevocable Trust v. United States* (2014) 2014 U.S. LEXIS 1788. In *Brandt*, the Court held that the U.S. Government does not possess an implied reversionary right over property granted to railroads under General Railroad Right-of-Way Act of 1875. This is important in cases where the railroad abandons the right of way. Until now, the Government has claimed its reversionary rights after abandonment allowed it to convey the rights of way for use in the "Rails to Trails" program. The *Brandt* decision means that the underlying fee owners own that abandoned right of way, raising concerns about the continued viability of "Rails to Trails."

Status of Redevelopment Dissolution

2012 was filled with quite a bit of turmoil surrounding the dissolution of redevelopment agencies. 2013 involved much of the same, as local agencies continue to struggle with the dissolution process and, in particular, the disposition of former redevelopment assets. There were, however, two legislative enactments designed to provide at least some clarity/relief.

With the dissolution of redevelopment agencies, the Polanco Redevelopment Act, which provided the government with tools to clean up contaminated property, was also eviscerated, since the clean-up provisions only applied to redevelopment agencies. To fix this problem, the Legislature enacted AB 440, which essentially creates "Polanco Act 2.0" by providing that other government agencies can implement most of the original Act's provisions. The law took effect January 1, 2014.

In early 2014, the Legislature also passed AB 471, which makes changes to the powers of "Infrastructure Financing Districts." While IFDs exist in a far more narrow realm than redevelopment agencies had, AB 471 expands their powers, including creating some ability for IFDs to function in former redevelopment areas. It remains to be seen whether this will create some (admittedly limited) version of "Redevelopment 2.0."

Eminent Domain and Underwater Mortgages

The idea that eminent domain might be used to right wayward housing markets has been floating around since 2012. The idea, espoused primarily by Mortgage Resolution Partners, is fairly simple: the government condemns underwater mortgages at low values and provides the property's owner with a new loan at less than 100 percent loan-to-value. The concept faces significant economic and legal challenges, but many still see it as a possible panacea, allowing agencies to fix their ailing markets and stem the tide of foreclosures.

Richmond, California became the epicenter for the debate, and as it moved closer to actually commencing eminent domain actions, the financial market fought back, filing peremptory lawsuits designed to strike down the plan before it even began. While the lawsuits did not succeed legally, the opponents have (thus far) won the war, as Richmond's City Council has not mustered the necessary votes to begin condemnation proceedings.

Meanwhile, across the country, the idea continued to spread, with rumors that cities in New Jersey, Minnesota, Pennsylvania, and Illinois – along with several other cities in California – were all considering the idea. But for all the "expansion" the idea saw in 2013, one fundamental thing remained: to our knowledge, not a single condemnation case has been filed anywhere in the country to condemn an underwater mortgage.

Themes for 2014

In 2014, we expect more decisions involving regulatory takings, (perhaps) the final chapter in the underwater mortgages saga, more efforts to reinstate at least limited aspects of redevelopment law, and a lot less attention on the U.S. Supreme Court, which will almost certainly not issue takings opinions over the next couple of years at anything like the pace we've seen in the past two years.

With respect to underwater mortgages in particular, it seems that as the housing market continues to improve all on its own, the urgency and drive to institute condemnation proceedings will diminish. Our gut reaction to this is that 2014 may be the final realistic year to get the program off the ground. If it doesn't happen this year, it becomes tougher to see it ever happening.

One final note. For projects that rely on federal funding, there may be some tense moments in 2014. The Highway Trusts Fund faces potential shortfalls later this year, absent action by Congress. Whether this will delay funding to ongoing projects or limit the funds available for new projects remains to be seen, but this is definitely something to watch for as we get into the second half of the year.