



Court of Appeal Explains how the Language in the Resolution of Necessity Impacts Eminent Domain Trials

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One of the issues often disputed between public agencies and property owners in eminent domain actions is the assessment of severance damages and, in particular, whether damages should be based (i) solely upon the terms of the resolution of necessity, or (ii) upon evidence concerning construction of the project in the manner proposed. A recent Court of Appeal opinion, *Sacramento Area Flood Control Agency v. Dhaliwal* (April 21, 2015) provides some guidance as to how these issues interrelate, holding that evidence outside the Resolution of Necessity is admissible to help define the scope of severance damages, provided that evidence does not conflict with the Resolution of Necessity's express terms.

County of San Diego v. Bressi

Thirty years before *Dhaliwal*, in *County of San Diego v. Bressi* (1986) 184 Cal.App.3d 112, the Court of Appeal addressed in detail the tension between the language of the Resolution of Necessity and evidence concerning the agency's plans regarding the project. In *Bressi*, the County sought an aviation easement over Bressi's property to allow airplane overflights for planes approaching an expanded Palomar airport. The Resolution provided that the aviation easement encompassed overflights by all types of aircraft, but at trial, the County argued that it did not plan to fly commercial jets into the airport. By excluding commercial jets – and the increased noise associated with jets – the County sought to limit the severance damages caused by its easement.

The *Bressi* court rejected the County's effort. In a holding routinely cited by landowner attorneys, the *Bressi* court held that the jury in a condemnation action must assess damages based on the most injurious use reasonable possible under the terms of the Resolution. In so doing, the court explained that the condemning agency cannot introduce evidence which contradicts (i.e., purports to limit) the scope of the taking and the

damage it could cause. Thus, the County's evidence regarding its plans not to fly commercial aircrafts over Bressi's property was inadmissible since the Resolution contained no such limitation.

The *Bressi* decision appears somewhat at odds with Code of Civil Procedure section 1263.420, which provides that severance damages include damages caused by "construction and use of the project for which the property is taken in the manner proposed by the [agency] . . ." If a condemning agency cannot introduce evidence concerning the "manner proposed" for its project, how is the jury to assess damages under section 1263.420?

The answer lies in the scope of the *Bressi* decision. *Bressi* does not hold (contrary to what some landowner attorneys assert) that the agency cannot introduce evidence concerning its project if it does not appear on the face of the Resolution. Rather, *Bressi* precludes only evidence that **contradicts** the Resolution.

Sacramento Area Flood Control Agency v. Dhaliwal

Sacramento Area Flood Control Agency v. Dhaliwal (April 21, 2015) provides crucial guidance as to how *Bressi* and section 1263.420 interact. In *Dhaliwal*, the property owner filed a motion *in limine* to exclude any evidence of possible access to the property by a particular road on the grounds that such evidence contradicts the resolution of necessity and would require future permits. The agency countered that there was no contradiction, and it was entitled to introduce post-project plans to provide access to the property. The court allowed all evidence to go to the jury.

On appeal, the Court explained that the jury is entitled to consider any factor affecting market value so long as it is not speculative and does not contradict the scope of the taking defined by the Resolution of Necessity. The Court held that it was proper for the jury to hear evidence regarding the owner's potentially obtaining post-project access, as it was not speculative and did not contradict the resolution.

In *Dhaliwal*, while the agency's Resolution did not specify that the owner reserved certain access rights, the Resolution did not prohibit the owner from securing such rights in the future, meaning there was no conflict. The Court held that absent a contradiction, the agency's failure to "carve out an exception" or provide the owner with access rights is of no consequence.

Lessons Learned

The *Dhaliwal* opinion is important for public agencies. It supports the proposition that an agency need not spell out every detail of its project in its Resolution, and that as long as the project in the manner proposed does not conflict with the Resolution of Necessity, it is appropriate to introduce such evidence to the jury.

Despite this, condemning agencies are advised to pay close attention in crafting their Resolutions. Just as drafting a Resolution too narrowly can create real problems during the project's construction, drafting it too broadly can give rise to a claim for damages that in reality will never occur.

In short, crafting a Resolution's language is not a "cookie cutter" exercise. Agencies should take real care and rely on the assistance of a qualified eminent domain attorney to ensure that the Resolution's language strikes the proper balance. And for projects involving multiple acquisitions, agencies should examine each Resolution on its own merits, rather than coming up with stock language and applying it to every Resolution being adopted. Taking a little extra time at this early stage can save agencies vast amounts of time and money down the road.