



Condemn Now, CEQA-Compliance Later? OK. Maybe...

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Acquiring property for public projects typically does not occur until after the project has received environmental approval. While this is the generally accepted rule – and it makes sense for a number of reasons – must a project receive environmental clearance before an agency may begin the property acquisition process? In a recent published decision, *Golden Gate Land Holdings, LLC v. East Bay Regional Park District*, the California Court of Appeal answered no, and permitted an agency to proceed in reverse order: filing an eminent domain action prior to its complying with the California Environmental Quality Act ("CEQA").

Will this method work in most circumstances? Probably not; the Court's holding appears limited given the unique circumstances involved. Should public agencies adopt this strategy moving forward? Not without fully understanding the risks. Should property owners give up on challenging right-to-take in an eminent domain action when an agency fails to follow environmental laws? Not if there is a real advantage to be gained if such an opposition is successful.

Background

As part of developing the San Francisco Bay Trail Project, a 400+ mile recreational corridor intended to encircle the San Francisco and San Pablo bays, the East Bay Regional Park District sought to acquire about 7.5 acres from Golden Gate Land Holdings. The District offered \$1.686 million for the property, and after no agreement could be reached, the District held a hearing to consider the adoption of a resolution of necessity to authorize eminent domain proceedings.

At the hearing, Golden Gate objected to the adoption of the resolution of necessity due to the District's failure to prepare an Environmental Impact Report ("EIR") to analyze the project and its environmental effects in compliance with CEQA. The District, over Golden Gate's objections, determined the project was exempt

from CEQA pursuant to CEQA Guidelines, section 15325, which provides an exemption for transfers of property in order to preserve open space, habitat, or historical resources. The Board concluded it was sufficient to rely on a feasibility study commissioned to determine the best alignment for the Bay Trail segment.

Golden Gate's Petition

Shortly after the District's adoption of the resolution of necessity, Golden Gate filed a petition for writ of mandate and complaint for injunctive relief, asserting the District had violated CEQA and the eminent domain law. In response, the District asserted the notice of exemption under CEQA only applied to the acquisition of the property -- not the construction of the Bay Trail, and that as such there was no basis to halt the District's acquisition of the property. The District also proceeded with filing its eminent domain action.

The Trial Court's Decision

The trial court partially granted Golden Gate's petition for writ of mandate, concluding (1) the District had approved a project that included both the proposed property acquisition and the proposed trail improvements, (2) the District's resolution erroneously concluded the project was exempt from CEQA compliance, and (3) while some authority suggests CEQA review must be completed before an eminent domain case is initiated, that approach was unpersuasive in this case.

The court allowed the District to move forward with its eminent domain action, but required it to vacate the resolution's conclusion that the project is exempt from CEQA and instead prepare an EIR. The court also held that the District "must not actually acquire the property without first completing compliance with CEQA."

The Appeal

Golden Gate appealed, arguing that the entire resolution of necessity should be set aside due to the improper CEQA exemption and because the District committed a gross abuse of discretion in making its necessity/least private injury findings without first complying with CEQA.

The Court of Appeal held that the CEQA regulations provide trial courts with flexibility in tailoring a remedy to fit a specific CEQA violation, and in this case the trial court did not abuse its discretion in concluding that the equities favored allowing the District to proceed with its eminent domain action but not "actually acquire" the property until it complied with CEQA.

The Court rejected Golden Gate's argument that the environmental review process would be tainted by allowing the District to proceed with the eminent domain action. Nonetheless, the Court stated that the CEQA analysis must be considered on the merits and without regard for the pending eminent domain action or the consequences of abandoning that course of action.

Conclusion

From an environmental-compliance standpoint, the Court's decision makes sense. CEQA Guidelines section 21168.9 clearly provides discretion to the trial court to leave certain approvals in place if the court finds that the public agency violated CEQA. In other words, failure to fully comply with CEQA should not entirely halt a major public works project.

From an eminent domain-standpoint, the Court's decision raises a number of issues, at least if it is read broadly. For instance:

- In adopting a resolution of necessity, a public agency is required to find that the property is necessary for the project and that the project is designed in a manner that is compatible with the greatest public good and the least private injury. How does an agency make these findings when it still needs to conduct its environmental review and the final project has not been fully identified?
- What if the environmental review process concludes that more or less property is needed for the project; in the case of more property being needed, the agency would have to go back and get a new appraisal, make a new offer, and adopt a new resolution of necessity; and in the case of less property being needed, the agency would have to partially abandon the eminent domain action, thereby becoming exposed to an award of attorneys' fees. This does not seem like the best use of public funds.
- Under the court's analysis, the agency can commence eminent domain proceedings, but it cannot "acquire" the property until it completes its environmental review. How does this work? What if the property owner wants to sell the property to the agency – is it prohibited from doing so? What happens if the environmental review process takes years – does the eminent domain action sit on hold in the meantime? Can the agency take prejudgment possession – and if so, how does the court conduct a balancing of the hardships when the project isn't fully defined and the owner does not know what the full impacts will entail?

Many of these questions likely were not an issue in this particular case. While the case was on appeal, the District secured environmental approvals, vacated its original resolution of necessity, and adopted a substitute resolution of necessity in conformance with the certified EIR. Therefore, when the Court of Appeal addressed the adequacy of the remedy, it did so knowing that an EIR had already been certified for the project and a proper resolution adopted, and as a result the Court may not have considered all the potential ramifications of its holding.

Public agencies should not rely heavily on this decision for a "condemn then comply" approach. The CEQA Guidelines provide that "CEQA compliance should be completed prior to acquisition of a site for a public project." (CEQA Guidelines, section 15004, subd. (b)(1).) There is good reason for this; agencies should understand a project's environmental effects – and the public should have an opportunity to weigh in – prior to irretrievably committing funds to property acquisitions. Moreover, the analysis of project alternatives during the environmental review process should not be influenced by prior property acquisitions.

With that said, funding for public projects has become a complex – and highly competitive – process, in which too many agencies are seeking too much funding for too many projects. The result is that funding agencies wield considerable power, and they demand the funds be put to good use in a timely manner. Funding commitments are therefore often tied to agencies quickly "certifying" the right-of-way – meaning securing possession of the needed properties. When these timelines become unmanageable (especially under California's drawn-out prejudgment possession process), it incentivizes agencies to look for opportunities to expedite the acquisition process, which could include commencing acquisition activities prior to final environmental clearance.