



Navigating COVID-19 for the Right of Way Industry

03.25.2020 | By **Bradford B. Kuhn**

COVID-19 has undoubtedly upended the world, including the way we do business and the future of our economy. While our focus should continue to be on the health and safety of our families, friends, and communities, many in the right of way industry are continuing to help move critical infrastructure projects forward. We have received a number of questions and concerns from clients on how the current pandemic affects the way we do business, and what to expect going forward. We will be hosting a webinar on **April 1, 2020 from 1:00 to 2:00 p.m. PT** to bring our industry together (virtually) and help answer as many questions as we can. **Please click here to register.**

In the meantime, we've provided a summary of issues for right of way professionals to take into consideration. In short, we will need to be prepared for delays and have patience as we work through a number of obstacles and challenges.

1. **Construction Delays.** California has declared a State of Emergency, ordering residents to "shelter-in-place". Does that mean construction of infrastructure projects is halted? No, critical infrastructure sectors may maintain continuity of operations, including a variety of public works projects and construction workers assisting with those projects. However, we understand that many contractors are struggling to secure necessary labor and materials, and some may be attempting to exercise force majeure clauses in their contracts to delay construction progress deadlines. See our infrastructure group's write-up on the applicability of force majeure provisions to COVID-19 and construction contracts. One bright side is that some localities seem to be viewing infrastructure construction as one of the few economic drivers still viable, and may look to fast track necessary approvals to keep construction moving forward at a time when most of the economy is simply shutting down.
2. **Court Closures.** California's Chief Justice has issued a statewide order suspending and continuing all jury trials for at least sixty days. Many courts are not holding hearings on civil matters except in emergencies, and for those still holding hearings, most courts are recommending or requiring court appearances via telephone. It is most likely that a routine hearing in a civil matter (e.g., status conferences and discovery motions) will simply be continued for weeks, if not months. From a right-of-way perspective, this could significantly impact timing

on motions for prejudgment possession, which could in turn delay the amount of time it takes for an agency to secure an order for possession to start construction activities. Even once any stay is lifted, criminal cases will take priority, and we expect the backlog to impact case scheduling for months into the future.

3. **Filing and Service Delays.** We are experiencing significant delays in the time it typically takes to file an eminent domain action and get assigned a case number and judge. With many businesses being closed, it also is becoming increasingly difficult to serve a summons and complaint on property and business owners. Agencies will need to plan accordingly in their typical condemnation timelines.
4. **Board Meetings.** Many public agencies are cancelling Board meetings, or at a minimum holding public meetings via teleconference. (See our write-up on California's order allowing for board meetings to take place via teleconference.) This may make it extremely difficult to adopt a resolution of necessity, further delaying the acquisition process.
5. **Title & Recording Issues.** Many County Recorders' offices are currently closed. This means public agencies are going to have difficulty recording easements, deeds, or final orders of condemnation, which could impact closing deadlines or obligations under purchase agreements, or otherwise delay transfers in title. Title and escrow companies are also experiencing delays due to the shelter-in-place requirements.
6. **Temporary Construction Easement Expirations.** Many public projects involve temporary construction easements (TCEs), which traditionally have a fixed duration or a specific expiration date. If construction is delayed or otherwise extended, public agencies may not be able to comply with their TCEs, potentially exposing them to inverse condemnation claims. Agencies should start reviewing their agreements now and see what extension rights are available, or what options may exist to ensure compliance. If it becomes clear that additional TCE rights will be needed and that negotiating those rights may be problematic, agencies should start planning to condemn those rights as soon as they reasonably can. For all the other reasons discussed in this e-alert, the timeline to gain possession of additional property rights is uncertain, but will likely be longer than usual.
7. **Appraisal and Site Inspection Issues.** Before issuing an offer to acquire property, agencies must offer the owner an opportunity to accompany the appraiser on a site inspection. Similarly, during litigation, appraisers typically like to conduct site inspections before rendering a valuation opinion. These site inspections may not be possible at this time, so appraisers need to start considering drive-by inspections or make other arrangements to obtain necessary access while ensuring safety. (The Appraisal Foundation has offered some guidance depending on the type of appraisal assignment.)
8. **Other Litigation Challenges.** With the absence of face-to-face meetings, it becomes incredibly difficult to conduct depositions, participate in mediations, or gain access to documents to respond to discovery. While many court reporters and mediation services are offering videoconferencing or other technological alternatives to in-person meetings, they may not suffice depending on the type of case, the issues involved, or the dollars at stake. Agencies and attorneys should start considering options if these critical litigation tools are postponed for several months.
9. **Valuation Problems.** One of the most difficult assignments valuation experts will experience is attempting to assess project impacts / damages versus other components contributing to real estate or business losses. Was it the temporary road closure or loss of parking, or was it some other external economic issue? With COVID-19, the ability to distinguish project impacts versus other issues becomes even more significant, as many businesses, particularly commercial/retail uses, are experiencing sudden and significant losses that are likely wholly unrelated to the project. Vacancies and collection losses are likely to increase significantly, and other economic factors may contribute to a sudden drop in value.
10. **Relocation Questions.** Tenant relocations may be extremely difficult at this time, as property tours, moving, and re-establishment activities may experience setbacks. Alternatively, some previously occupied locations may become available, providing more opportunities to successfully relocate a displaced business.

If you have questions during this challenging time, we are available to help assess how the current pandemic may impact your project and the right of way profession.