



A Cautionary Tale on Alleging Precondemnation Damages Versus a De Facto Taking

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Eminent domain cases typically revolve around a "date of value" – the date on which property is valued in determining the amount of just compensation the condemning agency must pay. That date is set by statute; typically, it is the date on which the agency deposits the amount of "probable compensation" to be awarded. But sometimes, the agency's activities, such as project planning and acquisition efforts, negatively affect the value of the property. In such circumstances, property owners may attempt to hold the agency responsible for such declines in value by claiming (1) precondemnation damages or (2) a de facto taking. While both claims are similar in that they involve holding the condemning agency accountable for damages caused by its precondemnation conduct, the difference in assessing damages is significant.

A recent California Court of Appeal decision, *People v. McNamara*, addressed the differences between the two claims, clarifying that (1) for de facto taking claims, the date of value shifts to an earlier date in time, as the "taking" occurred before the formal condemnation action was filed, and (2) conversely, for precondemnation damages claims, the date of value does not move, but damages are recoverable between the date on which the agency commenced the "wrongful" conduct and the date of value. The Court in *McNamara* chronicled the key differences between these two related claims, providing some crucial lessons for those involved with eminent domain and inverse condemnation actions.

Background

The McNamaras owned a 1.24-acre lot in Prunedale near Highway 101. While they had long planned to build a home on the property, the McNamaras became concerned when they learned of a potential freeway bypass project in the area that could impact their property. After being assured by Caltrans that the potential

project lacked funding, the McNamaras broke ground and ultimately moved into the home in 2004.

Meanwhile, Caltrans was taking steps to build its bypass project. After initially designating the McNamaras' property as a "full take," Caltrans re-designed the project to save the home. But the impacts were still severe: no front door access during four years of construction, an unusable driveway, a destroyed septic system, no access to a well -- which was the property's sole source of water, and a highway less than 50 feet from the residence. The McNamaras were not provided with the details of the impacts until 2007; had they known about them, they would have never built their home. While they started looking for a new home, the McNamaras did not have the financial ability to purchase a replacement property until they received the purchase proceeds from Caltrans.

Caltrans did not file its eminent domain action until 2008. Using the deposit proceeds, the McNamaras were finally able to purchase a replacement property in 2009. As trial approached in the condemnation action, the parties exchanged expert appraisal reports. The McNamaras' appraiser valued the take at \$1.55 million, and he also concluded the property should have been acquired in 2006, at which time it would have been worth an additional \$400,000. Caltrans' appraiser valued the take at just over \$1 million, with no amount for precondemnation damages.

The trial court found Caltrans liable for precondemnation damages beginning in 2006. The jury then awarded the McNamaras \$1.2 million for the property, plus \$175,000 for precondemnation damages. The trial court then issued a judgment notwithstanding the verdict, finding the McNamaras were entitled to \$400,000 for precondemnation damages since that was the only opinion of value offered on the issue. Caltrans appealed.

Appellate Court

On appeal, Caltrans argued that the McNamaras had not proven that Caltrans' pre-acquisition conduct caused any diminution of value to their property and, therefore, they were not entitled to recover any precondemnation damages. The Court of Appeal agreed.

The Court first started by distinguishing a claim for precondemnation damages as opposed to one for a "de facto taking." Specifically:

- **De Facto Taking:** A de facto taking occurs when there is a physical invasion or direct legal restraint prior to the date of value. Examples include a government agency's denying development permits on the basis that the government may want to acquire the property, and refusing to acquire the property unless the owner would sell at an agreeable price, or enacting a particularly harsh zoning regulation, designed to decrease any future condemnation award.
- **Precondemnation Damages:** Precondemnation damages liability occurs where a government agency acts improperly either by unreasonably delaying an eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation, and as a result of such action the property in question suffered a diminution in market value.

While both claims involve liability for pre-acquisition conduct by the agency, the difference in assessing damages can be significant. Where there has been a de facto taking, the date of value shifts to the date of the "taking," and all decline in value after that date is chargeable to the condemning agency, including damages wholly unrelated to the precondemnation activity of the public agency, such as a general decline in market value in the area. In contrast, where an agency is liable for precondemnation damages, the date of

value does not shift, and the agency is only liable for damages specifically caused by its activities; in other words, there is no liability for any decline in the market value of the property caused by general conditions unrelated to the activities of the agency.

Here, the McNamaras' damages calculation was solely based on a general decline in market value: what their property would have been worth if valued in 2006 instead of in 2008. While this may have been appropriate if the McNamaras were alleging a de facto taking, they were not; they were only seeking precondemnation damages, and therefore could only recover for declines in value directly attributable to Caltrans' conduct. There was no evidence that Caltrans' conduct affected the value of the property, as the McNamaras continued to live on the property, and they offered no evidence that the property's value was reduced during that period.

Because the McNamaras could not prove precondemnation damages, the Court reduced their damages award by \$400,000.

Conclusion

De facto takings unquestionably have a much higher threshold of liability as compared to the activities that may give rise to precondemnation damages. However, in seeking compensation, a property owner must thoroughly understand the differences between the two related claims, as the recovery may be significantly different in a rapidly changing real estate market (such as the one experienced in *McNamara* between 2006 and 2008). In a declining real estate market, a property owner would much rather succeed with a de facto takings claim, shifting the date of value to an earlier date to avoid the market down-turn. On the other hand, in an increasing real estate market, a property owner would be better off with a precondemnation damages claim, saving the date of value for as late as possible, while still seeking to recover for damages (such as lost rents) that may have occurred beforehand.

McNamara serves as a good reminder that public agencies need to be aware of the distinction between a de facto taking and precondemnation damages because it could have a dramatic impact on the assessment of the just compensation to be paid. It could also impact the legal instructions given to experts, and particularly, instructions related to the date of value. *McNamara* also reminds public agencies to tread carefully in their pre-acquisition efforts to avoid additional liability. It is a fine line to walk between conducting reasonable planning activities (which are unquestionably required for large public projects, even if they impact overall property values), and engaging in drawn-out acquisition efforts that begin to cause unreasonable, specific and direct injury to property owners.