

2021 EMINENT DOMAIN UPDATE: KEY DECISIONS IN PUBLIC USE AND JUST COMPENSATION



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PREREQUISITES TO THE TAKING

Utah: As long as taking is for the birds, not the environmental plaintiffs, it's a public use

In *Utah Dep't of Transp. v. Coalt, Inc.*, the Utah Supreme Court considered the public use of a taking instituted after a federal court upheld an environmental challenge to the Environmental Impact Statement (EIS) prepared by the Utah Department of Transportation (UDOT) for its Legacy Parkway Project and enjoined highway construction. In the middle of the protracted federal litigation, UDOT and the environmentalists settled. The settlement called for "additional measures to protect the wetlands and its wildlife inhabitants from the effects of the Parkway."¹

One of those measures? Get additional mitigation property for the Legacy Nature Preserve. Guess whose property was, as a consequence, now slated for eminent domain? You guessed it—Coalt's. Coalt objected to the taking, "arguing that UDOT did not have the authority to condemn Parcel 84 because it was not doing so for a transportation purpose or a public use, but to settle third-party litigation and mitigate a future unspecified transpiration project."²

The trial court rejected the argument, and the court of appeals affirmed, as did the Utah Supreme Court.

The court held that the statute authorizing UDOT to take property for highways includes a provision allowing for acquisition for mitigation of impacts from public transportation projects.³ In other words, UDOT's authority is not limited to taking property for highways but includes taking property to offset the impacts from highways. The court concluded that the fact that "UDOT agreed to take the additional mitigation property as part of a settlement is not legally relevant in and of itself. What matters is the purpose of the taking."⁴ The environmental litigation had a public purpose:

The very focus of the federal litigation was the question of what steps were necessary to minimize the environmental impact of running the Legacy Parkway along the wetlands of the Great Salt Lake. UDOT believed the 2000 EIS provided sufficient environmental protection. But the public interest litigants disagreed. The litigants did not advance a private, personal agenda. Rather their arguments centered on the sufficiency of the environmental impact statement.⁵

What of Coalt's "appeasement" argument that UDOT took the property to satisfy a third party settlement, and not for a statutorily approved highway project? No, the court held, "the fact that the public interest litigants influenced the final amount of mitigation that UDOT condemned for the Parkway is not necessarily material."⁶ A lawsuit, you see, is just another means of getting the "input from interested constituencies" that is just a natural part of the planning process. The nature of the input only becomes relevant "if the facts showed that UDOT actually took Parcel 84 to do something other than mitigate the effects of the Parkway, or that UDOT acted in bad faith."⁷

Now hold on just a second. Isn't there a difference between gathering input as part of the usual planning process, and making a one-on-one agreement with an identified private party in which the condemnor agrees to take identified private property? The Utah court concluded it was fine for the condemnor to agree with third parties to take Coalt's property in order to settle an unrelated dispute, something no private litigant could do.

After years of delay and having its first EIS and CWA permit thrown out by the Tenth Circuit, UDOT determined that the settlement agreement was necessary to end the dispute over environmental mitigation and lift the federal injunction that had halted the project. As in *G. Kay*, this demonstrates that UDOT's taking of Parcel 84 was motivated by its desire to proceed with the project. This supports rather than undermines the conclusion that the taking and associated mitigation was for the Parkway. The legislature and the governor agreed that the settlement was necessary to proceed with the project. We will not second-guess that determination absent an indication of bad faith.⁸

Chicago's redevelopment taking is still for public use because it prevents future blight

In *City of Chicago v. Eychaner*, the Illinois Court of Appeals revisited a case that it ruled on once before.⁹ Five years earlier, in *City of Chicago v. Eychaner*, the same court held that a redevelopment taking of Eychaner's property qualified as a public

use but remanded the case for a determination of the compensation owed.¹⁰

On remand, the jury determined just compensation was \$7.1 million. Also, while the case was remanded, the City changed its redevelopment plans. You know, the basis for the court of appeals' public use ruling. But the court's prior public use determination seems to have still bothered Eychaner, because he challenged it again:

[Eychaner] asserted the taking no longer served a permissible public use since the City had changed its plans for the area surrounding Eychaner's property. Specifically, Eychaner argued, "without the River West TIF Plan, there is no valid conservation plan—or any plan—on which the Blommer redevelopment project and the taking of defendant's property is based. It's a naked transfer of private property through the power of eminent domain to benefit a private party—now Fuji Oil Holdings, Inc. It is a taking for private, not public use, and is thus barred in Illinois."¹¹

Wait a minute, the city objected: same issue you lost. Eychaner claimed the circumstances changed, so he could raise the argument again. But apparently, he did not bring in evidence of these new circumstances or file a motion. The trial court agreed with the city, and concluded, first, that this new claim was outside the scope of the appellate court's remand, and second, that Eychaner should have objected earlier. So he appealed again.

Eychaner raises two arguments. First, he asserts the City has no right to take his property and that our ruling allowing the taking to prevent future blight was wrong and in conflict with supreme court precedent in *SWIDA*. Eychaner asks that we reverse that judgment and dismiss the eminent domain proceeding with prejudice. Alternatively, Eychaner contends the trial court erred in denying his motion to reconsider its denial of his traverse in light of the City's new North Branch Framework and asks that we reverse that denial and remand so the

trial court can reconsider in light of changed circumstances.¹²

No, the court held (again), law of the case. We're stuck with our 2015 public use decision, and so are you, property owner. But what about those alleged changed circumstances? Again, no deal. The owner should have raised it before trial and not after. The rule about a post-trial motion for a new trial requires a showing that the new evidence was not discoverable before trial. "He knew of the 'changed circumstances'—the North Branch Framework—before the second just compensation trial and had ample opportunity to bring the evidence to the court's attention."¹³

But even if they had been timely, the changed circumstances did not change the public use determination. The prior plans were not "superseded," but rather the new plans (and the old not-superseded plan) are part of a bigger plan that "together carry out the purpose of promoting the economic revitalization of the conservation area."¹⁴

The city, after all, has the public purpose of "prevent[ing] future blight."¹⁵ Yes, that's right. Take now to avoid future blight. But is that any kind of meaningful standard? After all, we're *all* potentially blighted in the future. As long as the condemnor has a study (which the city did) that says that, no problem. We suggest you read this part of the opinion, especially.

Supreme Court of India channels Magna Carta: When government takes property, it has obligation to pay

We can't pretend that we understand everything that is going on in the Supreme Court of India's opinion in *Hari Krishna Mandir Trust v. State of Maharashtra*, but after reviewing the decision, we thought we would include it because of the court's holding:

96. The right to property may not be a fundamental right any longer, but it is still a constitutional right under Article 300A and a human right as observed by this Court in *Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel and Others*. In view of the mandate of Article 300A

of the Constitution of India, no person is to be deprived of his property save by the authority of law. The appellant trust cannot be deprived of its property save in accordance with law.

97. Article 300A of the Constitution of India embodies the doctrine of eminent domain which comprises two parts, (i) possession of property in the public interest; and (ii) payment of reasonable compensation.¹⁶

As we read the decision, there's a road that the government thought it owned. There seems to be a debate about whether the road actually existed, or was just on the locality's plans. But in any event, the road was across private property, and the owners asserted "that the internal road had never been acquired by the Pune Municipal Corporation[.]" and "[t]he Town and Planning Department also admitted that Pune Municipal Corporation had wrongly been shown to be owner of said road."¹⁷

The owners instituted a case challenging the ownership of the road, arguing that Article 300A of the Constitution of India required reasonable compensation when private property is acquired, and that because compensation had not been paid, the road could not be government-owned.

Article 300A is not a typical "takings" or "just compensation" requirement, but is more akin to a "law of the land" clause: No person shall be deprived of his property save by authority of law.

The court concluded that although property is not a "fundamental" right expressly protected by India's Constitution, this provision means that when an owner is deprived of property, the term "authority of law" encompasses the right to reasonable compensation. The government has the power to take property for the public benefit, but when it does so, "it is obligated to compensate the injury by making just compensation[.]"¹⁸ The government may not have formally owned the road, but even if it acted like it did, it was obligated to pay compensation. "[E]ven though the right to claim compensation or the obligation of the State to pay compensation to a person who is deprived of his property is not

expressly provided in Article 300A of the Constitution, it is inbuilt in the Article.”¹⁹

Because compensation had not been paid, the court concluded that the owners of the adjacent private property owned the land on which the road was mapped, and directed “the Respondent authorities to act in terms of the Award dated 16th May, 1972 and delete the name of the Pune Municipal Corporation as owner of the private road in the records pertaining to the Scheme and carry out such other consequential alterations as may be necessary under Section 91 of the Regional and Town Planning Act.”²⁰

Statutory authorization and necessity: New Hampshire Supreme Court strictly construes authorizing statute

In *City of Portsmouth v. 150 Greenleaf Ave. Realty Trust*, the New Hampshire Supreme Court affirmed the denial of a partial taking for sewer purposes because the taking of wetlands did not fall in the sewer construction language of the statute cited as authority for the taking in the City’s declaration of taking.²¹

The City sought to condemn 4.6 acres, both for an existing sewer line for which it had never obtained an easement and a wetland area. Notably, the condemnation case arose in the midst of other litigation brought by the landowner against the town for trespass, alleging the City failed to properly maintain culverts under the sewer, causing the property to flood. The landowner obtained a favorable ruling that the City had only a revocable license for the sewer line and if it were revoked, the City would owe rent or have to exercise its eminent domain power. Prior to trial in that litigation, the City decided to condemn the sewer line, *and then some*.²²

The owner’s defenses were consolidated before the same trial judge who had all the context and who denied the taking on three alternate grounds: lack of statutory authority, insufficient public benefit (net-public benefit analysis finding the taking was unjustified vis-a-vis the impact on the private property), and bad faith (finding the actual motive of the condemnation was to cut off future litigation over

development of the property). The New Hampshire Supreme Court backed the trial court’s finding of fact concerning the nature of the project and upheld its legal ruling that the project did not fall within the ambit of the cited statute.²³ Practice pointer: for the first time on appeal, the City argued there were other statutes that granted it additional general condemnation authority, but they were not cited in the declaration, nor did the City move to amend its declaration. Because the Supreme Court found that the taking lacked statutory authority, it did not need to reach the alternate bases for denying the taking found by the trial court, but they were interesting!

Statutory authorization: Michigan landowners lose battle to stop construction of bridge to Canada

In *Dep’t of Transp. v. Riverview-Trenton R.R. Co.*, the Michigan Court of Appeals affirmed the taking of 19 properties with a common owner for construction of the Gordie Howe International Bridge (designed to span the Detroit River into Canada).²⁴ The common defenses raised myriad statutory challenges to the project alleging that various aspects of the Crossing Agreement (entered into among Her Majesty the Queen in Right of Canada, acting through the Minister of Transport, the Windsor-Detroit Bridge Authority, and the State of Michigan, acting through its governor and DOT) violated appropriations limitations that had been enacted prior to the Crossing Agreement. MDOT challenged the ability of the common owner to raise these challenges as a defense against the taking, but the Court of Appeals affirmed that attacks on the legitimacy of the project vis-a-vis legislative appropriations and other limits on commercial enterprises were justiciable in the condemnation case. Each of the owners’ complex defenses was determined on the merits, albeit against the landowners.

Statutory Authority: Pennsylvania Appeals court dismisses de facto blight taking claim for lack of formal notice

Hughes v. UGI Storage Co. presents an interesting twist on the statutory authority to condemn, turned

on its head as a cause of action by landowners contending that the pipeline company was already effectively using their property as a buffer area for its gas storage field (preventing alternate uses of their land and sub-surface rights).²⁵ In this case, there was no dispute that the Federal Energy Regulatory Commission (FERC) authorized use of the subject land for buffer area, subject to UGI complying with FERC's landowner notification requirements, which it did not do. The landowners sued for payment of compensation, and the trial court dismissed on grounds that UGI did not yet exercise the power to condemn that it could obtain by complying with the landowner notification requirements.²⁶ A very divided Commonwealth Court of Pennsylvania affirmed, with lengthy dissents from justices writing about how the majority erred in conflating de jure takings (which could not yet occur) and de facto takings for which there had been sufficient allegation in the complaint.

Necessity: condemnor can choose between a cemetery and an oak tree

In *Allard v. Big Rivers Elec. Corp.*, the Kentucky Court of Appeals made short work of each of the property owner's arguments objecting to a taking of land for an electric-transmission corridor, and we won't go through each contention here.²⁷

But the one that we will mention briefly is the necessity argument. You know, the one you often hear from your property owner clients: "they shouldn't put the [road, fire station, whatever the condemnor claims is the public use] on my property; it makes much more sense to put the [public use/purpose thing] somewhere else." Makes intuitive sense, doesn't it? After all, how can a taking be "necessary" to accomplish the stated public use or purpose if it is not the best place for the thing, or even a rational place to locate it?

Despite this, you also know that in all but a narrow bandwidth of cases, that argument goes nowhere, at least under the rulings in most jurisdictions.

That's what happened here. Big Rivers said it would put its energy corridor ... right *here*. Then, they

discovered that an old cemetery was also "here." Big Rivers decided to avoid that problem and altered the footprint of the taking to "over there." Problem was, "there" would require the uprooting of a "300-year-old Chinkapin oak tree located along the path of the newly proposed easement."²⁸ The owner objected, arguing lack of necessity. Don't take the historic tree; you should be taking the cemetery. Any guesses on how the court ruled?

If you concluded the court rejected the argument, you'd be right:

Third, we find no merit in Allard's lack of necessity argument. He posits that Big Rivers could have gone ahead with the original easement and moved the cemetery, or it could have chosen to build through a different route that would not affect the oak tree. However, 'the condemning body has broad discretion in exercising its eminent domain authority including the amount of land to be taken.' *God's Center*, 125 S.W.3d at 299 (citations omitted). It is not within the power of Allard to dictate the route the transmission line should take.²⁹

Statutory Prerequisites: "All bets are off for any actions other than exactness."

When an opinion starts off with "[t]his case offers a feast of legal issues—ranging from procedural to constitutional—but its main course is a cautionary tale to government entities: they must follow the exact statutory requirements for bringing a condemnation action[,]” you just know that you have to read the entire thing.³⁰

That's exactly what we recommend with the Utah Court of Appeals' opinion in *Salt Lake City Corp. v. Kunz*. The court concluded that when a statute requires that a condemnor provide the property owner with at least 10 days written notice and an opportunity to be heard before the condemnor takes a final vote to approve exercising eminent domain, "substantial compliance" isn't sufficient.³¹ Although this sort of statutory requirement is quite common—as are examples of condemning agencies not strictly adhering to the required procedures—we

find that courts are just as often willing to let it slide, and these requirements are honored more in the breach than in the observance. Thus, we appreciate reading decisions in which courts do what they should and hold the condemnor's feet to the fire the legislature established.

How bad was the city's deviation from the required procedures here? Not that bad, frankly. Instead of conforming to the notice and opportunity requirement, the city did this:

Based on the undisputed facts, the City fully complied with those requirements as to the first meeting by sending notice at least ten business days in advance and allowing Owners to speak at the meeting. However, it only half complied as to the second meeting because it allowed Owners to speak but did not send written notice at least ten business days in advance. And it did not comply with either requirement as to the third meeting because the notice it sent arrived only three business days before the meeting and Owners were not allowed an opportunity to be heard.³²

Responding to the owners' objection, the city responded with "ahh, close enough; besides, there's no showing that the owners didn't have actual notice or didn't have an opportunity to be heard." Sorry, held the court, when the statute says a condemnor must do X, it must do X. "Once the statute is determined to require strict compliance, all bets are off for any actions other than exactness."³³

The whole point of this type of procedural requirement isn't process for the sake of process, but to protect the rights of the property owners:

And the statute in this case does not relate to a mere fax number, recitation of a statute in a disclaimer, or a timeframe like the ones in the cited cases; instead, it goes to the weighty matter of providing procedural fairness and placing a check on a government entity's immense power to deprive an owner of a substantive private property right. Thus, those cases do not allow a reading of substantial compliance into

this statute because the statute's requirements are mandatory.³⁴

Prejudice to the property owner, *vel non*, is not even relevant, and the court rejected the city's argument that the owners needed to have shown some prejudice that resulted from the lack of notice and hearing.

In sum, we view section 78B-6-504(2)(c)'s requirements as strict based on longstanding precedent. Actual notice simply won't fly. And we conclude that Owners need not show prejudice in this context. Accordingly, we affirm the district court's interpretation and dismissal under the statute.³⁵

One last thing. The court rejected the owners' claim to attorneys' fees under the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA). The court mirrored the rationale of a recent Ohio Supreme Court decision, holding that the URA only applies to federal agencies, not Salt Lake City. The court also engaged in a somewhat weird (to us) approach to the URA's language that fees may be awarded if the agency "cannot acquire the real property by condemnation." The court read this language as meaning not that the owner defeats a particular taking, but that a court must conclude the condemnor "cannot" take the property.³⁶ In other words, there has to be some kind of final judgment that the taker can't take at all, not just that its case fails, as here.

We find that rationale to be just ... strange, especially in light of the court's earlier ruling on adhering to the requirements of Utah's procedural statute. Are there any circumstances in which a court will absolutely prohibit a condemnor from ever taking the property? We sure are hard-pressed to imagine any. In short, prosecuting and defending eminent domain actions are always done *seriatim*, and each case stands or falls on its own. A condemnor may repeatedly try to take property, but if it fails to adhere strictly to the requirements of how to do so, it should be on the hook for "not acquiring" the property.

But despite this glitch in the court's reasoning, we (naturally) recommend you read the opinion, and

incorporate its core holding: close enough is not good enough in eminent domain.

Statutory prerequisites: when California condemner doesn't fish within 10 years, it better cut bait correctly

California eminent domain law requires that if property taken isn't used for the intended public use "within 10 years" of the adoption of the resolution of necessity, then the condemner must offer to sell the property back to the (former) owner. Unless, that is, the condemner adopts a *new* resolution "reauthorizing the existing stated public use." In *Rutgard v. City of Los Angeles*, the California Court of Appeal put some meat on the bones of the statute.³⁷

We suspect that this situation doesn't arise all that often. Thus, from the eminent domain perspective, this one seems more interesting than important. But we also think that municipal law mavens may find this important, because the court's analysis focuses on local law:

This appeal presents four cascading questions:

First, does a public entity desiring to retain condemned property under section 1245.245 have to "adopt" its initial and reauthorization resolutions within 10 years of each other? We hold the answer is "yes."

Second, and if there is such a 10-year deadline, which definition of "adoption" does section 1245.245 use—the date when the resolutions are initially adopted, are finally adopted, or become effective? We hold that section 1245.245 uses the date of "final adoption."

Third, which law governs the inquiry into whether a resolution has been finally adopted—the local law governing the public entity at issue, or a standardized definition imposed by section 1245.245? We hold that local law fixes when a resolution is "finally adopted."

Lastly, when are resolutions finally adopted under the local law applicable here—namely, the city's charter? We hold that a resolution

is "finally adopted" once the city council has enacted the resolution and it has either been (1) approved by the mayor, or (2) vetoed by the mayor, but overridden by the city council.³⁸

Bottom line: "Because the city in this case finally adopted its initial and reauthorization resolutions 19 days past the 10-year deadline, section 1245.245 requires the city to offer to sell the property back to its original owner. The trial court's writ so ordering is accordingly affirmed."³⁹

Is there anything in the statute—or elsewhere—that ties the hands of the condemner if it does not make the 10-year new resolution window? In other words, let's say the condemner misses the window, offers it back to the former owner, who then buys it back. Is there anything preventing the condemner from simply rebooting and taking the property again from the new/old owner?

Good faith offer can't alter the scope of the take

How much can a condemner alter the scope of the taking before the good faith offer required by state law also needs to be re-done?

That's the question the Wyoming Supreme Court resolved in *EOG Resources, Inc. v. Floyd C. Reno & Sons, Inc.*⁴⁰ There, the condemner's original good-faith offer to the property owner was for a take of rights-of-way, easements, and surface use rights on 2,100 acres. Later, however, it amended the complaint to take only 70 acres. The owner objected to the amended take, arguing that the condemner had not complied with the statute's good faith offer requirement. The condemner responded that the 70 acres it now wanted was within the 2,100 acres its original offer covered, so what's the big deal?

It is a big deal in this case, held the court. The point of the good faith offer requirement is to give owners information so the parties can negotiate, and here, the taking had been altered so much that it did not "significantly resemble" the original offer:

The property EOG ultimately sought to condemn was a needle in the haystack of the

original offer. While true that the 70 acres sought in the condemnation proceeding were contained within the roughly 2,100 acres addressed in EOG's initial offer, Reno could not have known that it had the option to accept the offer only as to those 70 acres (nor is it evident that it was, in fact, an option at the time). It was not at all clear that the discrete 70 acres were the subject of the negotiations. Indeed, it seems that even EOG was uncertain as to what it was negotiating for, given its confusion concerning the extent of its rights under the existing surface use agreement and its withdrawal of the vast majority of the acreage from its condemnation action once those rights became clear. ... Contrary to EOG's assertions, we do not find it reasonable to expect Reno to have deduced that the offer contained a discrete sub-offer for the 70-acre pipeline easement from the map, financial summary chart, and proposed agreements covering 2,100 acres and containing a multitude of well-site locations, access roads, pipelines, compressor stations, communication towers, water sources, water ponds, etc.⁴¹

The court noted that the original and amended takings need not be "an exact match," but that whether an amended taking is covered by the original offer, and whether the condemnor must re-boot the offer process, is a case-specific inquiry:

EOG claims the district court's holding deprives condemnors and condemnees of the ability to negotiate to acquire the property sought via contract because it erroneously relied on the difference between an offer for a surface use agreement and a condemnation action for an easement to conclude that there was no good-faith offer for the property sought. EOG asserts this conclusion will require a burdensome, exact match between a purchase offer and property rights to be condemned. It does not. The type of property right sought to be acquired is one of several factors that could bear on whether an initial offer sufficiently described the property sought in a subsequent condemnation action. We do not hold that the property sought to be

condemned must be identical to the property described in the offer. We do hold, as a matter of law, that there must be a sufficient resemblance between the two to allow a court to conclude that the subject of the negotiation was clear to both parties and that the offer might have been accepted as it related to the property ultimately sought to be condemned. The record supports the conclusion that EOG failed to meet that standard.⁴²

Offer no good, (amended) complaint dismissed, owner entitled to attorneys' fees because the condemnor had not made a (valid) good faith offer.

Negative easement such as restrictive covenants still are not property in Colorado

On one hand, the Colorado Supreme Court's opinion in *Forest View Co. v. Town of Monument*, concluding that a restrictive covenant is not a property interest that the government needs to pay for, conflicts with other jurisdictions (Kansas, for example).⁴³ On the other, the ruling is nothing new under Colorado law because the court didn't announce a new rule, but simply refused to overrule a prior case holding the same thing, *Smith v. Clifton Sanitation Dist.*⁴⁴

The Town wanted to build a water tower. Seems like a reasonable goal. It purchased property, another reasonable thing. The property it bought, however, was subject to a covenant, running in favor of the neighboring property owners, providing that the owner couldn't use the property for anything other than single-family homes. Last time we checked, single-family homes don't include water towers, so the Town concluded the only way it could build was to extinguish the restrictive covenant and instituted an eminent domain action.

Wait, you say, I thought the Town already owned it, having purchased it on the market? Under Colorado law, a municipality may employ eminent domain to perfect title on property it has purchased. Eminent domain as a way to clear the decks, so to speak, free and clear of all encumbrances. The neighbors intervened, asserting a property interest in the restriction and a right to compensation for the diminution

of the value of their lots resulting from the covenant being wiped out.

The Smith case stood squarely in the way, so the neighbors argued that the case should either be limited to its facts, or simply overruled.

No dice, held the Colorado Supreme Court. Smith enunciated a broad rule: negative easements such as restrictive covenants are not “property” in Colorado. Private agreements between private property owners cannot restrict the government’s condemnation authority.⁴⁵

To us, that is a bit of apples-and-oranges (or circular) reasoning, because making a condemnor actually have to pay for all interests it takes isn’t a limitation on the power of eminent domain or the ability to exercise it. It simply means that maybe the condemnor can’t afford to take, which should not be viewed as a limitation of the power. But we understand the vibe that animates courts in this type of situation, since we see it so often: if we hold that the condemnor actually has to pay for everything it takes, why that would just stop progress! The government couldn’t take stuff it can’t otherwise afford!

That may be, but don’t tell us that this is because of some inherent limitation on the nature of the right. The market most certainly places a value on these types of restrictive covenants, yet when the government exercises its police power, it can (by virtue of its status as the government) simply eliminate that valuable right.

The court also noted that as a “negative easement or equitable servitude” it does not permit the neighbors to physically occupy the land. Again, the court doubled down on the assertion that enforcing the right would “restrict the exercise of the power of eminent domain.”⁴⁶ Again, this seems more like an argument that this is restricting the police power and not the power of eminent domain.

We suspect the Smith court (and the court here) purposely muddied the distinction, because were it to recognize that the restrictive covenant purported to limit the police power and not the eminent domain

power, it would have to also recognize that overcoming such a restriction when it has been recognized as a property right would trigger the obligation to provide compensation.

The court next set out a full-throated defense of Smith’s reasoning, concluding that the negative easement isn’t a physical occupation, and is more like a regulatory takings claim.⁴⁷ The court noted the split of opinion on the issue, but refused to join the acknowledged majority view that these are property interests, compensable in eminent domain.⁴⁸

The neighbors “will almost certainly see a drop in the value of their properties as a result of the Town’s decision to build a water tower on Lot 6.”⁴⁹ But too bad, because “Strong Policy Concerns Counsel Against Extending Colorado’s Takings Jurisprudence to Recognize the Claims Here (sic).”⁵⁰ If we were to hold that this a compensable interest, it would make takings for public use like this more expensive, and we can’t have that. “Finally, the potential burden on municipalities like the town were we to reverse Smith would be enormous.”⁵¹ Well, kudos for being frank, we suppose.

Several Justices concurred or dissented. Justice Gabriel argued that Smith was a case limited to its facts and did not announce a generally applicable rule. In Smith, the restrictive covenant was put in place right before the taking, specifically to try and put a poison pill in the acquisition. Not so here.⁵²

Our view? The Colorado Supreme Court majority got it wrong, badly. In essence, it holds that these restrictions are enforceable against everyone *except* someone with the power of eminent domain, and the only reason why is that it would be too expensive to do so. This was a naked exercise of judicial policymaking and rightly belongs in the minority view.

Relocation: after telling owner to beat it, California condemnor acts surprised that it did

Go on, read the facts in the California Court of Appeal’s opinion in *San Joaquin Reg, Transit Dist. v. Superior Ct.*⁵³ It’s worth your time, believe us.

After chasing Sardee, a long-standing manufacturing and service business from California, to Illinois by instituting condemnation proceedings and obtaining immediate possession of the property on which its Stockton plant was located, the Regional Transit District changed its mind and abandoned the taking. The owner sought damages under a state takings statute.

The District argued that it was not liable for all damages proximately caused by the proceeding because the owner had not “moved from the property.”

Wait, you say, I thought you just told me that the condemnor obtained possession of the property? Yes, it did, in two phases. First, the District and the owner stipulated to possession of the property subject to the owner’s temporary ability to occupy the front portion of the property (with payment of rent to the District) to allow it to wind down its operations and move to Illinois by June 2012. The owner had to vacate the unimproved rear portion a year earlier, by May 2011.

Sardee characterizes the back of the property as integral to the company’s operations for storage, truck turnaround, and housing dumpsters. According to Sardee, District’s right of possession destroyed any opportunity for the firm to expand its facilities, undertake larger and more complex jobs, and operate its business normally.

....

After being contacted by District, Sardee reviewed its options and determined that quickly finding a build-to-suit site would not work. To complete the build-to-suit option without a transition facility, Sardee would have to shut down operations for five to six months, which would kill its business. Instead, Sardee decided to expand and upgrade Sardee Lisle to allow for the transition of Sardee Stockton’s work and product lines to Sardee Lisle [in Illinois]. Sardee was aware of its duty to mitigate and aware of the disruption to its manufacturing business at Sardee Stockton the move would cause. Sardee management explored

options for a new facility from 2009 through 2011. Ultimately, Sardee planned on moving the company to its Lisle facility on an interim basis.⁵⁴

In response to the owner’s claim for damages, the District asserted that the “move from the property” language in the statute requires that the owner be *completely physically dispossessed* of the property, and because the owner remained for a time on part of the property, the statute did not mandate payment of damages. The Court of Appeal rejected that construction:

We note section 1268.620 does not use the term “physically dispossessed,” it only states the party must “move[] from” the property. When interpreting a statute, the plain language of the statute governs. We give the words their usual and ordinary meaning. Absent ambiguity in the language, we presume the Legislature meant what they said. (*Heidi S. v. David H.* (2016) 1 Cal. App.5th 1150, 1173.) The question becomes, did Sardee move from the property, not was Sardee completely physically dispossessed from the property.

District argues Sardee had not moved within the meaning of the statute “because it had exclusive rights to physically occupy the portion of the Property where it operated its Stockton facility, it did occupy the portion of the Property where it operated its Stockton facility, and it continuously operated its business there. As long as Sardee continued to operate its business on the Property, a fact confirmed by Sarovich’s April 20, 2012 email, there’s no basis for finding that it moved from the Property.”

The trial court disagreed, finding: “Sardee was physically dispossessed because [District] had taken physical possession of the northern portion of the parcel, and Sardee was paying rent to [District]. No taxes were being imposed by the County Tax Assessor. Further, Sardee had physically moved almost everything it needed to move from Stockton to Lisle to perform all of Sardee Stockton’s manufacturing operations in Lisle.⁵⁵

The Court of Appeal agreed with the trial court's analysis.

This is an important case for at least a couple of reasons. First, it rejects what is, in our view, a ridiculous argument for how "move" should be interpreted. After telling the owner that it better get lost (and the owner did so in a very practical way that mitigated damages), the condemnor abandoned the taking and then wanted to also abandon its obligation to make the owner whole for the trouble it caused. Yes, the owner didn't 100 percent actually move, but only because it agreed to pay rent to the District. Second, what about reliance? When a condemnor institutes eminent domain proceedings and then obtains possession before final judgment, how is a property owner supposed to react except by doing its best to try and comply?

As the Court of Appeal approvingly quoted the trial court:

[District] made repeated declarations that it was not abandoning its action. [District] had its Order of Possession, Sardee had spent several years setting up the interim site in Lisle for Sardee Stockton's manufacturing work, had located a relocation site in Stockton, and had moved equipment and begun carrying out Sardee Stockton's manufacturing functions in Lisle. [District] had refused Sardee's request for extra time to September 30, 2012. Sardee had to be out, and it affirmatively altered its position according to [District's] representations and actions.⁵⁶

The court agreed that "move" doesn't mean merely the thwarting of the owner's plans.⁵⁷ But it also concluded that when the owner actually moves, the statute means what it says.

JUST COMPENSATION AND VALUATION

North Carolina: there isn't just one way to value an "indefinite negative easement"

Chappell v. N.C. Dep't of Transp. is the latest decision in the long-standing "Map Act" inverse cases. This case is the follow up (after remand) to the

North Carolina Supreme Court's landmark decision in Kirby v. North Carolina Dep't of Transp., in which the court held that the Map Act, a statute by which DOT designated vast swaths of property for future highway acquisition, was a taking because the Act prohibited development and use of designated properties in the interim.⁵⁸ The court concluded "[t]hese restraints, coupled with their indefinite nature, constitute a taking of plaintiffs' elemental property rights by eminent domain."⁵⁹ The court remanded the case for a parcel-by-parcel determination of just compensation. Shortly after the decision in Kirby, the North Carolina Legislature repealed the Map Act, turning a permanent taking into a (very) long-term temporary taking.

On remand, the trial court concluded the case was a permanent taking, and awarded compensation accordingly. DOT had argued that the Map Act's massive use restrictions had not wiped out *all* uses of the properties, only some, and therefore this could not be valued as an indefinite negative easement. DOT appealed, and here we are.

In Chappell, the North Carolina Supreme Court (unanimously) affirmed the just compensation judgement on narrow grounds, as we hoped it would.⁶⁰ As we wrote after the arguments:

Second, we're not sure if the record shows that DOT preserved its main argument by an offer of proof of the uses supposedly remaining under the Map Act "negative easement." If not, that seems like one way for the court to rule in favor of the property owners and affirm, without dealing with the temporary vs indefinite nature of the taking. If the owners are satisfied with being compensated for the fee taking in this proceeding and not seeking the rent-plus-interest, who are we to say otherwise, provided the court does not establish a (wrong) rule that these type of cases generally are valued as permanent fee takes.

The court noted that under a North Carolina statute, partial takings are valued by the "before and after" method.⁶¹ In Kirby, the court concluded the Map Act

was an “indefinite restraint on fundamental property rights,” and limited the owners’ rights to:

improve, develop, and subdivide their property for an indefinite period of time. ...Thus, the relevant determination when calculating just compensation for a taking that involves less than the entire parcel of property starts with the fair market value of the entire property before the taking and the fair market value of what remains after the taking. This is true whether the taking is an indefinite negative easement, as in the case of Map Act takings, or involves some other taking for public use.⁶²

And here’s your first takeaway: the statute is about fair market value, but “the statute does not restrict real estate appraisers with regard to the method they use to determine fair market value.”⁶³ You can use any method (comparable sales, income cap, and replacement cost), and although “the comparable sales method is the preferred approach, the next best method is capitalization of income when no comparable sales data is available.”⁶⁴ And here, DOT was free to do this.

But, the court concluded, it didn’t. Instead, DOT’s expert “sought to value the rights that remain to the property owner after the taking based on a three-year temporary negative easement[.]”⁶⁵ The appraiser testified he chose this method because he didn’t have comparable properties. That’s not good enough, the court concluded, because “[l]acking any sales of comparable property from which to determine fair market value, there remained two other methods of assessing the fair market value of the property, the cost approach and the income capitalization approach.”⁶⁶ If you can’t value it one way, try another. Do not go off the map, so to speak.

[T]here was no evidence from a NCDOT appraiser concerning the fair market value of the property after the 1992 and 2006 takings based on a cost approach or income capitalization approach to valuation. Thus, it was not an abuse of discretion for the trial court to exclude testimony that did not relate to one of the three

appropriate methods of determining fair market value.⁶⁷

And here’s your second takeaway: labels don’t matter as much as substance. Valuing the taking as a “indefinite negative easement” or a “fee simple” taking” isn’t terribly important:

Whether one assumes the road is built, calls the taking similar to a fee simple taking, or gives the taking some other name, the fact that there was evidence of no market whatsoever for the property, in other words, that no one wanted to buy a house in the Outer Loop corridor once the 1992 map was recorded, was a proper consideration in determining the after-taking fair market value.⁶⁸

Here’s your third takeaway: even if a jury instruction was erroneous, the DOT didn’t show the error was prejudicial. The DOT didn’t introduce anything at trial to counter the property owners’ appraiser and “[t]here was no evidence of an alternative fair market valuation on a cost basis or income capitalization basis that could have informed the jury’s verdict.”⁶⁹

So there you have it: an appropriately narrowly tailored decision that upholds the verdict the property owners sought but did not venture into areas where the court might have screwed up the law for others. As we wrote at the time of argument, a narrow ruling on the evidentiary issue “seems like one way for the court to rule in favor of the property owners and affirm, without dealing with the temporary vs indefinite nature of the taking.” Looks like the court wisely did so.

Construction impacts from public project are not “quality of life” general damages, but takings requiring compensation

The Louisiana Court of Appeal’s opinion in *Lowenburg v. Sewerage & Water Bd. of New Orleans*, is long and detailed. But for those of you interested in inverse condemnation liability stemming from the impacts on property owners from public construction projects, this is your case.

This consolidated appeal involves a group of homeowners, Plaintiffs- Appellees (“Lowenburg Appellees”) and a non-profit church with a day-care center Plaintiff-Appellee, Watson Memorial Spiritual Temple of Christ d/b/a Watson Memorial Teaching Ministries, (“Watson Appellee”) who claim that they, along with their properties, sustained various types of damages as a result of the construction of the Southeast Louisiana Urban Drainage Project (SELA Project). This federally sponsored and funded project involved the construction of multiple drainage canals and was carried out by the United States Army Corps of Engineers (“USACE”) and Defendant-Appellant, Sewerage and Water Board (“Appellant”).⁷⁰

The owners sought compensation for things like lost and restricted access, excessive vibrations, noise, dust, dirt, debris, and “foul odors” that resulted in physical damages, and lost income and profits. After a trial, the court entered judgment for the owners that the construction had inversely condemned their property, and entered damage and compensation awards.

The Board appealed, raising a whopping nine points of error. The owners cross-appealed, arguing that they were entitled to greater damages, plus interest and attorneys’ fees on appeal.

We’re not going to go through the details on how the court disposed of each of the Board’s arguments. But the first part of the short story is that the court of appeals held that the damages suffered by the plaintiffs—loss of use and enjoyment for day and night noise, vibration, dust, loss of parking, and property damages—are not “quality of life” problems (as the Board characterized them) that may be considered general damages. After all, the Board argued, the plaintiffs’ “homes were never rendered uninhabitable and use was never lost.”⁷¹

The court rejected that argument, concluding instead that these impacts damaged the owners’ use and enjoyment of their properties, including their property right to street access.⁷² That was enough.

The second part of the short version is that the plaintiffs’ proof of damages was just fine. Especially interesting in the court’s run down of how each owner proved damages and compensation is the part where the court analyzes how to prove loss of use and enjoyment⁷³ and loss of access and parking.⁷⁴

Finally, the court cleaned up what looks like a typographical error in the trial court’s damage judgment, and held that the owners are entitled to interest and attorneys’ fees on appeal. Overall, we’d say this was a pretty resounding win for the property owners.

Texas Appeals court upholds project influence rule in the course of affirming compensation verdict

State v. CC Telge Rd., L.P. involved a 40 acre taking from a 600 parent tract for construction of a toll road for which the state offered compensation of \$1.3 million and the landowner demanded (and obtained) \$28 million.⁷⁵ In a noteworthy opinion, the Texas Court of Appeals affirmed the landowner’s introduction of evidence demonstrating attempts by the condemnor to interfere with entitling the property ahead of the condemnation and the difference in value between the highest and best use of the property without regard to project influence and the altered highest and best use as impacted by the taking.

TRIAL ISSUES

Utah Supreme Court rejects categorical bar on admissibility of sales after the date of taking

In Utah Dep’t of Transp. v. Boggess-Draper Co., LLC, the UDOT condemned part of the owner’s property in 2009, but the compensation trial (primarily a severance damage case) did not go to trial until 2018.⁷⁶ In the meantime, the remainder had been sold (in 2016) and developed as two car dealerships. The landowner secured an order in limine excluding evidence of these post-date taking events. At trial the landowner presented evidence about the property’s development potential, and the trial court rejected claims by UDOT that this opened the door to the previously excluded evidence about the 2016 sale and ultimate development of the remainder.

The jury ultimately awarded compensation of \$1.7M (there was no allocation in the verdict between land taken and severance damage).⁷⁷ The state Supreme Court reversed, finding that the statutory requirement to determine compensation as of the date of the taking does not support a categorical exclusionary rule concerning all subsequent events. The court reasoned that “a post-valuation-date sale or development of property may be relevant to the extent it aids the factfinder in checking assumptions about the development potential of the property in question—assumptions made in assessing the value of the property on the valuation date.”⁷⁸ The court acknowledged that the probative value of subsequent events may vary depending on how long after the date of taking they occurred and that not all post-valuation-date developments are necessarily admissible. It limited its holding merely to there being no categorical bar. In the instant case, the court found that it was prejudicial error to exclude the post-valuation-date evidence and remanded for new trial.⁷⁹ The Court also declined to change the standing interpretation of the state Takings Clause which does not include landowner fees and costs within guaranteed compensation.⁸⁰

Civil Procedure: stay in your lane, eminent domain—California’s eminent domain procedures aren’t “imported” into inverse cases

This one is California process-specific, but we think the California Supreme Court’s opinion in *Weiss v. People ex rel Dep’t of Transp.*, is still worth a read for you non-Golden Staters.⁸¹

Why, you ask? Well, we all have been in the situation where the court entertains motions in limine that look a lot like summary judgment motions, just before you are about to empanel your valuation jury. You know, things like “their theory of valuation is no good,” or “my theory is the only theory,” etc. You can prepare a case for months, only to have it blown up on the literal eve of trial. It’s wasteful, based on unfair surprise.

California has a procedure—only applicable to eminent domain cases—that front-loads these types

of questions. Any party may file what is called a “1260.040 motion” that asks the trial judge to make a pretrial ruling on “an evidentiary or other legal issue affecting the determination of compensation.”⁸² And you have to make these motions “not later than 60 days before commencement of trial on the issue of compensation.” Got it.

Thus, the government in *Weiss* asked, why not in inverse condemnation also? We’re going to a valuation trial, right? The question was whether statutory procedures in California’s eminent domain code could be, in the Supreme Court’s words, “imported” into and employed in inverse condemnation cases. As we all know, both eminent domain and takings cases are “condemnation” matters, and the government argued that the procedures the legislature required in eminent domain cases also make sense in inverse cases. So why not carry those procedures over? Instead of a typical summary judgment motion (or worse yet, eve-of-trial summary judgment motions disguised as evidentiary motions in limine), you front-load compensation legal issues.

Short story from the unanimous court: No. “The special statutory procedures that govern a public entity’s exercise of the power of eminent domain are inapplicable in inverse condemnation actions, which instead proceed by the rules governing ordinary civil actions.”⁸³ While inverse cases and eminent domain cases share many things, they are not simply mirror images, and inverse cases, unlike eminent domain, are plain old civil cases. Here, the court concluded, the procedure in the eminent domain code cannot be brought over.

While the “cross-pollination” embraced by *Chhour*, *supra*, 46 Cal.App.4th 273, may make sense with respect to provisions of the Eminent Domain Law that affect the amount of compensation due to a property owner, the special rules governing the procedure by which a public entity exercises the eminent domain power are another matter. As noted above, inverse condemnation actions proceed by the rules governing ordinary civil actions, not the special rules that apply to eminent domain

proceedings. Indeed, much of the “elaborate and lengthy process established by the Eminent Domain Law and related statutes”—would serve no purpose in an inverse condemnation action. (Property Reserve, *supra*, 1 Cal.5th at p. 188; see, e.g., §§ 1245.220 [requiring resolution of necessity], 1255.410 [authorizing motion for order of possession].) Chhour does not suggest that an appellate court may “import” into the inverse condemnation context provisions of the Eminent Domain Law that set out the special procedures applicable to eminent domain actions, such as section 1260.040.⁸⁴

Remember: eminent domain actions are special civil actions to establish the amount of just compensation owed to a property owner for the taking or damaging of private property. They are not typical civil litigation in which the plaintiff alleges that the defendant did something wrong. You hit me with your car, you broke a promise, you sunk my battleship, and the like. An inverse condemnation claim falls into that latter category. The plaintiff (owner) is alleging that the taker did something wrong: you took my property for public use, but you haven't paid me the compensation the constitution(s) require. First part is prove the taking, and if compensation is the remedy sought, then you fight about the amount the condemnor must provide. But in eminent domain actions, the court noted, “liability is established at the outset.”⁸⁵

The court concluded that because liability determinations in inverse cases are often disputed, a 1260.040 motion, if imported, would “replace, not supplement, existing procedures.”⁸⁶ The Code section, however, notes that it “supplements, and does not replace any other pretrial or trial procedure otherwise available to resolve an evidentiary or other legal issue affecting the determination of compensation.”⁸⁷ No deal.

Owner testimony: in eminent domain, there's a “low bar” for testimony about property value

In *Sabal Trail Transmission, LLC v. 18.27 Acres in Levy Cnty.*, the U.S. Court of Appeals for the Eleventh

Circuit concluded that the trial court did not abuse its discretion when it allowed the property owner to testify about the value of his property.⁸⁸

This is a ruling that should not be a surprise, given the same court's earlier published opinion holding the same thing in a case by the same pipeline condemnor against different property owners. Here, the court noted the “low bar” an owner must satisfy to testify (having “some basis” for the testimony).⁸⁹

One owner had some training as an appraiser. The other had experience buying and selling property in the relevant market:

Lee and Ryan Thomas satisfied the low bar of providing some basis for their valuation testimony. Lee trained as a land appraiser early in his career. Both men bought and sold property in Levy County over the years and knew what prospective purchasers would be looking for in a piece of property. And they explained the negative impact of the pipeline on their farming operations and residential life. Although Lee and Ryan provided little explanation for the specific values they testified to, we cannot say their testimony was purely speculative or that the district court abused its considerable discretion in admitting it.⁹⁰

NJ: before jury can make highest and best use determination, judge has “gatekeeping” function

The New Jersey Supreme Court's opinion in *Twp. of Manalapan v. Gentile*, is worth reviewing, even if you are not in the Garden State.⁹¹

The short story is that the property owner's appraiser opined that the highest and best use of the property was to divide it into smaller lots. The problem was that under its current Residential Environmental (RE) zoning that wasn't possible. It would need an upzoning to its former designation, R20. But the appraiser did not offer an opinion on whether an upzoning would have been probable, or even possible. During closing arguments, the property owners reminded the jurors that the property is surrounded by R20 zones, and “repeatedly referenced

the possibility of rezoning.”⁹² Jury came in above the Township’s appraiser’s testimony of \$2.83 million. Way above (\$4.5 million).

You know where this is heading, don’t you? After the Appellate Division affirmed, the Supreme Court easily reversed. As you know, to have the jury consider that the highest and best use of the property is a use other than its existing use (including the applicable regulations), the owner has to show four things: the HBU is legally permissible, physically possible, and financially feasible, and maximally productive.⁹³

The existing RE zoning meant that it was not “legally permissible.” That doesn’t mean it is impossible, however, and the owner might argue that an upzoning would be considered by a hypothetical market buyer, of course. Thus, the owner could argue that upzoning was possible, by introducing some evidence that the upzoning was reasonably likely.

Under New Jersey procedures, the trial court is supposed to conduct a “Rule 104” hearing in which the judge serves as a gatekeeper to evaluate whether the evidence of probability of upzoning is allowed to be presented to the jury, presumably because things like changes of zoning and the like are mostly legal determinations. The court here didn’t do so, meaning the jury should never have been allowed to go beyond the Township’s evidence. Game, set, and match.⁹⁴

Go back, do it again, and if the owner wants to offer evidence of the use of the property other than its current use, the court needs to hold a Rule 104 hearing.

Time isn’t money—landowner not entitled to interest on deposited funds satisfying just comp verdict

In *City of Fargo v. Wieland*, the North Dakota Supreme Court addressed an issue it had earlier declined to review: “whether a landowner who appeals an award in eminent domain proceedings, without accepting or withdrawing deposited funds, is entitled to the payment of post-judgment interest subsequent to the deposit of the full amount of the judgment.”⁹⁵

After a just compensation judgment, the city deposited the funds to cover the verdict, plus money for the court’s award of attorneys’ fees. The property owner appealed. Even though she could have, she didn’t withdraw the money because doing so would have waived her right to appeal on all issues except a claim for more compensation. Her appeal asserted the taking was invalid, so pulling the money would have waived the argument.

After losing the appeal, the owner argued she was entitled to interest on the deposit. The city asserted that no interest could run because the owner could have pulled the funds, but didn’t. The owner countered that this would force her into choosing between her right to appeal, and her right to the funds.⁹⁶

The court agreed with the city, noting that the operative statute (N.D. Civ. Code § 32-15-29) does not permit interest to accrue on deposits that cover the entire amount of a judgment.

While we agree with Wieland that the statute appears to require unsatisfied landowners to make a difficult choice between withdrawing the deposit and limiting their appeal to a claim for greater compensation, or foregoing the use of the funds and preserving all of their potential issues on appeal, there is nothing in the statute suggesting the legislature intended something different.”⁹⁷

The majority noted that the owner did not challenge the constitutionality of the statute. One Justice dissented, noting that this is a matter of just compensation under the constitution, not statutory grace. It is not really “interest,” but “such additional amount beyond the value of the property or the amount of the damage to the property as of the time of the taking or damaging as may be necessary to award the full equivalent of the value or the damage, as the case may be[.]”⁹⁸

Since the statute requires the depositor to “keep said fund full and without diminution,” this includes interest (or the time value of money, whatever you might want to call it), at least in the dissenting Justice’s view.⁹⁹

Under the majority's interpretation of N.D.C.C. § 32-15-29 and N.D.C.C. § 32-15-30, Fargo can simply dump more than \$900,000 on the clerk of court's counter and walk away. Under the majority's interpretation of the statutes, Fargo has no responsibility for how the funds are handled subsequently. I cannot agree with those results. If the words "keep said fund full" and "without diminution" in N.D.C.C. § 32-15-30 have any meaning, those words require that Fargo ensure interest accrues on the money that it remains responsible for paying Wieland. In order for Wieland to receive just compensation as required by both the North Dakota and the United States Constitutions, I also read N.D.C.C. § 32-15-30 as imposing on Fargo the risk that (and, hence, liability for) the deposited funds will fully pay Wieland just compensation when Wieland is legally entitled to withdraw the funds.¹⁰⁰

Apportionment—overlooked interest holder had no right to separate jury trial, but had an equitable right to compensation determined by bench trial

S.C. Dep't of Commerce v. Clemson Univ. illustrates the complications which may arise when a condemner settles with one property interest in a manner not subject to normal apportionment of funds and without a prior formal determination of compensation.¹⁰¹

Here, the state railways department condemned 69 acres owned by Clemson University on the date of taking. The department noticed all interest holders and tendered over \$9 million of just compensation.

Among the noticed interest holders was the Charleston County School District which maintained a magnet school campus on the parent tract. The School District filed a notice of appearance and demanded jury trial like all other defendants.

Prior to any compensation trial, the railway department and Clemson reached a non-monetary settlement in the form of a land swap, but the school district still wanted a jury trial on the issue of just compensation owed for its interest. The matter was referred to the non-jury docket and the district appealed.

Because the school district's interest was determined to be equitable, rather than legal, the trial court held and the appeals court affirmed that the District had no right to a jury trial.¹⁰² There being no state constitutional right to jury trial in eminent domain, the focus of the decision was on construction of the state eminent domain statute that allows either the condemner or an owner to demand a jury trial. Here, the School District had once held a formal lease with Clemson's predecessor in title, but it expired before Clemson became the fee owner, well before the date of taking. The magnet school continued to operate, however, which the trial court held created a tenancy at will which, under state law, was an equitable interest but not an equitable *title*. The School District acknowledged it was not a lessee, but that it had a possessory interest. This was not enough, in the court's opinion, to be eligible to demand a jury trial under the statute, and the District's remedy would be for the trial court to determine its compensation sitting in equity at a hearing similar to a post-trial apportionment hearing. 🍃

Notes

1 Utah Dep't of Transp. v. Coalt, Inc., 472 P.3d 942, 945 (Utah 2020).
2 Id. at 946.
3 Id. at 948.
4 Id. at 947.
5 Id.
6 Id. at 948.
7 Id.

8 Id., citing Utah Dep't of Transp. v. G. Kay, Inc., 78 P.3d 612 (Utah 2003).
9 City of Chicago v. Eychaner, No. 1-19-1053, 2020 WL 2322731, at *1 (2020 IL App 1st Dist. May 11, 2020).
10 City of Chicago v. Eychaner, 26 N.E.3d 501, 505 (Ill. App. 3d Dist. 2015).
11 Eychaner, No. 1-19-1053, 2020 WL 2322731, at *1
12 Id. at *5.

- 13 Id. at *6.
- 14 Id. at *7.
- 15 Id.
- 16 Hari Krishna Mandir Trust v. State of Maharashtra, No. 2013-6156, slip op. at 46-47 (footnote omitted) (India, Jul. 8, 2020)
- 17 Id. at 4.
- 18 Id. at 47.
- 19 Id. at 48.
- 20 Id. at 57.
- 21 City of Portsmouth v. 150 Greenleaf Ave. Realty Trust, 235 A.3d 997 (N.H. 2020).
- 22 Id. at 998.
- 23 Id. at 1000.
- 24 Dep't of Transp. v. Riverview-Trenton R.R. Co., et al, 958 N.W.2d 246 (Mich. Ct. App. 2020).
- 25 Hughes v. UGI Storage Co., 243 A.3d 278 (Pa. Commw. Ct. 2020).
- 26 Id. at 284.
- 27 Allard v. Big Rivers Elec. Corp., 602 S.W.3d 800 (Ky. Ct. App. 2020).
- 28 Id. at 802.
- 29 Id. at 809.
- 30 Salt Lake City Corp. v. Kunz, 476 P.3d 989, 990 (Utah Ct. App. 2020).
- 31 Id. at 991.
- 32 Id. at 997.
- 33 Id. at 998.
- 34 Id.
- 35 Id. at 999.
- 36 Id. at 1001.
- 37 Rutgard v. City of Los Angeles, 267 Cal.Rptr.3d 16 (Cal. Ct. App. 2020).
- 38 Id. at 20.
- 39 Id.
- 40 EOG Resources, Inc. v. Floyd C. Reno & Sons, Inc, 468 P.3d 667 (Wyo. 2020).
- 41 Id. at 675 (citation and footnote omitted).
- 42 Id. (footnote and citations omitted).
- 43 Forest View Co. v. Town of Monument, 464 P.3d 774 (Colo. 2020).
- 44 Smith v. Clifton Sanitation Dist., 300 P.2d 548 (Colo. 1956).
- 45 Forest View, 464 P.3d at 778; see also Smith, 200 P.2d at 550 ("Were the rule otherwise the right of eminent domain could be defeated if the condemning authority has to respond to damages for each interest in a large subdivision or area subject to deed restrictions or restrictive covenants.").
- 46 Forest View, 464 P.3d at 778.
- 47 Id. at 779.
- 48 Id. at 779-780.
- 49 Id. at 780.
- 50 Id.
- 51 Id.
- 52 Id. at 783 ("And the Town was well aware that the restrictive covenant posed an impediment to its plan to construct a water storage tank. That is why it instituted the present eminent domain proceeding.").
- 53 San Joaquin Regional Transit District v. Superior Court, 273 Cal.Rptr.3d 276 (Cal. Ct. App. 2020).
- 54 Id. at 279.
- 55 Id. at 284.
- 56 Id. at 283.
- 57 Id.
- 58 Kirby v. N.C. Dep't of Transp., 786 S.E.2d 919 (N.C. 2016).
- 59 Id. at 921.
- 60 Chappell v. N.C. Dep't of Transp., 841 S.E.2d 513 (N.C. 2020).
- 61 Id. at 522 (citing N.C.G.S. § 136-112(1) (2019)).
- 62 Id.
- 63 Id.
- 64 Id. (quoting Dep't of Transp. v. M.M. Fowler, Inc., 637 S.E.2d 885, 894 n.5 (N.C. 2006).
- 65 Id. at 523.
- 66 Id.
- 67 Id. at 524.
- 68 Id.
- 69 Id. at 525.
- 70 Lowenburg v. Sewerage & Water Bd of New Orleans, No. 2019-CA-0524, 2020 WL 4364345, at *1-2 (La. Ct. App. July 29, 2020).
- 71 Id. at *4-5.
- 72 Id. at *6-7.
- 73 Id. at *11-16.
- 74 Id. at *16-18.
- 75 State v. CC Telge Rd., L.P., 605 SW. 3d 742 (Tex. App 2020).
- 76 Utah Dep't of Transp. v. Boggess-Draper Co., LLC, 467 P.3d 840 (Utah 2020).
- 77 Id. at 844.
- 78 Id. at 845.
- 79 Id. at 847-48.
- 80 Id. at 849.
- 81 Weiss v. People ex rel Dep't of Transp., 468 P.3d 1154 (Cal. 2020).
- 82 Cal. Code Civ. Pro. § 1260.040.
- 83 Weiss, 468 P.3d at 1157.
- 84 Id. at 1165.
- 85 Id. at 862.
- 86 Id. at 863.
- 87 Id. at 862.
- 88 Sabal Trail Transmission, LLC v. 18.27 Acres in Levy County, 824 Fed.Appx. 621 (11th Cir. 2020).
- 89 Id. at 626.
- 90 Id.

91 Twp. of Manalapan v. Gentile, 231 A.3d 631 (N.J. 2020).
92 Id. at 302.
93 Id. at 637.
94 Id. at 639-640.
95 City of Fargo v. Wieland, 946 N.W.2d 695, 697 (N.D. 2020).
96 Id. at 698.
97 Id. at 699.

98 Id. at 701 (Crothers, J., dissenting) (citations omitted).
99 Id. at 702 (citations omitted).
100 Id. at 703.
101 S.C. Dep't of Com., Div. Pub. Rys. v. Clemson Univ., 851 S.E.2d 735 (S.C. Ct. App. 2020).
102 Id. at 740.

The image features a dark blue background with two rows of wooden bookshelves on either side, filled with various books. In the center, the text 'CALLING ALL AUTHORS!' is written in large, white, sans-serif capital letters.

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