2024 NATIONAL EMINENT DOMAIN UPDATE

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PUBLIC USE

Detailed Factual Findings on Public Benefit are Required

In re Gen. Mun. Auth. of City of Nanticoke involved a private benefit challenge to a proposed taking allegedly for construction of affordable elderly housing.[1] In consolidated cases, the trial court overruled both a facial challenge to the state Municipality Authority Act (MCA) and case-specific challenges that the actual nature of the taking was for more than an incidental private benefit.

On appeal, dismissal of the facial challenge was upheld on grounds that the language of the MCA violated neither the federal baseline reiterated in *Kelo v. City of New London*[2] nor Pennsylvania's common law. The case was remanded for further proceedings to determine whether the taking would result in more than an incidental private benefit. To inform proceedings on remand, the appeals court provided an explication of the different public use tests under state common law and the more protective, post-*Kelo,* Private Property Rights Protection Act (PPRPA).[3] Noting the legislative intent to curb "abuse of the eminent domain power," the court explained that the PPRPA prohibits taking property "to use it for private enterprise," which is a more protective standard than the common law test, "solely for private enterprise."[4]

Against this backdrop, the court identified gaps in the factual record and questions about how the development authority intended to use the properties and to whom the primary benefits would inure.[5] The court concluded that the record was not sufficiently clear regarding: (i) what the referenced entities were and what role they would play in the project; (ii) the *magnitude* of the benefits to named entities and the unnamed "equity investor"; and (iii) the existence of public need for the alleged benefits and the actual benefits that would flow toward those needs.[6] On remand, the trial court was directed to conduct a de novo hearing on these delineated factual issues.

Ability to Reconvey Taking to Private Developers Does Not Negate the Original Public Use

In *Penney Prop. Sub Holdings LLC v. Town of Amherst*, the owner of 2.3 acres of land that was leased and operating as a JC Penney department store unsuccessfully sought to annul a condemnation

determination to take 62 acres of land predominantly comprised of a mall.[7] The court denied a lack of notice challenge despite the fact that two of the three required means of notice of the public hearing failed (certified mail notice was never delivered and the secretary of state did not send alternate notice until after the hearing). The court ruled that notice by publication alone sufficed because the town was not informed before the hearing that the means of individual notice had failed.

The court rejected the owner's other public use challenges finding sufficient evidence that the targeted property was within an "[a]rea of economic underdevelopment and stagnation" and that the possibility of re-transfer to private entities did not negate the instant public purpose of acquiring land within a stagnant area.[8]

No Strict Construction of "Commercial" Use to Exclude Parking Predominantly for Healthcare Providers

In *Bowers Dev., LLC v. Oneida Cnty. Indus. Dev. Agency,* the Court of Appeals of New York reversed the appellate division's denial of a redevelopment taking, holding that an industrial redevelopment agency could condemn land at the request of an adjacent landowner to provide parking for the adjacent landowner's planned development of a medical office building.[9] The owner of the targeted parcel and the developer who had contracted to purchase it from the owner co-petitioned to annul the condemnation determination, and the appellate division granted the petition. In reversing, the court held that the envisioned parking for medical office tenants, retail tenants, and night usage for the public sufficiently met the "commercial use" criteria of the agency's statutory authority.[10] The challenger's argument that the parking would be for health-care, not commercial, purposes failed because of the overall commercial nature of the building to provide office space to rent-paying tenants.

Taking Upheld Even Though Proposed Project Deviated from Plan

Niagara Falls Redevelopment, LLC v. City of Niagara Falls involved a multi-faceted challenge by landowner/developer to a redevelopment taking by Niagara Falls.[11] The developer argued that the city had not established how it would pay for its proposed project, the city had failed to conduct a market study as required by its own Comprehensive Plan, and that the plan also set forth predetermined public use for the subject parcel that would involve Redevelopment LLC. Never mind all that, said the court. It reasoned that these considerations were outside of the court's limited review under the redevelopment statute and that, in any event, the plan provisions could not bind future councils. The court also went on to reject contentions that the take parcel was not described with adequate specificity (it had only been described by tax parcel and street address) and that the city had not timely issued its written synopsis of its determination, finding that the one-day tardiness was harmless.

Bald Conclusions Do Not Satisfy Necessary Blight Findings

In *Twp. of Cinnaminson v. Cove House LLC,* an appellate division reversed a trial judge's approval of condemnation for "blight" where the Township of Cinnaminson (Township) presented a 2013 expert report and some testimony about the current condition of old residences it wished to redevelop upon which the trial judge found the Township had satisfied what he viewed as a low evidentiary burden.[12] The trial judge found the evidence presented satisfied one statutory blight criteria:

> Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.[13]

In granting the taking, the trial judge noted some evidence in the record to support the Township's findings which he was constrained to second-guess, stating:

> So [the Township does not] need that much to connect the dots. I mean the standard is if there's evidence in the record and there is evidence in the record, I'm not supposed to second-guess the judgment of the Township in that regard. There's some evidence in the record that an expert testified, who has expertise, appropriate expertise in this area, and testified as to obsolescence and that the obsolescence was detrimental.[14]

The problem with this, however, was the conclusory nature of the expert report, the Township's findings, and the trial court's acceptance of them. In reversing, the Appellate Division sternly reminded that "a standard that requires 'substantial evidence' does not bespeak 'a relatively low evidentiary threshold.'"[15] Relying on the decision of the New Jersey Supreme Court in *Malanga v. Twp. of W. Orange,* issued just months before, the Appellate Division noted the blight statute "'does not ask whether property could potentially be more useful or valuable; it requires proof of a current problem, such as 'dilapidation,' 'obsolescence,' or 'overcrowding,'" and further that it does "not presume harm; it requires a showing of actual detriment."[16] To illustrate the inadequacies of the Township's evidence, the Appellate Division elaborated:

> [The expert] proclaimed in her report the property's "land use [was] deleterious and obsolete and the design [was] faulty" and its driveways were "inadequate" and "detrimental" to the community. But she did not identify what, if any, underlying characteristics of the property had led her to reach those conclusions and did not give any detail to support those blanket statements. She asserted the buildings needed to be "upgraded" and that the property needed "site improvements," but she did not specify what upgrades or improvements were needed. And those details are critically important in making and reviewing a redevelopment determination.[17]

Interestingly, *Malanga* involved a successful citizen challenge to a municipal determination that its own public library was blighted, which allowed the Township of West Orange to sell the land to a preferred developer instead of selling it under competitive bidding laws. In reversing lower courts that had validated this action (and proceeding with the case despite the pendency of a sale contract to a redeveloper), the New Jersey Supreme Court held that the Township of West Orange had not demonstrated the necessary requirements under the blight.[18] The court held that the record lacked evidence that: (i) the library suffered from "obsolescence" even though it lacked modern infrastructure and could function better: and (ii) the library's condition was detrimental to the public welfare.[19]

Pipeline Taking Allowed Despite Allegations of Predominant Private Benefit and Bad Faith

In *Muerdter v. Louisville Gas & Elec. Co.,* an unpublished opinion, the Kentucky Court of Appeals affirmed the trial court's rejection of landowner defenses to a natural gas pipeline taking on various grounds including predominant private benefit, improper concealment of the route from the public, and various forms of bad faith negotiations.[20] This would be a typical example of courts giving little weight to allegations where a pipeline company proceeds under authorizing common carrier legislation (such as the provisions of Kentucky eminent domain code here) to suggest a pipeline is a presumptively public use. But we highlight the case here in light of the Kentucky Supreme Court having granted review. This may be one to watch.

The trial court had ruled the defending owners, the Rummage and Iola families, had failed to produce evidence "'to counter the fact that the new pipeline is necessary for additional dependable service and capacity.'"[21] The appeals court agreed, reasoning that a determination of the "primary purpose" of the condemnation was not the applicable legal standard, and that the pipeline company need only

show that the pipeline would be for public use.[22] The appeals court also noted that, while the families had adduced evidence that 100 percent of the increased capacity would be used by Jim Beam facilities in the first few years (and then 95 percent after that), there was some evidence that the line would increase service to existing customers and meet local demand of others who had been denied service due to lack of capacity.[23]

The appeals court reasoned that the families had not presented sufficient evidence of concealment during the route selection process. As for bad faith negotiation allegations (such as telling residents farm taps could be granted to those who gave the pipeline company an easement when they could not and failing to inform the residents that once the line was laid, they could no longer drive farm equipment over it) the court held the pipeline company had met the legal requirements for good faith negotiations by making a pre-suit offer.

What Happens When a Taking Lacks a Public Use, but the Property is Already Seized?

Town of Apex v. Rubin started off as a somewhat typical public use challenge.[24] After a developer failed to negotiate an easement for a sewer line to serve a nearby housing project from a landowner (Rubin), the developer enlisted the Town of Apex to lend a hand. Apex instituted an eminent domain action to take the easement for the developer's sewer line by eminent domain, with the developer paying the compensation and the costs of the lawsuit. If this sets off your private benefit radar, you'd be right. The North Carolina courts sure thought so. No public use.[25]

You might think that this would signal the end of the matter. We know what would happen if Apex had affirmatively abandoned the taking. In that case, it wouldn't be off the hook and although it would not be able to execute its desired permanent taking, Apex could be liable for compensation for any temporary taking while it prosecuted the (failed) condemnation.

But this situation is different, because Apex wants to take the property and the court said no. Now what? You might think that Apex would try again, this time with all the "private benefit" stuff scrubbed out.

But no. While the court was considering the case, but before it imposed any remedy for the pretextual take, Apex simply installed the sewer line using its quick take power. Ah the old "midnight building permit" recast as "midnight eminent domain."

Now what ... again?

The trial court rejected Rubin's request for a mandatory injunction ordering Apex to get the sewer line off her property. The court concluded that the remedy for the trespass of a sewer line on Rubin's land was for her to sue for inverse condemnation for compensation, which she had not done. Lacking an inverse claim, the trial court concluded that the town's "just take it" approach was ok.

The North Carolina Court of Appeals affirmed the trial court's conclusion the taking lacked a public use. But it also expressed shock and dismay that the town would try to get around that by a purported exercise of its quick take power noting "[t]his not the law, nor can it be consistent with our Federal and State Constitutions."[26] But the court didn't order the town to remove the sewer line. Instead, it held that the proper claim is government trespass, and the proper remedy is ejectment.[27]

No party was satisfied with the court of appeals' ruling, and the town sought discretionary review (and Rubin conditionally cross-petitioned). The North Carolina Supreme Court agreed to take up the case. Stay tuned, we're going to keep following along.

PRIOR PUBLIC USE

Sovereign Immunity No Defense to Taking by One Governmental Entity from Another

In *Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Irrigation Dist. No. 1*, the Texas Supreme Court shut down what it observed as a recently emerging trend to assert sovereign immunity as a

government defense against a taking by another government entity.[28] The court did not reach the merits of this dispute between a county's "Improvement District" seeking an easement for the purpose of extending a water delivery pipeline under an existing canal and its "Irrigation District" which operates an existing water supply canal in the same county. The defending Irrigation District initially defended on grounds that the proposed underground pipeline would destroy its canal and then interposed a jurisdictional defense on sovereign immunity grounds. Because both lower courts had held the Irrigation District immune from suit all together, the Texas Supreme Court reversed and remanded for further proceedings to determine the Improvement District's right to take under the paramount purpose doctrine.[29]

This is an interesting read, not only because of the court's lucid review of sovereign immunity doctrine spanning from Roman to modern times, but also because of how it applied the doctrine. The court did not simplistically skip to the secondary question of whether the Texas Legislature had waived immunity by granting eminent domain power to the Improvement District, but instead addressed what it described as the "rare antecedent question" of whether immunity exists in the first place, exploring "how sovereign immunity interacts with a second power inherent to the state's status as a sovereign: eminent domain."[30]

Initially, the court cited to over a century of Texas case law involving condemnor-to-condemnor eminent domain disputes without any discussion of immunity in support of its characterization of sovereign immunity as a defense in public-on-public entity condemnation as a relatively recent phenomenon (appearing in Texas case dicta a couple of times since 2010). This led the court to ultimately declare that the Irrigation District's immunity defense "rings hollow."[31]

On the way to that conclusion, the court traced the common law roots of the sovereign immunity doctrine to underscore that the decision to modify or abrogate the doctrine for particular types of cases is a judicial one, leaving only waivers of immunity as the prerogative of the legislature.[32] It also synthesized the modern view of the doctrine as having the dual purpose of protecting the public fisc from litigation costs and potential judgments as well as promoting the separation of powers by preserving the Legislature's power to allocate tax revenues.[33]

In holding that there is no sovereign immunity to condemnation suits by other condemnors, the court articulated four reasons why the purposes underlying the doctrine would not be served by sovereign immunity in this context: (i) there would be a net-zero effect on the public fisc since compensation is paid to the government; (ii) granting immunity in this context would override legislative prerogative to grant eminent domain power to the Improvement District; (iii) government entities are not immune from takings claims on the "back end" after they take property without compensation, so it logically follows they are not immune on the front end where pre-take compensation procedures are being followed; and (iv) a condemnation suit does not infringe on the condemnee entity's policy discretion but rather would undermine the condemnation power given the condemnor entity by the legislature.[34]

Acknowledging that the legislature had granted eminent domain authority to both districts, the court reasoned:

> True, the condemnee entity is also addressing a public need. However, the paramount-public-importance doctrine has long provided an adequate framework for balancing the condemnor's legislatively granted condemnation authority with the condemnee's ability to serve its own public purpose. In applying the doctrine, the court defers to each entity's policy discretion by first considering whether allowing the condemnation undermines the condemnee's ability to fulfill that purpose. Only after the court determines that the two purposes cannot coexist does the doctrine require an inquiry into which interest should prevail under the circumstances of a particular

> case. The Irrigation District essentially asks us to replace this framework with a rigid judicial declaration that the policy decision of the condemnee public landowner should always prevail unless the Legislature expressly provides otherwise. We decline to do so. Instead, we reaffirm this Court's standing paramount-public-importance precedent.[35]

EXERCISE OF THE POWER SUBJECT TO REVERTER

Sovereign Immunity No Defense to Enforcement of Right of Repurchase Statutes

The Texas Court of Appeals held in *JRJ Pusok Holdings, LLC v. State* that a statutory right of re-purchase provision applied to the former landowner even though acquisition was accomplished by settlement.[36] Joint owners of land needed for a highway improvement project settled a pending condemnation case (albeit three weeks after its commencement) for a substantial increase over the state's presuit offer. Under the settlement, the right of way was conveyed by warranty deed reciting that the $680,000 of consideration represented a settlement compromise "to avoid eminent domain proceedings and the added expense of litigation."[37] The settlement also provided that the former owners would not seek damages, attorney's fees, or costs. The state nonsuited the case by motion representing that the "parties had negotiated the sale of the subject property."[38]

Over two years after the settlement, the former owners noticed that the planned highway had been re-routed elsewhere and they demanded their property back under a provision of the Texas Property Code entitling citizens (and their assigns) to repurchase property acquired through eminent domain if the property becomes unnecessary for the public use for which it was acquired. The road department refused to sell it back. The former owners then assigned their interest to Pusock Holdings LLC which filed alternate claims for violation of the applicable provision of the land code, inverse condemnation, and mandamus. The trial court dismissed for lack of jurisdiction on sovereign immunity grounds.

Though Pusack had relied exclusively on a constitutional waiver of immunity argument (asserting the Takings Clause of the state constitution), on appeal it successfully contended that the Texas Land Code contained a statutory waiver because of an intervening decision of another Texas appeals court.

> It would make little sense to give landowners the right to repurchase property previously taken by eminent domain yet deny them the ability to exercise the right. For us to conclude, as the State urges, that a landowner's sole recourse is to request the government to determine if the property is eligible—while shielding the government if it fails to make a determination or errs in its determination—does not give effect to the legislature's intent.[39]

The appeals court did, however, find that the alternate inverse condemnation and mandamus claims were properly dismissed. As to the inverse claim, the court agreed with the road department that Pusok Holdings' claim had not vested because it was not the owner at the time of the underlying taking (to whom compensation had been paid) and because the claim was premised on the mere anticipated continuance of a law that could be abolished. As to the mandamus claim, the appeals court concurred that the "ultra vires" exception to sovereign immunity was not met because the Director of Right of Way (who had been sued in his official capacity) had not acted outside the scope of his authority but had only acted incorrectly Acts within an official's scope of authority are shielded even if he or she "got it wrong."[40] The case was remanded for further proceedings to determine, as a factual matter, whether the subject property was rendered unnecessary for the public use for which it was acquired since the road department had not conceded this point prior dismissal on jurisdictional grounds.

NECESSITY

Maybe You Can Challenge Eminent Domain Necessity

Challenges to necessity in eminent domain by property owners are generally difficult to mount. But in

Pacific Gas and Electric Co. v. Superior Court, a California court held that in a necessity challenge, both the burden of proof and a legislature's assertion that a taking is needed to accomplish the stated public use are not totally un-challengeable in court.[41]

Under California law, there is a statutory presumption that a public entity's resolution of necessity to acquire property by eminent domain "conclusively establishes" public use and necessity.[42] "However, when the government is seeking to condemn a public utility to take over its operations, that conclusive presumption disappears."[43] In Pacific Gas, PG&E asked the court to clarify which standard of review applies in such cases.

The court concluded that the controlling statute "was plain on its face and compelled the conclusion that PG&E was entitled to actually litigate the public use and necessity issues," and that the statute permits a "factual contest on the issues[.]"[44] Imagine that— a property owner can actually object to a condemnor's assertion that her property is going to be taken for a public use or purpose and that the property is necessary to accomplish that use. Zut alors!

Before you get too excited, remind yourself that this ruling is limited to cases in which a "electric, gas, or water public utility" is being taken over "by a local public entity, other than a sanitary district exercising the powers of a county water district[.]"[45] Nonetheless, we're still glad to see some breaches in the nearly unbreachable judicial wall built around necessity in general.

DIMINUTION OF ACCESS

Landowner Cannot Obtain Compensation for Driveway Closure by Challenging Take of Adjacent Land

In *DEKK Prop. Dev., LLC v. Wisconsin Dep't of Transportation*, the Wisconsin Supreme Court affirmed an appeal court's reversal of an injunction against the state road department (DOT) requiring it to compensate DEKK for a taking and a driveway closure.[46] The DOT described its take, made in connection with a highway improvement project, to exclude the driveway closure, taking the stance that the driveway closure was a non-compensable police power decision. The landowner sought an injunction against DOT to require inclusion of the driveway closure in the case and to require compensation. The trial court obliged, but the appellate court reversed, holding that the statute under which the landowner sought relief was limited to challenging the taking described by the condemnor. The courts expressly did not reach the second issue of whether the landowner could claim compensation by some other avenue.

Compensation for Loss of Access Denied Where Easement Rights Were Extinguished and Some Access Remained

City of Carmel v. Barham Invs., LLC. involved installation of a roundabout that changed access to a car dealership, the main entrance of which was being eliminated by the project.[47] The trial court denied the city's motion for partial summary judgment that Barham was not entitled to compensation for its loss of access, and a jury subsequently awarded the dealership $2.4 million in damages. The appeals court reversed the denial of the city's motion because: (i) the dealership's easement in the road that had allowed its main entrance did not expressly reserve the access allegedly taken; and (ii) the city had acquired the road in another condemnation case, which extinguished the easement.[48] The court also noted that two access points to the business remained untouched and that the alleged loss of access was not "substantial or material" because the dealership could still run its business via another road.[49]

SEVERANCE DAMAGES

Severance Damages Claim Requires Ownership of the Condemned Property

In *State of Arizona Dept. of Transportation v. Foothills Reserve Master Owners Association Inc.*, the Arizona Court of Appeals construed state condemnation statutes to preclude a proximity damages claim by 589 homeowners in a subdivision where the state

road department took all of the subdivision's common area, in which the homeowners had easements.[50] Construing eminent domain compensation statutes that reference "parcels of land" to exclude easements, the court reversed the trial court's award of $12 million in proximity damages.[51]

The procedural posture of the case may have contributed to this outcome. Here, the Foothills Reserve Master Owners Association (HOA), which owned the subdivision common area, separately settled with the road department for the fair market value of the common areas, subject to independent resolution of the homeowners' claims. The homeowners sought two categories of compensation: $6 million in damages for the taking of the easements and an additional $12 million proximity damages for noise, pollution, loss of view, and unsightliness as a result of the new freeway. The road department conceded that compensation was due for the taking of the easements but contended the homeowners were not entitled to proximity damages because they had no possessory interest in the common areas.

The Arizona statute relating to the calculation of compensation for the part taken requires payment for "property" and "each and every estate or interest" in the property.[52] The state statute on severance damages provides for additional payment "if the property sought to be condemned constitutes only a part of a larger parcel."[53] The court rejected that argument, concluding that "parcel" refers exclusively to land and that their easements were instead created rights of use (or restrictions on use) of land.[54]

The court rejected the homeowners' "unity of interest" argument on grounds that courts only applied such analysis to determine the relationship between parcels of land. The homeowners' argument that the severance of their homes from the common areas (the latter viewed as the larger parcel) entitled them to severance damages, but the court rebuffed this as well, noting that several damages are only available when the landowner also owns the larger parcel. Notably, the opinion concludes with an acknowledgment that statutory law may not constrict baseline rights guaranteed by the state constitution but that the homeowners had not raised a constitutional challenge to Arizona's eminent domain laws.

Loss of Access Points Compensable Without Finding that Remaining Access is Unreasonable

The Court of Appeals of New Mexico upheld a severance damage verdict and the denial of new trial in *City of Albuquerque v. Tecolote Res., Inc.,* rejecting the condemnor's contention that the trial court gave the wrong jury instruction on diminished access.[55]

Tecolote owns a corner location shopping center from which the city condemned a strip of land for a rapid transit project. The project impacts included a reduced number of access points to Telecote's remaining property and erection of a median preventing left turns to and from a main road. Telecote sought $2.9 million in severance damages for impairment of access and the jury awarded $712,000. The city had asked for a jury instruction based on a state statute that allows compensation for diminished access where a landowner establishes that a taking leaves property with unreasonable access. The landowner succeeded in convincing the trial court to instead instruct the jury based on the general severance damage statute codifying a before–and–after market value rule. The appeals upheld the instruction, noting that the unreasonableness standard only applied where no land is taken and should not be the basis of instructions given in partial takings. In other words, the city was unable to wield a statute intended to expand compensability for diminished access (even where no land is actually taken) to limit compensation in a case involving the actual taking of land. The court concluded its opinion with a call for the appropriate committee to add clarification to standard jury instructions.

Jury Must Decide Issues Surrounding Severance Damages Claim

In *City & Cnty. of Honolulu by & through Honolulu Auth. for Rapid Transp. v. Victoria Ward, Ltd.*, the Supreme Court of Hawaii issued an extensive opinion resolving an interlocutory appeal of several partial summary judgment rulings on the scope of damages that could be claimed by the landowner and offsets

that could be sought by the condemnor.[56] The Honolulu Authority for Rapid Transportation (HART) took approximately two acres from the heart of Ward Village (owned by Victoria Ward, Ltd. (Ward)) for a transit station and associated rail lines. HART convinced the trial court through a series of motions for partial summary judgment to preclude Ward's severance damage claims on grounds that the Master Plan Permit allowing development of Ward Village required that future rail plans be "addressed and incorporated."[57] The court essentially reasoned that making room for the rail station and accommodating its effects was a condition of permitting and that Ward was estopped from claiming severance damages (e.g., lost development opportunities and circulation, cost of curing parking loss, and expense of noise and safety mitigations) because it had accepted the corollary benefits of the master permit.

These rulings were reversed on appeal due to factual disputes concerning the meaning of the "addressed and incorporated" language with instructions to submit to the factfinder all the disputed issues about intent of the parties, when and if the location of the proposed station had been determined at various points, and whether Ward had ever waived its compensation rights in the permitting process or in pretrial stipulations, the language of which was also disputed.

There are many valuation rule nuggets to mine here, but the main takeaway may be that juries decide condemnation cases, not judges via summary judgment. The state supreme court prefaced its detailed discussion with this bottom line:

> We acknowledge the factual and legal complexity of this case, and the circuit court's legitimate concern with narrowing the issues for trial. However, we conclude that in several circumstances, the circuit court incorrectly used summary judgment to resolve disputed factual issues. Most notably, the question of whether Victoria Ward is estopped from seeking severance damages involves disputed questions of fact and should be presented to a jury.[58]

This case is a good, even if long, read. The court articulately summarizes valuation rules common to many jurisdictions. It is also a cautionary tale about the pitfalls of permitting conditions. Here, the court found it "striking" that the Master Plan Permit did not require dedication of any particular parcels for the rail corridor or station, while it required specific land dedications for parks, etc.[59] That was among other telling facts that led the court to reverse summary judgments that precluded severance damages. Only time (and a doozy of a trial) will tell, but it may be that Ward successfully avoided an exaction at the time of permitting and, depending on a jury's factual findings about asserted waivers or estoppels, may avoid having to give up land for this public project with less than full compensation.

DATE OF TAKING

Date of Taking is When the Condemnor Occupies to the Exclusion of the Condemnee

In *Panhandle E. Pipe Line Co., L.P. v. Tarralbo*, a federal district court was confronted with the need to establish a date of taking for valuation purposes in a case where a pipeline company had leased land for a compressor station and, after renewal negotiations stalled, decided to holdover and then condemn the land.[60] The court held that the date of taking was the day the holdover commenced. The court also resolved a dispute concerning the scope of the property taken, since the pipeline company had constructed the buildings on the land. The court looked to Oklahoma state law and the language of the lease contract and determined that the pipeline company need not compensate for the buildings it had erected because it had retained the right to remove the buildings at the end of the lease term.

Plaintiff operated the Cashion Compressor Station pursuant to two certificates of public convenience and necessity issued by the Federal Energy Regulatory Commission (FERC). The station is located on a 20-acre tract of land (Property) in Kingfisher County, Oklahoma, which is owned by defendants. Plaintiff occupied the Property from April 20, 1979, to April 20, 2020, pursuant to three separate leases and one

lease extension. During this period, plaintiff constructed three buildings on the Property (Buildings). After their most recent lease expired, the parties were unable to reach a new agreement, but plaintiff continued to operate the Buildings on the Property.

The court followed the Supreme Court's rationale in *US v. Dow* and held that the date of taking was the date on which the plaintiff occupied the Property to the exclusion of the landowners. A later date would "'undermine policies determining the other incidents of the Government's obligation to provide just compensation.'"[61] It could also "encourage future manipulations, allowing condemnors to stay their hand 'until a [favorable] market situation' develops" and landowners "'might be in a position to increase unduly the Government's liability.'"[62]

BUSINESS DAMAGES

Business Losses Still Not Compensable After Recodification of Eminent Domain Law

In *Raylu Enterprises, Inc. v. City of Noblesville*, a business owner got Indiana courts to take a fresh look at whether business loss is compensable and lost.[63] Here, the city of Noblesville, Indiana initiated eminent-domain proceedings to appropriate a parcel of real estate owned by Raylu Enterprises, Inc. (Raylu). The two parties later agreed on compensation for the real estate, and Raylu agreed to withdraw its objection to the proceedings. Notwithstanding this agreement, Raylu sought to assert an inverse condemnation claim against Noblesville, arguing that while it had been compensated for the taking of its real estate, it had not been compensated for the taking of its business, which operated on the real estate. Noblesville moved to strike this claim, arguing in part that Indiana law historically does not recognize damages for the loss of a business in an eminent-domain action. The trial court granted the motion to strike. Raylu appealed, arguing the long-standing precedent should be re-examined considering Indiana's 2002 recodification of the eminent-domain laws.

On appeal, the Court found the 2002 recodification did not affect the substance of Indiana property law, holding: (i) Raylu may only receive compensation for the value of its real estate, which had already been given in the eminent-domain proceedings; (ii) Raylu could not receive compensation for the taking of its business because the business could operate elsewhere and thus had not been taken; and (iii) any compensation for the value of operating its business on that specific real estate had already been factored into the value of the real estate itself.

Statutory Cap on Compensation for Reestablishment Expenses Not Unconstitutional

In *Applied Bldg. Scis., Inc. v. S.C. Dep't of Commerce, Div. of Pub. Railways*, the Supreme Court of South Carolina considered whether reestablishment expenses for a dislocated business tenant are constitutionally guaranteed and the related question of whether a state statutory cap on recovery of such expenses is unconstitutional.[64] According to the opinion, 26 states (including South Carolina) have statutes authorizing *capped* compensation for re-establishment expenses for farms, non-profits, or small business dislocated as a result of eminent domain. The constitutionality of these caps has not been previously challenged but, in this case, an engineering firm that leased space in a building condemned by the state's Department of Commerce, Division of Public Railways, tried unsuccessfully.

Applied Building Sciences Inc. (ABS) was forced to move its business after condemnation of its landlord's building. There was no dispute that ABS was entitled to compensation for the taking of its leasehold (for which it received an apportionment of a settlement of compensation for the land taken), nor was there any dispute that ABS was entitled to moving costs and reestablishment expenses (the latter up to a maximum of $50,000 under state law). ABS renovated the space to which it relocated and presented a $560,000 bill to the Department for reimbursement. The Department refused. ABS brought an inverse condemnation claim for the amount of its reestablishment expenses in excess of the cap. The parties agreed to sever the inverse claim, and the trial court granted summary judgment against ABS by upholding the statutory cap as constitutional.

The state supreme court transferred the case to itself via a certification procedure and also upheld the constitutionality of the damages cap. In doing so, the court reiterated that South Carolina has largely adopted federal takings jurisprudence to determine when a taking has occurred and, accordingly, relied on several federal precedents holding that reimbursement of relocation expenses is not part of constitutionally guaranteed compensation under the Fifth Amendment. Such damages are a creature of statute, and thus the cap did not run afoul of any constitutional clause.

ATTORNEYS' FEES

Fees Recoverable are not Capped by Employment Agreement

In *State by Comm'r of Transportation v. Schaffer*, the Minnesota Court of Appeals addressed, as a matter of first impression, whether an award of statutory attorneys' fees in an eminent-domain proceeding is limited to the amount specified in the landowner's attorney-fee agreement.[65] The court found the grant of attorneys' fees to the owner of the condemned land was warranted under the statute governing attorneys' fees in eminent-domain proceedings, where the $92,000 awarded to the owner was about 114 percent greater than the condemning authority's last written offer for the land.

Dismissed Defendant Not Entitled to Fees

In *Columbia Gas Transmission, LLC v. 171.54 Acres of Land, More or Less, in Fairfield, Hocking, Monroe, Morgan, Muskingum, Noble, Perry, & Vinton*, Columbia instituted an action against various tracts of land in order to construct and operate the Leach Xpress gas pipeline project and was granted a certificate of public convenience from the Federal Energy Regulatory Commission (FERC) to do so.[66] Pursuant to Federal Rule of Civil Procedure 71.1, Columbia named all persons or interest holders who either had an ownership, possessory, or other interest in the tracts affected by the Leach Xpress Project or had or claim some right, title interest, or lien in, to, or on the affected tracts.

Blackhawk was listed as a party, and after several years of litigation surrounding the valuation of Blackhawk's interests, Columbia filed a Notice of Dismissal as to Blackhawk, stating that Columbia had "voluntarily acquired all necessary interests in the Condemnation Tracts from the Surface Owners [and] does not require any further interests from any remaining named Defendants/interest holders, Blackhawk included."[67] Blackhawk moved for attorneys' fees, arguing that Columbia abandoned the proceeding against it and Blackhawk was entitled to fees and costs pursuant to 42 USC section 4654(a). Columbia argued that Blackhawk's motion for attorneys' fees should be stricken under Federal Rule of Civil Procedure 12(f) because Blackhawk was a terminated party at the time it filed the motion.

The court found that because the motion for attorneys' fees was not a "pleading" as required under Rule 12(f), Rule 12(f) did not apply. The court also found that the motion should not be stricken as a "non-party filing," because the motion arose out of the same notice that terminated Blackhawk as a party.[68] The court ruled that federal law applied because condemnation under the Natural Gas Act is a federal law matter and, under section 4654(a)(2), attorneys' fees are not recoverable against a private entity.

PROCEDURE AND PRACTICE

Some Pre-Condemnation Entries are Takings Requiring Upfront Compensation

We don't often discuss trial court orders, but read on and you will understand why we made an exception here.

This case involves a pretty typical situation: a condemnor is contemplating taking property from someone and needs to figure out whether the property is suitable. It needs to get onsite and conduct surveys, examinations, tests, and take samples. Often, the owner of the property doesn't mind: "Pay me a bit for my trouble, indemnify me in the event someone gets injured, and you can have limited access to do your business and then go on your way, condemner."

But sometimes, an owner—as is her right—says no. In those cases, Oregon (as many states do) has a statute which says that a condemner may enter private property to conduct tests, take samples, and the like, as long as the owner is provided notice.[69] If an owner objects, the condemner may seek a court order "providing for entry upon the property and allowing such examination, survey, testing or sampling as may be requested by the condemner."[70]

Importantly, the statute also says that the owner is entitled to reasonable compensation for "[a]ny physical damage" resulting from the entry, and "[a] ny substantial interference with the property's possession or use" that is caused by the survey, entry, etc.[71]

Now that we've laid the foundation, here's how it played out in *Idaho Power Co. v. Bean*.[72] Idaho Power wants to run part of a transmission line over Bean's property in rural Oregon. It will need an easement and it needs to conduct studies. As the court notes:

> Petitioner must ensure that the project's path complies with permitting and siting requirements, including that it does not conflict with any protected resources. To ensure compliance, Petitioner must conduct surveys, tests, and samples on Respondents' property. These include three-toed woodpecker and northern goshawk surveys, rare plant inspection, gray owl and flammulated owl surveys, wetlands inspection, terrestrial visual encounter surveys, noxious weeds surveys, cultural resource surveys, enhanced archeological surveys, and historic properties management plan surveys, geotechnical drilling, land surveys, and an appraisal field visit.
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> ...
>
> Although Petitioner cannot say with certainty how many entries will be required for it to accomplish these various surveys, tests, and samplings (Tr. 136-160), all totaled, it appears they may amount to as many as thirty-two visits onto the property. Exhibit 2. The visits will primarily involve driving pick-up trucks and sometimes a trailer onto the property with crews of anywhere from one to five persons. *Id*. Four of the entries will involve some ground disturbance. Id. Two to five entries would be with "pickup trucks and trailer" Tr. 147. The geotechnical drilling will involve a "small track vehicle," Id. The "small track vehicle" is "probably larger than a F-350, but it's not quite as big as a large excavator." Id. The geotechnical drilling involves a "drilling crew" drilling "boreholes" approximately 6 to 8 inches in diameter. Exhibit 2, p. 4. The holes will be backfilled. Id. Petitioner acknowledges each entry will cause some interruption to the landowner.[73]

The property owner said no. The power company then sought an order to show cause why it should not be allowed entry under section 35.220.

The owner made two arguments in opposition. First, it asserted it was entitled to compensation before the entries and not after. Second, it argued the entries are takings under both the Oregon and US Constitutions.

The court agreed that the statute permits the power company to enter the property against the will of the owner, as long as it provided notice (check). The owner is entitled to "reasonable compensation" for physical damage or substantial interference with possession or use.[74] There's no statutory definition of those terms, but the court used the ordinary meaning and concluded that the entry "must cause actual harm to the land, crops or structures" on the property," or cause a "hampering of their quiet enjoyment of their property and/or their ability to produce an income from their property."[75] The entries seem to qualify.

So, what about that compensation? The owners asserted they were entitled to upfront compensation "in advance of Petitioner's entry."[76] Here, the court was presented with a problem: it concluded the statute only allows for post-hoc compensation because of the mechanics. Compensation is based on evidence of physical damage or substantial interference, and such evidence doesn't exist

until the condemner makes its entries. "That is a high bar. With the pre-condemnation entries contemplated here it would be very difficult to prove before the entry how the property would be physically damaged."[77]

But the conclusion that the owners cannot get reasonable pre-entry compensation "does not end the inquiry."[78] This takes us to the second argument—that the entries permitted by the statute are takings under the constitution(s), and thus require just compensation.

We won't go into the details, but suggest you read the order starting at page 8. Takings mavens will recognize the key citations to cases, such as *Cedar Point Nursery v. Hassid*,[79] involving the right to exclude being essential and the notion that it doesn't take much of an interference to be deemed a taking of that "essential" property stick.[80]

> Oregon courts have long held that "any destruction, restriction or interruption of the common and necessary use and enjoyment of the property of a person for public purpose constitutes a 'taking' thereof." Morrison v. Clackamas County, 141 Or 564, 568 (1933). To the extent that ORS 35.220 allows a condemner to enter onto one's property to conduct examinations, surveys, tests, and samples of the property without the consent of the owner and without just compensation, it is unconstitutional Such action amounts to a taking, under Article I, section 18 of the Oregon Constitution. This is because it deprives the property owner of that most essential property right: the right to exclude others from one's property. In order to comply with the Oregon Constitution, the condemner must pay "just compensation" before the pre-condemnation entry onto private property.[81]

Yes, the statute says an owner is entitled to reasonable compensation for these invasions if it causes physical damage or substantial interference. "However, the Oregon Constitution does not set such a high bar before the property owner may receive 'just compensation.'"[82]

But not all entries are takings. As *Cedar Point* noted, some government-authorized invasions are not takings "because they are consistent with longstanding background restrictions of property rights."[83] Even the property owner here agreed that some of the entries were not takings. Thus, some of the desired entries—land surveys or field visits—qualify, while some do not.[84]

For those entries that go beyond that, just compensation is due for appropriating "a right of access to the Respondents' property."[85]

> [T]he statute allows the condemner (Petitioner) to enter Respondents' property, without Respondents' consent, to examine, survey, test, and sample Respondents' property. The statute appropriates a right to physically invade the Respondents' property to conduct the various examinations, surveys, tests, and samples. Under Supreme Court precedent, this is a per se physical taking, which under the Fifth Amendment requires "just compensation." *Cedar Point Nursery*, 141 S.Ct. at 2074. In conclusion, Petitioner may not enter Respondents' property to conduct the surveys, tests and samples without paying "just compensation."[86]

That left the question of how much compensation. The court ordered the parties to try to come to an agreement and if no agreement can be reached, then the power company must institute eminent domain proceedings.

Settling a Just Compensation Claim Trades Property Rights for Contract Rights

Remember that recent First Circuit case which held that just compensation judgments cannot be subject to a governmental bankruptcy plan (cert denied, by the way)?[87] The court concluded that because the bankruptcy plan "rejected any obligation by the Commonwealth [of Puerto Rico] to pay just compensation, the Title III [bankruptcy] court properly found that the debtor was prohibited by law from carrying out the plan as proposed."[88]

Well, here's the other shoe dropping. In *In re Financial Oversight & Management Board for Puerto Rico*, the same court that held that a just compensation judgment may not be subject to reduction or discharge in a subsequent bankruptcy, held here that a just compensation *settlement* is.[89]

Suiza Dairy and other milk producers sued the Commonwealth of Puerto Rico for, among other things, a taking. It alleged that the Commonwealth's Milk Industry Regulation Administration's (yes, there is such a thing), "regulatory structure, which precluded them from making a reasonable profit in their milk business, constituted a confiscation of property in violation of the Takings Clause."[90] The district court concluded that the dairies were likely to prevail on the merits, and entered a preliminary injunction.

Eventually, the parties decided to settle. The settlement included an action component (the Administration "would 'promulgate a new regulatory scheme'") and a $171 million monetary component (the Administration would pay some cash, and consumers would pay via a new milk surcharge). The settlement described itself as a "final, absolute, binding and unappealable Judgment."[91]

The district court approved the settlement and incorporated it into a consent decree.

Three-and-a-half years later, the Commonwealth sought the protection of bankruptcy to restructure its debts. Suiza Dairy filed a creditor's proof of claim which it described as "NON-DISCHARGEABLE REGULATORY ACCRUAL CLAIM FOR U.S. CONSTITUTION[AL] VIOLATIONS INVOLVING [THE] TAKINGS CLAUSE."[92]

This was unsecured, naturally. And you know what that means. That's right—the resulting reorganization plan did not affirm the amounts in the settlement agreement, but "treat[ed] Suiza's claim as part of Class 53, a group of 'Dairy Producer' claimants that are entitled to receive, in full consideration of any allowed claim, 50% of the claim."[93]

The Title III court rejected Suiza's objections. The claims of other property owners who had not settled but who obtained just compensation judgments were not subject to the bankruptcy plan. The district court concluded the claims should not be treated the same. The takings claims reduced to just compensation judgments could not be reduced or eliminated in bankruptcy, while the takings claims which settled could.

The First Circuit affirmed. "The Plan properly classifies Suiza's claim as a non-takings claim."[94] The court found that "Suiza relinquished any takings claim it might have had when it voluntarily entered a settlement agreement in 2013."[95] In other words, the dairy traded its constitutional just compensation right for a contractual right. The former can't be eliminated or reduced in bankruptcy, while the latter may. Settlement agreements "are voluntary surrenders of the right to have one's day in court."[96]

That this was a settlement of a just compensation claim doesn't change that. Settling the takings claim "extinguished" it.[97] The court rejected Suiza's invitation to dig a bit deeper. Suiza argued that doing so would have revealed this was a just compensation settlement that that made it "special."[98]

> Specifically, Suiza claims that, because of the "self-executing character" of the Fifth Amendment, the right to just compensation arises immediately after a taking has occurred and cannot be disturbed or nullified in any way by the government's actions post-taking.[99]

The court rejected the notion that "self-executing" cases like *First English Evangelical Lutheran Church v. Los Angeles*[100] and *Knick v. Twp. of Scott*[101] mean that a just compensation claim can't be voluntarily surrendered. "These cases say nothing about whether property owners, through agreement with the government, can extinguish their own takings claims by settling."[102] The court explained that "[a]fter the settlement, any takings claim that Suiza might have had against the Commonwealth was replaced by a contractual claim."[103] Contract claims, unlike just comp claims, "can properly be impaired or discharged in bankruptcy."[104]

The court also rejected the argument that the Board didn't object to Suiza's claim which characterized its claim as a "takings" claim. Check out pages 19 through 31 for the details of why the court concludes the error, if any, was harmless (mostly grounded in bankruptcy procedure and law, so we're skipping it here).

Bottom line: as we've noted consistently, settling the case is ending the claim. Courts like to enforce these things, even when it means that you get treated like other unsecured creditors if the condemnor seeks to slough off its obligations in bankruptcy.

Notes

1 292 A.3d 1162, 1175 (Pa. Commw. Ct. 2023).
2 545 U.S. 469 (2005).
3 25 Pa. Code § 204(a).
4 292 A.3d at 1172-73.
5 Id. at 1174.
6 Id. at 1174-75.
7 2023 N.Y. Slip Op. 5058, No. 23-00478, 2023 WL 6528859, at *3 (N.Y. App. Div. Oct. 6, 2023).
8 Id.
9 225 N.E.3d 337, 40 N.Y.3d 1061 (N.Y. 2023).
10 Id. at 339.
11 218 A.D.3d 1306, 194 N.Y.S.3d 381, 384 (2023).
12 Twp. of Cinnaminson v. Cove House LLC, No. A-0576-23, 2023 WL 8368761 (N.J. Super. A. D. Dec. 4, 2023).
13 N.J.S.A. 40A:12A-5.
14 Twp. of Cinnaminson, 2023 WL 8368761 at *3.
15 Id. at *4.
16 Id. (citing Malanga v. Twp. of W. Orange, 253 N.J. 291, 319 (2023)) (emphasis in original).
17 Id. at *5.
18 290 A.3d at 1215.
19 Id. at 1230.
20 No. 2021-CA-1280-MR, 2023 WL 3134648, at *6 (Ky. Ct. App. Apr. 28, 2023), review granted (Sept. 20, 2023).
21 Id. at *1.
22 Id.
23 Id. at *3.
24 858 S.E.2d 387 (N.C. Ct. App. 2023).
25 Id. at 397.
26 Id. at 390.
27 Id. at 404.
28 669 S.W.3d 178 (Tex. 2023).
29 Id. at 188.
30 Id. 184.
31 Id. at 188.
32 Id. at 183.
33 Id. at 186.
34 Id. at 186-87.
35 Id. (citations omitted).
36 No. 14-22-00559-CV, 2023 WL 8939318, at *1 (Tex. App. Dec. 28, 2023).
37 Id. at *1.
38 Id.
39 Id. at *3 (citing State v. LBJ/Brookhaven Inv'rs, L.P. 650 S.W.3d 922, 932 (Tex. App. 2022), review denied (Nov. 10, 2023).
40 Id. at *6.
41 313 Cal.Rptr.3d 764, 772-76 (Cal. Ct. App. Sep. 21, 2023).
42 Cal. Civ. Pro. § 1245.250(a).
43 Bradford Kuhn and Steven Silva, Public Agency's Resolution of Necessity Not Entitled to Conclusive Presumption When Using Eminent Domain for Takeover of Public Utility, California Eminent Domain Report (Sept. 28, 2023), https://www.californiaeminentdomainreport.com/public-agencys-resolution-of-necessity-not-entitled-to-conclusive-presumption-when-using-eminent-domain-for-takeover-of-public-utility.
44 Id.
45 Cal. Civ. Pro. § 1245.250(a).
46 988 N.W.2d 653 (Wis. 2023).
47 222 N.E.3d 992 (Ind. Ct. App. 2023)
48 Id. at 996-98.
49 Id. at 998.
50 540 P.3d 1236 (Ariz. Ct. App. 2023).
51 Id. at 1239.
52 Ariz. Rev. Stat. § 12-1122(A)(1).
53 Ariz. Rev. Stat. § 12-1122(A)(2).
54 540 P.3d at 1240.
55 A-1-CA-39674, 2023 WL 9052473 (N.M. Ct. App. Dec. 28, 2023).
56 541 P.3d 1225 (Haw. 2023)
57 Id. at 1241.
58 Id. at 1235.
59 Id. at 1243.
60 No. CIV-20-751-D, 2023 WL 3575622 (W.D. Okla. May 19, 2023).

61 Id. at *3 (quoting U.S. v. Dow, 357 U.S. 17 (1958)).

62 Id. at *4.

63 205 N.E.3d 260, 261 (Ind. Ct. App. 2023).

64 2021-000051, 2024 WL 174157 (S.C. Jan. 17, 2024).

65 995 N.W.2d 177 (Minn. Ct. App. 2023), review granted Nov. 14, 2023.

66 No. 2:17-CV-70, 2023 WL 6390028, at *2 (S.D. Ohio Aug. 28, 2023).

67 Id. at *1.

68 Id. at *2.

69 Or. Rev. Stat. § 35.220.

70 Id.

71 Id.

72 No. 23CV12213, slip op. (Or. Cir. Ct. Sept. 6, 2023), available at www.inversecondemnation.com/files/opinion-re-pre-condemnation-idaho-power-co-v.-bean-or-cir-union-cnty-sep-6-2023.pdf.

73 Id. at 3-4.

74 Id. at 5.

75 Id. at 6.

76 Id. at 7.

77 Id.

78 Id. at 8.

79 141 S.Ct. 2063 (2021).

80 Idaho Power Co., Slip op. at 9-10.

81 Id. at 9.

82 Id.

83 Id. at 10.

84 Id.

85 Id. at 12.

86 Id.

87 In re Financial Oversight and Management Board for Puerto Rico, 41 F.4th 29 (1st Cir. 2022).

88 Id. at 46.

89 In re Financial Oversight and Management Board for Puerto Rico, 79 F.4th 95 (2023).

90 Id. at 104.

91 Id. at 105.

92 Id.

93 Id. at 106.

94 Id.

95 Id. at 106-07.

96 Id. at 107.

97 Id.

98 Id. at 108.

99 Id.

100 482 U.S. 304 (1987).

101 588 U.S. 180 (2019).

102 In re Financial Oversight and Management Board for Puerto Rico, 79 F.4th at 108.

103 Id.

104 Id.