

Recent Developments in Eminent Domain

Robert H. Thomas*

THE FOLLOWING ARE THE SIGNIFICANT EMINENT DOMAIN CASES decided in the past year, as well as some notable inverse condemnation and property rights cases that involve issues common to eminent domain litigation.

I. U.S. Supreme Court: *Horne v. Department of Agriculture: Way More than Silly Raisin Jokes*

“Separate educational facilities are inherently unequal.”

Chief Justice Earl Warren, *Brown v. Board of Education*¹

“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”

Justice Oliver Wendell Holmes, dissenting in *Lochner v. New York*²

“. . . prejudice against discrete and insular minorities . . .”

Justice Harlan Fiske Stone, *United States v. Carolene Products Co.*³

“Raisins . . . are a healthy snack.”

Chief Justice John Glover Roberts, *Horne v. Department of Agriculture*⁴

A Supreme Court win is a win, particularly by a margin of eight-to-one, so no one ought to complain too much about the Court’s opinion in *Horne v. Department of Agriculture*, holding that the United States Department of Agriculture’s requirement that raisin producers physically turn over a percentage of their yearly crops to the government without being provided compensation is a taking in violation of the Fifth Amendment.⁵

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1. 347 U.S. 483, 495 (1954).

2. 198 U.S. 45, 75 (1905).

3. 304 U.S. 144, 152 (1938).

4. (*Horne II*), 135 S. Ct. 2419, 2431 (2015).

5. *Id.* at 2443.

A. *All Joking Aside*

Because the case involved California raisin farmers and a regulatory scheme that was so easily subject to mockery, the case has spawned more than a few jokes and horrible puns in the popular media and commentariat. It certainly brought out the Chief Justice's dry wit, as reflected in the above quote. No less than *The Daily Show* did a piece caricaturing the USDA's regulation of raisins ("the product," according to the investigator interviewed, with plaintiff Marvin Horne labeled "a modern day Jesse James"), and nearly every report on the case has not resisted the temptation to make very bad raisin jokes.⁶ Even the Court could not hold back, and in addition to the Chief Justice's bon mot, Justice Thomas noted in his short concurring opinion that sending the case back to the Ninth Circuit for yet another try "would be a fruitless exercise."⁷ And do not forget those dancing raisins.

The case was also subject to mockery on the substantive side. The Ninth Circuit's rationale upholding the law was so transparently ridiculous that the Government did not even defend it seriously in the Supreme Court. The panel concluded that personal property is not subject to the same constitutional protection as real property, and thus the unconstitutional conditions doctrine of *Nollan*,⁸ *Dolan*,⁹ and *Koontz*¹⁰ was not applicable when raisins are seized.¹¹ So, it was not that hard to predict that the Hornes would prevail in their second trip to the Court.

Although "raisins . . . are a healthy snack"¹² certainly will not enter the Supreme Court Quote Hall of Fame (while clever, the phrase has not even generated an internet meme), it would be a mistake to relegate the case to the humor file, or to write-off the Court's ruling as a result so obvious that there was never any serious question about the outcome.

B. *Round I: Takings Defenses*

Horne is also one of those cases that could easily be overlooked by land use lawyers because it is not a traditional regulatory takings or

6. *The Daily Show*, Season 18, Episode 142 (Comedy Central television broadcast Aug. 13, 2013).

7. 135 S. Ct. at 2433.

8. *Nollan v. Cal. Coastal Comm'n*, 482 U.S. 825 (1987).

9. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

10. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

11. *Horne v. Dep't of Agric. (Horne I-A)*, 750 F.3d 1128, 1141-43 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

12. *Horne II*, 135 S. Ct. 2419, 2431 (2015).

inverse condemnation case in which a property owner asserted a positive claim that the government either physically harmed or overregulated her real property, such that it was the equivalent of the exercise of eminent domain, and sought just compensation as the remedy.

The takings claim arose as a defense by the Hornes to what Justice Kagan characterized as “perhaps the world’s most outdated law” the first time the case went up to the Supreme Court two years ago.¹³ The Hornes asserted the USDA could not legally impose fines on them for violating a statute that regulates the production and sale of raisins, because to do so would violate the Takings Clause.¹⁴ They defended against the fines under the Administrative Procedures Act (APA), seeking for the fines to be voided.¹⁵ They did not seek just compensation. Indeed, the remedy was the issue resolved unanimously in their favor in the first Supreme Court opinion, which held that the Hornes were not required to press their takings claim exclusively in the U.S. Court of Federal Claims, and their remedies for a taking were not limited to just compensation.¹⁶

The Hornes could, the Court held in that opinion, raise a takings defense and were not limited to the bizarre, wasteful process the Ninth Circuit would have required them to pursue: pay the fines in the district court, and then later seek reimbursement as just compensation by way of a Tucker Act claim in the Court of Federal Claims, which was, in the Ninth Circuit’s view, the only court with subject-matter jurisdiction to consider any form of a takings claim against the federal government.¹⁷

C. *The World’s Most Outdated Statute*

The litigation began when the USDA fined the Hornes, who had structured their raisin farming and processing operation in such a way that they believed they were exempt from the reach of the statute.¹⁸ The regulatory scheme is, as Justice Kagan aptly noted, complex.¹⁹ But here is the short version: The statute is a New Deal-era price control

13. Transcript of Oral Argument at 48-49, *Horne v. Dep’t of Agric.* (*Horne I*), 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev’d*, 135 S. Ct. 2419 (2015).

14. *Horne I*, 133 S. Ct. at 2059.

15. *Id.* at 2059-60.

16. *Id.* at 2063-64.

17. *Id.* at 2060.

18. *Id.* at 2059-60.

19. See Transcript of Oral Argument at 48-49, *Horne I*, 133 S.Ct. 2053; 7 U.S.C. § 608c (2012).

designed to maintain the market for raisins by limiting supply through something called a “raisin marketing order.”²⁰ This Article will not get into the statute’s technical distinction between a raisin “producer” (essentially, someone who grows raisins) and a raisin “handler” (who buy raisins from the producers, and who manages the sale further down the supply chain), but suffice it to say that the yearly raisin marketing order required producers to physically set aside a certain percentage of their yearly crops “for the account of” the Raisin Administrative Committee, (an agent of the USDA) an industry group which establishes how much of a producer’s yearly raisin crop cannot be sold.²¹ Title to the “reserve-tonnage raisins” actually transfers to the government, a fact which the Court found critical.²²

The Raisin Administrative Committee, in turn, controls the sale of these reserve-tonnage raisins—which are sold in secondary markets or simply given away—and keeps the proceeds for itself to cover the cost of administering the program, with the excess, if any, being returned to the handlers.²³ The bottom line is that producers may be compelled to turn over title of a large percentage of the raisins they grow to the government (actually, an agent of the government, the Raisin Administrative Committee, but any distinction there was abandoned by the government during oral arguments), and the statute itself provides no compensation mechanism.

The purported goal of the scheme is to stabilize the raisin market by limiting the amount of raisins grown each year that can be sold.²⁴ At the time of the statute’s creation, raisin farmers were not good at predicting the raisin market and, as a result, they grew more than the market could bear, and the prices dropped.²⁵ Until the Hornes, however, no one asked whether the program was still a good idea, nor had anyone challenged it.

The Hornes established a system where they were both producers and handlers, but they did not comply with the reserve-tonnage requirements.²⁶ This raised the ire of the USDA, which imposed massive fines, nearly \$700,000, which were affirmed during the USDA’s regulatory appeals process.²⁷ The Hornes sought judicial review in the U.S. District Court under the APA, interposing a takings defense

20. *Horne I*, 133 S. Ct. at 2056-57.

21. *Id.* at 2057-58.

22. *Id.* at 2061.

23. *Id.* at 2058.

24. *Id.* at 2057.

25. *Id.*

26. *Id.* at 2058-59.

27. *Id.* at 2059.

that argued, in essence, that the USDA cannot do this because it is physically taking the raisins and, in effect turning them over to someone else for public benefit or use, all without just compensation.²⁸

D. Round II: Fast Times in the Ninth Circuit

After the Supreme Court (in the first round) rejected the Ninth Circuit's jurisdictional dodge which concluded that the only forum in which a property owner can raise a takings argument (even as a defense) is the Court of Federal Claims, the Supreme Court sent the case back to the Ninth Circuit for a decision on the merits.²⁹

That court pulled another fast one. ("Fast one" is used because the Ninth Circuit panel had already ruled on the merits, issuing an opinion in the first case, and then withdrawing it in favor of the no-jurisdiction opinion which the Supreme Court eventually vacated. In the withdrawn opinion, the Ninth Circuit had ruled that there was no taking).³⁰ So it was no surprise that when the panel got the case back on the merits, it held that this was not a taking because raisins are personal property and not real property, thus they are not subject to the "physical occupation" per se rule of *Kaiser Aetna*,³¹ *Loretto*,³² and similar cases.³³ The basis of the Ninth Circuit's decision was so outrageous that the Government did not seriously defend it in the Supreme Court, and although those who follow regulatory takings cases were a bit surprised that the Supreme Court granted certiorari again, simply because this was the second time up (and that is rare), they truly were not that surprised given the low-hanging curve ball which the Ninth Circuit's rationale had offered up. There has never been a substantive distinction between personal and real property for purposes of takings or expropriation, back to the colonial days and even earlier, so it was hard to see how this rationale could survive.

It did not, and the Supreme Court's majority opinion expressly tracked the Hornes' three Questions Presented, answering each seriatim.

28. *Id.*

29. *Id.* at 2064

30. *Compare* *Horne v. Dep't of Agric.*, No. 10-15270, 2011 WL 2988902 at 9467-68 (9th Cir. July 25, 2011), *opinion amended and superseded*, 673 F.3d 1071 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015), <http://cdn.ca9.uscourts.gov/datastore/opinions/2011/07/25/10-15270.pdf>, *with* *Horne v. Dep't of Agric.*, 673 F.3d 1071, 1079-80 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

31. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

32. *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982).

33. *Horne I-A*, 750 F.3d at 1144.

1. QUESTION 1: PERSONAL VS. REAL PROPERTY

Every justice but Justice Sotomayor rejected the Ninth Circuit's rationale.³⁴ The opinion, authored by the Chief Justice, found it critical that title to the raisins actually transferred from the Hornes to the government and that the raisins were required to have been "physically set aside."³⁵ Magna Carta and the Takings Clause in the United States constitution were probably adopted in at least partial response to the "arbitrary and oppressive mode of obtaining supplies for the army"—which were takings of personal, not real, property.³⁶

Once it acknowledged that the same rules govern personal and real property, the eight-justice majority applied the long-standing physical takings rule, easily rejecting the Ninth Circuit's conclusion that *Lucas*³⁷ established a distinction between physical takings of personal property and takings of real property.³⁸ The *Lucas* language relied on by the Ninth Circuit involved regulatory takings and not actual appropriations; *Lucas* was not a physical taking case, but rather a regulatory wipeout: an entirely different animal.³⁹

2. QUESTION 2: RAISINS ARE NOT EAGLE FEATHERS, PESTICIDE TRADE SECRETS, OR OYSTERS

The Court also rejected Justice Sotomayor's assertion that this was not a taking because the regulations did not result in a total wipeout of the raisins' value.⁴⁰ After all, the Government argued that the regulations allowed in certain circumstances for producers, such as the Hornes, to potentially get some return, and a hypothetical, future interest is enough to say that the raisins were not taken. The Court rejected this theory, holding that a "contingent interest of indeterminate value" does not lessen the blow of a physical appropriation of the raisins.⁴¹

To reach this result, the majority rejected each of the cases which the USDA had raised to argue that the Court had, in years past, upheld similar schemes.⁴² The government prohibition on the sale of eagle feathers was not a confiscation of the feathers and left their owners with other valuable rights, so it was not a regulatory taking.⁴³ But

34. *Horne II*, 135 S. Ct. 2419, 2437 (2015) (Sotomayor, J., dissenting).

35. *Id.* at 2428 (majority opinion).

36. *Id.* at 2426 (internal citations omitted).

37. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

38. *Horne II*, 135 S. Ct. at 2427-28.

39. *Id.* at 2427; *see Lucas*, 505 U.S. at 1015.

40. *Horne II*, 135 S. Ct. at 2428-29.

41. *Id.* at 2423.

42. *Id.* at 2428-29.

43. *Andrus v. Allard*, 444 U.S. 51, 68-69 (U.S. 1979).

the Hornes, unlike the owners of the eagle feathers, actually lost possession of their reserve tonnage raisins, so it was not relevant whether the requirement left them with value.⁴⁴ Nor are raisins like dangerous pesticides, so in *Monsanto*,⁴⁵ the government could validly condition entry into the pesticide market on the surrender of trade secrets.⁴⁶ This is where the “healthy snack” bit came in. And raisins are not oysters, which are wild animals owned by the state on state land.⁴⁷ Raisins, by contrast, are private property, grown on private land.⁴⁸

3. QUESTION 3: “LET THEM SELL WINE?”

The Court also rejected the USDA’s attempt to characterize the regulation as a mere “use restriction” akin to a condition in a land use permit.⁴⁹ The Government had argued that it was the master of the raisin market, and if the Hornes wanted to play, they had to pay the price of admission. Which they did voluntarily, according to the Government. Having agreed to participate, they could not object to the price of the ticket: the raisin marketing order’s restrictions. The USDA also argued the Hornes were not being forced to use their grapes for raisins, or to even grow grapes at all. This “let them sell wine” theory was also soundly rejected by the majority.⁵⁰

Interestingly, the majority completely ignored *Yee v. City of Escondido*,⁵¹ a case relied upon by the USDA, which held that owners of mobile home parks which rented space to mobile-home owners did not have a physical takings claim arising from an ordinance controlling the rent they could charge, because they voluntarily opened up their properties to the renters.⁵² *Yee*’s rationale, if applied to the Hornes, might have supported the USDA’s argument that no one is forcing the Hornes to grow and sell raisins; that the Hornes can always do something else with their grapes and not turn them into raisins. Which would take the wind out of the Hornes’ sails on the physical

44. *Horne II*, 135 S. Ct. at 2429.

45. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020 (1984).

46. *Horne II*, 135 S. Ct. at 2430.

47. *Id.* at 2431 (distinguishing *Leonard & Leonard v. Earle*, 279 U.S. 392 (1929), which upheld a Maryland state tax requiring oyster farmers to turn over to the state 10% of the empty oyster shells which they harvested, or pay a monetary equivalent).

48. *Horne II*, 135 S. Ct. at 2431.

49. *Id.* at 2430-31.

50. *Id.* at 2430.

51. 503 U.S. 519 (1992).

52. *Id.* at 527-29; Brief for Respondent at 30-31, *Horne II*, 135 S. Ct. 2419 (2015).

takings argument. But only Justice Sotomayor's dissent mentioned that decision.⁵³

The majority did cite *PruneYard Shopping Center v. Robins*, the case in which the Court held there was no taking when the California Supreme Court interpreted the free speech provision of the California Constitution to bar the owner of a shopping center from excluding someone based on the content of their speech.⁵⁴ That can be seen as a very unsatisfactory reading of *PruneYard*, because it is difficult to see in either that case or *Yee* how the regulations at issue did not require a physical occupation, at least to the same extent as the raisin marketing order did.

E. *A Taking Without Compensation?*

Finally, we get to the main disagreement: did the regulation which resulted in the physical occupation of the Hornes' raisins also provide them "in-kind" compensation (and thus, there was no unconstitutional, uncompensated taking)?⁵⁵ Three Justices (Breyer, Ginsburg, and Kagan) dissented in part, and wanted to send the case back to the Ninth Circuit to figure out whether the Hornes may have benefitted more from the regulations than the value of the taken raisins.⁵⁶ If so, no problem.

The majority rejected this argument, which seemed to be gaining some traction during oral arguments, and held that nothing further was needed.⁵⁷ The appellate remedy was thus an outright reversal of the Ninth Circuit with judgment entered for the Hornes, and not the usual vacate-and-remand.

Chief Justice Roberts and the majority concluded that the just compensation in this case had already been calculated: the amount of the fine imposed by the USDA, which was supposedly based on market value of the raisins.⁵⁸ The point of this was not to calculate the compensation that the Hornes are owed—recall that the takings argument was raised as a defense to the fines imposed—the Hornes never paid the fines, nor did they seek compensation in the Court of Federal Claims, but a clever way for the majority to show that no compensation

53. *Horne II*, 135 S. Ct. at 2441 (Sotomayor, J., dissenting).

54. 447 U.S. 74 (1980); see *Horne II*, 135 S. Ct. at 2429 (5 S. Ct. at 2429) ("the value of the use of the property as a shopping center largely unimpaired, so the regulation did not go 'too far.'").

55. *Horne II*, 135 S. Ct. at 2432.

56. *Id.* at 2433 (Breyer, J., concurring in part and dissenting in part).

57. *Id.* at 2432 (majority opinion); see Transcript of Oral Argument at 15-17, *Horne II*, 135 S. Ct. 2419 (2015).

58. *Horne II*, 135 S. Ct. at 2433.

had been offered. Indeed, the amount of the compensation was already known, and the USDA had attempted to impose the cost on the Hornes and not the other way around.⁵⁹ Essentially, the majority concluded the USDA had conceded that no compensation had been paid and thus there was nothing to remand.

The Chief Justice's sleight-of-hand was much too hard in the view of those who follow regulatory takings. What mattered was that the regulation itself did not provide for compensation and the USDA did not offer any. There never was any need to calculate compensation in this case, just determine that the government did not provide any and the Hornes did not get any. The Court decided that in the first case, when it held the Hornes could raise their takings defense in the district court; that they did not need to pay the fine and then go ask for it back as just compensation in an action in the Court of Federal Claims.⁶⁰

F. Justice Breyer and Special Benefits

Justice Breyer and the dissenters' disagreement was with the lack of remand.⁶¹ He wrote that the case should have been sent back to the Ninth Circuit to calculate whether the Hornes received just compensation, since the Takings Clause says "no takings without just compensation."⁶² Maybe the Hornes were compensated by other means, such as having the market price of their raisins raised or stabilized, for example. He did not know, so argued for remand (this is where the Chief Justice's clever maneuver worked in: the majority knew how much compensation the Hornes would have been deprived—the amount of the fine—and because the Government thus tacitly admitted that no compensation had been paid, there was no need for a remand to calculate it).

This average-reciprocity-of-advantage argument was not pushed too hard by the Government and it was not in the Questions Presented.⁶³ The Ninth Circuit had not decided it. "It was barely touched on in the briefs," according to Justice Breyer.⁶⁴ So he did his own research and theorizing, and the dissenters relied on Breyer's version of the

59. *Id.*

60. *Horne I*, 133 S. Ct. 2053, 2063-65 (2013).

61. *Horne II*, 135 S. Ct. at 2433 (Breyer, J., concurring in part and dissenting in part).

62. *Id.* at 2433-34.

63. See Brief for Petitioner at i, *Horne II*, 135 S. Ct. 2419 (2015).

64. *Horne II*, 135 S. Ct. at 2433.

“benefits” rule to support their point that when looked at overall, the Hornes might be better off in the program than outside it.

The benefits rule is from eminent domain: when a taking increases the value of property, the increase, in some circumstances, has to be taken into account.⁶⁵ So if a new road takes property and that road creates access to the remaining land that was not there before, the land may be worth more than before.

But this is not a general rule as Justice Breyer set out, but rather the special benefits rule, applicable only in certain situations involving (1) partial, and not total takings; (2) where the “benefits” are specific to the remainder property, and not shared with the public; and (3) special benefits to the remainder may only be set off against damages to the remainder, and not to just compensation for the property actually taken.⁶⁶

Justice Breyer was, in effect, trying to bootstrap a narrow just compensation doctrine, that no party presented or argued, into the question of whether there’s been a taking at all, even in a case of a physical occupation. Which seems wrong. This sounds more like “regulatory just compensation” and not “regulatory takings.” Takings is concerned with impact on the property, not value to the taker. And when there’s been a physical taking, one really does not care how or if property not taken has been benefited at all.

G. Lone Wolf

And what to make of Justice Sotomayor’s solo dissent, which argued that there was no taking at all, because the USDA did not take all of the Hornes’ rights in their raisins?⁶⁷ The rights they have, according to Justice Sotomayor, is that contingent remainder that was mentioned earlier.⁶⁸ To her, the raisins were like eagle feathers, like pesticides, and like oysters. They are especially like mobile homes. To Justice Sotomayor, a physical occupation is no different than other cases, and must utterly destroy the value of property for it to be deemed a taking.⁶⁹ Which is just another way of bootstrapping in the *Penn Central*⁷⁰ ad hoc economic test into per se physical takings doctrine. A non-starter with her fellow Justices, and rightly so.

65. *Id.* at 2432 (majority opinion).

66. *See, e.g.*, 2 Philip Nichols, *The Law of Eminent Domain* sec. 249 (1917).

67. *Id.* at 2437-43 (Sotomayor, J., dissenting).

68. *Id.* at 2437.

69. *Id.* at 2440.

70. *Penn Cent. Transp. v. N.Y.C.*, 438 U.S. 104, 123-26 (1978).

H. *Takeaways from Horne*

Physical takings are still the Holy Grail of regulatory takings law. Although regulation can depress the value of property severely without it being a taking, a physical take is different.⁷¹ Even a small one. Does the physical take fetish make sense? No, because why should a regulation that nearly but does not totally wipe out the value of property be for the most part deemed okay, while a de minimus physical intrusion that causes little impact (*Loretto*) be treated like the apocalypse? No good reason, as far as one can tell. But there is no likelihood the Court will be abandoning this distinction in the foreseeable future.

1. CONDITIONS

The government cannot make the ticket for admission to the raisin market conditional on giving up some of the product.⁷² This is the biggest point to take home from *Horne*, and a prime area for future cases. Yes, the government can control markets, overwhelmingly. The line that the Court is unwilling to cross, however, (with the sole exception of Justice Sotomayor) is when those market controls require someone to physically surrender things. Like raisins. Like a small portion of the space on a rooftop for a cable box. And so forth.

2. GROUND RULES

Horne should leave takings lawyers doing what they have always done in these type of cases: property advocates will seek the physical take or its equivalent in the regulatory requirement, while police-power advocates will argue that it is only regulation, and not the physical invasion as in *Loretto*⁷³ (permanent occupation), *Kaiser Aetna*⁷⁴ (public easement for navigation), and now *Horne*⁷⁵ (taking title and possession).

3. FUTURE ISSUES

Horne left open some pressing questions. When is a requirement to give up property an “exaction” that imposes a physical taking, and when it is merely “economic regulation” reviewed under rational basis? What about rent control; does *Yee*’s rationale that a physical occupation is not really a physical occupation if the owner “voluntarily” opened up their land to renters survive *Horne* and the Court’s noticeable lack of citation to *Yee*? And what of other, similar agriculture

71. *Horne II*, 135 S. Ct. at 2429 (majority opinion).

72. *Id.* at 2430.

73. *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982).

74. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

75. *Horne II*, 135 S. Ct. 2419 (2015).

programs? Can the government get around *Horne* simply by rewriting the reserve-tonnage requirements as prohibitions on sale without requiring a transfer of title, and thus mere regulatory restrictions on use that do not impose a physical occupation?

The final thought on *Horne* is it says something that a case like this, involving the pervasiveness of the regulatory Leviathan, dragged on for so long and forced the property-owners to make two trips to the Supreme Court before the government was compelled to let go of a program that nearly everyone laughs at when they find out about it.

II. Public Use or Purpose—Power to Take

A. *The Chicago Way: City Taking Non-Blighted Property for Economic Development Was Not Pretextual Because . . . Studies*

In *City of Chicago v. Eychaner*, the Illinois Appellate Court upheld the taking of private vacant land near the Chicago Loop so that it could be transferred to the owners of a nearby chocolate factory (Blommer's Factory).⁷⁶ The court viewed this "A-to-B" taking as merely a part of an area redevelopment and tax increment finance plan, which would keep the chocolate factory from moving out as the area gentrified.⁷⁷

The opinion contains a long recitation of the reasons for the taking, how the Planned Manufacturing District (PMD) was designed to "protect[] the 2,800 industrial jobs located in the area, [to] prevent[] residential encroachment on the existing manufacturing facilities, and [to] encourag[e] manufacturers to invest in their facilities," and how the process ultimately resulted in Eychaner's land being transferred to Blommer.⁷⁸ In addition to the chocolate factory, the PMD area included eight other "industrial firms."⁷⁹ But the opinion (and apparently the plan) focused on Blommer's chocolate factory. Ironically, Blommer did not want to be included in the PMD because a property to its south was already scheduled for a "massive residential development," which meant there would be no buffer between Blommer's heavy industrial use and these future new residents, who would be sure to find "intolerable" the smell, noise, and traffic generated by the chocolate factory.⁸⁰

76. 26 N.E.3d 501 (Ill. App. Ct. 2015). For a visual depiction, see *id.* at 507.

77. *Id.* at 518.

78. *Id.* at 506.

79. *Id.* at 507.

80. *Id.* at 508.

Because it wanted to avoid these future troubles, Blommer suggested that the city exclude it from the PMD or prohibit the residential development.⁸¹ Otherwise, it might have to leave Chicago and convert its property to some other use.⁸² Or, the campus could be moved north.⁸³ Initially, these plans did not include Eychaner's land, but the very next month the city wrote to Blommer:

We are committed to keeping quality manufacturing firms, such as [Blommer] in the City. To that end, we are very interested in helping your [sic] create a larger 'industrial campus' as a means to internalize your loading operations, limit traffic impacts on adjacent streets, and provide room to expand." The commissioner wrote that the Plan Commission would: (i) work on the possibility of closing parts of Hubbard Street and Jefferson Street; (ii) pursue the creation of a tax-increment finance district to finance public infrastructure improvements and "any potential acquisitions," which now included Eychaner's land; and (iii) defer approval of residential development south of Blommer's plant "to explore design, use and density issues." The PMD, the commissioner noted, would "ensure that properties to the north and east of [Blommer's] factory are not developed for residential use," and also made clear that Blommer's "public support for this action [was] crucial in getting this measure through the legislative process."⁸⁴

By the following month the plan was even more concrete, and "Blommer commissioned an architect to draw up a site plan for its expanded campus[,] [t]hat plan included Eychaner's land" and proposed using the city's eminent domain power to take it and transfer it to Blommer for \$1.⁸⁵

The city complained that "Blommers seems to be negotiating as if they have us over [a] barrel," but ultimately a few months later, the city adopted the PMD and began the tax-increment financing scheme that would fund the thing.⁸⁶ The city commissioned studies, and produced a sixty-eight page report which concluded:

[T]hat tax-increment financing would induce private investment and arrest blighting factors in the area. Because the area had not been subject to growth and reinvestment, the study reasoned that property owners would not invest in their properties without tax-increment financing. The study anticipated benefits, including: (i) stronger economic vitality; (ii) increased construction and long-term employment opportunities; (iii) replacement of inappropriate uses, blight, and vacant properties with viable, high-quality developments; (iv) the elimination of physical impediments, such as roads in poor condition; (v) the construction of public improvements to

81. *Id.* at 509.

82. *Id.*

83. *Id.*

84. *Id.* at 510-11.

85. *Id.* at 511.

86. *Id.* For a discussion on tax increment financing schemes, see generally SECTION OF STATE AND LOCAL GOV'T LAW, ABA, TAX INCREMENT FINANCING (David Callies & W. Andrew Gowder, Jr. eds., 2014).

attract private investment; (vi) job-training services to make the area more attractive to investors and employers; and (vii) opportunities for minority- and women-owned businesses to share in the redevelopment.⁸⁷

Eychaner's land was not blighted, but there was some blight in the area, so Eychaner's land was soon placed into a "conservation area" because in the future it "may become a blighted area."⁸⁸ A few months later, Blommer submitted its proposal to redevelop the area around the factory, which included Eychaner's land, for all of the usual reasons that support an economic development taking: creating and retaining jobs, increased tax revenue, and to ensure that the plant stayed in the city.⁸⁹ When Eychaner refused to sell to Blommer, down came the city's eminent domain hammer.⁹⁰

The appellate court distinguished *Southwest Illinois Development Authority v. National City Environmental (SWIDA)*, the case in which the Illinois Supreme Court invalidated a taking for private benefit, concluding that an A-to-B taking with "minimal public benefit" which "principally benefitted" a private party could not withstand public use scrutiny.⁹¹ Concluding that the taking of private property for an adjacent racetrack's parking lot was a "purely private benefit and lacks a showing of a supporting legislative purpose," the *SWIDA* court held that the "true beneficiaries of this taking are private businesses and not the public."⁹²

The *Eychaner* court held *SWIDA* was different because they did not have plans.⁹³ In *SWIDA*, the condemnor produced no studies, and thus the court was able to see through the pretext to the "sweetheart deal" to understand that the taking was not intended to benefit the public.⁹⁴ It did not matter whether the public was allowed to access the property under its new ownership, because the key issue is the motive of the condemnor. Relying on *Kelo*,⁹⁵ the *Eychaner* court concluded that the City had adequately documented that its motives were pure because it showed the taking of Eychaner's land was just part of a plan. A "carefully formulated" economic development plan, not a sweetheart deal.⁹⁶ Thus, the court held the taking "unquestionably

87. *Eychaner*, 26 N.E.3d at 513.

88. *Id.* at 514.

89. *Id.*

90. *Id.*

91. 768 N.E.2d 1, 10 (Ill. 2002).

92. *Id.*

93. *Eychaner*, 26 N.E.3d at 518.

94. *Id.*

95. *Kelo v. City of New London*, 545 U.S. 469 (2005).

96. *Eychaner*, 26 N.E.3d at 522.

serves a public purpose of preventing blight, promoting economic revitalization, and protecting existing industry.”⁹⁷

The court rejected Eychaner’s pretext arguments after acknowledging that “[r]ecognizing the difference between a valid public use and a sham can be challenging.”⁹⁸ But the existence of the plans made it much less challenging, indeed a foregone conclusion:

[A] telling feature of sound public use in the context of economic redevelopment is the existence of a well-developed, publicly vetted, and thoughtful economic development plan. Such a plan was present in *Kelo*, and *Gutknecht*, but absent in *SWIDA* (“SWIDA did not conduct or commission a thorough study of the parking situation at [the racetrack]. Nor did it formulate any economic plan requiring additional parking at the racetrack.”). A taking will likely pass constitutional muster where done in furtherance of a sound economic development plan, rather than the plan retroactively justifying the taking.⁹⁹

This was no “sham to take [Eychaner’s] property.”¹⁰⁰ The City had an economic revitalization plan, and the taking was but a part of it because it “aligned” with the City’s stated goals to retaining “existing industry [Blommer], prevent[s] conflict between residential and industrial use [Blommer], and promote[s] investment and revitalization [Blommer’s] in a conservation area.”¹⁰¹

Having found the taking constitutional, the court did have problems with the way the trial court handled the just compensation issue, concluding that the “scope of the project” rule should have resulted in the trial court excluding evidence of the PMD zoning.¹⁰² The court held that the “public improvement” (the project) “is Blommer’s expanded industrial campus, the ultimate use of Eychaner’s property.”¹⁰³

The record indicates that the creation of the PMD, the River West TIF, and the taking of Eychaner’s land were all a single project. The City began the process of creating the PMD in late 1999 with the goal of protecting industrial users like Blommer. The City’s study regarding the River West TIF indicated that it was a “financial mechanism necessary to implement the goals and objectives of” the PMD. The taking of Eychaner’s land was not only an integral part of creating the PMD, but also served to carry out the goals of PMD and River West TIF. Namely, the preservation of the City’s industry, prevention of conflicts between industrial and residential uses, job creation, and increased tax revenue.¹⁰⁴

97. *Id.* at 520.

98. *Id.* at 521.

99. *Id.* at 521-22 (internal citations omitted).

100. *Id.* at 522.

101. *Id.* at 523.

102. *Id.* at 526.

103. *Id.* at 525.

104. *Id.*

Note the irony in the City's argument: the "project" for purposes of the scope of the project rule, supposedly the property owner's expectations of why its property was taken, was not to give it to its neighbor, when that was exactly the City's argument supporting its claims of public use. The court rejected as "speculative" the City's argument that "Eychaner's land would have been included in the PMD even if it was not taken for Blommer's expansion."¹⁰⁵

B. *Arizona Court of Appeals: Statute Giving School District Power to Take "Buildings and Grounds" Implies Power to Take Roads*

In *Catalina Foothills Unified School District No. 16 v. La Paloma Property Owners Ass'n*, the Arizona Court of Appeals held that a statutory grant of power to school districts to take property for "buildings and grounds" also implied the power to take property to access those buildings and grounds.¹⁰⁶

The School District acquired La Paloma's vacant land in a stipulated eminent domain judgment, promising that the only access to the new campus from an adjacent private road also owned by La Paloma would be on foot.¹⁰⁷ The road was used by residents of the La Paloma subdivision for vehicular access.¹⁰⁸ After the District built a new campus, it decided that it also needed vehicular access via that private road, so the District condemned it, subject to La Paloma's perpetual easement allowing the residents of the subdivision to continue using it.¹⁰⁹ La Paloma objected, because the statute¹¹⁰ delegating eminent domain power to school districts limits the delegation to takings for "buildings and grounds" and a road is not a "building" nor "grounds."¹¹¹ The court of appeals disagreed. Yes, the court recognized that "[a] court will not inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions," but this statute needed expanding and a bit of stretching.¹¹² The court held that the power to take buildings and grounds necessarily implied the power to take property to access those buildings and grounds.¹¹³

105. *Id.*

106. 363 P.3d 127 (Ariz. Ct. App. 2015).

107. *Id.* at 130.

108. *Id.*

109. *Id.*

110. ARIZ. REV. STAT. § 12-1111(3) (2016).

111. *Catalina Foothills*, 363 P.3d at 131.

112. *Id.* (quoting *City of Phoenix v. Donofrio*, 407 P.2d 91, 93 (Ariz. 1965)).

113. *Id.* at 514.

The court also rejected La Paloma's argument that "buildings and grounds" does not include existing roads, and held that it does not matter what the property was being used for before the taking, only after.¹¹⁴ This was an argument that the District cannot take property to get access into or on school grounds, and it would be ridiculous if a school district could take vacant land, but was prohibited from using a part of that land to create a road—a point conceded by La Paloma.¹¹⁵

And what about that other part of the statute which grants the power to take property for use as roads, but only grants that power to a "county, city, town or village," but not school districts?¹¹⁶ That provision would not allow the District to condemn land that is not connected to District property. But that's different than property that is connected to District property. It can take those roads. The court also disposed of other issues in the case: severance damages, voter approval of the taking, and prejudgment interest.¹¹⁷

C. To But Not Through: Bluegrass Pipeline Must be PUC-Regulated for the Benefit of Kentucky Consumers to Use Eminent Domain

The Bluegrass Pipeline is a massive private pipeline that would deliver natural gas from the Marcellus and Utica shale formations to the Gulf Coast.¹¹⁸ It is planned to run through thirteen Kentucky counties, although there are no "offramps" for the natural gas actually in Kentucky.¹¹⁹ In *Bluegrass Pipeline Co. v. Kentuckians United to Restrain Eminent Domain*, the Kentucky Court of Appeals concluded that the pipeline company did not have eminent domain power because it was not regulated by the Public Service Commission, and therefore was not "in public service" as required by Kentucky eminent domain statutes.¹²⁰

114. *Id.* at 515.

115. *Id.*

116. ARIZ. REV. STAT. § 12-1111(6) (2016).

117. *Id.* at 517-19.

118. *Kentucky House Votes to End Eminent Domain for Bluegrass Pipeline*, MARCELLUS DRILLING (March 24, 2014), <http://marcellusdrilling.com/2014/03/kentucky-house-votes-to-end-eminent-domain-for-bluegrass-pipeline/>.

119. *Proposed Bluegrass Pipeline*, KENTUCKIANS FOR THE COMMONWEALTH, <https://www.kftc.org/pipeline> (last visited May 15, 2016).

120. *Bluegrass Pipeline II*, 478 S.W.3d 386 (Ky. Ct. App. 2016); *See* KY. REV. STAT. ANN. § 278.502 (West 2016) ("Any corporation or partnership organized for the purpose of . . . operating oil or gas wells or pipeline for transporting or delivering oil or gas, including oil or gas products, in public service, may . . . condemn the land and material or the use and occupation of the lands.").

The trial court concluded that this means that a private entity like Bluegrass must be regulated by the PSC and “in public service.”¹²¹ Even though the plain text of the statute does not limit it to PSC-regulated entities, the trial court concluded that the legislative history made it clear that the legislature intended it to be so, and that Bluegrass cannot “circumvent the statutory protections for landowners to take advantage of the right of eminent domain.”¹²² The court of appeals agreed, holding:

[T]he legislature only intended to delegate the state’s power of eminent domain to those pipeline companies that are, or will be, regulated by the PSC. In addition, the NGLs in Bluegrass’s pipeline are being transported to a facility in the Gulf of Mexico. If these NGLs are not reaching Kentucky consumers, then Bluegrass and its pipeline cannot be said to be in the public service of Kentucky.¹²³

A big win for those who oppose these pipelines. Will other jurisdictions follow suit? Stay tuned.

*D. North Carolina Court of Appeals: No Public Use
or Benefit When Town, Fueled by Improper Motive,
Condemned Private Street to Make it Public*

In *Town of Matthews v. Wright*, the North Carolina Court of Appeals invalidated a taking, the stated purpose of which was to make a portion of a private road into a public street.¹²⁴ A taking to open a private road to the public? That sounds like a public use or purpose, no? And had the court of appeals stopped there without delving deeper, and had the case not had the history which it did, the result might have been different.

The facts that led the court to that conclusion are worth reading in depth, but here is the summary: the homes of the Wrights and five neighbors are located on a dead-end street, Home Place, which connects to the public street system at Revedery Lane.¹²⁵ Home Place was originally a private street, but the Town believed there was an implied dedication, and treated Home Place like a public street: it even paved it.¹²⁶ The Zoning Board of Adjustment concluded that it was public.¹²⁷ Litigation ensued. Lots of litigation. This entailed several trips to

121. *Kentuckians United to Restrain Eminent Domain v. Bluegrass Pipeline Co. (Bluegrass Pipeline I)*, No. 13-CI-1402, 2014 WL 10246980, at *7 (Ky. Cir. Ct. Mar. 25, 2014).

122. *Id.* at *6.

123. *Bluegrass Pipeline II*, 478 S.W.3d at 392.

124. *Wright IV*, 771 S.E.2d 328 (N.C. Ct. App. 2015).

125. *Id.* at 329.

126. *Id.*

127. *Id.* at 330.

the court of appeals.¹²⁸ After that court concluded there was no implied dedication, the Town adopted a resolution adding Home Place to the register of public streets in 2006, “nunc pro tunc” to 1985.¹²⁹ More litigation. More trips to the court of appeals. Pretty much the same result as the first time: no implied dedication by the Wrights.

Not to be deterred, the Town threw down what it thought was its trump card: it brought its power of eminent domain to bear to take the Wrights’ portion of the private road, and make it public.¹³⁰ The Wrights, after all, “*might eventually block*” the road.¹³¹ After some amusing insider machinations,¹³² the Town condemned the Wrights’ interest in the road, just compensation set at \$1,500.¹³³ It took only the Wrights’ interest and not those of their four neighbors.¹³⁴

This, of course, was not the end of the fight. The Wrights argued that the taking was invalid and not accomplished for a public use or purpose.¹³⁵ The trial judge agreed.¹³⁶ Usually, a taking to make a private street public would be fine, but here, the Town was simply trying to accomplish what its earlier thwarted actions could not. The court of appeals affirmed, holding that under the Fifth Amendment and the North Carolina Constitution’s due process clause (remember, North Carolina has no express “takings clause” in its constitution) the Wrights met their burden of proof that the taking was not for a public use or benefit.¹³⁷ The test is conjunctive: there must be both a use and a benefit.¹³⁸ There would be a right of public use of the road, but the public benefit was not there. The court concluded that the Town’s stated purpose, to keep the Wrights from maybe blocking the road in the future, did not hold up because the Wrights had never blocked the road.¹³⁹ Plus, the Town was not condemning the other four

128. See *Wright v. Town of Matthews (Wright I)*, 627 S.E.2d 650 (N.C. Ct. App. 2006); *Town of Matthews v. Wright (Wright II)*, 669 S.E.2d 841 (N.C. Ct. App. 2008); *Town of Matthews v. Wright (Wright III)*, 714 S.E.2d 867 (N.C. Ct. App. 2011); *Wright IV*, 771 S.E.2d 328.

129. *Wright IV*, 771 S.E.2d at 330.

130. *Id.* at 332.

131. *Id.* at 331.

132. See *id.* at 331-32 (detailing how the mayor and commissioner attempted to sway public opinion against the Wrights via questionable tactics).

133. *Id.* at 332.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 334.

138. *Id.* at 333.

139. *Id.* at 334 (“The predicate to ‘opening’ Home Place is that it must have previously been ‘closed’ in some way.”).

homeowners' private rights in Home Place, which would remain private, and "[i]t defies reason that the Town would need to condemn only the Wrights' portion of Home Place in order to 'open' the street."¹⁴⁰

The fact that the Town left the other four owners unmolested meant that its other purported public benefits, allowing neighbors to access their land, utility access, and the fire department's access to water, were also illusory.¹⁴¹ The court was also influenced by the case's long history, and the Town's serial failed efforts to make the road public:

The sequence of events leading up to the condemnation bolsters our conclusion that no public use or benefit is served by the condemnation. The evidence shows that the Town was motivated by considerations irrelevant to the public benefit. The evidence shows that Mayor Taylor and some of the Commissioners considered personal conflicts between the Town and the Wrights in making the decision to condemn—rather than considering the public use or benefit of the condemnation.¹⁴²

Has the Town finally received the Wrights' message?

*E. New York Appellate Division: Taking Invalidated
Because Town Segmented Environmental Review*

A typically short and cryptic one from the New York Supreme Court, Appellate Division. In *J. Owens Building Co. v. Town of Clarkstown*, the court concluded the town improperly divided up its downtown revitalization project into too many pieces before determining that it would not have an environmental impact.¹⁴³ The court held that the town should not have looked only at the drainage and storm water management part of that plan, but should have considered it as part of the larger project.¹⁴⁴ Consequently, the condemnation was invalid.

A good reminder that there is more than one way to do it when it comes to challenging the power to take and that attorneys are not limited to traditional "public use/purpose" theories.

140. *Id.*

141. *Id.* ("Rather, condemnation of the Wrights' portion of Home Place would only allow for those public benefits on the Wrights' portion of Home Place, which is at a dead end and landlocked by other individuals' portions of Home Place.")

142. *Id.*

143. 10 N.Y.S.3d 293, 295 (N.Y. App. Div. 2015).

144. *Id.*

F. *California Court of Appeals: Municipality Free to Form Community Facilities District to Take Over Water Utility*

The first sign that this opinion was not going the way of the Golden State Water Company, a private utility that provides water to the City of Ojai, California, was right there in the first paragraphs, which contain the one-two punch of labeling the company both a monopolist and one that price gouges California's most sensitive subject these days: water.¹⁴⁵

The opinion is infused with the flavor that Golden State positively deserved to have its property taken by eminent domain:

Monopolists have long been unpopular in this country. When King George III's choke hold on government led to intolerable levels of taxation, he was forced to divest his holdings. At the end of the nineteenth century, Congress passed the Sherman Antitrust Act with only a single dissenting vote. (26 Stat. 209, as amended, 15 U.S.C. §§ 1-7.) Introducing his landmark bill, Senator Sherman summed up the prevailing sentiment: "If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life." (21 Cong. Rec. 2457 (1890).) Nothing is more necessary to life than water. Residents of Ojai, fed up with sky high water bills, voted to oust appellant Golden State Water Company (Golden State), the private utility that monopolizes water service to their city, and replace it with respondent Casitas Municipal Water District (Casitas), a municipal utility that they hope will be more responsive to their concerns. They plan to finance this transaction by selling bonds pursuant to the Mello-Roos Community Facilities Act of 1982.¹⁴⁶

From that inauspicious piece of judicial advocacy, the opinion goes on to analyze the issue of whether California's "Mello-Roos" statute, which enables "Communities Facilities Districts" (special taxation districts) to be formed by local governments to set up funding for public works and public service projects, prohibited the voters of Ojai from forming such a district to pay the just compensation for the taking of Golden State's rights for transfer to the Casitas Municipal Water District.¹⁴⁷

145. *Golden State Water Co. v. Casitas Mun. Water Dist.*, No. B255408, slip op. at 1-2 (Cal. Ct. App. April 14, 2015), *opinion amended and superseded*, 186 Cal. Rptr. 3d 64, 66 (Cal. Ct. App. 2015).

146. *Id.*

147. *Id.* at 5-6. Professor Shaun Martin, who pens the California Appellate Report blog wrote: "[i]t's almost as though [the justice who authored the opinion] believes respondents' lposition even more than they do . . . [a]nd Justice Perren seems affirmatively enthusiastic about it." Shaun Martin, *Golden State Water Co. v. Casitas Municipal Water Dist.* (Cal. Ct. App. - April 14, 2015), CAL. APP. REPORT, (April 14, 2015), <http://calapp.blogspot.com/2015/04/golden-state-water-co-v-casitas.html>.

The court's short answer: no.¹⁴⁸ The statute allows funding for "purchases," and eminent domain qualifies even if it is not a voluntary transaction.¹⁴⁹

G. *Iowa: "Liberty Requires Accountability"—
Delegation of Eminent Domain Power Strictly
Construed, and Commission With Private
Members Could Not Take Property*

In *Clarke County Reservoir Commission v. Robins*, the Iowa Supreme Court held that the Commission did not have the power of eminent domain because several of its members were private actors.¹⁵⁰ The court also concluded that the post-judgment withdrawal of those members did not moot the property owner's appeal.¹⁵¹

Property owners are entitled to strict compliance with legal requirements when a government entity wields the power of eminent domain. These legal requirements help protect against abuse of the eminent domain power. We strictly construe statutes delegating the power of eminent domain and note the absence of a clear legislative authorization for a joint public-private entity to condemn private property. For the reasons elaborated below, we hold a 28E commission with members lacking the power of eminent domain cannot itself exercise the power of eminent domain or serve as an acquiring agency seeking a declaratory judgment under section 6A.24(2). We determine the postjudgment withdrawal of the private members did not render this appeal moot because the district court erred by entering judgment in favor of an improper acquiring agency.¹⁵²

"Liberty requires accountability," noted the court, and "[a] contrary holding would effectively enable private entities to exercise eminent domain powers through a 28E entity. Private entities are not accountable to voters."¹⁵³ The court sent the case back to the trial court, one justice dissented because he found the remand unnecessary and would have simply entered judgment for the property owner, making the

148. *Golden State*, slip op. at 7-8.

149. *Id.* at 8 ("The Mello-Roos Act . . . authorizes a public agency to 'purchase' real property in order to construct and develop government facilities. Given the obvious practical need in certain circumstances of using eminent domain power to acquire property for this purpose, the word 'purchase' should be construed in its broadest sense, which includes a taking by eminent domain in exchange for just compensation."). For more details on the case, see Brad Kuhn & Rick Rayl, *Mello-Roos May be Used to Fund Condemnation Action of Private Utility Provider*, LEXOLOGY, (April 17, 2015), <http://www.lexology.com/library/detail.aspx?g=e148a430-7833-41a8-8a2e-39daed5d37d2>.

150. 862 N.W.2d 166, 168 (Iowa 2015).

151. *Id.*

152. *Id.*

153. *Id.* at 176 (internal quotations and citations omitted).

Commission start over again—this time with no private members.¹⁵⁴ A good case and one worth reading.

H. *New Jersey: When Designating Blight, Baby can be Tossed Without First Showing the Bathwater's Dirty*

A few years ago, in *Gallenthin Realty Development v. Borough of Paulsboro*, the New Jersey Supreme Court held that in order to target property for redevelopment as “blighted,” the Government must show that it is in such condition that it “negatively affects surrounding areas” by promoting conditions that can develop into blight.¹⁵⁵ In that case, the targeted property was mostly undeveloped wetlands, and the “blight” of which it stood accused was the owner’s failure to put it to a more intensive economic use.¹⁵⁶ But that was not sufficient to support a blight finding, and the court held that the government must have done more than simply recited the standards for blight redevelopment and declare they were met.¹⁵⁷

In *62-64 Main Street LLC v. Mayor & Council of Hackensack*, the New Jersey Supreme Court revisited the issue.¹⁵⁸ Instead of a complete write up of this case, this Article will refer to a post by Anthony Della Pelle, at the *New Jersey Condemnation Law* blog, who, in “*Will the Latest New Jersey Supreme Court Property Rights Decision Revive the Redevelopment Market?*” writes:

Last week, a divided New Jersey Supreme Court ruled that condemning agencies do not have to prove that properties within an area “in need of redevelopment” have a deleterious effect on the surrounding area in order for those properties to be taken via eminent domain. The 3-2 majority opinion, authored by Justice Barry Albin, concluded that, so long as there is substantial evidence in the record that the legislative definitions set forth in New Jersey’s Local Redevelopment and Housing Law (“LHRL”) are met, a court is bound to affirm a local government’s redevelopment designation. The decision has stirred debate in the legal community as to whether the criteria for condemning property for redevelopment purposes has been eased, and whether it represents a departure from the Court’s landmark 2007 decision in *Gallenthin Realty Development, Inc. v Borough of Paulsboro*, 191 N.J. 344 (2007). One big difference between this latest case and Gallenthin was that here, the properties declared blighted were actually “boarded up” and displayed “prominent signs of structural deterioration,” and not simply economically underutilized. Moreover, according to the dissenting Chief Justice, the surrounding area is a “thriving, commercial area that is home to a newly built CVS, Auto Zone and branch of TD Bank.” Slip op. at 37. So it seems that this is the reverse of the classic Berman situation, where the court held it was okay to blight the baby (well-

154. *Id.* at 178-79 (Wiggins, J., dissenting).

155. 924 A.2d 447, 457 (N.J. 2007).

156. *Id.* at 449-50.

157. *Id.* at 456.

158. 110 A.3d 877 (N.J. 2015).

maintained property) if the legislature says the bathwater (the surrounding area) was dirty. The Hackensack majority, however, based its decision in the fact that the blight designation in Gallenthin was based on the criteria in subsection (e) of New Jersey's Blighted Areas statute (the property negatively affects other areas), while Hackensack's designation was based on subsections (a), (b), and (d) (which relate to the conditions of the property itself).¹⁵⁹

The dissenting Chief Justice did not think so and wrote:

Today, the majority takes a step backward from *Gallenthin*. In assessing different sections of the same law, N.J.S.A. 40A:12A-5(a), (b), and (d), the majority concludes that when the government designates an area to be "in need of redevelopment"—a critical step in the takings process—it need not affirmatively prove both elements set forth in *Gallenthin* to show that a property is "blighted." Instead, the majority permits the designation of private land for redevelopment even when government officials have not shown a decadent effect on surrounding properties.¹⁶⁰

I. *Minnesota Supreme Court Orders Power Company To Buy The Farm—Literally*

When one hears the phrase "buy the farm," he or she thinks of the cliché from the old war movies, not eminent domain. But in Minnesota, "buy the farm" is taken literally. In *Great River Energy v. Swedzinski*, the Minnesota Supreme Court interpreted that state's "buy the farm" statute, which gives certain landowners the option to require a public utility taking an energy corridor easement to buy their entire parcel, if certain conditions set out in the statute are met.¹⁶¹

To be accurate, the court was not "interpreting" the statute. It was reviewing the lower courts' refusal to graft a reasonableness requirement into the statute as *Great River*, a utility with the power of eminent domain under the statute, had requested following its condemning of a permanent easement and a temporary access easement across Swedzinski's land, prompting Swedzinski to exercised the option requiring *Great River* to buy the entire farm.¹⁶²

Great River argued that even though Swedzinski's election qualified under the factors laid out in the statute, it should not have been forced to buy more than was reasonable. It asserted that "the land subject to the election was so much larger than the land needed for the

159. Anthony Della Pelle, *Will the Latest New Jersey Supreme Court Property Rights Decision Revive the Redevelopment Market?*, N.J. CONDEMNATION L. BLOG, <http://www.njcondemnationlaw.com/2015/04/01/will-the-latest-new-jersey-supreme-court-proeprty-rights-decision-revive-the-redevelopment-market/> (providing more details and links for further analysis).

160. *62-64 Main St., LLC*, 110 A.3d at 898.

161. 860 N.W.2d 362 (Minn. 2015); MINN. STAT. S 216E.12.4 (2016).

162. *Id.* at 366-67.

easement.”¹⁶³ It argued that in addition to the factors spelled out expressly in the statute, wholly owned, undivided fee simple interest and timely notice, the land at issue in the election must be contiguous with the condemned parcel and “commercially viable”: there is an implied requirement of reasonableness under the totality of the circumstances.¹⁶⁴

Both the trial court and the court of appeals rejected the argument, as did the Minnesota Supreme Court, reasoning that the legislature spelled out certain factors, and those are all the factors.¹⁶⁵ Although in two earlier Minnesota Supreme Court decisions interpreting an earlier iteration of the “buy the farm” statute, the court had required that certain conditions be “reasonable,” in *Great River* it held that the legislature’s subsequent amendment of the statute had incorporated these cases’ reasonableness requirements and thus it was not a separate overall requirement under the current version of the statute.¹⁶⁶

The court recognized that it might make sense from a policy standpoint to have an overall requirement of reasonableness, but it is known that where policy arguments get one most of the time in Supreme Court arguments are directions to the legislature.¹⁶⁷ It was no different here.

J. *Second Circuit Court of Appeals: Amtrak Statute of Limitations on Claim Property is Immune from NY’s Eminent Domain Power*

The State of New York wants to build the Bronx River Greenway, a “23-mile-long ribbon of green with a multi-use path that will extend along the full length of the river in Westchester County and the Bronx.”¹⁶⁸ Who could argue with that? Amtrak, that’s who. After failing to acquire six parcels along the river owned by the “private corporation created by the Rail Passenger Service Act of 1970, 49 U.S.C. § 24101” in 2008, the State filed notices of appropriation and maps with the county clerk, and title to the land vested in the State.¹⁶⁹ They kept trying to work things out but to no avail, and, in 2012,

163. *Id.* at 365.

164. *Id.*

165. *Id.* at 367.

166. *Id.*

167. *See id.* at 367-68 (“The policy arguments that *Great River* advances in support of its theory that the statute should contain additional requirements are properly directed to the Legislature.”).

168. *Greenway Facts*, BRONX RIVER ALL., <http://www.bronxriver.org/greenway> (last visited May 18, 2015).

169. *Nat’l R.R. Passenger Corp. v. McDonald*, 779 F.3d 97, 99 (2d Cir. 2015).

Amtrak sued in federal court, arguing that the takings were invalid under the Supremacy Clause because they were expressly or impliedly preempted by federal law.¹⁷⁰

In *National Railroad*, the Second Circuit never reached the merits of Amtrak's preemption claim, concluding instead that Amtrak waited too long to raise it.¹⁷¹ The court applied New York's six-year statute of limitations and detailed the series of events that convinced the court that Amtrak knew or should have known about the injury:

We do not pause to determine the precise date on which [New York State Department of Transportation] knew, or had reason to know, because both possible dates are well beyond six years from the date this action was brought. In 2005, when Weld sent the email informing Amtrak that NYSDOT would hold a May 2005 public hearing on the subject of condemning Amtrak's land, Amtrak arguably had reason to know of the alleged Supremacy Clause violation that is the basis of its present claim. Eminent domain proceedings cloud title, and Amtrak concedes that it suffered not merely potential, but actual injury once its property became the subject of EDPL proceedings. At the very latest, Amtrak had notice of this harm in August 2005, when NYSDOT announced its findings.¹⁷²

But the takings actually did not take place until 2008, and since Amtrak sued in 2012, wasn't wastis okay? The court held no, stating:

[T]he completion of the takings was merely the final act of the intrusion on Amtrak's alleged Supremacy Clause rights that accrued in 2005 at the outset of the condemnation proceedings. It would make no sense to begin the limitations period—or restart it—when title to the real estate actually vests in the state, an act that occurs only after notice to interested parties and the requisite findings have been made. Indeed, Amtrak's proposed rule would leave the validity of a condemnation of its property in doubt for some six years after title has passed. Common sense, not to mention the record of Amtrak's failure to take any of the obvious protective measures, directs otherwise.¹⁷³

In other words, do not wait for the final hammer to fall before formally objecting. Attorneys who practice in this area are not sure they agree with the court's analysis because before the 2008 notices of appropriation, filing of the maps, and vesting of the title in the State, nothing was written in stone; it even appeared that there was some chance the State and Amtrak would reach an agreement. Common sense says that it would have tainted the negotiations were Amtrak to have thrown down a lawsuit at that point, and perhaps the reasons it did not file then was not that it was idly sitting on its rights, but rather (1) its property was still its property because the State had not taken the final act

170. *Id.* at 99-100.

171. *Id.* at 100.

172. *Id.* at 101.

173. *Id.* at 102.

to vest title and (2) it hoped that the ongoing negotiations might be successfully concluded short of a taking.

But the Second Circuit thought otherwise, so the prudent course is to file early and perhaps often. Landowners in these situations are put in a tough spot because, invariably, if they do file suit as the Second Circuit requires, either for inverse condemnation or to stop a taking, the condemnor will argue that the case is not ripe.

K. Texas Court of Appeals: Trial Court Cannot Determine Power to Take Until After Commissioners Determine Value

Texas has bifurcated its eminent domain process. After a petition in condemnation is filed in court in the “administrative” phase, the court appoints commissioners to hold a hearing and render an opinion on value.¹⁷⁴ If any party does not like commissioners’ decision, the “judicial” phase commences and the more familiar process begins.¹⁷⁵

In *In re Tarrant Regional Water District*, the question was if in the administrative phase the court has the obligation to appoint commissioners even where the court might agree with the property owner’s contention that its property was immune from condemnation.¹⁷⁶ The trial court refused to appoint commissioners, holding it would only do so after a hearing on whether the condemnor could legally take the property.¹⁷⁷

The court of appeals granted the condemnor’s petition for a writ of mandamus and held that during the administrative phase of an eminent domain case, the trial court has no power to avoid appointing commissioners.¹⁷⁸ It ordered the trial court to appoint the commissioners. The court of appeals concluded that during the administrative phase, the only duty or power of the trial court is to appoint commissioners.¹⁷⁹ It can not make any determination about the power to take. Even, apparently, in cases like this where the property owner may have a good claim that the taking should not even be occurring. The court of appeal shrugged off the argument that the condemnor lacked authority to take and held it is not a judicial problem—at least not yet. So appoint the

174. *In re Tarrant Reg’l Water Dist.*, No. 12-14-00329, 2015 WL 545783, at *1-2 (Tex. App. Feb. 11, 2015).

175. *See, e.g., In re Lazy WDist. No. 1*, 2016 Tex. LEXIS 410 (Tex. May 27, 2016) (detailing procedure in Tex. Prop. Code s 21.014).

176. *Id.* at *3.

177. *Id.* at *2.

178. *Id.*

179. *Id.*

commissioners and let them have their hearing, and then if a party objects have a hearing on value. And only then does the trial court have jurisdiction to determine whether the condemnor can take the property.¹⁸⁰

That does not seem very efficient, nor does it square with the understanding that courts are not just potted plants when it comes to cases that are on their docket, that they always having some kind of power to control them.

M. *Texas Court of Appeals: Pipeline Isn't a Common Carrier with Power of Eminent Domain Just Because Post-Taking It Might Transport Others' Carbon-Dioxide*

This one has been to the Texas Supreme Court before, where the court required trial courts to make an actual, factual inquiry into a claim that a pipeline company is a common carrier with the power of eminent domain, and not just accept the fact that the company registered as a common carrier as conclusive.¹⁸¹ The court sent the case back down, but the trial court concluded that the pipeline operator was a common carrier because after the pipeline's construction, the operator had the intent to move some carbon-dioxide belonging to another entity through the pipeline.¹⁸² It granted the pipeline company summary judgment on the common carrier issue.

In *Texas Rice Land Partners*, the court of appeals disagreed after applying the test set out in the Texas Supreme Court's decision and concluded that reasonable minds could differ about whether the pipeline operator is or is not a "common carrier" as defined in Texas statutes.¹⁸³ Under Texas law, a "common carrier" is defined as an entity that:

[O]wns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide or hydrogen in whatever form to or for the public for hire, but only if such person files with the commission a written acceptance of the provisions of this chapter expressly agreeing that, in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations conferred or imposed by this chapter.¹⁸⁴

180. *See id.*

181. *See Tex. Rice Land Partners v. Denbury Green Pipeline-Tex., LLC (Tex. Rice I)*, 363 S.W.3d 192 (Tex. 2012).

182. *Tex. Rice Land Partners v. Denbury Green Pipeline-Tex., LLC (Tex. Rice II)*, 457 S.W.3d 115, 117 (Tex. App. 2015), *cert. granted*, No. 15-0225 (Tex. 2016).

183. *Id.* at 120-21.

184. TEX. NAT. RES. CODE ANN. § 111.002(6) (West 2016).

In order to qualify under the Texas Supreme Court's fact-based test, the entity must have the intent to be a common carrier at the time of its plans to construct the pipeline. The court of appeals focused on this language from the Supreme Court's opinion:

[F]or a person intending to build a [carbon-dioxide] pipeline to qualify as a common carrier under Section 111.002(6), a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.¹⁸⁵

It did not matter that after construction, the entity produced evidence that showed the gas of others would be transported:

The record demonstrates that the Green Line was first contemplated in 2008, but Airgas did not approach Denbury Green about transporting carbon dioxide until after the Green Line was completed. Tellingly, when Airgas raised the issue in an email sent after the Texas Supreme Court's ruling, Airgas stated, "Given the recent ruling about your pipeline, I thought it might be advantageous for you to have another company transport some CO₂ down this line." As the Texas Supreme Court has noted, the professed use must be a public use in truth. We cannot say that the Airgas contract, reached after the Green Line's completion, speaks to Denbury Green's intent at the time of its plan to construct the Green Line.¹⁸⁶

This makes sense because the power of a private entity to take property as a common carrier should be determined by its intent at the time of the taking, not whether after acquisition it can devote the property taken to public use.

Because the common carrier issue turned on issues of fact (the entity's intent) about which reasonable persons could differ, the court concluded that summary judgment was not warranted. The court sent the case back down to the trial court. It has since been stayed as the Texas Supreme Court has granted cert.

N. *Washington: State Trust Land Can Be Condemned by County Utility*

Here's one with a somewhat unusual twist: the condemnee objecting to the taking by a public utility district was the State. In *Public Utility District No. 1 of Okanogan County v. State*, the Washington Supreme Court affirmed the power of the county utility district to take an easement over "school trust lands" for the construction of an high-voltage, high-capacity transmission line and corridor.¹⁸⁷ The land was owned by the public and held in trust for schools, was "a portion of the largest

185. *Tex. Rice II*, 457 S.W.3d at 120 (quoting *Tex. Rice I*, 363 S.W.3d at 202).

186. *Tex. Rice II*, 457 S.W.3d at 120 (internal citations omitted).

187. 342 P.3d 308 (Wash. 2015).

publicly owned tract of shrub-steppe habitat in the Methow Valley,” and was being used for cattle grazing.¹⁸⁸ The grazing leases generated \$3,000 per year for the state’s public schools, and also acknowledged that the land may be subject to easements and condemnation.¹⁸⁹

The court first concluded that an environmental organization could intervene to address the power of the utility district to take the land.¹⁹⁰ Although not an adjoining landowner (that, under prior decisions, would have standing to intervene by challenging the power to take), the interest of the environmental organization was like that of an adjoining landowner, and the State might not adequately protect that interest: the State was there to protect the lands as school lands, while the organization’s interest was in protecting “wildlife sanctuaries and shrub steppe lands.”¹⁹¹ Thus, the trial court did not abuse its discretion when it allowed the environmental organization to intervene to challenge the power to take.

On the other issue, however, the court sided with the utility-condemnor, and held that the state land was not immune from being taken.¹⁹² The utility has been delegated the power of eminent domain by statute, so the court viewed this issue as the scope of the delegation to a municipal corporation under the statute, which provides:

A district may take, condemn and purchase, purchase and acquire any public and private property, franchises and property rights, including state, county, and school lands, and property and littoral and water rights, for any of the purposes aforesaid, and for railroads, tunnels, pipe lines, aqueducts, transmission lines, and all other facilities necessary or convenient.¹⁹³

The State asserted that as trust land, its property was exempt and that transfer of the land would violate its fiduciary duties.¹⁹⁴ When the State owns land in its “proprietary” capacity, it’s enough that the enabling statute authorizes confers the power to take this type of land.¹⁹⁵ By contrast, when the State owns land in its “governmental” capacity” (in trust), it can only be condemned when the statute authorizes condemnation of the land in that specific capacity.¹⁹⁶ The court agreed with the State that it “indisputably” held the school lands in its trust

188. *Id.* at 311.

189. *Id.*

190. *Id.* at 312.

191. *Id.* at 314-15.

192. *Id.* at 316.

193. WASH. REV. CODE §a54.16.050 (2016).

194. *Okanogan Cty.*, 342 P.3d at 321.

195. *Id.* at 316.

196. *Id.*

capacity, meaning the question was “whether [the utility] is expressly authorized to condemn the subject school lands turns on whether the term ‘school lands’ provided in [WASH. REV. CODE §] 54.16.050 refers to school trust land.”¹⁹⁷

One may go through the court’s statutory analysis, but in short, the opinion concluded that “school lands” in the statute includes school trust lands: the legislature directed the courts to “liberally” construe the statute, and other, similar grants of power include the condemnation of trust lands.¹⁹⁸

As for the State’s prior public use argument (that the land was already being used to graze cattle) the court held that the utility’s proposed use was not incompatible with the state’s use, and therefore the doctrine did not prohibit the taking.¹⁹⁹ The court also rejected the State’s constitutional argument:

[The utility]’s condemnation of a right of way through school lands is consistent with these constitutional provisions because condemnation of an easement does not involve the sale of land in fee and requires payment of full market value. The plain language of section 2 [of the Washington Constitution], when contrasted with that of section 1, strongly indicates that the drafters did not intend the sale of lesser land interests (e.g., easements) be subject to the public auction requirements of section 2. Had they so intended, they would have included similar “estate or interest” language in section 2 as appears in section 1. Because [the utility] is not attempting to condemn a fee interest, we need not consider whether the public auction requirements of section 2 would prohibit condemnation of a fee interest.²⁰⁰

Finally, the court rejected the state’s argument that condemnation of school trust lands violated the State’s fiduciary duties as trustee.²⁰¹ The fact that condemnation requires the payment of just compensation was not incompatible with the State constitution’s prohibition on disposal of trust land, because that limitation is subject to the proviso that “unless the full market value of the estate or interest disposed of” is paid to the State.²⁰²

197. *Id.* at 317.

198. *See id.*

199. *Id.* at 318.

200. *Id.* at 321.

201. *Id.*

202. *Id.*

III. Just Compensation and Damages

A. *Texas Supreme Court Clarifies Just Compensation for Billboards*

In *State v. Clear Channel Outdoor, Inc.*,²⁰³ a case which involves the issue of whether the state DOT took a billboard when it ordered it removed during a road widening project, and if so, how it should be valued, the Texas Supreme Court held:

[W]e conclude that a billboard may be a fixture to be valued with the land, and that while the advertising business income generated by a billboard should be reflected in the valuation of the land at its highest and best use, the loss of the business is not compensable and cannot be used to determine the value of the billboard structure.²⁰⁴

The court rejected the State's contention that the billboards were moveable, and therefore personal property and not "fixtures," which are generally compensable in eminent domain. That means the State must pay for the billboards.

But that was not the end of the analysis. The court rejected the billboard owner's argument that it was entitled to compensation for the business losses which it incurred because it would have to move the billboard or (more accurately) build a new billboard elsewhere. Clear Channel argued that the value of the billboards should be based on the profits generated by their use in advertising.²⁰⁵ The court relied on the undivided fee rule to conclude that income generated by a business on taken property is not compensable:

Valuing the billboards separately from the land cannot afford Clear Channel compensation for lost business income that could not be recovered [under Texas law]. Clear Channel argues that capitalizing income from the use of property, as its expert did, is an accepted way of valuing income-producing property. While that is true, the property its expert valued—the billboard advertising operations—was not the property taken.²⁰⁶

The opinion concluded on this note:

Only the billboard structures themselves were excluded from the settlement, and the compensation due for them can be based only on their cost—\$25,000 per sign in the State's view, \$15,000 per sign in Clear Channel's. Clear Channel is not entitled to value the structures based on the income from its advertising operations, and evidence of that income was inadmissible. Its admission clearly resulted in an erroneous verdict.²⁰⁷

203. 463 S.W.3d 488 (Tex. 2015).

204. *Id.* at 490.

205. *Id.* at 496.

206. *Id.* at 497.

207. *Id.* at 498.

B. *Federal Circuit: “Before” Condition Must Account for Railroad Junk That Would Have Been Left Behind*

Rasmuson v. United States comes out of a rails-to-trails case, but has wider applicability.²⁰⁸ The case involved the usual: plaintiffs owned lands over which the railroad had rights of way, and when the railroad ceased operating the Surface Transportation Board issued a Notice of Interim Trail Use, the owners’ takings claim ripened because under Iowa law the land otherwise would have reverted back to the owners (but for the NITU).²⁰⁹

In the valuation trial, the Court of Federal Claims (CFC) applied the “before and after” method, and concluded that the “before” condition of the land was as it existed before the trails easements, but that the appraisers should “ignore any physical remnants of the railway’s use, which would have remained if the railway easement had been permitted to lapse.”²¹⁰ The Government appealed.

It argued that the appraisers should have considered the land in its “before” condition (as the railway left it, with the railroad’s junk left behind), and not under the “counterfactual assumption” that the land would revert to the owners with all that stuff gone.²¹¹ The CFC concluded that in the absence of the NITU, the railroad “did not have an obligation to remove the physical railroad construction features” and that the owners would be stuck with it if the land was not going to be used for a trail.²¹²

The Federal Circuit concluded that “[a] proper appraisal methodology has to account for those physical conditions . . . [t]hus, a ‘before’ calculation that does not take into account the costs of removing the physical remnants of the railway will result in an artificially inflated value and yield a windfall to the landowner.”²¹³ The court vacated decision and remanded back to the lower court.²¹⁴

208. 807 F.3d 1343 (Fed. Cir. 2015).

209. *Id.* at 1344-45.

210. *Id.* at 1345.

211. *Id.*

212. *Id.*

213. *Id.* at 1346.

214. *Id.*

IV. Is It A Taking?

A. Federal Court: Virginia's Entry Statute Not Facially Unconstitutional

The issue in *Klemic v. Dominion Transmission, Inc.*, was whether a Virginia statute, which “authorizes a natural gas company to enter private property without the landowner’s written permission and perform a survey for a proposed natural gas pipeline” was a facial violation of the United States and Virginia constitutions, “thus void and unenforceable.”²¹⁵ The court granted the gas company’s motion to dismiss, concluding that the facial challenge failed because the property owners do not possess a right to exclude entries for purposes of surveying in anticipation of an exercise of eminent domain.²¹⁶ It also concluded that an as-applied challenge was not ripe.²¹⁷

This is similar to, but not the same as, the issue now being considered by the California Supreme Court in *Property Reserve, Inc. v. Department of Water Resources*.²¹⁸ In that case, also an as-applied challenge, the entries which the Department of Water Resources proposed to undertake were not minor and innocuous; but instead they were major, and, as the court of appeal concluded, were well beyond the minor intrusions allowed by California’s entry statute.²¹⁹ The court of appeal concluded the proposed entries rose to the level of takings, meaning that if the Department of Water wanted to undertake them, it would have to exercise its eminent domain power to do so.²²⁰

Klemic is a different case, as evidenced by the District Court of the Western District of Virginia’s ruling that the as-applied challenge was not ripe because the gas companies “have not entered plaintiffs’ properties, and they have no intention of doing so now, given the change to the proposed route of the pipeline.”²²¹ That being so, there was no way to tell whether the gas company’s proposed entries went too far. The court merely held that Virginia’s statute was not unconstitutional in all cases, something that should not be surprising given the number of similar statutes around the country, and the low level of interference

215. No. 00041, 2015 WL 5772220, at *1 (W.D. Va. Sept. 30, 2015), *appeal filed*, No. 15-2338 (4th Cir. Oct. 30, 2015).

216. *Id.* at *9.

217. *Id.* at *21.

218. 168 Cal. Rptr. 3d 869 (Cal. Ct. App. 2014), *appeal docketed*, 326 P.3d 976 (Cal. May 3, 2016).

219. *Id.* at 875-76.

220. *Id.* at 899.

221. 2015 WL 5772220, at *7.

with a landowner's rights that they allow.²²² It's when the entry allowed by the statute is used for intrusive entry that there is constitutional trouble.²²³

It is presumed that were a Virginia gas company to propose to make entries that exceed what is contemplated in the statute or otherwise interfere with an owners' property rights in a concrete way, such actions well could be a taking, subject to the same rules recognized by the California Court of Appeal. The court in *Klemic* did not foreclose this, but merely told the owners to come back when you are subject to actual, rather than hypothetical, entry by the gas companies. That may not happen with these plaintiffs because it appears that the gas companies are looking at other parcels. And maybe this was the goal all along.

B. Federal Court: City Stopped Blowing Hot and Cold and had Exclusive Possession of Property Under Quick-Take Statute, so it was OK to Seize Anti-Eminent Domain Sign

James v. City & County of Honolulu is a case regarding a vacant parcel of property on the rural north shore of Oahu, which the City and County of Honolulu is condemning in order to build a new fire station.²²⁴ The City has not moved on building the station and has not included money in the budget to do so.²²⁵ There is even some question about whether this is a good place for a fire station.²²⁶

All this caused the property owner to erect several protest signs on the parcel.²²⁷ An additional issue arose when the City removed and stored the signs, which caused the owner to sue the City in federal court, alleging among other things, due process and First and Fourth Amendment violations and violations of the City's "stored property" ordinance.²²⁸

In the first case between the parties, the court denied the City's motion for summary judgment.²²⁹ The City argued the writ of immediate

222. *Id.* at *12.

223. *Id.* at *14.

224. *James I*, No. 13-00397, 2014 WL 4181461, at *1 (D. Haw. Aug. 20, 2014).

225. *Id.* at *2.

226. See Choon James, *Honolulu City Hall: Where is the Common Sense and Aloha?*, HUFFINGTON POST: THE BLOG (June 2, 2014, 10:55 AM), http://www.huffingtonpost.com/choon-james/honolulu-city-hall-where-_b_5056979.html.

227. *James I*, 2014 WL 4181461, at *2.

228. *Id.* at *4.

229. *Id.* at *8.

possession which it obtained in the state court condemnation proceedings effectively transformed the parcel into City property and gave the City exclusive possession of the land.²³⁰ Since the City possessed the property, it argued, it was not in the wrong when it removed the protest signs from its own land.²³¹

The federal court rejected the argument in part, holding that the Hawaii eminent domain statute²³² which allows governmental condemnors to obtain immediate possession of property, does not mean that the property subject to condemnation is publicly-owned once a writ is issued.²³³ Nor does it give the condemnor exclusive possession as a matter of law, merely the ability “to do such work thereon as may be required for the purpose for which the taking of the property is sought.”²³⁴

And because there were questions of whether the City had acted like it was in exclusive possession (the City continued sent the owner property tax bills and cited her for failing to keep the property free of weeds) the court concluded there were issues of fact still unresolved about whether the City had taken full advantage of what the statute allows, and actually exercised exclusive possession.²³⁵ Therefore, the Court did not grant the City’s motion for summary judgment.²³⁶ That case eventually settled for \$21.²³⁷

The court’s rationale appeared to be the right call in this situation. Yes, the statute could give a condemnor exclusive possession, provided that it is required for the purpose for which “the taking of the property is sought.” But here, the City blew hot and cold, not acting like it had exclusive possession: it dinged the owner for letting the parcel get overgrown yet it collected property taxes from them.²³⁸

The court’s ruling was a good reminder to Hawaii’s condemning agencies that they need to adhere to the limitations in the eminent domain statutes and cannot act outside the strict confines of what the law allows. Even though Hawaii’s statute allowing immediate possession is commonly referred to as a “quick-take” rule, in actuality it is not

230. *Id.* at *5-6.

231. *Id.* at *5.

232. HAW. REV. STAT. § 101-29 (2016).

233. *James I*, 2014 WL 4181461, at *5.

234. *Id.*

235. *James I*, 2014 WL 4181461, at *8.

236. *Id.*

237. *James v. City & Cty. of Honolulu (James II)*, 125 F. Supp. 3d 1080, 1088 (D. Haw. 2015).

238. *James I*, 2014 WL 4181461, at *2.

a true quick-take statute. True quick-take statutes immediately transfer ownership and title to the condemnor.²³⁹ By contrast, Hawaii law holds off on title and ownership transfer until there has been a judgment of condemnation. It merely transfers the right of possession, as noted in the language quoted above.

At the very least, the ruling is a reminder that agencies cannot take inconsistent and contradictory positions, arguing on one hand that the statute granted exclusive possession, yet on the other doing things inconsistent with that posture. But because eminent domain is such a potent power, condemning agencies often behave as if they have *carte blanche* and can take what they want, the rights of the property owners be damned. And because they are going to win in the end and get the property, owners have no business insisting that their rights be respected. But the requirements of the statutes are not mere details that do not need to be scrupulously followed.

Now, here is chapter two of the saga. After the owners filed the first federal lawsuit, the City sent a notice that it was exercising exclusive possession, issued tax reimbursement checks, and informed Reynolds (a recycling business that had been on the land) that it could not operate there.²⁴⁰ Pretty much everything it failed to do the first time.

The property owner put up several more signs, which the City, after notice, removed.²⁴¹ The City rented the abutting property, which it now owned, to Reynolds.²⁴² The property owner brought another suit in federal court, which “largely recycle[d] her Complaint from [*James I*], but also includes additional allegations regarding an October 18, 2013 seizure of signs and the City’s alleged interference with [her] contract with Reynolds Recycling Inc. (“Reynolds”), who was leasing the subject property from [her].”²⁴³

The court granted the City summary judgment on all federal claims.²⁴⁴ The difference between now and before is that the City effectively rectified its ambiguous behavior and started consistently acting like the exclusive possessor of the land:

239. See Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 970 (2003).

240. *James II*, 125 F. Supp. 3d at 1091-92.

241. *Id.* at 1086-87.

242. *Id.* at 1087.

243. *Id.* at 1084-85.

244. *Id.* at 1098.

Specifically, after the May 2013 seizure of James' signs and the filing of the [f]irst [a]ction, the City made well known to James that, despite its earlier mixed messages regarding James' possession, the City was now taking exclusion possession of the subject property. In particular, the City established unequivocally that it was taking possession of the subject property by: (1) filing in the State Action an August 15, 2013 Certification stating that the City took possession of the subject property on June 4, 2010; (2) notifying James' then-attorneys that James does not have a legal right of possession to the subject property, that neither James nor any other person is authorized to enter the subject property, and that any personal property found on the subject property will be removed without notice; and (3) issuing tax reimbursement checks on the subject property to James.²⁴⁵

Thus, the court concluded:

These actions left no question that the City was exercising its right of possession of the subject property to the exclusion of James, and the City took no contradictory actions suggesting to James that she still had possession of the subject property (such as by taxing James and/or requiring her to maintain the property as it previously did).²⁴⁶

Once the court determined the City now has exclusive possession of the land, it had little problem disposing of the property owner's federal claims. Her Fourth Amendment rights were not violated, because the City has a clear possessory interest in the land, and its seizure of the signs was reasonable.²⁴⁷ The City provided her all the process that was due under the circumstances because it gave pre-deprivation notice and "announced its intentions" to the owner which allowed her the chance to remove or retrieve them.²⁴⁸ It was also not a free speech problem because it is not a public forum for speech, it is "a vacant lot on which a fire station is to be built, and the City never opened it to the public."²⁴⁹ Without these federal claims, the court refused to exercise supplemental jurisdiction over the owner's state law claims.²⁵⁰

What is left is the City's ongoing eminent domain case in state court, in which it estimates the compensation for the land taken is \$521,000.²⁵¹

*C. Tennessee Doesn't Allow Private Condemnation
for Better Access, Only to Create Access to
Otherwise Landlocked Parcels*

Some jurisdictions have statutes which permit private-condemnation actions in which the owner of a landlocked parcel can exercise

245. *Id.* at 1091-92.

246. *Id.* at 1092.

247. *Id.* at 1093.

248. *Id.* at 1094.

249. *Id.* at 1096.

250. *Id.* at 1098.

251. *Id.* at 1085.

eminent domain to take the property of a neighbor for access. They are somewhat like common law easements by necessity and they have been seen in Pennsylvania²⁵² (private takings still must serve a public purpose) and Colorado²⁵³ (condemning owner must have concrete development plans), for example.

In *Vise v. Percy Tennessee River Resort Inc.*, the Tennessee Court of Appeals reviewed that state's private condemnation statutes and concluded they only allow use of the private-condemnation mechanism to create access to a landlocked parcel, not allow an owner who already enjoys limited access to condemn a neighbor's property to create "better" access.²⁵⁴

Pearcy's parcel was not completely landlocked, and dirt roads over a neighboring Tennessee Valley Authority (TVA) owned parcel allowed limited access.²⁵⁵ Another neighbor, Vise, developed their parcel into a private resort and, with TVA's permission, paved a road partially on TVA's land to allow access to its newly-developed parcel.²⁵⁶ Percy began using the paved road to access its parcel also, and "[a]s a result of the exclusive use of the blacktop road, the dirt roads originally used by the Appellants fell into disrepair and became impassable."²⁵⁷

Pearcy asked TVA for an easement so it could also develop its parcel into an RV park.²⁵⁸ TVA's permission was contingent on Percy also gaining rights to use a portion of Vise's property.²⁵⁹ When Vise would not agree, Percy filed a private condemnation action under Tennessee law to condemn an easement.²⁶⁰

The trial court rejected the claim and the court of appeals affirmed.²⁶¹ Percy's parcel already enjoyed access to its parcel over the dirt roads and was not landlocked. Yes, the access was bad and it would not permit the type of access Percy needed to develop the property. But it was sufficient to allow access to Percy's parcel for "farming purposes," and that was enough.²⁶² Strictly construing the

252. See *In re Opening a Private Rd. for Benefit of O'Reilly*, 5 A.3d 246 (Pa. 2010).

253. See *The Glenelk Ass'n v. Lewis*, 260 P.3d 1117 (Colo. 2011).

254. No. W201400640, 2015 WL 4273492, at *5 (Tenn. Ct. App. July 15, 2015), *reh'g denied*, (July 31, 2015).

255. *Id.* at *1.

256. *Id.*

257. *Id.*

258. *Id.* at *2.

259. *Id.*

260. *Id.*

261. *Id.* at *1.

262. *Id.* at *4.

two statutes,²⁶³ the court concluded that existing access was “adequate and convenient” and that “it would be a nonsensical result to allow a petitioner to make better use of their land at the expense of another’s property rights.”²⁶⁴ Section 102 only applies when a parcel is totally landlocked and section 101 only allows private condemnations when access is refused, as the court noted:

Because the statutory requirement has not been met, and because a private condemnation may not be used to make better use of a property when access to the property is already established, we conclude that the trial court did not err in determining that the Appellants are not entitled to their condemnation action under Section 101.²⁶⁵

A reminder that these statutes should be narrowly viewed and have a very limited scope.

D. Court of Appeal Files Pro-Condemnor Amicus

Brief in California Supreme Court “Entry Statute” Case

The California Court of Appeal did not formally file an amicus brief in favor of the Government in *Property Reserve, Inc. v. Department of Water Resources*, a case now pending in the California Supreme Court.²⁶⁶ But the court’s opinion in *Young’s Market Co. v. Superior Court*, does seem like a brief in support of the Department of Water Resources in *Property Reserve*.²⁶⁷

In *Property Reserve*, which has been briefed and argued, the California Supreme Court is considering whether pre-condemnation entries sought by the California Department of Water Resources conform to the “entry statute” or are so extensive as to be takings triggering the protections of the eminent domain code.²⁶⁸ A different court of appeal had concluded the proposed entries were takings.²⁶⁹

However, the court of appeal in *Young’s Market Co.* did not see things the same way as the court of appeal in *Property Reserve*, and concluded that the entries which the condemnor sought were not as extensive, and did not interfere with the owner’s use and enjoyment of its property.²⁷⁰ A couple of things, however, stood out.

263. TENN. CODE ANN. §§ 54-14-101, 54-14-102 (2016).

264. *Vise*, 2015 WL 4273492, at *5.

265. *Id.*

266. 168 Cal. Rptr. 3d 869 (Cal. Ct. App. 2014), *appeal docketed*, 326 P.3d 976 (Cal. May 3, 2016).

267. *See* 195 Cal. Rptr. 3d 18 (Cal. Ct. App. 2015), *rev’d*, 363 P.3d 697 (Cal. Jan. 13, 2016).

268. *See* 326 P.3d 976.

269. *Prop. Reserve*, 168 Cal. Rptr. 3d at 898-99.

270. *Young’s Mkt. Co.*, 195 Cal. Rptr. 3d at 34. For a more detailed discussion of this case, see Brad Kuhn, *Right of Entry Statutes are Back in Business—for Now*, CAL.

First, the court viewed the entry statute's procedures as an "eminent domain proceeding."²⁷¹ The problem is, under the California Constitution, real eminent domain proceedings have one more element: the right to have a jury determine compensation.²⁷²

Secondly, the court repeated the error two sentences later, so this was not just an oversight: it really did believe that the procedure under the entry statute, which admittedly look somewhat like eminent domain in that it has things like deposits, unwilling entry, and the like, was an eminent domain proceeding:

Such a proceeding is precisely what is permitted under the California Constitution, article 1, section 19's second clause, that is, an eminent domain proceeding with a deposit of a court-determined amount of compensation prior to entry: "The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."²⁷³

Perhaps, but what about the first jury clause? The entry statute proceedings are not eminent domain proceedings.

Thirdly, the court also got wrong the physical occupation doctrine, which views permanent physical occupations, regardless of how minor, as takings.²⁷⁴ The court of appeal held that the condemnor's activities here did not result in a physical occupation. The work took a few days and did not impact Young's Market's buildings, but the test borings were drilled, which looks pretty permanent and pretty physical, even though it is hard to see how this had much of a long-term impact.²⁷⁵ But one thing *Loretto* teaches is that it does not matter.²⁷⁶ That cable box was pretty de minimus, even though the court of appeal saw it as more de maximis. Regarding *Loretto*, the court

Eminent Domain Rep. (Nov. 21, 2015), www.californiaeminentdomainreport.com/2015/11/articles/court-decisions/right-of-entry-statutes-are-back-in-business-for-now/.

271. *Id.* at 29 ("The present entry statutes provide for an eminent domain proceeding by which a petitioner is authorized to conduct a broader range of examinations, including 'tests,' 'borings' and 'samplings.' Indeed, the entry statutes authorize only temporary entries for the limited purpose of engaging in 'activities reasonably related to acquisition or use of the property' for the particular use that the property is to be acquired by eminent domain" (internal citations omitted)).

272. CAL. CONST., art. I, § 19 ("Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.").

273. *Young* Private pr, 195 Cal. Rptr. 3d at 25.

274. *Id.* at 31-32; see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that the size of the property taken is not decisive in deciding if a taking has occurred).

275. *Id.* at 21-22.

276. *Loretto*, 458 U.S. at 435.

concluded that the installation of the cable box on Ms. Loretto's roof would *presumably* have required follow up visits by the cable guys, and in *Young required fol*, there was no such proposal.²⁷⁷ It is unclear where how the court reached this conclusion. The case does not mention there being any after-installation entries at issue.

In response to the court of appeal's positive reaction to the entry statutes in *Young's Market*, a petition from the property owner, or at least some kind of effort to hold off the court's ruling until the California Supreme Court decides *Property Reserve* is expected. Stay tuned.

E. *West Virginia: Department of Transportation
Should Not Have Mined Privately Owned
Limestone Without Owner's Permission*

In West Virginia, mineral rights can be owned separately from the surface estate.²⁷⁸ Not that unusual; something that one learns in the first year of law school, in Property I. One might assume that condemning agencies' lawyers in West Virginia and similar jurisdictions understand this and counsel his or her clients accordingly. Or maybe not, according to the opinion of the West Virginia Supreme Court of Appeals in *West Virginia Department of Transportation v. Newton*.²⁷⁹

"Mr. Parsons owned the surface, and Ms. Newton owned the minerals."²⁸⁰ The Department of Transportation (DOT) was building a highway and asked Mr. Parsons whether it could enter his land to test it.²⁸¹ He said yes. The DOT condemned and paid him for the land it needed for its highway project; but it also mined and took limestone for the road from the land.²⁸² Did the DOT assume that Mr. Parsons also owned the mineral rights? Was there some other reason that it did not ask Ms. Newton? This is not clear.

What is clear is that Ms. Newton did not approve. She brought a mandamus action to compel the DOT to institute eminent domain proceedings.²⁸³ Trial court concluded that the DOT should have

277. *Young's Mkt. Co.*, 195 Cal. Rptr. 3d at 23-24 ("After that time, [Condemnor] does not claim any property right, recurring right to enter, or right to continually monitor the testing areas, as the cable companies presumably would monitor or service their permanently affixed cable boxes in *Loretto* or permanent appropriation as the government committee did in *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015).").

278. *See* W. Va. Dep't of Transp. v. Newton, 773 S.E.2d 371, 374 (W. Va. 2015).

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 375.

condemned her interests, and the DOT filed an eminent domain action with the valuation date established as the date the DOT filed its eminent domain complaint.²⁸⁴ After valuation was established, the DOT appealed, asserting, among other arguments, that the trial court got the date of valuation wrong.²⁸⁵ The DOT's argument was "convoluted," it is understand that the date of the take is the date of valuation, and as best anyone can tell, its argument was that the date of valuation should have been earlier, when it actually mined and took the limestone.²⁸⁶ Perhaps the market value of limestone was lesser then that later, but this is unclear.

The Supreme Court of Appeals of West Virginia affirmed the trial court's conclusion that the DOT acted in bad faith when it mined and removed Newton's limestone for use in a highway project without her permission.²⁸⁷

The court resolved each of the DOT's eight other points of error in favor of Ms. Newton, also.²⁸⁸

F. North Carolina Court of Appeals: No Taking Even Though Department of Transportation Cut Off All Of Property's Northern After Parcel Gained Eastern Access

In North Carolina, a property owner has a right to direct access to adjacent highways, and "[i]f the State's action eliminates all direct access to the abutting road, then the action is 'a taking as a matter of law.'" ²⁸⁹ And it does not matter if the parcel has alternative access to the road.²⁹⁰ Unless the abutting highway moves, according to the North Carolina Court of Appeals in *Department of Transportation v. BB&R, LLC*.²⁹¹

In that case, there was no dispute that the DOT's road project took a portion of BB&R's land on which a convenience store/gas station was

284. *Id.* at 379.

285. *Id.* at 378.

286. *Id.*

287. *Id.* at 379. ("We also do not believe that, for purposes of the date of the take, it is relevant as to whether DOH's conduct was in bad faith or an honest mistake. The controlling fact is that DOH did not seek to condemn the limestone it took until after the property was removed and used in helping to build the highway.")

288. *Id.* at 386.

289. *Dep't of Transp. v. BB&R, LLC*, 775 S.E.2d 8, 13 (N.C. Ct. App. 2015) (quoting *Dep't of Transp. v. Harkey*, 301 S.E.2d 64, 71 (N.C. 1983)).

290. *BB&R*, 775 S.E.2d at 13-14.

291. *Id.* at 14.

located, and that before the taking, the property enjoyed direct access to Dowdle Mountain Road along the property's northern side.²⁹²

However, the court concluded the DOT was not liable for a taking of BB&R's northern Dowdle Mountain Road access because after the taking, it had access from the eastern side of the parcel.²⁹³ But what about the rule in *Harkey* that alternative access in the after condition does not matter? It is not applicable, held the court, because Dowdle Mountain Road was rerouted, and the parcel now enjoys direct access to the road from its eastern side:

Here, however, DOT's closure of the section of Dowdle Mountain Road that abutted the northern frontage of defendant's property did not eliminate all direct access from defendant's property to Dowdle Mountain Road. There is direct access to the re-routed Dowdle Mountain Road at the eastern boundary of defendant's property.²⁹⁴

According to the court, the property owner did not really lose anything: before the taking, it had two access points, and after the taking it had two. Never mind that Dowdle Mountain Road was in a different location after the taking, and "[a]t most, the re-routed road results in a vehicle having to travel a maximum of 650 feet more than it had to travel before to access defendant's property from the highway."²⁹⁵

The court rejected the owner's contention that its access was substantially interfered with, concluding that in the after condition, it "still has 'reasonable means of ingress and egress' from Dowdle Mountain Road to the property. Defendant's access to Dowdle Mountain Road was simply re-located to the eastern section of its property due to the re-routing of Dowdle Mountain Road."²⁹⁶ Which sounds a lot like alternate access.

G. *California Court of Appeals: "Temporary No-Build Area" While City (Maybe) Gets Around to Condemnation is a Taking*

The powers-that-be planned on building a major freeway interchange, part of which was going to be on the property owned by Jefferson Street Ventures.²⁹⁷ The problem was, Jefferson Street also had plans for its property (a shopping center) and when it came time for it to apply to the City of Indio for permits to build, the City said yes, but

292. *Id.* at 10.

293. *Id.* at 14.

294. *Id.* at 13.

295. *Id.*

296. *Id.* at 14 (internal citations omitted).

297. *Jefferson St. Ventures, LLC v. City of Indio*, 187 Cal. Rptr. 3d 155, 161 (Cal. Ct. App. 2015).

only if Jefferson Street left open and did not build on the eleven acres on which the interchange was envisioned.²⁹⁸

The City said it was going to buy it eventually, but the complex federal and state process for studying, evaluating, and funding the project takes a long time, and if Jefferson Street build on it now, it was going to cost the City more in the future to take the developed property and relocate all of the tenants.²⁹⁹

In *Jefferson Street Ventures*, the California Court of Appeal concluded that the City's condition was a taking of the "Temporary No-Build Area."³⁰⁰ There was no claim that Jefferson Street's development proposal caused or contributed to the need for a freeway interchange, and the only evidence in the record for why the City imposed the condition was that it might cost more in the future for it to condemn the property.³⁰¹

After this ruling, the County instituted an eminent domain action, and the Court of Appeal remanded the case to the Superior Court for consolidation with the pending condemnation.³⁰²

H. *North Carolina Court of Appeals: "Map Act,"
Which Land Banks Property for Future Highways,
is a Taking*

In *Kirby v. North Carolina Department of Transportation*, the North Carolina Court of Appeals not only held that the property owners' claims were ripe, but that the Map Act, which gives the DOT the ability to designate property for future highway use and prevent its development in the meantime, effected a taking.³⁰³ The court reversed the trial court's dismissal and sent the case back down for a calculation of the compensation owed to each property owner.³⁰⁴ A big win for the property owners.

The short story is that the North Carolina Legislature adopted a statute which allows the DOT to designate future highway corridors, but does not require it to actually acquire the property.³⁰⁵ Once the DOT

298. *Id.* at 163-64, 174.

299. *Id.* at 165.

300. *Id.* at 169.

301. *Id.* at 174 ("The City's primary rationale for removing 11 acres from the otherwise developable site was that it planned to acquire all or some of the development-restricted property for construction of the Interchange Project and if development of that property was permitted, the City could incur additional costs for the buildings and relocation of tenants.").

302. *Id.* at 181.

303. 769 S.E.2d 218, 236 (N.C. App. 2015).

304. *Id.*

305. *Id.* at 222.

files a map showing the location of the future highway with a county registrar of deeds, the owners of the properties designated cannot even pull building permits.³⁰⁶ Although there are means for property owners to seek relief from the development prohibition, that process is a limited one and a property owner must show extreme hardship.³⁰⁷ The stated purpose of the Act is to keep acquisition costs low.³⁰⁸

The court of appeals concluded that the property owners' claims for inverse condemnation, regulatory takings, and equal protection were ripe because the Act and the filing of the maps were an exercise of the state's power of eminent domain, and not merely the state "regulating" property under its police power as the DOT argued.³⁰⁹ Relying on the rationale of a Florida Supreme Court case, *Joint Ventures, Inc. v. Department of Transportation*,³¹⁰ the court held that the purpose of the Act was to reduce the cost of acquisition in the event of future condemnation, and was thus an exercise of the eminent domain power.³¹¹ In other words, a taking.

There is a lot of good language and quotations in the *Kirby* opinion, but the heart of the decision is on pages 227-235, with the crux of the takings rationale set out on pages 233-235. Once the DOT files a map with the register of deeds, the Act bars the issuance of building permits, "and are absolute."³¹² The court rejected the DOT's argument that this was "merely" a "temporary three-year restriction on new improvements" which eventually will be lifted.³¹³ To the contrary, the court concluded that the prohibition on use could last as long as sixty years, based on a letter sent from DOT's Chief Operating Officer.³¹⁴ This is a taking:

Therefore, with potentially long-lasting statutory restrictions that constrain Plaintiffs' ability to freely improve, develop, and dispose of their own property, we must conclude that the Map Act is distinguishable from the cases that established the rule that "the recording of a map showing proposed highways, without any provision for compensation to the landowners until future proceedings of condemnation are taken to obtain the land, does not constitute a taking of the land, or interfere with the owner's use and enjoyment thereof."³¹⁵

306. N.C. GEN. STAT. § 136-44.51(a) (2016).

307. § 136-44.52.

308. 1987 N.C. SESS. LAWS 1520 (2016).

309. *Kirby*, 769 S.E.2d at 232.

310. 563 So. 2d 622, 627 (Fla. 1990).

311. *Kirby*, 169 S.E.2d at 231-32.

312. *Id.* at 234.

313. *Id.*

314. *Id.* at 235.

315. *Id.* (quoting *Browning v. N.C. State Highway Comm'n*, 139 S.E.2d 227, 230-31 (N.C. 1964)).

In other words, the map designations were not merely preliminary planning, as the DOT argued, but clouded the plaintiffs' ability to use and market their properties.

Having concluded that the Act works a taking, the court remanded the case to the trial court "to consider evidence concerning the extent of the damage suffered by each Plaintiff as a result of the respective takings and concerning the amount of compensation due to each Plaintiff for such takings."³¹⁶

I. *Nevada: No Regulatory Taking When Department of Transportation Announced Future Plans to Condemn*

In *State ex rel. Department of Transportation v. Eighth Judicial Circuit*, the Nevada Supreme Court covered similar territory addressed by other courts concerning whether there is a taking when an agency with the power of eminent domain takes steps to condemn property, but has not actually done so yet.³¹⁷ Here, the Nevada court concluded that there was not a taking because even though the DOT announced "Project Neon," a "six-phase, 20- to 25-year highway improvement for the Interstate Highway 15 (I-15) corridor between Sahara Avenue and the U.S. Route 95/I-15 interchange in Las Vegas" which included plaintiff's property, it did not result in a "de facto moratorium" on development as the property owner characterized it.³¹⁸

Rather, the court viewed the DOT's actions as preliminary because the plaintiff's property "is not anticipated to be needed for Project Neon until 2028, if at all."³¹⁹ The plaintiff had not introduced evidence that the DOT's actions resulted in a physical taking or an economic wipeout.³²⁰ Indeed, the court viewed the plaintiff's failure to submit evidence at the summary judgment phase of specific economic harm caused by the DOT's actions to be a sign that the harm it suffered was "negligible," and thus it also rejected the plaintiff's *Penn Central* argument.³²¹ According to the court, the DOT's actions were not egregious enough and the designation of plaintiff's property

316. Kirby, 769 S.E.2d at 236. For more on the issue of map designations see Trent Andrews, *Official Maps and the Regulatory Takings Problem*, 2011 B.Y.U. L. REV. 2251 (2011).

317. 351 P.3d 736 (Nev. 2015).

318. *Id.* at 738.

319. *Id.* at 743.

320. *Id.*

321. *Id.* at 742-44.

for future acquisition was only one of those regulations that adjusts the benefits and burdens of economic life.³²²

Finally, the court distinguished between “precondemnation damages” and “just compensation for precondemnation activities,” holding that the former may be recoverable if the government engages in precondemnation activities that are unreasonable or oppressive but only if there has already a determination that there has been a taking.³²³ This passage in the court’s opinion is very muddled but the Nevada court is essentially holding that when cases present these facts, any economic impact on property is not going to factor into the takings liability question unless it is very severe.

J. New Jersey Court: There’s No Substitute for the Eminent Domain Process, Even on the Shore, Even in an “Emergency”

Minke Family Trust v. Township of Long Beach is a trial court’s opinion in one of the Jersey Shore “dune replenishment” cases.³²⁴ These are cases in which owners of beachfront property, or in one case, a municipality itself, objected to the state and local governments summarily taking easements on private property to be used to armor the shoreline against future hurricane damage.³²⁵ In response to Hurricane Sandy, the federal government threw \$3.461 billion at the shoreline in New Jersey and other states damaged by the hurricane, and as part of the package, the state and local governments were tasked with being “responsible for the rapid acquisition of property” needed.³²⁶

The main issue in the cases is whether the government can take easements on private property by simply declaring that it has done so, without first condemning the easements under New Jersey’s eminent domain statutes.³²⁷ The court framed the issue this way:

The core issue presented in Count III is whether the shore protection provisions of the DCA authorize a municipality to effect an immediate taking of a perpetual easement without instituting a condemnation action pursuant to the Eminent Domain Act, N.J.S.A. 20:3-1 to 20:4-22, namely the negotiation and valuation process to set the value of the taken property and pay any just compensation due.³²⁸

322. *Id.* at 742.

323. *Id.* at 745.

324. No. OCN-L-3033-14, slip op. at 1-2 (N.J. Super. Ct. Law Div. Feb. 13, 2015).

325. *Id.* at 4-5.

326. *Id.* at 4.

327. *Id.* at 9.

328. *Id.* at 11.

The court held no, concluding that in order to take these easements, even if it is an emergency, the government must do so by eminent domain.³²⁹ And that means following the statutory process for condemning and taking property under the Eminent Domain Act.³³⁰ The court granted the property owners summary judgment on that matter.³³¹ Yes, this qualified as an emergency under the statutory definition but that does not mean the government can simply take property without going through the condemnation process:

Nevertheless, the court finds that the DCA does not authorize the Township to effectuate a taking of plaintiff's property and filing a deed of perpetual easement with the County Clerk without instituting a condemnation proceeding pursuant to the Eminent Domain Act. If the Township wishes to acquire perpetual interests in plaintiff's property for shore protection measures, it must adopt an ordinance authorizing the acquisition under the DCA and comply with the procedural requirements of the Eminent Domain Act. The fact that the DCA provides the right of the property owner to receive just compensation at a later date does not militate against this finding.³³²

The Town had conceded that it was taking private property, which meant that the requirements of the New Jersey Constitution's takings clause kicked in. The court concluded that if the Town needed the property quickly, it could do so under the eminent domain procedures:

The Legislature did not intend, with the enactment of the Disaster Control Act, to trump the procedural due process under the Eminent Domain Act, which is guaranteed to a property owner faced with a taking of their property. The court is not unmindful of the sense of urgency on the part of State and local officials who desire to move expeditiously with the Federal funding earmarked for dune protection measures following the wrath of Hurricane Sandy. The court is also cognizant of the extensive efforts undertaken to obtain grants of easements on a voluntary basis by affected property owners. The proper course for governmental agencies dealing with property owners, who have not voluntarily granted deeds of easements, is to promptly institute condemnation actions. A taking can only occur when a municipality files and records declaration of taking under the Eminent Domain Act pursuant to N.J.S.A. 20:3-17. It follows that the unilateral act by the Township in filing and recording an unsigned deed of easement with its covenants against plaintiff's property following its resolution is without any legal basis and must be set aside and removed from the County records.³³³

329. *Id.* at 11-12.

330. *Id.* at 11.

331. *Id.* at 14.

332. *Id.* at 11-12.

333. *Id.* at 14 (internal citations omitted).

K. *Georgia Court of Appeals: Property Owner Entitled to Temporary Takings Damages in Addition to Attorneys' Fees When Condemnor Drops Case*

In *Fincher Road Investments, LLLP v. City of Canton*, the court held that a condemnee was entitled to recover attorneys' fees and costs when the condemnor abandoned a taking, and was entitled to recover just compensation for the temporary cloud which the condemnation placed on the property.³³⁴

This started as a quick-take and the City deposited \$787,400 with the court, after which the court declared that the City had title.³³⁵ The owner objected to the taking itself and to the amount of compensation, and after the court denied the owner's petition to set aside the taking, the owner appealed.³³⁶ The court of appeals held the trial court should have considered certain facts about the timing of notice of the condemnation.³³⁷ When the case was remanded, the City told the trial court it no longer wanted the property because "it had determined condemnation of the property was 'no longer necessary for public use.'"³³⁸ It dismissed the condemnation action.

The City agreed with the owner that under a Georgia statute, the City was liable for attorneys' fees and costs because the City had abandoned the condemnation.³³⁹ The owner, however, claimed that it was also entitled to just compensation for a temporary taking, for the time between the quick-take and the City's dismissal.³⁴⁰ The City disagreed, arguing that the statutory remedy of attorneys' fees and costs was the owner's sole remedy. The trial court agreed just compensation was not available, and back the parties went to the court of appeals.³⁴¹

The court's analysis starts with a reminder that private property is "the most basic of human rights, and it is the charge of the courts to defend them vigorously."³⁴² The court noted that Georgia's quick-take procedure means that fee simple title passed to the City upon

334. 779 S.E.2d 717, 718 (Ga. Ct. App. 2015).

335. *Id.*

336. *Id.* at 719.

337. *Id.*

338. *Id.*

339. GA. CODE ANN. § 22-1-12 (2016).

340. *Fincher Rd.*, 779 S.E.2d at 719.

341. *Id.*

342. *Id.* (internal quotations and citations omitted).

the deposit, which means that the City temporarily took the property, even though it abandoned the permanent take.³⁴³

The court disagreed that it would be a “windfall” and double recovery if the owner is provided with both fees and costs, as well as just compensation, the former being a statutory requirement, and the latter a constitutional command:

Here, while the City’s abandonment of its action undoubtedly entitled Fincher Road to damages under [GA. CODE ANN.] § 22-1-12, the City’s abandonment of its obligation to pay those statutory damages in no way relieved it of “the duty to provide compensation for the period during which the taking was effective.”³⁴⁴

*L. Florida Court of Appeals: Quick Take Deposit
Only Vests Owner’s Right to Compensation, Not to
Specific Funds*

In *Florida Department of Transportation v. Mallards Cove, LLP*, a regulatory takings case that followed on the heels of a straight condemnation, the Florida District Court of Appeals held that there was no taking because the plaintiff did not own the interest on the quick-take deposit.³⁴⁵

The DOT condemned property belonging to Mallards Cove via Florida’s quick take procedure, by which certain agencies may obtain immediate possession and title, provided they deposit a good-faith estimate of the land’s value with the clerk of the court.³⁴⁶ Under Florida law, the property owner’s right to just compensation is then vested, and two weeks later, the property owner withdrew the \$2 million deposit.³⁴⁷ While the funds were on deposit, the clerk invested it, and under a Florida statute, 90% of the interest went to the DOT.³⁴⁸ The eminent domain case wrapped up, with the owner agreeing that the final judgment represented full compensation for the property taken.³⁴⁹

But the owner was not finished: it filed a separate lawsuit, alleging the interest the clerk earned on the deposit was its property, and that the DOT and the clerk took that property without just compensation.³⁵⁰ The trial court agreed, because the deposit vested in the owner, meaning that the interest also became its property.

343. *Id.* at 721.

344. *Id.* at 722 (internal citations omitted).

345. 159 So. 3d 927, 929-30 (Fla. Dist. Ct. App. 2015).

346. *Id.* at 930.

347. *Id.*

348. *Id.* at 930-31.

349. *Id.* at 931.

350. *Id.*

The court of appeals, however, disagreed, holding that while interest is a component of just compensation, the interest in this case was not “property.”³⁵¹

First, the judgment in the eminent domain case was final and the property owner could not, in effect, seek additional compensation in a second action.³⁵² Second, the court rejected the owner’s claim that its property interest in the interest was separate from its property interest in the land taken, and that since its interest in the deposit vested immediately, the interest earned on the deposit also belonged to it.³⁵³ The court concluded that condemnees’ rights are indeed vested upon the deposit but that the right is one to full compensation, not the right to the specific funds on deposit.³⁵⁴

Having determined that, the prior eminent domain judgment meant the case was over. A decision somewhat governed by semantics, because if the owner indeed had the right to compensation immediately upon deposit, it should also have the right to the time value of that compensation from that point forward. The only question left is whether the outcome might have been different had the owner not stipulated in the eminent domain case that it was fully satisfied, but had pursued the claim for interest there.

V. Practice Issues

A. *Virginia: Jury Gets to Hear About Appraisal Bait-and-Switch*

In *Ramsey v. Commissioner of Highways*, the Virginia Supreme Court held that the jury can be told about a condemnor’s earlier appraisal that valued the taken property higher than its current appraisal.³⁵⁵ Under Virginia’s condemnation procedures, as a prerequisite to a court exercising jurisdiction over an eminent domain action, a state condemning agency must, as an initial step, present to the property owner a statement of “the amount which [the condemnor] believes to be just compensation,” and must include an appraisal if an appraisal is required:

The state agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established

351. *Id.* at 933-34.

352. *Id.* at 934.

353. *Id.*

354. *Id.*

355. 770 S.E.2d 487, 491 (Va. 2015).

as just compensation, and, if an appraisal is required or obtained, such written statement and summary shall include a complete copy of all appraisals of the real property to be acquired that the state agency obtained prior to making an offer to acquire or initiating negotiations for the real property.³⁵⁶

The DOT took a portion of the Ramseys' property for a highway project and presented them with the required statement, which valued their land at \$246,292.³⁵⁷ At trial however, a new DOT appraiser opined the taken land at \$92,127.³⁵⁸ The trial court viewed the earlier required "statement" as a settlement offer and prohibited the property owner from both telling the jury about it and fully cross-examining the state's appraiser.³⁵⁹ The jury never got to hear about the earlier lower appraisal, nor the reasons why the state's trial argument of just compensation was radically different, and rendered a valuation verdict that required the property owners to pay the DOT \$14,675 plus 3% interest from the date which they withdrew the deposit.³⁶⁰

The Virginia Supreme Court disagreed, and concluded that the statement wasn't a settlement offer because it must be made "before initiating negotiations."³⁶¹ The court agreed with the logic of the Fifth Circuit in *United States v. 320.0 Acres of Land*, which held that a similar statement of just compensation, required by the federal relocation act (on which the Virginia statute is modeled), was not a settlement offer and the trier of fact was entitled to hear about it and why the government's estimate changed.³⁶²

The court rejected the DOT's contention that this evidence would be too prejudicial.³⁶³ The statement was relevant and any prejudice that DOT's would experience was outweighed by the constitutional imperative and the ability of the DOT to explain to the jury why its view of just compensation changed so dramatically. The court wrote, "Permitting the landowner to dispute a condemning authority's contention of a lower value at trial . . . 'will serve as a limited [and wholly appropriate] check on the broad powers of the State in condemnation proceedings.'"³⁶⁴

356. *Id.* at 489 (discussing Va. Code Ann. §§ 25.1-204 (2016)).

357. *Ramsey*, 770 S.E.2d at 488.

358. *Id.*

359. *Id.* at 488-89.

360. *Id.* at 489.

361. *Id.* at 489-90.

362. 605 F.2d 762 (5th Cir. 1979).

363. *Ramsey*, 770 S.E.2d at 490.

364. *Id.* at 490-91 (quoting *Mich. Dep't of Transp. v. Frankenlust Lutheran Congregation*, 711 N.W.2d 453, 462 (Mich. Ct. App. 2006) (alterations in original)).

Hopefully, the Virginia Supreme Court's opinion will add to the growing trend of courts viewing tactics such as this with disfavor.³⁶⁵ As the Fifth Circuit noted in *320.0 Acres*, "the Government [should] not [be] completely free to play fast and loose with landowners telling them one thing in the office and something else in the courtroom."³⁶⁶

B. *Condemnor's Higher Initial Appraisal, Offer, and Deposit Admissible*

In *Coleman v. Mississippi Transportation Commission*, the Mississippi Supreme Court held that evidence of the condemnor's initial appraisal, its offer, and its deposit, were admissible when its appraiser presented a lower valuation at trial.³⁶⁷ The appraiser was also subject to cross-examination about why he lowered his valuation.³⁶⁸

The court concluded that the property owner was entitled to introduce evidence of the condemnor's initial offer and deposit of \$380,300 and to cross-examine the Commission's appraiser about why his trial testimony was that the property was worth nearly \$100,000 less, \$289,400.³⁶⁹ The trial court prohibited the jury from learning about the deposit and earlier appraisal, concluding it was part of settlement and compromise and thus excludable under Mississippi Rule of Evidence 408.³⁷⁰ The court also prohibited the property owner's appraiser from testifying that the property was worth \$799,000, because he "could not explain his appraisal methods."³⁷¹ The court entered a directed verdict for \$289,400.³⁷²

Relying in part on *United States v. 320.0 Acres of Land*,³⁷³ the Mississippi Supreme Court concluded that the condemnor's initial appraisal, a valuation required by state statute, was relevant and admissible, and was not an offer of settlement to be excluded under Rule 408.³⁷⁴

First, an appraisal is not an offer of settlement or compromise, it is an appraisal. Second, under Mississippi law, things that happen before a condemnation complaint is filed are not subject to Rule 408 because

365. See, e.g., *Coleman v. Miss. Transp. Comm'n* 159 So. 3d 546 (Miss. 2015) (reaching identical result on very similar facts).

366. 605 F.2d at 825.

367. 159 So. 3d at 548.

368. *Id.*

369. *Id.* at 549-550.

370. *Id.*

371. *Id.* at 550.

372. *Id.*

373. 605 F.2d 762 (5th Cir. 1979).

374. *Coleman*, 159 So. 3d at 551.

there's no disputed "claim," as the rule requires.³⁷⁵ Eminent domain is different, because the "claim" does not arise until the complaint is filed, unlike other civil actions where the "claim" arises when the duty or contract is breached, even if a complaint has not yet been filed.³⁷⁶

The court also concluded that the Commission's offer as well as the deposit was admissible, subject to a ruling on whether the jury would be too prejudiced by this evidence:

We find that MTC's first appraisal, in addition to cross-examination thereon, should have been available to the jury for consideration of MTC's prima facie demonstration of value and Coleman's claim to just compensation. Because the appraisal was erroneously excluded under Rule 408, where that rule did not apply, this exclusion was reversible error. We note that the appraisal, like all proffered evidence, is still subject to the Rule 403 considerations discussed earlier. Concerning Coleman's contention that exclusion of the quick-take deposit and the initial offer also constituted error, we find that, having been excluded subject to Rule 408, such exclusion was erroneous, as neither the offer nor the deposit is the type of "offers of compromise" covered by Rule 408. It may be the case on remand, however, that evidence of the deposit or offer is inadmissible under Rule 403.³⁷⁷

B. Connecticut Court of Appeals: Prospective Purchaser Cannot Testify as Expert About Valuation

In *Department of Transportation v. Cheriha, LLC*, the Connecticut Court of Appeals held that a prospective purchaser is not a valuation expert and thus cannot testify about the value of the taken property.³⁷⁸ The case involved the condemnation of a parcel in New Britain at the intersection of Beaver and Washington Streets.³⁷⁹ The trial court did not allow the property owner to introduce the testimony of one Dr. Sheik Ahmed, who was prepared to testify that seventeen months before the taking he had submitted a letter of intent to buy the parcel for a price in excess of the property owner's appraiser's trial valuation.³⁸⁰ The court of appeals held that it was proper to exclude Dr. Ahmed's testimony as it was in the nature of expert valuation evidence:

The defendant's argument is belied by the record in this case, which discloses that the defendant sought to introduce Ahmed's testimony regarding his preliminary offer as expressed in the letter of intent on the basis that it was "indicative of

375. *Id.* at 552 ("[T]his Court's position on the admission of this specific type of offer is clear: offers of compromise, in condemnation proceeds, cannot occur prior to filing of a complaint.").

376. *Id.* at 553.

377. *Id.* at 553-54.

378. 112 A.3d 825, 829-30 (Conn. App. Ct. 2015).

379. *Id.* at 828.

380. *Id.* at 829.

the fair market value” of the property. In addition, in its offer of proof, the defendant suggested that Ahmed should be permitted to testify because of his extensive background in the buying and selling of commercial properties. In light of this, it is clear that although the defendant identified Ahmed as a fact witness, it predicated the usefulness of his testimony on his asserted ability to assess the value of the property as an expert. Accordingly, it was not an abuse of discretion for the court to preclude his testimony on the basis that he lacked the expert qualifications to do so.³⁸¹

C. *California Court of Appeals: Condemnor’s
“Final” Pretrial Offer, Contingent on Approvals
from Other Agencies, Isn’t Really Final, Is It?*

California law requires a condemnor to present to the property owner a final pre-trial settlement offer twenty days before trial and for the property owner to make a final demand.³⁸² If a court later determines that the condemnor’s final offer was unreasonable and the property owner’s final demand was reasonable, the property owner is entitled to litigation expenses.³⁸³

In *City & County of San Francisco v. PCF Acquisitionco, LLC*, the court concluded that the offer by the city, which “was expressly made ‘contingent on the approval of the Federal Transportation Authority [FTA], the Board of Directors of the San Francisco Municipal Transportation Agency [MTA], and the San Francisco Board of Supervisors [the Board]’” was unreasonable as a matter of law because it was not a “final offer.”³⁸⁴ Thus, denying the property owner’s request for fees and costs was an error.

The court held that the purpose behind the statute is to promote settlement and that the City’s contingent offer, which might result in the property owner getting nothing were the FTA, the MTA and the Board to reject it, did not do so.³⁸⁵ Thus, the “final offer” “was not so much of an ‘offer’ as a ‘*recommendation* to enter a settlement.’”³⁸⁶ The Court stated:

Keeping in mind the statute’s purposes of promoting settlement and making a property owner whole for the cost of unnecessary litigation, we do not think the Legislature intended to make a condemnee chose between entering into an uncertain and contingent bargain or risk losing any chance of recovering its litigation expenses if it proceeds to trial.³⁸⁷

381. *Id.* at 831.

382. CAL. CIV. PROC. CODE § 1250.410 (West 2016).

383. *Id.*

384. 187 Cal. Rptr. 3d 591, 594 (Cal. Ct. App. 2015).

385. *Id.* at 595.

386. *Id.*

387. *Id.*

The court also rejected the City's argument that it was impractical for it to use a different procedure; that it was exempt from the statute by virtue of the City's Charter.³⁸⁸

The court remanded the case for a determination of how much the City owes the property owner for fees and expenses.³⁸⁹

D. *Condemnor Entitled to Ask Jurors Whether They Believe Department of Transportation "Lowballs," If Condemnor Hints It Does*

In *State v. Treeline Partners, Ltd.*, the court first comes up with a definition of "lowball":

In attempting to ask potential jurors whether they believe that the State "lowballs," the State's attorney properly inquired about whether the venire members held a pre-existing bias or prejudice that the State underestimates property values. See WEBSTER'S NEW WORLD COLLEGE DICTIONARY 801 (3d ed. 1996) (defining "lowball" as a verb meaning "to give an understated price, estimate, etc. to (someone), esp. without intending to honor it" or "to so understate (a price, etc.)").³⁹⁰

The case involved the State's attempt to ask potential jurors and make arguments about whether they believed that the State lowballs eminent domain valuations.³⁹¹ Now the State's lawyer did not just conjure up this line of questions out of thin air. The property owner's lawyer did not expressly suggest during voir dire or closing arguments that the State did so, but the lawyer did get close, and in closing stated that the State's "appraiser used 'low ball numbers.'"³⁹²

The court also delved into what it means to "lowball" and the property owner's arguments that it did not really open the door.³⁹³ Additionally, the trial judge threatened contempt without giving a real reason, which is a recipe for reversal.³⁹⁴

E. *Colorado: Judicial Evidentiary Rulings, Not Commission's, Control in Eminent Domain Valuation Hearings*

In those states with a commission process in condemnation, the judge gets to make the final call about what evidence is admissible.³⁹⁵ In

388. *Id.* at 596.

389. *Id.* at 597.

390. 476 S.W.3d 572, 577 (Tex. App. 2015).

391. *Id.* at 573.

392. *Id.* at 577.

393. *Id.* at 577-79.

394. *Id.* at 578-79.

395. See, e.g., Reg'l Transp. Dist. v. 750 W. 48th Ave., LLC, 357 P.3d 179 (Colo. 2015).

Regional Transportation Dist. v. 750 West 48th Avenue, LLC, the Colorado Supreme Court summed up the applicable rule of law succinctly: “commissioners have some implicit authority to make evidentiary rulings without the oversight of the trial judge” but “the judge is still the judge” and she gets the final call.³⁹⁶ So the commissioners cannot “overrule” or “reconsider” a judge’s earlier ruling that evidence is admissible nor can they ignore a judge’s instruction that they disregard other evidence.

It should not have been too hard to presage that judges would conclude that judges have the final say, but apparently it was an unsettled question in Colorado. The court had before it two commission rulings: the first granted the property owner’s motion in limine to exclude the condemnor’s expert from testifying about certain things, rendered after the judge denied the same motion; the second was the commission first determining that certain evidence was relevant, and then later the judge instructing the commissioners to not consider it.³⁹⁷

In both cases, the judge wins and has the final say:

Despite the rather complex relationship between the judge and the commission during eminent domain valuation hearings, the two issues presented in this case quickly resolve themselves by reference to a simple maxim: judicial evidentiary rulings control over commission evidentiary rulings.³⁹⁸

F. *Kansas: Eminent Domain Litigation is a “Civil Action” Subject to the Same Rules as Other Civil Cases*

In *Neighbor v. Westar Energy, Inc.*, the court concluded that Kansas’ “savings statute,” which allows a party in certain circumstances to refile a lawsuit that had been voluntarily dismissed without prejudice within six months, applied to eminent domain cases.³⁹⁹

The details involve peculiarities of Kansas practice and eminent domain law, but the takeaway is that the court concluded that despite the somewhat different procedures applicable to eminent domain cases (the valuation is initially determined by a panel of three appraisers, and if a party is dissatisfied with their conclusion, it may “appeal” to the district court), the eminent domain statute also provides that the appeal is “a new civil action” that “shall be tried as any other civil action.”⁴⁰⁰ Thus, Kansas’s “savings statute” applied, and allowed

396. *Id.* at 183.

397. *Id.* at 180.

398. *Id.* at 183.

399. 349 P.3d 469, 470 (Kan. 2015).

400. *Id.* at 472 (quoting KAN. STAT. ANN. § 26-508 (2016)).

Neighbor to refile his appeal of the panel valuation.⁴⁰¹ The procedures applicable to eminent domain cases are not so different unless the legislature expressly has said so. Here, it had not.

G. *United States Virgin Islands: No Appellate Jurisdiction for Quick-Take Ruling Until Eminent Domain Judgment Finalized*

In *Beachside Associates, LLC v. Virgin Islands Water & Power Authority*, the Supreme Court of the Virgin Islands held that in a quick-take action, a trial court's order rejecting a property owner's claim that the condemnor did not have the power of eminent domain is interlocutory and is not immediately appealable.⁴⁰² First compensation must be determined and a final judgment entered before an appeal can occur.⁴⁰³

This does not make practical sense. If the condemnor does not have the power to take the property, why should the parties incur the costs and delay in determining valuation? In Hawaii, a property owner is entitled by statute to calendar preference and an immediate interlocutory appeal of a trial court's decision upholding the power to take.⁴⁰⁴ And that was the court's problem: the court's jurisdiction is determined by statute, and the statute, unlike Hawaii's, is limited to final judgments.⁴⁰⁵ Virgin Island's statute is modeled, "word-for-word identical" to the federal Declaration of Taking Act and the U.S. Supreme Court has held that there is no right to appeal a quick take before entry of final judgment.⁴⁰⁶

VI. Attorneys' Fees

A. *Florida: When Government Excessively Litigates an Eminent Domain Case, "Full Compensation" Requires Payment of Attorneys' Fees*

Those of who represent property owners on the business end of eminent domain and practice in Florida or the few other states which allow recovery of attorneys' fees are lucky: the rest of the attorneys who practice in places where they are not permitted, either as a

401. *Neighbor*, 349 P.3d at 470.

402. 62 V.I. 723, 726 (2015).

403. *Id.* at 727.

404. See HAW. REV. STAT. § 101-34 (2016).

405. *Beachside Assoc.*, 62 V.I. at 726.

406. *Id.* at 726-727; *Catlin v. United States*, 324 U.S. 229, 236-37 (1945).

component of a constitutional command of just compensation or by legislative grace, are envious.

It is understood that to force a property owner to bear its own fees and costs to recover just compensation—compensation which the condemnor should have offered in the first place—effectively denies just compensation and allows a condemnor to get away with an inadequate offer simply because it may make little economic sense for the property owner to fight back with a lawyer.⁴⁰⁷ Each dollar spent on attorneys is a dollar less the owner gets for her property.

But even if an attorney represent owners in a non-fee-recovery jurisdiction, however, he or she should read the Florida Supreme Court's opinion in *Doerr Trust v. Central Florida Expressway Authority*.⁴⁰⁸ The court recognized that denial of attorneys' fees denies full compensation.⁴⁰⁹ It understood that fees are necessary to make property owners whole. It realized that property owners have no choice in these matters and have done nothing wrong. It acknowledged that the power of eminent domain is one of the highest powers of the state.⁴¹⁰ If that was not enough, the opinion contains valuable lessons for both property owners and condemnors.

First, the bottom line: the court held that when the government is "responsible for excessive litigation," it is liable for attorneys' fees under Florida statutes.⁴¹¹

In the case, the Expressway Authority wanted roughly ten acres of the Trust's land, for which it offered \$4.9 million.⁴¹² The trust said no and the Authority condemned.⁴¹³ The jury determined that \$5.7 million was just compensation.⁴¹⁴ Florida has a statute alluded to above that requires the payment of attorneys' fees in this situation.⁴¹⁵ The first part of the statute bases the fee on the "benefits achieved" by the lawyer.⁴¹⁶ This is a list of percentages of the difference between the precondemnation offer and the award (for example, for benefits up for \$250,000, the fee is 33%. For the benefits between \$250,000

407. See *Doerr Trust v. Cent. Fla. Expressway Auth.*, 177 So. 3d 1209, 1216 (Fla. 2015).

408. See generally *id.*

409. *Id.* at 1216-1217.

410. *Id.* at 1215.

411. *Id.* at 1217.

412. *Id.* at 1211-12.

413. *Id.* at 1212.

414. *Id.*

415. FLA. STAT. § 73.092 (2016).

416. § 73.092(1)

and \$1 million, 25%).⁴¹⁷ Under this provision, the property owners were entitled to a maximum of \$227,652 in fees.⁴¹⁸

The property owners, however, asserted that the court must consider the “qualitative and quantitative” factors such as “novelty,” “skill,” the amount involved, and the fees charged for similar legal services, which are set out in the second part of the statute which governs fee calculations for fees incurred in “defeating an order of taking, or for apportionment, or other supplemental proceedings, when not otherwise provided for.”⁴¹⁹ Applying this standard, the trial court awarded the property owner \$816,000 in fees.⁴²⁰

The court of appeals reversed, and although it agreed the case had been “over-litigated,” it held that the pre-condemnation offer “was not so indefinite that the benefits achieved by the Landowners could not be determined.”⁴²¹ So it sent the case back down and required the trial court to determine whether limiting the fee recovery to the \$227,000 under the benefits achieved statute would deny the owner full compensation.⁴²²

On remand, the trial court again sided with the owner, concluding that the Authority “had engaged in a ‘clear pattern’ of excessive litigation.”⁴²³ It litigated the case aggressively. It changed its agreed-to valuation theory and retained a new expert, an economist who “made 16 assumptions.”⁴²⁴ The owner’s attorney needed to rebut and their (costly) efforts paid off: the trial court prohibited the economist from testifying.⁴²⁵ And the Authority spent “twice as much time deposing the Landowners’ experts as the Landowners spent deposing the Authority’s experts.”⁴²⁶ Thus, it would undercompensate the owners, and therefore would be unconstitutional, if the court adhered to the “benefits achieved” formula and limited fee recovery to \$227,000 when the owner had to expend much more responding to the Authority’s tactics.⁴²⁷ The trial court reaffirmed its earlier \$816,000 fee award.⁴²⁸

The Authority appealed and the court of appeals again reversed, stating the owners should have sought sanctions to address the abuse of

417. *Id.*

418. *Doerr Trust*, 177 So. 3d at 1212.

419. *Id.* (discussing FLA. STAT. § 73.092(2) (2016)).

420. *Doerr Trust*, 177 So. 3d at 1212.

421. *Id.*

422. *Id.*

423. *Id.* at 1213.

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.* at 1214.

428. *Id.*

process.⁴²⁹ The average hourly rate of \$87 per hour (\$227,000 divided by the number of hours the owner's lawyers spent responding) was not "patently unconstitutional."⁴³⁰ But the court of appeals certified a question to the Florida Supreme Court, which saw the issue this way:

In an eminent domain proceeding, when the condemning authority engages in tactics that cause excessive litigation, is the benefits achieved formula in section 73.092(1), Florida Statutes, unconstitutional as applied to calculate attorney's fees for the hours incurred in defending against the excessive litigation?⁴³¹

The court said yes.⁴³² Florida's constitution requires "full compensation," and to implement this requirement, the legislature adopted the fee recovery statute to make owners whole.⁴³³ But even though the legislature has the power to adopt rules like the benefits achieved provision, which base the fee on a percentage of the benefits, that rule cannot be applied so that it ends up denying the owner a fee recovery that would make it whole.⁴³⁴

So when a condemnor does not play fair and the property owner must respond, it is not fair to limit her fee recovery to the fees set out in the benefits achieved statute.⁴³⁵ The government, after all, has "potentially unlimited resources to allocate to abusive litigation and legal representation" and it "places private property owners at a considerable disadvantage" to hobble them with limited fee recoveries.⁴³⁶

The court applied a mixed approach. It read the the benefits achieved statute to be constitutional only if the amount of time spent in opposing the excessive litigation also gets analyzed under the "quantitative and qualitative" factors part of the statute.⁴³⁷ Thus, owners can get both benefits achieved fees that are attributable to the actual award, as well as fees for time spent responding to a condemnor's excess.

Applying that formula, the court concluded that it did not have enough of a record to make a decision on how much the Authority owes the owner in fees.⁴³⁸ It sent the case back down for an evidentiary hearing to determine how much time was spent by the owner's

429. *Id.*

430. *Id.*

431. *Id.* at 1214.

432. *Id.* at 1219.

433. *Id.* at 1215-16.

434. *Id.* at 1216.

435. *Id.* at 1216.

436. *Id.* at 1217.

437. *Id.*

438. *Id.* at 1218.

attorneys responding to the Authority responding to an evidentiary.⁴³⁹ This means that the owner will recover \$227,000 in benefits achieved fees, plus an hourly rate recovery for time spent responding to the Authority's tactics.

As for the sanctions suggested by the court of appeals as the method of dealing with the bad behavior? The Supreme Court held that the possibility of sanctions does not satisfy the constitutional requirement of full compensation.⁴⁴⁰ Sanctions are discretionary and punitive, while full compensation is a mandatory constitutional command.⁴⁴¹ Besides, "excessive litigation" is not the bad faith behavior that is subject to sanctions, and while the Authority acted excessively here, it did not act "in bad faith or with evil intent."⁴⁴²

B. *Florida Court of Appeals: Offer Early, Offer Often—Early Pre-Condensation Offer Does Not Trigger Attorneys' Fee Statute*

In *General Commercial Properties, Inc. v. Florida Department of Transportation*, the court held that a statute, which requires the trial court to use the "first written offer" by the condemnor made prior to the initiation of the eminent domain case as the benchmark when it is calculating attorneys' fees, does not mean that the DOT is stuck with a very early offer it made under the "Early Acquisition Program."⁴⁴³

Under this program, the DOT made early offers to owners for properties it wanted to acquire.⁴⁴⁴ There was no obligation on the part of the owners to sell.⁴⁴⁵ As the court phrased it, it was an "arms-length negotiation" with no eminent domain threat.⁴⁴⁶ This was supposedly outside the usual eminent domain-related acquisition program and if the owner turned down the offer, there was nothing the DOT could have done.⁴⁴⁷ So in 2005, DOT made such an offer for \$400,000 to the owner, who turned down the offer.⁴⁴⁸

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* at 1218.

443. 178 So. 3d 439, 440 (Fla. Dist. Ct. App. 2015).

444. *Id.* at 440.

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.* at 441.

Nearly a decade later, DOT filed a condemnation action to take the property, making an offer of \$699,000.⁴⁴⁹ That too was rejected and after trial, the final judgment awarded the owner \$800,000.⁴⁵⁰

Under Florida's fee-shifting statute, the owner sought attorneys' fees keyed to the EAP offer of \$400,000.⁴⁵¹ The statute allows recovery of fees based on the difference between the "first written offer" and the final award, and that early offer was the "first written offer" according to the property owner.⁴⁵²

The court of appeals said no, there's a difference between the EAP written offer and the first written offer made during the condemnation process, since the EAP offer is really an attempt to purchase without the threat of eminent domain, and not like the sell-or-else "negotiations" that occur precondemnation.⁴⁵³

Besides, the DOT's EAP offer contained the condition that it was not to be used for calculating attorneys' fees, and the property owner agreed.⁴⁵⁴

C. *"Eminent Domain Abuse" Turnaround in Idaho:
Property Owner Liable for Condemnor's
Attorneys Fees for "Extreme and Unlikely"
Appeal and Defenses*

The Idaho Supreme Court's opinion in *Idaho v. Grathol* is a case where each piece seems okay but the whole result does not sit well.⁴⁵⁵ "Eminent domain abuse" is what seemed to fuel the opinion. Except here, it was not abuse of the property owner by the condemnor but rather the other way around: the overall vibe of the opinion was that the court was not too pleased with the property owner's approach.⁴⁵⁶ It determined the appeal was "extreme and unlikely" and assessed the property owner the attorneys' fees and costs the government incurred on appeal.⁴⁵⁷

It also concluded that the property owner may have interposed "extreme and unlikely" defenses in the trial court, even though that court had already concluded that the defenses were not unreasonable; the

449. *Id.*

450. *Id.*

451. *Id.*; FLA. STAT. § 73.092 (2016).

452. *Gen. Commercial Prop.*, 178 So. 3d at 441.

453. *Id.* at 444.

454. *Id.*

455. *See* 343 P.3d 480 (Idaho 2015).

456. *See, e.g., id.* at 487 ("Grathol is wrong.").

457. *Id.* at 493.

supreme court reversed the trial court's refusal to assess fees and costs.⁴⁵⁸ It also affirmed the valuation for the taken property made by the trial judge over the objections of the property owner.⁴⁵⁹ Pretty bad all around for the property owner.

But that is not what is fueling the dissonance with this case. It is appreciated when a client does not have to eat his or her own fees and costs, even more so when the other side plays fast and loose with facts and law or drags out the case unnecessarily. Generally, it is liked when courts are able to award fees. Especially, when a court can award fees to a property owner in an eminent domain case.

But a condemnor?

What is concerning is that the Idaho Supreme Court gave short shrift to the property owner's argument that "an award to a condemnor would unconstitutionally reduce the landowner's award merely because the landowner puts the government to its proof."⁴⁶⁰ Instead, the court treated this eminent domain case as if it was ordinary civil litigation. However, condemnation cases are not the typical "Plaintiff v. Defendant" civil litigation, where the plaintiff claims the defendant breached a duty, broke a contract, or committed some wrong. Eminent domain cases should be considered differently because the only reason the defendant is being sued is that she owns property that is purportedly needed for the public's use. There is no culpability involved.

Those not bothered by the result might say that the rule allowing an owner to be assessed fees and costs adopted by the Idaho court only applies to what the court calls "extreme and unlikely" cases of property owner abuse; that the court adopted standards, and thus safeguards, which would prevent condemnors from leveraging the power to seek fees to put even more pressure on property owners to take whatever is offered and forego theories of valuation that may seem novel or aggressive.⁴⁶¹ But exam the factors the court required to be met before a condemnor can be awarded fees and costs:

- (1) [W]hether the trial court correctly perceived the issue as one of discretion;
- (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and
- (3) whether the trial court reached its decision by an exercise of reason.⁴⁶²

458. *Id.* at 493-94.

459. *Id.* at 494.

460. *Id.* at 492.

461. *Id.* at 493.

462. *Id.* at 492 (quoting *Telford Lands LLC v. Cain*, 303 P.3d 1237, 1248 (Idaho 2013)).

Next, the court must apply the statute which allows the award of fees and costs to the “prevailing party” in “any civil action,” and determine which party “won.”⁴⁶³ In a condemnation case, this is not always straightforward. Who “wins” when the government’s duty is to award the full and perfect equivalent of the property taken? This part of the opinion is not easy to follow, but the court summed up the test this way:

First, the condemnor must have met all of *Acarrequi* factors that applied to the condemnor. Second, the condemnor’s case must have been brought reasonably, not frivolously, and have adequate foundation. Finally, the condemnee must meet the standard in [IDAHO CODE] section 12-121. Fees can be awarded under section 12-121 only when the court “finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation.” [IDAHO R. CIV. PROC.] 54(e)(1). When a district court decides in its discretion that a case meets all three of these elements, the condemnor recovers its attorney fees.⁴⁶⁴

In *Ada County Highway District v. Acarrequi*, the court held that the standards for fee shifting are not really standards, nor “rigid guidelines,” so it is really just up to the trial judge.⁴⁶⁵ Moreover, it is unclear how the final factor listed above squares with the trial court’s finding that the property owner’s arguments and conduct were not frivolous. One reading of these factors is that, absent the trial court really going off the rails, there is virtually no chance the appellate court will reverse.

The court held the trial court did not apply these factors and therefore sent the case back for a determination of whether the property owner would be held liable for fees and costs.⁴⁶⁶ The supreme court, however, assessed the owner fees and costs incurred by the government on appeal, concluding that the property owner’s arguments were “unreasonable,” “false and misleading,” “completely unreasonable and frivolous,” and “only ask the Court to re-weigh the evidence.”⁴⁶⁷

The opinion does not discuss the lodestar but since the government was represented by outside private counsel, a 470-lawyer firm, the amounts are likely going to be massive.⁴⁶⁸ The concurring opinion notes that “the State claimed it incurred \$724,136 in attorney fees, \$13,079.06 in costs as a matter of right, and \$167,103.59 in discretionary

463. *Grathol*, 343 P.3d at 492.

464. *Id.* at 493.

465. 673 P.2d 1067, 1071 (Idaho 1983), *overruled by Grathol*, 343 P.3d 480.

466. *Grathol*, 343 P.3d at 497.

467. *Id.* at 496-97.

468. See *About the Firm*, Holland & Hart, <https://www.hollandhart.com/about-firm> (last visited May 21, 2016).

costs, for a total of \$906,318.65.”⁴⁶⁹ The concurring justice also noted that “the costs of defending would likely have been substantially less, had the Attorney General’s office been properly funded and not obliged to seek the assistance of outside counsel.”⁴⁷⁰ It seems unfair to hang the fact that the Attorney General is underfunded on the property owner and if liable for the government’s fees, it should not be on the hook for more than what it would have cost the Attorney General’s office to prosecute the case.

The concurring justice also seemed even more offended by the property owner’s approach than the majority was, writing that it treated “the condemnation proceeding as a gravy train.”⁴⁷¹ Justice Jones also castigated the property owner for not taking the settlement which was offered to it by the condemnor because the settlement offer was “reasonable.”⁴⁷² How a settlement offer was entered into the record and why it is relevant is unclear.

The last question is whether this rule is going to be good for Idaho condemnors as well as Idaho property owners. Will the courts look with a similarly jaded eye when offers of just compensation end up being much lower than the final award?

469. *Grathol*, 343 P.3d at 497 (Jones, J., concurring).

470. *Id.*

471. *Id.*

472. *Id.*

