SUMMARY OF MAJOR EMINENT DOMAIN CASES & LEGISLATION

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United States

Georgia

Wise Bus. Forms Inc. v. Forsyth County, 2022 Ga. App. LEXIS 157

Facts: The property owner alleged a per se taking and inverse condemnation in the expansion of a road that increased surface and stormwater runoff flowing under the property and ultimately a sinkhole in the parking lot. The case was dismissed based on the statute of limitations. The property owner argued the statute of limitations began when it observed the sinkhole rather than when the project construction was completed. The project was completed in 2000, and the sinkhole was first noticed in 2016.

Issue: Did the statute of limitations commence in 2000 or when the sinkhole appeared?

Holding: The statute of limitations began to run on the claim of permanent nuisance when the creation of the nuisance became observable. The increased storm runoff was observable from the completion of the project; therefore, the statute of limitations began in 2000. The sinkhole did not constitute new harm sufficient to toll the statute of limitations because the harm in this case was the increased runoff. A change in the degree of harm does not grant an extended statute of limitations. The court noted: "if a plaintiff could sue a public utility each time the harm resulting from a permanent nuisance changed by degree, the rule requiring a plaintiff to bring one lawsuit for past and future damages within the applicable statute of limitations would be meaningless."

Iowa

Putenney v. Dakota Access, LLC, 2022 Iowa App. LEXIS 73

Facts: Dakota Access was acquiring easements for a petroleum pipeline. A county commission awarded the property owner $16,300 as compensation, which he appealed to the district court. The property owner testified as to the impacts and value. The jury awarded him $7,900 for the taking. The property owner appealed and argued that the district court abused its discretion by (1) limiting his closing argument, (2) excluding certain evidence about land values, (3) excluding evidence about the dangers of pipelines, (3) excluded evidence about post-taking damages, and (5) improperly instructed the jury. Issue: Did the district court error in excluding the property owner's evidence?

Holding: No, the appellate court upheld the district court's determination. (1) The court did not err in limiting his closing argument because evidence of the price a condemnor paid to another condemnee may not be used as evidence. (2) The excluded exhibit was not evidence of market value, but rather evidence of a pre-condemnation settlement discussion and, therefore, inadmissible. (3) The safety information pamphlet was not the kind of publication that was a matter of common knowledge and, therefore, was not an influence on market value. (4) Excluding evidence of post-taking damages was proper, as those damages are of the kind to be pursued in a separate proceeding. (5) The jury instructions were proper. Therefore, there was no abuse of discretion, and the district court did not err.

Rausch v. City of Marion (In Recondemnation of Certain Rights), 2022 Iowa Sup. LEXIS 55 (2022 WL 1434872)

Facts: A portion of undeveloped property was being condemned for a road. The property owner was entitled to testify about his opinion on the site's reduction in value resulting from the taking, but his testimony on comparable sales was limited based on the grounds of hearsay, lack of personal knowledge of those separate transactions and that he was unqualified as an expert.

Issue: While property owners are generally allowed to give opinion testimony about the value of their own property, should owners of commercial property who do not qualify as experts be allowed to support their valuation by testifying about allegedly comparable sales of property owned by others?

Holding: The district court did not err in prohibiting a property owner, who is a former restaurant manager with limited real estate experience, from testifying as to specific allegedly comparable sales of developed commercial property because of the owner's lack of expertise and the complexity of these commercial real estate valuations. The court disagreed with the district court's analysis on hearsay and personal knowledge because public records were available for those other properties to be admitted into evidence, and the property owner gained personal knowledge by reviewing those records and visiting the other properties. However, as the property owner was not an expert, he could not offer an opinion of value as to the other commercial properties where that opinion required technical or specialized knowledge. The admissibility of lay owner opinion testimony on comparable sales should be made on a case-by-case basis. Some valuations may be too complex for a lay witness to present to a jury.

Kentucky

Commonwealth v. Louisville Gas & elec. Co., 2022 Ky App. LEXIS 41 (2022 WL 1194180)

Facts: The gas company sought to condemn a portion of property for a pipeline, and the property at issue had a conservation easement on it that was held by the Commonwealth of Kentucky. The Commonwealth, through a motion to dismiss, raised the argument that sovereign immunity precluded the gas company from maintaining an action to condemn a state-owned easement. The motion to dismiss by the Commonwealth was denied, and an interlocutory appeal was taken.

Issue: Whether or not the doctrine of sovereign immunity precludes the circuit court from proceeding to determine whether the gas company is entitled to exercise the right of eminent domain with respect to property upon which the Commonwealth of Kentucky owns a conservation easement. Further, whether the conservation easement statute waived sovereign immunity by express language or by overwhelming implication.

Holding: Sovereign immunity did not bar the commencement of condemnation proceedings against the holder of the conservation easement. Therefore, the trial court did not err in denying the conservation easement holder's motion to dismiss. The court initially analyzed when a sovereign immunity defense must be raised and concluded that it must be raised, if at all, in the answer or other pleading as required by KRS 416.600. The court also addressed the substantive issues and held that the statutory language indicated that a conservation easement cannot act to impair the power of eminent domain and that a holder of a conservation easement may be a governmental body. Therefore, the court held that the conservation easement statute constituted a waiver by overwhelming implication, if not express language, of sovereign immunity where a governmental interest in a conservation easement is asserted as a defense to condemnation proceedings initiated by a party with a statutory right of eminent domain.

Maryland

Kaiguang Xu v. Mayor of Baltimore, 2022 Md.App. LEXIS 228 (2022 WL 951849)

Facts: The property owner was self-represented in a condemnation case. During a telephonic hearing, the parties appeared to agree to a bench trial, but this was some conflict as to what was actually agreed upon at the hearing. In a separate filing, the property owner made a request for a jury trial, but it was not a formal motion. Ultimately, the matter was tried as a bench trial, and the property owner appealed.

Issue: The primary issue address on appeal was whether it was legally correct to hold the trial without a jury?

Holding: No, it was an error to hold the trial without a jury and the case is reversed. Under Maryland condemnation law, the matter shall be heard by a jury unless all parties file a written election submitting the case to the court for determination. There was confusion as to the property owner's jury request, likely in part due to the fact that she was self-represented. Ultimately, the court determined that regardless of whether she did or not did request a jury trial, the statute said that the matter will be heard by a jury unless there is a written election to have it heard by the court instead. And, it was clear that there was not a written election transferring the matter to a bench trial.

Massachusetts

FBT Everett Realty, LLC v. Mass. Gaming Comm'n, 2022 Mass. LEXIS 247

Facts: FBT purchased vacant land which was contaminated and required extensive cleanup. It looked into a variety of possible uses, including a storage facility or big box retail. But two years later, Massachusetts legalized casino gambling and created the Commission, whose duties include issuing gambling licenses. A branch of the Wynn casino operation wanted the property and entered into an option agreement with FBT under which it would buy the land if Wynn was able to secure the necessary gambling license from the Commission. Wynn sought a license, and the Commission began an investigation of the applicant. But investigators uncovered evidence leading them to suspect that a convicted felon with apparent connections to organized crime had a hidden ownership interest in FBT. FBT denied the connection, but Commission continued to suspect that the person retained an ownership interest, and that FBT was concealing the connection. The commission was troubled by what it believed to be a lack of candor by FBT's principals and their failure to fully cooperate with the investigation. They were also anxious that individuals with a criminal background and associations with organized crime should not profit from the award of a casino license to Wynn for the Everett parcel. If the allegations were true, then Wynn's casino license application was in jeopardy: the Commission would not approve a license if FBT had connections to organized crime and stood to financially gain from selling the land to Wynn for a casino. The Commission allegedly suggested to Wynn that the property could still be sold — and Wynn might get its casino license from the Commission — if the deal could be structured so that any possibility of FBT potentially gaining from a sale of the property as a casino could be removed. Consequently, Wynn appraised the property based on its highest and best non-casino use (big box retail) at $35 million. Fearing that the commission would otherwise find Wynn unsuitable, dooming Wynn's license application and FBT's sale of the Everett parcel to Wynn, FBT agreed to amend the option agreement to reduce the price from $75 million to $35 million, thus eliminating FBT's casino-use premium. Wynn bought the property for $35 million, and because the proceeds which FBT received were not for a casino use, the Commission granted Wynn its gambling license. FBT brought a state-court lawsuit against the commission, asserting tortious interference with contract and a regulatory takings claim under Penn Central for the $40 million before-and-after difference allegedly brought about by the commission's actions. After discovery, the trial court entered summary judgment in favor of the commission on both claims, concluding that FBT purchased the property before gambling was legal and, therefore, it could not have reasonably expected to later sell the property for purposes of casino development. FBT's inability to prove one Penn Central factor was enough, and the whole claim fell.

Issues: Must the trier of fact reviewing a Penn Central takings claim analyze and balance all three factors?

Holding: When considering a regulatory takings claim under Penn Central, the trier of fact must consider and balance all three factors, and no single factor is dispositive. Thus, although FBT's purchase of the property at a time when casino gambling was not legal in Massachusetts weighed heavily against FBT having reasonable investment-backed expectations of selling the property for a casino, FBT made substantial investments in the property once casino gambling was legalized, and the economic impact of the commission's actions allegedly influencing Wynn were severe (a $35 million difference in value between casino use and big box retail use). Moreover, the character of the alleged commission action — influencing Wynn to alter its option agreement with FBT — was "highly unusual." The court remanded the case for trial.

New York

J. Nazzaro Partnership, L.P. v. State of New York, 2022 N.Y. App. Div. LEXIS 2906 (2022 WL 1414598)

Facts: The property at issue consisted of two tax lots, which were split-zoned. It had portions zoned for neighborhood business and a portion for residential areas. However, there were deed restrictions that the residential portion could not be improved with a home or other uses for 50 years (until 2060) due to the property being previously used as a gas station. Later, a portion of the property was being condemned. At that point, a bank was located on the property, with a portion on the residential-zoned area pursuant to a special exception granted by the Town. The claimant asserted that the highest and best use of the property was a two-story commercial building, with expanded parking on the residential portion of the property. The State argued that the highest and best use was a one-story building on the commercial portion of the property and residential development on the residential portion in 2060. The Court of Claims determined that the Claimant failed to substantiate the highest and best use and, therefore, used an impermissible valuation methodology. Therefore, the court accepted the State's valuation.

Issue: Did the court err in adopting the highest and best use valuation offered by the State's appraiser?

Holding: Judgment is affirmed because the claimant failed to show that it could satisfy the requirements for a use variance or that a variance was likely to be granted, which means the court of claims properly rejected the claimant's proposed highest and best use of the property. In determining potential uses of the property, the rule is that the court may consider potential uses in determining value if those uses are permitted by zoning regulations at the time of taking or if the claimant can demonstrate that there is a reasonable probability of rezoning. While the Claimant had a special exception for parking on the residential portion of the property, further expansion of such parking would require a use variance. The Claimant failed to demonstrate that it could satisfy the variance requirements or that a variance would likely to be granted. Therefore, as the two-story building was dependent on expanded parking, the Claimant failed to demonstrate that its proposed use was physically or economically feasible. Thus, the proposed highest and best use of the property as a two-story commercial building with expanded parking was rejected.

Galarza v. City of New York, 2022 N.Y. App. Div. LEXIS 3017

Facts: The City of New York condemned Galarza's Staten Island property for a stormwater management project. The property was zoned for residential uses but was also subject to wetlands regulations that severely restricted development. Galarza asserted the highest and best use of the property was a regulatory takings lawsuit. He argued that under either the categorical Lucas standard, or the ad hoc Penn Central test, the wetlands regulation had taken the property, and the just compensation owed by the City in the eminent domain case must include the premium a reasonable buyer would pay for the probability of a successful judicial determination that the regulations were confiscatory. After a nonjury trial the court agreed. It held that there was not a categorical Lucas taking of all use and value, but also that it was reasonably likely that Galarza would prove a Penn Central taking. The City appealed the Penn Central ruling, and the owner cross-appealed denial of the Lucas taking.

Issue: Did the owner prove a reasonable likelihood of success on a regulatory takings claim?

Holding: The appellate court affirmed, concluding that the 84% diminution of value of the property caused by the wetlands regulation, combined with the other Penn Central factors showed that the owner had a reasonable likelihood of success on a takings claim and that the method of calculating the loss in value was acceptable. The court affirmed that the trial judge properly utilized the methodology provided by the City's appraiser, based on the time, costs and risks involved in pursuing a takings challenge to the wetland regulations and deducted the cost of deregulation from the value of the property under the "before and after" method. Adjustments were then made to account for risk and the present value of money. Having resolved the issues on the Penn Central claim in favor of the owner, the court did not address the owner's cross-appeal of the Lucas claim.

Wesley Hills Ctr., LLC v. State of New York, 2022 N.Y. App. Div. LEXIS 876 (2022 WL 387008)

Facts: The State of New York took land along a road, which was part of a shopping center. The taking resulted in nonconformities in parking spaces and the loss of a landscape buffer. The Court of Claims awarded the property owner severance damages. The State contended that the owner failed to establish entitlement to severance damages.

Issue: Did the property owner properly establish entitlement to severance damages?

Holding: Yes, the award of severance damages was proper, as the property owner had demonstrated an entitlement to such damages. The severance damages were based on opinions of experienced, knowledgeable experts and the amount awarded was within the range of the expert testimony. Additionally, the decision to award was adequately explained by the court. As the Court of Claim's explanation was supported by evidence, it was entitled to deference.

North Dakota

Sauvageau v. Bailey, 2022 ND 86 (2022 N.D. LEXIS 85)

Facts: Property was needed for a flood control project. An offer was made for the fee simple acquisition at $460,000, which was rejected, and an offer was made for a right of way easement at $460,000, which was also rejected. The Flood control district attempted to use the quick take procedure to acquire a permanent right of way easement covering all of the property. The property owners' argued that the District lacked authority to take their property under the quick take procedure because that procedure was not available for full takes. The property owners sought a petition from the state supreme court to prevent the District from evicting them from their property.

Issue: Is the quick take procedure permissible for this type of acquisition?

Holding: The District was not able to use the quick take procedure for condemnation because that process is only available when a right of way is being acquired and here, the District was taking more than a right of way in the property. The property owners' petition was granted, and the district court was ordered to vacate its order denying the property owners' motion to dismiss the complaint and remanded for further proceedings. In coming to this decision, the permanent right of way easement had been valued as if it was a full take because the only interest the property owners would retain was the possibility of a reverter, which the appraiser valued at $0. The court determined that under the terms of the "right of way easement," the District was taking more than just an easement. The easement covered the entire property, closed the access road, removed all structures, disturbed the surface and subsurface of the property, and allowed the District to inundate the property. The court determined that by labeling the interest to be acquired as a permanent right of way, the District was trying to evade the statutory requirements and instead use a quick take process

Oklahoma

Rocket Props., LLC v. LaFortune, 2022 OK 5 (2022 WL 153188)

Facts*:* An inverse condemnation claim was instituted against the City of Tulsa. The City moved for summary judgment on the grounds that the Governmental Tort Claims Act governed the inverse condemnation claim. The motion for summary judgment was granted, and the inverse condemnation claim dismissed.

Issue: Whether an inverse condemnation claim is governed by the Oklahoma Governmental Tort Claims Act (GTCA).
Holding: Inverse condemnation claims are not subject to the GTCA. Even though the GTCA was amended in 2014 to expand the definition of a tort, condemnation proceedings do not involve a tort. As such claims are not a tort, the GTCA does not apply to inverse condemnation claims.

Tennessee

Walker v. State, 2022 Tenn. App. LEXIS 32 (2022 WL 244108)

Facts: A homeowner brought an action for nuisance and unlawful taking against the State of Tennessee for an alleged failure to maintain a drainage facility on an easement possessed by the State. The prior property owners had conveyed an easement to the State for a highway expansion and the current owners bought the property without an inspection. Flooding occurred, and the property owners asserted that it was the State facility that caused the damage. The alleged facility did not match anything the State would normally install, and the State did not have any record of installing the facility. It appeared that someone, potentially the prior owner, had made their own facility or modified a facility and that was the cause of flooding.

Issue: Even though the State has an easement, is it responsible for facilities that it did not install?

Holding: The court held that the State was not responsible for the flooding because it had no duty to remove or maintain the drainage facility/materials that had been placed on the property by some other user. The evidence suggested that the claimed facility was not the State's, and the property owner provided no evidence to the contrary. The State only had a responsibility for what it placed on the easement to facilitate its use of the easement.

Texas

Harris Cnty. Fresh Water Supply Dist. v. Magellan Pipeline Co., L.P., 2022 Tex. App. LEXIS 2512 (2022 WL 1144636)

Facts: Magellan Pipeline Company sought an easement for a pipeline to be located under the District's property. The administrative phase of the condemnation proceeding occurred and the Special Commissioners awarded the District $160,000 above what had already been paid to the District. The District filed a Plea to the Jurisdiction to the trial court, which affirmed the administrative decision. The District then appealed. On appeal, it argued for the first time that the condemnation suit should be dismissed because the District has governmental immunity.

Issue: Whether a governmental entity is immune from a suit to condemn a portion of its property for an easement?
Holding: In this case, no. The District's participation in the eminent domain litigation resulted in an abrogation of its right to claim immunity from suit. If the District had sovereign immunity, the suit should be dismissed. However, sovereign immunity can be waived, including when the governmental entity voluntarily engages in certain litigation. By contesting the amount of damages, the District did not simply oppose the condemnation. Further, through the contract history, the district had obligated itself to participate in the condemnation suit. Therefore, it failed any sovereign immunity.

Hlavinka v. HSC Pipeline Partnership, LLC, 2022 Tex. LEXIS 446

Facts: A private pipeline condemned Hlavinka's property for a pipeline to transport polymer-grade propylene. Hlavinka objected to the taking, asserting that the statute conferred common carrier status only on private entities whose pipelines transport "oil products," and propylene did not qualify. The owner also asserted that the taking lacked a public use or purpose. The trial court concluded the taking was valid and conducted a valuation trial. The court excluded the owner's evidence that he purchased the property to develop it as a pipeline. The land was well-suited for pipeline use because it is "directly between" two refining hubs, at least one pipeline already ran across the land at the time of the purchase, and by the time of trial, "closer to 25" pipelines crossed the land. The owner sought to introduce evidence of his negotiations with other pipeline companies in the time immediately before the taking as comparable sales. After the trial court excluded this evidence, the owner appealed.

Issue: Does a pipeline that transports propylene qualify as a common carrier? Is evidence of sales and negotiations for sale of the property for pipelines admissible?

Holding: Propylene is an "oil product," and thus, the pipeline is a common carrier under the statute that confers eminent domain power to common carriers. Moreover, the taking was for public use because at least one unaffiliated customer would be served. On the valuation issue, the Texas Supreme Court held that the project rule did not require exclusion of the owner's testimony about other possible sales of the property for pipeline uses. The testimony here was not offered to show the value of the property as a result of the condemnor's project, but because purchasers other than HSC also value the easement's geographic qualities. The court distinguished the "ordinary condemnation case" in which there is no evidence of an existing market for the property interest being taken. In the ordinary condemnation case, there is no credible evidence to suggest that, if the land had not been condemned, a pipeline easement could be sold to another. But because there are other pipeline projects in the area and on the property, a reasonable factfinder could conclude that Hlavinka could have sold to another the easement that they instead were compelled to sell to HSC.

State v. Gray, 2022 Tex. App. LEXIS 2091 (2022 WL 965250)

Facts: The frontage of a property along a highway was condemned to expand the highway. The property owner did not retain an expert witness. Instead, an owner testified as to value under the Property Owner Rule, using both the income approach and the sales comparison approach. The state argued the income approach was improper because the property had never generated income based on the storage of vehicles and in order to generate that type of income, improvements would need to be made to the property that have not yet been constructed. The State also argued the sales comparison valuation should be excluded because the property owner based his opinion of value on his personal preferences rather than market preferences. The State's motions to exclude were denied and the property owner introduced this valuation evidence.

Issue: Was the income approach and the sales comparison approach evidence properly admitted?

Holding: No, the trial court abuses its discretion in admitting the evidence of valuation based on the income approach and the evidence produced based on the sales comparison approach. As to the income approach, it is only permissible in two scenarios and neither of them are applicable to this condemnation. As to the sales comparison approach, market value is the standard, not value to the individual. Just because it is the property owner testifying does not mean they are not held to the same standards as expert witnesses. The evidence should not have been admitted and the case was remanded for a new trial.

Utah

Cardiff Wales, LLC v. Wah. Cnty. Sch. Dist., 2022 UT 19 (2022 Utah LEXIS 52)

Facts: Property was sold to the School District to avoid the eminent domain process. Years later, the School District determined it did not need the land and sold it to a third Party. The prior owner asserted that it had a right of first refusal because under Utah law, a governmental entity is required to offer property acquired by eminent domain or a threat of eminent domain to the original owner before disposing of it. The School District argued that the property was not actually acquired "under threat of eminent domain." The trial court and court of appeals determined that the prior owner never experienced a threat of eminent domain because that occurs when "an official body of the state or a subdivision of the state, having the power of eminent domain, has specifically authorized the use of eminent domain to acquire the real property," which they interpreted to mean that the formal eminent domain approval procedures are followed.

Issue: What does it mean to "specifically authorize" the use of eminent domain, as is required in order for there to be a "threat of eminent domain"?

Holding: While a "threat of condemnation" does need to be "specifically authorized," it does not require that the formal approval process employed in approving the filing of an eminent domain action be followed. However, the property owner would need to demonstrate that in some way the school district had authorized the use of eminent domain to take its land. In the present case, the property owner had pled sufficient facts to demonstrate that the School District had been authorized to acquire property under threat of eminent domain, thereby overcoming a motion to dismiss.

Washington

City of Spokane Valley v. High-Est, L.L.C., 2022 Wash. App. LEXIS 559 (2022 WL 782368)

Facts: The City initiated condemnation proceedings to acquire land for a roundabout. Defendants included the fee owner and other interest holders in the land at issue. The City entered into a stipulation with the fee owner for immediate possession. The other defendants argued the stipulation for possession was not enforceable as to them because they were not parties to the stipulation for possession. The stipulation was enforced by the court, and defendants appealed the order enforcing the stipulation.

Issue: Is the order enforcing the stipulation appealable?

Holding: No, the order lacks appealability and the appeal was dismissed. Unless there is a specific rule allowing for an appeal, the general rule is that only a final judgment or analogous trial court order can be appealed. Further, there was no case law that required the City to obtain the approval of non-possessory condemnees. Note, this opinion is not printed in the Washington Appellate Reports.

Wisconsin

Dekk Prop. Dev., LLC v. Wis DOT, 2022 Wisc. App. LEXIS 69

Facts: Eminent domain was used to acquire land from a property owner for a state highway project. The project required that a driveway connecting the property to the highway be closed. The property owner was compensated for the property acquisitions, but not for the driveway closure. The property owner brought an action for compensation due to the driveway closure. The trial court granted summary judgment in favor of the property owner that it must be compensated for loss of access rights. The DOT appealed.

Issue: Did the property owner have access rights through the driveway, such that the DOT should compensate it for the closure of the driveway?

Holding: No, the property owner was not entitled to compensation for the closure of the driveway because the DOT employed its police powers and the owner previously relinquished its access rights pursuant to the terms of a 1961 indenture entered into by the predecessor in interest to the property owner. The DOT has the police power to regulate access to a state highway in the interests of public safety and convenience. Also, the 1961 indenture transferred from the grantor to the DOT all rights of access to the state highway. As the property owner did not have any underlying rights to a driveway in that location, and because the DOT had statutory authority to regulate driveways in this way, this was not a taking, and compensation was not owed.

Federal Cases

Ballinger v. City of Oakland, 2022 U.S. App. LEXIS 2862 (9th Cir.).

Facts: Property owners rented out their home while they were away serving military duty. Later, they planned to move back in and "evicted" the tenants. The City of Oakland municipal code required landlords to pay the tenant a relocation fee when the tenant is evicted under certain circumstances. The property owners argued that this was a physical taking of their money for a private purpose and without just compensation. Alternatively, they argued that it was an unconstitutional exaction. The district court dismissed the case for failure to state a claim on the grounds that the relocation fee is a requirement sourced in the City's legislation and that it was not the result of a property-specific administrative determination or quasi-judicial adjudication.

Issue: Was the relocation payment an unconstitutional taking or an unconstitutional exaction?

Holding: While the Ninth Circuit determined this was not a taking or exaction, it did make a few noteworthy findings. First, the Ninth Circuit determined that this was not a physical taking of the money, but a regulation of the landlord-tenant relationship. The City has the power to regulate the actions of a landlord, and this was just another action, particularly as the property owners chose to enter the rental market willingly. In making this decision, the Ninth Circuit did hold that money can be the subject of a taking. However, that money must be identified as a specific fund of money. So, while not an unconstitutional taking in this case, it is possible for money to be the subject of a taking. Second, the court looked to see if this was an unconstitutional exaction. It determined that the monetary relocation fee was triggered by the property owners' actions, not a burden on the interest in the property. So, again, while the court denied the exactions argument, it did make a clarification that whether an exaction occurred no longer turns on whether or not the exaction was an administrative rather than a legislative condition. Therefore, it matters not who imposes the exaction (administrative v. legislative), but what the exaction does.

United States v. Cox, 2022 U.A. App. LEXIS 4636 (9th Cir.)

Facts: In an eminent domain action, the property owners asserted that the district court erred in awarding the amount of just compensation for the acquisition of a mine because it did not adopt the property owner's proposed use of the mine. They also argued that the district court erred by excluding certain survey evidence.

Issue: Did the district court err when it declined to accept the property owner's argument for a proposed use of the property and did it err when it excluded certain surveys?

Holding: As to the proposed use of the property, the district court did not err when it concluded that the property owner's proposed large-scale use for the mine was too speculative to be considered when calculating the compensation value. The property owners did not meet their burden of demonstrating that the proposed use was reasonably probable. As for the survey exclusion, the district court also did not err. The property owners had offered insufficient evidence that the surveys in question were designed and conducted by individuals that were sufficiently qualified to render those surveys reliable. The 9th circuit affirmed.

Barber v. Charter Twp. Of Springfield, 2022 U.S. App. LEXIS 9622 (6th Cir.)

Facts: Plaintiff sought a preliminary injunction to prevent the town, county, and parks and rec department from removing a dam near her property. She alleged the removal of the dam amounted to an unconstitutional taking and a trespass. Defendants filed a motion on the pleadings, alleging her claims were not ripe and she lacked standing, which was granted.

Issue: Whether the court had the power to hear her claims (not whether the claims would succeed).

Holding: She should have been permitted to have her claims heard. Based on the recent Cedar Point Nursery case, a claim for injunctive relief is ripe if the government has reached a final decision that will enable a future physical taking. The property owner claimed a regulatory taking (decision to remove dam) and then a physical taking (removal of dam). The court concluded that her claims were ripe if the defendants had reached a final decision about the dam's future. The court concluded that the final decision to remove the dam had been made and that plaintiffs may sue for injunctive relief even before a physical taking has happened. The property owner's claims were ripe, she had standing, and the matter was remanded to the district court to further consider whether she was entitled to injunctive relief.

LEGISLATION

Pending

2022 NJ A.B. 3162 (New Jersey) — Restricts use of eminent domain by private pipeline companies to those demonstrating pipeline is in public interest and that agree to certain regulation by the Board of Public Utilities.

2022 KY H.B. 772 (Kentucky) — Prohibits person or entity with power of eminent domain from acquiring any easement by prescription.

2021 GA S.B. 227 (Georgia) — Provides local governments an alternative process for the condemnation of blighted properties with the local jurisdiction, so long as the condemned property meets certain qualifications.

Failed

2021 IA H.B. 2442 (Iowa) — Authorizes the reduction of damages payable to an unresponsive property owner in condemnation proceedings based on additional costs incurred by the acquiring agency due to failure of property owner to timely respond.

2022 MO H.B. 2005 (Missouri) — In order for an electrical corporation to be deemed a public service and therefore be permitted to condemn, a minimum of 50% of its electrical load must be provided to Missouri consumers. Additionally, compensation for agricultural or horticultural land shall be 150% of fair market value, determined by the court.

- 5/18/2022 — Sent to governor

2021 NC H.B. 271 (North Carolina) — Amends the state constitution to prohibit condemnation of private property except for public use and requires the payment of just compensation for the property taken in an amount to be determined by jury trial, if requested by any party.

2022 CO S.B. 208 (Colorado) — If property encumbered by a conservation easement in gross is condemned, just compensation must be determined based on the value of the property as if unencumbered by the conservation easement in gross and must be allocated between the fee owner and the holder of the conservation easement based upon the value of their respective interests in the property.

- 5/18/2022 — Sent to governor

2021 MA H.B. 82 (Massachusetts) — Would amend the MA constitution to make the taking of land or interests by eminent domain for private commercial or economic development not a public use.

2022 NJ S.C.R. 104 (New Jersey) — Proposes constitutional amendment to limit exercise of eminent domain to acquisition of land for essential public purposes. This amendment would preclude the taking of property to eliminate blight, which is currently a permissible use of eminent domain. The sponsor comments as to the purpose of this change is to protect New Jersey residents from the effects of the Kelo decision.

Adopted

2022 IN H.B. 1262 (Indiana) — Increases advance notice to billboard sign owners who may be impacted by a project before a condemnation action is filed.

2022 UT S.B. 202 (Utah) — Requires, in some circumstances, a right of first refusal to the original owner of property that is now surplus and was acquired by eminent domain.

2022 UT H.B. 357 (Utah) — Modifies requirements of final offer before eminent domain trial and requires updated appraisal before offer.

2022 MS H.B. 1769 (Mississippi) — Provides that no property acquired via eminent domain shall, for a period of 10 years after its acquisition, be transferred or any interest therein transferred to any person, nongovernmental entity, public-private partnership, corporation or other business entity, with certain exceptions.

2022 VA S.B. 694 (Virginia) — various changes to precondemnation and condemnation procedures

- Condemnor required to provide property owner with title report and recorded instruments;
- Increase property owner survey reimbursement amount to $7,500;
- Requires TCEs to have an expiration date;
- Impacts to quick take procedure,
- Redefines "lost access," etc.

— Enacted with governor's recommendations.

2022 VA S.B. 666 (Virginia) — Redefines lost access and lost profits in eminent domain. Would limit liability for short term interruptions to business or lost access due to temporary takings that last for less than a week.

— Enacted with governor's recommendations

2022 VA S.B. 9 (Virginia) — Allows for potential recovery of attorneys' fees in an eminent domain action if judgment is not paid to a property owner within a specified period.

— Enacted with governor's recommendations.

2021 OK H.B. 1123 (Oklahoma) — Allows for broadband to be placed within existing electrical cooperative easements without being a violation of the scope of the easements in order to provide increased access to broadband.

Infrastructure Bill Updates

Federal funds under the Infrastructure Bill are already making their way down to the state and local level. Here are a few projects and entities that have received funding:

- Ports:
  - Port of Long Beach: The port has received a $52.3 million grant, which will go towards the Pier B rail project. The project (with a price tag of $870 million) aims to create capacity to handle 17 daily intermodal departures from the pier.
  - Port of Oakland: $5.2 million for electricity-related projects
  - Northwest Seaport Alliance: $15.7 million for off-dock container facility
  - Port of Albany: $24.9 million for its plan to develop 81 acres of adjacent vacant land into a manufacturing area for offshore wind energy and to revamp 14.5 acres within the port for the same purpose.
  - Georgia Ports Authority: $14.6 million to build a new ro-ro berth at the port of Brunswick
  - Port of Houston: $18.2 million for a 39-acre container yard
- North Carolina is receiving 25% more ($176 million compared to $140 million last year) in public transit funding from the FTA. $45 million will be used for rural transit services, which is an area serving less than 200,000. The remaining $131 million will go to urban transit agencies. The increased funding will help replace aging vehicles that are expected to be zero-emission vehicles. It will also allow the transit systems to adopt new technologies, such as on-demand micro-transit and cashless pay systems.
- The Department of Transportation's Pipeline and Hazardous Materials Safety Administration has begun accepting applications for its new Natural Gas Distribution Infrastructure Safety and Modernization Grant Program. This grant program will offer nearly $200 million in grants annually over the next five years thanks to the Infrastructure Bill.
- The National Telecommunications and Information Administration released its Notice of Funding Opportunity, which will provide grants for broadband improvements through the Broadband Equity, Access, and Deployment Program. It is anticipated that each state will be eligible for receive a minimum allocation of $100,000,000.
- The Federal Railroad Administration established the Corridor Identification and Development Program, which could significantly expand Amtrak's passenger rail network in the U.S. The program could add 30 or more new routes and increase service on at least 20 existing lines. The Federal Railroad Administration will not begin soliciting formal proposals for the program from states, cities, and other eligible public entities.
- On May 3, 2022, the White House released two interactive maps that demonstrate (1) how much funding (and in what categories) for each state has been announced and (2) announced infrastructure project locations. At this point, over $110 billion have been announced and are heading to states, Tribes, territories, and local governments, with over 4,300 specific projects identified for funding. (https://www.whitehouse.gov/build/six-month-anniversary/).

Other projects and sectors are struggling to establish the foundational infrastructure needed to roll out new systems, or are struggling to decide what projects to apply funding to:

- For broadband projects, the funding is becoming available, but there are infrastructure and other issues that are halting the roll out. There is a supply shortage, particularly of the protective jacket that surrounds the delicate fiber optic cables and a labor shortage. Given the demand, the supply of the fiber optic cables and other necessary supplies can exceed a year. There is also a lack of skilled technicians able to install the fiber optic cables. Various training programs are being established to increase the number of available technicians. Further, broadband is particularly needed in many geographically remote areas, particularly across the Navajo Nation in Arizona, New Mexico and Utah. So, while funding is becoming available, the resources to implement new projects have not caught up yet.
- Various states and communities are struggling to decide how to spend funds — whether it is best to go forward with long-stalled projects or if the funding should go towards a handful of more ambitious projects. For example, a more ambitious project would be undertaking an effort to speed up the commuter rail between Boston, Mass. and Providence, R.I., but it seems likely that the funds will be used on roads and bridges that are already within Rhode Island's capital plan.

CANADA

1353837 Ontario Incorporated v Stratford (City), 19 L.C.R. (2d) 1, 23 M.P.L.R. (6th) 234, 2021 CarswellOnt 14420 (Ont. Land Tribunal)

This long running case involved the expropriation by the City of Stratford of an 11.42 acre site in the downtown core, a former locomotive repair shop, which first commenced in April 2008.

The former owner brought a business loss claim for $1,062,569 and $22,700,000 for market value. The former owner had subjectively envisioned a project to redevelop the property into a mixed-use destination by reusing the existing building for a waterpark, retail "heritage street," dance barn, movie theatre and the construction of a new tower to house a hotel and condominium.

After several proceedings, including a series of court applications, the Tribunal held in this decision and related review that the City was entirely successful in its position that the market value of the subject lands was at most $290,000. The Tribunal considered evidence including several environmental reports related to the cost of remediation, building condition assessments and appraisal evidence and disregarded the evidence of the owner's retained experts. The valuation date in this matter also brought the Tribunal back to the global 2009 financial crisis and the ripple effect that it had on land valuation, including in the City of Stratford, Ontario.

Lynch v. St. John's (City), 2022 NLCA 29

This is a Court of Appeal decision related to "constructive expropriation" or "de facto expropriation" rather than the more common valuation decision arising from a specific exercise of an authority's right to expropriate private property under relevant expropriation legislation.

This case is a reference to the Court of Appeal to answer a narrow question of interpretation, whether the subject lands should be valued as confined by municipal zoning and development regulation in place or independent of such legislation. Complicating the question is the history of this matter.

In this matter, there was not one expropriation event; the court regarded the expropriation process as beginning in 1964 and culminating with the February 1, 2013, refusal by the city manager to exercise his discretion to permit any development, with the effect that all reasonable uses of the property were taken away.

The court directed in this case that valuation should not depend on the specific municipal zoning and watershed protection regulations because one of the purposes of the subject policy was to prohibit all activity on the [appellants'] property. The Court of Appeal held that the watershed policy was a part of the expropriation scheme and should be screened out for valuation purposes.

Sabo v AltaLink, 2022 ABQB 156

This case deals with the interaction between 'injurious affection' including where no land is taken under land expropriation legislation and the rights of utilities to operate without payment of compensation with a right of entry order where no taking of land is required under surface rights legislation.

In approximately 2016 and 2017, AltaLink began construction of two 138kV double circuit transmission lines. AltaLink obtained from the Alberta Utilities Commission the applicable transmission line permits and licenses. Thereafter, AltaLink unsuccessfully sought a permission to enter the owner's lands and applied for a right of entry order, which was granted for February to December 2016, including a right of way.

Here, the court provided a detailed history of the difference in Alberta between expropriation of land legislation and access rights under oil and gas exploration and power utility legislation. The court applied a broad and liberal interpretation of the applicable governing legislation and held that in Alberta, proximate landowners may be awarded compensation in the form of injurious affection arising from the nuisance, inconvenience and noise arising from the installation and operation of power transmission lines within the government road allowance even though neither the lines nor the steel monopole towers were installed within the area granted by a right of way order. The court concluded that the tribunal erred in holding, and it did not have the authority to award compensation. The court held in this discretion that the applicable tribunal has

discretionary authority, weighing the evidence before it, to award or not award damages for injurious affection in this circumstance. In this case, the court concluded that the AltaLink power transmission lines constituted a nuisance because the presence of the high voltage transmission lines on monopole steel towers immediately adjacent to the Appellants' lands represent a substantial and unreasonable interference with the Appellants' use and enjoyment of their lands.

Milne v. Canada, 2022 FC 63 (Federal Court File No. T-967-16)

This is a notable costs decision arising from a contested expropriation hearing for a federal railway expropriation. In this case, the owner was denied a majority of its costs, while still receiving a substantial costs award well in excess of the value of an expropriated land interest. In 2012, a small strip of land was expropriated from the owner to expand a railway corridor. The owner received $1,000 as statutory compensation and following a contested hearing was awarded an additional $1,100 for a total of $2,100 (see Milne v Canada, 2021 FC 765). The owner received no damages for additional sound and disturbance. The owner sought a total amount of costs $1,429,060.51 pursuant to rules 29 and 39 of the federal statute. The court took into account a settlement offer made prior to the hearing in the amount of $450,000.00 inclusive of costs and interest. As a result, the court denied the majority of the costs sought but still awarded significant costs in the amount of $273,518.68.

This case is significant, as it continues to show the evolution of costs principles in land takings. Formerly, it was not clear that offers of compensation would diminish or eliminate the likelihood of full and complete indemnification by an expropriating authority for the owner's legal, appraisal and other costs. Similar to a notable Ontario Court of Appeal, Shergar, here, the federal court considered offers to settle in reducing the costs owed by an authority to an owner a departure from the typical approach in Canadian expropriation law of full indemnification for costs where land is taken.