SUMMARY OF MAJOR
EMINENT DOMAIN CASES & LEGISLATION

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UNITED STATES UPDATES

California

Today's IV, Inc. v. Los Angeles County Metropolitan Transportation Authority, 2022 Cal.App. LEXIS 840 (2022 WL 5107251)

Facts: A property owner who owned a hotel in Los Angeles asserted claims of inverse condemnation and nuisance for the construction of an underground subway line. The property owner argued the claims were based on (1) the use of a cut-and-cover construction method, instead of a tunnel boring machine, (2) construction work during nights and weekends (which was particularly harmful to the hotel), (3) violation of certain noise limits, and (4) interference with access to the hotel. The trial court found no liability for inverse condemnation or nuisance.

Issue: Whether Metro's activities in constructing the tunnel warranted a claim for nuisance and inverse condemnation.

Holding: Affirmed, the inverse condemnation cause of action failed because the construction did not significantly impair access and did not cause excessive noise and dust. In order for there to be a claim for inverse condemnation in this situation, the property owner would have had to show that the property suffered from an intangible intrusion burdening the property in a way that is direct, substantial, and peculiar to the property itself. In the present case, the property owner argued that the impairment of access and excessive noise and dust constituted these types of intrusions. The court determined that the inconvenience to hotel guests due to construction detours and work was not enough to be a compensable deprivation of access; such work was reasonable and temporary, and the property owner did not plead sufficient facts (length of time, frequently of detours, difficulty, etc.) to survive a demurrer. As for noise and dust, the property owner did not sufficiently plead that the intrusion suffered by the hotel was unique, special, or peculiar in comparison with other property owners in the area. Further, the fact that the property owner operated a hotel in an area primarily occupied with office buildings does not mean that the hotel suffered peculiar intrusions that other neighboring properties did not. As a result, the demurrer was sustained.

Colorado

CORE Elec. Coop. v. Freund Invs., 2022 COA 63 (2022 Colo. App. LEXIS 852)

Facts: The electrical cooperative sought to acquire a nonexclusive easement for utility purposes across land primarily used for agriculture. The parties agreed the highest and best use for the land was to divide it into residential lots for future sale. The owner's appraiser used two methodologies — the sales comparison approach and the subdivision development method (known as the "developer's approach"). For the comparable sales method, the appraiser did not verify the amount of consideration from the buyer or seller for each of his comparables (essentially causing a hearsay problem). For the subdivision development method, he created hypothetical lots and estimated the costs to develop those lots. The cooperative argued that Colorado law expressly prohibited using the subdivision development method for hypothetically carving up land to value it in this way. The trial court limited the owner's valuation evidence for these reasons.

Issue: Did the trial court err by (1) finding the owner's appraiser's valuation based on the subdivision development method inadmissible and (2) excluding evidence of multiple comparable sales pursuant to section 38-1-118, C.R.S. 2021?

Holding: The property owner's appraiser's valuation based on the subdivision development method was inadmissible where judicial precedent generally prohibited the use of such method for property that had not been subdivided. There was no evidence the property was working to become subdivided lots, so any valuation of hypothetical lots was highly speculative. The trial court did err by excluding evidence of the comparable sales that the owner's appraiser did not directly verify with the buyer or seller because there were hearsay exceptions that made the evidence admissible in a different way, but that error was harmless.

Indiana

Ind. v. Bellwether Props., 2022 Ind. App. LEXIS 269 (2022 WL 3050699)

Facts: Electrical codes require that buildings of certain sizes must have 12.5 feet of horizontal clearance from electrical transmission lines. The property at issue had a 10-foot-wide electrical easement through it. The property owner sought to build a warehouse on its property, but the energy company informed the owner the design violated electrical safety codes, and a smaller warehouse was needed. The property owner argued that this was a taking of land without compensation. The energy company sought a motion for summary judgment that, as a matter of law, it did not take the owner's land. The trial court denied the energy company's motion for summary judgment.

Issue: Did the trial court err in concluding that the energy company was not entitled to summary judgment on the question of whether a taking occurred?

Holding: Yes, the energy company is entitled to summary judgment as a matter of law. If this was any type of taking, it would be regulatory (rather than physical) because there is no physical intrusion by the energy company or a third party. As for a regulatory taking, the clearance requirement did not deprive the property owner of all productive use of its land. Further, the clearance requirement did not interfere with the owner's investment backed expectations because there was already a warehouse on the land at the time of purchase, there were no plans to build another, and the electrical code had been incorporated at the time of purchase.

624 Broadway, LLC, v. Gary Hous. Auth., 193 N.E.3d 381 (2022 WL 3714283)

Facts: The Housing Authority acquired property through an administrative taking (an alternative to a lawsuit taking, which is authorized via Indiana Code chapter 32-24-2). The Authority only provided notice of its taking and hearing via publication, despite knowing how to contact the property owner. Further, the Authority refused to postpone its final meeting (including award of damages) to allow the property owner to obtain an appraisal. The property owner argued that notice via publication violated his federal due process rights.

Issue: Was notice via publication constitutionally deficient?

Holding: Yes, the notice was deficient. The matter is reversed and remanded for a damages hearing. Even though the statute provided that notice to non-resident owners need only be given through publication, that does not mean it was constitutionally sound. The Authority knew how to contact the property owner directly and had in the past but chose only to rely on published notice of the hearing. Because of this limited form of notice, the property owner was not able to complete an appraisal and present it at the last hearing on valuation. Also, the owner's appraised value was $325,000, while the Authority's was only $24,000. As a result, the deficient notice was not harmless.

Kansas

Kan. Fire & Safety Equip. v. City of Topeka, 2022 Kan. App. LEXIS 25 (2022 WL 2282791)

Facts: The City of Topeka bought property upon which businesses were operated, thereby forcing the businesses to relocate. These tenants sued the City and argued that they were entitled to relocation benefits under K.S.A. 2020 Supp. 26-518. After various procedural steps, the City sought summary judgment on the grounds that the court lacked subject matter jurisdiction to consider the tenants' claims because the statute did not provide the tenants a private right of action.

Issue: Under Kansas eminent domain law, do displaced persons have the right to file an independent action for relocation benefits under K.S.A 2020 Supp. 26-518?

Holding: The court concluded that under Kansas' eminent domain law, K.S.A. 2020 Supp. 26-518, a displaced person does not have a right to file an independent action for relocation benefits. This statute provides for an administrative proceeding for determining fair market value of private property taken for public use. The statute does not provide a mechanism for independent judicial review of a denial of relocation benefits (an administrative action in Kansas). The court noted that the tenants could have pursued various equitable remedies but that this particular statute does not provide a right of judicial review.

Louisiana

Lafayette City-Parish Consol. Gov't v. Bendel P'ship, 22-432 (La. App. 3 Cir 12/21/22)

Facts: The Lafayette City-Parish Consolidated Government instituted a quick-take expropriation of Bendel's property for a drainage project. It sought to construct four detention ponds on the property. Bendel objected challenging the public use and necessity of the taking, arguing the government was taking more property than it needed. The trial court agreed with the owner and dismissed the expropriation action for lack of necessity.

Issue: Under Louisiana law, did the property owner meet its burden of showing the location was selected in bad faith or so capriciously or arbitrarily that the selection "was without an adequate determining principle?"

Holding: The taking lacked necessity. Although Louisiana law also recognizes that the extent and location of the taking are within the discretion of the condemning agency and its decision is entitled to a presumption the taking satisfies a public need or interest, it also recognizes that if the owner carries its burden of showing the location was selected arbitrarily, then a reviewing court may conclude the condemnor abused that discretion. Here, although the mere availability of alternative sites to place the drainage project "is not, by itself, an indication that the expropriator has acted arbitrarily or capriciously," the appeal court reviewed the trial court's findings that looked at things like "alternate route[s], costs, environmental factors, long-range area planning, and safety considerations." The court reviewed the evidence submitted by the parties — which included testimony by one witness that "he had never seen a case where a property that has never been flooded was converted to purposely make it flood because usually lower elevated property would be used so that so much excavation would not be necessary" — and agreed that the owner carried its burden: "[i]n this case, the testimony and evidence make clear that no alternate routes were considered. The total cost of the project is unknown. Environmental factors and long range area planning were not considered. None of the witnesses testifying on behalf of LCG indicated that safety considerations were made regarding the gas line that runs through the property. Based on all of these factors, we cannot say that the trial court was manifestly erroneous in finding that LCG acted arbitrarily and capriciously.

New York

Matter of HBC Victor LLC v. Town of Victor, 2022 NY Slip Op 07313 (App. Div. 4th Dept.)

Facts: The Town wants to take property "connected to an enclosed regional shopping center known as Eastview Mall[.]" Until recently, the property was occupied by a retail department store, but the store closed permanently in February 2021. The owner tried to get a new tenant but could not. Perhaps sensing an opportunity, the Town sought to condemn for redevelopment. But its resolution of taking did not specify what it wants the property for but instead stated the public use generally: "[t]he proposed Acquisition is required for and is in connection with a certain project . . . consisting of facilitating the productive reuse and redevelopment of the vacant and underutilized Proposed Site through municipal and/or economic development projects . . . by attracting and accommodating new tenant(s) and/or end user(s)." The Town stated that "no specific future uses or actions have been formulated and/or specifically identified."

Issue: Is it enough to pass muster under the public use requirement to state generally that the purpose of the taking is for redevelopment in the future?

Holding: No, pointing to a recent similar case by the Second Department, the Appellate Division concluded that "[b]ecause the Town has not indicated what it intends to do with the property, we are unable to determine whether 'the acquisition will serve a public use.'" The public use for the taking is determined at the time of the taking, and simply speculating that the taking will produce future public benefits isn't enough: "In simple terms, the government cannot take your land and then decide later what to do with it without running afoul of the Takings Clause of the Fifth Amendment of the United States Constitution, as applied to the states by the Fourteenth Amendment." The court rejected the Town's argument that it doesn't need a particularized plan, and the government can take property for redevelopment even if it hasn't yet decided how the property will be used. The court first noted that "the Town professes to have no idea what it intends to do with petitioner's property." It might even transfer the property to the owner of the adjoining shopping mall. "Again, unless and until the Town says what it plans to do with the property upon taking, we cannot determine whether the taking will serve a public use." And there's no indication or claim that the property here is blighted, even under New York's notoriously low standards for blight: "To the contrary, the evidence at the public hearing established that petitioner has cleaned and maintained the premises since the Lord & Taylor vacancy and continues to pay property taxes at the assessed value of more than $4,000,000. We do not equate mere vacancy with blight, especially when the vacancy occurs unexpectedly in the midst of a global pandemic." Taking invalidated; attorneys' fees to the owner.

North Carolina

Cnty. Of Moore v. Acres, 2022-NCCOA-446 (2022 N.C. App. LEXIS 465)

Facts: The County's water and sewer system lines run along the rear of the property owners' property. The County contacted the owners to schedule maintenance on the lines, which would require the removal and replacement of a portion of the owners' fence. Permission was granted and the lines were serviced. Years later, the Defendants wanted to build their fence closer to the property line and were told they had to contact the County to confirm the utility line locations. They did not and instead proceeded to build the new fence, which exposed the underground mains, but it did not rupture them. The County learned of this and attempted to stop the work, but the owners ignored the County. This new fence blocked public access to a gravel road used by neighbors to access a garage and by the County to conduct maintenance. The County filed an action seeking a determination of property rights and injunctive relief. The trial court determined there was no evidence the County even owned the utility lines and dismissed the County's action.

Issue: Did the County have an interest in the utility lines and property?

Holding: Yes, even absent a recorded deed, the County holds title to the utility lines and the accompanying easement for maintenance under the theory of eminent domain. The court determined that the lines had been installed over a century ago, that the County took over operation over two decades ago and that the County had last exercised its easement rights in 2012. The court determined that by any measure, the time to file an inverse condemnation action had expired. After determining that title to the facilities and easement exists, the matter was remanded for a determination on the size and scope of the easement.

Ohio

State ex rel. Ohio Hist. Connection v. Moundbuilders Country Club Co., 2022 Ohio 4345 (2022 Ohio LEXIS 2465)

Facts: Ohio History Connection leased property to Moundbuilders County Club Company, and it sought to acquire the leasehold so that it could establish a public park and nominate it for the World Heritage list. The condemning entity hired two appraisal companies to assess the value of the leasehold interest. The condemning entity used the higher of the two appraisals to support the offer to purchase and then passed a resolution declaring its intent to appropriate the leasehold interest, followed by filing an appropriation action.

The defendant argued that the condemning entity failed to satisfy the requirement of a good faith offer. Specifically, it argued that the other appraisal actually demonstrated a higher value, that reliance on the appraisal used for the offer was an attempt to lower the value and that the failure to consult an attorney regarding the appraisal was direct evidence that the offer was not in good faith. In response, the condemning entity argued that it used independent qualified appraisers, and the misunderstanding of the content of the first appraisal was an honest mistake, and based on the understanding the condemning entity had at the time of the offer, it specifically made the offer at the higher value. The trial court held the condemning entity made a good-faith offer because it was based on a state-certified appraisal. The mere existence of another appraisal for a high value did not make the offer a bad-faith offer, and it determined that the testimony as to the mistake was credible and reasonable. As such, the trial court granted the petition to appropriate. The court of appeals affirmed the trial court's decision.

Issue: Was the good-faith standard properly applied (i.e., does a condemning authority need to show evidence that it acted in good faith, which is more than then absence of bad faith)?

Holding: The trial court did not err by granting the petition to appropriate because the condemning entity presented evidence to establish that it made a good-faith offer to purchase the leasehold interest, and the defendant failed to offer anything other than speculation to rebut that evidence. The standard to apply included whether the condemning entity established it acted reasonably under the circumstances in addition to whether it acted honestly. Further, a lack of good faith in the context of eminent domain negotiations can be shown by presenting evidence of objectively unreasonable behavior rather than evidence of subjective dishonest intent. The analysis of the courts below was consistent with this standard.

Ohio Power Co. v. Burns, 2022 Ohio 4713 (2022 Ohio LEXIS 2723)

Facts: Ohio Power Company determined that 10 miles of electric-transmission lines had aged significantly, and the current lines could no longer support the electrical load necessary to adequately service the community. To build the replacement project, Ohio Power needed supplemental easements. The Court held a necessity hearing with testimony for the need to replace the existing facilities. Ohio Power explained the need for the easement terms and that only one of them (distribution lines) was not necessary for the project. Ohio Power then removed that term from the easements. The Siting Board approved the project and determined that the project was necessary, but it had not reviewed the individual easements and property rights at issue. The trial court found the project to be necessary, that the easement terms (other than the distribution line term) were necessary, and Ohio Power was entitled to each presumption set forth in R.C. 163.09(B)(1). Further, the court found that the removal of a term in the easement did not constitute an abandonment entitling the landowners to fees. The court of appeal reversed, finding that Ohio Power was not entitled to the various presumptions and determined that there was a partial abandonment entitling the property owner to some fees.

Issue: Was the public utility authorized to appropriate property under R.C. 163.01(B) and (C), was it entitled to any of the necessity presumptions set forth in R.C. 163.09(B)(1), and were the landowners entitled to fees associated with Ohio Power's concession that one of the easement terms (right to install distribution lines, was not necessary?

Holding: Affirmed in part and reversed in part. Because neither the public utility's board of directors nor the Ohio Siting Board reviewed the appropriations (the proposed easement terms), the utility was not entitled to a rebuttable presumption under R.C. 163.09(B)(1)(a) or an irrebuttable presumption under R.C. 163.09(B)(1)(c). However, the utility was entitled to a rebuttable presumption under R.C. 163.09(B)(1)(b) because it provided evidence of the necessity for the appropriations. Therefore, the trial court erred in some of the presumptions applied. Further, the landowners were not entitled to fees associated with abandonment of appropriation proceedings because the utility did not abandon the proceedings when it conceded that the distribution-line term in the easement was unnecessary.

Oklahoma

Snow v. Town of Calumet Okla., 2022 OK 63 (2022 Okla. LEXIS 65)

Facts: The town maintained two municipal sewer lines pursuant to two temporary easements. When those easements expired, property owners sued for trespass and inverse condemnation. The town counterclaimed for quiet title based on prescription and both parties moved for summary judgment. The district court granted the property owners' motion on the quiet tile action holding that the town had not satisfied the statutory period of 15 years for prescriptive easements. The court also granted the town's motion on the claim of trespass on the grounds that the former owners had consented to the town entering the property and installing the sewer lines. The court granted the town's motion on the inverse condemnation claim on the grounds that the right to this claim belonged to the former owners of the property at the time the lines were installed. Therefore, the court said the town's quiet title claim was not viable and that both claims by the property owner were also not viable. The landowners appealed regarding only the inverse condemnation claim and argued that they had standing to assert that claim.

Issue: Did the property owners' have standing to assert an inverse condemnation claim?

Holding: Yes, the owners had standing. The town had expired easements and it sought perpetual easements without compensation. This warranted standing for a claim of inverse condemnation and the claim did not arise until after the temporary easements had expired. The matter was remanded for trial on compensation.

Texas

State v. SignAd Ltd., 2022 Tex. App. LEXIS 5264

Facts: A billboard needed to be relocated for a bridge project, but the billboard owner's application to relocate the billboard was denied. The owner moved the billboard anyway. A condemnation action was then filed, and at the compensation hearing, the State was unaware that the billboard had been moved, and compensation was determined for the loss of the billboard. The billboard owner disagreed with the compensation determination and applied for a temporary injunction to bar the removal of the billboard. At the injunction hearing, it was revealed that the billboard had been relocated. The State determined that it no longer needed to condemn any rights since the billboard relocated. The State dismissed its own condemnation suit, and the trial court awarded attorneys' fees and expenses to the billboard owner. The State contended that the billboard owner is not entitled to attorney's fees because (1) the billboard owner did not qualify as a property owner, and even if it did, the billboard owner caused its own costs because it could have told the State it moved the billboard before the suit was filed, and (2) the expenses to move the billboard are not recoverable because the billboard was moved before the suit was filed.

Issue: Should the billboard owner recover fees and expenses?

Holding: No, while the billboard owner would normally qualify as a property owner entitled to recovery of fees and expenses, the fees and expenses were unreasonable because they were caused by the billboard owner. Specifically, the billboard is a fixture, and thus, the billboard owner qualifies as a property owner. Further, even though the billboard was moved out of the right of way before the suit was filed, the Court determined that this does not negate the billboard owner's position as a property owner entitled to compensation. However, the entire suit could have been avoided if the billboard owner had told the State the billboard was moved; because the billboard owner unreasonably incurred its own attorneys' fees, such fees are not recoverable.

Washington

Aminpour v. Englund, 2022 Wash. App. LEXIS 1372 (2022 WL 2441355)

Facts: Two adjacent rural properties utilize a common driveway on an adjacent parcel for vehicular access pursuant to a recorded easement. The driveway predates the construction of the residences and was not installed in the actual easement area. One of the property owners bought the western parcel upon which the developed driveway was located. They then installed a gate across the developed driveway and asked the other property owner to enter into an easement agreement for the use of that driveway. Litigation was initiated with one property owner claiming they had rights to use the developed driveway. On a summary judgment motion, the court determined that the blocked property owners had no existing rights in the developed driveway, and the undeveloped easement provided them with the legal access to their parcel. They then amended their complaint to add a private condemnation claim for a private way of necessity over the developed driveway and argued the cost to build a new driveway on the easement would be prohibitive. The trial court ultimately concluded that there was sufficient grounds to find a private way of necessity over the developed driveway and allowed the private condemnation. The other property owners appealed.

Issue: Was there an error in allowing the grant of a private way of necessity over the existing driveway?

Holding: No, the grant of a private way of necessity was proper. Washington state law allows for private condemnation in the case of private ways of necessity. The court determined the cost of developing the other driveway would be prohibitive, as there would be substantial earthwork, environmental concerns, and substantial financial costs.

Wisconsin

Backus v. Waukesha Cnty., 2022 WI 55 (2022 WL 2431714)

Facts: The County was acquiring a temporary limited easement to construct a highway bypass (essentially the same as a temporary construction easement). The County argued that it only had to pay the rental value of the temporary limited easement, while the property owner argued he was also entitled to severance damages under Wis. Stat. section 32.09(6g), as a series of permanent damages allegedly arose out of the temporary limited easement.

Issue: Are severance damages compensable under Wis. Stat. § 32.09(6g) for a temporary limited easement?

Holding: No, section 32.09(6g) does not apply to a temporary limited easement. While the court explained that this statute does not facially differentiate between a temporary limited easement and a permanent easement, the court concluded that that portions of the statute limit its application to permanent easements alone, as the methodology does not logically apply to valuing temporary easements, particularly as there is no "remainder" after the limited taking period expires. There is also an issue with valuing the before and after when applied to a temporary easement because it in essence is valuing the same property without the temporary easement factored in. Therefore, section 32.09(6g) does not apply to temporary limited easements and those easements are instead compensated under constitutional and common law principles.

Wyoming

Colton v. Town of Dubois, 2022 WY 138, 519 P.3d 976 (2022)

Facts: Wyoming is one of those jurisdictions with a "use it or return it" statute, where if property taken is not actually used for 10 years after it is acquired by the government, the owner may ask for it to be returned. In 2008, Colton and the Town got into a dispute over land apparently needed (or wanted) for the municipal airport. Colton sued for inverse condemnation, "and sought to prevent the Town from condeming any portion of the property." After a bench trial, the court rejected Colton's arguments and concluded that the Town could take 30 acres of property after a determination of compensation. But before the compensation hearing took place, the parties settled. The Town would pay an agreed-upon amount and would acquire the 30 acres from Colton. And critically, the settlement agreement "contained several terms releasing the Town from all past, present, and future claims related to the disputed 30.17 acres." 10 years passed. Apparently, the Town didn't make use of the property and Colton sought to exercise his statutory right to recover it. The trial court granted the Town summary judgment.

Issue: By executing the settlement agreement, did the property owner waive his statutory right to seek recovery of the property?

Holding: The Wyoming Supreme Court concluded that by executing the settlement agreement, Colton waived his statutory rights, even though yes, the Town acknowledged it had not used the property for the airport. The property owner knowingly surrendered any right to reclaim. The court first accepted that the Town acquired Colton's property in a way that triggered the statute because it was acquired under the threat of condemnation. Next, the court concluded the statute was in force at the time of the settlement, and therefore Colton is assumed to have known about it. The court also concluded that Colton intended to relinquish his statutory rights because the agreement unambiguously says so in the "Statement of Purpose" and "Release" provisions. There, the agreement notes the agreement is to resolve all claims, including future claims: "[t]he stated purpose of the settlement agreement is to resolve any claims the parties 'may have in the future arising out of or in any way related to the above taking[.]' This purpose is further reflected in the terms of the settlement agreement. In multiple sections Mr. Colton agreed to release the Town from 'any and all' claims. The settlement agreement also definitively states 'Colton and Dubois hereby do, fully, finally, absolutely and forever settle any and all claims, disputes and differences that now exist, [and] may exist in the future . . . with respect to the taking[.]' The release provisions are broad but nonetheless unequivocal in expressing Mr. Colton's intent to waive 'any and all' future claims, 'related in any way' to the condemnation action, which would include any claims he had pursuant to Wyo. Stat. Ann. § 1-26-801(d). Thus, the settlement agreement undisputedly manifests the intent necessary to satisfy the third element of waiver." Finally, the court noted that the waiver is in accordance with public policy (an element of waiver under Wyoming law). We like the freedom to contract, and we like settlements, the court concluded.

FEDERAL CASES

Graves v. United States, 2022 U.S. Claims LEXIS 1463

Facts: Property owners own land completely surrounded by a national forest. The property has historically been accessed by a forest service road and its offshoot. In 1995, the property's then-owner signed a private road easement with the U.S. Forest Service that permitted her access to the property via a nonexclusive easement over a forest service road. The current property owners contends that in 2012, he was pressed to waive the prior easement for a revocable special use permit and that the once private road now became a system road. The property owners argued that by requiring them to maintain an easement, pay fees, have a special use permit, and allowing other landowners to use the road, the federal government's actions resulted in a taking. The government argued that the claims are barred under the six-year statute of limitations.

Issue: Was this claim barred by the applicable statute of limitations?

Holding: Yes, the claim was barred, and the government's motion to dismiss granted. Under the Tucker Act, claims for just compensation for takings must be filed within six years of the accrual of the takings claim. The property owners alleged a physical taking, along with a land-use exaction, occurred in 2016. The court determined that even if the property owners themselves did not have an understanding of a potential taking before 2016, they objectively should have known at the time of the signing of the 2012 easement. The easement document contained all of the terms of which the property owners' now claim are part of the taking. Further, there were other occurrences that would have placed them on notice, such as a sign being placed on the road.

FFV Coyote LLC v. City of San Jose, 2022 U.S. Dist. LEXIS 195036 (N.D. Cal 2022)

Facts: Plaintiffs own undeveloped land that was operated a seasonal pumpkin patch with associated attractions, but that use was no longer permitted under the City's general plan, which had been amended multiple times since it was first adopted in 1961. As development became more likely in the area that encompasses the property, community pressure increased to keep the area as open space. The City had purchased land adjacent to the property (which was also designated as "Industrial Park") to preserve it as open space. In 2019, the City began exploring a general plan amendment to address development in the area including the property. The general plan was amended and the property designation was changed from "Industrial Park" to "Agricultural." While the general plan amendment was under review, the property owners entered into a contract to sell the property to a developer for $44.1 million. Days after the property's designation was changed, the developer terminated the contract to buy the property. The property owners brought a suit for, among other things, a regulatory taking under the Fifth Amendment. The City filed a motion to dismiss for failure to state a claim.

Issue: Did the property owners sufficiently plead the takings claim to survive a motion to dismiss?

Holding: Yes, the property owners had sufficiently pled their takings claim, under the Penn Central test, to survive a motion to dismiss. The Penn Central test requires the evaluation of three factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. First, plaintiffs allege that the economic impact of the City's actions is "severe," in that the City's actions were directly responsible for the termination of the $44.1 million purchase agreement. Further, plaintiffs' complaint provided allegations that an expert report supports the position that agriculture is not an economically viable use of the property. Also, plaintiffs alleged that even the most recent use of the property as a pumpkin patch would no longer be permitted under the new land use designation. Given these allegations, the district court determined the plaintiffs had plausibly alleged that the economic impact of the regulatory change may be so severe as to constitute a taking. Second, the plaintiffs allege that the property was purchased as a long-term investment and that the property could reasonably be sold for development. They alleged that the history of land use designation for the property indicated the property was suitable for industrial development and that there had been a significant expenditure of funds on infrastructure improvements in the area since the 1980s to facilitate the area for the development of industrial uses. The district court concluded that deciding whether the expectation of future industrial development was reasonable was a factual inquiry that could not be decided at the pleading stage. Third, the plaintiffs allege that the City's actions were intended to "preserve" the property for the benefit of the public in a way that necessitates the payment of just compensation. They allege that the City accomplished this goal through a land use designation. The district court indicated that such allegations support the takings claim. Therefore, at this stage, the City's motion to dismiss is denied and the claim for a regulatory taking may proceed.

Lions Club of Albany v. City of Albany, 2022 U.S. Dist. LEXIS 208876 (N.D. Cal. Nov. 17, 2022)

Historical Background: In 1971, an electrically illuminated cross, measuring over 20 feet tall, was erected atop of Albany Hill, and it has existed since then. At the time, the land was owned by a couple that were members of the Lions Club, a nonprofit organization. The couple allowed the Lions Club to erect the cross and illuminate it every Christmas and Easter. In 1972, via a series of transactions, the underlying land was conveyed to the City of Albany for use as a public park, and the City was on constructive notice of the Lions Club's easement to maintain the cross. In November 2015, after prompting from a community group, the City began investigating if the cross was structurally sound with the electrical utilities. Despite finding no issue, the City worked with the power company to shut off the electricity to the cross, which resulted in the cross not being lit for the 2016 Christmas holiday. The Lions Club sued, and the City brought cross claims for quiet title, trespass, and nuisance. In cross motions for summary judgment, the Court found that the Lions Club had a valid easement, but that the City's use of the land bearing the cross was a violation of the Establishment Clause. The Court provided suggestions to remedy the issue, but no party sought to compel the City to do so. Ultimately, the parties settled and stipulated for a dismissal that would allow an immediate appeal. The June 2018 order was affirmed on appeal and three years passed.

Recent Background: In May 2022, the City filed a Superior Court complaint in eminent domain to acquire the Lions Club's easement, and a motion for prejudgment possession. The motion for prejudgment possession was granted, which permitted the City to take down the cross and safely store it pending the outcome of the eminent domain trial. In granting this motion, the Court noted that it had preliminarily found that the City could exercise eminent domain but emphasized that its determination did not reflect on the actual merits of the pending action. Notably, the Court cited the Legislative Committee Comment following Cal. Code Civ. Proc., section 1255.410.

Procedure: Following the state court order, the Lions Club filed a complaint in district court, along with a motion for preliminary injunction. The Lions Club alleged that free speech and freedom of religion violations had occurred by virtue of the state court's determination on the motion for prejudgment possession and that loss of such freedoms constitutes irreparable injury. The preliminary injunction was fully briefed and heard.

Issue: What weight did the options to remedy the Establishment Clause violation in the June 2018 order have and how does that order interact with the eminent domain prejudgment possession order?

Holding: Removal of the cross was enjoined, and the federal case was stayed pending resolution in state court. The state court judge was ordered to issue a new ruling on the prejudgment possession motion. "He should balance the hardships under state law, taking into account the establishment of religion on one hand versus the exercise of religion on the other and keeping in mind the distinct risk that once the cross is down, even "temporarily," it is down forever."

Analysis: The district court analyzed the June 2018 order and determined that it merely gave three options for how the City may cure the Establishment Clause violation but that those options were merely dictum and they could not be considered an order because no one in that prior case was asking for that relief. On the issue of whether the City can remove the cross pending trial, the district court directed the state court judge to address the hardship of violating the Establishment Clause and the risk that once down, the cross will never be put back up, in making a decision.

Adorers of the Blood of Christ U.S. Province v. Transcon. Gas Pipe Line Co, LLC, 53 F.4th 56 (Third Cir. 2022), 2022 U.S. App. LEXIS 30910

Facts: A religious organization (the "Adorers") held a belief that the extraction, transportation, and use of fossil fuels accelerates global warming and climate change, which defiles God's creation. Transco intended to place an interstate pipeline across property owned by the religious organization. During early stages of the pipeline, right of way agents for the pipeline company notified the religious organization of the pipeline and were informed that the religious organization would entertain no offer to purchase a right of way across their property. Later in the process, the pipeline company proceeded to file an application with the Federal Energy Regulatory Commission ("FERC") to obtain a certificate of public convenience and necessity and to obtain the power of eminent domain. It spent over 30 months publishing notices, mailing letters, and hosting meetings pertaining to the proposed route of the pipeline and the pipeline's construction. The religious organization provided no comments or objections and it did not attend any of the meetings. Even when contacted directly, the religious organization remained silent. In April 2017, Transco filed a complaint in federal court seeking an order of condemnation to permit it to take title to rights of way to the religious organization's property. Despite service, the religious organization did not respond to the complaint until after a default judgment had been sought.

The religious organization filed a separate suit in federal district court claiming that FERC and Transco had violated their rights under the Religious Freedom and Restoration Act ("RFRA") and that they had a right to raise a claim or defense for appropriate relief. Transco moved to dismiss for lack of subject matter jurisdiction. It was granted, and the district court concluded that the RFRA did not allow the religious organization to circumvent the specific procedures under FERC and the Natural Gas Act to challenge a FERC order. The religious organization appealed and the motion to dismiss was affirmed.

The pipeline was completed and put into service. The religious organization filed a new complaint in the district court. The organization sought monetary damages, and it argued that placing the pipeline into service was the trigger for the present action. Transco again moved to dismiss.

Issue: Did the religious organization have the ability under the RFRA to challenge the pipeline and the FERC approval?

Holding: No, Transco's motion to dismiss was affirmed. The religious organization's RFRA claim was an impermissible collateral attack on the FERC certificate because the claim should have been raised before FERC. The court held that any claim raising issues "inhering in" the certification of a new interstate gas pipeline must first be presented to FERC — or else forfeited, and this also applies to claims that "could and should have been" raised during the certification process.

Devillier v. Texas, 53 F.4th 904 (2022 U.S. App. LEXIS 32519)

Facts: The State of Texas appealed the district court's decision that plaintiff's federal Takings Clause claims against the State may proceed in federal court.

Issue: Does the federal court have jurisdiction to review these claims?

Holding: No. The Court of appeal vacated the district court's decision for want of jurisdiction and remanded with instructions to return the case to the state courts. The Supreme Court of Texas recognizes takings claims under the federal and state constitutions, with differing remedies and constraints turning on the character and nature of the taking.

Gearing v. City of Half Moon Bay, 54 F.4th 1144 (2022 U.S. App. LEXIS 33772)

Facts: The Gearings asserted that under California's Housing Crisis Act and California legislation passed in 2019 (Senate Bill 330), they were permitted as a matter of right to build housing on their properties. The City of Half Moon Bay asserted that the City's Land Use Plan severely restricted housing developments in the area where the properties were located, and that under the Land Use Plan the Gearings first needed to submit and the City needed to approve a master plan for the proposed housing development. Shortly thereafter, the City informed the Gearings that it planned to acquire their properties via eminent domain. Before any eminent domain action was filed, however, the Gearings filed an action in federal court asserting that the City's actions amounted to a regulatory taking in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. Approximately one week later, the City filed an eminent domain action in state court. The City then followed that up with a motion in the federal case requesting that the federal court stay the regulatory takings claim under the Pullman abstention doctrine. The Gearings argued that in light of the U.S. Supreme Court's decisions in Knick v. Township of Scott (2019) 139 S.Ct. 2162 and Pakdel v. City and County of San Francisco (2021) 141 S.Ct. 2226, Pullman abstention was no longer an option because it would effectively impose a state exhaustion requirement. Specifically, the Gearings argued that if the federal court stayed the federal litigation, they would have to litigate the crux of the regulatory takings claim — whether they did or did not have a right to build the proposed housing — as part of the state eminent domain action because it goes to the determination of the fair market value of the properties.

Issue: Does Pullman abstention apply to federal takings claims?

Holding: Yes, Pullman abstention permits a federal court to stay a federal claim to allow a state court to resolve a state issue that could either eliminate or narrow the scope of the federal claim. The Ninth Circuit explained that Pullman abstention addresses when a federal court may stay a ripe claim. Thus, the Gearings could defend the eminent domain action without challenging the constitutionality of the City's enforcement of the Land Use Plan, and after the eminent domain action is resolved, they could still litigate the regulatory takings claim in federal court. In that regard, the Ninth Circuit noted that the Gearings had made an England reservation in the state litigation, which prevents the state court from ruling on federal issues.

Fin. Oversight & Mgmt. Bd. v. Cooperativa de Ahorro (In re Fin. Oversight & Mgmt. Bd.), 41 F.4th 29 (1st Cir. 2022)

Facts: Puerto Rico property owners had claims and judgments for just compensation against the Commonwealth. One set of owners was (allegedly) owed compensation for the taking of their properties by eminent domain quick-take; they claimed the deposits didn't cover the actual amount of compensation. The other group of owners had inverse or regulatory takings claims. The court noted that "[f]or purposes of this appeal, all parties agree that the Commonwealth ... took private property from at least some of the takings claimants before petitioning for [bankruptcy]." The Commonwealth's bankruptcy petition ("perhaps the largest and most consequential public bankruptcy in the nation's history") sought relief for "sovereign debt ... under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act." The Commonwealth's PROMESA reorganization plan proposed to treat the claims of the property owners as general unsecured debt, payable "at a pro-rata share of the overall recovery for general unsecured creditors." In other words, likely pennies on the dollar, if that. The property owners objected, arguing that they have had their property taken without compensation, and their claims cannot be treated as unsecured debt because the constitution requires just (full) compensation. Thus, a claim for compensation can't be wiped out in bankruptcy. The Title III PROMESA court agreed, and "directed the Board to modify the plan of adjustment to provide for full payment of any valid eminent domain and inverse condemnation claims if the Board wished to make the plan confirmable." The Board did so (while reserving its right to appeal, which it eventually did).

Issue: May a claim for just compensation be treated as unsecured debt in a subsequent government bankruptcy?

Holding: The First Circuit affirmed, noting that the "appeal raises important questions about the interplay between the power to equitably restructure debts in bankruptcy and the Constitution's requirement that just compensation be paid whenever the government takes private property for public use." The holding: "[O]therwise valid Fifth Amendment takings claims arising prepetition cannot be discharged in Title III bankruptcy proceedings without payment of just compensation." And by "just" compensation, the court meant whatever full compensation is owed to the owners.

First, the court rejected the federal government's argument that this isn't a constitutional right vs bankruptcy power issue at all, but that the Article III court's holding was merely it exercising its equitable powers. The court concluded, "we read the Title III court's ruling to say precisely what it appears to say: that discharging valid, prepetition takings claims for less than just compensation would violate the Fifth Amendment and render a plan providing for such discharge unconfirmable under PROMESA." The court next rejected the federal government's invitation to avoid the constitutional question and instead concluded, "we move on to assessing whether the Fifth Amendment precludes the impairment or discharge of prepetition claims for just compensation in Title III bankruptcy. For the following reasons, we conclude that it does.". Can bankrupt governments "eliminate their obligation to pay just compensation and instead pay only reduced amounts based on a formula applicable to most creditors[?]" The court held no. First, "the Supreme Court has been very clear: the bankruptcy laws are subordinate to the Takings Clause." Bankruptcy laws are subject to the Fifth Amendment. Second, the court rejected the Commonwealth's argument that the Fifth Amendment protects only property held by the owners at the time of the bankruptcy. And because their real property had already been taken by the Commonwealth — either through expropriation by eminent domain or inversely taken by seizures — the only "property" possessed by the owners at the time of the bankruptcy were unsecured claims. The Commonwealth relied on Knick for that argument: because the right to compensation "arises at the time of the taking" its theory went, the claim doesn't arise later when the government denies compensation. And by the time the government denies compensation, the owners have already lost their real property: "because the takings at issue here all occurred prepetition, the [Commonwealth] contends, any constitutional violation would have arisen only at the time of the taking." The Commonwealth asserted therefore, the compensation is "untethered from the substantive Takings Clause violation itself." The First Circuit held no, Knick does not "cast doubt on the Fifth Amendment's requirement that just compensation be paid." The court concluded, "[r]ecognizing that the "right to full compensation arises at the time of the taking," id., does not imply that the subsequent denial of that compensation does not also raise Fifth Amendment concerns. We decline to read Knick as changing the Fifth Amendment right to receive just compensation into a mere monetary obligation that may be dispensed with by statute." The court rejected an argument that the Fifth Amendment protects only rights in specific property, and not unsecured claims for money. This isn't a question of "whether a bankruptcy law has effected a taking of property" (i.e., whether bankruptcy law wiped out the ability to enforce a contract or other claim) but rather, "whether the denial of just compensation for a taking" that "no one disputes" has occurred violates the right to compensation. The court next rejected the contention that "nothing about a claim for just compensation makes it any different for bankruptcy purposes than a claim for money damages for any other kind of constitutional violation." Relying on the "language and nature of the Takings Clause," the First Circuit held that "compensation is different in kind from other monetary remedies." The court concluded: "Just compensation then does not serve only as a remedy for a constitutional wrong; it serves also as a structural limitation on the government's very authority to take private property for public use. As the [Supreme] Court has stated, 'where the government's activities have already worked a taking . . . , no subsequent action by the government can relieve it of the duty to provide compensation.' Simply put, the Fifth Amendment contemplates a "constitutional obligation to pay just compensation." Thus, the court concluded, "payment of just compensation [is] unlike most other instances in which the government engages in a constitutional violation and is required to remedy that violation by paying money."

LEGISLATION UPDATES

Pending

2021 MA H.B. 1692 (Massachusetts) — Any agreement for damages from an eminent domain taking – for private or commercial investment — must award a minimum of 200% of fair market value for the parcel of land.

2021 MA H.B. 1688 (Massachusetts) — Prohibits eminent domain takings for the purpose of commercial enterprise, private economic development, or any private use of the property; property shall not be taken from one owner and transferred to another on the grounds that the public will benefit from a more profitable use; the question of whether the contemplated use is truly public shall be a judicial question; if property taken for public use is not used for that purpose within 5 years of the taking, it must be offered for sale back to the property owner from which it was acquired.

2021 OH H.B. 698 (Ohio) — Would modify various eminent domain rules to generally be more property owner friendly. Changes include exclusion of recreational trails from "public use" (hiking, bicycling, horseback riding, ski touring, canoeing, or other non-motorized forms of recreational travel); adjusts standard for an agency to show the taking is necessary and for a public use; changes rules surrounding initial and subsequent good faith offers; changes recovery of attorney's fees and expenses; changes rules for inverse condemnation.

2022 OK S. B. 41 (Oklahoma) — Changes terminology from "public purpose" to "public use" and defines it. Clarifies that economic development does not constitute a public use. Also provides definitions for blight and abandoned property and places the burden of proof on the condemning authority to prove that the taking of blighted property is necessary for a legitimate public use. The bill would also allow property owners to reclaim their condemned property if the condemning authority fails to use it.

Adopted

2022 MO H.B. 2005 (Missouri) — Changes rules of eminent domain and compensation for certain electrical companies, in favor of farmers, ranchers, and other landowners. Among the changes, to have the power of eminent domain in state for certain projects, the electrical companies need to divert power directly into the state and its constituents, not just construct long transmission lines that cross the entirety of the state. Further, where certain agricultural or horticultural land is to be taken, a farmer with at least 10 years' experience, from the county in which the land is to be taken, will be appointed by the court as one of the disinterested commissioners. Additionally, for agricultural or horticultural land, just compensation shall be 150% of fair market value, as determined by the court.

2022 CO S.B. 208 (Colorado) — If property that is encumbered by a conservation easement in gross is condemned through an eminent domain proceeding, 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.

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 to any person, nongovernmental entity, public-private partnership, corporation, or other business entity, with some exceptions.

Proposed Constitutional Amendments

- **North Carolina:** Amend 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 (2021 NC H.B. 271).
- **Massachusetts:** Amend the state constitution to make the taking of land or interests by eminent domain for private commercial or economic development not a public use (2021 MA H.B. 82).
- **New Jersey:** Proposes a constitutional amendment to limit the 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 in New Jersey. The purpose of this proposed amendment is to protect New Jersey residents from the effects of the Kelo decision. (2022 NJ S.C.R. 104.)
- **Texas:** Proposes a constitutional amendment concerning the right to repurchase real property acquired through eminent domain. This amendment would entitle property owners to repurchase property originally acquired via eminent domain in certain circumstances. (TX HJR 26.)

INFRASTRUCTURE BILL UPDATES

- **This is a non-exhaustive list of updates about funding and projects associated with the Infrastructure Bill.**

- **Ferries**

  - Nearly $300 million will be available through three grant programs to boost access to rural ferry service and electrify existing ferries. The programs include: $209 million for the FTA's Ferry Service for Rural Communities Program, $49 million for FTA's Electric or Low-Emitting Ferry Pilot Program, and $36.5 million for FTA's Passenger Ferry Grant Program.

- **Bridges**

  - In August 2022, the states of Kentucky and Ohio jointly submitted a funding application through the Bridge Investment Program for the 8 mile Brent Spence Bridge Corridor project. North Carolina has received $10.7 million in Rebuilding American Infrastructure with Sustainability & Equity (RAISE) grants that is planned to be used to renovate or replace 28 bridges in six northwest counties. Many of the bridges that will be renovated/replaced are currently low-water bridges that are prone to flooding during heavy rainfall.

- **Highways**

  - The U.S. DOT awarded the Michigan DOT $104.7 million for the I-375 project in Detroit. The goal of this project is to rebuild the Black Bottom and Paradise Valley neighborhoods, which are two Black communities that were destroyed when the I-375 was built. The project will work to remove the Jefferson Avenue curve, convert portions of I-375 to a lower speed boulevard, realign ramps, remove weaving and merging areas, install traffic calming measures, and incorporate LED lighting. Further, the project will reconnect neighborhood streets in the project area, construct wider sidewalks and bike lanes, improve pedestrian crossings, and remove two stormwater runoff pump stations and 15 bridges that divide the community.

  - In the first year of the Infrastructure Bill, nearly 25,000 new federal highway improvement projects were started.

  - Highway and Bridge projects can be tracked here: https://www.artba.org/economics/highway-dashboard-iija/

- **High Speed Rail**

  - The California High Speed Rail Authority was awarded a $25 million Rebuilding American Infrastructure with Sustainability and Equity grant from the U.S. DOT. The funding will go toward the Madera to Merced portion of the project.

- **Rail**

  - $1.4 billion will be available through the Consolidated Rail Infrastructure and Safety Improvement (CRISI) Grant program. This funding will improve both passenger and freight trains across America to make them safer, faster, and more reliable.

- **Freight**

  - The U.S. DOT selected 26 projects in 22 states and Puerto Rico for $1.5 billion in freight-related grants, under the Infrastructure for Rebuilding American (INFRA) grant program. These funds go toward projects involving highways, truck parking, food warehousing, freight railroads, border improvements, and more.

  - The Maritime Administration awarded nearly $39 million in grants to a dozen marine highway projects to assist with marine highways and improving access to navigable waterways and to reduce congestion.

- **Airports**
  - Of the $5 billion granted under the Infrastructure Bill for airport development projects, the first $1 billion (FY 2022) has been awarded. This $1 billion has funded more than 90 projects at airports across the country. Airports eligible under these grants are those operated within the national air transportation system. Applications for funds consider project factors such as, increase in capacity and passenger access, replacement of aging infrastructure, ADA compliance, accessibility for historically disadvantaged populations, energy efficiency, improved airfield safety, encouragement of competition, and the creation of good paying jobs.

- **Pipes**
  - In some places across the U.S., the replacement of lead pipes has been slow growing. This stems from the fact that many communities have no idea where lead pipes are located and how extensive the replacement process will be. The first step in replacing the pipes is mapping of the area, which some communities have been slow to do. This delay may result in various cities being too late to ask for available federal funds. In Iowa, for example, only a handful of cities have identified the location of lead water lines at this point. In communities where there have been scandals and media attention (i.e., Flint, Michigan), the mapping and replacement process has moved along faster due to national attention.

- **Electricity/Batteries**
  - California's system of batteries helped the state to weather its extreme heatwave in September 2022, without rolling blackouts. For example, during a peak evening during the heatwave, when the grid was approaching capacity, the batteries provided more power than the Diablo Canyon nuclear power plant, the state's largest electric generator. The ability of the batteries to pump power into the grid during a peak period saved the state from necessary blackouts.
  - Since the start of 2021, battery capacity in the U.S. has more than tripled, to 6,702 MW. The top five states by battery capacity were California, Texas, Florida, Massachusetts, and Nevada.
  - Texas moves ahead with an 80 MW distributed energy resource pilot designed ot boost grid reliability. This will allow thousands of small sources to contribute to grid reliability, lower energy costs, and reduced emissions.

- **Electrical Vehicles**
  - Charging — The Federal Highway Administration has approved the first 35 state plans to build EV charging stations along interstate highways. The approval of these plans unlocks more than $900 million in funding from fiscal years 2022 and 2023 to build EV charges across approximately 53,000 miles of highway.
  - Hurdles for electrical vehicles exists in the permitting process and the process of knowing where to deploy charging stations around the country.
  - Buses — Nearly 400 school districts, including in several Indigenous tribal lands, Puerto Rico, and American Samoa, will receive around $1 billion to purchase new, mostly electric school buses. These buses would improve air quality and have positive impacts on children's health.

- **Water**
  - Pennsylvania was awarded $240 million for water infrastructure improvements. The funds can help to improve safety of drinking water, improve waste water treatment, and help the stormwater system cope with increased damage from storms worsened by climate change.
  - New York State's Buffalo Sewer authority commenced a $55 million wastewater treatment project to modernize the Bird Island facility with the goal of reducing pollution into the Niagara River. The project will be funded in part with funds from the Infrastructure Bill.

- **Internet**
  - The Agricultural Department has announced that it is making available $759 million in grants and loans to enable rural communities to access high-speed internet, which is part of the broader $65 billion allocation for high-speed connectivity in the Infrastructure Bill. Of these funds, there are 49 recipients in 24 states.
- **Ports**
  - Five Washington State ports would receive nearly $71.5 million in federal grants for port infrastructure development.
- **Project Coordination**
  - Some jurisdictions are developing systems to support a "dig-once" policy. This policy recognizes that often times there are multiple infrastructure improvements that can and perhaps should be coordinated to reduce the impacts of construction. For example, when a road project occurs, broadband could also be placed under the streets, but the majority of the construction work need only occur once. While there are difficulties of coordinating and implementing projects across different timelines and agencies, some jurisdictions (Arizona, Illinois, Maryland, Minnesota, and Michigan) have taken efforts to implement some form of a "dig-once" policy.
- **Inflation Impact**
  - Inflation is impacting the pricing of materials and may delay or halt various projects. Fuel prices going up impacts the ability to transport materials, and materials themselves, such as iron and steel, are increasing in costs, and labor is demanding higher pay.
- **Labor Shortages**
  - The USDOT has a goal of adding 1,700 employees over the next five years to help meet the demands of the infrastructure law. State and local governments are facing shortages of workers with expertise in key areas, such as auditing, procurement, and acquisitions. The labor shortages also extends to the construction industry, particularly in skilled trades.

Overall progress of the infrastructure funding and projects in individual states can be **found here**.

CANADIAN UPDATES

Nova Scotia & the Supreme Court of Canada

Annapolis Group Inc. v. Halifax Regional Municipality, 2022 SCC 36

Facts: The appellant, Annapolis Group Inc. ("Annapolis"), starting in the 1950s, over time, acquired 965 acres of land with a long-term goal of securing enhanced development rights and reselling it. In 2006, the respondent, Halifax Regional Municipality ("Halifax") adopted the Regional Municipal Land Planning Strategy. The Planning Strategy reserved a portion of the land owned by Annapolis for possible future inclusion in a regional park. The Planning Strategy also zoned the lands as "Urban Settlement" and "Urban Reserve."

While these designations contemplate future residential serviced development, they do not expressly permit them. In order for service development to occur on the land owned by Annapolis, they must receive approval from Halifax in the form of an adopted resolution authorizing a "secondary planning process" and an amendment to the applicable land use by-law. Although Halifax adopted a revised version of the Planning Strategy in 2014, the zoning of the land owned by Annapolis had not changed. Since 2007, Annapolis made several attempts to develop the land. Finally, in 2016 Halifax ultimately refused to initiate the secondary planning process. Annapolis submitted that through public statements, signage and actions, the municipality encouraged public use of Annapolis' lands by holding them out as a park. Annapolis sued as a result, alleging a constructive taking, among other things.

Issues:

1. Did the Court of Appeal err in holding that an "acquisition of a beneficial interest" under the constructive taking test established by this Court in CPR requires land to "actually be taken" from an owner and acquired by the state? If not, should the CPR test be revisited?

2. Did the Court of Appeal err in holding that evidence of the state's intended use of the impugned land is irrelevant to a claim for constructive taking?

Holding:

The Majority held that the Court of Appeal erred in holding that an "acquisition of a beneficial interest" under the constructive taking test established by the Court in CPR requires land to actually be taken from an owner and acquired by the state. A "beneficial interest" is to be broadly understood as an "advantage" flowing to the state; as such, the interest acquired by the state can fall short of an actual acquisition by the state. A court deciding whether a regulatory measure effects a constructive taking must undertake a realistic appraisal of matters in the context of the specific case.

Further, the Court of Appeal erred in holding that evidence of the state's intended use of the impugned land is irrelevant to a claim for constructive taking. What ultimately matters, irrespective of matters of intent, is whether the state-imposed restrictions on the property conferred an advantage on the state that effectively amounts to a taking.

There are genuine issues of material fact arising from Annapolis' constructive taking claim to be tried. It should therefore be allowed to proceed to trial. This case is of national importance as this is the first time the issue of de facto expropriation has been considered by the Supreme Court since the CPR decision in 2006. Commentators have argued that this decision may significantly expand the scope of de facto expropriation matters in Canada due to the reconsideration of the applicable test.