

Recording Priority of a Non-Disturbance Agreement

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Should a property be foreclosed by a lender and in the foreclosure process be purchased by other than the lender, then there is a question as to the effect of the foreclosure on the nondisturbance agreement.

The bottom line is that a non-disturbance agreement will survive the foreclosure of a senior lien-trust deed, so long as that agreement has been recorded.

Normally the foreclosure of a senior lien will wipe out all intervening junior (later) liens. This includes an intervening leasehold on subject property. The theory was pledged as security for payment, and since foreclosure carries title from the date of loan, all intervening liens are left with no security for payment.

A later non-disturbance agreement on such an intervening lease, represents an exception to this rule. Although this is a junior lien (later in time to the trust deed), because it is granted by the beneficiary of the senior lienholder, this agreement represents a release of some of the senior lien's security for payment. Thus, as of the date of the non-disturbance agreement, the beneficiary of the senior lien holds as security for the loan, the entire property *except* the right of the current lessee to remain in possession after foreclosure. This represents something in the nature of a new leasehold, contingent on the occurrence of a foreclosure.

The only threat to this situation is the possibility that a Bona Fide Purchaser (BFP) with no knowledge of the diminished security, might purchase at the foreclosure of the

senior lien. The rule is that a BFP cuts off prior "hidden" equities. The non-disturbance agreement, if unrecorded, would be unenforceable against a BFP.

To prevent this from happening, the non-disturbance agreement must be recorded in order to impart knowledge of this equity to all potential purchasers. In this manner, no purchaser would qualify as a BFP.

In any event, if the beneficiary of the senior lien ends up with title upon foreclosure of his lien, he is bound (by having signed the non-disturbance agreement) to allow the lessee to continue in possession if the agreement was recorded or the purchaser had actual knowledge of it. Under these circumstances the purchaser would know the note was secured by less than the full fee title, and would have discounted his purchase price accordingly.

In either event, the beneficiary's granting the lease rights in the non-disturbance agreement, diminishes the security obtainable from the senior lien on foreclosure. And if this agreement is recorded, this condition is protected from the otherwise superior rights of a BFP.

Recent Court Decisions

As Published in
Just Compensation, A Monthly Report on Condemnation Cases
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STATUTORY DEFENSES TO TAKING

Town of Libertyville v. YPMA (Ill. App.) 536 N.E.2d 1275

The town sought to condemn a 19-acre parcel pursuant to the state Township Open Space Act. The owners moved to dismiss arguing that the Act authorizes condemnation only of parcels 50 acres or more. The subject property could be condemned if it was contiguous to existing open space owned by Libertyville, or open

space under condemnation, provided that the combined area was 50 acres or more. The town offered testimony that a cemetery adjacent to the subject property could be considered open space under the terms of the Act. Sceptical of this logic, the trial court granted defendants' motion. The trial court made an additional finding that the Act did not permit Libertyville to "leap frog" over the cemetery to create contiguity between the subject property and other parcels it owned. The town appealed. *Held*: affirmed.

The statutory language provided that a parcel of land less than 50 acres could not be considered open land. Consequently, the subject 19-acre parcel could not be condemned merely because at the time of the eminent domain proceedings against defendants, Libertyville's open-space program was comprised of well over 50 acres. Moreover, the subject property could not be taken because it was adjacent to a cemetery. The cemetery, owned by a church, could not be condemned. Therefore, following *Town of Libertyville v. Blecka*, 536 N.E.2d 1271, the cemetery could not be considered in determining whether the taking complied with the Act.

Finally, the court held that Libertyville's argument that the subject property was contiguous to open-space owned by the town to the north of the cemetery was without merit. Under *Blecka*, a property to be condemned must abut or adjoin a tract of 50 acres or more already owned or being contemporaneously condemned. The subject property did not meet these requirements.

OTHER DEFENSES TO TAKING

Doelle v. Mountain States Telephone & Telegraph (10th Cir.) 872 F.2d 942

In 1948, Mountain Bell, pursuant to a right-of-way granted by one joint tenant, built a phone line on the property. In 1982, erroneously relying on the 1948 right-of-way, Mountain Bell trespassed on the property to

construct a telephone substation. Doelle began residing on the property and discovered the substation. When Doelle objected, Bell sued to condemn, arguing that such a condemnation was justified under Utah statute. The trial court granted the easement and awarded damages. Doelle appealed, arguing that the condemnation was not justified by convenience, necessity, or expenses, in light of the irreparable injustice to his rights and the "substantial detriment in service." *Held*: affirmed.

The court upheld the trial court's conclusion that the use to which Mountain Bell had applied the property is a use "authorized by law" as that term is defined in Utah statute which allows condemnation telephone service. The court also found no error in the conclusion that the condemnation was necessary.

Doelle argued that Mountain Bell should be ejected from the property for failure to follow the regulations and procedures of the Utah Public Service Commission. Doelle argued further that Bell was bound by the law and agreements in force in 1948, that the easement on adjacent property gave Bell no right to construct a substation on his property, and that because "forcible ejection" was serve on Bell, Bell was required to leave the property. The court held that these issues were extraneous to the determination that Bell was entitled to an easement by condemnation on Doelle's property.

BUSINESS DAMAGES

Buck's Service Station v. DOT (Ga. App.) 381 S.E.2d 516

DOT condemned a portion of property leased to Buck. DOT filed a motion in limine, seeking to preclude Buck from introducing evidence of business losses. The trial court granted the motion in part. Buck pursued an interlocutory appeal, and DOT cross-appealed from the partial denial of its motion in limine. *Held*: affirmed in part and reversed in part.

The trial court had granted DOT's motion to the extent DOT sought to preclude evidence of Buck's business losses. The court held that it and the trial court were bound by *Housing Auth. of Atlanta v. Southern R. Co.*, 264 S.E.2d 174 (1980), which held that "temporary" business losses are not recoverable by a condemnee. Accordingly, the trial court did not err in denying DOT's motion which sought to preclude Buck from introducing evidence as to the consequential temporary damages. However, it was error to preclude evidence regarding Buck's *permanent* business losses.

INVERSE CONDEMNATION-REMEDIES

Tahoe-Sierra Preservation Council v. State Water Resources Control Bd. (Cal. App.) 259 Cal. Rptr. 132

In 1980, the Board prohibited discharge of waste attributable to new development into Lake Tahoe, pursuant to California's obligations for an area-wide waste treatment plan under the Federal Water Pollution Control Act. As a result of the Plan, owners of lots in the Lake Tahoe basin, were precluded from constructing residences on their lots, and they filed this action, alleging, among other things, regulatory taking. The trial court granted summary judgement for the Board and the owners appealed. *Held*: affirmed with modifications.

The court first noted that since the plaintiffs did not seek a waste discharge requirement under the Plan, it could not be ascertained whether there was any taking in the application of the Plan to the plaintiffs.

A takings claim is also not ripe until the claimant has sought and been denied just compensation through available adequate procedures. The Lake Tahoe Acquisitions Bond Act (Govt. Code, § 66957, subd. (a)) provided a source of compensation for the owners. However, they argued that the terms of the Act permitted payment of less than fair market value, and that it had been the

practice under the Act to offer amounts less than just compensation. Nonetheless, the court held that nothing in the Act precluded payment equal to just compensation.

The court modified the judgement of the trial court to one of dismissal for lack of ripeness.

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