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JULY 27, 2016

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CALIFORNIA SUPREME COURT HOLDS NO EMINENT DOMAIN ACTION REQUIRED FOR ENVIRONMENTAL AND GEOLOGICAL TESTING ON PRIVATE PROPERTY

On July 21, 2016, the California Supreme Court issued a significant eminent domain decision with broad implications for public agencies. In *Property Reserve, Inc. v. Superior Court (Department of Water Resources)*, the Court liberally construed California's precondemnation entry and testing statutes (Code of Civil Procedure sections 1245.010–1245.060) to apply to the Department of Water Resources' entry onto more than 150 properties in the Delta to conduct geologic and environmental testing. The purpose of the testing was to investigate whether the properties should be acquired to build a tunnel to transport water from Northern California to central and southern parts of the state. The Court held that the State need not have filed an eminent domain action for the testing because California's precondemnation entry and testing statutes satisfied the requirements of the takings clause of the California Constitution, as long as the statutes were reformed to allow for a jury trial on the issue of damages caused by the testing. (*See* Cal. Const., art. I, section 19(a).)

By way of background, California's precondemnation statutes afford public entities a quicker and more streamlined alternative to a classic eminent domain action, so that an agency may obtain the court's permission to enter onto property to conduct tests (including deep borings) to determine whether a parcel should be acquired for a public project.

BACKGROUND FACTS: STATE DECIDES TO CONDUCT EXTENSIVE TESTING FOR DELTA WATER PROJECT

The Department of Water Resources proposed entering onto dozens of privately owned properties in the Delta to conduct environmental and geologic studies before building new water conveyance facilities. The facilities were meant to improve the reliability of the state's water supply and to restore the Delta's ecosystem and native fish populations. According to the Department, the testing was necessary to assess the potential effects of the tunnel on biological, environmental, geological and archeological resources—as required by CEQA, NEPA, and other environmental statutes—and to determine whether any of the properties should be acquired for the new facilities.

PROCEDURAL HISTORY

Between 2008 and 2009, the Department filed more than 150 petitions under the precondemnation statutes, seeking entry onto properties located in Contra Costa, Yolo, Solano, San Joaquin and Sacramento counties. The superior court coordinated the proceedings into a single action pending in San Joaquin County Superior Court.

In 2010, the Department asked the court's permission to engage in mapping and surveys

related to plant and animal species, archeology, soil conditions, hydrology, and other environmental effects. The geologic activities consisted of drilling deep borings to determine subsoil conditions. The trial court granted the Department limited authority to enter each of the properties to conduct environmental testing, but denied the Department's request to conduct geologic testing on 35 of the properties. The court reasoned that the precondemnation statutes do not explicitly state that they are intended to apply to deep drilling, and prior authority had held that such activity would constitute a taking for purposes of the California Constitution.

The Court of Appeal for the Third Appellate District affirmed the decision to deny the geologic testing, and reversed the order granting the Department authority to conduct the environmental activities. The court determined that the current precondemnation statutes are only constitutionally valid when applied to testing that is so "innocuous" or "superficial" that it does not constitute a taking or damaging of property.

THE SUPREME COURT'S HOLDING

The Supreme Court reversed the Court of Appeal and held that as long as the precondemnation statutes were reformed to allow for a jury trial on the measure of damages, no eminent domain action need be filed for the State to conduct either environmental or geologic testing. The Supreme Court noted that nothing in the precondemnation statutes limits their scope to testing activities that are "innocuous" or "superficial." The Court held that the State did not overreach in proceeding under the precondemnation statutes rather than by filing an eminent domain action. The Court reasoned that forcing the State to file a condemnation action when it had not been yet determined whether the State would actually build the facilities in question was counter-intuitive.

The Court noted that California's takings clause, unlike the federal takings clause, requires a jury trial unless waived. The Court reasoned that the statutes cannot reasonably be interpreted as upholding the right to a jury trial to determine damages. The Court decided, however, that the appropriate remedy was not to invalidate the precondemnation statutes as a whole, but to judicially reform section 1245.060 "to provide a property owner the option of obtaining a jury trial on the measure of damages at the proceedings provided for in that subdivision."

IMPLICATIONS FOR PUBLIC AGENCIES

The Court of Appeal's decision in these cases had left substantial uncertainty regarding the appropriate procedures that public agencies should follow for precondemnation testing. In a thorough analysis, the California Supreme Court has now definitively endorsed the simpler precondemnation procedure—yet has also held that property owners will now be able to request a jury trial if they are dissatisfied with the court's determination of damages suffered due to pre-project testing.

Significantly, the Supreme Court also held that in measuring "just compensation" for any damage caused by a precondemnation entry, lost rent is *not* an appropriate measure of damages for the property owner, so long as the owner retains possession and use of the property during the testing. The Court held that awarding lost rent would result in an unwarranted windfall to the property owner. Instead, any damages for testing must compensate the property owner for actual injury to the property, as well as for any substantial interference with the owner's possession or use of the property.

For more information on precondemnation procedure or eminent domain actions, please contact James T. Diamond, Celia Lee, Dolores Bastian Dalton or any other attorney at Goldfarb & Lipman LLP at 510-836-6336.