

Handout Agenda Item 8 F
Date March 9, 2017

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Right of Way & Legal Strategies for Successful Project Delivery

March 8, 2017

SF City Club, 155 Sansome

1. Legal and Valuation Aspects of Easements: Brad Kuhn, Nossaman LLP; Ettore Minor, Bender Rosenthal, Inc; Steve Parent, Bender Rosenthal, Inc.
Easement, USPAP Std. Rule 1-2(e) requires a definition of the rights being appraised
Agencies should prepare the Easement prior to being appraised. Need Deed language, what is property owner allowed to do after that Easement is taken. Draft Easement or Scopes of what being appraised, Appraisers should demand from Agency prior to work. Defining the Scope: Broad. Good allows for all future uses; bad increases amount of compensation, ugly: in condemnation, owner will seek compensation based on the "most injurious use". Face right to take challenges (not necessary for project) and fight on ability to get property. Most Injurious Use (Co. of San Diego b. Bressi, 1986, CA1 Rptr. 3d 112). Co. avigation easement. After got into it realizes FAA limitations, can't utilize for jumbo jets. Court holds that County may not contradict RON. Jury: find damages must consider the most injurious use of the property reasonably possible based on entire range of used permitted under the resolution of necessity. Greater uncertainty of what being acquired, greater the fee to acquire. Damage caused to the remainder: The severance of the remainder from the part taken. The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken. Have to work with Engineers on How project will be constructed. If do it this way, can save a whole bunch of money v. exorbitant costs in project. How to save money in acquisition costs: Easement documents and Resolution of Necessity. EG Flood Control Easement w/Hotel egress/ingress. Project underground and owner can drive over v. Easement (Full Take). Huge valuation case because Most Injurious Use. Problems is with Agencies/Utility with Standard Easement language templates. May be time to back off. Implied Rights: Dfn: Something that was hinted at or suggested, but not directly stated; not exhibited by explicit and direct words. Express right - written into the document. Reliance of implied rights may be necessary to accomplish: activities related to maintenance; compliance with state and federal regulations. Key words for implied rights: use, operate, maintain, necessary incidents, appurtenances. Implied v. Express Rights (Written into the document). Impossible to put everything into the Easement. Implied Right Theory to do those things necessary for maintenance, or law change that may not be written into Easement but need to be reasonable, mostly for maintenance and coming into compliance. Not to put in a second line. Floating Access Easement (eg for bike trail) and would take out buildable lots when developer builds. Developer will give access easement over road when built. Aerial Easement: Acq. trolley line in fee. Trucks could not make turn if take in fee, then what really need so trucks can access the Whole Food Market, others. Huge win. TCE Temporary Construction Easements. Engineers often view temporary rights as inconsequential; Agencies budget only for the rental value of the property if anything (not severance damage such as lack of access, enormous severance damage claims, allow to share that area.). Ask if exclusive or non-exclusive, does contractor lay down in area and not allow property owner use. TCE really necessary or just convenient. Understand project plans, degree and duration of impact. More frequent in Design Build and let Design Builder to acquire TCEs. Agency in contract promises to deliver Right of Way but can't in year or two and therefore hit with huge delay claims. Adjacent Lands Clause. Use of Adjacent Lands. Does the document include an express right for use of adjacent lands? (are contiguous to and outside of RW boundaries). Purposes for which the area will be used: installation, reconstruction, maintenance, access. Defining a specific width, using an area reasonably necessary. Temporary Severance Damages: Absolutely, Degree and duration. TCE can result in compensable temporary severance damages. It depends on actual intended use (3 cases ref.). TCE duration.

Engineers will not be specific when to start. Construction Start date uncertain. Will pay for long period of time if TCE start date floats. TCE start once give owner notice v. specific date. FHWA Policy on TCEs w/Cal Trans. Can't do that. If need for a 3 year period then you pay for 3 even though need only for 12 months. Policy from FHWA/Cal Trans shopping center example is full take just because have to certify your right of way or don't have your contractor lined up. May need to give additional rent considerations to tenants for floating week. ? Temporary Rental Value and severance damages. TCE Conditions: Restoration. Overburdening an Easement: Acquire rights with the future in mind. Don't try to do more than what the document allows. Some language is very specific: distribution v. transmission; wood pole v. steel tower; a single line v. multiple lines; underground v. overhead; technological upgrades; intent. Determining Interference or Inconvenience. Does the Landowners use violate statutory law or regulatory req. Is the use restricted by the terms of the easement; is there defensible justification of unreasonableness; defining inconvenience (just need to do a diff. way but not an interference) eg change locks to gate, can still get there yes but hassle, residual rights of the property owner.

2. The Project Influence Rule: David Graeler, Nossman LLP; Mike Lahody, Bender Rosenthal Inc.

Mike Lahody, RW Delivery Cal Trans District 1,3,9 and 10 CA Code of Civil Procedures section 1263.330. Project Influence Rule on books since 1975. Minimal case authority. Adjusts definition of Fair Market Value. Designed to eliminate unfair impacts to both the public agency and the property owner ie rendering facility or waste water facility, light rail station. low comps. can't rely on because artificially low v. light rail station (more sales, higher rents). People v. Miller (1971) should take into consideration if property will be taken in future. Zoning restrictions should not be considered in determining value (City of San Diego v. Rancho Penasquitos). Perris v. Stamper, Metro Line construction (sister agency of Metro LA), Expo Line Santa Monica into downtown LA, light rail project. Expo b. City of Santa Monica (owner Thomas Patchett, Bergamot (Art Gallery, renown worldwide) station, Muppets. Fact intensive question if Rule applies. Patchett claims over \$10m in lost Goodwill argues security of occupancy because lease would continue into perpetuity. Argued project influence rule should not apply. Court ruled this is a Contract not under the Project Influence Rule and went to mediation and settled for \$10,000. Make sure lease agreement is documented well, no relocation rights under Uniform Relocation Act and no rights under the Project Influence Rule. Expo. v. City of Santa Monica (402 Colorado). Same project, same TDA funds, same judge. prime real estate one block to Santa Monica Pier. TDA funds allocated annually but can create rail reserve and allowed City to save and grow annually, grew to \$30m. In 1984, LACTC and City create "Rail Reserve" by using restricted rail funds. Proposed to purchase property using \$30M fund to protect Metro against price inflation. Use restricted to maintain for transportation use. City realigned and needed only 1/3 property. City claims severance damage of 2/3 thirds not taken. There is no specific contract between City and Metro although Board minutes are clear. Judge hesitated rule to go to jury for \$30m to City and it was mediated. City was over-reaching and against public desire to have project go forward. State Summation Rule: Benefits may offset damages but not the part take. LA County MTA v. Continental Development Corp. (benefits used to not be admissible prior). EG a lot more value with train station and people coming in to benefit business. AB 408 pending legislation, Assemblymember Phillip Chen, Riverside, Orange Co. Change rule to allow property owners to recover litigation expenses. Prior only if can prove offer is unreasonable. Look at good faith, care and accuracy of Agency and owner in regards to their demand. AB 408 will change dramatically by taking court discretion out. If larger than 10% then automatic litigation expense award. If somewhere between 0 to 10%. Some states like Florida allows attorneys fees on each case. This new bill is a game changer and will drastically affect local agencies.

3. Demystifying Business Claims: The Crossroads of Relocation and Goodwill: Bernadette Duran-Brown, Nossaman LLP; Ricardo Goni, Desmond, Marcello & Amster; Ceci Melanson, Bender Rosenthal, Inc.; Artin Shaverdian, Nossaman LLP

Reimbursement Program 49 CFR 24.207 (a), claim to be support by expenses incurred. Advance payments, reduce hardships. Business Relocation Benefits: Actual out of pocket costs incurred to accomplish the move: no limit; under Federal Rule Global settlements are not allowed. Value of some personal items that cannot be relocated economically: no limit; costs associated with locating a relocation site: State \$1,000, Federal \$2,500. Costs to est. relocation site: State \$10,000. Federal \$25,000. Large value claims driven by build out costs. Goodwill: There is no constitutional right to compensate for loss of Goodwill. Comes from Statutory. Business owner must prove: loss was from the acquisition. If owner took reasonable steps, may not be entitled to any Goodwill. Matteoni Goodwill practice guide. Compare to operative case: Regents of University of California v. Sheily (2004). Customers impulse buyers based on location v. repeat customers (Yum Yum Donuts case). 90% repeat. Court Sheily and Yum Yum not reasonable on relocation matters, efforts. Casasola Case LAUSD, Catering Truck. Sought \$1.13M as costs to mitigate loss of goodwill. Review before/after Goodwill value. LAUSD reimbursed \$224,000 for relocation expenses. Cassasola bought and improved relocation site. Court ruled Displaced Owner can't recover something not reimbursable/compensible. Legislative intent was to cap at \$10,000. to reestablish not to slide it under another category (Goodwill). State v. Presidio (Dance Studio, Performing Arts Foundation). Have to show entitled to compensation, to put your case forward to Court, in Presidio only have to do qualitatively. eg My reputation was impacted.