Property ‘Inspection’ or Taking?

BY ANTHONY F. DELLAPELLE, ESQ., CRE

Editor’s Note: This new “Legal Update” section will feature summaries of recent judicial decisions, legislative and regulatory updates, or other legal news that concerns the real estate industry. Summaries can refer to published case law, news items, blogs and other reference materials. To provide a summary, email REI@cre.org.

The California Supreme Court recently agreed to review an appellate court's decision that a condemning authority's “preliminary entry” constituted a taking under California's eminent domains. The appellate court ruling required the condemning authority—a water resource board—to pay just compensation to thousands of property owners in order to conduct invasive preliminary testing regarding the viability of a tunnel to transport fresh water from Northern California to the arid South. The case, entitled Property Reserve, Inc. v. Department of Water Resources, (Cal. App. JCCP No 4594, March 13, 2014), raises important constitutional property rights questions.

Pursuant to a statutory procedure, condemning authorities around the United States are routinely authorized to enter private properties to conduct pre-condemnation due diligence investigation. The entry can consist of visual inspections by real estate appraisers and surveyors, but may also in some states include more physically invasive testing. In the Property Reserve case, the government sought entry to conduct geologic studies such as borings and drillings which would leave cement “plugs” in bored holes up to depths of 200 feet. It also sought to conduct environmental studies by permitting personnel to enter the properties in question for weeks at a time over the course of a year.

A trial court granted the State preliminary entry for environmental testing on set terms, but denied preliminary entry for geological testing regarding the permanent physical occupation of private property, (i.e., a taking of private property which could only be accomplished by commencement of a condemnation action. The California Supreme Court has limited its review to determine if either the environmental testing or the geologic testing, or both, constitute a taking, for which just compensation is required, and also to determine whether California legislation provides a government agency with the right to use its eminent domain powers for this investigatory purpose.

As noted above, it is common for states to legislatively authorize government agencies with the power of eminent domain to “preliminarily enter” properties it may seek to condemn, in order to assist those agencies in determining...
whether future projects are viable and to estimate property acquisition costs. For instance, the New Jersey statute which applies to preliminary entry allows a potential condemnor to “enter upon property to make photographs, studies, surveys, examinations, tests, soundings, borings, samplings or appraisals or to engage in similar activities reasonably related to acquisition….” N.J.S.A. 20:3-16. The agency in New Jersey must, however, restore the property to its original condition if eminent domain is not used to acquire the property within two years of entry; otherwise it is required to pay damages to the property owner.

To determine whether preliminary entry proceedings go too far, courts will oft en conduct a balancing test by considering: 1) the degree to which the invasions are intended; 2) the character of the invasions; 3) the amount of time the invasions will last; and 4) the economic impact of the invasion. That test was employed by the California court in the Property Reserve case, and led the appellate court to conclude that the factors weighed in favor of a “temporary taking” equivalent to a temporary easement.

In keeping with the criteria above, a New York appellate court followed suit in late July 2014, when it held that the pre-condemnation inspection rights did not give the condemning authority’s representatives the right to enter and inspect the interior of a property, as that type of intrusion would violate the property owners’ Fourth Amendment rights. Jacobowitz v. Bd. of Assessors of Tp. of Cornwall, 2014 NY Slip Op 05544 (N.Y. App. 2014).

Now that the California Supreme Court has agreed to hear this case, and New York has chimed in, property rights advocates and condemning authorities around the country will be watching. While the government is certain to argue that it needs to have this tool available to conduct due diligence, whether agencies will be permitted to do much more than look at a property is likely to be addressed in detail in Property Reserve, and could lead to reactive legislation and/or case decisions in other states in the future.

Federal Water Reform Act Spurs Development

BY CHARLES NOEL SCHILKE, JD, AM, CRE, FRICS

On June 10, President Obama signed the Water Resources Reform and Development Act (WRRDA) into law. The $12.3 billion WRRDA (U.S. Public Law 113-121) provides broad authorization for U.S. Army Corps of Engineers water infrastructure projects. The act makes funds available for a variety of water projects that facilitate real estate development and enable the water infrastructure of existing communities to function more efficiently.

WRRDA authorizes a Water Infrastructure Finance and Innovation Authority (WIFIA), which provides loans for water projects separate from the long-standing state revolving fund (SRF) program. WIFIA is modeled on the popular Transportation Infrastructure Finance and Innovation Authority.

WIFIA loans will enable municipalities to execute the “repair, rehabilitation, or replacement” of a community water system or treatment works, construct desalination infrastructure, and enhance the energy efficiency of a water system. WIFIA may also fund any project eligible for the SRF program. The program will reduce the

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Charles Noel Schilke, JD, AM, CRE, FRICS, is director of the Edward St. John Real Estate Program and senior lecturer at Johns Hopkins Carey Business School in Washington, D.C. and Baltimore. At Hopkins, he teaches courses in Real Estate Development, Real Estate Transactional Law, Real Estate Environmental and Land Use Law, Business Law, Financial Institutions, Economics for Decision Making, The Firm and the Macroeconomy, and Financial Crisis and Contagion. Schilke has created commercial mortgage-backed securities (CMBS) on Wall Street, performed the real estate legal due diligence for the Exxon-Mobil merger, and financially restructured the real estate holdings of The American National Red Cross. He has developed major office buildings, large blood processing facilities, hotels, and mixed-use projects. He also frequently consults as an expert witness in real estate cases. Schilke earned a bachelor of arts degree from the University of Chicago, a master of arts degree from Harvard University, and a juris doctor degree from Cornell Law School. He is currently completing his doctoral degree at Harvard University, where he is writing a detailed financial analysis of the development of CMBS as his dissertation.