

When the Project Matters



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Precision can affect compensation.

EMINENT DOMAIN PRESUPPOSES that the government desires to acquire a property interest for a public project. The public project can be a road or a school or something far more exotic (think acquisition of an NFL team, as in *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982), or acquisition for an integrated plan for economic development, as in *Kelo v. City of New London*, 545 U.S. 469, 472 (2005).

But what happens when “the project” is vague or uncertain? Can the property owner defeat the condemnation? How can the owner show severance damages if the scope of the project isn’t clear? And how will the concept of “project impacts” be applied when the exact nature of “the project” is unknown?

REQUIREMENT FOR STATEMENT OF THE PROJECT

• In most states, before an eminent domain action may be filed, an ordinance or resolution regarding the necessity for the taking must be adopted. These statutory procedures typically require a statement of the project or public purpose for which the property is to be acquired. *See, e.g.*, Cal. Civ. Proc. Code §1245.230 (“the proposed project”) Col. Rev. Stat. §38-1-102 (“the purpose for which said property is sought to be taken”); Fla. Stat. Ann. §73.021 (“the public use or purpose for which

the property is to be acquired”); Mich. Comp Laws §213.55 (“a statement of purpose for which the property is being acquired”); N.J. Stat. §40:56-9 (“the location and character of the improvement proposed to be made”).

Such requirements are more than mere procedural pablum. Eminent domain has been described as the sovereign’s “most awesome grant of power.” *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 156 (Cal. Ct. App. 1985), *cert. denied*, 478 U.S. 1007 (1986). As another court put it: “Eminent domain is an intrusive power, and the potential for its abuse is boundless.” *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 710 N.E. 2d 896, 904 (Ill. App. 1999), *aff’d*, 768 N.E. 1 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002). The cases are frequently fraught with emotion, as property owners are told they must vacate their land and get out of the way in the name of municipal progress. As such, the project description has a moral, as well as a procedural, imperative. If the government is to take someone’s land by the awesome power of eminent domain, the landowner is surely entitled to know why.

Why Does The Project Matter?

The precise project that the public entity intends to construct is important for several reasons:

- First, the landowner may be able to assert an objection to the right to take if the project is not adequately specified;
- Second, the landowner needs a thorough understanding of the project in order to obtain a proper appraisal—at least when the take is anything other than a full take. This is usually a severance damages issues, but is also relevant to the part taken when, for example, an easement is being taken and is valued by the difference in fair market value with and without the easement;

- Third, the project is relevant to the issue of whether evidence is properly rejected or limited under the “project impact” rule.

Right To Take Objections Based on the Description of the Project

The various statutory requirements for a statement of the project or purpose for which the property is being acquired may provide a basis to challenge the right to take where the government’s statement is deemed inadequate. Vague or incomplete descriptions of the project may be used to attack the condemnation.

Many of the cases find their root in the United States Supreme Court’s decision in *Cincinnati v. Vester*, 281 U.S. 439 (1930). In *Vester*, landowners challenged the condemnation of what the city had determined to be an “excess condemnation” as a violation of due process. The city was acquiring a 25-foot strip of land for street widening. But it also resolved to take lands outside of the 25-foot strip, denominated as “excess,” to be held and possibly resold at some future time. The city’s resolution stated that the additional acquisition was “in furtherance of” the street widening and “necessary for the complete enjoyment and preservation” of the project. The landowners alleged that the city wanted to secure for itself the incremental increase in the value of the properties after the street widening was completed, as a means of partially recouping the cost of the project.

The district court enjoined the proceedings, the Sixth Circuit affirmed, and so did the Supreme Court. The district court held that using the increased value of adjacent properties to pay for the project was improper; and the city had made no showing of what it intended to do with the supposedly “excess” parcels. The district court rejected the city’s argument that it simply hadn’t yet decided what public use it would make of the properties; if the city were allowed to justify an excess condemnation merely on the “bare recital” in its resolution—

ithout a showing of any public project for which the additional land would be used — there would be no effective limit on the concept of “excess condemnation.”

Following *Vester*, some cases have invalidated the taking based on the inadequacy of the project description. In *In the Matter of Flatbush Ave.*, 304 N.Y.S.2d 552 (N.Y. Sup. Ct. 1969), the city sought to take property to widen two streets. The city charter required that the notice of condemnation state the purpose for which the lands were being condemned. The notice included, in addition to land to be used for the actual street widening, excess land totaling some 50,000 square feet to be taken “in connection therewith.” The court held that the large size of the additional land could not be justified as a remnant parcel, and the vague description of the project in the notice of condemnation was insufficient under *Vester*.

The particular statutory power invoked by the public agency as a justification for the taking may also be important. In *State Highway Commission v. Pacific Shore Land Co.*, 269 P.2d 512 (Or. 1954), the Oregon State Highway Commission adopted a resolution that it was necessary to take certain specified lands for rights of way to construct a highway. The commission also had separate statutory power to take property for drainage purposes or for trails. It sought to take two different parcels owned by Pacific Shore, but only one of the two parcels was within the right of way for the planned highway. At trial, a commission engineer testified that the second parcel was needed for drainage purposes. The trial court dismissed the complaint as to the second parcel but let it proceed as to the first. The Oregon Supreme Court affirmed. The court held that the statutes governing condemnation must be strictly construed. The declaration in the resolution as to the *purpose* of the taking is equally important as is the declaration of *necessity*. Because the resolution stated that the property was being acquired “for right of way purposes,” but the project maps

showed otherwise as to the second parcel, the Commission could not proceed based on the resolution it had adopted. The Commission was required to state in its resolution the exact purpose for which the property was being taken.

The requirement that the project be stated cannot be sidestepped. In *Florida East Coast Railway v. City of Miami*, 346 So. 2d 621 (Fl. Dist. Ct. App 1977), the city adopted a resolution authorizing the condemnation of 33 acres of land owned by the Railway. The adopted resolution merely stated that the land was to be taken “for public purposes,” without describing the particular project envisioned. The resolution also failed to legally describe the lands to be taken. The court ruled that the resolution was “grossly inadequate” and the trial court therefore lacked jurisdiction to entertain the proceeding.

On the other hand, numerous cases have rejected challenges to the right to take that were based on perceived inadequacies in the project description. For example, in *Wright v. Dade County*, 216 So. 2d 494 (Fl. Dist. Ct. App. 1968), *cert. denied*, 396 U.S. 1008 (1970), the resolution directing the condemnation stated that the land was to be acquired “for hospital purposes.” The owner challenged the right to take, arguing that no plans for construction had been prepared and the exact use to which the land was to be put was not sufficiently stated. The trial court rejected the challenge and the court of appeal affirmed. Plans and specifications were not required before the county could properly determine the necessity for the taking, and the statement of the project was sufficient.

In *Walker v. Florida Gas Transmission Co.*, 491 So. 2d 1286 (Fl. Dist. Ct. App. 1986), the condemnor’s resolution sought to take easements over certain land for gas pipelines. The owner challenged the taking, but the trial court and the court of appeal rejected the challenge. Taking for construction of distribution systems for gas plants by private entities was statutorily permitted, and the resolution

adequately described the properties over which the easements were sought.

In *Catawba County v. Wyant*, 677 S.E. 2d 567 (N.C. App. 2009), the county sought to take easements for a sewer line that would pump leachate from its solid waste landfill to a wastewater treatment plant. The sewer line would also serve a limited number of private users, and the property owners contended that the county had only identified a private user before the condemnation was filed. The property owners therefore challenged the condemnation as lacking a public use, but this challenge was rejected. The pre-suit notice delivered to the property owners stated that the purpose of the condemnation was “for a sewer line, to be part of the county water system.” The court upheld this description of the project as adequate.

In *Town of Midland v. Morris*, 704 S.E. 2d 329 (N.C. App. 2011), the property owners contested Midland’s right to take property for a natural gas pipeline that would serve residents of a different county. The notice of condemnation stated that the pipeline was to serve only Midland and its home county, not a different county. The court upheld the adequacy of the project description because only the “fundamental purpose” of the acquisition needs to be stated, not “each and every intended use of the property.”

In *Coastal Industrial Water Authority v. Celanese Corp. of America*, 592 S.W.2d 597 (Tex. 1979), the condemnor sought to take a water line easement over land owned by Celanese. Although the water easement was described by metes and bounds in the condemnor’s statement of taking, it did not specify the particular rights of use that would be reserved to the landowner—for example, whether the landowner could build on the easement area, cross it, fence it, etc. The trial court upheld the objection and dismissed the condemnation and the court of civil appeals affirmed. The Texas Supreme Court reversed. It held that the adequacy of the statement of taking was to be determined by the same rules

that determine the validity of a deed. Here, because the condemnor’s statement adequately identified the particular property over which the easement was to be taken, it was sufficient to support condemnation of an unlimited pipeline easement. The condemnor would be permitted to construct and maintain the pipeline and do whatever is reasonably necessary to support it. While a condemnor may take more limited interests by specifying lesser interests in the statement of taking, it need not do so. When a limited easement is not specified in the statement of taking, the property interest condemned is, by default, an unlimited easement.

“Economic development” cases are in a class by themselves. Where the public entity desires to take property for purposes of economic development, sometimes it does not have a particular redevelopment project in mind but is only trying to “seed” redevelopment by acquiring property first and hoping to attract a redeveloper and a project later. This scenario raises the question as to whether the mere declaration of “redevelopment” is an adequate project description to sustain the condemnation.

In *Anaheim Redevelopment Agency v. Dusek*, 239 Cal. Rptr. 319 (Cal. Ct. App. 1987), the Agency adopted a resolution of necessity to acquire the Pickwick Hotel “for the elimination of blight and for redevelopment purposes.” But the agency had no particular project in mind as for what would replace the “blight” once it was eliminated. The trial court dismissed the complaint, based on inadequacies in the resolution, including the project description. The court of appeal reversed. It held that the “public use” of redevelopment had been established years earlier, when the redevelopment plan itself was adopted for the area that included the Pickwick Hotel, and the time to challenge the inclusion of the property in the redevelopment plan had long since passed. The Agency was permitted to implement the redevelopment plan by using its eminent domain power to acquire the property “until a specific proposal for the property is accepted.”