Condemnation, Zoning & Land Use Litigation

FROM THE SECTION OF LITIGATION CONDEMNATION, ZONING & LAND USE LITIGATION COMMITTEE

Winter 2011, Vol. 14 No. 1

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Recovering Business Goodwill in Condemnation Cases

By Anthony F. Della Pelle and Cory K. Kestner – February 16, 2011

A potential client walks into your office after learning that his business property will be taken by eminent domain. The business owner has worked long and hard to develop a successful business on the property and is now worried that the business's goodwill will be lost forever. You remember learning in law school that businesses are not generally entitled to recover for goodwill, but that recently a case came out that challenged that general premise. Additionally, you remember that eminent domain is based on equitable principles, and that a property owner must be placed in as good a position pecuniarily as he or she would have been if the property was not taken. You tell your client that you will investigate the situation to ensure that you provide the best possible guidance.

In denying recovery, courts have historically relied on the position that the property owner is being compensated for the real property actually taken and that the business can continue its operations at a new location. This general principle fails to address certain distinct situations that have been recognized in statutes and case law. Researching whether or not an exception can be used in your client's specific case can be reduced to several questions: 1) Does my jurisdiction have a statute addressing the recovery of business goodwill? 2) Does my state recognize an exception that would permit my client to recover for business goodwill? 3) Are my client's claims speculative, or can they be supported by evidence? The first two questions focus on the substantive issue presented, while the third question directly relates to the valuation process in every case whether controlled by statute or case law.

Statutes

The first step is to research whether or not your state has a statute covering the recovery of goodwill in condemnation actions. Several states have enacted "goodwill" statutes to define goodwill and the circumstances of its compensability in condemnation proceedings. Wyoming's statute is actually entitled "Loss of Goodwill" and provides that "the owner of a business conducted on the property taken, or on the remainder if there is a partial taking, shall be compensated for loss of goodwill." Wyoming's courts, however, have not provided any guidance on the statute's limits in any later cases. Colorado specifically provides for "moving expenses and actual direct losses of property including, for business concerns, goodwill and lost profits that are reasonably related to relocation of the business."

Florida will pay damages for loss of business goodwill under the rubric of business damages. Business damages are available under Florida statute 73.071(3)(b) when a business meets the following requirements: (1) The business holds a property interest in the land being acquired; (2)

the taking is only a partial taking, and no damages will be paid if the entire property is taken; (3) the business must have operated on the site for five or more years; and, (4) the damages result directly from the loss of property. Construction activities or other impacts associated with construction are not compensable. Affected businesses must submit a written settlement offer to Florida's Department of Transportation that includes an explanation of the nature, extent, and amount of monetary damages being claimed. The offer must be prepared by the business owner, a certified public accountant, or an expert familiar with the business. The business must also submit adequate business records to substantiate the claim. Florida will either review the claim and supporting records internally or hire an outside CPA or business-damage expert to review the claim. The ultimate amount of business damages to be paid will be negotiated with the owner or determined through condemnation proceedings.

If your state does not have a goodwill statute permitting recovery in condemnation actions, then it is time to ask question number two, whether there is a caselaw exception that can be applied to your client's situation.

Caselaw Exceptions

It is important to recognize the type of exception that will apply to your specific case because that will control the facts and arguments you will rely upon. Five exceptions have been identified in caselaw.

Temporary Takings

Temporary takings have been found to create compensable claims for business losses because the property owner does not have the ability to relocate like he or she would for a permanent taking. The U.S. Supreme Court, in the leading case *Kimball Laundry Co. v. United States*, faced this issue when the U.S. military occupied a laundry facility during World War II. They found this distinction is noteworthy because, unlike the usual fee taking in a condemnation case that allows a business to relocate the business operations to a new location (and presumably to receive relocation assistance payments therefore), the owner who is subjected to a temporary taking retains none of the going-concern value that it formerly possessed, and the taker fully occupies the owner's shoes for some temporary period of time. The major elements identified by the court are a temporary interruption based on government occupation and an inability to relocate operations during the interruption. The courts upholding this exception have not been concerned with whether or not the occupied property is used by the government, but rather that the owner has been denied use of the property. Finally, the displaced owner will need to prove the amount of loss suffered because of the taking.

Unique Location

Another potential exception that is recognized by some states is that goodwill may be compensable when the location of a business is so unique that the business would be destroyed by moving to another location. Condemnees must argue that the business is successful because of a unique competitive advantage gained by the specific location, and not a general advantage of

being on a busy street. One example is a pharmacy located directly across the street from a hospital, and another is a concession operator at a racetrack with a contract to operate as the sole concession vendor. These unique location traits represent specific benefits gained by the individual business owner versus the general benefit of being located on a busy commercial street that could be replicated and thus rejected by the courts as a reason to recover losses.

Licenses

The "unique location" logic applied in the "failure to relocate" cases has also been applied to award goodwill for the loss of a license. Although courts generally hold that a license is not compensable property, they have found licenses constitute a definite economic asset of monetary value for its owner even when only considered a mere privilege as far as the relation between the government and the licensee is concerned. The ability to move the license to another location becomes an important consideration in cases dealing with liquor or other specific-use licenses that may have restrictions on the zones where they can be issued. License-taking courts often rely on the fact that a condemnee cannot move the goodwill to another location and ignore whether the government chooses to take advantage of the business use. Instead, the courts rely on the interference with the business owner's ability to operate the business by removing the licensee's use of the license to establish a claim to recover for calculable losses. The proofs to be established under this exception are not that the location itself was unique, but rather that the location is important because no other location existed to where the license could be relocated.

Inverse Condemnation

Some state courts have allowed the recovery of goodwill in inverse-condemnation actions because the taking was categorized as temporary and interfered with the operation of the business or lease. Typically, the complaining party in an inverse-condemnation action must establish both government interference with the property and that the interference caused a taking that denied the business owner use and enjoyment of the business. Additionally, recovery under this exception is not speculative because the limited period of interference restricts in the cases it has permitted the parties to establish an actual damage amount. The business owner must then first show that the government interference occurred, and afterward present proofs establishing the specific financial loss suffered by the owner during the taking period.

Franchisee

Franchisees have not exactly been recognized as an exception to recover because no case has been found that actually permitted a franchisee to recover goodwill as part of a condemnation action. Instead, each of the cases has denied a franchisee the right to be compensated for goodwill because the franchise agreement permitted the franchisor to terminate the agreement upon the commencement of a condemnation action. However, the D.C. Court of Appeals in *Eyob Mamo v. District of Columbia* did not preclude admitting goodwill testimony in future cases where the facts would support admitting such testimony. Thus, if a franchisee were contractually permitted to seek damages in a condemnation action, then a valuation argument may be viable.

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Conclusion

A business owner's attorney should be prepared to educate the court on the nuances of the goodwill exceptions applicable to the business owner's case. Business owners claiming the loss of business goodwill bear the burden of establishing a legal and factual foundation for their claim, but that foundation can be well supported by existing caselaw. The judicially recognized exceptions, especially *Kimball*, which is the law of the land, and the established caselaw, provide abundant legal and factual bases for developing a claim.

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Inverse Condemnation: An Update from Around the United States

By Jennifer Franks – February 16, 2011

In recent years, inverse-condemnation law has continued to develop in major decisions across the country. In a unanimous decision, the U.S. Supreme Court upheld the Florida Supreme Court's *Stop the Beach* decision, agreeing that the beach-restoration program was not an unconstitutional taking. A Ninth Circuit panel expanded compensable regulatory takings in *Guggenheim*, but the court will rehear the case en banc. The Florida state court struggled to define exaction in *St. Johns River Water,* a case now awaiting review by the Florida Supreme Court.

Stop the Beach Renourishment

In *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, the Supreme Court unanimously affirmed that Florida's Beach and Shore Preservation Act is not an unconstitutional taking. This decision was highly anticipated, as it was the first takings case for Chief Justice Roberts and Justices Alito and Sotomayor. The Court split on the nuances of the judicial-taking question, with Justice Scalia, Chief Justice Roberts, Justice Thomas, and Justice Alito finding that while this was not a judicial taking, such a taking is possible. The remaining justices declined to determine whether a judicial decision can violate the Takings Clause. Justices Kennedy and Sotomayor concurred that this case did not require that analysis and, if it did, the Due Process Clause would properly limit judicial power. Justices Breyer and Ginsberg, exercising judicial restraint, said that this difficult constitutional question did not need to be answered to adjudicate this case. Justice Stevens did not participate in the decision because he is retiring.

In *Stop the Beach*, Florida landowners claimed the state's beach-restoration program constituted a regulatory taking. Florida's Beach and Shore Preservation Act authorizes the state to restore beaches eroded by hurricanes and tropical storms. This beach restoration creates new land that the state deems public; the private landowners argue this effectively deprives them of property rights without just compensation. The lower court found that the statute violated Florida's constitution, but the state supreme court disagreed. Specifically, the Florida Supreme Court certified the question of whether "on its face, does the Beach and Shore Preservation Act unconstitutionally deprive landowners of littoral rights without just compensation?"

The Florida Supreme Court found that, within the narrow context of restoring critically eroded beaches under this statute, there was no unconstitutional taking. The state has a constitutional duty to protect Florida's beaches and, on its face, the statute reasonably balances the public and private interests in the shore. Moreover, the Florida Court opined that the private landowners derive benefits under the statute: Their land is protected from further erosion, their littoral rights to use and view are preserved, as is their littoral right to access. On appeal to the U.S. Supreme Court, the property owners argued that the Florida Supreme Court's decision constituted a judicial taking, in violation of the Fifth and Fourteenth amendments.

The U.S. Supreme Court unanimously affirmed the Florida Supreme Court's holding that there was no unconstitutional taking. Justice Scalia, writing on behalf of the Court, noted that the Takings Clause "only protects property rights as they are established under state law, not as they might have been established or ought to have been established." Florida had the right to fill in its own seabed and the sudden exposure of land was properly treated as an avulsion for the purposes of ownership—meaning the state owned the land and the property owners' accretion and littoral rights were subordinate. Florida's decision did not "contravene the established rights of the petitioner's Members" and therefore was not an unconstitutional taking.

The Ninth Circuit Expands Regulatory-Takings Jurisprudence in *Guggenheim*

In *Guggenheim v. City of Goleta*, the Ninth Circuit issued a lengthy split decision holding that the city's rent control ordinance (RCO) is a *Penn Central* regulatory taking because it transfers 90 percent of mobile park real property value from the park owners to the mobile-home tenants. The court's expansive discussion of compensable regulatory takings, as well as standing and ripeness, seemingly anticipates future appellate review. Indeed, the city petitioned the Ninth Circuit for a rehearing en banc, and the court granted review on March 12, 2010, ordering that the "three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit."

Before addressing the plaintiff's takings claim, the Ninth Circuit discussed extensively whether the case was justiciable, focusing on standing and ripeness concerns. *Guggenheim* had an extensive procedural history, having been litigated in three trial courts, but the court was especially concerned about ripeness, asking the parties to discuss it at oral argument. The court focused its ripeness analysis on the U.S. Supreme Court's *Williamson* requirements, that a

"takings claim is not ripe until the property owner has attempted to obtain just compensation for the loss of his or her property through the procedures provided by the state for obtaining such compensation and been denied." Applying *Williamson* is problematic, though, because it "requires plaintiffs to go first to state court, where they are likely to generate a ruling on the merits of their taking claim from the state court that in turn will have preclusive effect should they opt to return to federal court."

The Supreme Court has acknowledged that, as a practical effect, *Williamson* closes the federal courthouse doors to Fifth Amendment claimants. However, in his *San Remo Hotel, L.P. v. City and County of San Francisco* concurrence, Chief Justice Rehnquist, joined by three other justices, "wrote specifically . . . to explain why he believed *Williamson* may have been wrongly decided." The Ninth Circuit opines at length on *Williamson* and its *Guggenheim* application in an apparent effort to invite the Court to reconsider *Williamson*. The court concluded *Guggenheim* was ripe under *Williamson*.

After determining justiciability, the court reversed the district court's finding that there was no taking and remanded for the district court to determine compensation due. The *Guggenheim* owners could only appeal the regulatory taking facially under *Penn Central*, as there was no physical invasion or deprivation of all economic benefit and the plaintiffs failed to bring an as-applied challenge as a corollary claim. While facial *Penn Central* claims are difficult to win, such claims were determined to be viable; here, the court ultimately concluded the mere enactment of the ordinance constituted a taking. The court found that mobile-park real-property owners and mobile-home owners have distinct, divergent property interests, and with this divided ownership, rent-control ordinances may effectuate wealth transfer requiring compensation.

The *Guggenheim* plaintiffs owned mobile-park real property, which they leased to mobile-home owners. Despite the name, mobile homes are not so mobile, and owners tend to sell their homes—and the associated leases—rather than move them. To protect mobile-home owners from park owners charging exorbitant rates, the County of Santa Barbara, California, enacted the RCO in 1979, before the subject property was incorporated by the city. The city incorporated on February 1, 2002, at which time it adopted by reference the entire county code, including the RCO.

The RCO limited the park owners from increasing rent in step with surrounding properties. Over time, this resulted in significantly below-market-value rent, which in itself became a distinct property interest. Thus, "the right to occupy a mobile home site at a below-market rent acquires its own intrinsic value distinct from the value of the land." Ultimately, this created a "transfer premium," shifting wealth from the park owners to the mobile-home owners. When the RCO became effective, mobile-home owners could capitalize the value of lower future rent into their homes' selling price. Rent was not actually controlled because the new owner paid more for

housing in the form of this transfer premium. The mobile-home owners realized a windfall in the transfer premium, while the park owners lost property value via the regulation.

Courts categorize and analyze regulatory takings based on whether the government has physically invaded the property, enacted a regulation depriving the owner of all economic benefit of use, or where the *Penn Central* factors apply. *Penn Central* does not articulate a set rule, but rather is an ad hoc analysis. As such, courts consider the economic impact of the regulation on the owner, the extent the regulation interferes with investment-backed expectations, and the nature of the governmental action.

The majority concluded that *Penn Central* would apply and that the RCO was a regulatory taking because it "caused substantial hardship to the Park Owners;" the "mere fact that the Park Owners bought the Park in its regulated state does not mean that the City has not taken property by regulation"; and "the RCO looks more like a classic taking than a mere shifting of benefits and burdens." Moreover, the RCO "singles out mobile home park owners and forces them to bear a burden of providing affordable housing in the City that should be born by the taxpayers as a whole."

In his dissent, Judge Kleinfeld disagreed with the majority's conclusion that the RCO was a regulatory taking because of the RCO's enactment history, specifically the county's RCO 1979 enactment, with 1987 amendments. The plaintiffs acquired the property in 1997, while the county's RCO was effective, and thus the property purchase price reflected the transfer premium passing to the mobile-home owners. Moreover, the statute of limitations had run on the original owners' takings claims. While the plaintiffs avoided the statute of limitations, due to the statutory incorporation procedure the city followed, the city's RCO was not a new regulation. Rather, "[s]ince the *Guggenheims* benefitted from a lower purchase price reflecting the burden of the rent control ordinance when they bought the trailer park, fairness does not require that they be compensated." The RCO does create unfairness by distorting the rental market; the average price of a trailer in the park increased 88 percent above its sale price. Judge Kleinfeld concluded that the RCO did not harm the *Guggenheim* plaintiffs and that they had no claim to just compensation.

Subsequent federal cases cite *Guggenheim*; however, federal courts have yet to apply it, instead choosing to distinguish these cases. In *Mann v. Calumet City*, the owners' claims were based on due process and not the Takings Clause. The intervenor-defendant in *HRPT Props. Trust v. Lingle* cited *Guggenheim*, but not as persuasive authority. In *Thunderbird Hotels, LLC v. City of Portland,* the owners argued that under *Guggenheim*, their case was ripe. The court disagreed and distinguished on the facts.

The Ninth Circuit Further Facilitates Landowner Access to Federal Courts

In *Los Altos El Granada Investors v. City of Capitola*, the Ninth Circuit found that the plaintiffs had properly reserved their right to assert federal claims in federal court, and the state court's decision striking that original reservation was irrelevant and not preclusive. *Los Altos*, like *Guggenheim*, has a complicated procedural history due to "the sisyphean task that the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* has created for plaintiffs who seek to have their federal taking claims adjudicated in federal court." Because of the plaintiffs' extensive litigation to exhaust the state-court claims—to ripen the federal claims—the district court found the plaintiffs had created a bar to any federal claims in federal court. The Ninth Circuit disagreed, reversing the district court's decision and remanding.

The *Los Altos* plaintiffs claimed a rent-control ordinance transferred wealth from mobile-home park owners to mobile-home tenants, creating an unconstitutional taking. The plaintiffs filed federal claims in district court that were dismissed for lack of ripeness, leading the plaintiffs to attempt to ripen the case in state court. As part of that action, the plaintiffs asserted an *England* reservation, to "reserve for independent adjudication in the federal courts . . . all federal questions." The state court, without any explanation, granted the city's motion to strike this reservation as irrelevant. The district court then held that the federal-court claims were barred as precluded.

The Ninth Circuit found the reservation was valid because the plaintiffs were forced to file in state court, to ripen their case. While the federal courts do give full faith and credit to the state court's decision to strike the reservation from the record, this does not bar the plaintiffs from federal court. The reservation does not have to be explicitly on the record and the federal forum remains open when plaintiffs are forced to first litigate in state court. The Ninth Circuit's decisions in *Guggenheim* and *Los Altos* seemingly increased landowners' access to federal courts, circumventing the problematic *Williamson* decision.

Landowners May Claim Both Breach of Contract and Regulatory Takings

The Federal Circuit found that the plaintiff water districts' claim alleging the government had breached its contract to release water did not preclude the water districts from alleging an alternative takings claim. The district court erred in dismissing the takings claim, and the plaintiffs were free to pursue that claim during the years the government was not liable under contract law.

In *Stockton East Water District v. United States*, the plaintiffs were water agencies organized under California law that provided water to municipal, industrial, and agricultural users. The plaintiffs entered binding contracts for water with the United States. They claimed the United States breached these contracts by failing to provide the agreed-upon quantities and that Congress's Central Valley Project Improvement Act (CVPIA), which expressly required water release for fish, wildlife, and habitat restoration needs, impaired vested contractual rights in violation of the Fifth Amendments takings clause.

The Federal Circuit agreed that the trial court properly deferred the takings claim, in favor of first deciding the contract issue. Courts properly decide cases on non-constitutional grounds when possible and, while plaintiffs may allege alternative claims, recovery is permitted for only a single harm. Pleading a cause of action under a breach-of-contract theory does not preclude an alternative takings claim, and therefore the trial court erred in dismissing this claim.

Florida Continues to Define "Exaction" under the *Nollan* and *Dolan* Standards

In a split decision, the Florida court of appeals affirmed that, under the Supreme Court's *Nollan* and *Dolan* standards, it was an unconstitutional taking to deny a landowner's development permit because he refused to provide offsite wetland mitigation. The offsite mitigation requirement was an unconstitutional taking because it "had no essential nexus to the development restrictions already in place on the Koontz property and was not roughly proportional to the relief requested by Mr. Koontz." In applying *Dolan*, the majority was not persuaded by the Water District's argument that the trial court lacked jurisdiction because Koontz's claim was really a challenge on the merits of the permit denial, and properly adjudicated in an administrative proceeding. Similarly, the majority was not convinced by the district's argument that there was not a taking because Koontz was required to expend money to improve the district's land and was not required to physically dedicate land. However, both the concurring and dissenting judges opined that what constitutes an exaction and triggers the *Nollan/Dolan* analysis is far from settled. The final outcome will remain unresolved, until the Florida Supreme Court decides the following question:

Where a landowner concedes that permit denial did not deprive him of all or substantially all economically viable use of the property, does Article X, Section 6(a) of the Florida Constitution recognize an exaction taking under the holdings of *Nollan* and *Dolan* where, instead of a compelled dedication of real property to public use, the exaction is a condition for permit approval that the circuit court finds unreasonable?

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Partial Takings and the Contingent "Cost-to-Cure"

By Michael J. McCalley – February 16, 2011

While state budgets shrink, it is no surprise that its agencies look for ways to save a dollar. One way that condemnors may attempt to reduce damages in a partial-condemnation case is to present the possibility of a "cure." The concept of a cure or "cost-to-cure" in condemnation matters has its roots, at least partially, in the theory of mitigation of damages. If there are

mitigating measures that can be taken to reduce the damages caused by the taking, the condemnor is generally permitted to present evidence of such measures for consideration in determining the just compensation to be paid to the property owner.

Unfortunately, the condemnor's idea of what will cure the damages is rarely one that would be acceptable to a property owner. This can be due to the fact that the condemnor may have no experience running the property and therefore does not appropriately assess the impact a taking may have on the ability of the owner to continue its existing use. Furthermore, it has become increasingly common to see a cure presented that requires local land-use approvals. A cure that is contingent upon permits or approvals from outside agencies may never come to fruition, thereby jeopardizing the constitutionally required "just compensation." Given the multitude of problems often associated with a cost-to-cure and the fact that the risk associated with such cures is most frequently placed fully on the shoulders of the property owner, courts should exercise a heightened level of scrutiny before permitting such evidence to be heard by a jury.

The concept of a cure is not new, but is seemingly finding its way into more and more partial-taking cases. Again, a cost-to-cure is the method through which the doctrine of mitigation of damages has been applied to condemnation actions. Most cases that have considered mitigation of damages in a partial-taking condemnation action have done so where the cost to cure is based on actions that can be taken by the property owner relating directly to the remaining property; that is, the condemning agency is the sponsor of evidence relating to the cure. The theory authorizes the introduction of evidence that a condemnee can reduce its damages in a partial condemnation by taking corrective measures to improve the remainder property, even though such action need not actually be taken. The cost of implementing the corrective measures is commonly referred to as "cost-to-cure" damages.

Evidence of a cost-to-cure will only be permitted where the cost is less than or equal to the diminution in fair market value for the remainder if the condition caused by the taking is not cured. In this sense, the use of a cure is an alternative measure of damages in partial-condemnation cases. It also must be recognized that a proposed cure may not completely cure the damages caused by the taking. In such a case, the property owner is not made whole unless he or she receives the cost of the partial cure *plus* damages.

The use of a cure is simple enough when it involves simple measures, such as restriping a parking lot to regain spots lost as a result of a taking or perhaps relocating an identification sign on the remaining property. Quite often, however, a proposed cure to a partial taking is not as simple as grabbing a roller and a bucket of paint. Given the ever-broadening scope of local land-use regulations, cures proposed in response to a taking that involves either reconfiguration of property, reconstruction of improvements, or changes to site features, often require some form of local-agency approval. Accordingly, where the proposed cure is not permissible as of right under local land-use controls, a host of issues can arise. In these situations, where the cure is contingent

upon obtaining permits or approvals from outside agencies, one must analyze whether it is appropriate for the court to allow evidence of such a cure to be presented.

The primary issue with a proposed cure in condemnation is the fact that, unless the cure has been accomplished prior to trial, it always includes some degree of speculation. A condemnor proposing a cure that is contingent upon a discretionary approval is speculating that (a) the property owner or a hypothetical purchaser could obtain all approvals necessary to implement the cure; (b) the cure can be implemented for a fixed price; (c) the cure can be achieved within a reasonable time period; and (d) the cure will in fact cure the damages, or at least a portion thereof, created by the taking. Simply stated, any cure that requires a property owner to obtain an approval from a local board or agency to implement the cure can be fraught with issues.

Obtaining a commercial land-use approval is rarely ever a slam dunk. Unless the use is specifically permitted and the property conforms with all bulk requirements, the reviewing authority will have a significant deal of discretion in reviewing any land-development application. Moreover, even if the proposed use or structure is permitted under the existing zoning at the moment, local land-use boards are often given the ability to amend their land-use ordinances even in the face of a pending application. If a variance or an exception from the controlling ordinance is required to obtain the approval, the party seeking relief will usually have a substantial burden to prove that such relief is legally appropriate. Moreover, local boards usually have the authority to attach conditions to such relief, which could impact the value of a property. As a result, a local board can impose any one of a number of obstacles to a property owner's ability to obtain a land-use approval. Accordingly, whenever a cure requiring local agency approval is required, one should never assume the approvals will be granted.

Furthermore, it is rarely the case that a cure will implicate only one approval from one agency, due to increasingly extensive planning and zoning regulations, which create jurisdiction over development with various local, county, and state agencies. Thus, where a proposed cure has multiple layers of approvals, each required approval adds an additional layer of risk. The layers of possibilities and probabilities associated with whether a property owner or prospective purchaser could obtain each of the myriad approvals needed to secure the cure may, without any further analysis, demonstrate that such a cure is too speculative based on the law of probabilities. That is, while the likelihood of obtaining any one of these approvals on its own may be reasonably probable, the likelihood of obtaining *all* these approvals in the near future relative to the date of taking is, statistically speaking, far less likely.

In addition to the degree of speculation that attaches itself to each approval needed to achieve a proposed cure, obtaining land-use approvals can require significant investment costs of filing development applications; depositing escrows; hiring professionals to prepare site plans, surveys, and environmental impact statements; and in attending public hearings. While a proposed cure should estimate each of these costs, the time and cost is largely dependent upon the makeup of the local board and their personal schedules and feelings toward an application. In the real world,

the costs associated with obtaining a local approval for a commercial use can quickly mount up. Too often, the condemning agency's estimate of the cost to secure such approvals when presenting a cure reflects a best-case scenario.

Another consideration is whether a condemnor's cost-to-cure hypothetical is reflected in open-market transactions. There is no question that the taking of private property for public use requires the payment of just compensation. Typically, the measure of just compensation is described as the fair market value as of the date of taking, which has been defined as "the value which would be assigned to the property by knowledgeable parties freely negotiating for its sale under normal market conditions based on all surrounding circumstances at the time of the taking." Accordingly, proofs in a condemnation must begin with the value of the land as of the date of the taking based upon the condition of the land at that time, and the uses to which the land is adapted and restricted. Thus, local planning and zoning restrictions in effect as of the date of the taking are material and relevant to the issue of usability and have a significant bearing on the commercial value of the land.

The impact of a prospective cure on the fair market value of a property on the date of taking can be difficult to gauge because rarely, if ever, do real-life transactions involve such a scenario. In the real market, few if any buyers would buy a damaged property on the prospect that the damages could be cured, without the purchase being subject to obtaining the necessary approvals. Market purchasers will not bear such risk. Rather, such purchasers are typically subject to obtaining approvals, thereby giving the purchaser the ability to walk away from the deal if and when the necessary permits or approvals are denied. In a condemnation situation, a property owner does not have such a luxury. Thus, when a condemning agency presents a cure in a condemnation matter, it is asking the court to ignore normal market conditions. As a result, a cure that is contingent upon outside-agency approvals places the risk that such approvals will be denied on the property owner and converts just compensation to a mere percentage chance.

Given the fact that cures often, if not always, place the lion's share of risk on a property owner, those seeking to present evidence of a cure should be held to a higher standard of proof. Not only should a condemnor have to demonstrate that the cure was reasonably probable on the date of taking, but courts should also require the condemnor to present evidence that the cure has a reasonable certainty of achievement.

In most cases where the reasonable probability of relief from a land-use ordinance has been examined, the issue has concerned the impact that such a reasonable probability of a zone change, if it existed, would have had on the value of the property in the situation before the taking. Initially, the trial judge, in his or her role as "gatekeeper" of the evidence, must determine if the evidence is sufficient to warrant a determination that such a change is reasonably probable. A trial court must screen the proffered evidence to ensure that the jury is not presented with speculative or remote possibilities that no reasonable prospective buyer would consider. Only after this threshold is met will the court permit the jury to consider whether the proposed zone

change or variance was such a possibility that a hypothetical buyer on the date of taking would take it into consideration in fixing the value of the property. Thus, it is generally agreed that if, as of the date of taking, there is a reasonable probability of a change in the zoning ordinance in the near future, the influence of that circumstance upon the market value as of that date may be shown. The law will ordinarily recognize the truth if the parties to a voluntary transaction would, as of the date of taking, give recognition to the probability of a zoning amendment in agreeing upon the value.

Much like a property owner seeking to present evidence of a potential zone change or variance in the before-taking situation, a condemning agency that proposes a cure has the burden of establishing that the proposed cure is feasible or reasonably likely, and that it will in fact cure the damages caused by the taking. The preliminary burden of demonstrating that the cure was more than just a possibility should not be easy for a condemning agency to overcome. Quite often, as discussed above, when it comes to local land-use approvals, there are no guarantees due to the myriad issues they present. Accordingly, when a condemnor is presenting evidence of a cure that requires multiple variances, the court, in performing its gate-keeping function, should employ a higher standard before permitting the evidence to be heard by a jury.

To allow a condemnor to present evidence of a cure with only a chance of coming to fruition makes just compensation to the property owner contingent upon the granting of the variances. This is especially significant in the majority of jurisdictions that hold that a condemnee has only one opportunity to seek just compensation for the damages to the remainder, present and prospective, which may be known or reasonably be expected to result from the taking. To date, only a few jurisdictions have addressed the issue of whether a condemning agency should be permitted to present evidence of cost-to-cure severance damages premised on speculation that variances would be granted to permit the cure.

Allowing evidence of a cure contingent upon an outside agency approval, permit, and/or variance places all the risk on the condemnee—the variances must be granted or the cure cannot legally be accomplished. In turn, if the variance is denied, "full compensation" to the condemnee is denied. Thus, while costs-to-cure may be admissible for the purpose of establishing just compensation, they do not create individual rights to the cure. Consequently, to proceed with a claim that the damages can be cured, a condemning agency should be required to demonstrate that the cure is reasonably certain.

While the cost- to-cure may be relevant to the issue of damages in a condemnation matter, the trier of fact should not be permitted to assess the cure without reference to the total estimated reduction in fair market value of the remaining property without the cure. While costs-to-cure may be admissible for the purpose of establishing just compensation, they do not create individual rights. Thus, costs-to-cure are only admissible on the issue of just compensation if they are tied to their effect upon fair market value and could reasonably be seen as reducing the damages caused by the taking.

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To present the full picture to a trier of fact, the cost-to-cure must be weighed against the damages it seeks to mitigate. To permit a condemning agency to present evidence of a cost-to-cure without fully explaining the damages it has caused only tells half the story and potentially could lead the jury to view the cure as an accomplished fact. Hence, condemnors should be required to testify as to the value of the property without the cure, because the cure is only a possibility, while some degree of damage is certain.

Most jurisdictions have not addressed the issue of whether an award of damages in a partial-taking case may be limited to a cost-to-cure when the proposed cure requires discretionary approvals or permits from a governmental agency. Accordingly, there are few decisions addressing what must be demonstrated to allow evidence of such a cure and who bears the burden of proof with respect thereto. Nevertheless, the constitutional mandate of "just compensation" is jeopardized if a property owner is obligated to seek a permit or an approval when such approval is discretionary. Given the implications and the risk associated with a contingent cost-to-cure, the burden of proof should fall squarely on the party proposing the cure, which is typically the condemnor. Additionally, the party proposing the cure should be required to demonstrate more than a reasonable probability of such a cure. Rather, the proponent should be required to present evidence that the cure is reasonably certain to be achieved.

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The Case for Recovery of Business Loss in the Taking of Real Property

By Christian Torgrimson and Angela Robinson – February 16, 2011

No single issue can complicate an otherwise routine condemnation case as quickly as a business-loss issue. When the site upon which a business depends is taken or damaged, it is not uncommon to see business-loss claims that are well in excess of the value of the real estate. With claims of this magnitude, business owners and their counsel must convince courts that a taking or damaging of real property can cause a bona fide loss to intangible aspects of the business, including goodwill and going-concern value; the intangible nature of a business should not preclude recovery because the loss can be properly quantified; and therefore such loss must be a part of the Fifth Amendment's mandate that "just compensation" be paid before private property is taken. Some state courts and legislatures have agreed, recognizing business loss as an element of just compensation in different forms, and offering the same possibility to practitioners seeking to change the law in other jurisdictions. However, recovery for business loss in condemnation cases still remains the exception to the rule.

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The General Rule—No Recovery for Business Loss

Despite the gradual recognition of business loss as part of just compensation, most courts remain reluctant to compensate property owners for business loss that cannot be precisely quantified. The traditional reason for denying recovery is that damage to business is *damnum absque injuria*, a harm without an injury, and thus not compensable. Other common lines of reasoning that courts articulate for denying business-loss recovery include:

- Business loss is too speculative to calculate to an acceptable degree of certainty.
- The condemnor has not taken the business from the owner, only the real property.
- The U.S. Constitution does not grant compensation for the taking of personal or intangible property.

Exceptions to the General Rule

As a result of the substantial hardship caused by the exclusion of business loss to business owners, some courts have chipped away at the general rule. The U.S. Supreme Court carved out two major, albeit narrow, exceptions in cases involving businesses taken for government operation and cases involving temporary takings. In 1893, the Supreme Court first addressed a governmental taking of a business for continued operation in *Monongahela Navigation Co. v. United States*. In *Monongahela*, a company had been granted a state charter to construct and operate locks on the Monongahela River, which the government condemned and continued to operate. The legislation authorizing the taking provided no award of compensation for the loss of the franchise to collect tolls. In holding that the Fifth Amendment required that the company be provided with the "full and perfect equivalent" of the appropriated property, the Supreme Court emphasized that the company was entitled to recover compensation for the loss of its franchise because it was an integral part of the property's value to the owner.

In 1949, the Supreme Court addressed the temporary taking of a business in the case of *Kimball Laundry Co. v. United States*, in which the government temporarily occupied and operated the Kimball Laundry plant to serve the members of the army. The market value of the laundry plant dropped considerably during this time. The district court awarded recovery for the physical takings related to the equipment, machinery, and the like, but wholly denied recovery for the diminution in the value of the business. The Supreme Court held that the intangible nature of a business, in and of itself, does not preclude compensation for its loss when a business is temporarily condemned. The temporary taking effectively eliminated Kimball's ability to profit from its customer list and customers' loyal patronage during the government's occupancy of the premises. In holding that the government had to compensate the Kimballs for the going-concern value of the lost business, the Supreme Court distinguished between a permanent taking of a fee simple to business property and a temporary taking of the same. In the former, the Supreme Court found it was highly probable that the owner would be able to relocate the going-concern value and that any losses resulting from the owner's inability to do so would be "speculative." In

the latter, however, the likelihood that the owner would be able to temporarily relocate was so remote as to give rise to a requirement for compensation.

Trend Toward Allowing Business-Loss Recovery

More recently, the general rule of no recovery has been the subject of harsh criticism. This criticism has caused several states to modify or even eliminate the rule, either legislatively, judicially, or in the case of Louisiana, by constitutional amendment.

Legislative Recognition of Business-Loss Recovery

Several courts have recognized the harshness of the reality of denying recovery to a business owner, but have concluded that the remedy must be legislative, rather than judicial in nature. To date, the following five states have enacted the most comprehensive legislation authorizing business-loss recovery.

California and Wyoming

A business owner may recover goodwill by proving (1) the taking of property or injury to the remainder caused the business loss; (2) neither relocation nor other reasonable steps will prevent the loss; and (3) no other statutory or other form of recovery will include compensation for the loss.

Florida

"Where less than the entire property is sought to be appropriated . . . an established business of more than 4 years' standing before January 1, 2005 . . . [or] an established business of more than 5 years' standing on or after January 1, 2005" may recover for business loss.

Idaho

A business owner may recover for business loss if: (1) The property sought to be condemned constitutes only a part of a larger parcel; (2) the business has more than five years' standing; (3) the taking of the property reasonably caused the business loss; (4) the business is owned by the party whose lands are condemned or located upon adjoining lands owned or held by such party; (5) neither relocation nor other reasonable steps would have prevented the loss; (6) no other statutory or other form of recovery will include compensation for the loss; and (7) the business owner submits the required statutory notice to the condemning authority.

Vermont

Property owners should be compensated for "the direct and proximate decrease in the value" of a business located on property that is to be taken.

Judicial Recognition of Business-Loss Recovery

Courts in Georgia, Michigan, Minnesota, Wisconsin, Alaska, and Nevada have all determined that, as a matter of state constitutional law, business loss is compensable to varying degrees. These judicial determinations, that recovery of business loss in condemnation cases is mandated

by state constitutions, represent a fundamental shift away from the legal reasoning underlying the general rule of no recovery.

Georgia
In 1966, *Bowers v. Fulton County* became the Georgia Supreme Court's seminal state decision requiring compensation for businesses loss as a matter of state constitutional law. In *Bowers*, the Georgia Supreme Court held that a property owner could recover for business loss and relocation expenses as separate items of damage in addition to the value of the property condemned. In so holding, the Court expressly overruled numerous earlier cases that disallowed the recovery of business loss and limited evidence of such loss to the purpose of showing the use and value of the property condemned.

In spite of the broad language of the *Bowers* decision, there are several elements of procedure and proof that are required before business loss may be recovered in Georgia:

- A condemnee must plead and prove business loss as a separate element; a condemnor is not required to include business loss in its initial estimate of compensation.
- A condemnee must prove a unique relationship between the business and the property condemned under any one of three tests for uniqueness.
- Evidence of business loss cannot be remote or speculative, and the loss must be permanent, not temporary.
- A tenant operating the business may recover for either a total loss of or partial damage to a business that continues to operate; a fee owner operating the business must prove a total loss at that location to recover business loss as a separate item of damage.

Michigan
Michigan allows recovery of business losses on a limited basis. Just compensation requires that the condemnee be "in as good a position as was occupied before the taking." Going-concern value and good will are recoverable only if the business is taken for use as a going concern. The rationale is that a successful business may generally be relocated to another location; therefore, if the government does not take the business for use as a going concern, "the owner of that interest need not be compensated since nothing is taken."

Minnesota
In Minnesota, courts uphold the general rule denying recovery of business loss in condemnation cases, but allow recovery in certain situations. A condemnee can recover loss of going-concern value by showing: "(1) that his going-concern value will in fact be destroyed as a direct result of the condemnation, and (2) that his business either cannot be relocated as a practical matter, or that relocation would result in irreparable harm to the interest."

Wisconsin

Caselaw in Wisconsin is inconsistent as to whether a business owner may recover for incidental losses. In *Luber v. Milwaukee County*, the Wisconsin Supreme Court had no difficulty in holding that rental income is a property interest for which an owner must receive compensation under the Wisconsin constitution, noting that the test for determining damages is not what the government has gained, but rather what the owner has lost. The *Luber* court found that the Wisconsin statute providing for restricted compensation operated not as "a matter of legislative charity but as an unauthorized limit upon recovery." Therefore, the *Luber* Court explicitly rejected the rule making such consequential or incidental damages *damnum absque injuria*, and invalidated the Wisconsin statute insofar as it limited compensation.

However, subsequent cases cast doubt on the *Luber* ruling, thus making the extent of recovery for a business owner in Wisconsin uncertain. For example, in *Hasselblad v. City of Green Bay*, the Wisconsin Court of Appeals concluded that *Luber* "does not constitutionally mandate unlimited recovery for all consequential damages in eminent domain actions." In *Hasselblad*, the court upheld a statutory limit on business-replacement damages, finding no constitutional right to compensation for relocation expenses. The court recognized that *Luber* was a "radical departure" from the prevailing rule that condemnation provides no recovery for consequential or incidental damages. The court also found that there was a rational basis for distinguishing the incidental damages awarded in *Luber* because "[r]ental losses bear a direct relationship to fair market value that business replacement expenses do not."

Alaska

In Alaska, the temporary loss of profits during relocation of a business due to the taking of property on which a business is conducted, constitutes property that is "damaged for public use" for which there must be compensation under the Alaska constitution. Loss of profits to business resulting from the state's exercise of eminent-domain power is an item of special damages, and thus the condemnee has the burden of proving by preponderance of evidence the amount of profits lost as a direct result of the taking.

Nevada

In *State v. Cowan*, the Nevada Supreme Court held that lessees were entitled to compensation for destruction of their business as an exception to the undivided-fee rule. The court also held that business goodwill, rather than lost profits, was the appropriate measure of damages for the complete destruction of the lessees' business. In *Cowan*, the lessees operated a franchised gasoline station on the condemned property that was completely destroyed. The lessees were unable to relocate their business because oil companies were not extending new leases for gas-station franchises in the area, which meant the lease's value was inextricably tied to the unique location of the condemned property. In this situation, the court concluded that the undivided-fee rule would not adequately compensate the lessees for what was taken, and therefore the Nevada constitution required compensation for the destruction of the business.

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Louisiana—Constitutional Recognition of Business-Loss Recovery

Historically, Louisiana courts denied compensation for business loss under the theory that such losses were *damnum absque injuria*. In 1974, however, Louisiana amended its constitution, providing that

[i]n every expropriation or action to take property . . . the owner shall be compensated to the full extent of his loss . . . [which] shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation.

Subsequent to its adoption, courts interpreting the Louisiana constitution of 1974 have determined the following: that business owners must receive sufficient compensation to restore their building facilities to their pre-condemnation condition, even where the compensation exceeds the value of the entire parent tract; that property owners can recover for the loss of future rental income under a lease; that lessees can recover for loss of business interest; and that loss of business profits is compensable.

Conclusion

Prohibition of recovery for business loss remains the general rule across the country, thus ensuring continued losses are incurred by business owners when the real estate is taken or damaged. However, the past few decades have seen an increased trend among states recognizing business loss as an element of just compensation, both legislatively and judicially. An argument can be made that to satisfy the "just compensation" clause of the Fifth Amendment, the taking of private property must include business loss. Despite the intangible nature of a business, such loss can and should be quantified as part of just compensation.

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NEWS & DEVELOPMENTS

Transcanada Keystone and the XL Pipeline Project

In 2007, TransCanada Keystone Pipeline Company began a public-relations campaign across the Great Plains as a prelude to constructing a crude-oil pipeline from the oil sands of Alberta, Canada, through the central United States, to refineries in Illinois and Oklahoma. TransCanada is a Canadian company, building the pipeline in partnership with Conoco Phillips. Between them, they control almost $200 billion in assets, with $6.5 billion in net income in 2009.

TransCanada sent technical and public-relations teams to town-hall meetings along the route of the pipeline to convince owners of the safety of the pipeline and the integrity of the company, touting the economic benefits to state and local taxing authorities. There was considerable noise from opponents, but the project right-of-way was acquired and the construction completed through Nebraska and the Dakotas in 2010.

The Second Phase, the Keystone XL

During the discussions regarding the original Keystone line, TransCanada revealed plans to build a second line out of Canada, a 36-inch pipeline that would carry crude oil to the Gulf of Mexico. This second line, known as the Keystone XL, would complete a 12.2 billion dollar project, delivering 1.1 million barrels of crude oil per day. The oil would be heated at numerous stations along the route, to approximately 160 degrees Fahrenheit, and pumped at approximately 1,400 pounds of pressure.

The public-relations campaign for the XL Project commenced while work to construct the first line was still underway. However, the going got a little tougher the second time around.

Local Opposition

The XL Pipeline will enter the United States several hundred miles west of the entry point of the original line, and will travel southeasterly until it meets with the first Keystone line in Nebraska near the Kansas state line. This route will take it through the Nebraska Sand Hills, a vast and unique, but fragile, area of grasses and wide-open spaces. Once disturbed, the grass cover can take many years to reestablish itself. Wind and water erosion can be severe before reestablishment occurs. Perhaps more important, the Sand Hills sit on top of the Ogallala aquifer, which supplies ground water to much of the Great Plains. The Ogallala aquifer is under virtually all of Nebraska and parts of seven other Great Plains states from South Dakota to Texas.

The farmers and ranchers of Nebraska were not so quick to accept their fate the second time, and TransCanada was not so quick to obtain the needed right-of-way agreements. Landowner groups made demands for more owner-friendly easements. It did not help the process when TransCanada decided to offer fewer dollars to landowners along the XL route than had been paid the first time.

TransCanada became frustrated with the negotiations and threatened to file condemnation before it had obtained approval from the Environmental Protection Agency., which is a necessary step to obtaining a permit from the State Department for construction. That premature threat merely increased the opposition's resolve, and the battle escalated. TransCanada purchased radio and television spots, declaring the benefits of cooperating with our good neighbor to the north and the ability to offer our children a better education with the extra tax dollars to be paid by TransCanada. The phrase "Good for America, Good for Nebraska" was seen and heard often. These media spots competed, sometimes back-to-back, with ads decrying the spoliation of one of

America's cherished ecosystems and the potential contamination of a vital and far-reaching groundwater system.

U.S. Senators, congressmen, and governors made statements asking Secretary Clinton to deny the permit and move it away from the Sand Hills, while petroleum-company supporters accused them of merely supporting a "not in my backyard" campaign.

At this writing, the battle is not over, but it has quieted down. One of the largest opponent groups made peace with TransCanada, but TransCanada negotiators have let phrases like "if this project gets built" slip into their discussions, while still claiming that TransCanada plans to get started digging a trench through the Sand Hills in 2011.

— *William G. Blake, Baylor, Evnen, Curtiss, Grimit & Witt, LLP, Lincoln, NE*

Disparate Settlements in Condemnation Equal-Protection Violation?

Experienced condemnation practitioners are well familiar with widely different treatment of seemingly similarly situated properties. One property owner will receive what looks like a lowball offer while another owner receives what seems to be a very generous offer. Yet, little attention is paid to the settlement process. The usual just-compensation and good-faith-negotiations challenges often do not provide a useful remedy for the owner on the lowball end of the equation.

In an informative, well-reasoned article, Benjamin L. Schuster builds on two fairly recent Supreme Court decisions to argue that the "class of one" equal-protection doctrine should be considered as an effective way to protect property owners from arbitrary and irrational treatment in condemnation settlements. The author includes interesting statistics from studies, anecdotal stories of perceived egregious disparities, as well as insight from a different angle on one of the effects of the Supreme Court's *Kelo* decision.

See Benjamin L. Schuster, *Fighting Disparate Treatment: Using the "Class of One" Equal Protection Doctrine in Eminent Domain Settlement Negotiations*, 45 Real Prop., Trust and Est. L.J., 369 (2010); *Village of Willow Brook v. Olech*, 528 U.S. 562 (2000); *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146 (2008).

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Book about Use of Eminent Domain Results in Everyone Getting Sued

In 2007, Carla Main authored *Bulldozed: Kelo, Eminent Domain and the American Lust for Land,* a book about a family's struggle against what was perceived by the author as modern abuse of eminent domain by taking private property for economic development. The book provides details of the involvement of a developer in the acquisition of the family's property by the City of Freeport, Texas for a new marina. But that is not the most interesting part of the story.

The developer apparently did not care for the book, as he sued everyone connected with it for defamation, including the author, the publisher, a prominent law professor who wrote praise notes for the back cover, and two newspapers. The author and the publisher remain as defendants. The defendants claim the book merely gives a factual account of the real-estate development and its effect on the lives of real people, and claim the suit is merely an attempt to suppress free speech. Their motion to have the suit dismissed was heard September 28, 2010, by a Texas state court.

You will find entertaining and sometimes enlightening reading here.

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http://apps.americanbar.org/litigation/committees/condemnation/home.html