SUMMARY OF MAJOR
EMINENT DOMAIN CASES & LEGISLATION

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Authors:
Brad Kuhn, Nossaman LLP
Jillian Friess Leivas, Nossaman LLP
Robert Thomas, Pacific Legal Foundation
Ajay Gajaria, Aird & Berlis LLP

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UNITED STATES UPDATES

Arkansas

City of Sherwood v. Bearden, 2023 Ark. App. 67 (2023 Ark. App. LEXIS 68)

Facts: Property owners filed an inverse condemnation action alleging the City had placed rainwater drainage pipes under the street near their property, that the pipes were not sufficient size to handle the rainwater in the area, and that the City's failure to place properly sized pipes resulted in repeated flooding of their home. The City filed a motion for summary judgment that argued there was no evidence the City was involved in the installation of the pipes, that the inverse claim was barred by the statute of limitations, and that the City was immune from liability under the tort-immunity statute because although labeled inverse condemnation, the suit was really a claim for a tort. The summary judgment motion was denied, and an interlocutory appeal taken. The court of appeal only had jurisdiction to hear the statutory-immunity issue.

Issue: Is the cause of action for inverse condemnation really a tort claim, and if so, is the City immune?

Holding: Yes, the cause of action was not actually one for inverse condemnation, but at most, negligence. As a tort, the City was immune.

Analysis: The court found that the Plaintiff failed to offer any proof that the City installed the pipes. Moreover, mere approval of the developer's plans is not sufficient evidence of government action that could constitute a taking. Further, there were no allegations that the lack of maintenance caused the flooding, only that the pipes themselves were too small. The court also found that the Plaintiff failed to prove any intentional conduct necessary to establish a taking. As the claim is not one for inverse condemnation, but at most, negligence, the tort-immunity statute is applicable. Therefore, the City is entitled to immunity on the tort claim.

California

Mendocino Railway v. Meyer, Case No. SCUK-CVED-2020-74939 (California Superior Court, April 19, 2023)

Facts: Mendocino Railway, which operates a popular excursion train known as the Skunk Train, asserted that it was a public utility with the right to take property through eminent domain. The railway sought to acquire a 20-acre parcel to construct and maintain a rail facility related to its ongoing and future freight and passenger rail operations. The property owner asserted that the railway did not have the power of eminent domain.

Issue: Whether or not the railway was a "common carrier" public utility and therefore entitled to use the power of eminent domain.

Holding: No, the railway had failed to establish that it had the constitutional and statutory power to use eminent domain to acquire the property.

Analysis: The railway asserted that it was a "common carrier" public utility and therefore entitled to use the power of eminent domain. The Public Utilities Code defines "common carrier" to mean those providing "transportation" to the public for compensation. The parties did not dispute that "transportation" requires taking people or property from point A and dropping it off at point B, but the railway's round trip excursions for sightseeing did not qualify.
However, the railway asserted that it should also qualify if it has the availability to provide the services of transporting freight or passengers (i.e., so long as it offered the services of transporting freight or passengers, whether or not that was actually occurring, should be sufficient). The court determined that the intention to provide services in the future is not sufficient to establish the railway as a public utility now. The court did note that the railway may be able to obtain public utility status in the future, but the current evidence did not support such a finding.

Despite determining that the railway did not satisfy the definition of public utility, the court analyzed whether not the railway's proposed acquisition met the requirements of eminent domain law. First, the court determined the proposed 20-acre acquisition could be characterized as a private operation for private gain rather than for public use (the fact that private commercial retail was proposed was one factor). Second, the railway did not satisfy the statutory requirements of greatest public good and least private injury. Specifically, the initial plan for the site prepared at the time the complaint was filed included a campground (which was not consistent with the operation of a railway and could not be the basis for eminent domain), the credibility of a later admitted site plan was questioned, as it was admitted 18 months after the eminent domain action was filed, and the railway lacked analysis as to the impacts of the proposed maintenance and transload facility on residents living directly adjacent to the site. Altogether, the railway failed to meet its burden to establish that the project was planned or located in a manner that will be most compatible with the greatest public good and least private injury.

Ramsey v. City of Chowchilla (2023 Cal.App. Unpub. LEXIS 2147)

Facts: The City initiated discussions with a property owner in 2005 to acquire private property for a highway improvement project. City officials told the owner that the highway project was an "eminent domain project", and the property would be acquired for just compensation. In 2007, the City asked the owner to provide a price to voluntarily sell the property, so the owner secured a broker's opinion of value, and the City secured its own appraisal. In 2008, the City informed the owner that it was waiting for an approved project study report, which would take several weeks, but then property negotiations would occur "due to the fact that your property must be acquired in order to construct the new interchange" and "it [appeared] certain that [their] property [would] be acquired." In 2009, the City informed the owner it had initiated the process of land appraisal and that it would complete the appraisal and negotiation process and move to acquire the needed land within 18 months. In 2011, the City then adopted a general plan which rezoned the property to "public facilities." Several more years passed, and Caltrans then began the environmental review process for the project.

Given the delays and uncertainty with the public project, the owner retained a real estate agent to market the property for sale or lease. More than a dozen prospective buyers or tenants expressed interest, but once the City's planned acquisition was disclosed, all prospective buyers/tenants were no longer interested. This went on for more than 8 years. The owner was left with leasing the property on a month-to-month basis with undesirable tenants at below-market rates. In 2020, the owner finally sued the City for inverse condemnation and pre-condemnation damages, claiming that the City's actions constituted a direct and special interference with the property, lowered its value, eliminated the income it could otherwise enjoy, and specifically targeted his property since it was the only one that was rezoned for public facilities uses.

Issue: Did the City's actions amount to inverse condemnation and give rise to pre-condemnation damages?

Holding: No, the City's actions did not eliminate all economically beneficial use of the property and did not constitute a taking under the Penn Central factors. Further, the Court determined there were no pre-condemnation damages.

Analysis: On appeal, with respect to the inverse condemnation claim, the Court held that the change in zoning to "public facilities" did not eliminate all economically beneficial use of the property and did not constitute a taking under the *Penn Central* factors. Private economic uses were still permitted under the public facilities designation, including private schools, agricultural uses, hospitals, gas stations, recycling facilities, and other similar uses subject to a conditional use permit. Moreover, the owner still achieved some rental income from the site in its current condition, and because the owner never attempted to secure permits or approvals for other uses, the issue was not ripe.

With respect to the precondemnation damages (*or Klopping*) claim, the Court explained that the owner must demonstrate the public agency acted improperly by either (i) unreasonably delaying an eminent domain action following an announcement of intent to condemn or (ii) other unreasonable conduct. The Court further highlighted that adoption of a general plan, by itself, is insufficient to trigger liability under *Klopping*. Finally, the Court explained that planning activities cannot give rise to precondemnation damages liability, even as here, where the city made it known it was planning a project that would result in the condemnation of private property, appraised the property, communicated its intent to acquire the property, and expressed specific intent over a number of years to build the project.

Shenson v. County of Contra Costa (2023 Cal. App. LEXIS 244)

Facts: *Shenson* involved a situation in which in the 1970s, the County approved maps for residential subdivisions and required the developers to (i) make drainage improvements to collect and convey water from the subdivisions to an adjacent creek and (ii) dedicate drainage easements to the County. However, the County never accepted the offers of dedication for the drainage improvements, which remained in the ownership of the subdivision association. The County, nevertheless, continued to collect drainage fees from the homeowners for a future proposed flood protection project.

Two homeowners sued the county for inverse condemnation and parallel tort causes of action after the drainage improvements failed and resulted in serious erosion and subsidence damage. The owners claimed that the County assumed ownership and responsibility of the drainage improvements by requiring the subdivision developers to construct them and to offer to dedicate easements to the county to enable it to maintain them. The owners also argued that the County's collection of drainage fees from homeowners rendered it responsible for the drainage improvements constructed by the subdivision developers. The County asserted that it did not accept the offers to dedicate the easements and did not otherwise assume responsibility for maintaining the drainage improvements, and that it could not be liable for merely collecting fees for future improvements that, thus far, have not been constructed because of the unavailability of matching federal funds. The trial court found no liability, concluding that, as a matter of law, a public entity must either own or exercise actual control over a waterway or drainage improvements to render them public works for which the public entity is responsible, and in this case, there was no such ownership or control. The owners appealed.

Issue: Whether or not the County could face inverse condemnation liability as a result of flooding associated with drainage facilities.

Holding: No, there could be no inverse condemnation liability in this circumstance because the facilities were not public works.

Analysis: A public entity may be liable when alterations or improvements to its own upstream property result in the discharge of an increased volume of or velocity of surface water in a natural watercourse causing damage to the property of a downstream owner. However, as with any upstream property owner, whether public or private, a government entity is only liable if, considering all of the circumstances, its conduct was unreasonable, and the lower property owner acted reasonably. A government entity may be liable in inverse condemnation where the increased volume or velocity of surface waters and resulting damage are caused by discharge of increased surface waters from public works or improvements on publicly owned land or if it has incorporated the watercourse or public improvements into a public drainage system.

Here, the court held that while the County imposed a condition on the developer, requiring them to construct the drainage improvements and also required that the developer to offer to dedicate easements for drainage purposes to the County, it was the subdivision developer that designed and built the improvements. Moreover, the County never accepted the offer of dedication, never maintained or repaired the drainage improvements, and therefore they did not constitute a public work. Further, requiring artificial drainage facilities and conveying water across properties over which it might not have flowed when the area was undeveloped does not convert those improvements into public works.

Finally, the court explained that utilizing an existing watercourse for drainage of surface water runoff, and requiring others to do so, does not transform the watercourse into a public drainage system; there must be some *affirmative* action by the public entity to assume ownership or responsibility of the watercourse. Here, the County did not have any ownership interest in the creek and did not perform any maintenance on the creek. The drainage fees being collected by the government were placed in a fund intended to cover a future flood protection project. Simply implementing and collecting drainage fees to fund a proposed project that was never built does not convert the creek into a public drainage system.

Robinson v. Superior Court (So. Cal. Edison) 2023 Cal.App. LEXIS 158 (March 2, 2023)

Facts: A privately owned public utility company sought an easement for an electrical transmission line. The owner challenged the utility's ability to secure possession, claiming that the utility had not established a right to take the property. Prejudgment possession was granted, and the owner sought a Writ from the Court of Appeal.

Issue: What must be established under the "public use and necessity" rules for a privately held utility company to condemn property, and who makes that determination?

Holding: The Court must determine whether the public use and necessity factors have been established under a preponderance of the evidence standard and must make express findings on those factors.

Analysis: The owner asserted that Edison was required to adopt a resolution of necessity before initiating the lawsuit to condemn an easement. The Court concluded that the utility is not a "public entity" that is required to adopt a resolution of necessity. As to the prejudgment possession motion, for condemnors that are not public entities (i.e., public utilities), they have the burden of proof on the issue of necessity, and the Court must make such findings explicitly either in writing or orally on the record.

Ventura v. City of San Buenaventura, 87 Cal.App.5th 1028 (2023 Cal.App. LEXIS 50)

Facts: A property owner was in the process of developing a multiunit townhome project on the property pursuant to an approved map and grading plan. During excavation, uncertified fill was discovered, and the City then rejected the prior grading plan, requiring the owner to conduct a more extensive excavation. The owner conducted this extensive excavation and later sought reimbursement from the City, which was denied. The owner argued that the City's modification of an approved grading plan for the property (i.e., the requirement to conduct deeper excavations) resulted in an unconstitutional taking for which it is entitled to just compensation. The City demurred for failure to exhaust administrative remedies, and the demurrer was sustained.

Issue: Did the property owner forfeit its objection to the grading plan modifications because it failed to exhaust its administrative remedies?

Holding: Yes, the owner's failure to exhaust administrative remedies before complying with the city engineer's oral modification of a grading plan barred an action for inverse condemnation alleging the modification violated a municipal code requirement.

Analysis: An administrative remedy — an appeal — was available to the owner, but it did not avail itself of this remedy. The court determined that there was nothing to lose by filing an appeal, as other work could have continued while an appeal on the extensive grading was conducted. Further, the justifications for requiring exhaustion of administrative remedies makes particular sense in the context of construction, underground unknowns, and public safety.

Colorado

City and County of Denver v. Monaghan Farms, Inc., 2023 Colo. App. LEXIS 982 (2023)

Facts: In 1988, Denver was going to take Monaghan's property for what would become the DIA airport. Just compensation was determined to be in the range of $27 million, and while the case was pending before the Colorado Supreme Court, the parties settled. The parties executed a mutual release, and the trial court entered an order transferring title to Denver "free and clear of all liens and encumbrances."

In 2017, after learning that Denver planned to lease part of the property for private commercial use instead of for DIA, Monaghan sent a letter to Denver requesting good faith negotiations under the settlement agreement, contending that it retained a "right to reversion" if the parcels were no longer used by DIA. There was also a claim that the use DIA intended to make of the parcel wasn't a public use. In response, Denver instituted a quiet title action, asserting that it owns the property free and clear of any interest, including Monaghan's claimed reversion. The trial court held in favor of Denver: the use DIA intended to make was a public airport use, and there's no reversionary interest anyway because the transfer to Denver agreed to in the settlement agreement was an unencumbered fee simple absolute.

Issue: Did the settlement agreement reserve a right to reversion in favor of the property owner if the property was not used for the stated public purpose?

Holding: No, in the settlement agreement, the landowner agreed to transfer its property to Denver as a fee simple absolute title, free of any encumbrances.

Analysis: When an agreement contains the language "free and clear of all encumbrances," that describes a fee simple interest, free of a right of reverter. The court also rejected Monaghan's argument that the condemnation wasn't expressly to take a fee simple interest, thus the settlement agreement didn't (and couldn't) convey more. The court held that there's no requirement for a condemnation to be for "fee simple absolute" in order to take a fee simple absolute interest. The interest taken is the interest taken and the lack of certain 'magic words' doesn't change the nature of the estate that Denver obtained."

Florida

Lake Lincoln, LLC v. Manatee Cty., 355 So. 3d 493 (2023 Fla. App. LEXIS 227)

Facts: A 10.32-acre (vacant and undeveloped) parcel was designated as retail/office/residential. This was located within a 1,124-acre Tara Development of Regional Impact ("DRI"). The property owner, Lake Lincoln, sought to amend the zoning to permit different types of development on the 10.32 acres. The County denied the amendments as to a portion of the property and issued a decision that identifies the 10.32 acres as open spaces and wetlands. At that time, the property owner owned an additional 12.73 acres that was not contiguous to the 10.32-acre parcel. The property owner sued and alleged a permanent regulatory taking. Later, a rezone was permitted to authorize limited residential uses. Therefore, between 2010 and 2019, the 10.32-acre parcel was restricted to open spaces and wetlands. However, the trial court found no liability since the relevant parcel was the entire 1,124-acre Tara DRI.

Issue: What is the "relevant parcel" upon which the takings claim should be measured?

Holding: The relevant parcel is not the entire tract, rather it is the 10.32 acres.

Analysis: To determine the relevant parcel, a court looks at physical contiguity, unity of ownership, and unity of use. In evaluating the unity of use, the courts look to the intent of the owner, the adaptability of the property, the dependence between parcels, the highest and best use of the property, zoning, the appearance of the land, the actual use of the land, and the possibility of tracts being combined in use in the reasonably near future. As to physical contiguity, the court determined that Lake Lincoln owns no property adjacent to the 10.32-acre parcel. As to unity of ownership, although Lake Lincoln is the successor developer to the entire Tara DRI, Lake Lincoln actually only owned a very small percentage of the Tara DRI at the relevant time in 2010. As to unity of use, the application showed that Lake Lincoln's proposed use and intent was to develop a 3.32-acre commercial sub-phase independently from other properties within the DRI. As to zoning, adaptability, and appearance, the standalone commercial property would be consistent with its future land-use classification and the neighboring uses. Further, there was no realistic possibility of the parcel being combined with other tracts in the reasonably near future. Therefore, the relevant parcel was only the 10.32 acres. Then, when considering the relevant parcel, the undisputed facts demonstrated that Lake Lincoln could achieve no economic use on its 10.32-acre parcel as a result of the County's restrictions on use for only open space and wetlands during the nearly 9-year period. As such, summary judgment was proper on the inverse condemnation claim.

TR Investor, LLC v. Manatee Cnty., 355 So. 3d 1004 (2023 Fla. LEXIS 747)

Facts: Owner obtained a permit to develop a subdivision. The land use regulations required wetland buffers as a condition of approval. In certain situations, development within the buffer is permissible if part of an overall application to develop the entire site. The owner did not request approval to impact the wetlands or the buffer area. Instead, owner sought a variance to reduce the buffer size down to 5 feet, which was denied. The subdivision development proceeded (without reducing the buffer area pursuant to a variance) and the buffer areas were dedicated to the development homeowners associations as common area. Owner argued that the requirement of 30-foot buffers adjacent to wetlands was an unconstitutional taking without just compensation as (1) an illegal exaction and (2) a per se taking (based on the theory that the regulations were a de facto conservation easement).

Issue: Was the wetlands buffer an illegal exaction or a permanent physical occupation?

Holding: No, the wetlands buffer was not an illegal exaction, as it did not require any dedication of land or monetary payment as a condition of approval of the development permit, and there was no permanent physical occupation.

Analysis: As to the exaction argument, the 30-foot buffer requirement did not give the County any property rights, whether an easement, a land dedication, or money payment. The owner continued to own the land in fee, had the right to use the buffer for all authorized uses, and the right to exclude others from the property. Further, the owner ignored the process to seek approval to develop within the buffer. As to the physical takings argument, owner argued that the de facto easement required the forced conveyance of the buffers to the homeowners association and therefore precluded the ability to exclude third parties. However, none of the regulations pertaining to the buffer require that strangers be allowed to pass over a developer's property. Additionally, the buffer regulations did not leave the owner without any practical use or value in its land.

Shands v. City of Marathon, 2023 Fla. App. LEXIS 3025 (2023 WL 3214154)

Facts: Property owners own an offshore island in the Florida Keys. In 1986, Monroe County adopted regulations that changed the zoning of the island to Conservation Offshore Island. In 2004, property owners filed for a dock permit. This was denied. They then filed for a Beneficial Use Determination, seeking approval for a building permit for a single family residence that had been planned since the late 1950s. Despite the Special Master recommendation to grant the permit, the City Council rejected the recommendation and denied the Beneficial Use Determination application. Property owners sued the City for inverse condemnation, based on the theory of an as-applied regulatory taking of their property without just compensation.

Two appeals followed: one reversing a trial court dismissal on statute of limitation grounds and the second reversing the trial court grant of the City's summary judgment motion. Property owners then filed for partial summary judgment on the ground that the zone change effectively limited the use of the property to beekeeping and personal camping, which rendered the property economically idle. Partial summary judgment was denied on the basis that an award of transferred development rights (TDRs) and Building Permit Allocation System points, considered in tandem with the residual land value of the property derived from personal recreation and bee keeping, precluded a per se as-applied claim. Ultimately, a non-jury trial followed, and the court determined the property owners failed to establish a taking under the ad hoc multifactored analysis set forth in Penn Central. Property owners appealed.

Issue: Did a potential availability of TDRs and building permit allocation system rights, considered in tandem with the residual land value deprived from personal recreation and beekeeping, preclude a per se as-applied claim?

Holding: No, property owners established an overly burdensome government regulation that deprived them of all economically beneficial uses of their property, and they were entitled to an award of partial summary judgment on their per se as-applied Lucas claim.

Analysis: A potential award of TDRs and building permit system allocation points was not just compensation to the property owners. Any income associated with the TDRs does not flow from the cultivation or development of the property, but instead from the non-use of the property. As such, the property owners had sufficiently shown that government regulations stopped them from using their property for economic benefit and the property owners were owed a partial summary judgment win under Lucas.

Georgia

Schroeder Holdings, LLC v. Gwinnett County, 366 Ga. App. 353 (January 5, 2023)

Facts: Plaintiff filed an application to amend the County's official zoning map, requesting that an approximately 100-acre tract of land be rezoned. It asserted that the property had no reasonable economic use as currently zoned because the cost to improve this type of property would not yield enough return with the larger tracts required under the existing zoning classification. The rezoning application was denied. Plaintiff asserted claims of regulatory taking, inverse condemnation, and substantive due process violations. County moved for summary judgment arguing that Plaintiff's only remedy was review under a writ of certiorari, but that Plaintiff failed to comply with the procedural requirements for seeking that review. Superior court granted the County's motion for summary judgment.

Issue: Were the rezoning denials quasi-judicial decisions that could only be challenged by means of a writ of certiorari?
Holding: No, the superior court erred in concluding that the Board's denial was a quasi-judicial zoning decision that could only be challenged by the way of certiorari.

Analysis: There are two types of zoning cases. First, a constitutional attack is raised against a zoning ordinance and the issue must be raised before the local governing body to afford that body the opportunity to amend its ordinance to bring it within constitutional limits. In this situation, when an application for re-zoning is granted or denied, the zoning authority is acting in a legislative capacity and, when challenged, the superior court is not limited to examination of the evidence presented to the zoning authority. Second, a special permit is sought under terms set out in the ordinance and the landowner presents his case on its facts and the law to the local governing body. That body acts in a quasi-judicial capacity. This type is appealed by writ of certiorari.

Indiana

Guzzo v. Town of St. John, 203 N.E.3d 1055 (2023 Ind. App. LEXIS 11)

Facts: The property consisted of two parcels of wooded land with a house and a barn on it. The property was treated under the zoning ordinances as a legal non-conforming use, as the house predated the zoning to highway commercial and light industrial. Per the zoning regulations, a non-conforming use ceases six months after the property is abandoned. When the prior owner passed away in 1990, it was transferred to the current owners but with a reserved life estate for one individual. She vacated the property in 2009 and quitclaimed her life interest to the current owners. After this time, no one resided on the property, and the gas and electricity to the property were removed. Ultimately, condemnation of the property was sought, and the property owners asserted that the Town should compensate them 150% of fair market value of the property because it was "a parcel of real property occupied by the owner as a residence" pursuant to Ind. Code section 32-24-4.5-8(2). The trial court determined that the property did not qualify as being occupied by the owner as a residence at the time of the taking. The case was appealed, and the court of appeals affirmed. While the case was pending a transfer, the State Legislature amended Indiana Code section 32-24-4.5-8. The property owners asserted the change in law should be applied retroactively and the State supreme court agreed. The case was sent back to the trial court to determine the fair market value of the property and assess whether the property owners were entitled to enhanced compensation under subsection 8(a)(2) for residential property. In the trial court, the property owners again asserted entitlement to enhanced compensation under the revised statutes. The court determined the property was only entitled to 100% compensation, not the enhanced 150% compensation. Property owners appealed.

Issue: Whether the trial court erred when it interpreted the state eminent domain statutes to deny the property owners compensation at the statutory rate of 150% of fair market value of the property.

Holding: The trial court erred in interpreting the statutes to only require 100% compensation instead of 150% compensation.

Analysis: The plain language of the revised statute did not require that the property be owned for personal use or that the owner must occupy the property as a residence. It only required that a single family dwelling be on the property. The trial court improperly added a "personal use" requirement to the statute. Further, the word "dwelling" does not imply a requirement of habitability. The property consisted of a single-family dwelling that was not owned for purposes of resale, rental or leasing. As such, it satisfied the statutory requirements for enhanced compensation and the property owners were entitled to 150% of fair market value as provided by statute.

Raylu Enters. V. City of Noblesville, 205 N.E.3d 260 (2023 Ind. App. LEXIS 66) (2023 WL 2360060)

Facts: City initiated eminent domain proceedings to appropriate a parcel of real estate. The parties agreed on the compensation for the real estate. However, the property owner asserted an inverse condemnation claim against the City based on claims of compensation for the taking of its business, which operated on the real estate. The City moved to strike the owner's claims on the ground that Indiana does not recognize damages for loss of a business in an eminent domain action. The property owner argued that long-standing precedent should be re-examined considering the 2002 recodification of the eminent domain laws.

Issue: Did the 2002 recodification of the eminent domain laws create a right for compensation for the loss of a business in an eminent domain action?

Holding: No, the recodification did not affect the substance of the Indiana eminent domain law, and there was no new provision creating compensation for loss of a business.

Analysis: Based on state precedent, there is no right to compensation for the taking of the business, as the business may move and operate elsewhere. To the extent there is value associated with operating a business on that specific piece of real estate, that compensation is already factored into the value of the real estate itself. The recodification changed the statutory language pertaining to inverse condemnation claims from "land" to "property" and the property owner argued this was an intent to broaden the scope of compensation to include personal property such as a business. But the court stated that both the legislative purpose and other case law made it clear that the recodification was only a restatement of existing law and contained no substantive change. Therefore, it was proper to strike the inverse condemnation counter claim.

Town of Linden v. Birge, 204 N.E.3d 229 (2023 Ind. LEXIS 162)

Facts: A drain carried water through the town and through an easement on the property at issue. Due to years of neglect, the drain fell into disrepair and flooding occurred throughout the town. An improvement project was commenced. After the project, while flooding was reduced in other areas, the property at issue flooded after heavy rainfall. The property owner sued for inverse condemnation. The Town moved to dismiss, claiming discretionary-function immunity under the state Tort Claims Act. The trial granted it, but the Court of Appeals reversed. On remand, the court found that the flooding was a permanent physical invasion. On an interlocutory appeal, the Court of Appeals reversed the finding that the flooding was a permanent physical invasion. Property owner petitioned for transfer.

Issue: What is the proper analytical framework for takings claims based on flooding?

Holding: The intermittent flooding is recurring, so the claim was properly analyzed as a permanent taking. However, the trial court did not resolve whether or not the flooding's interference was substantial enough to be a taking.

Analysis: If flooding is continuous or "intermittent but inevitably recurring" and the invasion is substantial, then it results in a per se taking. If, on the other hand, the flooding is temporary or of finite duration, then the *Arkansas Game* factors apply. Here, the trial court was accurate in determining that this was a permanent taking, but the court failed to analyze whether or not the taking was substantial. The matter was remanded for further development on whether there are factual findings to support a determination that the flooding amounts to a permanent physical invasion that warrants a taking.

Iowa

Christ Vision, Inc. v. City of Keokuk, 2023 Iowa App. LEXIS 60 (2023 WL 387070)

Facts: Plaintiff owned a historic church, but it fell into disrepair. After multiple years, the building was declared a nuisance. Plaintiff did not challenge that declaration. The court ordered a timeline for the Plaintiff to make a plan for repairs, otherwise the City could abate the nuisance or demolish the church. The Plaintiff did not make the repairs and, after notice, the City demolished the building. Plaintiff sued and claimed the City took the church without due process or just compensation. The City moved for summary judgment, which was granted.

Issue: Did the actions of the City result in a taking of property without compensation under a theory of inverse condemnation?
Holding: No, the City could enforce its nuisance law without compensating Plaintiff for its losses stemming from that enforcement.

Analysis: Under inverse condemnation law, while a property owner has a constitutionally protected interest in rundown property, there is no right to maintain a nuisance. The history of this matter showed that the Plaintiff did not challenge the nuisance order. Therefore, the Plaintiff failed to prove that there was a constitutionally protected property interest at stake and failed to prove that the government "took" that property interest.

Castles Gate Homeowners' Ass'n v. K & L Props., LLC, 2023 Iowa App. LEXIS 97 (2023 WL 1812849)

Facts: In Iowa, eminent domain is authorized by statute for use by a private party in a situation where that owner is landlocked and needs to acquire a public way to the nearest road. An eminent domain action starts with an application for condemnation and appointment of a compensation committee to assess damages. A challenge can be raised by filing a petition for judicial review of the eminent domain authority, which must be raised, per statute, within 30 days of service of the notice of assessment. Here, a private property owner initiated an eminent domain action to acquire a right of way to landlocked property. The application, notice of assessment, and a plat map were served on the Homeowners' Association agent and the wife of the president. 31 days later, the Association filed a petition for review. The private property owner asserted the petition was untimely. The Association claimed that it was never served with any documents signed by the court, including the list of appointed commissions and alternates. The district court ruled that the service of the notice and application substantially complied with the relevant eminent domain notice statute and that the petition was untimely.

Issue: Despite the private property owner failing to comply with multiple requirements set forth in the eminent domain code, was the petition for review nonetheless untimely?

Holding: The timing for filing a petition for review is dependent on the timing associated with the service of the notice of assessment, which was complied with. The failure to strictly comply with the other statutory requirements has no bearing on the timing requirement.

Analysis: The statute setting forth the timing for the petition is based on the personal service of the notice of assessment. The arguments by the Association that the private property owner failed to comply with various other requirements (mailing the list of commissioners and alternates, filing the original approved application with the county recorder, the prerequisite of a resolution authorizing the acquisition) are inapplicable to the timing requirement associated with service of the notice of assessment. While the private property owner did not properly mail the list of assessors or record the signed application, those requirements do not have bearing on the timing of any petition for review (note: as a private party, the step pertaining to a resolution is inapplicable to this entity).

New York

Huntley Power, LLC v. Town of Tonawanda, 2023 N.Y. App. Div. LEXIS 3197 (2023)

Facts: The Town instituted eminent domain proceedings to take Huntley's riverfront property, including an electric plant decommissioned in 2016, and water intake structures. The asserted public use was to revitalize and redevelop the former industrial property, which was a blight on the Town and to maintain the critical raw water supply to significant industrial employers in the Town.

Issue: Was this redevelopment taking for a public use?

Holding: Yes, the court concluded that condemnation could serve a public use, benefit, or purpose under the rational basis test.

Analysis: Applying the rational basis test, the court held that the asserted public use was not irrational. The court rejected the argument that the Town's "stated purpose for acquiring the property manifests an intent to engage in constitutionally prohibited private enterprise because the Town intends to sell the property to a private developer." That was of little concern because the "taking of substandard real estate by a municipality for redevelopment by private corporations has long been recognized as a species of public use." Moreover, the condemnation was not "excessive" merely because more land was taken than was minimally needed. There's no obvious abuse — or at least any abuse that would qualify as an abuse of discretion. One Justice dissented from a part of the court's conclusions. The dissenter would have analyzed the takings separately, the first being the taking of the decommissioned electric plant. That taking is a public use, as it serves a public use and purpose for the reasons noted above. But the second taking — the intake structures along the river — is another matter, because prior to the closure of its power plant, the owner used the intake system to withdraw millions of gallons of untreated water to provide cooling for its generating units, but since closure of the plant, has allowed other local businesses to obtain water for industrial uses from the river. Privately withdrawing the water is far less expensive than the treated water that the businesses would otherwise have to purchase for their manufacturing processes, and this is contrary to the Town's stated purpose to take the water intake structures to ensure that local manufacturers have access to inexpensive raw water.

Texas

Hidalgo County Water Improvement District No. 3 v. Hidalgo County Irrigation District No. 1, No. 21-0507 (Texas Supreme Court)

Facts: The Improvement District operates an underground irrigation pipeline. The Irrigation District operates an open irrigation outtake canal. The Improvement District was extending its irrigation pipeline and the proposed extension would cross under the Irrigation District's canal. The Improvement District sought to purchase a subsurface easement, but the offer was rejected. It then filed an eminent domain action. The Irrigation District argued that it had governmental immunity and that the Legislature had not waived that immunity. On that basis, the suit was dismissed. The Court of Appeals affirmed. Issue: In an eminent domain action by one political subdivision against another, does the governmental immunity bar such proceeding?

Holding: No, governmental immunity does not apply in this context.

Analysis: The Improvement District made two arguments that governmental immunity does not apply. First, the modern justifications for governmental immunity are not served by applying the doctrine to condemnation suits. Second, it asserted that separating the power to condemn from the power to bring an action to condemn makes little sense. As such, the Improvement District argued that disputes between governmental entity condemnees should be addressed under the paramount-public-importance doctrine, not the immunity and waiver framework. The court determined that given the purposes governmental immunity serves, its nature, and the development of the immunity and eminent domain precedent, the Irrigation District was not immune from suit. The court reaffirmed the longstanding paramount-public-importance precedent.

City of Dallas v. Millwee-Jackson Joint Venture, 2023 Tex. App. LEXIS 783 (2023 WL 1813499)

Facts: A property was accessible via an easement from the railroad, which ran under the nearby railroad bridge and connected with a public street (Alamo Street). Alamo Street had been a public street for at least 30 years and was fairly well maintained. In order to develop the property, the owner needed a second access point. One option for that second access point involved construction of a bridge and changes/extension of Alamo Street. Due to the economy, that plan was put on hold. As development started again, the City revised its Thoroughfare Plan and deleted the Alamo Street extension. Further, the City abandoned the portion of Alamo Street already next to the property. The easement was removed, that portion of the road demolished, and access to the property was blocked. There were numerous claims and issues, but the trial court ultimately issued a permanent injunction that ordered the City to either open and maintain the street, or to initiate an eminent domain proceeding to condemn and compensate for the street closure. Many appeals and cross appeals occurred.

Issue: Did the trial court err in denying the inverse condemnation claim?

Holding: No, but only because the recovery afforded under the permanent injunction was equal to or better than what could be afforded under an inverse claim. The closure of the road was wrongful.

Analysis: As to the regulatory taking inverse condemnation claim, the owner alleged two types — (1) an acquisitory intent or unfair advantage taking and (2) an unreasonable interference claim based on the closure of Alamo Street on the owner's ability to develop the property. The court did not go further into the inverse claim because it said the permanent injunction by the trial court (directing the City to either open and maintain Alamo street or initiate an eminent domain action for compensation) would grant the owner the same type of recovery (or better) than what is permissible under an inverse condemnation claim.

Tex. DOT v. Robert Dixon Tips Props., 2023 Tex. App. LEXIS 1479 (2023 WL 2396807)

Facts: TDOT was expanding a portion of a highway. To do so, it used a portion of property known as Northwind Boulevard. A property owner asserted that this boulevard was a private roadway and TDOT contended that it was publicly dedicated when the subdivision was created. The property owner asserted a takings claim, requested a declaration the road was not a public road, sought compensation for use of the disputed portion, and sought injunctions barring TDOT from using the road for construction activity. TDOT asserted that sovereign immunity shielded it from suit and liability. TDOT filed a motion to dismiss for lack of subject matter jurisdiction on the grounds that the road had been publicly dedicated (i.e., if there is no demonstration of property ownership, a takings claim is not viable, and the trial court lacks jurisdiction). The trial court denied the motion.

Issue: Did the property owner sufficiently demonstrate ownership of the property such that there was subject matter jurisdiction to maintain an inverse condemnation claim?

Holding: No, as the property owner did not sufficiently demonstrate evidence that they had any property ownership interest, there was no subject matter jurisdiction over the inverse condemnation claim.

Analysis: The property owner asserted that TDOT's public dedication argument is an affirmative defense and that TDOT was asking the court to shift the burden of the defense to the property owner. The court disagreed based on the position that (1) the determination of ownership is integral to deciding subject matter jurisdiction and (2) procedurally, TDOT was not seeking to shift its burden, but rather a determination as a matter of law that property owner did not own what it claimed to own. As for the dedication issue, there are four elements: (1) person making the dedication must have the ability to dedicate (owns the property in fee simple), (2) there must be a public purpose served by the dedication, (3) the person must make either an express or implied offer, and (4) there must be an acceptance of the offer. The property owner and TDOT dispute where there was an offer and acceptance. Here, the plat map included a roadway clause that referenced the roads being for public use and determined that this was an express offer. Further, while the street was not explicitly named, it was shown on the map, which was sufficient. TDOT produced evidence that the road was accepted by public use and expressly accepted by a TDOT engineer. The court found this sufficient. Since the property owner had no actual ownership interest in the road, the inverse condemnation claim could not be sustained.

Vermont

Nesti v. Vt. Agency of Transp., 2023 VT 1 (2023 VT LEXIS 1)

Facts: The Vermont Agency of Transportation (VTrans) rebuilt Route 7, which included constructing a new, enclosed stormwater-drainage-management system to collect stormwater from the widened road surface. The system directed the water downhill toward Lake Champlain. Nesti's property lies west of Route 7 and abuts the Lake. No material change was made to the system since 2006. Later, the stormwater began to form a ravine. A suit for damages and injunctive relief was filed in December 2018. Vtrans moved to dismiss on the grounds that each claim was barred by the six-year statute of limitation under 12 V.S.A. section 511. The property owner argued that the statute of limitation should be 15-years under 12 V.S.A. section 501.

Issue: Whether the takings claim was time barred under the six-year SOL under 12 V.S.A. section 511.

Holding: The taking claim was subject to the six-year statute of limitations for civil actions, rather than the 15-year statute of limitations to recover lands under VT Stat. Ann. Tit. 12, section 501.

Analysis: Section 511 applies to both physical and regulatory takings claims, as the prior case law does not limit the six-year SOL to regulatory takings claims. Further, adverse possession and takings claims are distinct causes of action and subject to different limitations periods because each is a product of contrasting public-policy choices.

Washington

City of Sammamish v. Titcomb, 525 P.3d 973 (2023 Wash. App. LEXIS 466)

Facts: The City sought to initiate the George Davis Creek Fish Passage Project to replace storm drain infrastructure and eliminate existing barriers to fish passage on the creek. The last portion of the creek runs through the property of Titcomb and Behringer and specifically beneath the residence. A fish ladder is integrated into the home's foundation. The City decided to pursue a project alternative that included acquisition of separate property and a rerouting of the creek. The City determined alternatives that kept the creek going through the Titcomb property did not meet state fish passage rules, the capacity for a 100-year flow event and federal permitting requirements. The City was concerned that Titcomb would claim compensation for the taking of the water rights. The City tried to negotiate with Titcomb for over a year, but was unsuccessful. As a result, the City proposed an ordinance to authorize condemnation proceedings. The City ordinance authorized the use of condemnation of property rights in water flowing from George Davis Creek, including for the purposes of reducing and eliminating storm drainage capacity issues, traffic safety, flood protection, and supporting salmon recovery. Thereafter, the City initiate condemnation proceedings to acquire the water rights. Titcomb argued the City did not have statutory authority to condemn private land for fish passage purposes. The court dismissed the City's action, and the City appealed.

Issue: Is the City authorized to condemn the property for stormwater facility purposes, which includes fish passage purposes, pursuant to RCW 8.12.030?

Holding: Yes, the City has the power of eminent domain for this purpose, as fish passage improvements are incidental to the authorized purposes.

Analysis: The parties do not dispute the City had the power of eminent domain for stormwater facilities. But the property owner argued that this project was a fish passage project and not a stormwater facility project. The court said that the authorizing ordinance specifically set forth the project purposes that are consistent with the statutory grant of authority (i.e., the infrastructure was inadequate for storm events, periodic flooding, addition maintenance necessary, and related safety concerns). That the project also provided fish passage benefits did not divest the City of its authority. Further, the ordinance stated the compensation would be paid for from the City's stormwater enterprise fund. The fact that the City received a grant from the Salmon Recovery Act for some of the project does not preclude the condemnation, as there was no evidence that the salmon funds would be used to compensate the property owners.

Wisconsin

Sojenhomer LLC v. Vill. of Egg Harbor, 2023 Wisc. App. LEXIS 254 (2023 WL 2485509)

Facts: Wisconsin has a state statute (section 32.015) that states property cannot be acquired by condemnation to establish a "pedestrian way." Another statute (section 61.34(3)(b)) states that a Village board cannot acquire property by condemnation for the purpose of a "pedestrian way." The Village sought to condemn part of plaintiff's property to establish a sidewalk, as part of a road improvement project. The road was narrow with heavy traffic, and pedestrians were forced to walk in the road. There were also visibility issues. Village argued that a sidewalk is different from a "pedestrian way." The circuit court agreed and determined that the Village was not prohibited from condemning property for a sidewalk.

Issue: Is a sidewalk the equivalent of a "pedestrian way," such that the Village did not have the eminent domain authority to acquire land for such purpose?

Holding: Yes, a sidewalk was equal to a pedestrian way and the statutes prohibited the Village from using eminent domain to condemn land for pedestrian ways.

Analysis: The road had a variety of safety issues, but most centered around pedestrians walking in the street since there was no sidewalk. The project sought to construct some drainage improvements, lighting, crosswalk, buried utilities, a sidewalk, etc. The acquisitions were necessary to accommodate the sidewalk and lighting. In interpreting the statute, the condemnation power is strictly construed, and the court uses the rules of statutory interpretation. Essentially, the court determined that while all sidewalks are pedestrian ways, not all pedestrian ways are sidewalks (i.e., sidewalks are adjacent to roads, while pedestrian ways can also be in other locations). Based on this, the broader prohibition on the use of condemnation for pedestrian ways included the prohibition on condemnation for sidewalks. Further, the court was not convinced by the Village's arguments that the sidewalk was part of the larger road project, and the sidewalks are necessary for road safety (for which it did have the power of eminent domain) because the court believed the evidence to show that the specific space being acquired by condemnation was necessary to fit in the sidewalk, not the other road improvements.

*The sidewalk and lighting were actually installed. The matter was reversed and remanded for further proceedings. The Village filed a petition with the state Supreme Court to reconsider the appeals court ruling.

Dekk Prop. Dev., LLC v. Wis. DOT, 2023 WI 30 (406 Wis. 2d 768) (2023 Wisc. LEXIS 132) (2023 WL 2976998)

Facts: Plaintiff owns approximately 4 acres of property near the corner of STH 50 and County Highway. There is one driveway to STH 50, which the DOT sought to close and one driveway to CTH H, which will remain available for use. The STH 50 driveway was governed by a right of access deed. In 2019, the DOT sought to acquire a portion of property along the CTH H side of the property for the STH 50 road improvement project. The STH 50 driveway would have to be closed as part of a future project and the DOT would not compensate for that because the commercial building the driveway used to serve had been demolished and any redevelopment of the property would require a driveway in a different location further away from the intersection. The DOT made an offer to acquire the property interests along the CTH H side of the property. Plaintiff filed an action under Wis. Stat. section 32.05(5) challenging the DOT's rights to remove the right of access via the driveway onto STH 50. Separately, the DOT sent a notice of the intent to remove the STH 50 driveway for a future project.

Issue: Whether Plaintiff may seek compensation for the driveway closure in a right to take action under Wis. Stat. section 32.05(5).

Holding: Wis. Stat. section 32.05(5) is not the mechanism in which to challenge the closure of the driveway access.
Analysis: Compensable eminent domain and non-compensable police power actions can occur at the same time and as part of the same highway construction project. Even when the DOT undertakes different projects that are part of the same overall highway construction project, that does not necessarily merge each project into one single compensable act. Wis. Stat. section 32.05(5) may only be used to contest the condemnation of the property described in the jurisdictional offer.

FEDERAL CASES

Tyler v. Hennepin County, Minnesota, No. 22-166, ___ U.S. ___ (May 25, 2023)

Facts: In Minnesota, if a person fails to pay their taxes (and any associated penalties and interest) the county can obtain a judgment against the property that transfers limited title to the state. The landowner remains the beneficial owner of the property and has three years to "redeem" their whole title by paying the balance owed. However, if the landowner does not timely redeem title in Minnesota, the whole title is "vested" in the state, and the tax debt is extinguished. Once the State owns the property, it may keep the property for a public use or it may choose to sell the property. Importantly, in Minnesota, if the property sells for more than the amount owed, the excess is not returned but is instead split between the county and the local school district.

Geraldine Tyler owed a total of $15,000 in back taxes, penalties, and interest on a condominium she no longer lived in but continued to own. She did not pay and redeem within the statutory three-year period, and Hennepin County, MN, eventually sold the condo for $40,000 — a surplus of $25,000 — and retained the excess proceeds. Ms. Tyler sued, arguing that Minnesota's system resulted in a taking of her home equity. The Federal District Court dismissed her complaint for failure to state a claim, and the Eighth Circuit affirmed.

Issue: Whether the plaintiff had sufficiently plead a claim for inverse condemnation based on the alleged taking of a property interest in the excess property funds.

Holding: Yes, because the surplus funds from a property sale belongs to the taxpayer/landowner, the Takings Clause of the Fifth Amendment does not allow the state to appropriate more than it is owed.

Analysis: The Supreme Court began by explaining that state law may allow government to impose property taxes; that interest and late fees may be imposed; and that property may be seized and sold to satisfy the amount owed. But, while state law is a primary source of determining what property rights exist, state law is not the absolute answer. Instead, the Supreme Court looks to state law but also traditional property law principles, historical practices, and the Supreme Court's own precedents. By broadening the scope of the inquiry, the Supreme Court has taken a more protective stance on property rights. The Supreme Court explained that this approach would prevent states from avoiding the Takings Clause by legislating away traditional property rights. Thus, Minnesota law retaining the surplus proceeds was not the final answer.

Tracing the history of tax forfeitures to the Magna Carta of King John, through the treatment of tax sales in early American history, and through post-Civil War Supreme Court jurisprudence, the Supreme Court concluded that while the government may seize and sell a property to satisfy a debt to the public, any excess proceeds belong to the now dispossessed landowner, subject to claims by lienholders. In the Court's words, paraphrasing a Biblical passage, "The taxpayer must render unto Caesar what is Caesar's, but no more." In essence, a government may satisfy the debt in money or property but may not retain the surplus. Because the surplus belongs to the taxpayer/landowner, the Supreme Court concluded that Ms. Tyler had a plausible claim that Hennepin County took her property interest in the excess funds, and the Supreme Court reversed the judgment of the Eighth Circuit.

Sabal Trail Transmission, LLC v. 18.27 Acres of Land in Levy Cnty., 59 F.4th 1158 (11th Cir. Feb. 3, 2023) (2023 U.S. App. LEXIS 2773)

Facts: Plaintiff is a natural gas company that has a certificate of public convenience and necessity from FERC under the Natural Gas Act. Plaintiff sought to acquire easements for a pipeline in Florida. The actions were filed, immediate possession granted, and the pipeline built. A jury trial commenced on compensation. Plaintiff argued that federal law applied. Defendant property owner sought to apply state law. The state (Florida) law would provide more compensation than would federal law because the state (Florida) defines compensation for condemnation as including attorneys' fees, while federal law does not. The district court ruled that state law governed and the owners were also entitled to attorneys' fees.

Issue: Whether, in a condemnation action where a private entity uses the federal eminent domain power under the Natural Gas Act, 15 U.S.C. §717f(h), federal law or state law supplies the rule of decision in determining what compensation the condemnor must pay the landowner.

Holding: Case law precedent requires that state law supply the federal law on the meaning of compensation under 15 U.S.C. § 717f(h).

Analysis: First, looking directly at the text of the Natural Gas Act, it does not say whether state or federal law supplies the standard for determining compensation in a condemnation action that a NGA licensee institutes relying on the federal eminent domain power. Second, under the prior-precedent rule, the case of Georgia Power controls given the similarity between the statute there and the one currently at issue. There, it was decided that state law would control. Third, there was no sufficient justification to replace the state law on the definition of compensation with the federal common-law definition.

Behrens v. United States, 59 F.4th 1339 (Fed. Cir. Feb. 13, 2023) (2023 U.S. App. LEXIS 3361)

Facts: The railroad easements at issue were acquired through a variety of means. Ultimately, the railroad sought to abandon the railway and the Missouri Department of Natural Resources sought to utilize the easements for an interim trail use. The property owners argued that the easements were only permitted for railroad purposes and not conversion to a public recreational trail.

Issue: Was the interim trail use within the scope of the easements at issue, and, if not, does that result in a taking?
Holding: No, the easements were not broad enough to encompass interim trail use or railbanking because Mo. Rev. Stat. section 388.210(2) explicitly limited the scope of the easements granted to the railroad to be used for railroad purposes. As a result, a taking occurred.

Analysis: As the language of the deed and state law govern the scope of the easement, if converting a railway easement to a recreational trail is outside the scope of the original railway easement, then a Fifth Amendment taking occurs. As to the scope of the easements, Missouri statute 388.210(2) explicitly limited the scope of the easements to railroad purposes. Next, the court determined that trail use and railbanking are not railroad purposes.

Ideker Farms, Inc. v. United States, 71 F.4th 964 (Fed. Cir. June 16, 2023) (2023 U.S. App. LEXIS 15005)

Facts: The Missouri River floods annually, and in the 1990s, the Corps of Engineer and the Fish and Wildlife Service began discussions concerning proposed changes to the River, designed to mitigate the environmental impact of the federal flood control measures built and installed long ago. Eventually, the two federal agencies decided to restore the Missouri River to a more natural state and abandoned the former policy of prioritizing flood control (2004 changes). Although the period from 2000 to 2006 was largely a drought, periodic flooding returned in 2007, 2008, 2010, 2011, 2013, and 2014. Property owners sued, alleging the 2004 changes caused frequent and severe flooding on their farms between 2007 and 2014 that amounted to permanent, physical takings under the Fifth Amendment. Eventually, the U.S. Court of Federal Claims concluded the government caused the flooding and after a trial held the government liable for taking a permanent flowage easement. The court awarded just compensation to three representative plaintiffs for $7 million. That compensation did not include anything for the loss of the crops destroyed; the CFC held that loss was a consequential damage and not recoverable. Both sides appealed: the government from the liability judgment, the owners from the denial of crop compensation.

Issues: Is temporary but recurring flooding a categorical taking? Were the property owners entitled to recover for destruction of their crops?

Holding: Yes, temporary but inherently recurring flooding is treated as a categorical taking, not by applying the *Arkansas Game* multi-factor test. Moreover, the crops are a separate property interest, and damage to that property was not a consequential damage.

Analysis: The Federal Circuit first rejected the government's statute of limitations argument. The "stabilization" doctrine, which instructs courts to look when the impact of the government's acts or omissions stabilized when the impacts are spread out over time, applies here. Thus, a takings claim need not invariably be triggered by the physical event giving rise to liability occurs. When the harm stabilizes is a fact question, and the CFC was not clearly erroneous when it concluded the damage settled in 2014, not earlier. On the merits of the takings claim, the court rejected the government's argument that the flooding must be analyzed under the *Penn-Central*-plus factors for temporary flooding outlined by the Supreme Court in *Arkansas Game & Fish*. While the flooding here did not cover the plaintiffs' properties permanently with water, the parties had stipulated that the government has not ceased and does not plan to cease flooding the plaintiffs' lands. Additionally, the Supreme Court's more-recent Cedar Point opinion makes that "abundantly clear" because the temporary flooding took the property owner's right to exclude. The court also held that it was not altering the trespass-versus-takings jurisprudence, or questioning the usual rules about isolated and unintentional temporary flooding. On crop damages, the court agreed with the property owners that their crops are "property" for which they are entitled to receive just compensation and the loss of the crops aren't (uncompensated) consequential damages. Those damages are damages that flow from the taking and are collateral. After all, the flooding wiped out the crops, and it wasn't just some side effect.

United States of America v. 6.03 Acres of Land in the County of Santa Barbara, 2023 U.S. App. LEXIS 11452 (67 F.4th1006) (2023 WL 3331051)

Facts: In 1952, the U.S. initiated an eminent domain action to acquire land for a reservoir. At that time, part of the condemned land was owned by Plaintiff's predecessor. The judgment specified that the taking was subject to existing rights of way in favor of the public and third parties for highways and roads. An access road existed on part of the land that was condemned. The access road was then locked with gates. 30 years later, the property owner asserted a right to use the access road.

Issue: Did the plaintiff sufficiently plead a property interest in the access road?

Holding: No, the asserted easement rights over a road failed because plaintiff had not plausibly alleged that their predecessors-in-interest had an easement over the road, hence no easement could have been preserved as an existing right of way in the eminent domain action.

Analysis: The plaintiff asserted that since the original eminent domain judgment was subject to the existing rights of way in favor of the public and third parties, that the predecessors had an interest that then passed to him (a right of access to public streets for adjacent property owners). However, the court determined there were no allegations that the access road at issue was a public street at the time of the condemnation. Since Plaintiff had not plausibly alleged the predecessors had any easement right over the access road, no easement could have been preserved that could have been passed on.

Merrits v. Richards, 62 F.4th 764 (3rd Cir. Mar. 16, 2023) (2023 U.S. App. LEXIS 6267)

Facts: PennDOT sought two right of way easements to improve a 1-mile stretch of Route 22. The easements covered less than one-tenth of an acre, but the property owner opposed the offer. As such, PennDOT proceeded to file an eminent domain action and acquired the easements. As the property owner did not prevail in his objections in the state court proceeding, he filed suit in District court claiming that the acquisitions violated the US Constitution and Pennsylvania law. The district court dismissed all claims with prejudice. Property owner appealed and argued: (1) that his claims for injunctive and declaratory relief against the PennDOT officials under the Eleventh Amendment should have survived due to the Ex Parte Young exception, (2) his 1983 claims for damages against the PennDOT officials in their individual capacities should have survived due to the *Burford* abstention doctrine.

Issue: Does the *Ex parte Young* exception support the position that the claims for declaratory relief and injunctive relief against the PennDOT official should survive dismissal? Does the *Burford* abstention doctrine support the position that the claim for damages against the PennDOT officials in their individual capacities should survive dismissal?

Holding: Property owner's 1983 just compensation claim against the PennDOT officials in their individual capacities should be heard. All other claims should be dismissed without prejudice.

Analysis: Under the *Ex parte Young* exception, the Eleventh Amendment immunity gives way in certain situations so that a state official may be sued in federal court in his or her official capacity by a citizen of another state for injunctive or declaratory relief. For the exception to apply, there must be an ongoing violation of federal law and a request for relief that can be characterized as prospective. Property owner's claims do not satisfy these requirements. *Burford* abstention protects state administrative processes from undue federal interference in two situations: (1) where difficult questions of state law bearing on policy problems of substantial public import and (2) where federal review would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern. The court determined this doctrine cannot be used to dismiss claims seeking damages. The court also conducted an analysis under the *Rooker-Feldman* doctrine and concluded this doctrine does not require dismissal of the just compensation claims but it does as to the other claims.

CHKRS, LLC v. City of Dublin, 2023 U.S. App. LEXIS 7696 (2023 Fed. App. 0150n (6th Cir.)

Facts: Property owner leased a home to Plaintiff. The contract included an option for the lessee (Plaintiff) to purchase the home. The contract also had a condemnation provision that stated the property owner had a right to the funds of a condemnation action if they were disbursed before the lessee (Plaintiff) had "procured on the purchase option." The City commenced a condemnation action in state court, property owner asked the court for the funds, Lessee (Plaintiff) emailed property owner and said it wanted to buy the property, Lessee (Plaintiff) claimed this was sufficient to "procure" the property, and the court distributed the funds to the property owner. The appellate court affirmed the trial court reading of the lease. Lessee (Plaintiff) bought the home in 2018 and then sued the City in federal court, asserting takings for work done in second half of 2016 (a reentry onto the property). An appeal occurred on the issue of standing before the present appeal. District court (on remand) held that Lessee/Plaintiff did not have a compensable interest in the property when the taking allegedly occurred. Lessee/Plaintiff appealed.

Issue: Did Plaintiff have a compensable interest in the property at the time of the taking, such that it would be entitled to the condemnation proceeds under the lease contract?

Holding: No, Lessee/Plaintiff did not have a compensable property interest at the time of the alleged taking.

Analysis: First, the party who has a property interest at the time of a physical taking (not a party that obtains an interest after the taking) has the right to payment. The Supreme Court's recitation of this rule is not dependent upon state law. Here, the "taking" occurred in late 2016, but Plaintiff did not buy the property until 2018. The prior owner had the personal right to payment and that right did not run with the land. Next, leaseholders do have compensable interests under the Takings Clause. However, a lessor and lessee may depart from that typical framework in their lease agreement. Here, the lease terms on condemnation controlled and the court determined that it was the alleged "taking" that triggered to whom the funds would be paid (i.e., at the time in late 2016, prior owner still owned the property and was entitled under the lease to the condemnation proceeds).

LEGISLATION UPDATES

Passed

H.B. 1105 (Illinois) — Provides that property belonging to a public utility that provides water or sewer services, and that is subject to the Illinois Commerce Commission, may not be taken or damaged by eminent domain without prior approval of the Illinois Commerce Commission, except for property to be acquired by a municipality with a specified number of inhabitants or a regional water commission, or a municipality that is a member of a regional water commission.

H.B. 1026 (Maryland) — Authorizes Prince George's County to exercise powers of eminent domain to acquire and develop or redevelop, for a public purpose, certain neglected property located in the county that has been designated as a transit-oriented development and is located within a business development district.

S.B. 159 (Montana) — Removes the authority to exercise eminent domain by counties for public recreational or cultural purposes and by the Land Board to designate natural areas. Prohibits the use of eminent domain for uses whose primary purpose is a trail, path, or a connecting trail or path.

H.B. 1561 (Tennessee) — Provides that eminent domain may not be used in Sumner County to acquire privately owned real property for parks, trails, paths, or greenways for walking, running, hiking, bicycling, or equestrian use, unless the privately-owned real property is parallel to, runs directly along the length of, and extends in the same direction as a highway, road, or street.

SB 1477 (Virginia) — Authorizes Dominion Energy Virginia to establish an offshore wind affiliate to act as a public utility.

SB 1441 (Virginia) — Requires Virginia's State Corporation Commission to consider the economic benefit of offshore wind projects when reviewing cost recovery requests.

Pending

State Laws

A.B. 1476 (California) — Known as the Community Redevelopment Law of 2023, AB 1476 proposes to revive redevelopment agencies in California, including the grant of the power of eminent domain to such agencies. A.B. 1476 was re-referred to the Committee on Appropriations on April 27, 2023.

A.B. 80 (California) — Would establish a West Coast Offshore Wind Science Entity to monitor California's ocean ecosystem and inform the management of offshore wind development.

A.B. 3 (California) — Would establish the State Energy Resources Conservation and Development Commission to develop strategic plans for offshore wind development, including one for seaport readiness.

S.B. 850 (California) — Would make technical, non-substantive changes to Code of Civil Procedure section 1240.040 pertaining to the requirement of a Resolution of Necessity for Public Entities. Appears to merely clarify that this provision applies only to public entities.

S.B. 837 (Hawaii) — Would allow the Department of Business, Economic Development, and Tourism the power of eminent domain.

S.B. 836 (Hawaii) — Would allow the Agribusiness Development corporation the power to acquire property through condemnation.

H.B. 4543 (Illinois) — Creates the Illinois Rust Belt to Green Belt Fund and mandates that the fund be used by the Department of Commerce and Economic Opportunity to facilitate work on a new utility-scale offshore wind project or related port.

H. 2924 (Massachusetts) — Would establish a commission to study the future economic impact of the expiration of the federal offshore wind investment tax credit.

H. 953 (Massachusetts) — Would establish a commission to examine the environmental and economic impacts of offshore wind projects on state fisheries.

Proposed Constitutional Amendment H. 35 (Massachusetts) — Would amend the state constitution to prohibit the use of eminent domain for private commercial or economic development.

H.B. 4273 (Michigan) — Would require condemnation notifications to tenants.

L.B. 394 (Nebraska) — Would alter the determination of damages in certain situations. For agricultural property, the damages shall include two times the fair market value of the condemned property, reasonable severance damages, and condemnee's abstracting expenses. Severance damages for agricultural property would include replacement costs for various items included on the condemned property.

L.B. 133 (Nebraska) — Would provide that entities exercising the power of eminent domain are subject to the Open Meetings Act.

S.B. 1306 (New York) — For cities of certain sizes, the city council would have the authority to approve or disapprove any public authority's or public benefit corporation's use of eminent domain. The city council shall approve or disapprove any proposed use of the power of eminent domain by majority vote, after at least one public hearing on the matter.

S.B. 7337 (New York) — Would require the preparation of a comprehensive economic development plan for the use of eminent domain when the primary purpose is economic development and certain residential premises are to be acquired; requires municipal approval of the exercise of eminent domain power in such cases.

Proposed Constitutional Amendment H.B. 458 (North Carolina) — Would amend the North Carolina Constitution to prohibit condemnation of private property except for a public use; provides for the payment of just compensation with a right of trial by jury.

S.B. 457 (South Carolina) — Would require that an entity with the power of condemnation must hold a public meeting to disclose the likelihood of condemnation on surrounding properties when purchasing new real property or changing the use of real property which the person or entity already owns.

S.B. 787 (Tennessee) — Would change from 30 days to 60 days the time in which a respondent who is not satisfied with the amount deposited by a condemnor, or otherwise objects to taking through the use of eminent domain, must file an answer to the petition initiating a condemnation proceeding.

Proposed Constitutional Amendment H.J.R. 81 (Texas) — Would amend the state constitution to prohibit the taking of property by eminent domain for transfer to a private entity (eliminates the caveat that previously limited condemnation where the transfer to the private entity was for the primary purpose of economic development or enhancement of tax revenue).

Federal Laws

Drone Infrastructure Inspection Grant (DIIG) Act, S. 1817 — Would Authorize $100 million in competitive grants for local governments to fund more opportunities for using American-made drones to inspect, maintain, and construct critical infrastructure projects. This would establish a drone infrastructure inspection grant program and a drone education and training grant program in the US DOT and would enable research universities to access grants geared toward training the next generation of workers to operate drones.

HR 9641 — Amends the Outer Continental Shelf Lands Act to support the development of offshore renewable energy projects; establishes the Offshore Power Administration.

HR 9049 — Would appropriate some offshore wind lease revenue to establish streams of funding for coastal infrastructure and resiliency.

Failed

H.B. 5036 (Connecticut) — Would have prohibited the state and municipal governments from exercising the use of eminent domain for commercial purposes.

S.B. 132 (Indiana) — Would have required a county, city, or town to use eminent domain to establish or expand a thoroughfare, instead of requiring dedication of private property as part of a subdivision plat.

S.B. 220 (Indiana) — Would have provided compensation for business loss resulting from condemnation in situations where a city or town condemns property located outside of the municipality.

H.B. 10 (Louisiana) — Would have removed eminent domain authority of carbon dioxide storage facility operators.

S.B. 2085 (Mississippi) — Would have provided an owner of a business conducted on property taken under the power of eminent domain compensation for the loss of goodwill under certain conditions.

H.B. 1384 (North Dakota) — Would have increased the award for property consisting of a primary residence by 20%. The increase may not be considered by the trier of fact in the original assessment of damages.

S.B. 2313 (North Dakota) — Would have provided that following the assessment of damages by the trier of fact, the court shall increase the award by 33% and enter judgment accordingly. The increase may not be considered by the trier of fact in the original assessment of damages.

H.B. 1136 (South Dakota) — Would have prohibited the use of eminent domain if the intended purposes were to place and operate a privately owned pipeline for the principal purpose of transporting carbon dioxide.

S.B. 201 (Texas) — When assessing damages to property, if the property is subject to a conservation easement, evidence shall be admitted on the local market value of the property based on the property's highest and best use without consideration of the property's conservation easement status.

H.B. 196 (Utah) — Would have modified the public use for which the right of eminent domain may be exercised. Specifically, it would have removed the creation of a public park as a public use for which the right of eminent domain may be exercised.

Local Policy Updates:

- Los Angeles City Downtown Community Plan and New Zoning Code: On May 3, 2023, the Los Angeles City Council approved two community plans designed to spur equitable, sustainable housing development in downtown Los Angeles and Hollywood. Ove the next two decades, this plan will permit the construction of up to 135,000 new homes (100,000 in downtown Los Angeles and 35,000 in Hollywood). The community plans waive parking requirements for downtown developments and create incentives for affordable housing development and include requirements to provide affordable housing.

INFRASTRUCTURE BILL UPDATES

As of May 12, 2023, over $220 billion in funding announced for over 32,000 projects.
Examples of recent grants, projects, and industry updates:

Internet

- Enabling Middle Mile Broadband Infrastructure Program: This program funds construction, improvement, or acquisition of middle mile infrastructure, along with administrative costs associated with running the program. It helps build regional networks that connect to national networks, and it does not directly connect end-user locations. This program brings infrastructure capacity to local networks and lowers the cost of deploying future networks. So far, projects where grants have been announced under this program encompass more than 350 counties across 35 states and Puerto Rico.

Bridges

- Bridge repair has taken a priority for many communities, given the backlog of critical maintenance needs and the statistics on aging bridge infrastructure. New technological developments, such as Accelerated Bridge Construction, are enabling state transportation departments to plan, design, and construct bridges without interrupting traffic.

Highways

- Small Scale Local Safety Grant (Vermont Agency of Transportation): will provide grants as small as $5,000 and up to $35,000 for construction-ready projects. The projects will increase safety on the local roadway system and can include a combination of curve warning signs, edge line markings on paved roads, breakaway devices, intersection signing and marking, and removal of objects to widen clear zones.
- USDOT announced $21.8 million in grants for 33 National Scenic Byways Program projects, including 5 grants awarded to Tribal applicants. These grants help recognize outstanding scenic, historic, cultural, natural resources, and archaeological sites.

High-Speed Rail

- Current projects include California's Los Angeles to San Francisco project and the Brightline West project between Las Vegas and Southern California.
- In Georgia, possible routes are being analyzed between Atlanta — Charlotte, North Carolina; Atlanta – Savannah, Georgia; and Atlanta — Chattanooga, Tennessee. Environmental studies are underway for some of these options.
- Options for routes in Texas are also being considered.
- Massachusetts is exploring the option of the East-West Rail, which would run from Boston to Springfield.

Electricity

- Summer 2023 presents risks of blackouts if summer weather turns extreme. In order to alleviate some strain on the electrical grid during spikes associated with weather events, using railroads to transport batteries may be an option. Freight trains can handle the weight of the batteries and the extensive railroad systems in the country mean the batteries can be transported as needed when it is apparent that a weather event is approaching. This would not be a full solution to electrical grid spikes and blackouts but could help alleviate some of the impacts.
- Solar panels on manufacturing sites in Arizona, California, Nevada, and New Mexico may increase as the cost to install panels decreases. Many manufacturing facilities have flat roofs and expansive facilities that make them suitable for solar panels.
- An offshore transmission link between Nova Scotia and New England is being explored. It would connect offshore wind in the Gulf of Maine and in Nova Scotia with load centers in the two regions.
- Department of Energy has released a proposed framework for designating National Interest Electric Transmission Corridors for specific transmission projects. Projects in a national corridor can use the DOE's $2.5 billion Transmission Facilitation Program and the #2 billion Transmission Facility Financing Program as a source of funds.

Buses

- The Oregon Department of Transportation awarded $28.5 million in funding for programs to support bus services, including funds to maintain and purchase vehicles, building bus charging stations, and more.

CANADIAN UPDATES

Ontario

Eric Levin Holdings Inc. v Ministry of Transportation, 2023 ONSC 3284 (CanLII)

Keywords: Commencement date for calculation of interest – Rate of interest – Productive use interpretation – Tribunal statutory authority

Ontario Land Tribunal Decision: *Secemb Investments Ltd. v MTO, 2022 CanLII 60837 (ON LT)*

Appeal: ONSC Decision: *Eric Levin Holdings Inc. v Ministry of Transportation, 2023 ONSC 3284 (CanLII)*

Facts: Secemb Investments Limited (the "Claimant") owned land in the City of Ottawa, containing a one-story multi-tenant commercial building. MTO sought to expropriate this land to replace the existing Queensway Bridge.

Issue: The Tribunal was required to decide on two outstanding issues: (i) determining the commencement date for calculating interest and (ii) whether the Claimant's claim for interest at a rate above the statutory 6% should be granted. With respect to (i), the Claimant argued that the date for calculating interest should begin either on the date of their first meeting with the Ministry, or in the alternative, the day the space of the largest tenant (37% of the site) became vacant. With respect to (ii), the Claimant asserted that the Tribunal ought to award 12% interest (rather than statutory 6%) due to the Ministry's delay in negotiating the settlement.

Holding: With respect to issue (i), the Tribunal held that the commencement date for the calculation of interest begins when the "productive use" of the land cases. The Tribunal concurred with the finding in Levine v. Ottawa (City) where it was decided that despite the landowner's loss on profits from their leases, the lands were still considered a productive use so long as the use of land was "significant." In this case, the last tenant was vacated on February 28, 2023. Thus, the Tribunal held that interest calculations should begin on that date, not earlier. With respect to issue (ii), the Tribunal held that it would not consider this submission. The request for 12% interest was not within the Claimant's pleadings and was part of a late oral plea. The Tribunal reasoned that granting this request would cause prejudice to the Ministry. Furthermore, being a "creature of statute", the Tribunal reasoned that it did not have any inherent jurisdiction to amend the Claimant's pleadings to include their oral plea.

Appeal Holding: The Court rejected the Claimant's appeal of the Tribunal's decision. The Court held that there was no evidence that the Appellant's desires to expand the development of the property (i.e., to redevelop) were ever initiated. This is distinguishable from Nova Scotia (AG) v. S&D Smith Central Supplies Limited where the landowner provided extensive corroborating evidence of his future plans to develop and expand the land. In addition, the Court affirmed the Tribunal's discretionary authority (s. 13(4) of Ontario Land Tribunal Act) respecting its decision to deny the Appellant its request for a 12% rate of interest due to delay in negotiating the settlement. The court further stated that both parties were responsible for the delay as the final settlement represented a compromise.

Law Society of Ontario v. Metrolinx, 2023 ONSC 1169 (CanLII)

Keywords: Ontario Heritage Act – section 33 – Interlocutory injunction

Facts: In November 2022, Metrolinx took possession of the expropriated land located at the Osgoode Hall site for the planned Osgoode Station along the future Ontario line. The Law Society of Ontario, the owners of the expropriated property, asserted that the grounds surrounding Osgoode Hall's central buildings were an important aspect of the historic site. Counsel for LSO argued for an interlocutory injunction preventing Metrolinx from taking any further actions by raising s. 33(1) of the Ontario Heritage Act. This provision, which requires any alterations to heritage properties receive municipal council approval, reads as follows:

> **Alteration of property**
>
> 33 (1) No owner of property designated under section 29 shall alter the property or permit the alteration of the property if the alteration is likely to affect the property's heritage attributes, as set out in the description of the property's heritage attributes in the by-law that was required to be registered under clause 29 (12) (b) or subsection 29 (19), as the case may be, unless the owner applies to the council of the municipality in which the property is situate and receives consent in writing to the alteration. 2019, c. 9, Sched. 11, s. 11.

Issue: Does s. 33(1) of the OHA apply in this case to support the granting of an interlocutory injunction on Metrolinx's activities?

Holding: The ONSC interpreted the express words of s. 33(1) as applying only to owners of designated heritage properties who seek to alter their property. However, the court ruled that the LSO did not own the property in question, nor were they proposing to alter it. Having expropriated the land, Metrolinx owned the property and is the party proposing the alterations (i.e., removing the trees). Therefore, the LSO failing to prove any serious issue to be tried, the court dismissed the interlocutory injunction application.

** We wish to express our thanks and gratitude to Aird & Berlis LLP summer student Hayden Cheung for his assistance in preparation of this case-law update.*

British Columbia

North Vancouver (District) v. Hanlon, 2023 BCCA 114 (CanLII)

Keywords: Valuation of Property – Fair Market Value – Expropriation Compensation – Appraisal Methodology

BCSC Decision (2022): *Hanlon v North Vancouver (District), 2022 BCSC 353 (CanLII)*

Appeal - BCCA Decisions (2022): *Hanlon v. North Vancouver (District), 2022 BCCA 220 (CanLII)* BCCA Decision (2023): *North Vancouver (District) v. Hanlon, 2023 BCCA 114 (CanLII)*

Facts: Parties asked the Court to determine the market value of the plaintiff's property on the day it was expropriated by the District of North Vancouver for the purpose of reconstructing a highway. District made advance payment of $2m (as required by s. 20 of BC Expropriations Act), based on a property value appraisal of $1.68 m. The additional payment represented costs of moving and other compensation. The Plaintiff relied on its own appraisal report to assert a market value of $3.2 million. Both reports use different methodologies. The main, and critical, difference between the reports is their treatment of the geographically closest comparable project: the "Spera Comparable". The Spera Comparable is located across the street from the Property.

Issue: What is the correct methodology for determining the "fair market value" of the property? How should the appraisals have assessed the Spera Comparable?

Holding: Plaintiff's report is largely preferred. It correctly considers the full Spera Comparable value. The District report downplayed the significant rise in demand and value of real estate in the Plaintiff's neighbourhood during that period, resulting in an undervaluation of the Property. However, the Court was also not entirely convinced that the Plaintiff's report was entirely correct. It noted that given the plaintiff had failed to sell the property previously for $1.9m in 2017, that undermined the asserted valuation of $3.2m. Furthermore, the failed sale occurred after the Spera assignment (comparable), which also dilutes the force of that sale as a comparable. Given these dual concerns, the Court decided on an alternative valuation of $2.9m.

Issues on Appeal: The relevant issues on appeal by the District are whether the trial judge (i) erred in determining the maximum market value of the lands, (ii) misconstrued the evidence, failing to differentiate between a "large tract of assembled lands" and a "single lot to be assembled with other lands of development", and (iii) erred in using the sale price of a large assembly of neighbouring lands.

Appeal Holding: Appeal dismissed. On issue (i), the Court held that even if the penultimate listing of the Lands at $1.9 m did provide conclusive evidence as to its market value, it is common ground that it must then be adjusted for time in a rising market between the listing's expiration in April 2017 and the date of taking in November 2018. Furthermore, the property was listed at $1.9 million, but not transacted. Thus, the Court held, a listing is not a completed transaction and is not on its own evidence of market value. On issue (ii), the Court held that this would not be considered as the evidentiary record was not developed at trial to support the District's new theory on appeal. On issue (iii), the Court ruled that the trial judge did not ere in concluding that the District's appraiser's Spera Comparable was inaccurate and "fatal to its conclusions."

Canada (Attorney General) v. Hideaway II Ventures Ltd., 2023 BCCA 223 (CanLII)

Keywords: Class action – Expropriation claim – Fishery

Facts: This is Federal Government's appeal from the certification of a class action brought by the respondents, as representative plaintiffs, on behalf of commercial geoduck fishers who claim damages for expropriation of their right to fish in waters off Haida Gwaii.

The appellant challenges the certification of a class action brought by the respondents, on behalf of residents of British Columbia engaged in commercial fishing in the Pacific coastal waters of Canada, who claim damages for expropriation of their right to fish geoducks. The respondents ground their expropriation claim in the Minister of Fisheries' decision to close geoduck fisheries in designated Strict Protection Zones in Haida Gwaii. The respondents allege the elimination of commercial geoduck fishing in the Zones was an uncompensated expropriation of their right to harvest geoducks.

Issue: The central issue on this appeal is whether the judge erred by certifying a class action founded upon a claim that has no chance of success. Both parties cited Atlantic Lottery as a helpful statement of the judge's task: while novel claims that might represent an incremental development in the law should be allowed to proceed to trial, claims, including novel claims, which are doomed to fail should be disposed of at an early stage in the proceedings. The appellant says this is not a novel claim and is determined by settled law. The respondent asserted that the judge correctly considered this to be a novel claim and one that is arguable, that is to say, a claim with a reasonable chance of success.

Holding: Appeal allowed. The certification judge erred in law in concluding that the plaintiffs demonstrated an arguable cause of action. It is settled law that no one has a proprietary interest in the fishery in Canada's tidal waters. Tidal fishers are regulated by Canada and not a matter of property and civil rights. The Quebec Fisheries Reference further supports the appellant's argument that the right to fish in tidal waters is not proprietary, by likening the right to fish in the sea to the right of navigation. Furthermore, the Court held that the reduction in fishing quotas is not expropriation. The appeal court judge cited a "substantial" body of case law supporting that proposition: see Malcolm v. Canada (Fisheries and Oceans); Kimoto v. Canada; and Canada v. 100193 P.E.I. Inc. A right to fish in waters to which the Fisheries Act applies does not exist in law unless authorized under that statute, usually by licence. Licences do not create property rights in the fishery. Thus, the respondents cannot claim relief in the nature of compensation for expropriation of their right to harvest geoducks.

Springman and Springman Limited v. Surrey (City), 2023 BCCA 130 (CanLII)

Keywords: Calculation of compensation for partial expropriation

Facts: The appellant, Springman and Springman Limited ("Springmans"), operated a car dealership on the property in question for over a decade. In 2011, City of Surrey contacted the owners to notify them of their intention to expropriate some of the property to accommodate the construction of an overpass. According to the Springman owners, that news resulted in some employees leaving and the purchase of less inventory. In 2012, the City acted on three expropriation notices and compensated the Springmans as required under s. 20 of the EA.

Issue: The Springmans assert that the trial judge undercompensated them for the expropriations, having failed to recognize the "financial peril" of the company due to expropriations. They argued, and the court considered, three heads of damages: (i) injurious affection; (ii) business losses; and (iii) loss of opportunity.

Holding: Appeal allowed in part. The BCCA held that the judge erred in calculating compensation for the reduction in value of the remaining land by relying on a percentage approach that she had rejected as not based on market evidence. Compensation for injurious affection must be grounded in the impact of the taking on the market value of the remaining property. The judge also misapprehended the evidence in concluding that the appellants' decision to sell the land and business was not a result of the expropriation. Consequently, they are entitled to claim certain out-of-pocket expenses and costs as business interruption losses. Finally, the Court ruled that the trial judge did not err in rejecting the appellants' claim for loss of opportunity to continue to operate the business and sell the land at a later date, as such claims are not compensable under the Expropriation Act.

Manitoba

Winnipeg (City of) v Barcoga Holdings Inc, 2023 MBCA 19 (CanLII)

Keywords: Injurious affection calculation method

Facts: The City of Winnipeg expropriated a strip of land running along the western boundary of the owner's commercial property for the purpose of road improvements in the Polo Park area of Winnipeg. The parties agreed that the market value of the expropriated land was $277,500. The parties did not agree on injurious affection of the remainder of the land. While the City's appraiser stated there was no injurious affection, the Land Value Appraisal Commission (LVAC) found that there was. The City disputes LVAC's appraisal method.

Issue: Did the LVAC ere in finding that there was injurious affection?

Holding: No, the LVAC did not err on any of the issues raised by the City. The "before and after" method of determining the market value of the land taken and injurious affection of the remainder is specifically contemplated in s. 27(3) of the Act. The LVAC determined the market value of the property both before and after expropriation. In light of the record, there is no mystery as to how it came to its decision.

Newfoundland and Labrador

Shute v. Paradise (Town), 2023 NLSC 24 (CanLII)

Keywords: Determining value of expropriation – Severance damages

Facts: Town expropriated a strip of land owned by the Shutes (the "Appellants"). Based on the Board of Assessors' decision, the Town provided a total sum of $65,000 for the value of the land and easement acquired, in addition to a 3.5% simple rate of interest. The Appellants appeal the Board's decision relating to compensation and costs. Furthermore, as part of the expropriation, an old retaining wall located on the Strip was removed. The Town was required to replace the wall. The Board found that the Shutes chose a placement of the new wall parallel to the road. The placement of the new wall resulted in 47 square metres of the Shutes' land being outside of the wall on the front of their property.

Issue: The relevant issues here are whether the Board erred in (i) determining the value of the land expropriated from the Appellants and (ii) not awarding the Appellants severance damages relating to 47 square metres of land between their new "retaining wall" and their front boundary. The other issues in the judgement related to costs.

Holding: With respect to issue (i), the Court agreed with the Board's conclusion of the fair market value amount. The Board noted that the Appellants did not provide any evidence contrary to the Appraiser's. With respect to issue (ii), the Court held that the Appellants' land was not divided because of the expropriated land and the retaining wall. The wall is within their own property. The Board reasoned that even prior to the expropriation, the Appellants had a retaining wall that separated a small parcel of land between that wall and the front boundary of their property. The current retaining wall creates no material difference. Thus, the Board did not err in not granting severance damages relating to the 47 square metres of land.