



*Eminent Domain:
Where Are We, and
Where Have We Been?*

Presented by Rick E. Rayl

nossaman.com

Appraisal Institute's
42nd Annual Litigation Seminar

November 18, 2009

MAKING IT HAPPEN.

A Brief History Lesson

MAKING IT HAPPEN.

2005

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Kelo v. City of New London

- Seminal Supreme Court case
- Held economic motives can qualify as a Public Purpose
- Little direct impact on California law
- Triggered public awareness and outrage



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2006

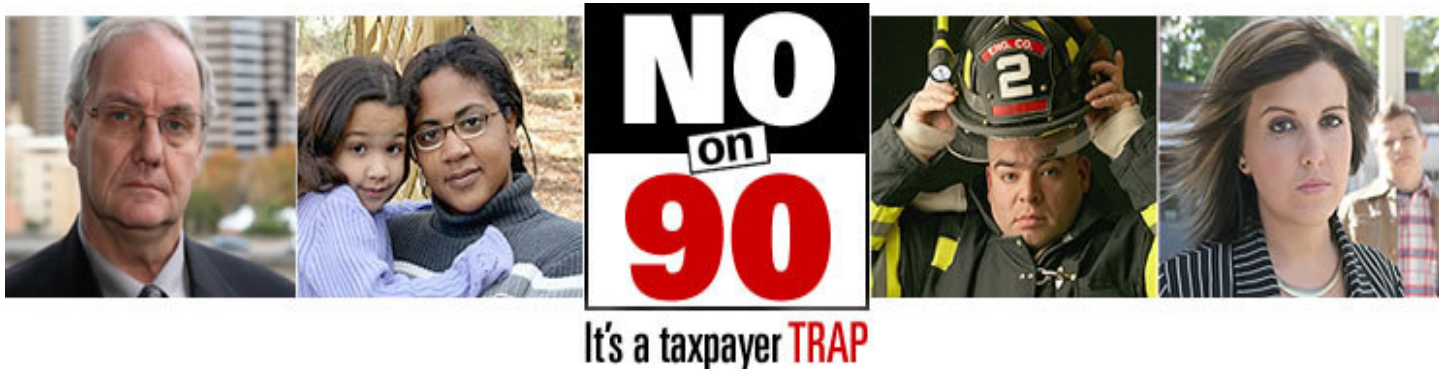
MAKING IT HAPPEN.



MAKING IT HAPPEN.

2006 “Reform”

- Highest profile effort: Proposition 90
 - Sought dramatic change in eminent domain law
 - Also contained significant, non-eminent domain provision
 - Failed at the polls, after leading until near the election date
- Even though Proposition 90 failed, similar propositions passed in many states in November 2006



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2006 Eminent Domain and Land Use Reform Measures

<u>State</u>	<u>Type of Reform</u>	<u>Result</u>
Arizona	Eminent domain & regulatory takings	Pass (65%)
California	Eminent domain & regulatory takings	Fail (48%)
Florida	Eminent domain	Pass (69%)
Georgia	Eminent domain	Pass (82%)
Idaho	Eminent domain & regulatory takings	Fail (26%)
Louisiana	Eminent domain	Pass (55%)
Michigan	Eminent domain	Pass (84%)
Nevada	Eminent domain	Pass (63%)
New Hampshire	Eminent domain	Pass (86%)
North Dakota	Eminent domain	Pass (68%)
Oregon	Eminent domain	Pass (67%)
South Carolina	Eminent domain	Pass (84%)
Washington	Regulatory takings	Fail (42%)

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2006 “Reform”

- Moderate Legislative reform did pass
 - **Senate Bill 1650:** Limits changes in the proposed public use, etc.
 - **Senate Bill 1206:** Narrows blight definition
 - **Senate Bill 53:** Changes rules regarding extending time for eminent domain
 - **Senate Bill 1809:** Minor changes in rules for redevelopment plans



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“The Big One”: Senate Bill 1210

- Adds the requirement that agencies must offer landowners \$5,000 for their appraisal
- Changes significantly the timing and rules for obtaining prejudgment possession

I'm an Appraiser; Why Should I Care?

- The \$5,000 requirement creates a new opportunity for entrepreneurial appraisers. **This means:**
 - For (virtually) every condemnee, money exists for a landowner appraisal
 - You need to find a way to do a “\$5,000 Appraisal”
- What is a \$5,000 Appraisal?
 - Not necessarily a full, written appraisal report
 - Statutory intent is that landowner has a meaningful opportunity to analyze the agency's offer/summary of appraisal up front
 - Your job really it to help the landowner determine whether the agency's offer is fair and, if not, if it is off by a little bit – or a whole lot

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The “\$5,000 Appraisal” – Cont.

- CCP § 1263.025 requires that the agency offer to pay:
 - “Reasonable costs, not to exceed five thousand dollars”; for
 - “an independent appraisal ordered by the owner”; and
 - the “independent appraisal shall be conducted by an appraiser licensed by the OREA.”
- “Independent appraisal” need not necessarily mean a full appraisal report (though some agencies may argue otherwise)
 - May be an informal review of the agency’s offer/appraisal summary
 - May be “phase one” of a phased appraisal project
- Keep in mind USPAP limitations on what an appraiser can and cannot do (and see, e.g., AO-19, “Unacceptable Conditions”)

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2007

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2007 “Reform”

- Some “Clean-up” Legislation adopted
 - **Assembly Bill 1322:** Creates unique appraisal-exchange rules for Caltrans
 - **Senate Bill 698:** Further changes standards for prejudgment possession; creates “Informational Pamphlet” requirement

2008

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2008 “Reform”

- **Proposition 98:** California Property Owners and Farmland Protection Act (*Howard Jarvis Taxpayers Association*)
 - Similar to Proposition 90, with significant reforms (and non-eminent domain baggage)
 - Failed at the polls

2008 “Reform”

- **Proposition 99:** Homeowners and Private Property Protection Act (*League of Cities*)
 - Moderate reforms targeted at condemnation of owner-occupied homes for redevelopment purposes
 - Passed at the polls

2009

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2009 “Reform”

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Eminent Domain Reform: Are we There Yet?

- No new initiatives in the works
- No legislative reform in 2009
- No pending reforms that appear to have any momentum

- BUT

Eminent Domain Reform: Are we There Yet?

- Recent Pfizer announcement has created renewed outrage
- Some states still actively engaged in reform efforts
(e.g., Texas Proposition 11, adopted earlier this month)

A New Information Source (and Some “New” Technology)

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New Resource for Keeping Informed

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- » Projects
- » Right to Take
- » Events
- » Inverse Condemnation & Regulatory Takings

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Home » Events » Join Me at the Appraisal Institute's 42nd Annual Litigation Seminar

Join Me at the Appraisal Institute's 42nd Annual Litigation Seminar


POSTED ON OCTOBER 26, 2009 BY RICK E. RAYL

On November 18, the Southern California Chapter of the Appraisal Institute is hosting its 42nd Annual Litigation Seminar. This full-day event features a great panel of speakers, and has been approved for eight hours of both Appraisal Institute and Office of Real Estate Appraisers ("OREA") continuing education credit.

It is being held at:

Embassy Suites Hotel
 11767 Harbor Blvd.
 Garden Grove, CA 92840
 714-539-3300

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I will be speaking at 3:45 p.m. on "New Cases & What's Happening in Eminent Domain." I understand that I am the last speaker of the day, and that you will undoubtedly have heard all you want to hear about eminent domain by the time 3:45 rolls around, but if you come, please stick around for my presentation. I hate speaking to an empty room.

I'd preview what I plan to say, but it will probably depend a lot on what happens earlier in the day, and besides, if I told you now, there would really be no incentive to stay until the end of the day with me. Hope to see you there!

TAGS: [Appraisal Institute](#), [Events](#)

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- » Redevelopment
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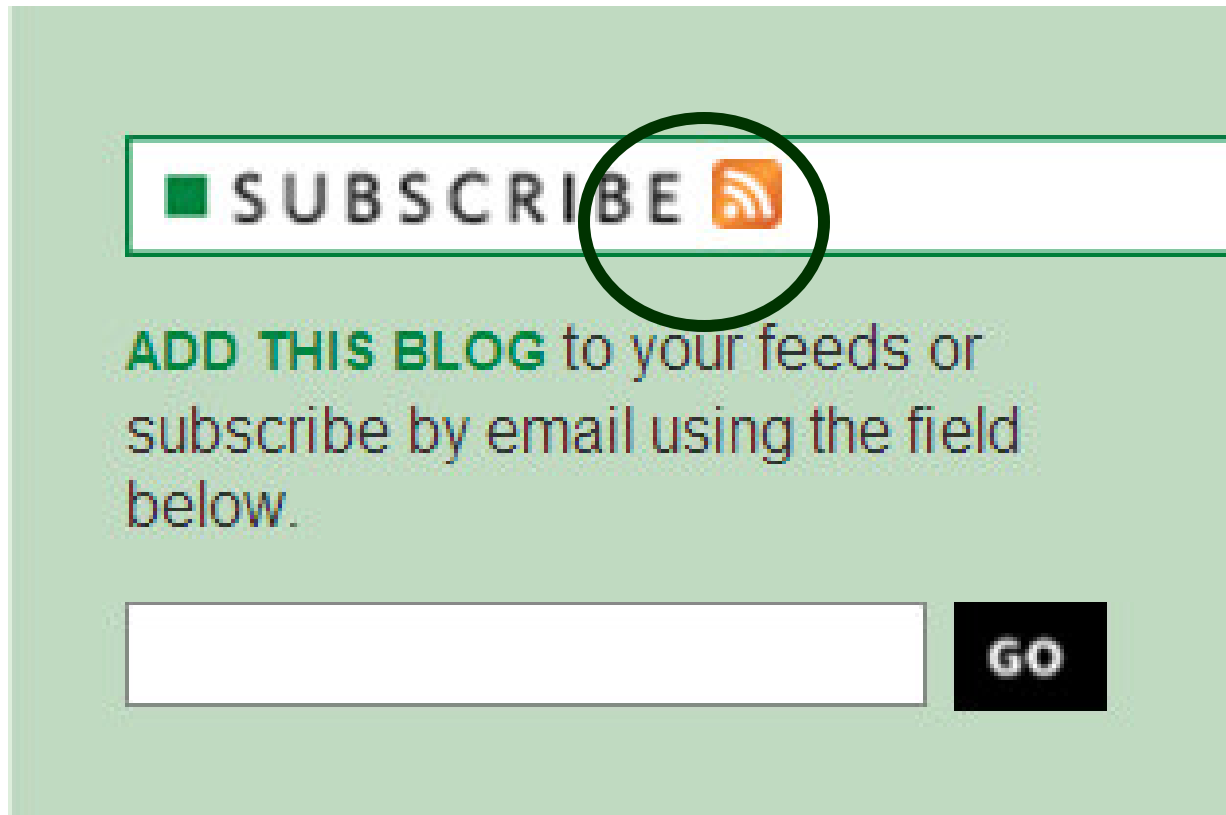
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■ **RECENT POSTS**

- » Tulare County Considering New Eminent Domain Actions for Road 106 Widening
- » La Mirada and Santa Fe Springs Move Forward with Eminent Domain Actions
- » IRWA Chapter 67 Lunch Features Transportation Planning Discussion
- » San Diego Contemplating Eminent Domain on Behalf of Escondido Developer
- » Kelo aftermath continues as Pfizer sets to close New London plant
- » Southern California Eminent Domain Attorneys Discuss Proposed Changes to Los Angeles Eminent Domain Rules
- » Lake Forest to Move Forward with Eminent Domain Action
- » City of Vista Seeking to Acquire Motel Property for Redevelopment Project

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RSS Feeds: What are they and how do they work?



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RSS Feeds: What are they and how do they work?

California Eminent Domain Report

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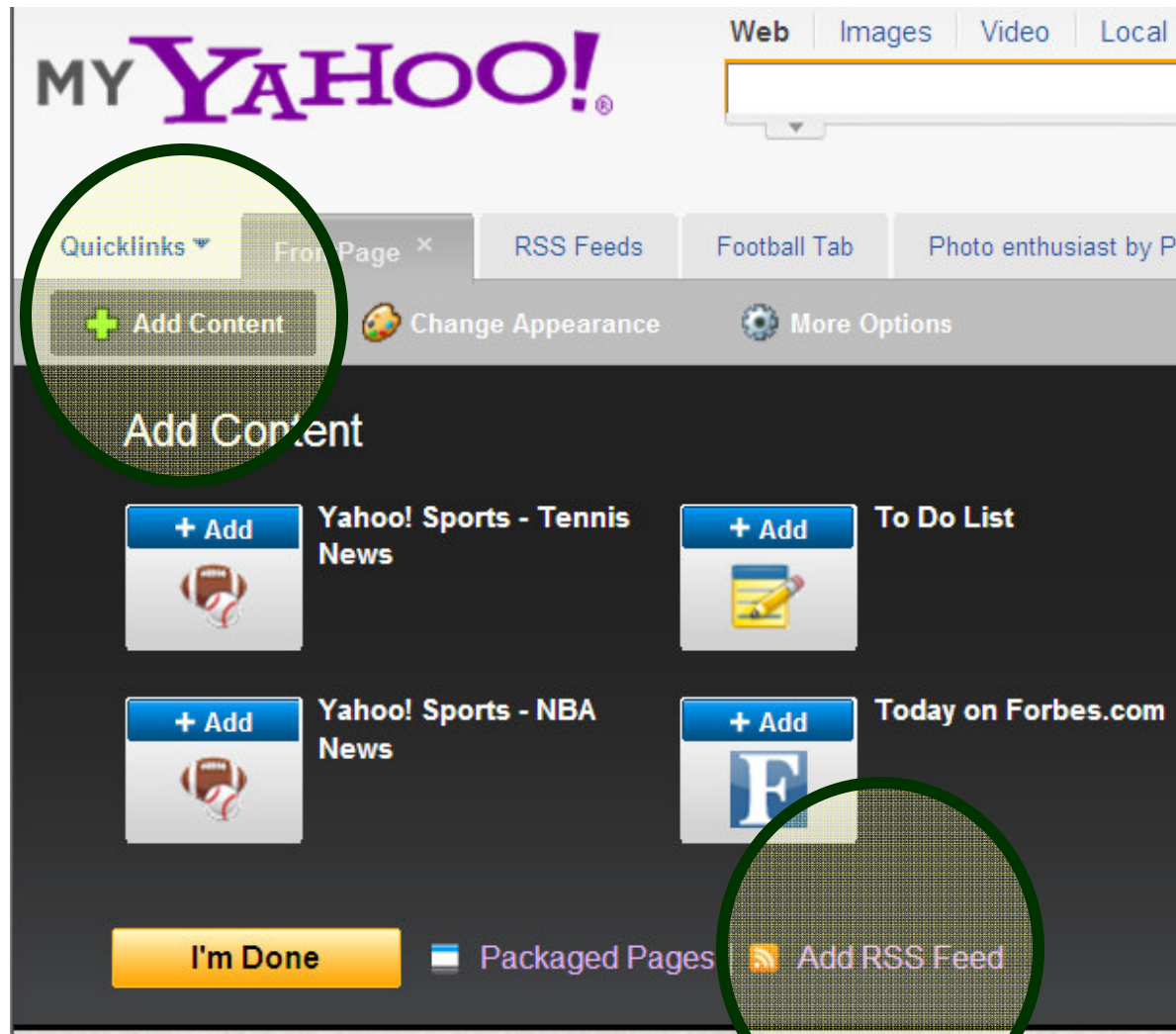
Current Feed Content

Tulare County Considering New Eminent Domain Actions for Road 108 Widening
Posted: Thu, 12 Nov 2009 08:44:11 -0800

Just a few weeks ago, we reported on [Tulare County's plans to condemn a number of properties to facilitate the widening of Road 80](#). Now, [Visalia Times-Delta](#) reporter Valerie Gibbons reports that Tulare County is considering condemnation for four additional parcels. this time to facilitate the widening of Road 108 (or Demaree Street) between

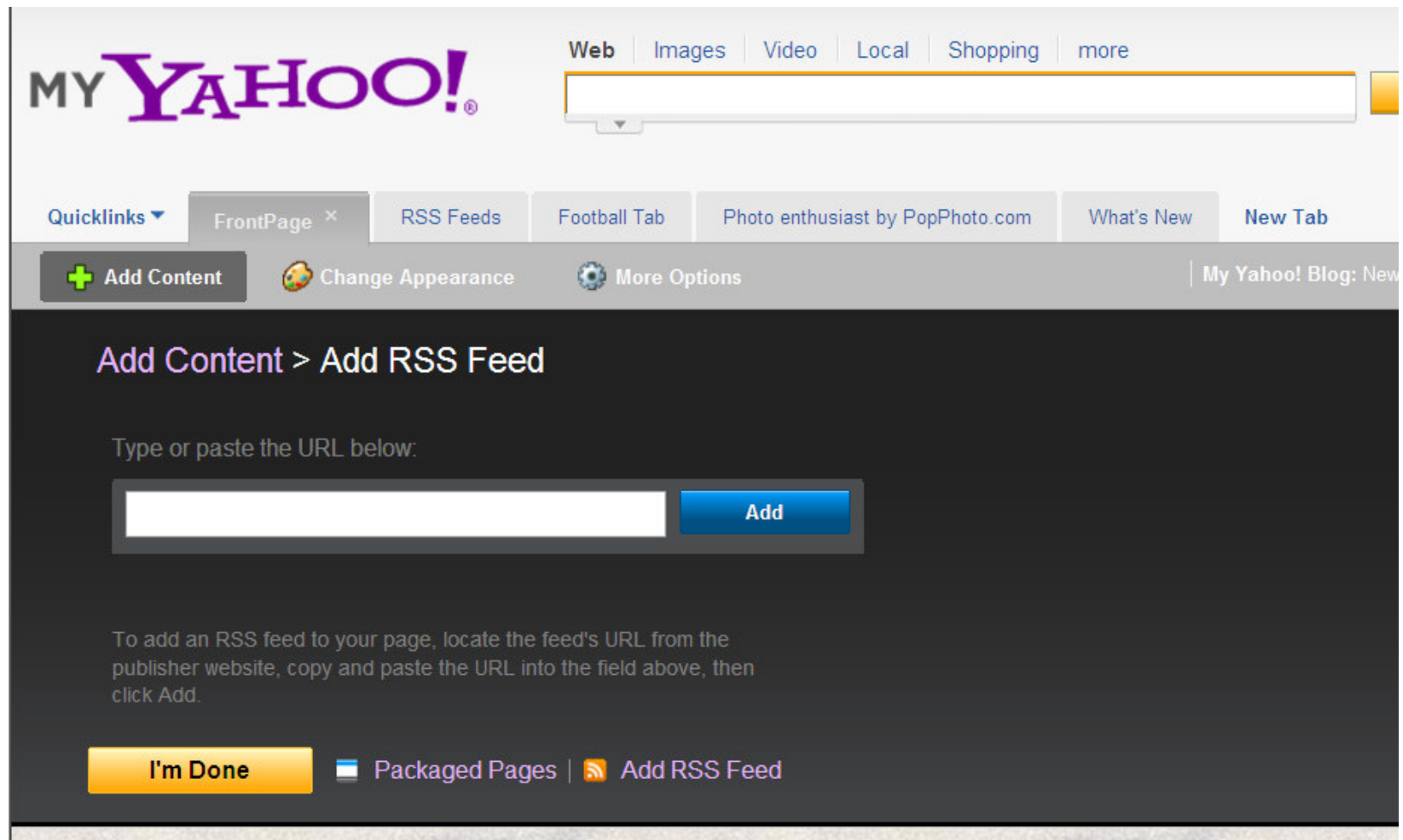
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RSS Feeds: What are they and how do they work?



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RSS Feeds: What are they and how do they work?



The screenshot shows the My Yahoo! interface for adding an RSS feed. At the top, the My Yahoo! logo is on the left, and navigation tabs for Web, Images, Video, Local, Shopping, and more are on the right. Below the logo is a search bar. A horizontal menu contains tabs for Quicklinks, FrontPage, RSS Feeds, Football Tab, Photo enthusiast by PopPhoto.com, What's New, and New Tab. Below this menu are buttons for Add Content, Change Appearance, and More Options. The main content area is titled 'Add Content > Add RSS Feed' and contains the instruction 'Type or paste the URL below:' followed by a text input field and an 'Add' button. Below the input field is a paragraph of instructions: 'To add an RSS feed to your page, locate the feed's URL from the publisher website, copy and paste the URL into the field above, then click Add.' At the bottom of the main area are buttons for 'I'm Done', 'Packaged Pages', and 'Add RSS Feed'.

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RSS Feeds: What are they and how do they work?

California Eminent Domain Report - powered by FeedBurner - Windows Internet Explorer

http://feeds.lexblog.com/CaliforniaEminentDomainReport

File Edit View Favorites Tools Help

Add Content > Add RSS Feed

Type or paste the URL below:

ds.lexblog.com/CaliforniaEminentDomainReport **Add**

To add an RSS feed to your page, locate the feed's URL from the publisher website, copy and paste the URL into the field above, then click Add.

I'm Done | Packaged Pages | Add RSS Feed

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RSS Feeds: What are they and how do they work?

The screenshot shows a web interface with a dark header. On the left, the text "Add Content > Add RSS Feed" is displayed. Below this, a green checkmark icon is followed by the text "You have successfully added the feed to your page." A text input field contains the URL "ds.lexblog.com/CaliforniaEminentDomainReport" and a blue "Add" button is to its right. Below the input field, a paragraph of text reads: "To add an RSS feed to your page, locate the feed's URL from the publisher website, copy and paste the URL into the field above, then click Add." At the bottom left of the header, there is a yellow "I'm Done" button, a "Packaged Pages" link, and an "Add RSS Feed" link with an RSS icon. On the right side of the header, there is a search bar with the placeholder text "Search content..." and a magnifying glass icon. Below the search bar is a purple "Browse Content" section with a list of categories: "My Yahoo! Essentials", "Open Apps BETA what's this?", "Entertainment", "Money", "News", "Sports", and "All Categories".

Below the header, the main content area is divided into two columns. The left column contains three widgets: "Personal Assistant" with an "Options" dropdown, "Yahoo! Local & Maps" with an "Options" dropdown, and a "Driving Directions" widget with a "Search Local" input field and an "Origin:" dropdown menu. The right column contains a "California Eminent Domain Report" widget with an "Options" dropdown and a list of news items:

- Tulare County Considering New Eminent Domain Actions for Road 108 Widening - 9 hours ago
- La Mirada and Santa Fe Springs Move Forward with Eminent Domain Actions - 1 day ago
- IRWA Chapter 67 Lunch Features Transportation Planning Discussion - 2 days ago
- San Diego Contemplating Eminent Domain on Behalf of Escondido Developer - 2 days ago
- Kelo aftermath continues as Pfizer sets to close New London plant - 3 days ago

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RSS Feeds: What are they and how do they work?

The screenshot displays an RSS feed interface with two main sections. The first section is titled "eminent domain" - Google Blog Search and features a list of articles with a yellow "Options" menu open over it. The menu includes icons and labels for Settings, Share, Alerts, More Info, Refresh, and Remove. The second section is titled "California Eminent Domain Report" and contains a list of news items with their respective timestamps.

"eminent domain" - Google Blog Search Options ▾

- A Turning Point for Eminent Domain ? - Room for Debate Blog ... - 3 eminent domain Christopher Capozziello for The New York Times P research and development headquarters in New London, Conn., w condemned to make wa...
- Why Eminent Domain Had To Be Reformed : Delaware Liberal - 6 h Hopefully we all remember the fight that Ed Osbourne fought for s his business (an incredible auto repair shop) from being taken thro The issue was tha...
- Pfizer abandons site of infamous Kelo eminent domain taking ... - 3 c The private homes that New London, Conn., took away from Suzette Kelo and her neighbors have been torn down. Their former site is a wasteland of fie.
- Vin Suprynowicz » Blog Archive » Eminent domain ? 'Never mind' - 14 hours ago the project for which the city of New London infamously used its power of eminent domain to seize and ultimately bulldoze the homes of Susette Kelo and her neighbors, after that seizure was OK'...
- The Neighborhood Retail Alliance: Eminent Domain as Corporate Welfare - 1 day ago And the WSJ tells it like it is-corporate welfare in extremis: "The aftermath of Kelo is the latest example of the futility of using eminent domain as corporate welfare. While Ms. Kelo and her ...

California Eminent Domain Report Options ▾

- Tulare County Considering New Eminent Domain Actions for Road 108 Widening - 9 hours ago
- La Mirada and Santa Fe Springs Move Forward with Eminent Domain Actions - 1 day ago
- IRWA Chapter 87 Lunch Features Transportation Planning Discussion - 2 days ago
- San Diego Contemplating Eminent Domain on Behalf of Escondido Developer - 2 days ago
- Kelo aftermath continues as Pfizer sets to close New London plant - 3 days ago
- Southern California Eminent Domain Attorneys Discuss Proposed Changes to Los Angeles Eminent Domain Rules - 6 days ago
- Lake Forest to Move Forward with Eminent Domain Action - 1 week ago
- City of Vista Seeking to Acquire Motel Property for Redevelopment Project - 1 week ago
- A Train Ride in a World Without Eminent Domain - 1 week ago
- CLE International Two-Day Eminent Domain Conference in San Francisco - 2 weeks ago

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Who Has an RSS Feed: Blogs




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November 12, 2009

Vice President Biden announces DOT approval of over 10,000 Recovery Act projects

S u b s c r i b e

E-mail updates



RSS feed



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Who Has an RSS Feed: Major New Sources

Los Angeles Times

Thursday, Nov. 12, 2009
6:54 p.m. PST

News

- Top News
- Most E-mailed Stories
- California | Local News
 - California Politics
 - Orange County
 - California's War Dead
- Data Desk
- National
- National Politics
- Business
 - Personal Finance
- Education
- Environment
- Religion
- Science
- Technology
- World
 - Africa
 - Asia
 - Europe
 - Latin America
 - Middle East

Opinion & Columns

- Commentary
- Sandy Banks
- Meghan Daum
- Jonah Goldberg
- Patrick Goldstein
- David Lazarus
- Steve Lopez
- Patt Morrison
- Dan Neil
- Tom Petruno
- Bill Plaschke
- George Skelton

Arts & Entertainment

- Art Reviews
- Entertainment News
- The Envelope
- Movie News
- Movie Reviews
- Music News
- Music Reviews
- Restaurant Reviews
- Theater & Dance Reviews
- TV News

Sports

- Sports
- Auto Racing
- Baseball
 - Angels
 - Dodgers
- Basketball
 - Clippers
 - Lakers
 - Sparks
- Boxing
- College Basketball
- College Football
- Golf
- High School Sports
- Hockey
 - Anaheim Ducks
 - Kings
- Horse Racing
- Olympics
- Pro Football
- Soccer
- Tennis
- USC Trojans Sports

Living

- Autos
- Books
- Food
- Health
- Home & Garden
- ICU: Los Angeles Connections
- Image
- Living Green
- Real Estate
- Travel
 - Europe
 - Hawaii
 - Las Vegas
 - Mexico

Blogs

- Afterword
- All The Rage
- Babylon & Beyond
- The Big Picture
- Bit Player
- Booster Shots
- Bottleneck Blog
- Comments Blog
- Culture Monster
- Daily Dish
- The Daily Mirror
- Daily Travel & Deal Blog
- D.C. Now
- The Dish Rag
- Entertainment News & Buzz
- Greenspace
- Gold Derby
- Holiday Gift Guide
- Hero Complex
- The Homicide Report
- Jacket Copy
- LA Land
- LA Now
- LA Unleashed
- La Plaza
- Lakers Blog
- Money & Company
- The Movable Buffet
- Opinion LA
- Outposts
- Pop & Hiss
- Readers' Representative Journal
- Show Tracker
- Technology
- Top of the Ticket
- Up to Speed
- Varsity Times Insider

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Who Has an RSS Feed?

- Frankly, too many things to name; just look for:



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I'm an Appraiser; Why Should I Care?

- RSS feeds represent a way to keep on top of projects and legal developments as they happen. **This means:**
 - You can put yourself in a position to know about what is going on before a potential client calls you
 - This puts you in a great position to know what the potential client is calling about before they tell you – and to have immediate input into their problems
- RSS feeds also allow you to keep track of published references to you or your projects. **This means:**
 - You can keep track of (and control?) your own “PR Campaign”

Possession Wars!



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Changes in Possession Rules

Senate Bill 1210

(CCP §1255.410 and §1263.025)

- Requires providing property owner with an informational packet.
- Requires \$5,000 offer for an independent appraisal: Is there a change in degree of “negotiation” required?
- Lengthens the time to obtain possession.

Possession: Best Case Timing

<u>Step</u>	<u>Days</u>
Notice of Intent to Appraise	0
Appraisal	30
Written Offer	35
Negotiations	45
Notice of Hearing on Resolution of Necessity	45
Adopt Resolution	65
File Condemnation Action	66
File Motion for Possession	66
Hearing on Motion for Possession	166
Effective Date of Order of Possession	196 days (6.5 months)

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I'm an Appraiser; Why Should I Care?

- Agencies will often be under the gun, desperate to get possession as quickly as possible. **This means:**
 - More pressure to work quickly on the deposit appraisal
- New balancing test means courts will scrutinize deposit appraisal more closely than ever. **This means:**
 - If you miss something important, Court may deny agency possession, which could kill an entire project
 - Very real risk exists that you will be deposed on your deposit appraisal; you better be ready to defend it
- Agencies that rarely condemn may not know about these rules until it is too late. **This means:**
 - You can be the “hero” if you educate your clients up front

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New Local Rules?

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Changes Being Considered for Chapter 16 (Los Angeles)

- LA Superior Court's Local Rules on eminent domain create procedural rules unique to Los Angeles County:
 - Intricate, joint “First Pretrial Conference Statement” that arguably creates early expert disclosures
 - Detailed, “Appendix A” that controls the expert exchange, and requires far more than a Statement of Valuation Data

Changes Being Considered for Chapter 16 (Los Angeles)

- Draft amended rules have been circulated by Commissioner Mitchell to eminent domain attorneys
- Recent meeting with Commissioner to discuss the proposed changes:
 - Existing proposal eliminates unique Pretrial Conference, converts initial hearing to a standard Case Management Conference
 - Meeting revealed some momentum (including from Commissioner Mitchell himself) to eliminate entirely Appendix A, moving LA County to a “Statement of Valuation Data” exchange
- Changes likely to take effect January 2011

New Case Law

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Shaw v. County of Santa Cruz (1/2009)

- Regulatory-takings claim involving County's refusal to issue a ministerial permit for a well
- Court held that County's failure to issue permit was unjustified, and ordered that the permit be issued
- However, court rejected claim that this failure triggered inverse condemnation liability

City of Stockton v. Marina Towers (2/2009)

- City condemned property without first defining a real project
- Court conclude that the “project” was the condemnation itself, and that it failed as a public use
- City had already decided what to do with the property and had built a stadium – remanded for damages



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Nossaman E-Alerts

Overly Broad Resolution of Necessity = Victory for Property Owner?

Authored By: [David Graeler](#), [Bradford B. Kuhn](#)

02/19/09



print



email

Likely the worst case scenario a condemning agency can face is for it to pass a resolution of necessity, file a condemnation action, obtain prejudgment possession, build its improvement, and subsequently lose in court on a property owner's right to take challenge. The specter of the agency losing a vital public project by being ordered to surrender possession of property that it spent millions of dollars improving is enough to send shudders through even the most seasoned right-of-way professionals.

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Hauselt v. County of Butte (3/2009)

- Inverse-condemnation case involving flooding
- At issue was whether liability could arise from modifications to a flood control channel which resulted in additional flooding on a particular property
- Court ruled that the issue turned on a “reasonableness” inquiry
- Since modifications were reasonable, no liability in inverse condemnation

Los Angeles Unified School District v. Pulgarin (6/2009)

- Business owner did not possess a written lease, and trial court concluded that owner could not recover lost goodwill
- Court of Appeal reversed, holding that the correct inquiry is factual, focused on security of tenancy
- Existence of a written lease probative, but not dispositive:

“[E]vidence of the pre-condemnation duration of a periodic tenancy and the quality and mutual satisfaction in the landlord and tenant relationship are probative for determination of compensation for loss of goodwill.”

Guggenheim v. City of Goleta (9/2009)

- Ninth Circuit Held that Rent Control Ordinance Constituted a Taking
- Elaborate Discussion of Procedural Rules that Typically Preclude a Damages Award
- Held Damages Recoverable; Remanded to Trial Court

The screenshot displays the Nossaman LLP website. The main header reads "CALIFORNIA EMINENT DOMAIN REPORT" with a quote: "... nor shall private property be taken for public use, without just compensation." Below the header is a navigation menu with links for ABOUT, SERVICES, CONTACT, ARCHIVES, and a SEARCH box. A banner image features a collage of historical documents and modern cityscapes. The main content area shows a breadcrumb trail: Home > Inverse Condemnation & Regulatory Takings >. The article title is "Are Regulatory Takings Claims Still More Bark Than Bite?" posted on October 19, 2009, by K. Erik "Rick" Friess. The article text begins: "Typically, regulatory takings litigation generates a lot of noise and gnashing of teeth but, at the end of the day, rarely are government agencies bitten with an order that they pay compensation. However, a new opinion from the federal 9th Circuit Court of Appeals, *Guggenheim v. City of Goleta* (Sept. 28, 2009, Case No. 06-56306), demonstrates that regulatory takings litigation can have teeth. In *Guggenheim*, the 9th Circuit holds that the city of Goleta's rent control ordinance on mobile home parks went too far and that the".

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Are Regulatory Takings Claims Still More Bark Than Bite?

POSTED ON OCTOBER 19, 2009 BY K. ERIK "RICK" FRIESS

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National Parks & Conservation Association v. Bureau of Land Management (11/2009)

- Not an eminent domain case, but a very recent highest and best use dispute
- As part of proposed land exchange, BLM appraised property
- Appraiser did not consider a landfill as a potential highest and best use, even though that was exactly the use contemplated for the property
- Ninth Circuit upheld a summary judgment against BLM

Monks v. City of Rancho Palos Verdes (10/2008)

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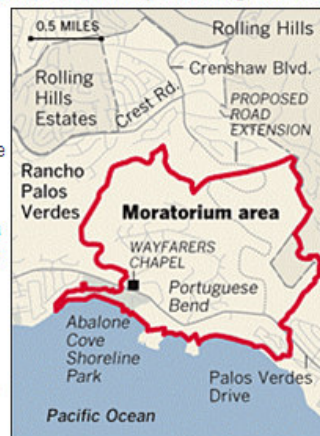


City of Rancho Palos Verdes Faces Payment to Property Owners for Regulatory Taking

POSTED ON NOVEMBER 13, 2009 BY K. ERIK "RICK" FRIESS

Just over a year ago, on October 1, 2008, the California Court of Appeal issued a fairly rare ruling: it found a public agency had committed a regulatory taking and remanded the matter back to the trial court to determine the amount of damages to be paid to the property owners. Specifically, the Court held in *Monks v. City of Rancho Palos Verdes* that the City of Rancho Palos Verdes' rules preventing development in an area susceptible to landslides (the infamous Portuguese Bend landslide area) constituted a regulatory taking that was not justified by the city's power to regulate nuisances and protect the public interest. (For more details, Brad Kuhn and I wrote an article for the *California Real Estate Journal*, "California Court of Appeal Opens The Door to Regulatory Takings Claims," that details the holding in the case, and its potential implications.)

Today, Jeff Gottlieb's article in the *Los Angeles Times* "Legal battle over land use engulfs Portuguese Bend" reports that the trial on the regulatory takings damages is fast approaching:



- City development moratorium involving landslide-prone Portuguese Bend overturned
- City ordered to issue building permits to owner
- Damages trial set for December 1, 2009

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Questions?



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