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**CITY OF SAN BUENAVENTURA, Plaintiff and Respondent, v. NORTON S.  
KARNO, Defendant and Appellant.**

**No. B237181**

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DI-  
VISION SIX**

**2012 Cal. App. Unpub. LEXIS 8708**

**November 29, 2012, Opinion Filed**

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**PRIOR HISTORY:**

Superior Court of Ventura County, No. 56-2010-376308 CU-EL-VTA, Henry J. Walsh, Judge.

**COUNSEL:** Law Offices of Julian A. Pollok, a Professional Corporation, for Appellant.

Price, Poster & Parma; Todd A. Amspoker, Timothy F. Metzinger, and Ariel Calonne, City Attorney, City of San Buenaventura, for Respondent.

**JUDGES:** YEGAN, J.; GILBERT, P.J., PERREN, J. concurred.

**OPINION BY:** YEGAN, J.

**OPINION**

Norton S. Karno appeals from a judgment and final order of condemnation in an eminent domain proceeding brought by the City of San Buenaventura (City). After a court trial, it approved the taking of the sewer line easement underneath appellant's property. Before the trial, City adopted a resolution of necessity for the taking of the easement. Appellant contends that the trial court erroneously required him to prove that, in adopting the resolution of necessity, City had committed a gross abuse of discretion. Appellant argues that his burden was merely to produce substantial evidence of a gross abuse

of discretion. He also argues that he met this burden by producing substantial evidence that, before the hearing on the resolution of necessity, City had irrevocably committed itself to the taking of the easement. In addition, appellant contends that (1) City failed to carry its burden of proving that the taking of the easement was justified, (2) the project for which the easement was taken was not adequately identified in the resolution of necessity, and (3) the trial court's statement of decision was deficient. We affirm.

*Factual and Procedural Background*

In 2007 the City Council approved a vesting tentative map for the Azahar Place project, "a 60-unit multi-family rental housing facility" to be developed by a "non-profit affordable housing developer."<sup>1</sup> The units would be rented to persons and families of low or very low income. To help finance the project, City agreed to loan \$3 million to the developer and approved the issuance of revenue bonds in the maximum principal amount of \$17 million.

1 "'Tentative map' refers to a map made for the purpose of showing the design and improvement of a proposed subdivision and the existing conditions in and around it and need not be based upon an accurate or detailed final survey of the property." (Gov. Code, § 66424.5, subd. (a).) "The vesting tentative map statutes ([Gov. Code] §§ 66498.1 et seq.), adopted in 1984, were intended to offer developers 'a degree of assurance, not previously available, against changes in regulations.' [Citation.] Section 66498.1 permits a developer to file a 'vesting tentative map' whenever a tentative map would otherwise be required. Approval of the vesting tentative map entitles the developer, subject to certain limitations, to proceed with the project 'in substantial compliance

with the ordinances, policies, and standards described in [Gov. Code] [s]ection 66474.2,' that is, with those in effect when the map application was determined to be complete. [Citation.]" (*Golden State Homebuilding Associates v. City of Modesto* (1994) 26 Cal.App.4th 601, 611, fn. omitted.)

As a condition of its approval of the affordable-housing project, City required the developer to connect to City's sewer system. Both the vesting tentative and final map showed that developer would connect to an existing sewer line underneath a car-parking area on appellant's property.

The developer tried without success to purchase the necessary sewer line easement from appellant. Developer then requested that City exercise its power of eminent domain. On September 28, 2009, city council approved an agreement between City and developer whereby City would "prepare and file . . . all documents and pleadings necessary to acquire the [easement] either through negotiation or through an action in eminent domain." Developer agreed to pay all expenses incurred by City.

The city attorney contacted appellant and tried without success to negotiate the purchase of the easement. On June 14, 2010, the City Council adopted a resolution of necessity authorizing City to exercise its power of eminent domain to acquire the easement. The resolution described the easement as "a 15-foot-wide-underground trench of approximately 632 square feet for the construction, placement and maintenance of a public-sewer line and incidental purposes."

Several months before City adopted the resolution of necessity, it had advanced \$2 million of the \$3 million it had agreed to loan to developer. The \$2 million was used to finance the developer's purchase of the site for the affordable-housing project. Escrow closed on February 17, 2010.

On June 23, 2010, City filed the present action in eminent domain. Judgment in favor of City, along with a final order of condemnation, were entered on October 14, 2011.<sup>2</sup>

<sup>2</sup> In footnote 1 at page 1 of its brief, City states: "The new sewer line has already been constructed and the City has issued Certificates of Occupancy for the affordable housing project." In its reply brief, appellant neither objects to nor disputes this statement.

#### *Resolution of Necessity*

"A public entity may not commence an eminent domain proceeding until its governing body has adopted a

resolution of necessity . . . ." (Code Civ. Proc., § 1245.220.)<sup>3</sup> A properly adopted resolution of necessity "conclusively establishes" the statutory criteria for the taking of property for a project. (§ 1245.250, subd. (a).) The statutory criteria are "(a) The public interest and necessity require the project. [¶] (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. [¶] (c) The property sought to be acquired is necessary for the project." (§ 1240.030.)

3 All further statutory references are to the Code of Civil Procedure.

A resolution of necessity does not conclusively establish the statutory criteria "to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body." (§ 1245.255, subd. (b).) "A gross abuse of discretion may be shown by a lack of substantial evidence supporting the resolution of necessity. [Citation.] It may also be shown where at the time of the agency hearing, the condemnor had irrevocably committed itself to the taking of the property regardless of the evidence presented. [Citation.]" (*Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 Cal.App.4th 141, 149.) If the requisite showing is made, the resolution of necessity loses its conclusive force, and the public entity has the burden of proving the statutory criteria by a preponderance of the evidence. (*Redevelopment Agency of the City of Huntington Park v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128 (*Norm's Slauson*)).

#### *Appellant's Contention: Abuse of Discretion*

Appellant contends that City abused its discretion because, at the time of the hearing on the resolution of necessity, it "was irrevocably committed to the . . . Project going forward with the easement through [appellant's] Property . . . ." City was irrevocably committed because it had required the easement "as a condition of its approval of the . . . Project, long before the City Council considered the propriety of adopting the Resolution of Necessity." (Fn. omitted.) (AOB8)

#### *Burden of Proof*

Appellant argues that, as the owner of the property to be taken, he had merely a burden of producing substantial evidence of a gross abuse of discretion. Once he carried this burden, the burden shifted to City to prove by a preponderance of the evidence that the taking met the statutory criteria. Appellant argues that the trial court erroneously required him to prove a gross abuse of discretion by a preponderance of the evidence. In its statement of decision, the court declared: "To overcome [the] presumption [arising from the resolution of necessity,

appellant] would have to prove that the adoption of the resolution was 'influenced or affected by gross abuse of discretion by the governing body.' [Citations.] "[Appellant] . . . did not satisfy his burden to prove that the City had irrevocably committed itself to adopting the Resolution of Necessity . . . ." Thus, "the burden never transferred to the City to prove the justification for the taking."

In support of his contention that he had only a burden of producing substantial evidence of a gross abuse of discretion, appellant relies upon the following passage from *Norm's Slauson*, *supra*, 173 Cal.App.3d at p. 1128: "[O]nce a defendant property owner *establishes by substantial evidence* that the resolution of necessity was invalidly adopted and because of a gross abuse of discretion is not entitled to its ordinary conclusive effect, the burden of proving the elements for a particular taking must rest on the governmental agency." (Italics added.) This passage does not support appellant's contention. The appellate court stated that the property owner must "establish," not "produce substantial evidence of," a gross abuse of discretion. The words "establish" and "prove" have similar meanings. Black's Law Dictionary defines "establish" as "[t]o prove; to convince." (Black's Law Dict. (9th ed. 2009) p. 626, col. 1.) It defines "prove" as "[t]o establish or make certain." (*Id.*, at p. 1345, col. 2; see also *Lawson v. Superior Court In and For Los Angeles County* (1957) 155 Cal.App.2d 755, 759 ["the word 'prove' means 'to establish a fact . . . as true'"].)

When the *Norm's Slauson* court used the term "substantial evidence," it was recognizing that, unless a finding of a gross abuse of discretion is supported by substantial evidence, it will not be upheld on appeal. (See, e.g., *People v. Dishman* (1982) 128 Cal.App.3d 717, 721 ["The People, in proving the commission of the crime [of receiving stolen property], have the primary obligation to establish, by substantial evidence [court lists elements of the crime]").) In another passage, the *Norm's Slauson* court reiterated the requirement that the property owner "establish" an abuse of discretion: "[O]nce the property owner has *established* an abuse of discretion and thus eliminated the conclusive force of the resolution of necessity," the public entity has the burden of proving the required criteria by a preponderance of the evidence. (*Norm's Slauson*, *supra*, 173 Cal.App.3d at p. 1128, italics added.)

Other cases agree that the property owner has the burden of proving a gross abuse of discretion. In *National City Business Assn. v. City of National City* (1983) 146 Cal.App.3d 1060, 1065, the court declared: "Once . . . a resolution [of necessity] is passed, the burden on the public use issue shifts to the property owner, and that burden may be met only by a showing of gross abuse of discretion by the condemnor [citation]." (See also *Hunt-*

*ington Park Redevelopment Agency v. Duncan* (1983) 142 Cal.App.3d 17, 26 ["Appellant's contention that the Duncans failed to sustain their burden of *proving* that the Agency abused its discretion in adopting the resolution is meritorious and requires reversal of the judgment [italics added]"].)

#### *Standard of Review*

"In reviewing the trial court's determination on the question of whether the public agency has committed a gross abuse of discretion, appellate courts apply the standard of review applicable to ordinary mandamus. In such cases, the appellate court "is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.] However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed." [Citations.] [Citation]" (*City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202, 1221-1222.)

#### *Appellant Failed to Carry His Burden of Proof*

It matters not whether we independently review the trial court's determination or apply the substantial evidence test. Under either standard we uphold the court's ruling that appellant failed to prove that, prior to the hearing on the resolution of necessity, City had irrevocably committed itself to the taking of the easement.

In support of his contention that City had irrevocably committed itself, appellant again relies on *Norm's Slauson*, *supra*, 173 Cal.App.3d 1121. There, before the hearing on a resolution of necessity, a public agency and a developer agreed that the agency would "acquire the property for transfer to the developer and the developer would build a condominium project thereon. . . . That agreement was followed by the issuance and sale of tax exempt bonds to pay for the acquisition. [¶] In short, the agency . . . in effect sold the property and issued bonds to obtain the money to acquire the property all before taking any steps to condemn the property." (*Id.*, at p. 1125.) The appellate court concluded that the agency had "irrevocably committed itself to take the property in question, regardless of any evidence that might be presented at [the] hearing." (*Id.*, at p. 1127.) Thus, the hearing "was a sham and the Agency's policy making board simply 'rubber stamped' a predetermined result." (*Ibid.*)

Unlike the agency in *Norm's Slauson*, City did not "'rubber stamp[]' a predetermined result." (*Norm's Slauson*, *supra*, 173 Cal.App.3d at p. 1127.) One of the conditions of City's approval of the vesting tentative map was that the developer "demonstrate [its] right to construct the improvements," including the connection to City's sewer system. If the developer were unable to ac-

quire the property rights necessary to construct the improvements, it could "[r]equest in writing that the City acquire[] the property [rights] . . . and exercise[] its power of eminent domain to do so, if necessary." City did not guarantee that it would exercise its power of eminent domain: "The City does not and cannot guarantee that the necessary property rights can be acquired or will, in fact, be acquired. All necessary procedures of law would apply and would have to be followed."

When the developer was unable to negotiate an agreement for the purchase of the easement from appellant, City agreed to "prepare and file . . . all documents and pleadings necessary to acquire the [easement] either through negotiation or through an action in eminent domain." But in the agreement City made clear that its obligation was conditional on the adoption of a resolution of necessity: "It is understood that prior to the initiation of any eminent domain action, it will be necessary for the City *in its sole discretion* to adopt a resolution of necessity for the acquisition of the property . . . . Other than the deposit of funds to cover initial attorney's fees and the deposit of probable compensation, the adoption of a resolution of necessity shall be a condition precedent to any further obligation of the City herein." (Italics added.)

Appellant argues that City nevertheless irrevocably committed itself to the taking of the easement because, before the hearing on the resolution of necessity, "at least \$2,000,000 in loan proceeds [for the affordable-housing project] . . . were funded by the City." This argument erroneously assumes that the affordable-housing project could not have gone forward without the easement. There were two more costly alternatives to the easement. One was to install a new sewer line under State Route 126. The other was to install a sewer lift station. In *Norm's Slauson*, on the other hand, there was no alternative to the taking of the property upon which the condominium complex would be constructed.

Because appellant failed to carry his burden of proving a gross abuse of discretion, the burden never shifted to City to prove that the taking met the statutory criteria. Thus, the adoption of the resolution of necessity "conclusively establishes" the statutory criteria for the taking. (§ 1245.250, subd. (a).)

#### *Identification of Project*

The resolution of necessity was required to adequately identify the project for which the easement would be acquired. (*City of Stockton v. Marina Towers LLC* (2009) 171 Cal.App.4th 93, 107-109.) The resolution of necessity erroneously designates the property to be benefited by the easement as "a 128-unit two-story

apartment complex." (PE 12, p. 1) The property to be benefited is a 60-unit apartment complex. Appellant contends that this error renders invalid the resolution of necessity.

We disagree. The project is described as "the construction, placement, and maintenance of a public sewer line" that will serve a residential development. A map attached to the resolution shows the precise location of the easement on appellant's property. It is inconsequential whether the development consists of 128 units or 60 units. In either case, the development must still have sewer service.

Appellant claims that the resolution of necessity incorrectly describes the project "as an extension of the City sewer," when in fact the project is the installation of a new sewer line to connect to the City's sewer system. This argument is a meritless exercise in semantics.

#### *Statement of Decision*

Appellant argues that the statement of decision is deficient because the trial court did not respond to his request to explain (1) why it "was applying a different standard of proof than that required by *Norm's Slauson*," and (2) "how the City would have the ability to withdraw from the commitments (financial and otherwise) that it had made to the . . . Project." This argument is also meritless. "The trial court prepared a detailed [seven]-page statement of decision in which it set forth both the factual and legal basis for its decision." (*Bandt v. Board of Retirement, San Diego County Employees Retirement Ass'n* (2006) 136 Cal.App.4th 140, 163.) No more was required. (*Ibid.*) "In issuing a statement of decision, the trial court need not address each question listed in a party's request. All that is required is an explanation of the factual and legal basis for the court's decision regarding such principal controverted issues at trial as are listed in the request. [Citation.] [Citations.]" (*Kazensky v. City of Merced* 65 (1998) Cal.App.4th 44, 68.)

#### *Disposition*

The judgment and final order of condemnation are affirmed. City shall recover its costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.