



Perils in Prejudgment Possession

What the Changes in Prejudgment Possession Rules Mean for Project Planners and Managers, Acquisition Agents, and Appraisers

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Overview

- **Shift in Perception Regarding Condemnation.**
- **Changes in Prejudgment Possession Rules.**
- **Horror Stories.**
- **Obtaining Possession and Avoiding Successful Right-to-Take Challenges.**

Obtaining Possession: “The Good Old Days”

- Easy to quickly obtain orders for possession.
- Advice to agencies: follow the rules, and you will get possession quickly.
- Advice to owners: don't bother with challenges. Possession/right-to-take challenges are expensive, and you'll lose.

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Shift in Perception: Eminent Domain Awareness

- *Kelo* triggered public awareness and outrage.
- The push for eminent domain reform (Propositions and Legislation) resulted in minor changes.
- Outrage has subsided, but cynicism is still present.

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.

Horror Stories: Recent Examples

City of Stockton v. Marina Towers



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Overly Broad Resolution of Necessity = Victory for Property Owner?



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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.

This is precisely what the City of Stockton (City) faced when the Court of Appeal in *City of Stockton v. Marina Towers LLC, et al.* (February 13, 2009, C054495) __ Cal.App.4th __, held that the project description in the resolution of necessity adopted by the City was so vague, uncertain and sweeping in scope that it failed to specify the "public use" for which the City sought acquisition of the property. That the City's resolution of necessity was stated so broadly was not surprising, as the City did not decide how it was going to use the property until after it

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Horror Stories: Recent Examples

- An agency fails to fully consider the status of a developer's entitlements: the agency settles for 10 times the offer in order to keep the project on schedule.
- A property owner acquires a property adjacent to the subject property days before the agency adopts its resolution of necessity: the agency ends up with a year-long court battle over its right to take.

Horror Stories: Recent Examples

- An agency needs to change the scope of acquisition after filing its condemnation action: the agency ends up paying a large sum in order to keep its project on schedule.
- An adjacent property owner complains he was not given notice of the hearing on the resolution of necessity: the agency loses the owner's right-to-take challenge long after the project is built.

Horror Stories: Recent Examples

- A property owner convinces an agency's board to have staff "continue negotiations" regarding certain issues raised by the owner: the agency loses a right-to-take challenge -- after it built its project -- based on a claimed failure to fully negotiate those issues.
- An agency makes an offer to acquire the day before its hearing on its resolution of necessity: the agency redesigns its project to one that was less satisfactory in order to avoid having to file the condemnation.

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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Avoiding Traps for the Unwary

- The change in rules has dramatically increased the time it takes to obtain prejudgment possession and eliminated certainty of possession.
- Many right-of-way agents, project managers, and appraisers do not understand the new rules and can get project timelines in trouble because they wait too long to commence acquisition-related activities.
- **Solution:** Make sure everyone involved in the right-of-way acquisition process knows the new rules; set a firm deadline by which each step in the condemnation process must commence.

Precondemnation Procedures

- Understand what the government must do before passing a Resolution of Necessity.
 - Provide an informational pamphlet
 - Make the \$5,000 offer (or offers?) -- avoid attaching “strings”
 - Allow the owner to complete the independent appraisal then negotiate?
- Failure to follow the new rules could give landowners a viable right-to-take challenge or basis for a possession fight.
- This can be devastating, especially in light of the timing of the possession rules we just discussed.
- **Solution:** Circulate a checklist to right-of-way agents and appraisers listing all the things that must happen before the hearing on the resolution of necessity.

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Precondemnation Checklist

- ✓ Offer of compensation / Informational Pamphlet
- ✓ Summary of appraisal (with recent date of value)
- ✓ Notice regarding \$5,000 payment for landowner appraisal
- ✓ Well-supported justification for prejudgment possession

Questions?

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