Panel Discussion with Condemnation-Focused Attorneys

Kevin M. Zanni

This column presents a roundtable discussion between our Insights *editor Kevin Zanni and a panel of distinguished legal counsel who regularly practice in the eminent domain discipline.*

Introduction

The perspectives of practicing attorneys are often influenced by (1) current and historical judicial decisions and (2) their personal experiences. In order to provide a practitioner's perspective, we discussed the current state of eminent domain and expropriation matters with a panel of practicing attorneys.

Our panel is comprised of Steven J. Quam, a shareholder in the condemnation and eminent domain practice of Fredrikson & Byron, P.A., and Mark A. Easter, a partner with Best Best & Krieger, LLP (BB&K).

Steve Quam is an eminent domain lawyer, focusing on all aspects of the land acquisition process, including condemnation, for major transmission and pipeline projects. Steve has significant experience representing both landowners and taking authorities on condemnation proceedings.

When working with taking authorities (usually utilities or pipeline companies), Steve works with the client to efficiently obtain the right-of-way necessary to construct major linear electric transmission facilities or pipelines.

Steve's work often begins during the regulatory process and extends through the valuation process. When working with property owners, Steve works with the client to develop and present a claim for just compensation. Steve has tried scores of cases to court-appointed condemnation commissioners, juries, and judges.

Mark Easter's practice focuses on public agency acquisitions, including eminent domain and inverse condemnation litigation. Mark is a partner residing in the Riverside, California, BB&K office. He is the leader of BB&K's eminent domain practice group.

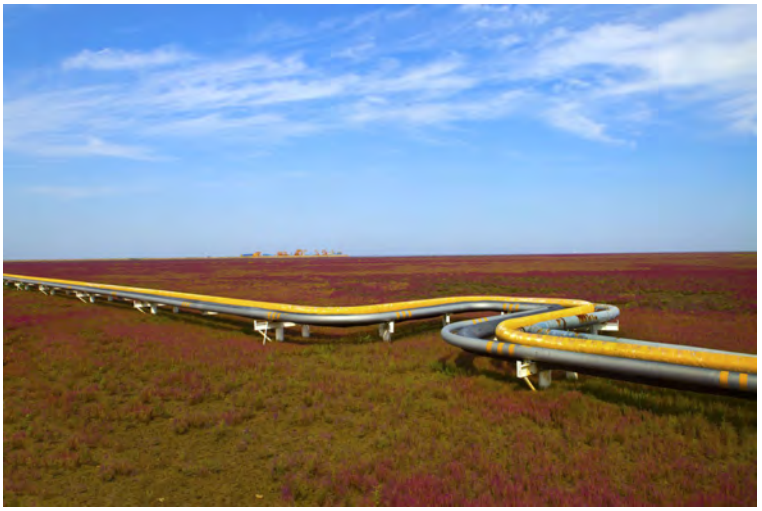
Mark has represented public agencies throughout California on a wide variety of public acquisitions, including projects for cities, counties, redevelopment agencies, school districts, special districts, water districts, transportation agencies, and housing authorities.

The *Insights* editorial team developed some questions related to the panel's expertise that should be of interest to our readers. We then presented our questions to our panel. We hope that you find their insights as informative as we did.

Zanni: Please describe your legal practice and your specific subject matter experience.

Easter: I have been a real estate litigator for over 25 years, and for the last 22 years, my focus has been real property acquisition and eminent domain. I primarily represent public agencies.

The scope of my representation spans from the very beginning to the very end of public agency acquisitions, including assisting agencies with site selection, determining what property is needed, selecting appraisers, reviewing appraisal reports, and negotiating with property owners on the front end, through the administrative process of the agency adopting a resolution of necessity for the use of its eminent domain power, and through the entire eminent domain litigation process, including just compensation jury trials and appeals.



I have handled acquisitions of both real estate and going-concern businesses for school districts, water districts, cities, counties, redevelopment agencies, utility districts, and transportation agencies.

Quam: My practice focuses almost exclusively on condemnation matters. Over the past 18 years, I have served as land rights counsel for major linear utility projects in Minnesota, including the Alliance natural gas pipeline (252 miles of right-of-way in Minnesota), the MinnCan petroleum pipeline (304 miles of right-of-way) and CapX2020 (fours high voltage transmission lines with over 600 miles of new right-of-way in Minnesota, North Dakota, South Dakota, and Wisconsin).

In addition, I worked with the Minnesota Twins as they partnered with Hennepin County to acquire the land necessary to construct Target Field in downtown Minneapolis.

During that time, I also represented scores of property owners in condemnation cases that have arisen out of road, sewer, and redevelopment projects.

My partners Mark Savin and Howard Roston have an active owners' practice as well. They represent owners of all kinds, ranging from homeowners affected by temporary easements to national retailers affected by road projects.

Zanni: In what role do you typically provide representation—for the condemning authority or the subject of the eminent domain action? In your experience, how often do these actions go to court?

Easter: I am currently lead counsel for about 50 to 60 separate eminent domain matters. A significant number of those are for a very large transportation project, the widening of the 91 freeway through Corona, California.

The matters I am currently overseeing involve a wide variety of types of properties and businesses, including residential, commercial and industrial properties as well as vacant land, and also businesses such as car dealerships, restaurants, hotels, self-storages, warehouses, fast food restaurants, gas stations, and even museums. In most of these cases, the main dispute is over just compensation—rather than over the right to take.

Quam: The three large linear transmission projects identified above [Alliance, MinnCan, and CapX2020] have taken, or currently take, a large amount of my time. During those periods, 90 percent of my time is spent working for taking authorities. Between linear projects, approximately 70 to 80 percent of my time is spent on landowner cases.

Minnesota uses a commissioner process to initially establish the just compensation that the taking authority must pay to acquire the property rights at issue. Both sides have the right to appeal the commissioners' award to the district court, and a jury trial may be requested.

The percentage of cases that make it through to the commissioners hearing varies significantly depending on the circumstances of the project and the parties involved.

Typically, a small percentage of cases is appealed to district court, and those cases that are appealed are usually settle before a trial is held.

Zanni: How often are you involved in a condemnation matter in a typical year? What types of eminent domain actions are you involved in?

Easter: I am representing the public agency side in almost all of the condemnation actions that I am currently working on. Only two or three of our cases will actually go to trial in a given year. In California, the procedure calls for an exchange of appraisals 90 days before trial.

The majority of our cases settle in that 90-day window between the appraisal exchange and the trial date, and usually after the appraisers have had their depositions taken.

Quam: Each day I come to work, I deal with one or more condemnation matters. For the past five years, I have dealt primarily with condemnation actions related to the CapX2020 transmission line projects.

In connection with those projects, the Fredrikson team has filed petitions that have sought to acquire

easements over more than 700 parcels of land in Minnesota and North Dakota.

In addition, I am involved in condemnation actions brought by the Minnesota Department of Transportation, and various cities and counties. My partner Mark Savin represents a national retailing corporation in condemnation proceedings throughout the United States.

From time-to-time, I consult with Mark regarding cases in other jurisdictions.

Zanni: Please identify and briefly describe the case law that you find useful in condemnation actions.

Easter: In the acquisitions that I work on, usually the largest disputes over just compensation are in cases involving "partial acquisitions."

In these cases, the appraisers often do not disagree significantly on the value of the "whole" property in the before condition, or even the value of the part being acquired, but they do disagree significantly on the damage to the remainder.

A lot of times, property owners claim damages based on a project impairing access to the property in the after condition.

There are a whole series of cases (including *People v. Ayon* (1960) 54 Cal. 2d 217 and *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal. App. 4th 1538, 1557) that recognize that the government is not required to pay damages for a proper exercise of police power, and that in order for a property owner to be entitled to compensation, an impairment of access must be "substantial."

Many of our severance damages cases involve significant disputes over temporary and permanent impairments of access, and whether those impairments are substantial and legally compensable.

Another decision that we find useful is *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal. 4th 698, which held that in California, in assessing the after condition value, the issue of project impacts, or severance damages, must be weighed evenly with project benefits, in determining the after condition value.

The *Continental* decision also held that damages cannot be based on speculative, imaginary, or conjectural considerations. We frequently have to file pre-trial motions to seek to exclude damage claims that violate this principal.

Finally, we have many real estate and business owners that seek to claim damages based on the actions of the condemning agency in the years leading up to the actual filing of eminent domain proceedings.

Property and business owners will often claim that because the agency's project was being planned, their business suffered, or they could not find suitable renters, or they simply could not sell their property.

However, *City of Whittier v. Klopping* (1972) 8 Cal. 3d 39 clearly limits a public agency's liability to situations in which it has either (1) unreasonably delayed filing eminent domain proceedings after formally announcing an intent to do so or (2) directly interfered with the owner's property rights, causing a diminution in the value of the property.

In most cases, the actions of the condemning agency do not rise to the level of (1) or (2).

Quam: As part of the CapX2020 project, we have been working with several statutes that are unique to Minnesota. The cases that have interpreted and applied what many would consider ambiguous statutes have provided guidance for the parties moving forward.

As a very general matter, we find case law that recognizes value as it understood by the marketplace

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to be useful. Where this standard is employed, it is possible for both condemning authorities and owners to understand the real costs of property acquisition through eminent domain.

In most jurisdictions, however, "market value" as understood for purposes of eminent domain deviates from true transactional real estate value because of political pressures from government authorities.

So, while eminent domain law varies substantially from state to state, it is now common to see case law that limits compensation for loss of access or loss of visibility even though anyone active in commercial real estate knows how critical access and visibility are to a property's value.

A recent useful case discussing these issues is *Utah Department of Transportation v. Admiral Beverage*, 2011 UT 62, 275 P.3d 802, in which the Utah Supreme Court reversed its own 2007 decision and held that loss of visibility must be valued as the real market would value it and not according to an exclusionary rule.

Zanni: Based on your experience, do you see any current trends developing in condemnation actions (e.g., more actions now than in prior years, types of property subject to condemnation, or other)?

Easter: Ever since the *KELO* decision, the use of eminent domain has been much more closely scrutinized by local officials than it was 10 years ago. Agencies, including the state Department of Transportation, have put procedures in place to insure that every step is taken to address property owner concerns and exhaust every possibility of a voluntary acquisition.

Another trend we are seeing with large transportation projects is the use of the "design-build" approach.

This means that rather than waiting until a project has been completely designed, and the design is approved, before the agency commences with acquisition efforts, the agency initially just gets approval of a design "envelope" for the acquisition of property, so that the acquisition process can begin earlier, with the determination of the specific final design some time later.

This approach has been met with some resistance by attorneys representing property owners who contend, among other things, that if the agency does not yet have an approved design, how can it make findings that a certain property, or a certain portion of property, is necessary for a public project?

Also, we are finding that the casting of the broader design "envelope" is an imperfect process, and that as the design and build process goes forward, the agency still needs to occasionally go back to property owners and ask for right of way interests that did not fall within the original envelope.

The justification for this alternative approach is to get the project completed and online several years earlier. It remains to be seen if that occurs.

Quam: Fredrikson has tracked some changes in eminent domain relating to the frequency with which such actions occur, and the issues that arise in those cases. Eminent domain cases are occurring more frequently.

For example, a search of LexisAdvance shows that there are nearly double the published eminent domain cases in the 2000s (17,025) then there were in the 1990s (10,533), and we are currently on pace to nearly double again.

Issues of access and visibility are occurring more frequently within those cases. A higher percentage of eminent domain cases now contain access issues.

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