Getting A Fair Shake

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Despite California's fairly progressive stance on awarding "just compensation" in eminent domain actions, business owners often bear a disproportionately heavy brunt of the inconveniences associated with eminent domain projects. Notwithstanding the availability of damages in the form of loss of business goodwill, courts historically have been reluctant to award damages (primarily in the form of lost profits) suffered by business owners during the construction of an eminent domain project. More recently, courts seem to be more willing to award temporary lost profits. Given the relative uncertainty concerning the recoverability of such temporary damages, it is only a matter of time before the California Supreme Court squarely addresses this issue. Until such time, business owners should always claim these damages in eminent domain action, as such damages may very well be compensable.

In 1976, California became the first of several states to enact a statute providing for compensation for the loss of business goodwill. Before that time, California court decisions held that compensation for business losses in eminent domain cases was not allowed. Under eminent domain law, "goodwill" means the benefits that attach to a business as a result of its location, its reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old patronage or acquisition of new patronage. In order for a business owner to establish entitlement to recover compensation for a loss of goodwill, the business owner must prove each of the following: (1) that goodwill exists; (2) the loss of goodwill will be caused by the taking of the property in the eminent domain action; and (3) that the loss cannot be prevented by a relocation or by taking reasonable steps to preserve goodwill.

In 1984, in the landmark decision of People ex rel. Department of Transportation v. Muller, the California Supreme Court construed for the first time the provisions of the statute allowing for recovery of loss of goodwill. In its decision the Court broadened the generally accepted interpretation of bona fide loss of goodwill by declaring that a business may be compensated for loss of goodwill when the business has lost profitability - even when no loss of patronage is apparent. Subsequent court decisions have continued to broadly interpret the statute authorizing loss of goodwill.

However, despite the availability of loss of business goodwill, business owners have historically been unable to recover for temporary business losses caused by construction of an eminent domain project. Depending on the scope and the type of the project, the impacts from the project can be devastating to the business owner. For example, during the construction of a typical street widening or freeway widening project, the condemning agency will tear up the land with an arsenal of heavy equipment. Traffic is often rerouted and access to the affected businesses is almost always temporary impaired, if not entirely cut off. In short, the equipment, traffic delays and rerouting associated with eminent domain projects often make it too inconvenient for a prospective customer to patronize a particular business, which results in a loss of profits to the business.

Unfortunately, condemning agencies almost never offer anything to compensate the business owner for these temporary lost profits. These condemning agencies usually rely on case law which holds that temporary injury resulting from actual construction of public improvements is generally non-compensable. These same cases also hold that losses caused by a temporary interference with access are not compensable unless such interference is "unreasonable." Some cases suggest that if an interference with access is occasioned by actual construction work, the interference is not unreasonable. Accordingly, under the case law relied upon by condemning agencies, this "unreasonableness" is often difficult to prove because most access interference is occasioned by actual construction.

However, most of the cases relied upon by the condemning agencies involve situations where the agency has not actually taken property on which the business is located. This is significant because in 1997 the California Supreme Court in Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp. recognized that owners whose land has been taken are to be compensated more fully than owners whose land has not been taken. By so recognizing, the California Supreme Court is consistent with previous eminent domain case law mandating that business owners "be put in as good position pecuniarily as [it] would have occupied if [its] property had not been taken." Probably because of the Continental decision, courts recently have been more willing to award temporary lost profits to business owners. Nevertheless, there is still no decision which specifically addresses this issue, making it ripe for judicial consideration.

Until such time as a definitive decision is made regarding the recoverability of lost profits caused by construction of an eminent domain project, the business owner should seek such losses as an element of damages. The business owner should document all construction activities with extensive photographs and a journal reflecting all construction activities, and especially any construction activities which appear to be "unreasonable." The business owner should also obtain from the condemning agency all documents regarding the construction, including construction schedules and journals. With proper legal representation and supporting evidence, the business owner stands a fighting chance of recovering all damages, including temporary lost profits, caused by the eminent domain action.

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Practice Areas

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