# 2023 NATIONAL EMINENT DOMAIN UPDATE

**AMY BRIGHAM BOULRIS** is a shareholder with the Gunster law firm in Florida. Her practice concentrates on property rights defense litigation state wide at both trial and appellate levels. She exclusively represents landowners in eminent domain, takings, development exactions, Harris Act, and civil rights contexts. She is an honorary member of the Owners Counsel of America, longstanding Florida Legal Elite Hall of Fame honoree, and member of the Board of Trustees at the Pacific Legal Foundation. She has been rated AV Preeminent Attorney, as independently determined by Martindale-Hubbell (Highest Possible Rating), 2023; The Best Lawyers in America®, Eminent Domain and Condemnation "Lawyer of the Year" in Miami, 2011, 2017, 2023; The Best Lawyers in America®, Eminent Domain and Condemnation, 2007-23; and The Best Lawyers in America® Business Edition: The Litigation Issue, 2021.

**ROBERT H. THOMAS** practices in trial and appellate courts nationwide as the Director of Property Rights Litigation and a Senior Attorney with the Pacific Legal Foundation. He is currently the Visiting Chair in Property Rights Law at the William and Mary Law School. He is an elected member of the American Law Institute and has a popular blog on land use, property, and takings law: www.inversecondemnation.com.

The authors gratefully acknowledge the assistance of Gunster associate attorney, Teresa Muniz.

## PUBLIC USE

### UNESCO designation enough to support taking

In *State ex rel. Ohio History Connection v. Moundbuilders Country Club Co.*, the Ohio Supreme Court held that the taking of the Country Club's lease for the property served a public use.[1] The Ohio History Connection, a state agency, sought to extinguish the Moundbuilders Country Club's lease on the Octagon Earthworks land using the power of eminent domain. The agency wanted to convert the earthworks into a public park and nominate the structures to the World Heritage list as part of the interconnected Hopewell Ceremonial Earthworks. The Country Club objected, arguing that the taking was not in the best interest of the public as a whole.

The Ohio Supreme Court disagreed, holding that establishing the earthworks as a public park will "help preserve and ensure perpetual public access to one of the most significant landmarks in the state of Ohio."[2] In a dissenting opinion, Justice Sharon L. Kennedy argued that *Norwood v. Horney*,[3] (a case most readers will be familiar with) required that the Country Club's allegations be resolved by the trial court, not disposed of by law-and-motion. The dissent argued that the "contingent and prospective" nature of World Heritage designation did not justify the exercise of eminent domain.[4]

### "Take now, decide later" isn't a public use

*HBC Victor LLC v. Town of Victor* is a classically short opinion from the New York Supreme Court. It's so short that we were tempted to simply post the opinion and let you read it, because it will probably take you just as long to read our summary, but we're up to the challenge of making our summary even shorter than the opinion, so here goes.[5]

The town wanted to take property "connected to an enclosed regional shopping center known as Eastview Mall[.]"[6] Until Covid-19, the property was occupied by a retail department store, but the store closed permanently in February 2021. The owner tried to get a new tenant but, unsurprisingly, came up short.

Perhaps sensing an opportunity, the Town sought to condemn for redevelopment, but its resolution of taking did not specify why it wanted the property:

> The proposed Acquisition is required for and is in connection with a certain project … consisting of facilitating the productive reuse and redevelopment of the vacant and underutilized Proposed Site through municipal and/or economic development projects ... by attracting and accommodating new tenant(s) and/or end user(s).[7]

Even in condemnor-friendly New York, this one should raise a red flag. "In its determinations and findings, the Town stated that 'no specific future uses or actions have been formulated and/or specifically identified.'"[8]

When you draft your findings like that, condemning agency, shame on you. (Kudos, however, for your honesty.)

Pointing to a recent similar case by the Second Department, the Appellate Division concluded that "[b]ecause the Town has not indicated what it intends to do with the property, we are unable to determine whether 'the acquisition will serve a public use.'"[9] The court rejected the Town's argument that the government can take property for redevelopment without a particularized plan. The public use for the taking is determined at the time of the taking, and simply speculating that the taking will produce future public benefits isn't enough: "In simple terms, the government cannot take your land and then decide later what to do with it without running afoul of the Takings Clause."

Further, there was no indication or claim that the property here was blighted, even under New York's notoriously low standards for blight:

> To the contrary, the evidence at the public hearing established that petitioner has cleaned and maintained the premises since the Lord & Taylor vacancy and continues to pay property taxes at the assessed value of more than $4,000,000. We do not equate mere vacancy with blight, especially when the vacancy occurs unexpectedly in the midst of a global pandemic.[10]

Taking invalidated; attorneys' fees to the owner.

Think the Town will have another go at it? If so, think it'll draft the resolution the same way (or will it heed Justice Scalia's *Lucas*[11] dictum)?

## Waiver of future claims includes reclaim statute

*Colton v. Town of Dubois* is a good reminder that when you settle a case, you settle the case.

Wyoming is one of those jurisdictions that has "I want it back" provisions, where if property is not actually used for a specified number of X years after it is acquired by the government, the owner may ask for it to be returned. In Wyoming, the term is 10 years:

> If a public entity acquires property in fee simple title under this chapter but fails to make substantial use of the property for a period of ten (10) years, there is a presumption that the property is no longer needed for a public purpose and the previous owner or his successor may apply to the court to request that the property be returned to the previous owner or his successor upon repayment of the amount originally received for the property in the condemnation action. A public entity may rebut the presumption created under this subsection by showing good cause for the delay in using the property.[12]

Back in the day, Craig Colton and the Town of Dubois got into a fight over land apparently needed (or wanted) for the municipal airport. Colton sued for inverse condemnation, and "and sought to prevent the Town from condemning any portion of the property." [13] After a bench trial, the court rejected Colton's arguments and concluded that the Town could take 30 acres of property after a determination of compensation.

But peace prevailed before the compensation hearing took place and the parties settled. The Town would pay an agreed-upon amount and would acquire the 30 acres from Colton. Critically, the settlement agreement "contained several terms releasing the Town from all past, present, and future claims related to the disputed 30.17 acres."[14]

Ten years passed. Apparently, the Town didn't make use of the property and Colton wanted it back. He sued, seeking to reclaim it. The trial court granted the Town summary judgment and the Wyoming Supreme Court agreed. The court concluded Colton waived his statutory rights by executing the settlement agreement, even though, yes, the Town acknowledged it had not used the property for the airport. (This is a true waiver situation—not the more usual forfeiture by inaction—since Colton knowingly gave up his right to reclaim.)

The court first accepted that the Town acquired Colton's property in a way that triggered the statute because it was acquired under the threat of condemnation. Next, the court concluded the statute was in force at the time of the settlement, and therefore Colton is assumed to have known about it. The court also concluded that Colton intended to relinquish his statutory rights because the agreement unambiguously says so in the "Statement of Purpose" and "Release" provisions. There, the agreement notes the agreement is to resolve all claims, including future claims:

> The stated purpose of the settlement agreement is to resolve any claims the parties "may have in the future arising out of or in any way related to the above taking[.]" This purpose is further reflected in the terms of the settlement agreement ... The release provisions are broad but nonetheless unequivocal in expressing Mr. Colton's intent to waive "any and all" future claims, "related in any way" to the condemnation action, which would include any claims he had pursuant to Wyo. Stat. Ann. § 1-26-801(d).[15]

Finally, the court noted that the waiver is in accordance with public policy (an element of waiver under Wyoming law). We like the freedom to contract, and we like settlements, the court concluded.

So, what lessons can we take from this? When you settle, you settle. Done. Finis. Unless you want to hold on to some rights (in which case you don't agree to language that waives your rights so broadly). But don't be surprised if the other side really insists on that language. And that points to another option: if you want to retain your rights, don't settle. The waiver of future rights is just one of those things that parties have to assess the risk of when they are deciding on fight or flight.

## PRE-CONDEMNATION PREREQUISITES

### "Under threat of condemnation" means only a specific threat

A Utah statute requires that if a condemnor doesn't actually use property it acquired "under a threat of condemnation," it must try and sell it back to the (former) owner. The statute defines "threat of condemnation" as when "an official body of the state or a subdivision of the state, having the power of eminent domain, has specifically authorized the use of eminent domain to acquire the real property."[16]

So, what does "specifically authorized" mean? In *Cardiff Wales, LLC v. Washington County School District*, the Utah Supreme Court concluded it means any specific threat to take.[17] The condemnor must do something more than indicate it is thinking about eminent domain but need not take the final step in approving an eminent domain lawsuit.

The school district offered to buy property belonging to Cardiff Wales (CW) to build a new high school. During the negotiations, the district reminded CW that if a settlement was not reached voluntarily, it would institute a condemnation action. With that kind of offer, CW agreed to the sale.

Flash forward a decade. The district decided it wasn't actually going to use the land and no longer needed it. Instead of offering it back to CW, the district instead sold it to a developer. Now hold on, CW asserted, you acquired the property under threat of condemnation (we remember your "reminder" that you could just take the property if we didn't sell), so we have the right of first refusal and we want to exercise that right.

The trial court disagreed that the sale was "under threat of condemnation," and the court of appeals agreed, holding that "to survive the motion to dismiss under the theory that [the School District] acquired the Property by threat of condemnation, Cardiff [Wales] must allege that [the School District] voted and approved the use of its eminent domain power to acquire the Property."[18] "Specific authorization" means final vote.

The Utah Supreme Court disagreed, noting that the legislature clearly signaled that a "general fear" that the government might take the land if it isn't voluntarily sold does not amount to a threat of condemnation (every property owner lives under such a general fear, no?). However, the court wasn't willing to draw the line as late in the game as the court of appeals, either:

> Instead, to meet her statutory burden, a landowner must plead and prove some government action that indicates the government has authorized the use of its eminent domain authority in a way that bespeaks a specific intent to condemn the landowner's property. [19]

What does this mean when pleading a right of first refusal under the statute? "This means that to survive a motion to dismiss, Cardiff Wales needed to plead that the School District took some sort of action that transformed its general eminent domain power into a specific threat to take Cardiff Wales's parcel by eminent domain." Slip op. at 12.[20] CW's complaint "did not use the words 'specifically authorize' in its complaint," but it did allege enough (e.g., the district's statement that it intended to use condemnation if necessary and CW's allegation that it sold the property to avoid an eminent domain lawsuit) to infer that the district specifically authorized the use of eminent domain.

In other words, it doesn't take the condemnor formally adopting a resolution of taking, but on the other hand, a general power to condemn isn't enough either. The answer lies somewhere in between.

This is a statutory case, so may have limited utility to those of you not in Utah. But the overall vibe seems pretty Goldilocks: not too late, but not too soon, emphasizing that these things are all about facts, facts, and facts, and the presumption should be that these cases are resolved on proof of those facts, not the law.

So maybe the jury should decide. Sounds about right.

### Condemnor must put owner on actual notice

In *624 Broadway LLC v. Gary Housing Authority*, the Indiana Supreme Court held that a condemning agency must provide the property owner adequate notice that it would be taking its property as part of a redevelopment project.[21]

The Gary Housing Authority (Authority) wanted to redevelop 624 Broadway's commercial property in downtown Gary into mixed-use residential. The Authority instituted an "administrative taking" under Indiana law, which is "an alternative to the 'traditional' lawsuit route" that "occurs when an authorized governmental body condemns property and awards damages through resolutions."[22]

The administrative taking statute only required notice to the property owner by publication. And that's exactly the notice the Authority gave 624 Broadway. "It twice published notice of the resolution and upcoming meeting in two area newspapers of general circulation."[23] Broadway's agent found out about the meeting from a reporter, and he appeared at the meeting and spoke. At the meeting, the Authority confirmed the taking, assessed $75,000 in damages, and set another meeting to consider objections.

The owner asked for a postponement of the meeting, but the Authority refused. The owner even sued (unsuccessfully) to get a restraining order to stop the meeting so that the owner's appraiser could evaluate the property. With nothing stopping it, the Authority held the meeting, at which it concluded it could take the property, and awarded the $75,000 in damages. One day after that meeting, the owner's

appraiser inspected the property and issued a report valuing it at $325,000.

624 Broadway raised a constitutional due process argument, asserting that the notice provided by the Authority was insufficient. Hold on, the Authority countered, the statute only requires us to publish notice of the taking and our hearing, and there's no question we did that. Although the lower courts bought that assertion, the Indiana Supreme Court didn't.

Taking property requires due process notice, and that process requires some kind of hearing. The notice provided must be reasonably calculated to inform. Yes, the Authority complied with the statute and published notice, but statutorily compliant doesn't mean "constitutionally sound." The court noted that "[c]ertainly, a statute can provide more protection than the Constitution. But when a statute provides less, the government must do more."[24]

Not that notice by publication is always bad. You can publish notice where it isn't possible or practicable to give other kinds of notice. But if you know where to find someone, or can easily figure that out, then you have to make an effort.

> The Housing Authority admittedly knew the identity and address of 624 Broadway's registered agent. Indeed, its September 19 damages resolution included his address. 624 Broadway's articles of organization, filed with the Indiana Secretary of State, listed its registered agent, his address, and an email address for service. Further, the Housing Authority demonstrated its ability to successfully communicate with 624 Broadway during its eminent domain lawsuit. *See* L.D., 938 N.E.2d at 671 (finding notice by publication insufficient when a party "had successfully given notice" in a previous case but "made no attempt to do so" in the instant case). Yet once it transitioned to an administrative taking, it apparently became incapable of sending a letter or email to 624 Broadway. An administrative taking may be a "streamlined procedure for taking private property," *Util. Ctr., Inc. v. City of Fort Wayne*, 985 N.E.2d 731, 736 (Ind. 2013), but it cannot circumvent the Constitution. "[W]hen notice is a person's due, process which is a mere gesture is not due process." Mullane, 339 U.S. at 315. Because the Housing Authority knew how to provide personal notice, its notice by publication was a "mere gesture."[25]

But wait, isn't it enough that the owner's agent actually knew about the meeting (from a reporter) and showed up? No, the court concluded, "we cannot say 624 Broadway was not prejudiced: under our harmless error standard, an error's 'probable impact' is not 'sufficiently minor' if it did not 'affect the substantial rights of the parties.'"[26] Had the Authority provided adequate notice, 624 Broadway might have had an appraisal ready for the meeting and not two weeks after.

Having found a problem, the next question was remedy. The court concluded that the owner was not entitled to vacate the taking, because the court was not convinced that it was for a bad purpose. Instead, the court remanded the case for a properly noticed hearing on damages where the Authority can consider all of the owner's evidence. That'll surely change things.

## Owner denied service of process has standing to set aside taking

In *Edgewater Hall Enterprises, LLC v. City of Canton*, the City of Canton (City) narrowly escaped a finding of bad faith conduct for knowingly excluding an owner of record from service of process (thanks to a favorable appellate review standard and a shred of evidence), but the excluded landowner was nonetheless allowed to pursue a set aside of the declaration of taking entered without opportunity to be heard.[27] Moral of the story for condemnor counsel, don't try this at home, you might not get as lucky.

The City sought to take two easements over an approximate 11-acre tract with river frontage: (i) an environmental mitigation easement along the riverbank which had been granted by Edgewater's predecessor-in-title to prevent development of the river frontage; and (ii) an additional permanent

easement over that area to install a gravity sewer main and pedestrian path. It also sought to take a temporary access easement to cross the balance of Edgewater's property during construction of the project along the riverbank.

The City's own appraiser estimated total compensation for the permanent and temporary easements at $57,000. Though the City provided a copy of its appraisal to Edgewater, it offered a fraction of the appraised value ($10,000) to Edgewater because of settlements it had been able to achieve in that range with neighboring owners. Edgewater and the City negotiated for over a year regarding the compensation for the easements before impasse.

Rather than file a petition to acquire the easements and allow the compensation dispute to resolve in due course, the City first filed a separate petition to acquire only the permanent sewer main/pedestrian path easement *without serving Edgewater.* The only parties served were Edgewater's predecessor-in-title and the bank from which Edgewater acquired the parent tract (subject to the pre-existing mitigation easement) after foreclosure. The Court proceeded to enter an order of taking on the City's good faith deposit of only $3,800.

Six weeks later, the City filed a second action to acquire the associated temporary construction easement and served Edgewater with notice of only that case. Over Edgewater's objections to the taking on the grounds of bad faith and other technical objections to the City's petition (e.g., alleged insufficient description of the take area and duration of the easement), the trial court granted the taking.

Edgewater filed petitions to set aside both declarations of taking, among other reasons, for bad faith dealing by the City. The trial court rejected both petitions. As to the permanent easement taking, the court concluded Edgewater did not own the riverbank area subject to the original mitigation easement and therefore lacked standing to challenge the declaration of taking. As for the temporary construction easement case, the trial court held that the City had not acted in bad faith and that the alleged technical deficiencies in the declaration of taking could be cured by amendment rather than dismissal. Edgewater brought interlocutory appeals on both cases, which were consolidated.

The Georgia Court of Appeals affirmed the trial court's ruling that the City's actions did not rise to the level of bad faith because there was at least some evidence in the record to support the trial court's conclusion. Georgia law allows annulment of declaration of takings in "situations of fraud or bad faith, the abuse or misuse of condemnation powers,"[28] but the courts have imposed a high burden of proof on the challenger to show conscious wrongdoing motivated by improper interest, ill will, or fraud. A trial court's finding on the issue of bad faith is to be upheld if there is any evidence to support it.[29]

What was the "any evidence" upon which the trial court relied in finding no willful bad faith? The City had obtained a (clearly erroneous) title report which concluded that Edgewater did not own the land underlying the original easement area because the easement was lessed out in the deed. The appeals court soundly rejected the conclusion of the title report, reasoning that the deed described the entire 11-acre parcel and only lessed out mitigation easement interest, not the easement area or underlying fee. Accordingly, Edgewater owned the fee underlying the riverbank over which the City sought to impose a new permanent easement for public facilities, and thus had standing to set aside a declaration of taking for lack of notice.[30]

So, while the appeals court affirmed the City's narrow escape from a finding of bad faith in its tactical bifurcation and sequencing of cases without appropriate notice to Edgewater, it reversed the lower court's holding that Edgewater had no standing to set aside the taking.

Now, we all know that the City could have filed a single case with two parcels and listed the owners it believed to be of record as to each parcel so that Edgewater could have a fair opportunity to be heard

on the title issue. Not only would that have been appropriate due process given the City's knowledge of Edgewater's claimed ownership interest, but it would have prevented two appeals and remand proceedings to consider Edgewater's challenge to the permanent easement taking.

### Hospital parking lot not an authorized reason to take

Unsurprisingly there isn't a lot in the majority opinion in *Bowers Dev. LLC v. Oneida Cnty. Indus, Dev. Agency*, (this is from the New York courts after all, which don't seem to write long opinions), but we're including it so you can compare the majority with the dissent.[31]

The majority held that the agency's power to take is limited by the terms of the delegation of eminent domain power (for "commercial" facilities), and here, eminent domain is being used to take property for a parking lot for a hospital not for a surface lot. That isn't a "commercial" use.[32]

Not so fast, said the dissent. Courts are supposed to defer to an agency's statements about why it is taking property, and to an agency's interpretation of what ambiguous statutory terms such as "commercial" mean.[33] The dissent found that the agency's definition was neither irrational nor unreasonable and thus should have been given deference.

Whose vision do you like more?

## NECESSITY

### Consideration of other sites

Check this out—a decision upholding a necessity challenge to a taking.

*Necessity*, you say? What's this? Aren't necessity challenges subject to an even more deferential judicial standard of review than the rational basis test applied to declarations of public use? Didn't the US Supreme Court in *Adirondack Ry. Co. v. New York* say that "[t]he general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance but one for the determination of the legislative branch of the government"?[34] What gives?

In *Lafayette City-Parish Consolidated Gov't v. Bendel P'ship*, the local government brought an expropriation action (that's eminent domain or condemnation to you non-Louisiana lawyers), seeking to take property to construct four detention pods to improve drainage.[35] The owner objected, challenging the public use and necessity of the taking (the government was taking more property than it needed). The trial court agreed with the owner and dismissed the action. The Louisiana Court of Appeal affirmed.

How so, you may ask, given the low bar for necessity where the courts for the most part wash their hands of the issue?

This challenge, as you might have guessed, was made under Louisiana law. And there, the standards are a bit more realistic. Louisiana law does recognize that the extent and location of the taking are within the discretion of the condemning agency and its decision is entitled to a presumption the taking satisfies a public need or interest. However, Louisiana law also recognizes that if the owner carries its burden of showing the location was selected in bad faith or so capriciously or arbitrarily that the selection "was without an adequate determining principle," then a reviewing court may conclude the condemnor abused that discretion.[36]

That's what happened here. Although the mere availability of alternative sites to place the drainage project "is not, by itself, an indication that the expropriator has acted arbitrarily or capriciously," the appeal court reviewed the trial court's findings that looked at things like "alternate route[s], costs, environmental factors, long-range area planning, and safety considerations."[37]

In the end, the court of appeal reviewed the evidence submitted by the parties—which included testimony by one witness that "he had never seen a case where a property that has never been flooded was converted to purposely make it flood because usually lower elevated property would be used so

that so much excavation would not be necessary,"—and agreed that the owner carried its burden:

> In this case, the testimony and evidence make clear that no alternate routes were considered. The total cost of the project is unknown. Environmental factors and long range area planning were not considered. None of the witnesses testifying on behalf of LCG indicated that safety considerations were made regarding the gas line that runs through the property. Based on all of these factors, we cannot say that the trial court was manifestly erroneous in finding that LCG acted arbitrarily and capriciously.[38]

Now if only other courts would look at necessity the same way.

## Necessity is judged by property taken, not overall project

In *Ohio Power Co. v. Burns*, the Ohio Supreme Court declined to apply a statutory presumption of necessity to the power company's efforts to use eminent domain to expand the scope of several existing utility easements to upgrade electric transmission lines.[39] Although the case turned on the interpretation of the term "appropriation" in the Ohio statute, it has some lessons for those of us not in the Buckeye State.

In the absence of three statutory presumptions that a taking is necessary, the general rule in Ohio is that the condemnor bears the burden of proving necessity by a preponderance of the evidence. Here, "[t]he landowners opposed the easements in general, alleging that the appropriations were overly broad and unnecessary, and they challenged the need for several of the easement terms specifically, including the need for distribution lines."[40]

The trial court considered testimony and other evidence submitted by the power company to show the project was necessary, including evidence that the Ohio Power Board adopted a resolution "recognizing the necessity of acquiring easements in connection with the project."[41] But the evidence showed the board had not reviewed any specific easement, "and instead, through its resolution, delegated to the officers, engineers, and other agents of the company the authority to acquire individual easements to complete the project."[42]

Therein lay the issue: the owner argued that the term "appropriation" in the statute is the trigger to the creation of either a rebuttable (or an irrebuttable) presumption in favor of necessity, requiring an individualized determination, not a conclusion about whether a project broadly is necessary. In other words, easement-by-easement, and not project-as-a-whole.

The trial court rejected the argument, but the court of appeal reversed. After which, the power company sought, and the Ohio Supreme Court granted, discretionary review.

The court concluded that "appropriation" was not meant broadly to mean the project or the overall taking, but each condemned easement. The court noted that "[t]he property rights of an individual are fundamental rights," and that judicial review of takings ensures that "no more [is taken] than that necessary to promote the public use."[43]

Paragraphs 23 through 28 lay out the reasons why appropriation was meant narrowly, and you can read that part if you are interested.

Those of us not in Ohio will want to pick it back up at paragraph 29, where the court rejected the power company's "doing this individually and seeking necessity determinations from the Power Board for each easement would be too much trouble" argument.

First, the court held that nothing requires the company to seek the Board's review. It only needs to do so if it wants to take advantage of the statutory presumptions.[44] Second, inconvenience is no excuse: "Simply because it may be inconvenient or tedious for Ohio Power to obtain the required resolutions or approvals for each appropriation to be entitled to a presumption under R.C. 163.09(B)(1)(a) or (c) does not mean that such an interpretation is unreasonable or absurd."[45]

Although the court concluded there was no need for another necessity hearing, it sent the case back down "to the trial court to make the specific findings concerning the challenged easement terms consistent with the presumption set forth in R.C. 163.09(B)(1)(b)."[46]

And that's a good way to remember this case: necessity isn't always a belief that the "condemnor knows best."

## SELF-EXECUTING JUST COMPENSATION CLAUSE

### Just compensation claims can't be set aside in bankruptcy[47]

Several years ago, a divided panel of the Ninth Circuit held there's nothing particularly special about an unresolved takings claim for just compensation that sets it apart from other creditor claims in a government bankruptcy.[48] The majority held that owners who assert a takings claim against a debtor government—but who have not been compensated—before the bankruptcy are just unsecured creditors who must "share[] the pain" of the government going broke and sloughing off debt, even if it means that as a result the owner has had its property taken without just compensation.

Next up, Round Two. In *In re Financial Oversight & Management Board for Puerto Rico v. Cooperative de Ahorro y Credito Abraham Rosa*, the First Circuit went the other way.[49]

Here's the setup. Puerto Rico property owners had claims for just compensation against the Commonwealth. One set of owners was (allegedly) owed compensation for the straight-up eminent domaining of their land by quick-take; they claimed the deposits didn't cover the actual amount of compensation. The other group of owners had inverse claims. The court noted that "[f]or purposes of this appeal, all parties agree that the Commonwealth ... took private property from at least some of the takings claimants before petitioning for [bankruptcy]."[50] That agreement would have consequences in the court's later analysis, so remember this point.

The Commonwealth's petition ("perhaps the largest and most consequential public bankruptcy in the nation's history") sought relief for "sovereign debt ... under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act."[51] The Commonwealth's reorganization plan proposed to treat the claims of the property owners as general unsecured debt, payable "at a pro-rata share of the overall recovery for general unsecured creditors."[52] In other words, likely pennies on the dollar, if that.

The property owners objected. Hold on, our claims are not plain-old unsecured debt because the Constitution says we get just (full) compensation. Thus, a claim for compensation can't be wiped out in bankruptcy. Confirming the plan would leave us holding the bag, and the court can't confirm the plan with our claims listed as unsecured debt.

The Title III court agreed, and "directed the Board to modify the plan of adjustment to provide for full payment of any valid eminent domain and inverse condemnation claims if the Board wished to make the plan confirmable."[53] The Board did so (while reserving its right to appeal, which it eventually did).

The First Circuit started off by noting that the "appeal raises important questions about the interplay between the power to equitably restructure debts in bankruptcy and the Constitution's requirement that just compensation be paid whenever the government takes private property for public use."[54] Let's get to the holding first:

> [O]therwise valid Fifth Amendment takings claims arising prepetition cannot be discharged in Title III bankruptcy proceedings without payment of just compensation.[55]

And by "just" compensation, the court meant whatever full compensation is owed to the owners. How did the court reach this result? Read on.

First, the court rejected the federal government's argument that this isn't a constitutional right versus bankruptcy power issue at all, but rather an exercise of equitable powers. No, the court concluded, "we read the Title III court's ruling to say precisely what

it appears to say: that discharging valid, prepetition takings claims for less than just compensation would violate the Fifth Amendment and render a plan providing for such discharge unconfirmable under PROMESA."[56]

Next, having rejected the federal government's invitation to avoid the constitutional question, the court concluded that "the Fifth Amendment precludes the impairment or discharge of prepetition claims for just compensation in Title III bankruptcy."[57] Can bankrupt governments "eliminate their obligation to pay just compensation and instead pay only reduced amounts based on a formula applicable to most creditors[?]"[58] The court held no.

First, "the Supreme Court has been very clear: the bankruptcy laws are subordinate to the Takings Clause."[59] Second, the court rejected the Commonwealth's argument that because the owners' real property had already been taken by the Commonwealth at the time of bankruptcy, the only "property" possessed by the owners were unsecured claims not protected by the Fifth Amendment.

The Commonwealth relied on *Knick v. Twp. of Scott*[60] for that argument. Yes, you read that right. Because the right to compensation arises at the time of the taking, its theory goes, the claim doesn't arise later when the government denies compensation. The Commonwealth asserted, therefore, that compensation is "untethered from the substantive Takings Clause violation itself."[61]

The First Circuit rightly held that *Knick* does not "cast doubt on the Fifth Amendment's requirement that just compensation be paid."[62] And here's the critical part:

> Recognizing that the "right to full compensation arises at the time of the taking," does not imply that the subsequent denial of that compensation does not also raise Fifth Amendment concerns. We decline to read *Knick* as changing the Fifth Amendment right to receive just compensation into a mere monetary obligation that may be dispensed with by statute.[63]

The court next rejected the contention that a Fifth Amendment claim for compensation is no different "than a claim for money damages for any other kind of constitutional violation" that can be adjusted in bankruptcy.[64] Relying on the "language and nature of the Takings Clause," the First Circuit held that just compensation is not simply a monetary remedy for a constitutional violation but "serves also as a structural limitation on the government's very authority to take private property for public use."[65] Thus, the court concluded, "payment of just compensation [is] unlike most other instances in which the government engages in a constitutional violation and is required to remedy that violation by paying money."[66]

The court expressly rejected the Ninth Circuit's reasoning in the *Stockton* case. Instead, the First Circuit found "the dissenting opinion of Judge Friedland in that case to be more persuasive."[67]

Here's how the First Circuit wrapped up:

> Reduced to its nub, the issue we decide is rather simple. The Fifth Amendment provides that if the government takes private property, it must pay just compensation. Because the prior plan proposed by the Board rejected any obligation by the Commonwealth to pay just compensation, the Title III court properly found that the debtor was prohibited by law from carrying out the plan as proposed.[68]

Naturally, given our view that *Stockton* was ever-so-wrong, we feel validated by the First Circuit here. So, remember that part-and-parcel of the power to take property is the corresponding obligation to, you know, actually pay for it. All of it. And anything that interferes with that right, whether it is, as here, a Congressional bankruptcy statute, a state statute, or anything else must yield to the just compensation imperative.

### What if a condemnor doesn't pay?[69]

What will a court do when a condemnor is ordered to pay (the property owner has a judgment in hand), but the condemnor says "no thanks"?

The latest incarnation is the Fifth Circuit's opinion in *Ariyan, Inc. v. Sewerage & Water Board of New Orleans*.[70] There, a group of property owners successfully brought takings claims under Louisiana law against the Sewerage and Water Board after its flood control project caused "property damage and economic loss." In the various cases, verdicts were rendered, and judgments were issued from 2018 through 2020.

Well, you know what is supposed to happen next. Judgment debtors are supposed to pay up, or else the judgment creditor may satisfy the judgment by other means.

But what happens when the government doesn't pay up? There's not much a property owner can do if the governmental debtor doesn't lift a finger. So even though the government does not enjoy sovereign immunity from takings liability, it does enjoy it when it comes to, you know, actually paying just compensation.

Plaintiffs here filed a new suit, arguing that the city's refusal to comply with the state court judgments gave rise to a second takings claim.[71] The district court sympathized with the plaintiffs but dismissed their claim, noting that "centuries of precedent" held that a state's failure to pay a debt is not a constitutional violation.[72]

The Fifth Circuit agreed, citing *Folsom v. City of New Orleans*, in which the Supreme Court held that a city's inability to pay state court judgments for property damage did not amount to a deprivation of property in violation of due process rights because the property owners still had "an existing liability against the city."[73] We guess this isn't surprising given the Fifth Circuit's read of *Folsom*, plus the fact that the same court rejected a similar claim just a couple of years ago.

Before we proceed, a disclosure: we (along with our law firm colleague Kady Valois) filed an amicus brief in support of the property owner, arguing that "[t]he Takings Clause does not permit the Sewerage Board to take property and hand the owner an IOU the Board might pay sometime in the future if and when it feels like it. Instead, it requires the Sewerage Board to pay the court ordered just compensation without 'unreasonable delay.'"

We continue to think that is the heart of the issue. Instead of a blanket rule that just compensation judgments are not property protected by the Fifth and Fourteenth Amendments, this claim should be resolved on the factual merits of whether the delay in payment is unreasonable—an issue that cannot be determined by a categorical "no liability" rule in a motion to dismiss. After all, are there not some circumstances in which the delay in providing just compensation is unreasonable and therefore not just compensation at all? Yes, they may get compensation somewhere down the road if the government wants to provide it and actually gets around to asking the legislature for the money.

Under the Fifth Circuit's categorical rationale, however, the constitutional requirement of just compensation is merely a suggestion. After all, the property owners here have undoubtedly had their property taken but have not been provided just compensation. The Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation," not that it shall not be taken without an IOU.

## PROPERTY TAKEN

### It's not an "easement" when condemnor takes everything permanently

The Cass County Water Resource District in North Dakota wanted to acquire the Sauvageaus' property for a flood control project (i.e., flooding the property, removing all trees and vegetation, putting the land underwater permanently, cutting off the public access road, and removing the Sauvageau home).

The District offered to buy the fee interest from the Sauvageaus for the appraised value of $460,000. The Sauvageaus declined. So the District offered $460,000 for a permanent easement. Also declined.

Next up, eminent domain, with the District seeking a "permanent right of way easement" by quick take.

We're taking it now, so you have a few months to get out of your home and get off the land. The Sauvageaus objected. You might be able to take our property for a flood control project, but under the North Dakota Constitution, quick take is reserved for acquisitions of "rights of way."

But wait, the District countered, a permanent easement *is* a right of way—it's right there in the quick take petition. The Sauvageaus responded that the District might call it an "easement," but, in reality, the District was seeking to acquire the entire property (i.e., possession "upon, over, in, under, across, and through" their land).

In *Sauvageau v. Bailey*, the North Dakota Supreme Court agreed with the owners and held that what the District called a "right of way" was actually a fee simple interest and, thus, outside the scope of the quick take statute.[74]

> On the basis of the pleadings and the facts in the record, as a matter of law the District is taking much more than an easement or right of way in the Sauvageaus' property. The District is not acquiring a strip or a parcel of the Sauvageaus' property for a right of way. The District intends to close the public road, remove all structures from the property, engage in disturbance of the surface and subsurface, and inundate the property with water. The District is taking the entire property for full value while leaving the Sauvageaus with only a reverter interest with no value.[75]

Thus, no quick take. "By labeling the interest in the Sauvageaus' property as a 'permanent right of way easement,' the District is attempting to evade the requirements and property owner protections of [the straight (slow) take process]."[76]

### Continued use of expired easement creates second taking

The Oklahoma Supreme Court's decision in *Snow v. Town of Calumet* clarifies who can bring an inverse condemnation claim and what such a claim should allege.[77]

In 1978, the Snows' predecessor-in-title granted the Town of Calumet a temporary easement to maintain sewer lines which expired six months after the Snows purchased the property in 2010. However, the Town didn't cease its use of the property after the temporary easement expired. Flash forward seven more years, and the Town asked the Snows to grant it perpetual easements for its continued use. The Snows asked for compensation, but the Town said no.

The Snows filed a lawsuit for trespass and inverse condemnation in state court, with the Town counterclaiming with a quiet title claim asserting it had acquired a perpetual easement by prescription. Cross motions for summary judgment flew: the Snows won the prescription claim (the prescription period is 15 years in Oklahoma), while the Town won the trespass claim. The inverse condemnation claim was dismissed because the claim belonged to the former owners who had consented to the Town's invasion of the property and, thus, the Snows lacked standing.

The Oklahoma Supreme Court reversed, concluding that the Snows had standing to bring an inverse claim. While acknowledging the "general rule" that "the right of inverse condemnation belongs to the owner at the time of the taking,"[78] the court held the inverse claim wasn't based on the original physical incursion (which was indeed permissive), but on the Town's continued use of the Snow land even after that permission expired.[79]

Takings claims are not limited to one per property, and "[m]ore than one taking can occur involving a single piece of property."[80] Thus, the fact that the Town had installed the sewer lines with the prior owners' permission was not relevant to whether the Town's continuing use of the property after the expired permission was a taking. There's a difference, after all, between a temporary easement and a perpetual easement, and an owner is within her rights to tell third-party users of her property that "you can use it for only a certain amount of time after which your possession becomes adverse to me."

Reversed and remanded for trial.

We included this one because of its relation to the Covid-19 eviction moratoria. Most of the takings challenges raised by landlords have gone nowhere because the courts have largely viewed the issue in terms of the right to exclude. Ah ha!, the courts exclaim, you landlords invited these now-nonpaying tenants to possess your properties, so you can't say that moratoria allowing them to remain rent-free has taken your right to exclude.

But we think the analysis should be more like the one applied by the Oklahoma Supreme Court. Yes, property owners may have initially invited tenants to possess and occupy their properties, but that permission was subject to two conditions: (i) the continuing payment of rent; and (ii) the expiration of the original permission after a certain time (the expiration of the lease, for example). So it isn't so much the right to exclude that is being interfered with, but some other right (e.g., the right to recover property, the right to re-possess it, or maybe a "reverter").

## VALUATION

### Reasonable probability of a successful regulatory taking challenge

In *In the Matter of New Creek Bluebelt, Phase 4*, the New York Appellate Division upheld a trial court's award of $699,000 for the taking of 21,000 square feet of residentially-zoned land near the eastern shore of Staten Island for a storm water management project.[81] The landowner appealed from this award on grounds that the court had not properly applied the "reasonable probability incremental increase rule" which allows a condemnee to contend for an increment of compensation above the market value of land as regulated if there is a probability that the regulations constituted a regulatory taking.

Theoretically, this type of compensation increment represents the premium a knowledgeable buyer would be willing to pay for a potential change to a more valuable use (similar to the well-settled rule in most jurisdictions that evidence of a probable rezoning is admissible at a compensation trial). Here, the subject property, though zoned for residential development, was designated as wetlands. The evidence before the trial court established that the wetlands designation caused an 84 percent diminution in market value and effectively prohibited any development.

The court rejected the City of New York's (City) argument on appeal that the incremental increase rule had been implicitly overruled and affirmed that the record evidence of diminution in value and development implications supported a finding of reasonable probability that the wetland regulations would be found to constitute a regulatory taking.[82] But the appeals court also upheld the trial court's adoption of the City's appraisal methodology which substantially discounted for the time, cost, and risk associated with pursuit of a regulatory takings challenge. The City's appraiser calculated the difference between the unregulated and regulated value (identifying the increment) but then deducted the "cost of deregulation" associated with pursuit of a takings claim, and then further discounted for risk and the present value of money.[83]

Notably, the appellate court also affirmed the propriety of the City appraiser's reliance on the predicate opinion of the City's legal expert in estimating the time and cost of a legal challenge to the regulations. It also upheld the trial court's factual finding that a regulatory takings challenge would take three and a half years at a cost of $350,000 (in addition to other "extraordinary costs") as being within the range of expert testimony.[84]

So, is this really just or full compensation? Does a discount of this kind fail to make the owner whole where the *reason* for time, cost, and risk was potentially a result of project influence? The opinion does not elaborate on the background of the wetlands regulation and whether it was a precursor to the Bluebelt project. That might be a meaningful distinction from probability of zoning cases where the time, cost, and risk of pursuit are not a potential product of project influence. Good questions to ask in these probability-driven compensation cases.

## Adjustments to comparable sales

Another valuation case out of the New York Appellate Division, *Chynn v. Cnty. of Suffolk*, offers some interesting discussion about adjustments to comparable sales.[85]

Here the condemnor, County of Suffolk, challenged awards of $1.75 million and $1.83 million for two oceanfront homes in the Bay Park neighborhood of Fire Island acquired for barrier island beach and dune restoration in the aftermath of Hurricane Sandy. The appeals court (which reasoned it had virtually as much say in determining compensation as the trial court because there had been a non-jury trial) tinkered with most of the adjustments that had been made by the parties' appraisers, resulting in net reductions in the compensation awarded for the homes to $1.578 and $1.646 million, respectively.[86]

At the consolidated compensation trial (the homeowners had retained the same appraiser), the appraisers all agreed that the highest and best use was for continued use of the single-family oceanfront homes. They also all used the comparable sales approach. As in most valuation trials, that was the extent of agreement. From there the expert testimony diverged in selection of sales and adjustments to selected comps. The owners' appraiser adjusted for location and view but also applied upward adjustments for time (increasing market conditions), for condemnation blight (because the announcement of the acquisition project had chilled the market on Fire Island). The County's appraiser also made adjustments for location, different characteristics of homes, and time of sale. The difference of opinions was roughly between $1.5 and $2 million.[87]

After hearing the evidence, the trial court noted that there was one common comparable sale among the array of sales utilized by the opposing appraisers and proceeded to make adjustments to this one common comp. The trial court adopted the landowners' upward adjustment for time and half of the adjustment for condemnation blight. It applied adjustment for the comp's superior location but inferior ocean view and differences in the quality of the decks. Based on all the tweaking of adjustments to the common comparable sale price, the trial court entered awards higher than the County's appraisals.

The appellate decision is an exercise in tweaking the lower court tweaks, but some aspects of the discussion are noteworthy. First, the appeals court found error in the trial court's adoption of the landowner's three percent upward time adjustment because while the appraiser testified that his review of the "market conditions in the area" showed the market had been increasing during the period between the time of the comparable sale and the date of taking, he had also admitted to not having any data or other evidence to support the amount of adjustment.[88] In connection with time adjustment, the appellate court also rejected the condemnor's downward market conditions adjustment because it was based on a sales survey published by a local realtor which covered Nassau and Suffolk counties for a 10-year period. The appeals court reasoned reliance on this survey was improper because the condemnor's appraiser conceded that he did not know how many homes on Fire Island were included in the survey, that there was no way to determine how the mean and median values reported in the survey had been calculated, and there was no data to support his opinion that housing on Fire Island was similar to that throughout those two counties during the study period.[89]

Second, the appeals court found error in the trial court's application of any condemnation blight adjustment because, under New York precedent, mere announcement of impending condemnation does not itself justify disregard of condemnation blight in establishing compensation. Under New York precedent, additional evidence of other acts which "may be translated into an exercise of dominion and control" is required.[90] While information about the restoration project and related condemnations "percolated through the Fire Island community," the condemnee homeowners had not introduced evidence of any affirmative conduct by the County that unreasonably interfered or further depressed the value of the properties."[91] (Note, this is not the standard in other states where announcement may be enough or create a presumption.)

## Recent purchase price is of "highest rank" in determining compensation

In *J. Nazzaro P'ship, L.P. v. State*, the New York Appellate Courts offered another nuance to ponder.[92] This case involved the partial taking of co-joined lots purchased by the condemnee in 2010 for $1 million. One portion of the co-joined lots was zoned for neighborhood business and the other for residential, though residential use is prohibited until 2060 because a gas station formerly operated on the site.

In 2019, the state road department condemned about 7.6 percent of the parent tract for road improvements. The landowner claimed $1.7 million in severance damages on the basis of a before value of $5.6 million and after value of $3.9 million. By the date of taking, triple net ground lease tenant, Chase Bank, had constructed a new 4,000 square foot, one-story branch bank building and was paying $225,000 annually with increases every five years.

The landowner's appraiser opined that the highest and best use of the parent tract was for an 8,000 square foot (two-story) building and use of the restricted area for additional parking. She utilized an income capitalization approach that included future income from the hypothetical addition of a second story and parking and concluded that value of the property was $5.6 million before the taking and $3.9 million after the taking.[93]

The state's appraiser applied an 80 percent value discount to the residentially zoned portion because of the residential restriction through 2060 (perhaps without regard for potential non-residential uses). In any event, the trial court rejected this discount because the state's appraiser did not provide any evidence supporting the amount of this reduction. The trial court otherwise adopted the state's valuation and awarded $71,000 for severance damages to the parent tract, finding that the landowner's appraiser had utilized an impermissible methodology.[94]

The Appellate Division affirmed. In also rejecting the landowner's appraisal, it pointed out there was insufficient evidence of probability of obtaining a use variance to allow additional parking on the residentially zoned area. While the landowner had obtained a special exception permitting parking in the first 50 feet of that area, further expansion would require a use variance and the owner presented no evidence of being able to meet the legal standards for that under the town code.[95] The appeals court also noted that there was insufficient evidence that doubling the square footage of the building was physically or economically feasible and that the landowner's appraisal approach strayed too far into a lost profits zone.

The appeals court went further, holding that the "relatively recent" purchase price of the subject property—*nine years before*—was evidence of the "highest rank" in determining the value of the property.[96] The court rejected the landowner's argument that the purchase price was "abnormal" because of environmental contamination, noting that the record had established the prior owner's remediation efforts. Details!

## Exclusion of subdivision approach and most of expert's comps

The Colorado Appellate Court decision in *CORE Elec. Coop. v. Freund Investments, LLC* presents a cautionary tale about the use of a "development approach" to valuation and the sound practice of verifying comparable sales.[97]

In upholding an $83,000 jury award for the taking of a non-exclusive powerline easement, the appeals court: (i) affirmed the lower court's exclusion of the subdivision development methodology relied upon by the condemnee's appraiser; and (ii) held that the exclusion of six out of seven of the appraiser's comps, was improper but *harmless*.

The easement encumbered 26 acres out of a 2,722-acre parent tract in agricultural use. The power company's appraiser found no severance damages and discounted the value of the easement take area by 50 percent because it fell within what would be the setback for area for residential development. Prior to trial, the parties had stipulated that the highest and best use of the parent tract was to divide the property into 35- to 40-acre residential lots for future sale.

The condemnee's appraiser employed two methodologies: (i) a subdivision development methodology which estimates retail sale value based on a hypothetical subdivision of the property discounted for time and cost of development, etc.; and (ii) a comparable sales approach based on seven comparable sales, only one of which he had personally verified.[98] In addition to excluding the development approach as speculative and impermissible under Colorado law, the trial court excluded six of the seven comparable sales for failure to verify them, leaving a single comparable sale. The landowner (whether or not planned before trial) also called an appraiser that had originally been hired by the condemnor to testify. While his testimony may have been helpful on the value of the part taken, he had found no severance damages.

On appeal the landowner argued that exclusion of its subdivision approach to value was erroneous. The appeals court disagreed because the subject property had not yet been platted with lots presently for sale (as in cases where the development approach had been deemed admissible).[99] The landowner also contended that the excluded comparable sales should have been alternatively admissible under the hearsay exceptions for public records. Though the appellate court ultimately agreed that the sales were independently admissible as public records, it also held that their exclusion was harmless error.[100]

In response to the owner's lament that this exclusion left the owner's case dependent on a solitary sale and prejudicially diluted the credibility of its expert, the court unsympathetically reasoned that the jury appeared to have rejected his percentage of loss theory which would not have been aided by the excluded comparable sales, noting that the power company's appraiser's unit value was actually higher.[101] The court also suggested that not all credibility was lost by virtue of the fact that the jury awarded some severance damages when the power company's retained appraisers (one of whom the landowner called as a witness) opined that there were no severance damages. Where the landowners' damages estimate was in the $200,000 to $300,000 range, a $50,000 damages award may be small consolation for the owner and certainly still begs the question of whether the credibility of the appraiser was damaged to the point of affecting the fundamental fairness of the trial.

Notes

1 No. 2020-0191 (Ohio 2022); see also Dan Trevas, State Can Acquire Octagon Earthworks From Country Club, Court News Ohio (Dec. 7, 2022), available at https://www.courtnewsohio.gov/cases/2022/SCO/1207/200191.asp#.ZFO613bMJPY.
2 Id. at ¶44.
3 853 N.E.2d 1115 (Ohio 2006).
4 Id. at ¶48.
5 2022 NY Slip Op 07313 (N.Y. App. Div., Dec. 23, 2022).
6 Slip op. at 1.
7 Id. at 2.
8 Id.
9 Id.
10 Id. at 3.
11 Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
12 Wyo. Stat. Ann. § 1-26-801(d).
13 Colton v. Town of Dubois, 519 P.3d 976, 978 (Wyo. 2022).
14 Id.
15 Id. at 981.
16 Utah Code Ann. § 78B-6-521(1)(a)(ii) (2022).
17 511 P.3d 1155 (Utah 2022).
18 Id. at 1159 (quoting Cardiff Wales, LLC v. Washington County School District, 483 P.3d 1262 (Utah Ct. App. 2021)).
19 Id.
20 Id. at 1163.
21 193 N.E.3d 381 (Ind. 2022).
22 Id. at 383.
23 Id. at 384.
24 Id. at 385.
25 Id. at 385-86.
26 Id. at 386.
27 880 S.E.2d 582 (Ga. Ct. App. 2022).
28 O.C.G.A. § 32-3-11 (b).
29 Edgewater, 880 S.E.2d at 586.
30 Id. at 589.
31 211 A.D.3d 1495 (N.Y. App. Div. 2022).

32 Id. at 1496 ("While OCIDA's determination and findings indicate that the subject property was to be acquired for use as a surface parking lot, the record establishes that, contrary to respondents' assertion, the primary purpose of the acquisition was not a commercial purpose. Rather, the property was to be acquired because it was a necessary component of a larger hospital and healthcare facility project.").

33 Id. at 1501-02.

34 176 U.S. 335, 349 (1900).

35 No. 22-0432, 2022 WL 17825600 (La. Ct. App. Dec. 21, 2022).

36 Id. at *9.

37 Id.

38 Id. at *10.

39 No. 2021-1168, 2022 WL 17981391 (Ohio Dec. 29, 2022).

40 Id. at ¶7.

41 Id. at ¶12.

42 Id.

43 Id. at ¶22.

44 Id. at ¶30 ("Ohio Power is not required to have the Siting Board or the Power Board approve the individual appropriations in order to appropriate a property or an interest or right therein. But if it does get such approval, then it obtains the legal presumption of necessity.") (citation omitted).

45 Id. at ¶31.

46 Id. at ¶35.

47 Disclosure: one of the authors was counsel for the property owners in the subsequent petition for writ of certiorari proceedings in the Supreme Court.

48 In re City of Stockton, 909 F.3d 1256 (9th 2018).

49 41 F.4th 29 (1st Cir. 2022).

50 Id. at 41.

51 Id. at 37.

52 Id. at 38.

53 Id. at 39.

54 Id. at 37.

55 Id.

56 Id. at 40.

57 Id. at 41.

58 Id.

59 Id. at 42.

60 139 S.Ct. 2162 (2019).

61 In re Fin. Oversight & Mgmt. Bd., 41 F.4th at 43.

62 Id.

63 Id. (internal citations omitted).

64 Id. at 44.

65 Id.

66 Id.

67 Id. at 45. In his dissent, Judge Friedland wrote: "The majority instead holds that Cobb has forfeited all property rights in the condemned parcel under California law, and that his pending claim is 'simply' a statutory claim for monetary damages. But the statutory character of Cobb's claim does not diminish its constitutionally protected status—indeed, a constitutional claim for just compensation is a statutory claim for monetary damages under California law.").

68 Id. at 46.

69 Disclosure: one of the authors was counsel for the property owners in the subsequent petition for writ of certiorari proceedings in the Supreme Court.

70 29 F.4th 226 (5th Cir. 2022).

71 Id. at 229.

72 Id.

73 Id. at 230 (citing Folsom v. City of New Orleans, 109 U.S. 285, 289 (1883)). Justice Harlan's dissent in Folsom noted that because "the value of the judgment, as property, depends necessarily upon the remedies given for its enforcement, the withdrawal of all remedies for its enforcement … is, I submit, to deprive the owner of his property." Id. at 295.

74 973 N.W.2d 207 (N.D. 2022).

75 Id. at 215.

76 Id.

77 512 P.3d 369 (Okla. 2022).

78 Id. at 372.

79 Id. at 373 ("When the Town sought perpetual easements from the Snows for the continued use and maintenance of the sewer lines more than seven years after the temporary easements expired, the Snows owned the property, giving them standing to allege an inverse condemnation claim.").

80 Id.

81 205 A.D.3d 808 (N.Y. App. Div. 2022).

82 Id. at 810-11.

83 Id. at 812.

84 Id.

85 204 A.D.3d 905 (N.Y. App. Div. 2022).

86 Id.at 906.

87 Id. at 907.

88 Id. at 909.

89 Id.

90 Id.

91 Id. at 910.

92 205 A.D.3d 690 (N.Y. App. Div. 2022).

93 Id. at 691.

94 Id. at 692.

95 Id. at 693.

96 Id. at 693-94.

97 517 P.3d 697 (Colo. App. 2022).

98 Id. at 703-04.

99 Id. at 702.

100 Id. at 705.

101 Id.