International Right of Way Association
Chapter 1 – Los Angeles County
November 2002 Newsletter

Upcoming Events

December 10, 2002 Annual Tri-Chapter Installation Topic - History of Queen Mary
Location - The Queen Mary, Long Beach
December 17, 2002 - Board Planning Meeting
December 25, 2002 - Merry Christmas
January 1, 2002 - Happy New Year

Membership Luncheon

November 26, 2002 Guest Speaker - Mr. Skip Tucker of the Karrass Negotiations Institute
Topic - Negotiation Skills and Tactics Location - Steven's Steakhouse, Commerce
November meeting is also Past President's Lunch (free meal for Presidents who RSVP) as well as Awards Presentation for Employer of the Year and Professional of the Year

President's Message

By: Rudy Romo

Planning a schedule, event, or daily activity requires careful thought and perseverance. The Chapter recently sponsored the fall seminar which proved to be a great success thanks to Mr. Bryan Riggs, MAI. Bryan had been planning his event since early spring and solicited guest speakers, topics, venue, agency accreditations and much more.

The planning process involves the ability to take on a task and make a decision to do one thing or another. It takes effort to carry out a task and do it well. Throughout the year, I've been busy planning simple events like our monthly board meetings and subsequently developing an agenda with topics that need to be addressed by the Board.

We all come across situations or people that, in our opinion, display a lack of forethought. And we are quick to criticize the event or people behind it. Well, we'll always be able to say "coulda, woulda , shoulda", but hindsight is always marvelous. Sometimes or all the time if possible, we should stop and think, before that awful statement "He/she doesn't know what they're doing or they should have done this" comes up.

All too often, we are quick to criticize the actions of others. I've heard the old adage "If you think you can do it better, than you do it." Actually, I really feel this is true. Those who criticize the most have never even attempted to do the task in question.

Michael Popwell, President Elect, elected to take on the task of planning the Tri-Chapter December Installation luncheon. As of today, I know Michael has put a great deal of time, effort, and dedication into this event. And I know it will be really worthwhile and rewarding. Michael's planning efforts have proven favorable because we are going to have a great December luncheon.

The planning effort is followed by the ability to implement the activity and then control its environment. As we learned in business school 101, the phrase "Plan, Implement, Control" is largely a part of our daily lives. We plan what we are going to do, we then implement the activity, and then control the activity so that it turns out the way we desire it.

Our attorneys are taught in law school that the case is won in preparation, not in the courtroom. Preparation and planning are synonymous with each other. An engineer studies various alternative alignments to determine the most effective route. An appraiser obtains all the data they can about the immediate market and subject property to formulate their opinion of value. An acquisition agent studies the title, environmental, and appraisal reports prior to the first written offer. A relocation agent studies the appraisal report, market listings, rentals, and moving costs prior to the delivery of the relocation eligibility and entitlement letters. A property manager studies the rent rolls, income and expenses prior to the initiation of a rent increase. Thus, at every stage of profession, we each plan and study our data carefully prior to the implementation of our activity and subsequent control. So, let's make sure that our planning process is carefully thought out in everything we do.

We'll see you at Steven's on November 26th!

Case of the Month

Emeryville Redevelopment Agency v. Harcros Pigments, Inc.
2002 DJDAR 10329 (2002) (Ca. Ct. of Appeal 1st Dist.)
By: Noel Tapia, DEMETRIOU, DEL GUERCIO, SPRINGER & FRANCIS, LLP

The Court's decision in Emeryville Redevelopment Agency v. Harcros Pigments, Inc. solidifies several well established eminent domain principles. The Emeryville decision is interesting because of the large number of issues the Court considered, as well as the number of errors made by the trial court.

This appeal arose out of an eminent domain proceeding initiated by the Emeryville Redevelopment Agency ("Agency"). The Agency sought to acquire 13 acres of chemically contaminated land ("Subject Property") owned by defendant Elementis Pigments,

Inc. ("Elementis"), formerly known as Harcros Pigments, Inc. The Subject Property was originally occupied by Native Americans. In the late 1920's, an amusement park on the Subject Property was leveled, and the Subject Property was developed for industrial uses.

In 1987, the Agency included the Subject Property in a 270-acre redevelopment project. In 1990, the Subject Property was acquired by Elementis. Elementis manufactured iron oxide pigments on the Subject Property.

The Agency initiated its eminent domain proceeding on February 19, 1998. In May of the same year, the Agency deposited $1,062,000 with the State Treasurer as the amount of probable compensation and applied for prejudgment possession. The Court authorized the Agency to take possession of the entire property by December 31, 1998.

In 1999, the Agency began demolition and soil remediation. During the course of these activities, the Agency discovered remains of over 100 Native Americans. This triggered an obligation pursuant to the California Environmental Quality Act ("CEQA") to treat these remains with great care. The Agency then undertook measures to comply with CEQA.

The eminent domain trial commenced on November 8, 1999. On December 20, 1999, the jury returned a verdict in the amount of $12,493,283 for the fair market value of the Subject Property. The Agency timely filed an appeal from the judgment while Elementis filed a cross-appeal.

The Court of Appeal considered several issues. First, the Court of Appeal considered whether the trial court correctly admitted evidence of Agency transactions as comparable sales. These transactions included the Agency's purchase of neighboring properties that were acquired for public purposes. The Agency could have acquired these properties via its eminent domain powers.

Prior to trial, the Agency filed a motion in limine to exclude any evidence of sales of property to the Agency. The Agency argued that Evidence Code Section 822(a)(1) prohibited the admission of any evidence demonstrating the price or other terms of an acquisition of property, if the acquisition was for a public use for which the property could have been taken by eminent domain. The trial court denied the Agency's motion.

Upon review, the Court of Appeal found that Evidence Code Section 822(a)(1) did not confer discretionary power on the trial court, and that Evidence Code Section 822(a)(1) categorically excluded such evidence. The Court of Appeal rejected Elementis' argument that Evidence Code Section 822(a)(1) was solely enacted to protect private property owners. Also, the Court of Appeal found that the public use exception to Evidence Code Section 822(a)(1) was inapplicable because this exception only applied to properties acquired by public agencies that were already in public use by another public entity. Here, the Subject Property served a

private purpose. Accordingly, the Court ruled that the trial court erred in admitting evidence of the Agency's purchases of the properties neighboring the Subject Property.

Next, the Court of Appeal considered whether the trial court properly admitted a recital in the contract of a comparable sale. Expert appraisers for both the Agency and Elementis agreed that the so-called "Ikea Property" transaction was a comparable sale. The Ikea Property sold for $21 per square foot for land in both Oakland and Emeryville.

However, during pre-trial discovery, the Agency discovered that Elementis' appraiser set the value of the Emeryville portion of the Ikea property at $27.64 per square foot. The appraiser arrived at his figure by interpreting a recital in the Ikea Property sales contract that states that the Emeryville portion of the property was more valuable than the Oakland portion. The contract included a formula that enabled the Elementis appraiser to arrive at the $27.64 figure. The Agency filed a motion in limine to preclude any evidence that contested the purchase price of the Ikea Property at $21 per square foot but the trial court denied the Agency's motion in limine.

The Court of Appeal held that the trial court mistakenly allowed Elementis to introduce the $27.64 figure as evidence before the jury. The Court of Appeal reasoned that comparable sales evidence is admitted for the purpose of providing the jury an objective market evaluation against which to check an appraiser's valuation. The Court of Appeal determined that the only objective evidence the jury could deduce from the Ikea Property sale was the ultimate price paid; $21 per square foot. The Court of Appeal reasoned that to allow the introduction of different values for the Oakland and Emeryville portion of the Ikea Property would improperly introduce subjective opinions rather than facts to the jury.

The Agency also filed a motion in limine to exclude any evidence of the development project which was planned to include the Subject Property. The Agency cited to California Code of Civil Procedure Section 1263.330 for the proposition that evidence of a specific plan or project is inadmissible to show the value of the Subject Property.

The trial court denied the Agency's motion. Citing to City of Los Angeles v. Decker (1977) 18 Cal. 3d 860, the trial court ruled that evidence of the development project that was scheduled to include the Subject Property was admissible to help demonstrate the highest and best use of the Subject Property and to rebut the Agency's contentions that the Subject Property was stigmatized and not suitable for development.

The Court of Appeal determined that the trial court erred. The Court of Appeal reasoned that the Decker Court allowed evidence of the project for which the property was acquired because there existed a dispute between the parties regarding the acquired

property's highest and best use. The Court of Appeal found that such a dispute did not exist in the instant case. Here, both the Agency and Elementis agreed that the highest and best use of the Subject Property was mixed commercial use.

Next, the Court of Appeal considered whether the trial court's errors likely led to a jury determination regarding the fair market value of the Subject Property that was more favorable to Elementis. Elementis argued that its appraiser's use of Agency transactions as comparable sales was harmless because his appraisal report analyzed 25 transactions, and only three of these were the Agency transactions that trial court erroneously allowed the jury to consider.

The Court of Appeal disagreed. The Court of Appeal found that Elementis' appraiser's use of the Agency's transactions were critical to developing and supporting insinuations regarding the Agency's conduct that were harmful to the Agency. One insinuation was that the prices paid for neighboring properties by the Agency represented a gift of public funds. Second, the Agency's transactions could be used to support the argument that the Agency wanted to treat Elementis unfairly and offer them below fair market value for the Subject Property. The evidence also suggested that the Agency was making an effort to conceal evidence of comparable sales.

Additionally, one of the Agency's transactions involved a property immediately adjacent to the Subject Property. The Agency paid $28.50 per square foot. The jury in the instant case placed a value of $29 per square foot for the Subject Property. The Court reasoned that the $29 per square foot value given to the Subject Property by the jury was likely greatly influenced by the $28.50 figure paid by the Agency for the neighboring property.

The Court of Appeal also considered whether the trial court properly allowed Elementis to seek, and ultimately receive, compensation for the value of the fixtures and equipment located on the Subject Property. The jury awarded Elementis $466,000 for the value of the fixtures and equipment. The Agency argued that Elementis should not have received any compensation for the value of the fixtures and equipment. Based on the highest and best use that the Subject Property was valued for, the Agency argued that the fixtures and equipment were not worth $466,000.

The Court of Appeal agreed with the Agency. In the instant case, the Subject Property and the fixtures and equipment were appraised assuming different highest and best uses. The Court of Appeal concluded that California law did not support the proposition of valuing property and fixtures and equipment based on different highest and best uses, unless it was reasonably probable that the fixtures and equipment would be utilized pursuant to their alternative highest and best use for an interim or transitional period. The Court of Appeal determined that this narrow exception did not apply to the instant case. The Court of Appeal found that Elementis

should have received the value of the fixtures and equipment based on the Subject Property's highest and best use. As a result, the Court of Appeal ruled that Elementis was entitled to the salvage and scrap metal value of the fixtures and equipment.

Next, the Court of Appeal considered whether the trial court properly withheld the issue of loss of business goodwill from the jury. In its cross-appeal, Elementis argued that the trial court erred by not allowing it to present evidence of loss of business goodwill to the jury. Elementis argued that loss of business goodwill was an issue that related to the amount of compensation, and as such, was an issue for the jury to consider and not the trial court.

The Court of Appeal found that the trial court's ruling was correct. The Court of Appeal reasoned that the determination as to whether the conditions exist for loss of business goodwill is an issue for courts to consider and not juries. According to the Court of Appeal, a jury may only consider whether a party has suffered a loss of business goodwill and the amount of the loss, if any, after a trial court determines that the conditions for loss of business goodwill exist. In the instant case, the Court of Appeal determined that the trial court was within its power to consider and ultimately determine that the conditions for loss of business goodwill did not exist.

In its cross-appeal, Elementis also claimed that the trial court erred by deducting $332,228 from its verdict to pay for an unpaid special assessment lien. Elementis argued that the amount of the lien should not have been deducted from its award because the City of Emeryville, to whom the special assessment was owed, was not named as a defendant. Elementis argued that California Code of Civil Procedure Section 1250.250 provided that lienholders must be joined as a party to collect an unpaid lien. The Court of Appeal stated that California Code of Civil Procedure Section 1250.250 did not remotely stand for Elementis' proposition. The Court of Appeal found that California Code Section 1265.250(b) explicitly provides that in an eminent domain action, the amount of a lien shall be paid to the lienholder from the award or withheld from the award for payment. The Court of Appeal ruled that the trial court properly withheld the amount of the unpaid lien from Elementis' award.

On appeal, the Agency also contended that the trial court erred by allowing Elementis to challenge the measures adopted by the Agency in an effort to comply with the archaeological mitigation requirements of CEQA. The Agency argued that the trial court should not have allowed Elementis to challenge its adoption of the measures, because the measures were adopted pursuant to CEQA. The Court of Appeal ruled that the trial court correctly considered the challenge of the mitigation measures adopted by the Agency. The Court of Appeal reasoned that the issue before the jury was not whether the measures were adopted correctly pursuant to CEQA but instead how much a hypothetical buyer and seller would have deducted from the sale price had they known about the necessary CEQA mitigation measures.

The Court of Appeal also considered three other issues on appeal. The Court of Appeal ruled that the trial court's decision to refuse to assign the case to a single judge for all purposes was within its discretion considering the size and complexity of the case. The Court also found that the Agency's challenge to the trial court's decision to award attorneys fees and costs to Elementis was moot in light of the Court's reversal of the trial court's judgment, since the attorney's fees and costs were unlikely to recur in exactly the same way. Finally, the Court found that the Agency's contentions that the trial court erred by excluding evidence of the Agency's expenditures in remediating the contaminated soil, and by staying a portion of the judgment pending the outcome of a federal action against Elementis and others to recover costs, were moot.

As you can see, the Emeryville Court considered and solidified many well established eminent domain principles and will likely prove to be a very useful aid for eminent domain practitioners.

Monthly Article

New Working Relationships In Right of Way

By Michael G. Murray

Outsourcing, the new (or is it the old and revisited) way of dealing with project requirements? It seems that over time the cycle for right of way projects swings from agencies wanting to have full control of all aspects of projects involving rights of way to being willing to relinquish some control to outside service providers. Recently a big boost for outside service providers was put in place in California by the voters to enable the outsourcing of projects right of way needs In this voter approved mandate, Caltrans was essentially required to hire outside assistance to get projects completed in shorter time spans than would happen with current staffing and budgets.

A recent example of this relatively new kind of working relationship has been the cooperation between Caltrans and the Alameda Corridor Transportation Agency (ACTA). The purpose of this relationship is for ACTA with Caltrans oversight, to provide right of way services and construction for the Pacific Coast Highway grade separation project at Alameda Street in Wilmington, CA. This project has become what is somewhat of a test case for Caltrans current policies and procedures in a new cooperative venture in an effort to expedite a greatly needed project.

For those readers not familiar with this project a brief description is in order. ACTA and Alameda Corridor Engineering Team (ACET) recently completed the Alameda Corridor Rail Project from the Ports of Los Angles and Long Beach to the intermodal yards just south of the I-10 Freeway (Washington Blvd., Downey Road area) in Los Angeles. This project was one of the largest public works projects in the USA at a cost of 2.4 billion dollars over a 23-mile length. Included in this project was the construction of an

approximately 11 mile long trench dug through several city and county jurisdictions which accomplished the separation of freight train traffic below street level vehicular traffic. This project enhanced the freight travel and alleviated surface street traffic tie ups, reduced smog producing emissions, cleaned up blighted areas, provided jobs, and housing among its many benefits.

A direct result of the Alameda Corridor Project is the significant increase in surface street vehicular/railroad conflicts where the Alameda Rail Corridor, Alameda Street, and the Wilmington Branch rail crosses PCH. With the increased frequency of freight trains traversing the Alameda Corridor, PCH traffic is frequently brought to a standstill for extensive intervals. Many businesses and normal traffic depend highly on timely vehicular access through the area. As you may well imagine additional freight train traffic along Alameda Corridor crossing PCH are tying up traffic for quite some time. It is readily apparent that this at grade traffic interference needs to be alleviated.

As a result of the at grade traffic delays, the PCH grade separation project, though planned for some time, has reached a critical stage of urgency in execution. Caltrans staffing and other current project demands has provided the opportunity in this situation to begin the pioneering efforts of Caltrans with an outside service provider in ACTA to cooperatively provide right of way services to solve this traffic jam.

Until recently, Caltrans had no specific guidelines to help put such a cooperative project together. New working relationships with outside resources are now being forged. As might well be imagined, large state agencies like Caltrans has in place its own methodology and system of project development. This means that when Caltrans and another agency/service provider begin to unite in a cooperative relationship for a project, the cultures of both organizations must come together and mesh in a way that allows the project to be completed in both a timely and economical way.

Comparing it to world events today in the political realm, might be akin to putting together the large country of China and the Small country of New Zealand to provide a project acceptable to both that benefits the world at large. Imagine how that would work with the conflicting cultures. Both would have their own languages wherein interpretation of each other's meanings would not always be clear. Each would have some conflicting goals. The larger and long established organization would want to emphasize their historical policies and procedures for adaptation by the smaller participant, while not wanting the smaller participant to appear to be too independent.

The question might arise as to who's way to accomplish the project should be adopted, or as to has the final say in various matters can quickly become a major issues that can cause roadblocks to completing the project, which is of course is the primary goal. So it is

imperative that the working relationship be established that melds both cooperating entities operational cultures in ways that allow the project to be completed in an economical and timely manner.

In the PCH project, Caltrans is trying to adapt their way of doing business to allow the "outside services providers", such as, ACTA to interact with Caltrans in a way that lets them be comfortable with the altogether differing culture of ACTA. A sense of trust must be established between the parties to ensure each that they will properly perform their respective tasks. On the one hand we have a large governmental agency with a tremendous heritage of the way they conduct their business with many layers of processes and various departmental expertise that are use to their internal operations. Then on the other hand we have ACTA a relatively small legislaturally created agency recently and originally formed for purposes of one primary project.

Combining the cultures of these two organizations into a working relationship that functions in an efficient and compatible manner requires that each be willing to look at the project processes in ways that are outside their familiar norm. Choices must be made along the way as to what each finds acceptable for completing the project at hand and to maintain the working relationship in a manner so that everyone gains new and beneficial perspectives that will be of use in the next cooperative project.

The key to providing this melding, cooperation, and continuing working relationship is for the participants to maintain a sense of open mindedness and a sense of flexibility that allows changes to be made by each of the parties that continues to allow the project to move towards completion. At the same time it should avoid any compromise that jeopardizes the project outcome or the continuing working relationship of those responsible for carrying it to completion.

Monthly Report

Holly Rockwell, Chapter Secretary

The following items were among those discussed at the Board's meeting on October 8, 2002.

- The *Fall Seminar* is being held on October 22 at the Quiet Cannon. The speakers and agenda have been confirmed, and registrations are being submitted.

- Gus Parcero, Engineering Chair, will represent the Chapter at the *Leadership Council* conference in San Diego on October 24th – 26th. The Board had previously approved a $500 subsidy to be used towards that conference.

- Rudy Romo, President, and Michael Popwell, President-Elect, will represent the Chapter at the *Chapter 1 Regional Forum* on November 9, 2002 in San Jose.

- It was noted that for each IRWA Class, the Chapter was being charged between $200 and $800 by Headquarters for *copying and mailing costs.* The charges were assessed to the Chapter even when a course was cancelled. It was agreed to follow up with Headquarters to ascertain the policy and method of calculation. It was also agreed to incorporate the copying and mailing costs into consideration of viability of future courses.

The following motions were passed:

- Motion to approve up to $6,000 out of the Chapter's reserves to purchase a Chapter Projector for educational classes, seminars and luncheons.

- Motion to accept the following new members into the Chapter:
  Stephen Piatel
  Elaine McDaniel
  Daniel Provencio

- Motion to spend $300 on the audio equipment and $300 on a Ship's Officer's presentation for the Tri-Chapter Installation Lunch

- Motion to approve $100 for professional reproduction of Chapter logo.

Please feel free to contact any of the Board members with your comments, questions or concerns. Also, Board meetings are held at 12:00 on the second Tuesday of each month at the LA County Public Works Department in Alhambra. Chapter Members are encouraged to attend and participate.

Special Events

- Youth Leadership Council - The IRWA sponsored a Young Leadership Council weekend in San Diego from October 25-27, 2002. The purpose of it was to promote leadership and direction at the Chapter levels. The Chapter 1 Board felt that someone on the Board should go and obtain as much information as possible to provide leadership at the Board level. The Chapter was proud to send Mr. Gus Parcero, Engineering Chair of Chapter 1 and employed with the Los Angeles City Dept. of Public

Works.

- Nominations & Awards - The Chapter is pleased to present the Professional of the Year, Large company/agency, and small company/agency at this coming luncheon's meeting. The respective names/organizations will be announced at the meeting.

Monthly Drawing

This month's membership drawing is at $80.00.

Class Schedule

2002 Scheduled Courses for Chapter 1

Dates	Class Code	Title	Instructor	Location	Coordinator	Phone No.	Email
Nov 15	403	Easement Valuation	Ralph C. Brown, SR/WA	Riverside, CA	Stephi Villanueva	(909) 387-8255	svillanueva@res.co.sbcounty.gov
Dec 6	211	Effective Written Communications	Carol Brooks, SR/WA	Torrance, CA	Francis Vicente	(310) 538-0233 ext. 123	