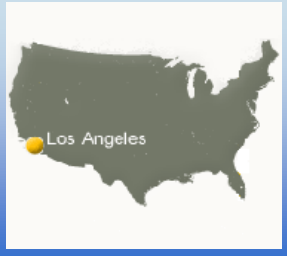
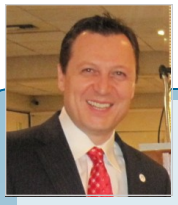
IRWA Los Angeles Chapter 1



International Right-of-Way Association - The Founding Chapter since 1934

JANUARY 2012

Inside this issue:



President's Message — Konstantin Akhrem

Happy New Year!

This is promising to be a great year for the Los Angeles area Right of Way practitioners with federally funded transportation and infrastructure projects fast approaching on the horizon.

Expertise in the Uniform Act is more in demand than ever before. IRWA in collaboration with Right of Way International Educational Foundation (RWIEF) has done a really great job updating the training courses, making them more relevant, practical and useful than ever before. Today's IRWA courses are designed to give you immediate skills and tools to get the job done. It is demonstrated with every course. Every time I participate in a course I walk away with something I call *"just this alone was worth my time and money!.."* and I've always had several of these "Wow" or "Aha!.." moments with every IRWA course I have taken.

I want to urge you to start your year with Professional Development in mind and the IRWA as your mission-critical partner, whether you are a public agency or a private consultant. ◆

For your Calendar...

Upcoming Training:

02/08/12 - **Conflict Management** (course # 213)

02/09/12 - **Alternative Dispute Resolution** (Course # 203)

02/24/12 - **Property Descriptions** (Course # 902)

4/04/12 - **Negotiating Effectively with Diverse Clientele** (Course # 209)

January 24, 2012 - First Luncheon of the Year (see page 2)

March 21, 2012 - Federal Agency Update, Washington, D.C.

March 27, 2012 - Quarterly Luncheon. Joint function with *Southern California Chapter of Appraisal Institute*. To request/suggest a topic/speaker, contact the Chapter's President-Elect, **David Graeler, Esq**. (see page 18)

April 24, 2012 - Annual Valuation Conference, Montebello, CA

May 22, 2012 - General Membership Meeting, Officer Elections and Installations (Tentative. Location TBD)

June 10 - 13, 2012— Annual International Education Conference, Seattle, WA

July 1, 2012 - New Fiscal Year, New Board of Directors begins its term.

July 24, 2012 - Past Presidents Luncheon

Details & Updates are regularly posted at www.irwa-chapter1.org

January 24, 2012 – Quarterly Luncheon

First Luncheon in 2012—Free for Chapter 1 Members

"Attending a chapter meeting is like swimming in a sea of business contacts."

Randy A. Williams, SR/WA, MAI, FRIC

International President of IRWA.

David Graeler, Esq.
Nossaman LLP
President-Elect

Aaron Aftergut
Integra Realty Resources
Luncheon Chair

Guest Speaker

A.J. Hazarabedian, Esq.

You are cordially invited to *the first luncheon of 2012* on **Tuesday, January 24, 2012**, at **Steven's Stake House** in Commerce, which is **free** to all current Chapter 1 members. This event typically attracts more than 100 - we look forward to seeing you!

Guest Speaker

Invited by David Graeler, Esq., the chapter's President-Elect, the guest speaker, **A.J. Hazarabedian, Esq**. of **California Eminent Domain Law Group.** Mr. Hazarabedian has extensive experience in handling eminent domain cases for property owners, business owners, and public agencies, and has worked on cases involving tens of millions of dollars. He has been interviewed on the topic of eminent domain by CNN Headline News and Fox News Channel. In addition to his law practice, Mr. Hazarabedian serves as a court-appointed mediator in eminent domain matters on the Los Angeles Superior Court mediation panel.

Topic

Strategies for minimizing litigation expenses in Property Acquisition (while getting great results): An Eminent Domain Attorney's Perspective.

Admission & Schedule

FREE to Chapter members, $16 for all others.

11:30 - Doors open
12:00 - Program begins
1:00 - Program ends

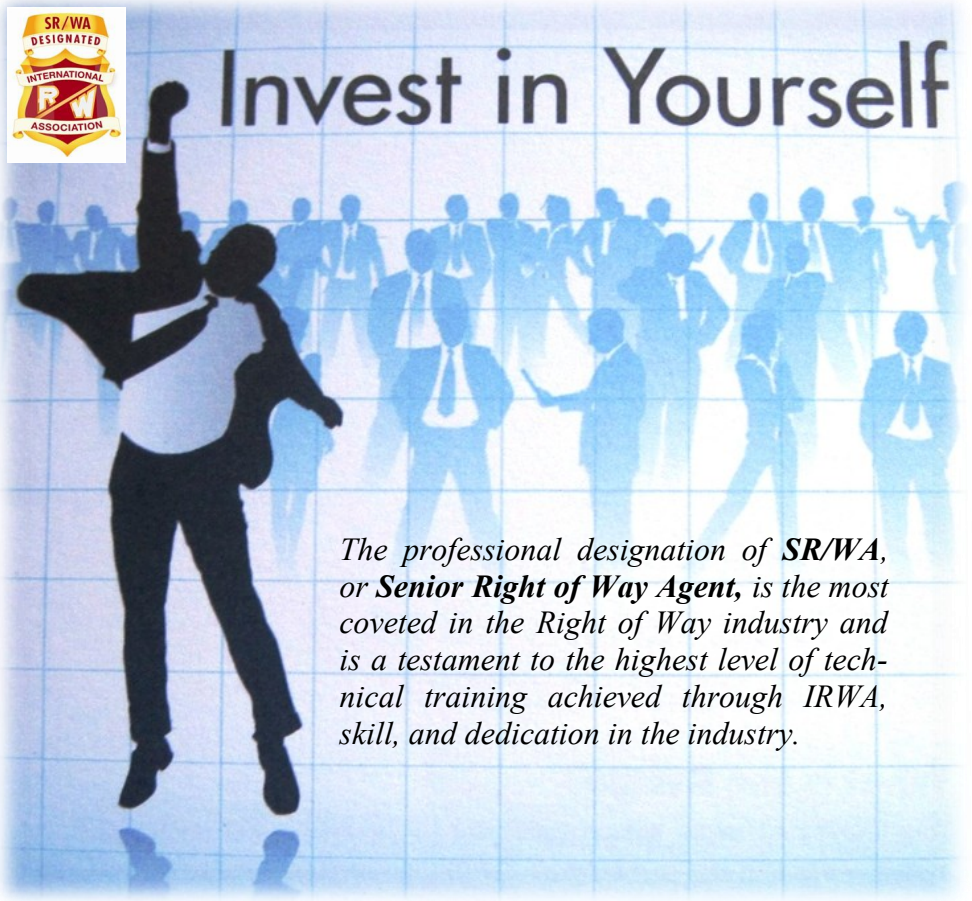
Reservations

Highly recommended

RSVP to:
Aaron Aftergut
Luncheon Chair
818-290-5434
aaftergut@irr.com.

Participate... Learn... Advance...

Be there!..



Boost your career with IRWA Credentials!

Generalist Certifications:

Right of Way Agent
Associate Right of Way Professional
Right of Way Professional
Senior Right of Way Agent

Specialist Certification areas:

Appraisal (R/W-AC)
Asset Management (R/W-AMC)
Environmental (R/W-EC)
Negotiations (R/W-NAC)
Relocation Assistance (R/W-RAC)
Uniform Act (R/W-URAC)

Qualifying criteria applies. For details, please contact the Chapter's Professional Development Chair *(see p. 18)*

Upcoming IRWA Courses:

Date	No.	Title	Instructor	Coordinator
Feb 8, 2012	# 213	Conflict Management	Carol Brooks, SR/WA	Natasa Lenic 310-720-9517 natasa.lenic@yahoo.com
Feb 9-10, 2012	# 203	Alternative Dispute Resolution	Carol Brooks, SR/WA	Natasa Lenic 310-720-9517 natasa.lenic@yahoo.com
Feb 24, 2012	# 902	Property Descriptions	Ralph Brown, SR/WA	William Larsen 818-290-5428 wlarsen@irr.com
April 4—5, 2012	# 209	Negotiating Effectively with Diverse Clientele.	Joseph Pestinger, SR/WA	Dan Kazden (805) 578-2400 (x 104) dKazden@riggsandriggsinc.com

Tom Hanley, P.E.
Education Chair

If you did not find the course you need to meet your professional education goals, we want to hear from you!..
Please contact **Tom** at **(714) 379-3376**, Ext. **284**
thanley@paragon-partners.com

For additional information and registration log on to www.irwa-chapter1.org and click on COURSES

News Releases, Publicity Releases, RFP, RFQ, Technical Articles, Updates, are welcome — contact konstantin@irwa-chapter1.org.

Focus on: Professional Development

What is Right of Way Certification?

The Right of Way Certification is granted to IRWA members who have achieved professional status through experience, education and examination in a single right of way discipline.

Earning this certification demonstrates an unparalleled achievement in a single discipline and reinforces a standard of excellence. The certification is available in these six areas:

- Appraisal
- Asset Management
- Environmental
- Negotiations
- Relocation Assistance
- Uniform Act [new]

What are the prerequisites for the R/W certification?

Any member involved in one of the above disciplines is eligible. Applicants must be an IRWA member in good standing, have a minimum of 2 years of relevant ROW professional experience within the last 5 years, and meet the coursework and exam requirements.

What happens after R/W Certification is earned?

The R/ W Certification expands employment opportunities, increases salary potential, boosts chances for career advancement and demonstrates professional commitment.

Employers benefit from the R/W Certification too. Most employers recognize the roles that professional development and continuing education play and encourage their staff to pursue such things. The R/W Certification helps employers to identify and reward employees with proven initiative, dedication and knowledge. I helps to create a strong professional foundation and training ladder. The Certification enhances employee skills through multidiscipline training and examination. It also assures continuous education updates through recertification.◆

IRWA What's New In Education?

TWO NEW POLICIES: SR/WA COMPRENSIVE EXAMS & ETHICS COURCES FOR CERTIFICATION.

New SR/WA Comprehensive Exams:

Effective **January 1, 2012**, there will be new SR/WA Comprehensive Exams.

(Individual discipline exams remain the same.)

New Ethics Requirement:

Effective **July 1, 2012**, only IRWA ethics courses – **103, Ethics and the Right of Way Profession** or **104, Standards of Practice for the Right of Way Professionals** may be applied towards the ethics requirements for recertification. Non-IRWA ethics courses previously approved by the IPDC will no longer count for recertification.

If you wish to use one of the previously approved non-IRWA ethics courses for recertification in your current 5-year recertification cycle, you must complete the course before July 1, 2012.◆

Online Training:

In addition to the currently offered classes, the following courses are available online:

103, 104, 105; 200, 205, 303, 304; 400, 402, 403;	600, 606; 700; 800, 801, 802;

The Online Courses can be accessed through the chapter's website **www.irwa-chapter1.org**

Note: **500 series** courses (*Relocation*) and **900 series** (*Engineering*) are not available online.

Michael F. Yoshiba, Esq.
Richards Watson & Gershon, a Professional Corporation
Law Chair

Legal Update: A Year in Review — 2011

Eminent Domain and Inverse Condemnation Decisions – 2011

Eminent domain/Inverse condemnation law had its fair share of published decisions handed down by California's various appellate courts including the high court in 2011, keeping eminent domain and inverse condemnation an ever evolving area of the law.

The courts handed down seven published decisions involving either eminent domain or inverse condemnation issues. Of the seven published decisions, six were inverse condemnation cases. Interestingly, all of the inverse condemnation decisions were handed down by California's various appellate courts, with California's Supreme Court handing down the only eminent domain decision.

The one decision handed down by California's Supreme Court which involved an eminent domain issue, was actually a case the parties settled shortly before oral arguments. Nevertheless, California's Supreme Court felt "the issue presented is of continuing public importance" and as such elected to retain jurisdiction of the case. While "public importance" may be the reason cited by the Supreme Court, I like to think that the justices of the Supreme Court find eminent domain law as fascinating and enjoyable as the rest of us, and therefore could not forego the opportunity to contribute to this area of the law in 2011.

So what exactly did the courts decide in 2011? To start off, the appellate courts decided the following six issues: (1) the applicability of the statute of limitations on an inverse condemnation matter after dismissal of an eminent domain action; (2) whether the acquisition and demolition of structures in a neighborhood entitles the remaining landowners to compensation; (3) revisiting the *IHOP* case, whether a franchisor is an "owner" of a business, and furthermore whether a loss of business goodwill claim may be assigned by the operator to the franchisor; (4) whether the County's conduct in installing K-rails to divert rain water from certain properties and prevent their flooding was reasonable; (5) revisiting *Klopping,* whether certain conduct by a government agency constitutes general planning or an announcement of intent to condemn sufficient to justify damages for unreasonable delay in condemnation; and (6) whether a city's downzoning of an owner's undeveloped parcel was arbitrary and capricious and constituted improper discriminatory spot zoning and a compensable taking. The Supreme Court, not wanting to be left out, decided whether a lienholders' withdrawal of a portion of a deposit results in a waiver of the property owner's right-to-take claims and defenses.

A brief discussion of each of the decisions listed in the order referenced above is provided below:

Submitted by
Artin N. Shaverdian, Esq.
California Eminent Domain Law Group, APC

Legal Update: A Year in Review — 2011 (continued)

Cobb v. City of Stockton, 192 Cal.App.4th 65

The first of the published decisions was filed by California's Third District Court of Appeal on January 26, 2011. In *Cobb v. City of Stockton,* 192 Cal.App.4th 65, the court ruled on the application of the statute of limitations in an inverse condemnation action after the governmental agency had filed an eminent domain action, which action was dismissed nine years later for lack of prosecution, prompting the owner to file an inverse condemnation claim.

In October of 1998, the City of Stockton ("City") filed an eminent domain action to acquire the owner's property. The City then deposited probable compensation and obtained an order for prejudgment possession before the end of the year. The City thereafter constructed a public roadway across the condemned property. However, in October of 2007, nine years after the eminent domain action was commenced, the trial court dismissed the action for lack of prosecution.

Five months later, in March of 2008, the property owner, Cobb, initiated an inverse condemnation action seeking damages for the taking of the property for the now existing roadway. The City demurred to the owner's complaint arguing the inverse claim is time barred, inasmuch as the taking occurred more than five years before the complaint was filed. The trial court agreed with the City in sustaining its demurrer, but the appellate court reversed the trial court's decision.

The appellate court stated, whether the five year statute of limitations has run turns on whether the owner's cause of action accrued at the time the City took possession of the property, or later, when the City abandoned its eminent domain action. The court went on to hold that since the City was not in wrongful possession of the property during the pendency of the eminent domain action as it had obtained an order for prejudgment possession, a cause of action for inverse condemnation did not accrue until the City no longer had a right to occupy the owner's property. This did not occur until the eminent domain action was dismissed in October 2007, and as such, only then did the statute of limitations begin to run.

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Legal Update: A Year in Review — 2011 (continued)

City of Los Angeles v. Superior Court (Plotkin) **194 Cal.App.4th 210**

Two and a half months after the Third District filed its decision in the Cobb matter, the appellate courts' Second District published its own opinion on inverse condemnation on April 12, 2011. In *City of Los Angeles v. Superior Court (Plotkin),* 194 Cal.App.4th 210, the court ruled on the issue of whether the City of Los Angeles' ("City") buying and demolishing structures in neighborhoods near the Los Angeles International Airport entitled the remaining landowners to compensation for inverse condemnation.

In 1997, City began implementing a "Residential Sound Proofing Program" to sound insulate residential dwellings near Los Angeles International Airport ("LAX"). Homeowners were not interested in soundproofing; however, a group of residents requested the City purchase their properties in lieu of soundproofing. The City then developed a Voluntary Residential Acquisition and Relocation Program. It was voluntary in that "if an owner did not voluntarily indicate an interest in having his property purchased, the airport would not seek to purchase that owner's property." The Program required demolition of acquired properties to mitigate incompatible residential land uses affected by noise from LAX.

In July 2009, real parties Peter Plotkin et al., filed a suit against the City for inverse condemnation and damages due to condemnation blight. The complaint alleged that the City's acquisition of properties, relocation of tenants, demolition of properties, and the City's use of some properties for fire department practice and filming of special effects, had resulted in the diminution of values of their properties including loss of rental income. Plotkin also contended that the City had "gained de facto control of their property," resulting in the City being the only buyer for their properties. On a summary adjudication motion, the trial court ruled in favor of Plotkin finding that real parties had established that the City's creation of "condemnation blight" resulted in a constitutional duty to pay just compensation. However, the City sought writ review of the trial court's granting of the real parties' motion for summary adjudication.

In deciding whether the City's actions resulted in a viable claim for inverse condemnation, the appellate court examined the Supreme Court's decision and applied the two prong test outlined in *Klopping v. City of*

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Legal Update: A Year in Review — 2011 (continued)

Whittier (1972) 8 Cal.3d 39 (*Klopping*). As *Klopping* made clear, to assert a claim for inverse condemnation based on unreasonable precondemnation conduct, a plaintiff must establish first that the public entity engaged in unreasonable activity, either by excessively delaying initiation of an eminent domain action or by other oppressive conduct; and second, that the offensive conduct was a precursor to the entity's condemnation of the plaintiff's property.

The court indicated that first, real parties had failed to present evidence to establish the most basic component of a *Klopping* claim – that the City had condemned their properties, had intent to condemn, or had plans for future use of their properties that would someday require condemnation. To the contrary, the evidence presented indicated that (1) for roughly a decade, the City had entered into voluntary agreements with owners to purchase, and (2) City had no plans for the properties it had acquired. Moreover, real parties failed to establish that the land was being acquired for a public purpose. According to the undisputed evidence presented, once the properties were acquired, they were demolished and left empty and the only purpose of the program was to assist residents affected by noise.

Finally, with respect to "unreasonableness" of the City's conduct, real parties' suggested that the City could have prevented blight by restoring the neighborhoods, and renting buildings it had acquired or developing other uses for properties rather than leaving them vacant. The court disagreed, indicating that the real parties' suggestions would defeat the program's purpose which was to protect individuals from living in proximity to the airport noise.

In short, the court held that real parties fell short on both accounts for finding *Klopping* style inverse condemnation liability based on unreasonable precondemnation conduct.

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Legal Update: A Year in Review — 2011 (continued)

Galardi Group Franchise & Leasing, LLC, v. City of El Cajon, 196 Cal.App.4th 280

Both the Second and Third District courts of appeal having filed opinions with respect to inverse condemnation issues, the Fourth District filed its own published opinion on June 7, 2011. In *Galardi Group Franchise & Leasing, LLC*, *v. City of El Cajon*, 196 Cal.App.4th 280, the Fourth District Court of Appeal revisited the concept of entitlement to loss of business goodwill by the "owner" of a business conducted on property taken by eminent domain (CCP §1263.510) and entitlement to goodwill compensation as an assignee of a lost goodwill claim.

Galardi, as franchisor of Wienerschnitzel restaurants, subleased a location including all fixtures and equipment for the operation of the restaurant to Mark Bingham (the "Operator"). The Operator operated the restaurant at its location in El Cajon for approximately 20 years under a written operating agreement which contained a provision stating that the Operator "waived" its right to any condemnation award. In 2007, the property was acquired by eminent domain and the restaurant closed. Although Galardi and the Operator tried preserving the goodwill by relocating, they were unsuccessful.

In October of 2008, Galardi and the Operator executed an assignment whereby the Operator assigned any claim it had for lost goodwill compensation to Galardi. Galardi then filed an inverse condemnation suit against the City alleging entitlement to lost goodwill compensation as owner of the restaurant, and alternatively as an assignee of the claim for loss of business goodwill to the extent the Operator was held to be the "owner". The matter proceeded to trial with the City relying on *Redevelopment Agency v. International House of Pancakes, Inc.* (1992) 9 Cal.App.4th 1343 (IHOP), to argue that as a non-owner franchisor, Galardi was not entitled to compensation for lost goodwill. The City further argued that based on the executed operating agreement whereby the Operator waived its right to any condemnation award, the City was not obligated to pay lost goodwill as the Operator had nothing to assign to Galardi when it executed the assignment assigning its claims.

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Legal Update: A Year in Review — 2011 (continued)

The trial court agreed concluding that Galardi was not the "owner" of the business and further concluded that the Operator had no interest to assign and entered Judgment in favor of the City. Galardi timely appealed. The Court of Appeal, relying on *IHOP* concluded that there was no indication of ownership by Galardi. Like the claimant in *IHOP,* the court states that Galardi "established a method of operation intend[ing] to immunize or insulate itself from the risks and liabilities inherent in the ownership of a business…"

The appellate court also agreed with the trial court and concluded that Galardi was not the owner of the business under CCP §1263.510. However, with respect to Galardi as an assignee of the lost goodwill claim, the appellate court concluded that the parties intended the waiver clause in the operating agreement to define their respective rights to goodwill damages vis-à-vis one another, rather than benefiting a third party - or in this case the City. The court went on to say that this is further supported by the fact that in anticipation that Galardi might not be considered the owner of the business, Galardi and the Operator executed the assignment, which action confirms that they did not believe the waiver barred the Operator from obtaining a condemnation award and reaffirming their intention that Galardi be entitled to any such award.

Accordingly, the court reversed the trial court's holding that the waiver clause barred assignment of the claim and remanded the matter to the trial court to determine whether Galardi has proven the remaining statutory elements showing entitlement to compensation for lost goodwill and if so, empanel a jury to determine the amount of compensation.

Legal Update: A Year in Review — 2011 (continued)

***Gutierrez v. County of San Bernardino*,**
198 Cal.App.4th 831, on August 24, 2011

The Fourth District Court of Appeals was not done yet, as it handed down its second inverse condemnation decision in *Gutierrez v. County of San Bernardino,* 198 Cal.App.4th 831, on August 24, 2011.

San Bernardino County Court House

In *Gutierrez*, property owners alleged that takings occurred during rainstorms in December 2003 and October 2004 when their properties were inundated with water, dirt, and debris flowing from the mountainous area north of their properties and down Greenwood Avenue where the homes were located. While 80% of Greenwood Avenue was paved, the top 20% closest to the mountains was an unimproved dirt road. In October of 2003, fires denuded the mountains and in December 2003 after it rained, water flowed out of the mountains and down Greenwood Avenue carrying with it significant amount of debris. The flow caused substantial damage to plaintiff's properties. The following month, in an effort to protect the residents, the County placed K-rails along both sides of the paved portion of Greenwood Avenue. In October 2004, more rain caused water and debris to flow down Greenwood Avenue with some of the water and debris escaping the confines of the K-rail, causing damage to plaintiff's properties.

Plaintiff's alleged that Greenwood Avenue, including the unpaved dirt alignment, was a public improvement for purposes of an inverse claim; that the County's installation of K-rails was a further public improvement; in both storms Greenwood functioned as a storm channel, proximately causing damage; and the County should be strictly liable for damages under *Albers v. County of Los Angeles,* (1965) 62 Cal.2d 250.

As to the 2003 incident, the court held that the dirt alignment was unimproved raw land that had not been deliberately acted upon by the County and, as such, was not a "public improvement." With respect to the paved portion of Greenwood Avenue, it was found to be a "public improvement;" however, the court held that the paved status of Greenwood Avenue was not a "substantial cause" in brining about plaintiff's damages. To establish a causal connection between the public improvement and the plaintiff's damages, there must be a showing of "a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury." As the trial court had found, the sole cause of plaintiff's damages was the breaking of a dam at the foot of the mountains which caused large amounts of debris and sediment to reach plaintiff's properties, not the paved status of Greenwood Avenue.

As to the 2004 flood and the County's installation of K-rails, the issue was whether to apply a standard of reasonableness or a strict liability standard to the County's actions. The court refused to follow the strict liability standard set forth in *Albers* citing other cases which indicated that the strict liability standard of *Albers* should be applied to cases with similar facts to *Albers*. The court cited reasoning from other cases stating that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements. That "strict liability would discourage construction of needed public improvements." Accordingly, the court held that the "reasonableness" standard was appropriate in this case. Applying the six factors set forth in *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, to determine the reasonableness of the County's conduct in installing the K-rails, along with the evidence demonstrating that the K-rails were installed for the purpose of protecting plaintiff's properties, that the installation benefited the adjacent properties, and that the damage to plaintiff's properties would have been greater in the absence of the K-rails, the court concluded that the County's conduct was reasonable.

Legal Update: A Year in Review — 2011 (continued)

Joffe v. City of Huntington Park,
201 Cal. App. 4th 492, as modified (Dec. 2, 2011)

With the Fourth District outpacing the Second and Third District Courts of Appeal in their inverse condemnation decisions, the Second District once again struck back with a new decision on November 9, 2011. The Second District charted familiar territory in its *Joffe v. City of Huntington Park*, 201 Cal. App. 4th 492, decision as it once again revisited the application of the Supreme Court's landmark decision in *Klopping v. City of Whittier* to decide whether the City's precondemnation activities went beyond the planning stage into the acquisition stage allowing the recovery of damages on a theory of inverse condemnation.

The plaintiff Joffe owned property in the City of Huntington Park and operated a furniture manufacturing business therefrom. Beginning in 2002, the City repeatedly expressed its intent and desire to acquire and develop two 40 acre sites for a mixed use project. The property owned by Joffe and his business operating thereon were included in the project area. Between 2002 and 2008, Joffe was repeatedly informed by the City and the developers that the project was on track and that his property would eventually be acquired. Specifically, Joffe alleged that: (1) City caused Joffe's property to be appraised; (2) City caused Joffe's business to be analyzed for relocation; (3) City requested that Joffe obtain his own independent appraisal so the parties could enter into negotiations; (4) City erected large signs announcing the project; (5) In both written and oral communications, the City stated Joffe's property would be acquired for the project; and (6) During the entire period prior to Joffe filing the inverse condemnation action, City expressed its intent to build and develop the project. Joffe claimed that all of these actions by the City interfered with his use and enjoyment of the property and resulted in irreparable damage and a claim for inverse condemnation under the *Klopping* rule.

In *Klopping* the Supreme Court set forth its two-prong test and held that "a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to the condemnation; and (2) as a result of such action, the property in question suffered a diminution in market value." In the instant case, the court concluded that the first part of the first prong of the *Klopping* two-prong test had not been met, as the City did not commence eminent domain proceedings, adopted no resolution of necessity, and the conduct of the public agency did not result "in a special and direct interference with the owner's property." The court reasoned that "the bulk of the conduct of the City, on which plaintiffs seek to base their *Klopping* cause of action, constitutes general planning with no specific and direct interference with plaintiff's property." Over 200 parcels were affected by the project and the City's conduct applied equally to all 200 parcels. Even acts which were directed specifically at Joffe, such as appraising Joffe's property, were held to constitute general planning.

With respect to the second part of the first prong of the *Klopping* rule, the court ruled that Joffe could not pursue a cause of action for "unreasonable precondemnation conduct" because they have alleged no such conduct. The court explained that plaintiff for the first time in its reply brief argued "that the real gist of their claim is not delay, but that the City defendants acted unreasonably." However, without any allegations in plaintiff's complaint which could conceivably render the City's conduct unreasonable, plaintiffs have alleged only that the City defendants performed some planning activity on a project that was never built and as such the City was not subject to inverse condemnation liability.

Legal Update: A Year in Review — 2011 (continued)

***Avenida San Juan Partnership v. City of San Clemente*,** 201 Cal. App. 4th 1256

Finally, to close out the year and take home the trophy for the most inverse condemnation cases decided in 2011, the Fourth District Court of Appeal issued one final decision on December 14, 2011 in *Avenida San Juan Partnership v. City of San Clemente*, 201 Cal. App. 4th 1256. Fortunately, it did not involve a *Klopping* claim.

The case involved zoning of an undeveloped 2.85 acre sloped parcel fronting Avenida San Juan. When the owners purchased the property in 1980, the zoning allowed six houses per acre. In the 1980s, the owner wanted to develop four houses, and the city approved a tentative parcel map for four single family lots, however, the owner did not develop it at that time. As a result of earlier opposition to developments, residents requested that the city designate the parcel "open space." As such, in 1993, the city amended its general plan and zoning codes and created the RVL (Residential, Very Low) zone which permitted 1 dwelling per 20 acres, and imposed it on several properties including the subject property. All parcels surrounding the subject property however were zoned RL (Residential Low) permitting 4 dwelling per 1 acre.

In 2004, when the owners hired an engineer to assist them once again with developing the property is when they became aware of the downzoning. Shortly thereafter, the owner submitted development applications to build four dwellings on the property. However, the city council denied the application and the landowner filed a writ of mandate and an inverse condemnation claim for regulatory taking.

The trial court found that the city's downzoning constituted illegal "spot zoning," and issued a writ of mandate ordering the City to vacate its resolution denying the owner's application, and made the rare finding of a compensable regulatory taking using the "Penn Central factors" test (*Penn Central Transp. Co. v. City of New* York (1978) 438 U.S. 104). The Appellate court affirmed the trial court's judgment and gave the City the choice of either complying with the writ of mandate or paying inverse condemnation damages, and remanded the case to the trial court to reconsider the fair market value of the property.

In reaching its conclusion, the court rejected the city's topography rationale that the RVL zone preserves sloped areas of the community since much of San Clemente reflects the same topography. The appellate court agreed that the parcel was "an isolated area" that had "become an island" of extra-ordinarily large lot sized zoning "in a residential ocean of substantially less restrictive zoning." As such, the court held that the City's downzoning was arbitrary and capricious and constituted discriminatory spot zoning.

In addition, in examining the required three core regulatory taking factors outlined in *Penn Central,* the court agreed with the trial judge that: (1) the "economic effect on the land owner" was dramatic as illustrated by the $1.3 million difference between the property valued if four houses could be built and the zero value the trial judge found under the new zoning; (2) the regulation wholly "undermined the investment-backed expectations of the owner" who purchased the property in 1980 when it was under the same zoning as the surrounding properties; and (3) the "character of the governmental action" appears to have been largely motivated to keep the subject parcel undeveloped as "open space."

Finally, with respect to the City's defense that the owner's challenge of the downzoning was time barred by the statute of limitations governing direct attacks on newly enacted land use ordinance (since the RVL zoning was enacted in 1993), the court concluded that it did not apply. The court indicated that the present action was not a "facial challenge" but an "as applied" challenge. An as applied challenge considers the application of that law to the particular circumstances. Here the owners were not challenging the 1993 general plan amendment or the 1996 zoning ordinance, nor were they challenging the RVL zoning designation in general. Instead, the owners were challenging the City's refusal to consider changing the RVL restriction as it applied to their property, and that did not happen until 2007 when the City denied the owner's variance application. Accordingly, the statute of limitations did not

Continued on next page

Legal Update: A Year in Review — 2011 (continued)

begin to run until the City's final administrative adjudication when they denied the owner's application. Thus the owner's inverse condemnation claim was ripe.

Los Angeles County Metropolitan Trans. Authority v. Alameda Produce Market, LLC, Cal.4th 1100

While eminent domain and inverse condemnation may in fact be important areas of the law, the high court was correct when it stated that the only eminent domain issue it was deciding on in 2011 was of public importance. On November 14, 2011, the Supreme Court Justices unanimously decided in *Los Angeles County Metropolitan Trans. Authority v. Alameda Produce Market, LLC,* 52 Cal.4th 1100, that a lender's withdrawal of a portion of the deposit of probable compensation constitutes a waiver of rights to contest the taking by the persons receiving such payment, but does not constitute a waiver of the property owner's claims and defenses in an eminent domain action. Furthermore, distinguishing the facts of the instant case from an earlier ruling by the appellate court in *Redevelopment Agency of San Diego v. Mesdaq,* 154 Cal.App.4th 1111, the court also held that the owner's failure to object to the withdrawal also does not result in a waiver of the owner's right to object to the taking.

In 2004, the Los Angeles County Metropolitan Transportation Authority ("MTA") filed a complaint in eminent domain seeking to acquire property owned by Alameda Produce Market, Inc. ("APMI"). Under California's "Quick Take" eminent domain procedures, MTA also deposited $6.3 million as the probable amount of compensation for the property and applied for immediate possession of the property. APMI filed an answer raising numerous objections to the proposed taking, including an objection to MTA's request for an order for immediate possession.

Shortly after filing the complaint, three lenders with liens against the property – VCC Alameda, Namco Capitol Group, and California National Bank ("Lenders") – applied to the court for withdrawal of a portion of the deposit equal to the amount owed them by APMI in satisfaction of their respective liens. MTA objected to the Lenders' applications by filing a standard notice and objection. APMI received the notice, but did not file an objection. MTA later withdrew its objection and eventually entered into a stipulation, which stipulation was not signed by APMI, agreeing to the withdrawals. The court granted the Lenders' applications to withdraw $6.1 million of the deposited funds. APMI never applied to withdraw any of the funds.

In 2006, after a bench trial, the trial court entered an order dismissing MTA's eminent domain complaint, finding that it had failed to engage in meaningful negotiations with APMI. In 2008, the court entered a final order dismissing MTA's complaint and requiring MTA to relinquish the property to APMI within 90 days. MTA argued that APMI's failure to object to the Lenders' withdrawals constituted a waiver of APMI's right to challenge the taking. The trial court rejected that argument ruling that APMI had committed no affirmative act sufficient to constitute a waiver. The Court of Appeal reversed the judgment ruling that APMI's failure to object to the Lenders' withdrawal did constitute a waiver, relying on *Mesdaq,* which found a waiver where a property owner, in a filed response to his lender's withdrawal application, informed the court he was not objecting to the withdrawal request. APMI appealed to the California Supreme Court.

Continued on next page

Legal Update: A Year in Review — 2011 (continued)

The Supreme Court's ruling was centered on the wording of Code of Civil Procedure Section 1255.260, which specifies the circumstances under which a withdrawal from a deposited amount in an eminent domain proceeding waives a party's right to continue to contest the taking. Section 1255.260 provides: "If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of *the persons receiving such payment* except a claim for greater compensation." (Emphasis added.)

The Court focusing on the word "receive" in the statute, found the Lenders were "persons receiving such payment," but APMI was not. "In this case, none of the deposited funds were delivered to, and placed in the hands of APMI; nor did APMI take possession and control, or accept custody, of any withdraw funds." As such, the court concluded that "APMI was not a 'person [ ] receiving such payment' as those words are commonly understood."

MTA, however, argued that the statute's language may include more than the Lenders and should include APMI, as APMI's rights were waived because it "receives the direct benefit of" the withdrawal when its debts to the Lenders were paid off. Such an interpretation would require the Court to change the words "persons receiving such payment" in Section 1255.260 to "persons receiving the benefit of such payment," the Court said. "Doing so would violate the cardinal rule that courts may not add provisions to a statute."

Furthermore, the Court stated that nothing in Section 1255.260 refers to a non withdrawing defendant's failure to object. That is, there is no provision in 1255.260 linking a defendant's failure to object to the withdrawal to a waiver of his or her claims and defenses. However, the Court went on to point out that section 1255.230, subdivision (c) does expressly speak to this circumstance. That is, pursuant to section 1255.230 (c) the only consequence of a notified defendant's failure to object to a withdrawal application is that defendant's forfeiture of any "claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants."

Finally, MTA argued that APMI waived its defenses relying on *Mesdaq*, which found a waiver where a property owner, in a filed response to his lender's withdrawal application, informed the court he was not objecting to the withdrawal request. First, the court distinguished the instant case from *Mesdaq* indicating that in that case the owner had expressly consented to his lender's withdrawal by filing with the court a written response indicating they did not object to the lender's withdrawal. APMI on the other hand filed no such response. Next, the court rejected *Mesdaq* stating that the statutory analysis by the appellate court in that decision was abbreviated, and did not examine the relationship between section 1255.260 and 1255.230(c) as discussed above.

The Supreme Court ruled that because APMI was not a person receiving payment from the withdrawal, and it did not waive its right to contest the eminent domain proceeding, the Court of Appeal erred in holding to the contrary. The Court reversed the judgment and the matter was remanded for further proceedings.◆

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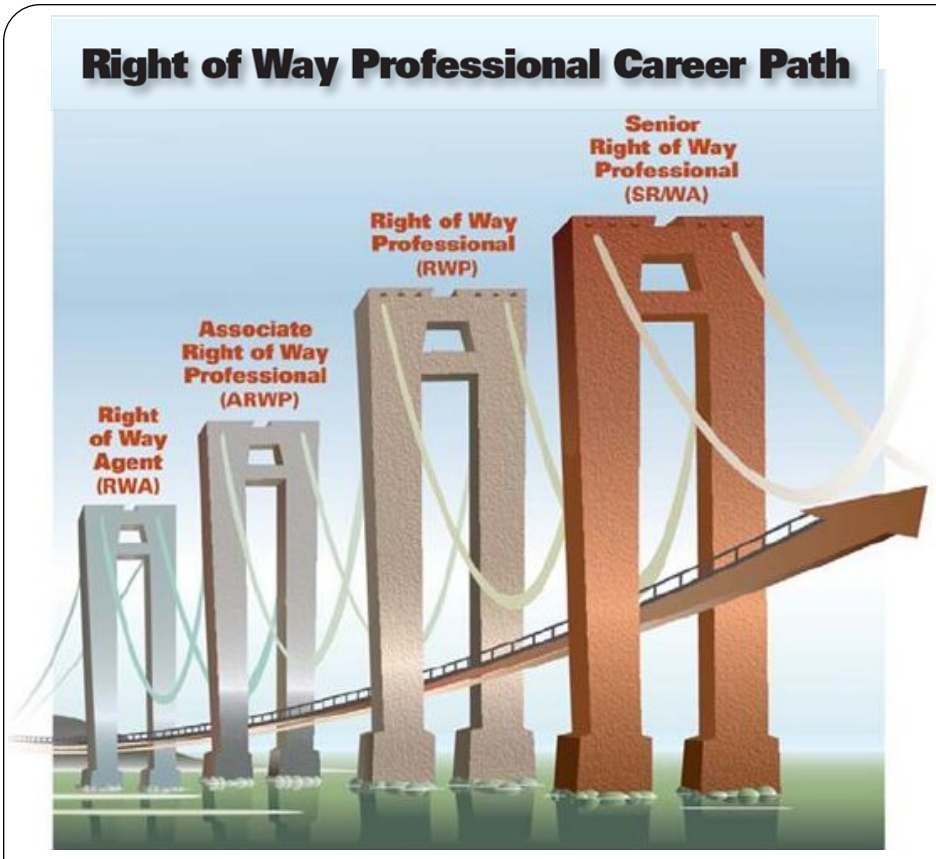

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