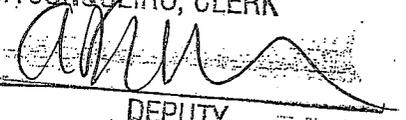


SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SAN JOAQUIN

APR 08 2011

ROSA JUNQUEIRO, CLERK

By



DEPUTY

IN RE: DEPARTMENT OF WATER RESOURCES CASES	COORDINATED ACTION: JCCP 4594 OPINION AND FINAL ORDER DENYING PETITION FOR ENTRY FOR GEOLOGICAL ACTIVITIES
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Petitioner's Request for Judicial Notice. Denied as to Exhibits 17-21, inclusive. Crab Addison, Inc. v. Superior Court (Martinez) (2008) 169 Cal.App.4th 958, 963. Otherwise, granted.

Background and Incorporation of Certain Prior Rulings and Findings. The court held a series of hearings and issued formal Rulings on a wide variety of preliminary issues on October 22, 2010, November 19, 2010, December 16 and 17, 2010, January 21, February 18, 24 and 25, 2011 which rulings and factual findings are incorporated herein, to the extent not inconsistent with this Opinion or Order. At the October 22, 2010 hearing the court indicated that it was: "...considering whether to have one hearing date on the petition for all cases on all matters except for drilling requests and then to have a separate hearing date on the requested order for drilling." Court's Tentative for October 22, 2010, No. 12. In the final Ruling for that day, the court: "set a hearing on all issues on the petition for entry, except for drilling, for December 16 and 17, 2010..." Later the court severed the issues of geologic testing and drilling, and heard all other issues first, issuing an Order of Entry and Investigation of Real Property (Other than Geologic and Drilling) on February 22, 2011. The court conducted hearings on the Geologic and Drilling issues on February 24 and 25, 2011 and then heard legal arguments on March 24, 2011. A final hearing for legal arguments on Geologic and Drilling was conducted on April 8, 2011.

The Proposed Geological Activities Project. The Proposed Geological Activities Project (hereafter the "Project") is set out in the original description in DWR's Master Amended Petition under "Geological Activities", as further refined or limited by the pleadings and evidence taken at the February 24, and 25, 2011 hearings. The core components of the Project are the CPT testing and the core drilling.

Petitioner has made no effort to separate core drilling from CPT testing since the two have been presented as substantially intertwined. There is no presentation that CPT testing would be of any substantial benefit in the absence of the core drilling. The core drilling/CPT testing has been well described in the evidence taken in this case, including pictures of the drilling rigs. It has been testified that assembled truck, rigs, forklift and equipment would occupy a space of about 100 feet times 100 feet, though it could also be spread out along a road. Transcript of Proceedings, February 24, 2011, p. 68, attached to Declaration of Thomas H.

Keeling filed March 17, 2011. The core drilling would in general be around 205 feet in depth, which would remove a volume of core sample of about 2.04 cubic yards of earth from each drill hole which would be replaced permanently by about an equal volume of bentonite grout. See Declaration of Mark E. Pagenkopp, filed March 4, 2011 for the volume calculations. There would also be a significant volume of drilling mud injected into each hole during drilling and recovered in drums and removed from the premises. The entire process of CPT testing and core drilling would require about 14 work days on each assessor's parcel containing up to two drill sites. The heavy equipment also might remain on the parcel over one or two weekends, which would not be counted in the work days.

Overview. The evidence presented supports the conclusion that DWR needs to do CPT and core drilling along the lines indicated in the proposal in order to determine the best feasible alternative for the water conveyance project. The evidence also supports the conclusion that the water conveyance project is a matter of public interest and that DWR is authorized to investigate the project and is seriously considering the acquisition of the properties identified for the purposes of the project. However, DWR's genuine need for the Project does not necessarily mean that the statutes or constitution authorize DWR to proceed by manner of a petition for entry. DWR could instead acquire by contract with the property owners the right to proceed. DWR could acquire the necessary easement for drilling in an eminent domain action. See Section 1240.110. It could utilize the "quick take" provisions of the code for this purpose, if it chose. Section 1255.410.

The issues are really whether the Project involves a "taking" under the United States Constitution and damage or taking under Article I, Section 19 of the California Constitution and, whether the Project is authorized under Title 7, Chapter 4, Article 1 of the Code of Civil Procedure, commencing with Section 1245.010, and, if so, is that section constitutional.

The Evolution of the Code. Code of Civil Procedure Section 1242 from 1861 until 1975 as Section 1245.010 did not specifically authorize borings. It is clear that over time the Legislature intended to broaden the scope of the pre-condemnation survey.

1. "1242. In all cases, parties authorized to enforce the right of eminent domain shall have the authority to survey and locate the property required... Such parties may enter upon the property and **make examinations, surveys and maps thereof**, and such entry shall constitute no cause of action in favor of the owner of the property..." Statutes of 1861, Revised Laws of the State of California, Sacramento, Code of Civil Procedure (1871), Title VII.
2. "1242. In all cases where land is required for public use, the State...may survey and locate the same... The State...may enter upon the land and **make examinations, surveys and maps thereof**...." Stats. 1872, Code of Civil Procedure, Title VII, section 1242.

3. "(b) Subject to Section 1242.5, a person having the power of eminent domain may enter upon property to make **studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities** reasonably related to the purpose for which the power may be exercised." Stats. 1970
4. Section 1245.010. "Subject to requirements of this article, any person authorized to acquire property...may enter upon property to make **photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities** reasonably related to acquisition or use of the property for that use." Added by Stat. 1975.

It is fair to conclude that the Legislature intended to give authority for at least some soil borings. However, this evolution also shows that the Legislature knew the importance of words and added words to a statute when it desired to expand pre-condemnation entries.

Jacobsen v. Superior Court. Our Supreme Court in 1923 ruled for a property owner against a water district which sought to enter his land to do extensive borings on his property. The court relied in part on its interpretation that the governing statute (C.C.P. 1242) required an eminent domain action to be filed prior to the entry authorized by Section 1242. Jacobsen, supra 192 Cal. 319 at 324 and 329. County of San Luis Obispo v. Ranchita 16 Cal.App.3d 383, 388 makes clear that since the adoption of Section 1242.5 in 1959, there is no requirement that an eminent domain action be filed prior to seeking entry under Section 1242 (now 1245.010).

But a major thrust of the Jacobsen decision was that the proposed plan of drilling violated the constitution of California. The constitution then provided:

"Private property shall not be taken *or damaged* for public use without compensation having *first* been made to or paid into court for the owner thereof" Jacobsen, supra at 326. (Emphasis in the original).

The current provision is similar but in addition requires a jury determination.

"(a) Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner...." Cal. Const. Art. I, Sec. 19.

The Jacobsen opinion entertained "no doubt" that the proposed drilling plan amounted to an invasion of the petitioner's property rights under the constitutions of California and the United States (p. 328-329). The court went on to announce its limited reading of the code section based on constitutional restrictions:

"But however this may be, it is clear that whatever entry upon or examination of private lands is permitted by the terms of this section cannot amount to other than such innocuous entry and superficial examination as would suffice for the makings of surveys or maps and as would not in the nature of things seriously

impinge upon or impair the rights of the owner to the use and enjoyment of his property. Any other interpretation would, as we have seen, render the section void as violative of the foregoing provisions of both the state and the federal constitution.” Jacobsen, p. 329 (Emphasis added).

The Jacobsen opinion has never been reversed or limited. It was relied on in County of San Luis Obispo v. Ranchita 16 Cal.App.3d 383. Notably, the Law Revision Commission Comment of 1975 to section 1245.060 refers to Jacobsen for the proposition that: “Similarly, the term “substantial interference excludes liability for minimal annoyance or interference that does not seriously impinge upon or impair possession and use of the property. See Jacobsen v. Superior Court 192 Cal 319, 219 P. 986 (1923).” There is no indication that the Law Revision Commission believed that Section 1245.060 eliminated the constitutional concerns of Jacobsen. Jacobsen has been followed widely in other states, see County of Kane v. Elmhurst National Bank (1982) 111 Ill. App.3d 292, 298, 443 N.E.2d 1149, 1153-54 and the cases surveyed therein. Only Texas appears to allow core drilling in a pre-condemnation survey. That opinion concludes that the drilling would be damage to property but not a taking of property. Puryear v. Red River Authority of Texas (1964) 383 S.W.2d 818, 821. There is no description of the proposed scope or method of drilling or any analysis of the constitutional issue or any consideration of Jacobsen.

The court previously granted judicial notice to the California Law Revision Commission Reports, Vol. 9, December 1969. That report rightly states that: “The holding in the Jacobsen case has been partially overcome by a special statutory procedure, provided in 1959 by enactment of Section 1242.5 of the Code of Civil Procedure.” The public entity sought to enforce its inspection in Jacobsen by a writ of prohibition to restrain the private owners from interfering with the inspection and drilling. The Jacobsen court ruled that Section 1242 was part of a Title dealing with eminent domain and that the “section apparently contemplates the existence and pendency of such proceedings [eminent domain] as a basis for whatever entry upon or examination of the lands of private owners affected thereby is permitted by the succeeding clauses of the section.” Jacobsen at p. 329. As Ranchita indicated, the adoption of the petition procedure in Section 1242.5 eliminated the need to first file an eminent domain action. County of San Luis Obispo v. Ranchita 16 Cal.App.3d 383 at 389.

Taking under U.S. and California Constitutions. The United States Supreme Court held that the permanent installation of a cable television box and wires, occupying about 1 and ½ cubic feet in space on an apartment building constituted a taking which required just compensation. Loretto v Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, 438. In this case each bore hole removes from the property about 2.04 cubic yards of native soil and replaces it permanently with about 2.04 cubic yards of bentonite grout.

DWR has acknowledged that the proposed actions would constitute a “taking” for constitutional purposes, by saying respondents would not be required to prove it.

“Respondents are not required to “prove the fact of the taking of real property” because DWR acknowledges that the geological borings and the boring backfill activities it seeks to conduct constitute a “taking or damaging” of private property for public use. Whether or not DWR’s activities are characterized as a “taking” or a “damaging” is immaterial, since both require compliance with Constitutional requirements and because the difference between the two terms is semantic, not substantive.”
Petitioner’s Reply Brief, filed March 21, 2011, p. 10.

DWR now belatedly states that: “DWR has conceded that its geological borings and backfill activities will likely result in a “taking or damaging” of private property, but not both.” Petitioner’s Supplemental Brief After March 24, 2011 Hearing, p. 13, lines 26-27. DWR now describes the borings as “damage” and not a “taking” without any analysis of the difference. But DWR continues to broadly argue that: “IN ACCORDANCE WITH THE LEGISLATURE’S INTENT, *JACOBSEN* HAS BEEN CODIFIED AND THE ENTRY STATUTE PROCEDURE PROVIDES FOR THE TAKING AND DAMAGING OF PROPERTY THAT COMPLIES WITH THE CONSTITUTION.”
Petitioner’s Supplemental Brief After March 24, 2011 Hearing, p. 9, lines 18-19.

The court concludes on the basis of the evidence, the concession, and logic that the Project would constitute a “taking” for the purpose of the United States Constitution. At minimum, DWR has conceded, and the court finds, that the Project would constitute a “taking” or “damage” to private property within the meaning of California Constitution Article I, Section 19.

Petitioner seems to believe that since the code added “borings” in Section 1245.010 and provided for the deposit with the court of the probable amount of actual compensation (Section 1245.030(c)) and a variety of means to collect damages in Section 1245.060, that Jacobsen is irrelevant in light of current statutes and that there has been compliance with the California and United States constitutions. But nothing in Sections 1245.030 or 1245.060 meets the requirements of California Constitution, Article I, Section 19 which provides:

“(a) Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.”

Under the entry statutes, there is no jury to ascertain ‘just’ compensation. A judge determines ‘probable’ actual compensation, not “just” compensation. The money is not *first* paid to or into the court for the owner. Instead, recovery of the deposit requires the owner to file an application or claim and the court to then adjudicate the claim. See Sec. 1245.060(c) and the Law Revision Commission Comments thereto. Nor is there any compliance with the second sentence of Section 19, paragraph (a) which authorizes a “quick take” of possession. That sentence requires the commencement of an eminent domain proceeding. The preliminary

survey provisions of Chapter 4, Article 1, commencing with Section 1245.010 do not constitute an eminent domain action, which instead commences with filing of an eminent domain complaint. Section 1250.110. As to the second sentence as well, the preliminary entry provisions do not provide for the court to determine “just compensation”. It is clear that the preliminary entry statutes do not comply with Article I, Section 19 for a taking or constitutional damage to property.

Legislative History. Petitioner argues that since there is a remedy for damage in Sections 1245.060 and 1245.030(c), the Legislature intended to eliminate the need to file an eminent domain action for a taking in a preliminary entry and that all constitutional concerns have been met. The legislative history provided by DWR is ambiguous at best, only suggesting that some persons favored broader rights of inspection. There is no legislative history that anyone considered Section 1245.010 to authorize a taking or damage within the meaning of Article I, Section 19 or that section 1245.060 provided a “just compensation” remedy for a state or federal constitutional taking.

Words in a statute have meaning. In construing a statute, a court should first turn to the words of the statute to determine the intent of the Legislature. “If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.” People v. Knowles (1950) 35 Cal.2d 175, 183.

Few words are better known to the public and the Legislature than “just compensation” which appears in both the U.S. and California constitution in relationship to the “taking” of private property.

“...nor shall private property be *taken* for public use without *just compensation*.” U.S. Constitution, Amendment V. (Emphasis added.)

“Private property may be *taken or damaged* ...only when *just compensation*...” Cal. Const. Art. I, Sec. 19. (Emphasis added.)

But the words “just compensation” appear nowhere in pre-condemnation provisions of Section 1245.010 et seq. or any of the Law Revision Commission Comments to those sections. Likewise, one could reasonably expect that if the Legislature intended to provide authority for a court to authorize a “taking” or constitutional “damage” under Section 1245.010 et seq. that there would be some reference to the word “taking” in the code sections or the Law Revision Commission Comments to those sections. There are none.

The Context of the Law Argues Against Petitioner’s Interpretation. Petitioner seems to argue that the preliminary survey compensation provisions are the functional equivalent of an eminent domain action. There is no legislative history or rationale that the Legislature intended such a sweeping result. To try to construe these sections to be a new limited but speedier form of eminent domain would violate the rule that: “[s]tatutory language defining eminent domain powers is strictly construed and any reasonable doubt concerning the existence of the power is

resolved against the entity.” Kenneth Mebane Ranches v. Superior Court (1992) 10 Cal.App.4th 276, 282-3.

In 1975 the Legislature adopted a general revision of the Eminent Domain Law as Title 7 of the Code of Civil Procedure, commencing with Section 1230.010. The eminent domain law contains hundreds of sections dealing with procedures and compensation, among other issues. Petitioner asks this court to infer that the Legislature indirectly created a separate system to authorize a taking of, or constitutional damage to, private property and to provide constitutional compensation by a standard of actual damage. The court declines to create such a system and to attribute it to some perceived legislative intent.

Using Section 1245.060, with its requirement of the owner filing a claim or civil action, as a substitute for eminent domain compensation, would contradict the plain language of Government Code section 7267.6 which provides:

“If any interest in real property is to be acquired by exercise of the power of eminent domain, the public entity shall institute formal condemnation proceedings. No public entity shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.”

The Legislature has adopted an extensive ‘quick take’ procedure for a public entity to obtain quick possession of property it requires. See Title 7, Chapter 6, Article 3, commencing with Code of Civil Procedure Section 1255.410. Among the many requirements is that an eminent domain action be first filed. These sections are discussed in history and detail in Mt. San Jacinto Community College Dist. v. Superior Court (2007) 40 Cal.4th 648. One cannot look at these extensive provisions and reasonably believe that the Legislature intended to create an alternative means for constitutional taking based on nothing in the code but a few comments in various levels of legislative history.

While looking at legislative intent we should also note the purpose and intent sections of Proposition 99, approved June 3, 2008, eff. June 4, 2008, which is the latest amendment to Article I, Section 19 and which states in Section 4:

“The provisions of Section 19, Article I, together with the amendments made by this initiative, constitute the exclusive and comprehensive authority in the California Constitution for the exercise of the power of eminent domain and for the payment of compensation to property owners when private property is taken or damaged by state or local government...”
Historical Notes to Article I, Section 19, Prop. 99.

The above seems to exclude the creation of some statutory mechanism that does not comport with Article I, Section 19.

Instead, the damages referred to in sections 1245.030 and 1245.060 relate to trespass or tort type damages to property in the course of a minimally invasive survey that does not amount to a taking; for instance, a surveyor in a Jeep who rides over and destroys some plants

while conducting a survey, or delay damages caused to a farmer when state survey vehicle blocks an access road for several hours. Neither of these instances would constitute a taking or the type of constitutional damage under Article I, Section 19 but both would yield damages that could be compensated under the sections in question. In 1872, Section 1242 provided that the State could make entry for surveys and that: "...such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantonness, or malice." Statutes of 1872, Code of Civil Procedure, Section 1242. Over time, the code developed to pay for actual damages that were not purely nominal.

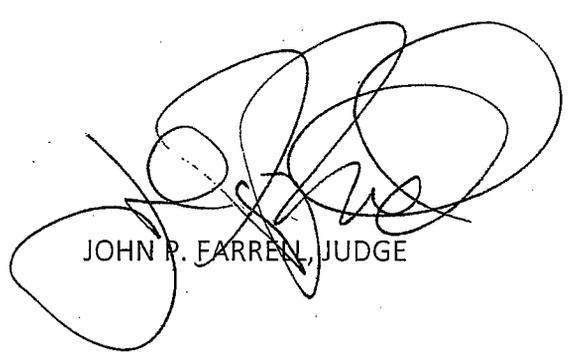
Conclusion. There is no reason to believe that the Legislature intended to authorize "borings" which were of unconstitutional magnitude any more than it intended to authorize "studies" which were so prolonged or extensive as to be unconstitutional. There may well be borings which would pass constitutional muster, such as use of a hand auger, insertion of rods for electrical or magnetic testing, small diameter mobile drilling units, or the like. But the plan of borings and testing presented here in the Project constitutes a taking and constitutional damage. Such an action must comply with constitutional and statutory provisions for a taking and for just compensation.

The court therefore construes Section 1245.010 et seq. to only authorize borings to the extent constitutionally permissible. Alternatively, the court would declare Section 1245.010 unconstitutional under Article I, Section 19 of the California Constitution to the extent it authorized borings such as in the Project which include the removal and taking of native soil and the injection of a permanent foreign substance in the quantities contemplated in the Project.

ORDER. IT IS THEREFORE ORDERED THAT THE PETITION OF THE DEPARTMENT OF WATER RESOURCES FOR AN ORDER OF ENTRY REGARDING GEOLOGICAL ACTIVITIES IS DENIED AS UNAUTHORIZED UNDER CODE OF CIVIL PROCEDURE TITLE 7, CHAPTER 4, ARTICLE 1, SECTION 1245.010, *et seq.* OR IN THE ALTERNATIVE AS VIOLATING ARTICLE I, SECTION 19 OF THE CALIFORNIA CONSTITUTION.

SO ORDERED

Dated: April 8, 2011



JOHN P. FARREN, JUDGE