

Property 'Inspection' or Taking?

whether future projects are viable and to estimate property acquisition costs. For instance, the New Jersey statute which applies to preliminary entry allows a potential condemnor to “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....” *N.J.S.A. 20:3-16*. The agency in New Jersey must, however, restore the property to its original condition if eminent domain is not used to acquire the property within two years of entry; otherwise it is required to pay damages to the property owner.

To determine whether preliminary entry proceedings go too far, courts will often conduct a balancing test by considering: 1) the degree to which the invasions are intended; 2) the character of the invasions; 3) the amount of time the invasions will last; and 4) the economic impact of the invasion. That test was employed by the California court in the *Property Reserve* case, and led the appellate court to conclude that the factors weighed in favor of a

“temporary taking” equivalent to a temporary easement.

In keeping with the criteria above, a New York appellate court followed suit in late July 2014, when it held that the pre-condemnation inspection rights did not give the condemning authority’s representatives the right to enter and inspect the interior of a property, as that type of intrusion would violate the property owners’ Fourth Amendment rights. *Jacobowitz v. Bd. of Assessors of Tp. of Cornwall*, 2014 NY Slip Op 05544 (N.Y. App. 2014).

Now that the California Supreme Court has agreed to hear this case, and New York has chimed in, property rights advocates and condemning authorities around the country will be watching. While the government is certain to argue that it needs to have this tool available to conduct due diligence, whether agencies will be permitted to do much more than look at a property is likely to be addressed in detail in *Property Reserve*, and could lead to reactive legislation and/or case decisions in other states in the future. ■

Federal Water Reform Act Spurs Development

BY CHARLES NOEL SCHILKE, JD, AM, CRE, FRICS

ON JUNE 10, PRESIDENT OBAMA SIGNED THE WATER Resources Reform and Development Act (WRRDA) into law. The \$12.3 billion WRRDA (U.S. Public Law 113-121) provides broad authorization for U.S. Army Corps of Engineers water infrastructure projects. The act makes funds available for a variety of water projects that facilitate real estate development and enable the water infrastructure of existing communities to function more efficiently.

WRRDA authorizes a Water Infrastructure Finance and Innovation Authority (WIFIA), which provides loans for water projects separate from the long-standing state revolving fund (SRF) program. WIFIA is modeled on the popular Transportation Infrastructure Finance and Innovation Authority.

WIFIA loans will enable municipalities to execute the “repair, rehabilitation, or replacement” of a community water system or treatment works, construct desalination infrastructure, and enhance the energy efficiency of a water system. WIFIA may also fund any project eligible for the SRF program. The program will reduce the

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Institutions, Economics for Decision Making, The Firm and the Macroeconomy, and Financial Crisis and Contagion. Schilke has created commercial mortgage-backed securities (CMBS) on Wall Street, performed the real estate legal due diligence for the Exxon-Mobil merger, and financially restructured the real estate holdings of The American National Red Cross. He has developed major office buildings, large blood processing facilities, hotels, and mixed-use projects. He also frequently consults as an expert witness in real estate cases. Schilke earned a bachelor of arts degree from the University of Chicago, a master of arts degree from Harvard University, and a juris doctor degree from Cornell Law School. He is currently completing his doctoral degree at Harvard University, where he is writing a detailed financial analysis of the development of CMBS as his dissertation.

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so that communities may repair and expand water systems at lower cost to water users and taxpayers than would otherwise have been possible.

WIFIA provides that the Corps and the Environmental Protection Agency (EPA) may each lend \$175 million in low-interest loans over five years for water and wastewater projects expected to cost at least \$20 million. If fully funded, after selecting borrowers through a competitive process, the Corps and the EPA together could leverage this to offer \$3.5 billion worth of loans over a five-year period.

However, Congress provided that WIFIA must deny funding if a state plans to lend an equal or greater amount of SRF funds to a given project in a single year. Congress further mandated that 15 percent of each year's WIFIA

appropriation be reserved for lending to small community water system projects.

Congress also limited WIFIA funding to 49 percent of project costs, and prohibited additional tax-exempt financing, such as general obligation and revenue bonds, for the residual project costs. This prohibition effectively prevents communities from combining WIFIA funds with tax-exempt debt to pay 100 percent of project, reducing the impact of WIFIA in facilitating infrastructure development and repair.

Still, WRRDA and WIFIA constitute the first true appropriations bill for Corps water infrastructure since 2007, and should significantly alleviate the dearth of funding in this area for many communities. ■