

# Property 'Inspection' or Taking?

BY ANTHONY F. DELLAPELLE, ESQ., CRE

*Editor's Note:* This new "Legal Update" section will feature summaries of recent judicial decisions, legislative and regulatory updates, or other legal news that concerns the real estate industry. Summaries can refer to published case law, news items, blogs and other reference materials. To provide a summary, email REI@cre.org.

THE CALIFORNIA SUPREME COURT RECENTLY AGREED TO review an appellate court's decision that a condemning authority's "preliminary entry" constituted a taking under California's eminent domains. The appellate court ruling required the condemning authority—a water resource board—to pay just compensation to thousands of property owners in order to conduct invasive preliminary testing regarding the viability of a tunnel to transport fresh water from Northern California to the arid South. The case, entitled *Property Reserve, Inc. v. Department of Water Resources*, (Cal. App. JCCP No 4594, March 13, 2014), raises important constitutional property rights questions.

Pursuant to a statutory procedure, condemning authorities around the United States are routinely authorized to enter private properties to conduct pre-condemnation due diligence investigation. The entry can consist of visual inspections by real estate appraisers and surveyors, but may also in some states include more physically invasive testing. In the *Property Reserve* case, the government sought entry to conduct geologic studies such as borings and drillings which would leave cement "plugs" in bored holes up to depths of 200 feet. It also sought to conduct environmental studies by permitting personnel to enter the properties in question for weeks at a time over the course of a year.

A trial court granted the State preliminary entry for environmental testing on set terms, but denied preliminary entry for geological testing on the grounds that those activities would result in the permanent physical occupation of private property, (i.e., a taking of private property which could only be accomplished by commencement of a condemnation action. The California Supreme Court has limited its review to determine if either the environmental testing or the geologic testing, or both, constitute a taking, for which just compensation is required, and also to determine whether California

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planning matters. He has served as special counsel to municipal agencies and public utilities in condemnation cases, real estate tax appeals, and in planning and zoning matters. He has been appointed by the Superior Court of New Jersey as an expert in real estate valuation matters, and has published several articles and lectures regularly, both in New Jersey and nationally, on real estate valuation and property rights issues.

DellaPelle is the sole New Jersey representative for Owners Counsel of America, a national association of leading eminent domain lawyers across the country. He is rated AV<sup>®</sup> Preeminent<sup>™</sup> by the Martindale Hubbell Law Directory, and has been recognized by his peers as a "New Jersey Super Lawyer" as published in the New Jersey Monthly Magazine since its inception in 2005, in which he was selected as one of New Jersey's Top 10 attorneys for 2012. Previously he was selected as one of New Jersey's Top 100 attorneys in 2009, 2010 and 2011. DellaPelle appears regularly on national television, where he provides commentary on eminent domain and property rights issues around the country. He served on Governor Chris Christie's transition team in 2009, and is the author of two blogs: New Jersey Condemnation Law and New Jersey Property Tax Law.

DellaPelle received a bachelor of arts degree in economics and English from Franklin & Marshall College, and his juris doctor degree from the Seton Hall University School of Law. He is a member of the American Bar Association's Condemnation Committee and is chairman of the Morris County Bar Association's Condemnation Committee. DellaPelle currently serves as a commissioner of the New Jersey Public Broadcasting Authority, is an officer and Trustee of the Franklin & Marshall College Alumni Board of Directors, and is the vice president of the New Jersey Hall of Fame Foundation.

legislation provides a government agency with the right to use its eminent domain powers for this investigatory purpose.

As noted above, it is common for states to legislatively authorize government agencies with the power of eminent domain to "preliminarily enter" properties it may seek to condemn, in order to assist those agencies in determining

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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 condemner 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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