

# Competing Condemnation Authority

When property already put to a public use  
is sought for another public use

AAPA Port Real Estate Seminar



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# Issue

- More than one entity with the general power of eminent domain seeks the same property; or
- One condemning authority seeks property already held by a condemning authority or already devoted to public use.



# Examples

- A port seeks to expand its terminal and needs property owned by the neighboring city that does not want the expanded terminal.
- City acquires property adjacent to the airport to prevent runway expansion.
- A port seeks property owned by a utility or railroad.
- A utility or pipeline company seeks property owned by a port authority.



# How to Determine Who Wins

- Each State has its own law or procedure, but State agencies generally trump local agencies or political subdivisions.
- Common Law Rule – Prior Public Use Doctrine
- Exceptions and modifications to the common law rule
- State statutory schemes, example California – rebuttable presumption of “more necessary”



# Prior Public Use Doctrine

- A condemnor that has been delegated the power of eminent domain may not condemn public property, or property devoted to a public use, unless expressly or impliedly granted the authority by statute.
- Essentially a first in time rule that was intended to avoid “free for all.”
- Simple, but does not account for changing needs.



# Exceptions to Prior Public Use

- Consistent Use Exception – allows for the condemnation of property already put to public use if the two uses are compatible and can coexist without one materially interfering with the other. Examples, utilities and pipelines under roads and railroad tracks.
- Non-Public Purpose – the property is not actually used for public purpose.



# Modifications to the Prior Public Use Doctrine

- Judicial Balancing Tests termed as:
  - Paramount Public Use Doctrine
  - Paramount Public Importance Doctrine
  - Higher and More Necessary Use Doctrine
- Different names, but all balance the public benefit and determine which is more important or necessary.
- Allows for the consideration of alternatives and each entity's ability to obtain replacement property or an alternative site.



# Statutory Schemes

- States often establish a hierarchy of uses and of entities with the power of eminent domain.
- States also set stated priorities and rebuttable presumptions.
- California has a statutory scheme that does both allowing for the best and most necessary public use.



# Cal. C.P.R.C Art. 7

- A condemnor can condemn property already put to a public use if the use for which the property is sought is a “more necessary public use.”
- Rebuttable presumptions apply and the condemnor has the burden of establishing that its use is a more necessary public use.
- Allows for a partial taking when the proposed use will not unreasonably interfere with or impair the current public use or reasonably anticipated future public use.



# Presumptions

- State use is more necessary than local use
- Use by a public entity is more necessary than use by a private entity (even for the same use)
- First use is presumed more necessary
- Priority of uses are:
  - Parks, open space and recreation
  - Wildlife management
  - Historical sites
  - Exemptions for roadway and highway expansion.



Only one gets to bring home the  
bacon, but everyone get dirty.





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