



LEGAL BRIEFING

No, You Don't (Have the Right to Take)*By Chuck Krolikowski*

When private property is being condemned for a public project, several questions pop into the mind of a condemnation attorney: "What is the highest and best use of the property?" "Which valuation expert should we hire?" "How much compensation can we recover for the client?"

Perhaps the first question the attorney **should** consider is whether the governmental agency has the "right to take" the client's property in the first place. In a case recently tried by partners Chuck Krolikowski and Leonard Polyakov, the Riverside County Superior Court ruled that the governmental entity did **not** have the right to take our client's property for a public project.

In *Elsinore Valley Municipal Water District v. R & H Wildomar*, the client obtained certain entitlements to develop single-family homes in what is now the City of Wildomar. The local water district attempted to take a portion of the property to construct a multi-million dollar sewer-lift station to serve the proposed development, as well as other neighboring projects. The water district provided notice of its intention to take the property and made a pre-condemnation offer to purchase the property based upon an appraisal.

When the client rejected the offer, the district passed a resolution of necessity to take the property by eminent domain. The resolution, however, identified property to be taken that was larger in size than what was described in the original notice and offer to purchase. The water district did not notify the client that

the size of the property to be taken had increased, nor did it make a new offer to purchase. Relying on its resolution of necessity, the district filed the condemnation action and began constructing the lift station.

In response to the action, the client challenged the district's right to take the property on several grounds. After a multi-day bench trial, the court upheld the challenge, finding that the district acted arbitrarily and without due regard for the client's property rights. The court held that the district failed to provide adequate notice of the hearing on the resolution of necessity, and further failed to make a proper pre-condemnation offer. As a result, the court dismissed the condemnation action in its entirety, even though the water district had already completed the construction of the sewer-lift station.

As this case illustrates, a property owner and the condemnation attorney should not automatically assume that the governmental agency has the right to take the property, merely because it has passed a resolution of necessity for a public project. Rather, a careful analysis of the facts may reveal that the agency has overstepped its authority or failed to comply with certain pre-condemnation requirements and, therefore, does not have the right to take the property.

Chuck Krolikowski is a partner in our Newport Beach office, where he heads the land-use and eminent domain practice group. He can be reached at charles.krolikowski@ndlf.com.

**Arbitration Now Binding On Attorneys***By Jay Freedman*

Binding arbitration can still be an attractive option for builders, developers and others faced with litigation. If conducted properly, an arbitration proceeding can be more efficient and less expensive than traditional litigation. A 2008 decision by the California Supreme Court also allows the parties to include a right to appellate review in their contracts, which may remove an often cited barrier to the enforcement of arbitration provisions in residential purchase agreements.

However, a recent decision from the California Court of Appeal may make it more difficult to find attorneys who are willing to represent parties in arbitration proceedings despite the potential advantages to their clients. In *Bak v. MCL Financial Group, Inc.*, the Court of Appeal held that attorneys representing parties in arbitration proceedings are subject to the same burdens as the parties they represent. An attorney for MCL was sanctioned by the arbitrators for a pre-hearing discovery violation. The trial court confirmed the arbitration award, including the imposition of sanctions, and the attorney appealed.

The Court of Appeal affirmed the trial court's ruling, stating as follows: "We conclude that, by voluntarily appearing for defendants in the arbitration proceedings, which included conducting prehearing discovery, ... objector [attorney] subjected himself to the jurisdiction of the arbitration panel and was subject to its rulings." As a result, the attorney did not have a right to appeal the sanctions award, as the arbitration clause did not provide appellate rights to the parties.

While not a direct barrier to enforcing arbitration provisions, *Bak* may as a practical matter have a chilling effect. Under *Bak*, a party's business decision to arbitrate is now imposed on that party's attorney. While there are many sound reasons to submit an action to arbitration, those benefits are often designed for the parties rather than the attorneys. The *Bak* decision may now create a conflict between a party that desires to enforce an arbitration provision and the party's counsel who does not want to waive its right to appeal discovery sanctions and other adverse awards. As such, parties may now find it harder to enforce arbitration provisions because their attorneys may not want to participate.

Jay Freedman is a partner in our Newport Beach office, where he specializes in construction and business litigation. He can be reached at jay.freedman@ndlf.com.

Celebrating 25 Years!

Newmeyer & Dillion LLP celebrates its 25th Anniversary on August 13. What started out as three lawyers and two secretaries back in 1984 has grown to become one of the largest indigenous law firms in Orange County. With the successful addition of our Walnut Creek office, **Newmeyer & Dillion** now comprises of more than 50 lawyers, a dozen paralegals and a support staff of more than 60 people. We want to thank all of those who helped make this possible. The firm is looking forward to sharing the future with all of you.

Newmeyer & Dillion's new electronic **California Developer Update**, under the direction of partner **John O'Hara** and associate **Mike McClellan**, debuted in April, and we are very pleased with the reception from our clients and colleagues. The inaugural edition featured articles on important legal and risk-management issues that face California developers in 2009, including "Enforcing the Right to Repair" by **John O'Hara** and **James Hultz**; "The Crawford Decision" by **Jeff Dennis**; "The Changing Face of Binding Arbitration" by **Jay Freedman**; and "Top Five Insurance Issues for 2009" by **James Hultz** and **Uliana Kozeychuk**. To receive the inaugural edition of the California Developer Update, or to sign up to receive subsequent issues, please e-mail marketing@ndlf.com.

The firm is pleased to announce the participants in our Summer Associate Program, offering real-world experience to law-school students. This year, our Newport Beach office is hosting **Annie Hu** from University of San Diego Law School and **Bahaar Hamzehzadeh** from University of California Hastings College of the Law.

UPCOMING EVENTS

PCBC 2009

Friday, June 19

9 a.m. – 1 p.m.

Moscone Center, San Francisco

Jan Gruen will be participating in the California Housing Foundation Workshop: "SB 800—Updates and Advanced Techniques for Claims Handling."

More info at <http://www.mychf.org/go/chf/education/sb800-updates-and-advanced-techniques-for-claims-handling/>

Orange County/Long Beach Chapter, California CPA Society

Wednesday, June 24

6 p.m.-8:30 p.m.

Marmalade Café at The District, Tustin

Mark Himmelstein will address goals and benefits of alternative dispute resolution in today's business climate.

More info at: <http://www.calcpa.org/public/Catalog/CourseDetails.aspx?CourseID=09H2160609>

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About Newmeyer & Dillion LLP

Newmeyer & Dillion LLP, originally formed in 1984, is comprised of creative, highly motivated business attorneys who possess outstanding credentials, training and experience in their respective fields of practice. The firm represents a wide variety of clients, which include national and local financial institutions, real estate development companies, manufacturers and service organizations, as well as individuals.

Litigation

- *Business*
 - Unfair Competition/Trade Secret
 - Business & Professions Code §17200
 - Partnership Dissolution
 - Lender Liability
 - General Business Disputes
- *Real Estate*
 - Construction
 - Real Estate Finance
 - Environmental Warranty
 - Title
 - Inverse Condemnation and Eminent Domain
 - Government Tort Claims
 - Regulatory Takings
- *Labor & Employment*
 - Wrongful Termination
 - Employment Discrimination
 - Sexual Harassment
- *Insurance & Risk Management*
 - First and Third Party Coverage
 - First and Third Party Bad Faith
- *Products Liability*
- *Appellate Practice*

Business Arrangements

- Formation, Structuring, Maintenance and Evaluation of Business Entities (Corporations, Limited Liability Companies, General Partnerships, Limited Partnerships, Joint Ventures)
- Shareholder, Partnership and Stock Option Plan Agreements
- Purchase and Sale of Businesses
- Business Dissolutions
- Employment and Independent Contractor Matters
- Licensing and Franchising Arrangements

Corporate Finance, Securities and Mergers & Acquisitions

- Venture Capital Financing
- Mergers, Acquisitions, and Leveraged Buyouts
- Public and Private Securities Offerings
- Federal Securities Law

Real Estate Transactions

- Acquisition, Development, Option, Sale and Lease of Real Property (Residential, Retail, Multifamily, Office, Industrial, Agricultural)
- 1031 Like-Kind Exchanges
- Master Planned Community Developments and Community Associations
- Department of Real Estate and Other Regulatory Filings
- Construction Related Matters
- Military Base Reuse
- Due Diligence

Real Estate Lending & Finance

- Documentation of Real Estate, Personal Property and Unsecured Loans
- Coordination of Loan Transactions for Borrowers

Land Use/Environmental

- Development Agreements
- Mitigation Agreements
- Subdivision Map Act
- Environmental Permitting