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Nev. Const. Art. I, Sec. 8(6)

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....and also sometimes you might have to pay a lot of money even if there is no taking because reasons.

Precondemnation Damages

A Novel Expansion of Government Liability

Steven M. Silva

Planning is necessary and good.

- a. Congressionally mandated procedure for developing long-range transportation **plans** and shorter-range transportation improvement **programs**
 - i. United States Code Title 23 (Highways) and Title 49 (Transportation)
 - ii. Identify state, regional, and local agencies with primary responsibility for transportation planning
 - Nevada Department of Transportation (NDOT)
 - Regional Transportation Commissions (RTC)
 - Metropolitan Planning Organization
- b. Other laws
 - i. NRS 278 – Planning and Zoning
 - ii. National Environmental Policy Act (NEPA)

But, public planning can affect use, desirability, value of private real property... which might generate liability to government.

- a. Traditional limitations on government liability for planning is inherently a weighing of societal benefits and harms.
 - i. “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Pennsylvania Coal v. Mahon*
 - ii. “A reduction or increase in the value of property may occur by reason of legislation for the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered a ‘taking’ in the constitutional sense.” *Danforth v. US*
- b. Project influence rule (NRS 37.112)
- c. New trend in eminent domain
 - i. Planning documents “make it clear” and “announce the intent” for government to “take” the property
 - ii. “Freezing” of property’s financing ability, marketability, rentability, development potential, use
 - iii. Precondemnation damages

Question

- Whenever you, as the Government,
 - take an Action,
 - Affecting any of these Rights held by the landowner,
 - Does the landowner have a remedy against the government?

Action 1 – Taking



Government

Landowner

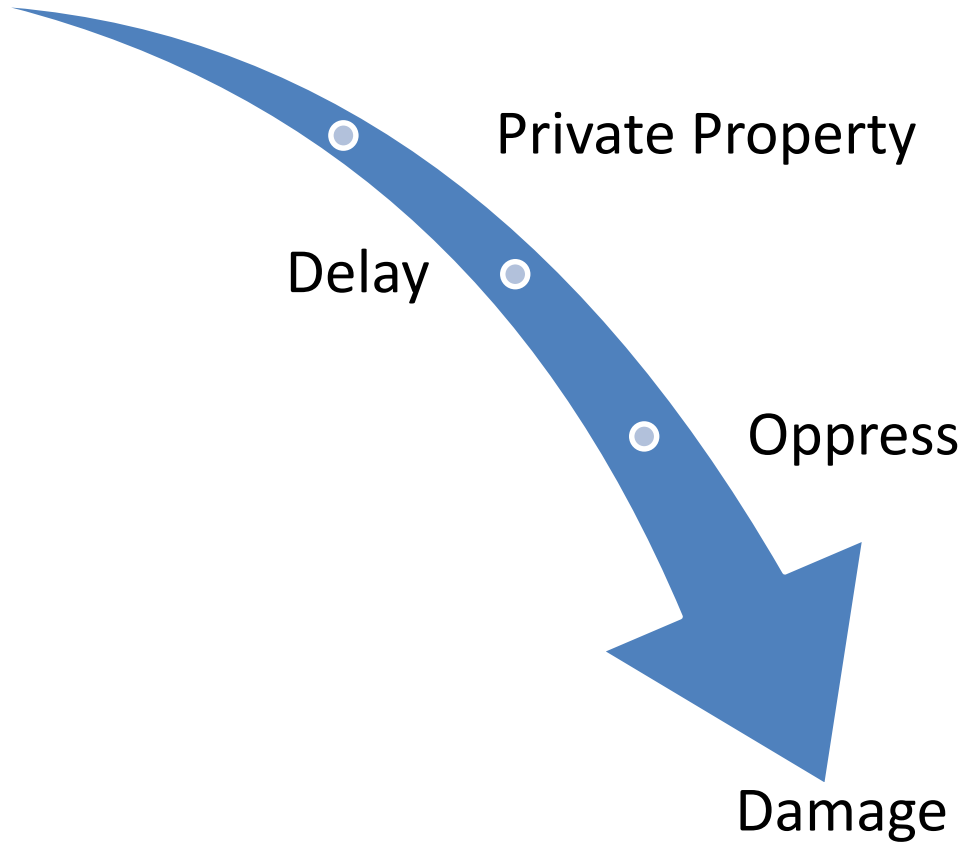


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Action 2 – Announcement of Intent to Condemn



Announce



How do you know if you are Announcing, or just thinking of a Plan?

- An official announcement that a landowner's property will become the government's property.
 - Condemnation resolution by the City Council
 - Announcement by high ranking City Officials
 - Official policy to require dedication of a landowner's property *because it is needed for the government's project*

Non-taking Takeaway

- Public projects can negatively impact land values.
- Historically, this has been noncompensable.
- Recently, Courts have found more circumstances when it *is* compensable.

Liability

Key is that the government is going after (wants) the landowner's property, and announces the intent to do so.

1. This is the liability element.
2. It creates a cloud or blight.

Causation

- “Extraordinary delay or oppressive conduct following an announcement of intent to condemn certain property conceivably reduces the market value of that property – especially when the government fails to retract its announcement to mitigate its detrimental effects.”
 - *Buzz Stew, LLC v. CNLV*, 124 Nev. 224 (2008)

Remedy

- “By allowing a cause of action for precondemnation damages, public agencies will be dissuaded from prematurely announcing their intent to condemn private property.”
 - *Buzz Stew, LLC v. CNLV*, 124 Nev. 224 (2008)

This Remedy is a Message to You



Pre-condemnation Damages

- a. “Pre-condemnation damages” defined: (1) decline in property value due to (2) unreasonable or oppressive governmental conduct (3) after the government has officially announced its intent to condemn.
- b. “The pivotal issue...is whether the public agency’s activities have gone beyond the planning stage to reach the ‘acquiring stage’.”
- c. “Acquiring phase” defined: (1) officially announcing intent to condemn the property at issue in the case; or, (2) taking steps toward filing a formal eminent domain action; or (3) filing a formal eminent domain action.

Original Intent

- Precondemnation damages comes from California, which makes sense because the California Constitution requires the payment of just compensation for both taking *and damaging* property for public use.
- The cause of action is supposed to compensate for undue delay in condemning a property after announcing that the property would be condemned:
 - Occupied property slated for condemnation in 2010, but no complaint filed. As of 2012, all tenants have left due to pending condemnation.
 - Property slated for condemnation in 2011 but no complaint filed, in 2013 sells for low-ball price because buyers factor in the pending condemnation.
 - Governed by statute.

Nevada Version

- But in Nevada it has morphed. Has been used to support lawsuits where government voluntarily acquires other property in vicinity. Has been used where government redrew maps in street plan to show future required dedication.
- Very little case law. We are still not sure how dangerous the cause of action is from a liability standpoint, but the District Courts are not dismissing the claims. As such, even if there's no ultimate liability, can be expensive to litigate and settle.

Procedural posture

- Counter-claim in a direct condemnation action. (Traditional)
- Companion claim with inverse condemnation.
 - In California, inverse condemnation embraces damages, including pre-condemnation damages.
- Stand-alone claim for pre-condemnation damages.

Sproul Homes v. State of Nevada

(“mere” planning)

No Invasion/Appropriation of Property

- i. No claim that state plans final
- ii. No claim that property will definitely be acquired for project
- iii. No condemnation resolution

“Clearly, not every decrease in market value as result of precondemnation activity is compensable. Nevertheless, when precondemnation activities of the government are unreasonable or oppressive and the affected property has diminished in market value as a result of the governmental misconduct, the owner of the property may be entitled to compensation.” Citing *Klopping v. City of Whittier* (Calif.)

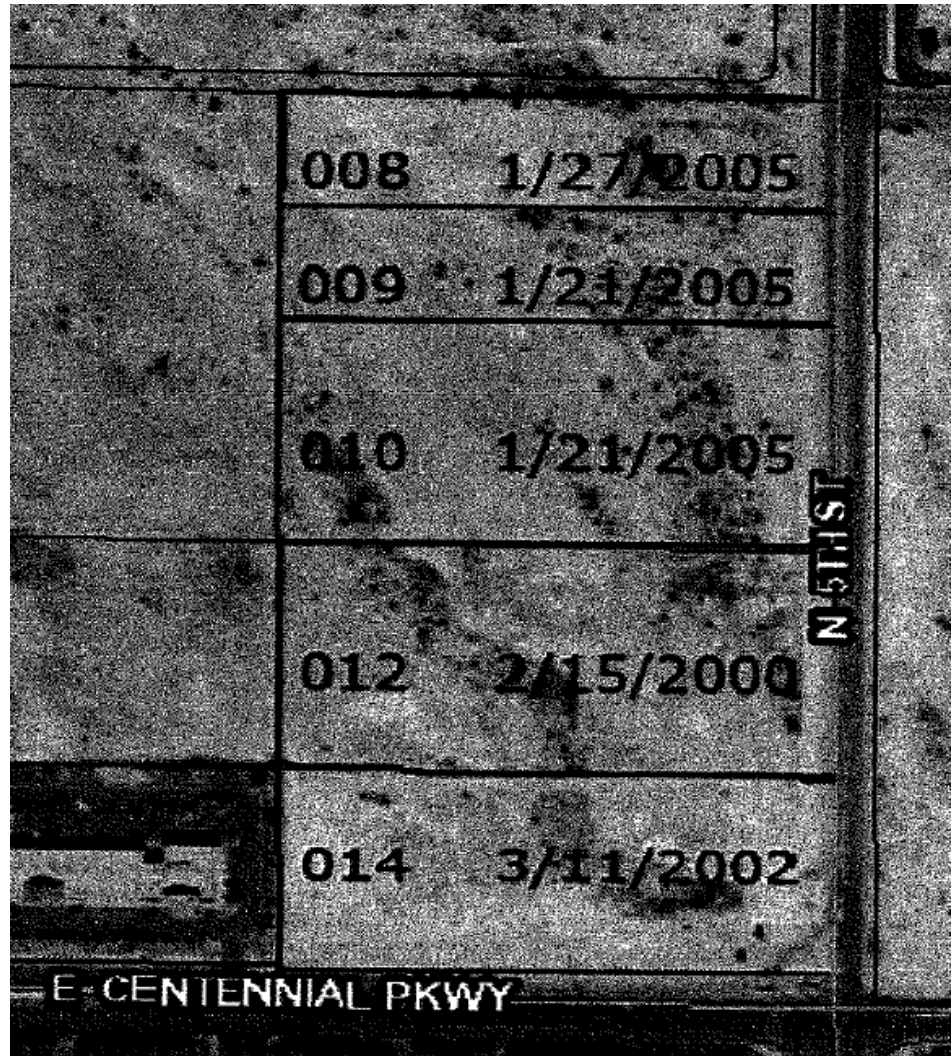
Sproul Homes' unanswered questions

- a. What is “mere” planning?
- b. When is property “definitely” going to be acquired?
- c. When are plans “final?”
 - i. Why is this relevant?
 - ii. Buzz Stew appears to set a high standard.
 - iii. 5th & Centennial announces a lower standard.

5th & Centennial

- Presently, the most frightening case in Nevada in the area of pre-condemnation damages
- Thus far only case where landowner prevailed on a “raw” claim for precondemnation damages at trial.
- Affirmed on appeal.

5th and Centennial





What went wrong?

- A little difficult to say with 100% certainty. The District Court and Supreme Court list a number of things that all taken together appear to have amounted to an intent to condemn
- The critical problem appears to be:
 - Imposition of **future** right of way dedication
 - Paired with **present** action to preserve the land
 - With no condemnation action filed to acquire land

Court finds actual implementation of Project; which is more than “mere planning”

- The district court found that the City undertook, adopted, and *implemented* the seven-mile-long, limited access **Project**. This official action went beyond mere planning, establishing the first prong of the Landowners' precondemnation claim. *See Buzz Stew*, 124 Nev. at 229, 181 P.3d at 673 (“The pivotal issue [regarding an announcement of intent] is whether the public agency's activities have gone beyond the planning stage to reach the acquiring stage.” (internal quotations marks omitted)).

City of N. Las Vegas v. 5th & Centennial, LLC, No. 58530

Liability Analysis

- The record reflects that a significant amount of evidence supported the district court's finding that the City: **(1) took official action amounting to an announcement of its intent to condemn; and (2) following such action, engaged in improper conduct.**

These are the first two elements of precondemnation damages

Court's analysis:

- “The record indicated the following official action **and** improper conduct:”
- This creates an analytical difficulty because the Court addresses two elements at the same time.

the Property because the City's oppressive conduct and nearly eight-year delay essentially froze it.

The record reflects that a significant amount of evidence supported the district court's finding that the City: (1) took official action amounting to an announcement of its intent to condemn; and (2) following such action, engaged in improper conduct. The record indicated the following official action and improper conduct: (1) in July 2004, the City decided to widen the North 5th Street roadway right-of-way without providing property owners along North 5th formal notice that this decision would affect their property rights; (2) at a hearing on October 6, 2004, the City announced its intent to condemn when it amended its Master Plan of Streets and Highways to include plans for a general frontage requirement of 100-150 feet along North 5th Street (AMP-70-04);² (3) that same month, the City, through its then-presiding mayor, reconfirmed the announcement of its intent to condemn the property; (4) in November

²At the public hearing, Clete Kus, the City Public Works representative, announced, "the primary purpose [of AMP-70-04] was to obtain dedication along the undeveloped part of the North 5th corridor." North Las Vegas City Commissioner Steve Brown confirmed "[t]he vote is made with the understanding that they are making a change that will eventually [a]ffect property owners." Brown then publicly announced that "even though eminent domain and condemnation is not being discussed at this meeting, this is the first step of the process." We have previously articulated the impact a plan can have on a prudent purchaser. See *Cnty. of Clark v. Alper*, 100 Nev. 382, 390, 685 P.2d 943, 948 (1984) ("The adoption of the general plan and the transportation study by the county commissioners was equivalent to a public announcement that the Alper parcel would be subject to the future widening of Flamingo Road. Based on these planning guides, it would be apparent to the prudent purchaser that the county would not approve any use or development which is inconsistent with the widening project or which would not alleviate the traffic congestion.").

2004, the City published the North 5th Street Corridor Study, which further confirmed the City's intent and contained plans, diagrams, and pictures that created uncertainty regarding the Landowners' property; (5) published in 2005, the City's Capital Budget for years 2007-2011 allocated \$121,575,400 to the Project; (6) in 2005, the City also entered into multiple contracts with the Regional Transportation Commission of Southern Nevada (RTC) for the Project; (7) the City imposed right-in/right-out turning restrictions along the entire length of the North 5th super arterial corridor in August 2006 to preserve its high-speed character;³ (8) in November 2006, the City revised its comprehensive Master Plan to incorporate the Project into its land use planning and zoning criteria; (9) in December 2007, the City published the North 5th Project Development Report, which contained specific engineering details demonstrating the City's intent to acquire a portion of the Landowners' property; (10) the City's eminent domain complaints from 2010 concerning other properties along the North 5th Street in the northern section demonstrated the Project was more than conceptual; and (11) the parties stipulated into evidence project maps demonstrating many of the privately-held parcels the City had acquired for the necessary right-of-way for the project.⁴

³We note that although a city, through zoning, can generally control turn restrictions, precondemnation damages are appropriate in this case because the City caused uncertainty and a decrease in the market value of the Property when it was not forthright with its intentions regarding the Project and failed to move forward with its intended condemnation of the Property.

⁴The City's person most knowledgeable on the Project, Dr. Quiong Liu, reinforced many of these facts through his testimony at trial.

Wait, what?

- (1) in July 2004, the City decided to widen the North 5th Street roadway right-of-way without providing property owners along North 5th formal notice that this decision would affect their property rights;
- (2) at a hearing on October 6, 2004, the City announced its intent to condemn when it amended its Master Plan of Streets and Highways to include plans for a general frontage requirement of 100–150 feet along North 5th Street (AMP–70–04);
- (3) that same month, the City, through its then-presiding mayor, reconfirmed the announcement of its intent to condemn the property;
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- (11) the parties stipulated into evidence project maps demonstrating many of the privately-held parcels the City had acquired for the necessary right-of-way for the project.
- If you successfully read this, you have excellent eyesight.

Ok, let's break that down

- (1) in July 2004, the City decided to widen the North 5th Street roadway right-of-way without providing property owners along North 5th formal notice that this decision would affect their property rights;
- **(2) at a hearing on October 6, 2004, the City announced its intent to condemn when it amended its Master Plan of Streets and Highways to include plans for a general frontage requirement of 100–150 feet along North 5th Street (AMP–70–04);**
- (3) that same month, the City, through its then-presiding mayor, reconfirmed the announcement of its intent to condemn the property;
- If we read this literally, “the announcement of intent to condemn” appears to be the amendment of the master plan that merely put lines on a piece of paper. This is unusual.

4 through 7

- (4) in November 2004, the City published the North 5th Street Corridor Study, which further confirmed the City's intent and contained plans, diagrams, and pictures that created uncertainty regarding the Landowners' property;
- (5) published in 2005, the City's Capital Budget for years 2007–2011 allocated \$121,575,400 to the Project;
- (6) in 2005, the City also entered into multiple contracts with the Regional Transportation Commission of Southern Nevada (RTC) for the Project;
- (7) the City imposed right-in/right-out turning restrictions along the entire length of the North **5th** super arterial corridor in August 2006 to preserve its high-speed character

...and the rest.

- **(8) in November 2006, the City revised its comprehensive Master Plan to incorporate the Project into its land use planning and zoning criteria;**
- (9) in December 2007, the City published the North 5th Project Development Report, which contained specific engineering details demonstrating the City's intent to acquire a portion of the Landowners' property;
- **(10) the City's eminent domain complaints from 2010 concerning other properties along the North 5th Street in the northern section demonstrated the Project was more than conceptual; and**
- (11) the parties stipulated into evidence project maps demonstrating many of the privately-held parcels the City had acquired for the necessary right-of-way for the project.

Court Summarizes “Announcement”

- The City's 2004 amendment to its Master Plan of Streets and Highways (AMP–70–04) allowed for North 5th Street to be widened up to 150 feet *and provided that approval of development applications must be conditioned upon landowners giving up a 75–foot right-of-way on the land fronting that street.*

City of N. Las Vegas v. 5th & Centennial, 130 Nev. Adv. Op. 66, 331 P.3d 896, 897 (2014) (denying rehearing)

- *Notice, initial decision is unpublished order, rehearing decision was published opinion.

Wait... Amending a MAP?!?!

- Maps and plans are amended all the time. It appears that the problem here is that once the map was amended, the City treated that map's new lines as a present requirement, not a future aspiration.
- The Opinions do not directly explain, but it appears that the post-amendment actions of the City “in hindsight” gives the amendment the character of being an announcement of intent to condemn.
- Had the City amended the map and plan, but NOT acquired property through dedications and condemnations, this amendment may not have been an announcement.

City's “wrongful conduct”

- (1) failed to move forward with its intended condemnation of the Landowners' property, which caused uncertainty and decreased the market value of the Property; and
- (2) should have been more forthright in disclosing its intentions regarding the Landowners' property.
- But #2 creates an interesting tension. The problem with pre-condemnation damages is announcing a condemnation too early, and then not condemning quickly. (i.e. Unreasonable Delay). Here, the Courts suggest that City should have made more announcements even sooner.

- The Landowners also demonstrated at trial that the City treated North 5th Street property owners with developed property differently by **paying some of them just compensation while forcing others with undeveloped property to dedicate the increased right-of-way as a condition of development**

Damages

- The Project, with its restrictions to access, overpass at Centennial, dedications, exactions, super-arterial roadway construction costs, and potential “take” for the RTC park-and-ride significantly affected the fair market value of the Property, resulting in pre-condemnation damages.

Damages

- District Court calculated “damages” by looking at diminution of value.
- Court compared two offers to purchase:
 - One at \$14,500,000 that would have been apparently been viable with the project.
 - One at \$18,750,000 that was rendered unviable because of looming project.
 - Court found difference in price was the damage.

Slight Silver Lining

- Per *5th & Centennial*: statutory shield against attorney fees in “all eminent domain actions except a prevailing inverse cause of action” applies in pre-condemnation damages.
- NRS 37.185

Applied lessons

- If you announce a future dedication or exaction, you may have to be ready to actually acquire the land.
- If you begin actually conditioning development on that street amendment, you are very likely to have announced condemnation.

Actions Speak Louder Than Words

- Although the City's planning documents may have included the phrases “preliminary,” “conceptual only,” and “subject to change,” its actions belied these disclaimers. Therefore, we conclude that substantial evidence supported the district court's precondemnation damages order.

City of N. Las Vegas v. 5th & Centennial, LLC, No. 58530, 2014 WL 1226443, at *4 (Nev. Mar. 21, 2014)

- Just saying that you are in “planning” will not save you. The Court will look beyond the formalities of the project stages and look into what the government is actually doing.

What Is An Announcement?

Yes

- Condemnation Resolution
- Public statements by high ranking officials of an intent to condemn
- Official Policy to require dedications to support the public's project

No

- Planning
- Mapping
- Designing
- Budgeting
- NEPA process
 - Public hearings
- Council hearings to authorize the above process

Can We Require Dedications?

- Conveyance by landowner to public for free.
 - Yes, to mitigate the impacts of the landowners' project.
 - No, if the purpose is acquire private property for the government's project.

Project Based Analysis

- A significant danger in 5th & Centennial is the project based analysis of the matter.
- In California, the analysis of intent to condemn focuses narrowly on what the government did concerning the specific property at issue.
- 5th & Centennial looked at the entirety of project.

5th & Brooks



Strategies for Limiting Exposure

1. Legislative redress

- a. Statute of limitations
- b. Defining pre-condemnation damages
 - i. Legislation subject to judicial scrutiny for constitutionality if “damaging” property requires payment of just compensation

2. Public retractions

- a. Buzz Stew v. City of North Las Vegas
- b. Beware of re-affirming a plan that you're not committed to.

3. Disclaimers

- a. May be helpful, but are not a shield.
- b. Although the City's planning documents may have included the phrases "preliminary," "conceptual only," and "subject to change," its actions belied these disclaimers.

4. Clearly identify who can make binding representations on behalf of agency to landowners

- a. Ad America, Inc. v. State of Nevada (Project Neon)
- b. McCarran v. Sisolak

5. Avoid mentioning “eminent domain” or “condemnation” in public planning hearings, unless you mean it. But don’t play hide the ball, either.

5A. Be extra caution when a project is a “strip” project, like a road widening

6. Avoid unlawful conditions on development applications/ rezone requests/use permits on grounds that agency may acquire property in future.

a. City of Sparks v. Armstrong

b. 5th & Centennial

7. Phased Projects:

- a. No out-of-phase acquisition or construction
- b. Clearly define phases
- c. Might not be an absolute shield

8. Know what your partners are doing

- a. Vicarious liability for acts of another agency imposed only if involvement is sufficiently direct and substantial.

Shewfelt v. United States; Ad America (Neon)

- a. But, in 5th & Centennial, NV Supreme Court found RTC's involvement to be relevant (although not dispositive).

9. Adopt a “Go ask legal” policy.

- You're at the desk, you know that there is an aspirational policy to eventually widen a road
- Someone comes in to develop a parcel along that road
- Do not assume that conditioning approval on a dedication will be liability

10. Document communications with landowners impacted by projects

11. Settlements

- a. If you have the money, buy the property
- b. If you have the money, make it a total take instead of a partial take
- c. Use settlement documents to your advantage
 - i. Draft away 5 year reversion under PISTOL

12. Constitutional arguments

- Precondemnation damages are not a taking.
- The Constitution of Nevada is a “taking only” Constitution.

13. Merger of remedies

- Precondemnation damages can dovetail with the project influence rule.
- Scrutinize claimed damages to determine whether they are duplicative of a project influence adjustment already included in just compensation.

14. California solutions to California problems

- The jurisprudence in California is very well developed.
- Primarily focuses on actual treatment of the property.

Sample case cites:

Joffe v. City of Huntington Park, 201 Cal. App. 4th 492, 501, 134 Cal. Rptr. 3d 868, 872 (2011), as modified (Dec. 2, 2011)

HPT IHG-2 Properties Tr. v. City of Anaheim, 243 Cal. App. 4th 188, 191, 196 Cal. Rptr. 3d 326, 329 (2015)

Parting Thoughts

- Nevada Supreme Court will need to decide the nature of the claim:
 - Tort vs. Taking
 - Common law vs. Constitution
- Requires better understanding of planning process by attorneys.
- Will increase uncertainty in eminent domain actions for foreseeable future.