

ROAD AND ACCESS LAW: SUCCESSFULLY HANDLING DISPUTES

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INTRODUCTION: CREATING AND USING PUBLIC ROADS IN CALIFORNIA

California has over 169,000 miles of public roads.² The state highway system, which consists of roads under state jurisdiction, comprises only 9 percent of all roads in the state. Most of the public roads in California (78 percent) are under the jurisdiction of local governments. The public roads in various counties vary from San Francisco (901 miles) to Los Angeles (21,185 miles). Sacramento has 4,830 miles of public roads, San Mateo County has 2,068 miles, San Joaquin County has 3,352 miles, Santa Clara County has 4,862 miles, Contra Costa County has 3,273 miles, and Alameda County has 3,598 miles of public roads.

Access to and use of public roads and rights of way are significant issues for many property owners in California. There are special circumstances involving public roads that are recorded; some roads can be "public," even if not recorded; a right of way for a road may not be co-extensive with the actual pavement; the interests of governments and private property owners often conflict; and eminent domain (particularly post-*Kelo*³) and the law of easements are significant for public roads. The issue of public rights of way even involves access to the beach and to rivers and lakes.⁴

The following reviews (1) the creation of public roads in California, (2) whether unrecorded roads are public roads (including unrecorded R.S. 2477 Roadways), (3) dedication and acceptance of land for public roads, (4) prescriptive rights in the public, (5) purchase and eminent domain, (6) acceptance into the government's road system, (7) influences on the scope of the right of way, and (8) legal rights of property owners and governments.

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² U.S. Dept of Transportation, Federal Highway Administration, Highway Statistics, 2005 Table HM-14 (Oct. 2006). <http://www.fhwa.dot.gov/policy/ohim/hs05/htm/hm14.htm>

³ *Kelo v. City of New London* (2005) 545 U.S. 469.

⁴ Article 10, section 4 of the California Constitution provides that no entity or person "shall be permitted to exclude the right of way to [waters of the State] whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water..." This Constitutional protection involves coastal access and river and lake access throughout California.

I. The Elements of Established Public Roads

A. General Principles.

1. Mixed Definitions – Freeways, highways, streets, boulevards, etc.

The California Streets and Highways Code and the California Vehicle Code establish three types of public roads: *freeways*, *highways*, and *streets*. The Vehicle Code defines a *highway* as “a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street.”⁵ The Vehicle Code uses similar language to define *streets*.⁶ The Streets and Highways Code defines a *freeway* as a closed off *highway*, and therefore significantly limits the rights of abutting property owners.⁷

The distinction between a *highway* and a *street* is not clear, because the legal definitions are often mixed. As noted, both definitions of highway and street in the Vehicle Code refer to one another: *Highway* includes *street*; *street* includes *highway*.⁸ Sometimes, specific types of streets have special definitions. A *boulevard*, for example, means a road no less than 30 feet and no more than 100 feet in width. In locations where the *boulevard* is less than 60 feet in width, no railroad, electric road, or street railroad shall exist unless the governing body allows for an exemption.⁹ This definition for a *boulevard* first came into effect in 1905.¹⁰ Such antiquated terminology adds to the general confusion of defining streets, highways, and freeways.

The Streets and Highways Code authorizes cities, counties, and the State to build public roadways.¹¹ And, in order to build a public roadway, the government entity can acquire land either voluntarily or by eminent domain.¹² The government can own the land in fee or in a lesser form of title, such as an easement.¹³

2. Standards for Public Roadways and Additional Definitions

⁵ Veh. Code §360.

⁶ Veh. Code §590.

⁷ Sts. & Hwys. Code §23.5

⁸ Veh. Code §360, §590.

⁹ Sts. & Hwys. Code §26002.

¹⁰ Sts. & Hwys. Code § 26002.

¹¹ Sts. & Hwys. Code §90 (State), §941 (Counties), §1800 (Cities).

¹² Sts. & Hwys. Code §102 (State), §965 (Counties), §1810 (Cities).

¹³ Sts. & Hwys. Code §104.

All public roadways must conform to specific standards. All *public streets* must offer at least a 40 feet right-of-way. The Streets and Highways Code prohibits spending public moneys on any roads less than 40 feet in width.¹⁴ Of course, some public roads are constrained by geography or other factors to be less than 40 feet wide. Thus, Counties are authorized (upon unanimous resolution by their boards of supervisors) to create roads narrower than 40 feet in width.¹⁵ And, Cities have the authority (upon a four-fifths vote by the city council), to build and maintain public streets less than 40 feet wide.¹⁶

The Streets and Highways Code authorizes the State to create freeways and highways.¹⁷ A freeway is “a divided arterial highway for through traffic with full control of access and with grade separation at intersections.”¹⁸ The State can create new freeways or convert current highways into freeways.¹⁹ To build freeways, the State can spend its own money or it may obtain federal highway funds.²⁰

There is also a distinction between a *freeway* and an *expressway*. A freeway is a divided arterial highway for through traffic with full control of access and with grade separations at intersections.²¹ An expressway does not fully control access, does not have to be divided, and does not necessarily have grade separations at intersections.²² A freeway can also be known as a controlled access highway, where development into a freeway is not expected for some time.²³

(State Highways)

The State has two types of *highways*: 1) *general highways*, 2) *scenic highways*. *General highways* have very few specifications and commonly run throughout the state. *Scenic*

¹⁴ Sts. & Hwys. Code §160.

¹⁵ Sts. & Hwys. Code §906.

¹⁶ Sts. & Hwys. Code §1805. (City streets established before 1935 are exempt from the width requirement.)

¹⁷ Sts. & Hwys. Code §90, §105.

¹⁸ Sts. & Hwys. Code §257. "Freeway' means a highway in respect to which the owners of abutting lands have no right or easement of access to or from their abutting lands or in respect to which such owners have only limited or restricted right or easement of access."

¹⁹ Sts. & Hwys. Code §100.1.

²⁰ See, e.g., The U.S. Emergency Highway Energy Conservation Act of 1974, 23 U.S.C. §101; Sts. & Hwys. Code §820.

²¹ *Id.*

²² Sts. & Hwys. Code §257. "...Most formal expressways are County Routes, usually in the San Francisco Bay Area (specifically, Santa Clara County). The Santa Clara County Expressway Network is a 377-mile network of extra-wide streets that haul commuters from the Almaden Valley to Milpitas to Palo Alto." <http://www.cahighways.org/stypes.html>

²³ Sts. & Hwys. Code §23.5.

highways, in contrast, are created by the legislature to protect and enhance the natural and scenic beauty of California.²⁴

To designate a *scenic highway*, the California Department of Transportation²⁵ must determine whether the highway corridor requires protection and if a local government agency has developed a plan for a *scenic highway*.²⁶ If the local government determines to withdraw its plan at any time, the State will declassify the *scenic highway*.²⁷ The scenic highway system includes portions of over 50 highways throughout California.²⁸

(*County Roadways*)

Counties have similar powers to the State in building, adopting, and maintaining public roadways (including highways).²⁹ Counties also can adopt existing public or private roadways into their own county highway system.³⁰ And, counties can adopt highways from the State.³¹

After creating a highway, a county may restrict its use, or even close it, if necessary for protection of the public, or as the result of storms, or for further construction.³² In addition to this authority for road closures, the 1980 "Public Streets, Highways, and Service Easements Vacation Law,"³³ And, for freeways, a county can adopt any part of the state's freeway system in order to monitor it and repair it. And, a county has the authority to convert any street or highway into a freeway.³⁴

(*City Roadways*)

Cities can create new streets or convert streets and highways into freeways.³⁵ Before the conversion of a street or highway into a freeway, a city must first obtain approval from the

²⁴ Sts. & Hwys. Code §260.

²⁵ Also known as "CALTRANS."

²⁶ Sts. & Hwys. Code §261.

²⁷ Sts. & Hwys. Code §262.

²⁸ Sts. & Hwys. Code §§ 263.1-263.9.

²⁹ Sts. & Hwys. Code §941.

³⁰ Sts. & Hwys. Code §941.

³¹ Sts. & Hwys. Code §760.

³² Sts. & Hwys. Code §942.5.

³³ Sts. & Hwys. Code § 8300 *et seq.* Note: Section 8300 supersedes the Street Vacation Act of 1941 (former § 8300 *et seq.*, Sts. & Hwys. Code) and the Public Service Easements Vacation Law (former § 50430 Gov't Code).

³⁴ Sts. & Hwys. Code §941.1

³⁵ Sts. & Hwys. Code §1800.

State.³⁶ A city may also grant a county the right to use its streets or roads, and may grant a county the right to incorporate a city street or road into the county's general plan.³⁷

Government entities can convert streets or highways into freeways. An example is the conversion in 2004 of State Route 37 between the Napa River bridge and Enterprise Street in Vallejo from a four lane highway to a four lane freeway.

However, if a government entity converts a street or highway into a freeway, it must either obtain the consent of all abutting owners, or acquire their rights of access through eminent domain.³⁸

II. Establishment of Public Roads – and Government Acquisition

Public roads can be established in various ways. One of the perennial issues involves implied “R.S. 2477 roadways,” described below. Other ways in which public roads come to exist include dedication and acceptance, prescriptive rights that arise in the public, direct purchase, and “takings” or the use of eminent domain. In addition, the public may have a right to use roads, but until roads are deemed accepted into governmental road systems the government is not liable for maintenance, nor for injuries from use.

A. "Ancient Roads" -- Unrecorded R.S. 2477 Roadways

(“Off Record” -- Is It Legitimately a Public Road?)

The question of whether unrecorded "ancient roads" are public roadways is becoming more and more significant throughout the West, particularly as development occurs in formerly rural areas.³⁹ In California, the issue of unrecorded public roads generally arises from the U.S. Act of July 26, 1866. This mining law (which itself was superseded by the Mining Law of 1872), included a provision that granted a right of way across public lands for construction of highways. This provision is commonly referred to as "R.S. 2477."⁴⁰

³⁶ Sts. & Hwys. Code §1802.

³⁷ Sts. & Hwys. Code §1850.

³⁸ Sts. & Hwys. Code §100.3, §1801 ("No public highway shall be converted into a freeway except with the consent of the owners of abutting lands or the purchase or condemnation of their right of access thereto.") "...it is permissible to take or damage rights of access for which compensation is paid in the construction of a freeway." *Holloway v. Purcell* (1950) 35 Cal.2d 220, 230.

³⁹ We have received reports of this issue arising in San Mateo County, Shasta County, and the Sierra foothill counties.

⁴⁰ In its entirety, R.S. 2477 provided that “the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” (“An Act Granting Right of Way To Ditch and Canal Owners Over The Public Land, and for Other Purposes” (Mining Law of 1866), Act of July 26, 1866, Ch. 262, § 8, 14 Stat. 251, codified at R.S. 2477, recodified at 43 U.S.C. § 932, repealed by Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976).)

The reservation of public road rights of way by R.S. 2477 was *self-executing* and did not require government approval or public recording of title. When the U.S. issued patents to public lands and thus created the origin of a chain of private title, uncertainties arose as to whether R.S. 2477 public rights of way encumbered these private properties. This uncertainty, which continues today, has implications for the general public, federal agencies, and state and local governments who assert title to (or at least rights to use) "R.S. 2477 rights-of-way." And, private interests continue to either favor or oppose these ancient and unrecorded R.S. 2477 rights-of-way.⁴¹

The legal concept is that R.S. 2477 was an *offer of dedication* by the federal government that could be *accepted* by the public through use. In this way, R.S. 2477 roadways can be said to comply with the California law as to dedications and acceptance (outlined below). As noted, these public roads do not appear on either the State land records or the public lands records (maintained by the BLM).

How the issue of R.S. 2477 roadways arises in modern times is shown in a recent California case, *Western Aggregates, Inc. v. County of Yuba*.⁴² Union protestors against a sand and gravel company were arrested when they came on the company's mining properties in the Yuba Goldfields area near Sacramento. The question was whether they were on private property or on a R.S. 2477 unrecorded public road. If they were on a public road they were not trespassing. The County proved public use of a roadway after 1866 in the general area, that it had repaired the road, and that official maps included the road. The court found this was sufficient evidence that the County had accepted the dedication made by the statute, R.S. 2477.

B. Dedication (and Acceptance)

Any individual or entity may dedicate land, without written or unwritten formalities, to the public to establish a public road.⁴³ In addition, an "implied-in-law" dedication -- and acceptance -- can be based on the activities of the general public during a "prescriptive period" of time.⁴⁴ Therefore, as long as the owner of a property forms the intent, or the courts infer such intent, to allow the public to use the land as a public roadway, the property will be considered to have been dedicated to public use as a roadway.⁴⁵

Note: Once private land is dedicated to public use, *de facto* abandonment will never revert the interest in the land (whether easement or title) back to the original owner.⁴⁶

⁴¹ For a recent review of California law, see *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, discussed in the text. For the law in other western states, a recent summary may be found in *McIntyre v. Board of County Commissioners* (Colo. 2004) 86 Pac.3d 402.

⁴² 101 Cal.App.4th 278 (2002).

⁴³ *Smith v. City of San Luis Obispo* (1892) 95 Cal. 463, 466.

⁴⁴ *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 240.

⁴⁵ *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 213-214.

⁴⁶ *Humboldt County v. Van Duzer* (1920) 48 Cal.App. 640, 644.

Abandonment may only occur through operation of law, a specific act by the government body controlling the roadway, or by court order.⁴⁷ Thus, the general rule is that until such time as the government body relinquishes its interest in the roadway, the owner and heirs of the dedicated land may not reclaim it.

C. Public Prescriptive Rights.

Another way for a public roadway to come to exist is through the public gaining a prescriptive easement. As with prescriptive rights among private parties, the public must be said to have used the claimed private way 1) open and notoriously, 2) continuously, 3) in a manner hostile to the true owner, 4) with an apparent claim of right of *public* use, and 5) for a period of five years.⁴⁸

Unlike explicit dedication (and implied dedication and acceptance, such as with R.S. 2477, *supra*), lack of public use may lead to abandonment as a matter of law. Abandonment by the public user can occur, if the roadway is not needed and the government intends to abandon it, thereby generally inducing reliance by the private owner.⁴⁹ But, "even occasional use of a public road for access purposes, in the absence of an alternative road, precludes a finding of abandonment..."⁵⁰

D. Purchase

Another way in which a public roadway can come to exist is by the government simply buying it, or exercising the government's right of eminent domain and paying the owner just compensation.⁵¹ Voluntary purchase is just that, an agreement between a seller and a buyer that results in the exchange of compensation for a deed to an easement or fee title for a strip of land that is or will be a roadway. And once purchased, the roadway can only revert to private ownership through operation of law.

E. Eminent Domain/Condemnation

In California as elsewhere, there are significant issues surrounding a "taking" by the government of private property. The California Constitution prohibits the taking *or damaging* of

⁴⁷ Sts. & Hwys. Code §901.

⁴⁸ *California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal.App.4th 1798, 1803 ("(1) actual possession; (2) open and notorious use; (3) continuous and uninterrupted use for five years; (4) use and possession hostile and adverse to the true owner's title; (5) under color of title or claim of right; and (6) payment of taxes."); and *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 240-241 ("Whether the user was adverse is a question of fact to be determined from all of the circumstances of a case.")

⁴⁹ *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278. But, "the general rule is: 'Once a highway, always a highway.'" *Id.* 101 Cal.App.4th at 304-305.

⁵⁰ *Id.*, at 305 (Citation omitted).

⁵¹ Eminent domain is discussed in greater detail below.

private lands for public use with just compensation.⁵² Therefore, cities, counties, and the State of California all have the power to pay “just compensation” and acquire, without the permission of the owner, property to construct public roads.⁵³ And, as with direct purchase (and dedication and acceptance), once the government acquires property through eminent domain, the roadway can only be abandoned through operation of law.⁵⁴

1. Post –*Kelo* Issues in Eminent Domain and Public Roadways

The Fifth Amendment of the United States Constitution and Article 1, Section 9 of the California Constitution permits the public taking of private land for public use if just compensation is paid. These constitutional rights to take are often implicated in the creation of public roads.⁵⁵

The process in California for state agencies to force the transfer of private property to construct a public road begins with the California Highway Commission (CHC), when it adopts a resolution. The resolution must identify the real property necessary for the public road and declare that public interest and necessity require the acquisition of that property.⁵⁶ The resolution of the CHC is conclusive of evidence of the public necessity to acquire the property, and cannot be disputed (unless a challenger can prove fraud, bad faith, or an abuse of discretion).

The State's power to acquire property for public roads through eminent domain is long-standing and broad,⁵⁷ and courts continue to expand the role of eminent domain as new situations develop.

The United States Constitution's Fifth Amendment permits the public taking of private land for public use with just compensation.⁵⁸ The Fifth Amendment extends to States through the Fourteenth Amendment.⁵⁹ The California Constitution codified the Fifth Amendment.⁶⁰ Under the power of eminent domain, a government entity may take private land to construct a

⁵² Cal. Const. Art. 1, § 14.

⁵³ Gov't. Code §40404.

⁵⁴ Sts. & Hwys. Code §901.

⁵⁵ See discussion above as to minimum widths for rights of way, and the distinction between public rights of way and acceptance into the road systems of cities, counties, or the State.

⁵⁶ *People v. Thomas* (1952) 108 Cal.App.2d 832, 835.

⁵⁷ *Humboldt County v. Dinsmore* (1888) 75 Cal. 604, 609 (challenge by property owner to 60 feet wide roadway condemned by county; *held*, county had statutory authority for any width over 40 feet wide). “The discretion of the California Transportation Commission or of the board of supervisors [as to width] may not be interfered with so long as the acquisition is not under the minimum limit, and the width adopted is not in excess of what is reasonably necessary for highway purposes under the circumstances.” *Cal.Jur.3d, Highways* (2006) §12.

⁵⁸ U.S. Const. Amend. 5.

⁵⁹ U.S. Const. Amend. 14.

⁶⁰ Cal. Const. Art. 1 § 14.

public road.⁶¹ However, courts and legislatures (and, in California, voter approved initiatives, will continue to define and redefine the role of eminent domain).

2. Redefining “Public Use” & “Blighted” ---The *Kelo* Decision and California Law

When taking private land for a roadway, as for any use, the government entity must first demonstrate the fact of prospective *public use* of the land.⁶² In June 2005, in a controversial five to four vote, the United States Supreme Court expanded the definition of *public use* in *Kelo v. City of New London (Kelo)*.⁶³

In *Kelo*, nine homeowners challenged the City of New London’s attempt to use eminent domain to take their property and turn it over to private ownership in order for private developers to build a resort hotel and conference center, 80 new residences, a museum, marinas,, and various research, office, and retail space over a 90-acre area.⁶⁴ These holdout property owners believed the taking violated their Fifth Amendment rights because the taking was for *private use*.⁶⁵ The City believed that the taking of the property and its development would improve the local economy.

The Fifth Amendment prohibits taking private property for public use unless the taking is for public use and the owner receives just compensation.⁶⁶ In *Kelo*, the Court focused solely on the question of *public use* and whether or not the City's taking the land for *private use* in hopes to improve the local economy violated the Fifth Amendment.⁶⁷ Writing the opinion, Justice Stevens stated, “Because [the redevelopment plan] unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment. . . . [And] [p]romoting economic development is a traditional and long accepted function of the government.”⁶⁸

The Court found that the City sufficiently articulated the public purposes of its redevelopment plan to create 1,000 jobs, increase taxes and other public revenues, and revitalize an economically distressed area of the City. The Court ruled that it would defer to the City's judgment as to the public need justifying the use of the takings power. "The Court long ago rejected any literal requirement that condemned property be put into use for the ... general

⁶¹ Gov’t. Code § 40404.

⁶² U.S. Const. Amend. 5; Cal. Const. Art. 1 § 14.

⁶³ *Kelo v. City of New London* (2005) 545 U.S. 469, 128 S.Ct. 2655.

⁶⁴ *Kelo*, 545 U.S. at 474-475, 128 S.Ct. at 2659-60. [dissent O’Connor]; http://en.wikipedia.org/wiki/Kelo_v._New_London.

⁶⁵ *Kelo*, 545 U.S. at 475, 128 S.Ct. at 2660.

⁶⁶ *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32 (2003); see Cal. Const. Art. 1, § 14.

⁶⁷ *Kelo*, 545 U.S. at 472, 128 S.Ct. at 2658.

⁶⁸ *Kelo* 545 U.S. at 484, 128 S.Ct. at 2665.

public.⁶⁹ Rather, it has embraced the broader and more natural interpretation of public use as public purpose.⁷⁰ Without exception, the Court has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings power."⁷¹

The dissent emphasized how the decision could negatively impact society. "Today, nearly all real property is susceptible to condemnation on the Court's theory."⁷² "The beneficiaries are likely to be those citizens with disproportionate influence and power. . . . As for the victims, the government now has license to transfer property from those with fewer recourses to those with more. The founders cannot have intended this perverse result."⁷³

The federal and California courts have given a broad interpretation to *public use* for some time. In an unreported decision in which the owners of an easement right of way challenged a taking by local government ostensibly to curb illegal uses and which transferred the easement to private ownership, the California Court of Appeals explained:

"The United States Supreme Court and the California Supreme Court define public use broadly. 'Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment.' (Citations omitted.) Moreover, '[i]t is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.'" (Citations omitted.) Under this broad definition of public use, our courts have held that governmental entities have the power to condemn private property owned by lessors for redistribution to lessees (citation omitted), private roads that do not connect to any public roads (citation omitted), and a professional football franchise (citation omitted)."⁷⁴

As the dissent pointed out in *Kelo*, it appears to be that "nearly all real property is susceptible to condemnation." In short, the law in California today is that the State or local authorities need only articulate a broad public purpose to condemn property -- including roadways and rights of way easements --- and then transfer it to private individuals for redevelopment. California law only requires that the taking must be:

- 1) In the public interest and necessary for the stated project.
- 2) Compatible with the greatest public good and the least private injury.

⁶⁹ *Kelo*, 545 U.S. at 479, 128 S.Ct. at 2662, citing *Hawaii Housing Authority v. Midkiff* (1984) 467 U.S. 299, 244 (upholding the Hawaiian Land Reform Act).

⁷⁰ Referring to *Fallbrook Irr. Dist. v. Braciley* (1896) 164 U.S. 112, 158-164.

⁷¹ *Kelo*, 545 U.S. at 480.

⁷² *Kelo*, 545 U.S. at 504, 128 S.Ct. at 2677 [dissent].

⁷³ *Kelo*, 545 U.S. at 505, 128 S.Ct. at 2677 [dissent].

⁷⁴ *City of Citrus Heights v. Morgan* (3d DCA, July 29, 2005), No. C046674, 2005 WL 1793805, at p. 6.

3) Required for the project.⁷⁵

Additionally, California codifies the term "blighted" to clarify what private property can be taken for economic redevelopment. Sections 33030 to 33037 of the California Health & Safety Code specifically identify what qualifies as a "blighted area" which can be condemned for economic redevelopment. Although California has limited takings to blighted areas, it remains unclear how *Kelo* will affect the requirement that takings only be for *public use*. The limitations in California law may be influenced by the expanded definition of public use approved in *Kelo*.

See, for example, the recent decision in *Neilson v. City of California City* (2007) 146 Cal.App.4th 633, where court rejected designation of "blight" for 24.4 square miles of vacant desert land; city had defined area with lots with no legal or physical access to rights of way as equivalent to lots of irregular shape and size within the definition of "blighted" in § 33031(a)(4), H&S Code. An automobile company purchased much of the private land from a railroad in this checker boarded area, and the city proceeded in eminent domain against the holdout private property owners. The automobile company proceeded to build a desert test facility. Several cities appeared as *amicus* for the defendant city; several counties weighed in on behalf of the plaintiff. The attorney general also appeared as *amicus* for the plaintiff.

The result for roadways is that a California court could allow the taking of private land for the construction of a private road. It could happen today once an area is designated as "blighted."

3. Redefining Just Compensation – Severance Damages

After the government proves the takings occurred for a public benefit, the government must prove it is giving "just compensation" to the property owner.⁷⁶ "Just compensation," in turn, depends on whether the government has taken all or only part of the private property interests. Depending on the type of takings, the injured party's recourse will vary.

If the government takes the entire property, the injured party may seek compensation for its fair market value.⁷⁷ Fair market value is defined as the highest price on the date of valuation that would be agreed between a seller and buyer both acting in good faith.⁷⁸ Parties disputing the government's valuation can make a claim with the Board of Control.⁷⁹ If an individual disagrees with the Board's determination of value of the property, the individual may have a jury decide the value of the land (or a Superior Court judge if jury trial is waived).⁸⁰

⁷⁵ CCP § 1240.030.

⁷⁶ Cal. Const. Art 1 § 14.

⁷⁷ CCP § 1263.310

⁷⁸ CCP § 1264.310

⁷⁹ 23 CCR §630(f).

⁸⁰ Cal. Const. Art 1 § 14.

Of particular relevance to public roadways (and utility easements, subways, water pipelines, canals and other linear parts of the complicated infrastructure of California) is the doctrine of "severance damages." When the government condemns only a part of a parcel of private property the government is said to be making a "partial taking."⁸¹ When a partial taking occurs, the injured party's compensation not only includes the value of the land taken, but also any additional injuries arising from the taking, called "severance damages."⁸² To determine the value of a partial taking, the government must pay the fair market price before the taking compared to the fair market value after the taking.⁸³

The government can offset the compensation for any injury caused by the partial taking by demonstrating an increase to the value of the land. The California Supreme Court in 1997 in the *Continental* case involving the Los Angeles subway construction overturned the prior rule for severance damages and held that:

“[I]n determining a landowner's entitlement to severance damages, the fact finder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural nor speculative.”⁸⁴

Whether roadways are "ancient R.S. 2477" rights of way, roadways dedicated to public use, purchased by governmental bodies, or acquired by eminent domain, they must all be formally accepted into the State's, or a county's or a city's road system.

E. Acceptance into the Government Road System

A roadway may be a public right of way or roadway, but not have been formally accepted into the State's or a county's system of highways, or into a county road system, or by a city as a street or boulevard. "Private" roads over which the public has the right to travel, whether express or prescriptive, are "public" roads, but they are not "county" roads until accepted into the county road system.⁸⁵

The duty of a county or a city to maintain a road does not begin until it has been formally accepted into the city or county road system. In other words, public use alone does not suffice to create government liability.⁸⁶ "Public roads" are not "county roads" until formally accepted.⁸⁷

At common law, a government entity would presumably have control over -- and liability for -- public roads if the government maintained the road.⁸⁸ The California Supreme Court

⁸¹ *Los Angeles County MTA v. Continental Development Corp.* (1997) 16 Cal. 4th 694, 705 (hereafter, *Continental*).

⁸² CCP § 1263.410.

⁸³ *Pierpont Inn v. California* (1969) 70 Cal 2d 282, 295.

⁸⁴ *Continental*, 16 Cal. 4th at 718, overruling *Beveridge v. Lewis* (1902) 137 Cal. 619, 623-24.

⁸⁵ *Hanshaw v. Long Valley Road Ass'n* (2004) 116 Cal.App.4th 471, 480.

⁸⁶ *Western Aggregates, Inc., supra*, 101 Cal.App.4th at 297.

⁸⁷ *County Responsibility for Public Roads* (1978) 61 Ops. Atty. Gen. 466, 1978 WL 22792.

recognized this common law rule in *Union Transportation Co. v. Sacramento County* (1954) 42 Cal.2d 235.⁸⁹

The potential liabilities of counties were enormous. Shortly after the *Union Transportation Co.* decision, the California legislature added Sections 941(b) and 1806(a) to the Streets and Highways Code. Section 941(b) and Section 1806(a) create statutory presumptions that counties and cities are not liable for public roadways until they are formally accepted by those entities.⁹⁰ So, today, even community services districts do not have a continuing duty to provide road maintenance and snow removal services to streets and roads that have not been officially accepted into any public road system under the district's jurisdiction.⁹¹

III. What Influences the Scope of the Right-of-Way?

The government may acquire title to property, including roadways, in fee or in any lesser interest.⁹² Before 1935, the case law was mixed, but generally the State would only acquire a right-of-way.⁹³ In that year, the legislature enacted the comprehensive Streets and Highways Code.⁹⁴ This Act specifically authorized the State to own roads in fee.⁹⁵ However, if the State acquired roadways before 1935, it remained unclear whether or not the State acquired the fee interest or only an easement interest. After some mixed conclusions by the lower courts, the California Supreme Court in 1954 ruled held that without formal proceedings, the government (and the public) only receives an easement when a public road is acquired.⁹⁶

Thus, it is important to keep in mind that private persons can still own the land under public right-of-ways when the government only holds an easement. The owner's rights are limited, because he, she, or it must still act in a manner consistent with the purpose of the government's easement.⁹⁷

⁸⁸ *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 240.

⁸⁹ In *Union Transportation Co.* the evidence showed that a county roads superintendent sent road equipment to the part of the road that collapsed, with instructions to make repairs. This supported the inference of implied acceptance by the county of the road into the county road system -- and the county's liability for the plaintiff's subsequent damages and injuries.

⁹⁰ *Copeland v. City of Oakland* (1993) 19 Cal.App.4th 717, 720; Sts. & Hwys. Code §941(b). §1806(a).

⁹¹ *In re Hon. Marshall Rudolph*, 89 Ops. Cal. Atty. Gen. 148, 2006 WL 1968781 (July 12, 2006).

⁹² Sts. & Hwys. Code §104.

⁹³ *People v. Thompson* (1954) 43 Cal.2d 13, 19.

⁹⁴ Sts. & Hwys. Code §1.

⁹⁵ After 1935 and through 1961, counties could only obtain right-of-ways over land and could not hold land in fee. In 1961, the legislature repealed the limiting statute, §905, Streets & Highways Code.

⁹⁶ *People v. Thompson, supra* 43 Cal.2d at 19.

⁹⁷ *Colegrove Water Co. v. City of Hollywood* (1907) 151 Cal. 425, 429.

The rights of an owner abutting a public right-of-way are similarly limited. The abutting owner's rights are always subordinate to the rights of the public.⁹⁸ And, even when the government and the public only have an easement for the public roadway, the public easement includes the right to use the soil beneath the roadway to lay sewers, gas pipes, or for any other purpose within the scope of the public use. The use of the owner in fee must yield to the needs of the public.⁹⁹ The courts recognize that rights-of-way are generally construed to include technological advancements, and all members of the public, whether individuals or corporations, are allowed to use a public right-of-way.¹⁰⁰

At times, the rights of the State, counties, and cities are subordinate to the rights of the United States when dealing with issues of right-of-way. The U.S. can preempt many state laws involving roadways in federal legislation.¹⁰¹ The rights of preemption flow from the Supremacy Clause.¹⁰² Although not a favored power, Congress may use the Supremacy Clause when Congress believes federal legislation requires universal implementation among all states.¹⁰³ At such time, the State must yield whatever power Congress requires over public roads, streets, and highways.

A. Example: Telecommunications – Conflict Between Federal Law and State Law

The Supremacy Clause is the focus of a current ongoing dispute under the Federal Telecommunication Act (FTA).¹⁰⁴ The FTA was updated in the Telecommunications Act of 1996¹⁰⁵ and promotes using public roadways for telecommunication cable systems.¹⁰⁶ The FTA

⁹⁸ *Id.*; an abutting property owner does not have the right to insist a street be left in its original condition. (*People ex rel. Dep't of Transportation v. Ayon* (1960) 54 Cal.2d 217, 223-24 (discussed as an example below). Nor does an abutting property owner have the right to compensation for the diversion or rerouting of traffic. *Brumer v. Los Angeles County Metropolitan Transportation Authority* (1995) 36 Cal.App.4th 1738, 1749.

⁹⁹ *Hayes v. Handley* (1920) 182 Cal. 273, 282.

¹⁰⁰ *Bello v. ABA Energy Corp.* (2004) 121 Cal.App.4th 301, 312 ("The scope of public rights-of-way in developed areas is 'more extensive' because of the need to 'accommodat[e] ... sewers, gas and water pipes, electric wires, and conduits for railroads.' In areas where intensive use of the rights-of-way is necessary to support public infrastructure, 'the use by the owner of the fee must yield to the public use.'" (Citations omitted.)

¹⁰¹ *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.* (1980) 450 U.S. 311, 317-18.

¹⁰² *Id.* "The supremacy clause of the United States Constitution, which supports the doctrine of federal preemption, provides that the laws of the United States "shall be the supreme law of the land." (U.S. Const., art. VI, cl.2.) "It is a familiar and well-established principle that the Supremacy Clause ... invalidates state laws that 'interfere with, or are contrary to,' federal law." (Citation omitted.) *Citizens to Enforce CEQA v. City of Rohnert Park* (2005) 131 Cal.App.4th 1594, 1601-1602.

¹⁰³ *Id.*

¹⁰⁴ 47 U.S.C. §151.

¹⁰⁵ PL 104-104, February 8, 1996, 110 Stat 56.

¹⁰⁶ 47 U.S.C. §151. "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. §253.

also limits the amount of damages the city or state can recover as for the laying of cables in public right-of-ways.¹⁰⁷

Cash-poor local governments often try to charge a “franchise fee” to companies for using public right-of-ways.¹⁰⁸ Some cities use other terms for such fees. In a recent case, the City of Berkeley attempted to impose a “non-cost based competition fee.”¹⁰⁹ The city intended to use the fees to act as tariffs in order to collect money for the right to use city streets to install telecommunications cabling.¹¹⁰ The Berkeley case was one of several Qwest Communications, Inc. brought against various cities. The Ninth Circuit ruled in the *Berkeley* case, and again in the *City of Portland* case that the FTA can preempt the cities' ordinances if Qwest and other telecommunication companies show the ordinances may have the effect of prohibiting services. The companies need not prove that the ordinances actually have this effect.¹¹¹

Note: The Eighth Circuit, in *Level 3 Communications, Inc. v. City of St. Louis*¹¹² has rejected the 9th Circuit's decisions, as well as similar rulings in the 1st and 10th Circuits.¹¹³ This is an ongoing and interesting issue, because Section 253(a) of the FTA states: “No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” According to the Eighth Circuit, telecommunications companies must prove “actual or effective prohibition” and not merely a possibility of a prohibition in order to preempt local regulation.¹¹⁴

In the technological boom of the late 1990s, the capabilities of telecommunications greatly advanced. In 2000, DSL service reportedly tripled in a single quarter of the year.¹¹⁵ Currently AT&T has increased serves more than 12 million subscribers nationwide.¹¹⁶ ATT is the nation's largest provider of DSL services.¹¹⁷ The technological boom has led to a massive retrofitting of cable systems running in local government's right-of-ways.

¹⁰⁷ 47 U.S.C. §253.

¹⁰⁸ *City of Auburn v. Qwest Corp.* (9th Cir. Ore. 2001) 206 F.3d 1160, 1167.

¹⁰⁹ *Qwest Commc'ns, Inc. v. City of Berkeley* (9th Cir. 2006) 433 F.3d 1253, 1256.

¹¹⁰ *Id.* In addition, the fees also go to recover costs of the cities when cities need to relocate right-of-ways or move the companies' cables for the benefit of the public.

¹¹¹ *Qwest Corp. v. City of Portland* (9th Cir. 2004) 385 F.3d 1236, 1239, *cert. denied*, 544 U.S. 1049 (2005).

¹¹² (Feb. 5, 2007) 477 F.3d 528, 532-533.

¹¹³ *Qwest Corp. v. City of Santa Fe* (10th Cir. 2004) 380 F.3d 1258, 1270 n.9; see also *Puerto Rico v. Municipality of Guayanilla* (1st Cir. 2006) 450 F.3d 9, 18; *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.* (1st Cir. 1999) 189 F.3d 1, 9.

¹¹⁴ *Level 3 Communications, supra*, 477 F.3d at 532.

¹¹⁵ *DSL Users Triple*, CNNMoney (Nov. 10, 2000); *available at*: <http://money.cnn.com/2000/11/10/technology/dsl/>.

¹¹⁶ AT&T Fast Facts; *available at*: <http://www.att.com/gen/general?pid=8400>.

¹¹⁷ *Id.*

As new cables are installed, local communities find it harder and harder to determine if they can collect franchise fees or if the companies are exempted by the FTA. The problem arises because companies like AT&T not only provide DSL, but also telephone and cable television services.¹¹⁸ Local communities must deal with the problem of bundled services. So, if a part of the service is preempted by the FTA while another part is not preempted, what franchise fees can a local government collect?

The FTA defines "telecommunication" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."¹¹⁹ This broad definition, with the preemption given by the FTA creates a new burden onto the local communities and their public roadways. In the situation of AT&T, who provides services protected under the FTA, recent rulings seem to indicate a city may not put a franchise fee on AT&T since AT&T will, usually, only put one cable into the public right-of-way to offer all of its services.¹²⁰

Since Congress enacted the FTA in 1996, several cases have been decided. They have had varying results for telecommunications companies and State and local governments.¹²¹ The courts appear somewhat divided in applying the 1996 Act to situations involving franchise fees on cable companies. When the courts find that the FTA preempts state law, they use the Supremacy Clause.¹²²

B. Subways and Light Rail Lines

Recent decisions involving the light rail line in Los Angeles demonstrate how the courts will address inverse condemnation claims arising from claims of abutting property owners vis-à-vis public streets and roadways. In *Perrin v. Los Angeles County Transp. Comm'n.*¹²³ the plaintiff property owner sued in inverse condemnation because the light rail line blocked access to her property and lessened her property's value. The train eliminated parking on the plaintiff's side of the street, and by installing a guard rail and concrete divider made it very difficult for pedestrians to cross the street to plaintiff's business. The court ruled that even though access to plaintiff's property was more inconvenient, it was not completely cut off, and so the rail line did not sufficiently cut access to amount to a compensable taking or damaging of plaintiff's property.

¹¹⁸ AT&T; available at: www.att.com.

¹¹⁹ 47 U.S.C. §151, §153(43).

¹²⁰ Compare *Pacific Bell Telephone Co. v. City of Walnut Creek*, (N.D. 2006) 428 F.Supp.2d 1037.

¹²¹ *City of Auburn v. Qwest Corp.*, *supra*, 206 F.3d 1160; *Qwest Comm. v. City of Berkeley* (9th Cir. 2006) 433 F.3d 1253. Compare *Pacific Bell Telephone Co. v. California Dept. of Transp.* (N.D. Cal. 2005) 365 F.Supp.2d 1085, 1090 ("Based on the record before the Court, the Court finds that Pacific did not produce sufficient evidence to demonstrate that the amount of the State's fee is a prohibition within the meaning of Section 253(a), an issue on which Pacific bears the burden of proof at trial.")

¹²² 47 U.S.C. §253.

¹²³ (1996) 42 Cal.App.4th 1807.

The *Perrin* decision is similar to *Brumer, supra*¹²⁴ where light rail train line, though preventing vehicles from passing and parking in front of plaintiff's property, was not shown by a private property owner to lessen public access to the property. Earlier, in *Lane v. San Diego Elec. Ry. Co*¹²⁵, when a street car line installed a turn-around loop across the driveway to a business, the California Supreme Court ruled that no compensable taking or damaging resulted.

To help answer questions about rights-of-way, California publishes the Code of Ethics for Employees in Right of Way and Asset Management. This 2600 page guide covers the roles and responsibilities of the state when dealing with obtaining and monitoring right-of-ways.¹²⁶ The guide also provides the forms and exhibits used by government agencies.¹²⁷ Free copies of the manual are available on the CALTRANS website.¹²⁸

IV. Legal Rights of Property Owners versus Municipalities

A. Legal Rights of Property Owners and Governments

1. Assessment Districts to Finance Road Improvements & Maintenance

Although we don't review in detail the effect of assessment district law on creating and using public roads in California, it is important to mention how assessment district law imposes costs on property owners abutting public roads. Special assessment districts are created under express legislative authority in order to help pay for permanent public improvements and maintenance.¹²⁹ The rationale is that the assessed property has or will receive special benefits in addition to those generally received by the public.¹³⁰ The enactment of Proposition 218 in 1996 diminished the appeal of special assessment districts as a financing method.

Public streets and highways are not always built at public expense; but they can be constructed at the expense of contiguous lots and properties under the direction of local authorities.¹³¹ For instance, under the Improvement Act of 1911, the owners of commercial property along a street must pay for project that included curbs, gutters, sidewalks, improved drainage, and congestion reducing measures.¹³²

¹²⁴ 36 Cal.App.4th at 1738.

¹²⁵ (1929) 208 Cal. 29.

¹²⁶ Department of Transportation State of California, *Code of Ethics for Employees in Right of Way and Asset Management*; available at: <http://www.dot.ca.gov/hq/row/rowman/manual/>.

¹²⁷ *Id.* The website also provides information on obtaining a printed copy of the Code of Ethics document.

¹²⁸ *Id.*

¹²⁹ See, e.g., Cal.Jur.3d, Highways & Streets, §108.

¹³⁰ *White v. County of San Diego* (1980) 26 Cal.3d 897.

¹³¹ *Id.*

¹³² *White v. County of San Diego* (1980) 26 Cal.3d 897.

2. Example: The Landscaping and Lighting Act of 1972.¹³³

The 1972 Landscaping and Lighting Act is an example of a special assessment district law that has been somewhat curtailed by Proposition 218. This Act authorizes local government agencies to establish landscape and lighting maintenance districts in order to pay the costs of landscaping and lighting public areas. All local agencies can use this Act, including cities, counties, school districts, water districts, *et al.*

The agencies can install and maintain landscaping, statues, fountains, general lighting, traffic lights, recreational and playground courts and equipment, and public restrooms. They can acquire land for parks and open spaces, community centers, municipal auditoriums and halls. Agencies can issue notes or bonds to finance larger improvements.

Maintenance and servicing under this Act are “improvements” in their own right and do not depend on a new installation.¹³⁴

The effect of Proposition 218 in 1996 on this Act illustrates how the standard of judicial review for assessment districts was altered. In *Knox v. City of Orland*, *supra*, the California Supreme Court upheld an assessment district that was not building any new parks, but instead using assessments to maintain existing facilities. At that time, the standard for judicial review was that

“a special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts unless it clearly appears on the face of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed to the properties to be assessed or that no benefits will accrue to such properties.”¹³⁵

Proposition 218 modified this standard for judicial review. It added Section 4, subd. (f) to Article XIII D. The Proposition provided that

“in any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.”¹³⁶

¹³³ Sts. & Hwys. Code §22500-22675.

¹³⁴ *Knox v. City of Orland* (1991) 4 Cal.4th 132.

¹³⁵ *Id.*, 4 Cal. 4th at 146.

¹³⁶ Cal. Const. art. XIII D §4(f). See, e.g., *Blake v. City of Port Hueneme* (2d DCA 1997), No. B108759, *rev. denied, ordered not published*, 68 Cal.Rptr.2d 627 (beach maintenance assessment district imposed on property owners with view, *etc.*, but general public benefits).

There are questions as to how the “special benefit” is to be determined. The issue of “special benefit” is currently under review by the California Supreme Court in *Silicon Valley Taxpayers Ass’n v. Santa Clara County Open Space Auth.*, 130 Cal.App.4th 1295, 30 Cal.Rptr.3d 853, review accepted, Oct. 12, 2005 as Case No. S136468.¹³⁷

In *Taxpayers*, the Authority imposed an assessment under the 1972 Landscaping and Lighting Act to fund a program of future regional open-space acquisitions. The specific acquisitions, however, are prospective. The Authority could not reveal to landowners exactly how much it might pay for a given site. So, the Authority asked its consultant to attempt to show the total benefit to private property from the unknown acquisitions and then calculate the proportionate benefit to each property owner in the assessment district.

Another case involving the 1972 Act, *Dahms v. Downtown Pomona Property & Business Improvement Dist.*, has also been accepted for Supreme Court review and is awaiting disposition of *Silicon Valley Taxpayers*.¹³⁸ As a point of interest, the Court of Appeals in *Dahms* established a two part test which it applied to determine if the requirement of Proposition 218 had been met. The test is:

1. Will the affected properties receive special benefits?
2. Is the assessment proportional to the benefits conferred on the specific property?

According to the *Dahms* appeals panel, if this test is met the review on appeal is merely to determine if substantial evidence exists in the trial court record to support the trial court’s affirmative findings on the two questions.¹³⁹ For the time being, the *Dahms* decision, although not citable, and the unreported 1997 *Blake* decision establish in a practical sense the two parameters for determining if the special benefit exists for an assessment under the 1972 Act. The eventual opinion of the Supreme Court in *Silicon Valley Taxpayers Association* may require modification of this “practical” test.

2. Ingress and Egress for Abutting Owners

An owner of private property abutting a public road has special rights, over and above the rights of the general public. These rights include the right to access his, her or its land. A property owner's abutter's rights also include the rights of view, access, light and air and the right to have the street space kept open so that signs on the lot are visible to passersby.¹⁴⁰ The

¹³⁷ As of January 31, 2008, briefed and awaiting setting of oral argument.

¹³⁸ *Dahms v. Downtown Pomona Property & Business Improvement Dist.* (2006) 138 Cal.App.4th 115, rev. granted July 12, 2006.

¹³⁹ *Id.*

¹⁴⁰ *People ex rel. Dep’t. of Public Works v. Presley* (1966) 239 Cal.App.2d 309; see also *People ex rel. Dept. of Transportation v. Wilson* (1994) 25 Cal.App.4th 977, 980.

property right is akin to an easement in the public road which is appurtenant to the property and which is a private right, as distinguished from that owner's right as a member of the general public.

The abutting property owner's right to a view is to ensure that travelers on the road can see the property from the road. For business purposes, the right to a view ensures that "travelers upon the highway can see the abutting property and be thereby induced to enter upon the property and do business with the owner."¹⁴¹ The right to a view creates an easement of a reasonable view from the highway or road to the abutting property which is considered to be a "valuable property right." And, any "the impairment or destruction of that view is the destruction of a valuable property right."¹⁴² Thus, obstruction of a view is a compensable injury.¹⁴³

The rights of landowners who depend on others viewing their property are not absolute, however. Recently the California Supreme Court ruled that the City of Los Angeles acted within its authority to plant palm trees adjacent to major freeway even though they obstructed the sight of plaintiff's billboards. The plaintiff alleged that such action constituted a taking of property without just compensation. The Court emphasized that while adjacent property owners have the right to be seen, the City also has the right to make aesthetic improvements for the public good. Incidentally, the billboard company could have foreseen that such improvements would be made.¹⁴⁴

The abutting landowner also has the right of ingress and egress. This right is best described as an "easement of ingress and egress," or as the right of access to the abutting property.¹⁴⁵ The abutting owner may be required to defer to public regulation of the manner and location of access, but unless just compensation is paid, the government cannot impair the easement of ingress and egress, *i.e.*, it cannot prevent access nor can it substantially interfere with it.¹⁴⁶

Although access to an abutting property owner's property cannot be cut off entirely, a state or county may regulate and limit access so long as the limitation is not a substantial impairment.¹⁴⁷ These alterations are non-compensable, even if they cause depreciation in the

¹⁴¹ *People ex rel. Dept. Public Works v. Lipari* (1963) 213 Cal.App.2d 485, 488.

¹⁴² *Id.*

¹⁴³ *People ex rel. Dep't of Public Works v. Presley* (1966) 239 Cal.App.2d 309.

¹⁴⁴ *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 522-523.

¹⁴⁵ *Lane v. San Diego Elec. Ry. Co.* (1929) 208 Cal. 29.

¹⁴⁶ *Lexington Hills Ass'n v. State of California* (1988) 200 Cal.App.3d 415.

¹⁴⁷ *People By and Through Dep't of Public Works v. Murray* (1959) 172 Cal.App.2d 219, 225.

abutting owner's property value as they are merely "inconveniences suffered by him as a member of the public."

For example, a state or county can block direct access by

- installing a traffic island,
- placing permanent dividing strips which block direct access to the opposite side of the highway,
- painting double lines (which are not to be crossed),
- designating a street as one-way.¹⁴⁸

An instructive example of how the courts apply these principles can be seen in *People ex rel. Dep't. of Public Works v. Ayon*.¹⁴⁹ In *Ayon* the abutting property owner complained when street improvements cut off half the traffic traveling on a busy street in front of its grocery store. The California Supreme Court explained the improvements and the new traffic pattern, and then articulated several well-established rules for such situations. These are:

(1) The abutting property owner has a free and convenient use of and access to the highway;

(2) The abutting property owner's right to ingress and egress is not absolute. He cannot demand the street be frozen in time so he can go in and out in the same manner. "Modern transportation requirements necessitate continual improvements of streets and relocation of traffic."

(3) The abutting property owner has no constitutional right to compensation because street improvements affect traffic flow. This is a business risk of "modern society under modern traffic conditions."

(4) The abutting property owner has a compensable right to direct access from the property to the street and for the through traffic on the street. However, reasonable and proper traffic regulations that impede convenience of access that do not affect direct access are noncompensable.

(5) States and counties may exercise their police powers for traffic regulation by installing traffic islands, putting in permanent dividing strips, painting double white lines (which ban cross-overs), and making streets one-way.¹⁵⁰

Based on these rules, the Court held that for this case the new divider strip in the street did not impede direct access and to traffic traveling in one direction. (But, of course, it prevented

¹⁴⁸ *People ex rel. Dep't of Public Works v. Russell* (1957) 48 Cal.2d 189, 195.

¹⁴⁹ *People ex rel. Dep't. of Public Works v. Ayon* (1960) 54 Cal.2d 217, 223-24.

¹⁵⁰ *Id.* at 223-224.

traffic from the other direction turning into the plaintiffs' parking lot.) And, the Court found that the plaintiff, as an abutting owner, had no compensable claim when traffic was diverted or rerouted to another street, even though the value of his property was substantially diminished.

And, when dealing with freeways and expressways, the rights of private abutting owners are even more limited.¹⁵¹ Unlike private parties abutting highways, courts have found that abutting owners to freeways have *no legal right to views or access*. The courts reason that the purpose of a freeway is to provide rapid transit for passing cars. This purpose has been found to be "antagonistic" to abutter's rights, such as allowing travelers to view and patronize businesses abutting the freeway.¹⁵² And, when freeway building causes residential streets to be truncated and turned into cul de sacs, thereby losing access to an intersecting street, there is not a compensable taking per se. However, the cutting of streets is a substantial factor in determining if just compensation is due.¹⁵³

The rights of the owners of the underlying fee, when public roads and rights of way are only easements, are also severely circumscribed. Once a private landowner grants an easement for a public right-of-way, he or she retains only a few residual rights to restrict use of the public right-of-way. Use of the public's easement is subject only to governmental control, ordinarily exercised by the government issuing encroachment permits. And, in most cases, the government does not have to get the consent of the underlying fee title owner to issue encroachment permits.

It is important to keep in mind that every member of the public (including companies) has an equal right to use the public right-of-way.¹⁵⁴ And, new burdens can be imposed on the fee title owner as modern science develops new improvements; "the scope of the right of way is not fixed but responds to changing societal conditions."¹⁵⁵ Such uses include transportation and installation of sewage, water, gas and telecommunication lines.

Even though a public user will not have to get the title owner's consent, the government agency must consider whether the encroachment is a "permissible use." In general terms, the proposed encroachment should:

- (1) Serve as a means to transport people, commodities, waste products or information, or serve public safety;

¹⁵¹ Sts. & Hwy. Code § 23.5 (" 'Freeway' means a highway in respect to which the owners of abutting lands have no right or easement of access to or from their abutting lands or in respect to which such owners have only limited or restricted right or easement of access."); *People ex rel. Dept. of Transportation v. Wilson* (1994) 25 Cal.App.4th 977, 982 ("...while the purpose of a highway is to provide landowners with abutter's rights, the purpose of a freeway is to eliminate those rights.").

¹⁵² *Id.*

¹⁵³ *Breidert v. Southern Pac. Co.* (1964), 61 Cal.2d 659, 661 ("...although the bare allegation of a cul-de-sac does not in itself suffice to establish a compensable right, a showing of a substantial impairment of the property owner's right of access to the system of public streets does so.")

¹⁵⁴ *Bello v. ABA Energy Corp.* (2004) 121 Cal.App.4th 301, 315.

¹⁵⁵ *Id.* at 309.

(2) Serve either the public interest or a private interest of the underlying landowner that does not interfere with the public's use rights; and

(3) Not unduly endanger or interfere with use of the abutting property.

As the *Kelo* decision dramatically shows, the permissible use need not be by or for a public entity itself. *The encroacher's use only has to serve a public interest.*

Also, a government agency may permit significant uses on a roadway easement even without an express grant or dedication of a public right-of-way from the private landowner. As explained above as to the springing into existence of public roadways, a private owner need not make an express grant, or go through the process of dedication (and acceptance). Persistent public use alone can create a public right-of-way. Also, a conclusive right-of-way is presumed when a private property abuts an established street or road. (The presumed right-of-way includes the whole scope of uses permitted under the common law.) Finally, the public has a right to as much land as is needed for the right-of-way; the only requirement is that it be a reasonable width.

VI. Conclusion

California's public roadways have an array of unanswered questions ranging from simply identifying the difference between a highway and a street to the more complex role of telecommunications rights for use of right-of-ways. The California Constitution and statutes try to give simple answers such as the definition of eminent domain, but courts find that the supposed answers do not address all of the problems. But, regardless of the confusion, the unanswered questions, and the see-sawing balance of power between private owners and municipalities, people will continue to use the intricate system of roads created by the cities, counties, and the State of California.

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