IRWA
ORANGE COUNTY
CHAPTER 67

International Right of Way Association Chapter 67 Orange County, California




Inside This Issue:

BUNDLE of WRITES

October 2017

President's Message

Artemis Manos, SR/WA
Southern California Gas Company
agmanos@semprautilities.com (714) 256 1673

Dear members,

Reflecting on the devastating natural disasters that have battered the nation in 2017 alone, we are reminded about the significant impact Right of Way Professionals have on improving people's quality of life through infrastructure development. The demands to strengthen infrastructure against current and future natural disasters only highlights this importance. Critical infrastructure projects providing energy, utilities and transportation to the masses would not be possible without the support of highly skilled Right of Way practitioners.

On October 5th, Alyson Suh and I will be attending the Region 1 Fall Forum in Phoenix, Arizona to collaborate with other Chapters Voting Directors and the entire International Executive Committee (IEC) on an interactive session to discuss Strategic Planning initiatives to ensure that the International Right of Way organization is able to meet the future needs of our International community.

Education Update:

Chapter 67 is sponsoring Course 701: Property/Asset Management: Leasing which will be held in Irvine on October 23-24 and is approved by the California Board of Real Estate Appraisers for 15 units of continuing education. Participants will learn the fundamentals and practical aspects of leasing. Registration information is available at the end of this newsletter as well as here: http://www.irwa67.org/events/course-701-property-management-leasing/.

Looking forward to seeing everyone on the 10th!

EXECUTIVE BOARD

President
Artemis Manos, SR/WA*
Southern California Gas Co.
(714) 256 1673
agmanos@semprautilities.com

Vice President / President Elect
Alyson Suh, Esq., Director*
Woodruff, Spradlin & Smart
(714) 415 1050
asuh@wss-law.com

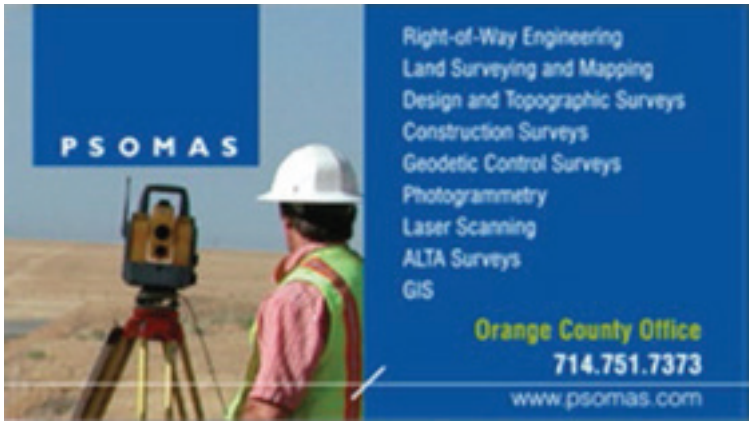
Treasurer
Meredith McDonald, Senior Appraiser - The Kiley Company
(714) 655 6515
mmcdonald@kileycompany.com

Secretary
Amanda Fitch, RWA
Mobilite
(714) 325 8649
amanda.fitch@mobilite.com

Past President
Katherine Contreras, Esq., Assoc.
Bender Rosenthal
(951) 710 3253
k.contreras@benderrosenthal.com

Chapter Advisor
Mike Rubin, Esq.
Rutan & Tucker
(714) 641 3423
mrubin@rutan.com

Nominations & Elections
TBD



BOARD CONTINUED

Professional Development
Rudy Romo, SR/WA
City of Irvine
(949) 724 7303
rromo@ci.irvine.ca.us

Education
James Vanden Akker
Metropolitan Water District
(213) 217 6324
JVandenAkker@mwdh2o.com

Membership
Rhonda Weiss, SR/WA
Security Land & R/W
(714) 635 3380
rweiss@securitylandrow.com

COMMITTEE CHAIRS

Case of the Month
Mike Rubin, Esq.
Rutan & Tucker
(714) 641 3423
mrubin@rutan.com

Engineering / Survey
Will Estepa, PLS
Psomas
(714) 751 7373
william.estepa@psomas.com

Environmental
Ann M. Johnston
Psomas
(714) 751 7373
ann.johnston@psomas.com

Hospitality
Joe Munsey, RPL
Southern California Gas Co.
(949) 361 8036
jmunsey@semprautilities.com

CHAIRS CONTINUED

Legislation
Franci Coleman
Retired, CalTrans
(213) 925-5179
francicole@gmail.com

Newsletter/Communication
Gabe Becerra
Overland, Pacific & Cutler
(949) 872 3237
gbecerra@opcservices.com

Nominations Committee
Joe Munsey, RPL
Southern California Gas Co.
(949) 361 8036
jmunsey@semprautilities.com

Pipeline / Utilities
Joe Munsey, RPL
Southern California Gas Co.
(949) 361 8036
jmunsey@semprautilities.com

Public Agency Liaison
Mathew VanEck, MAI
Kidder Mathews
(949) 557 5047
mvaneck@kiddermathews.com

Relocation
Michele Folk SR/WA, RW-RAC
Overland, Pacific & Cutler
(949) 951 5263
mfolk@opcservices.com

Seminars Co-Chairs - TBD

Tri-Chapter Luncheon - TBD

Valuation - TBD

*International Director

Editor's Corner

Gabe Becerra
Overland, Pacific & Cutler
gbecerra@opcservices.com (949) 872 3237

Welcome back readers for the October edition of our newsletter. If you would like to contribute content to the newsletter, have questions or any ideas to improve the content please contact me at gbecerra@opcservices.com or (949) 872 3237

UPCOMING EVENTS:

October 10th Luncheon

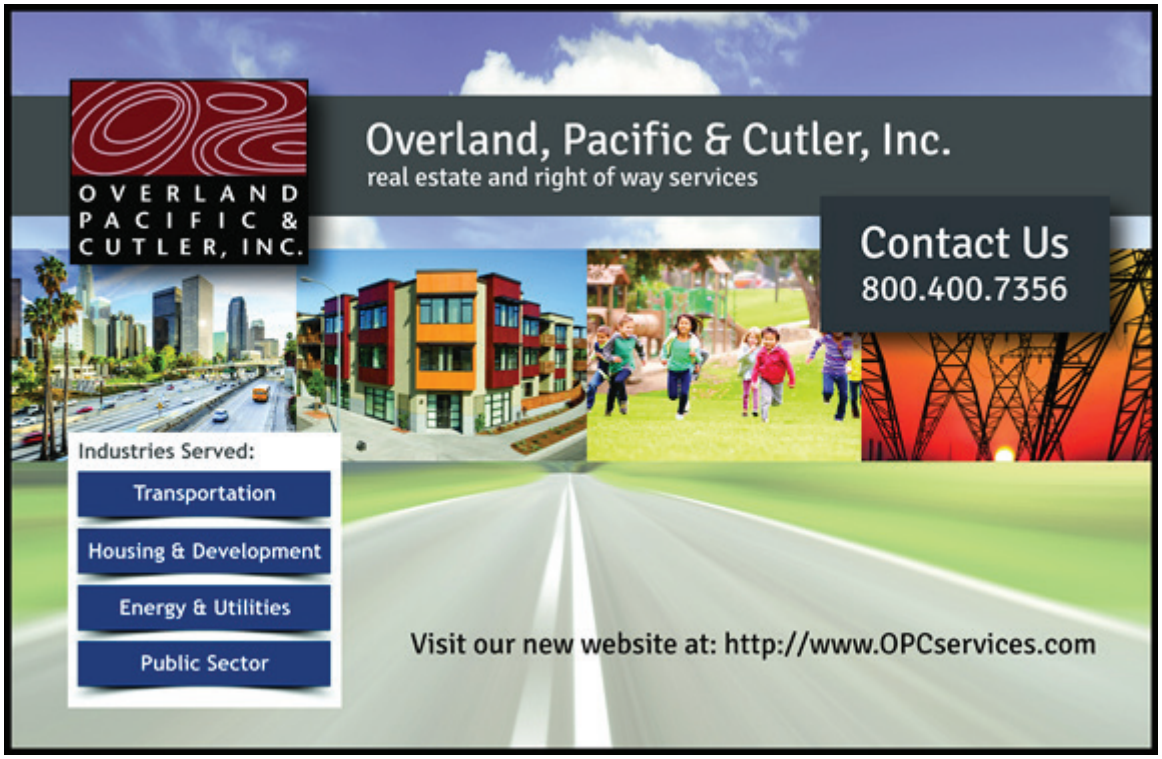
Topic: I Have a Project. What is the Environmental Mitigation Going to Cost.
Speakers: Ann Gildersleeve, Project Manager for Southern California Edison
Click here to purchase luncheon tickets online.

Education Seminar & Casino Night sponsored by Chapter 57

Date: October 13, 2017
Location: Chino Hills, CA (click here to register)
Topic: Through the Eyes of the Property Owner

Property/Asset Management: Leasing Course 701

Date: October 23-24, 2017
Location: Las Lomas Community Park, Irvine
Sponsored by: Chapter 67. Registration form below (click here for details)



Mike Rubin
Rutan & Tucker, LLP
mrubin@rutan.com

Size Counts- But It's Not the Actual Size of the Tank that Matters, but How Big It Looks from the Outside!

Central Valley Gas Storage LLC v Southam, (2017) 11 Cal.App.5th 686 .

Summary: The *Central Valley Gas Storage* case involved unusual property rights being condemned for an unusual public use, i.e., the taking of underground gas storage rights by a public utility for an underground gas storage reservoir. But *Central Valley* is not a public use case, there was no challenge or controversy over whether condemnation could be utilized for the public use. Instead, the issue in controversy was how these underground gas storage rights should be valued. More specifically, whether the rights should be valued based upon (i) the number of surface acres the owner possessed that overlaid the storage reservoir, or (ii) the volume of the storage capacity that existed within the owner's land (and which would be utilized by the public utility condemnor).

The underground gas reservoir being assembled by the condemnor consisted of 677 surface acres, 80 of which were owned by the holdout condemnee owner. The owner's evidence, however, was that it owned a much higher percentage of the underground storage capacity than other surface owners, and that the compensation paid should reflect this premium storage ability that underlaid its' property. In fact, the only appellate case on the issue, *Pacific Gas & Electric Co. v Zuckerman* (1987) 189 Cal. App. 3d 1113, expressly held that the value of underground gas storage rights cannot be based upon the value of the surface area, because the only rights being acquired were underground storage rights and no surface rights were being acquired (severance damages, however, could be awarded based upon interference with the surface use).

In the *Zuckerman* case (back in 1987), the appellate court acknowledged that "underground storage properties are sui generis and that normal approaches to valuation are problematical." (*Zuckerman*, at p. 1128). For that reason, it held that the value of such rights may be determined by any approach that is "just and equitable", citing Evidence Code § 823 and Code of Civil Procedure § 1263.320, subd. (b). Based on this clear precedent, the owner asserted in *Central Valley* that it was error for the trial court to permit the jury only to hear evidence of the value of the underground storage rights based upon the size of the surface ownership, and to exclude any evidence from the owner's expert which valued the underground rights based upon the capacity of the underground storage reservoir that underlaid the owner's property.

The Court of Appeal, however, upheld the ruling of the trial court that had excluded the owner's valuation testimony, and that had only allowed testimony valuing the underground storage rights based upon the number of surface acres owned. The Appellate Court noted that times have changed since *Zuckerman* was decided in 1987, and the evidence now demonstrated that there was a <u>private market</u> for underground storage rights, and every sale involved in that private market based the amount paid for the storage rights, solely upon the number of surface acres owned by the private property owner. There was no evidence of any sales in the private market for underground storage rights that were based upon the size of the portion of the underground reservoir that fell within a property ownership. Since there was now a private market for such rights, Evidence Code § 823 and Code of Civil Procedure § 1263.320, subd. (b) were no longer applicable, and the only valuation methodology allowable is the methodology actually utilized in the marketplace.

Practical Lessons: There is a tendency by many judges to liberally permit evidence to be introduced to a jury in condemnation cases, thus allowing the jurors to weight the persuasiveness of the all of the evidence and allowing the attorneys to argue to the jurors why specific evidence should not be given credence. There have been a number of important condemnation cases during the past few years where the appellate courts have rebuked lower courts for excluding evidence from the jury and have ordered the cases to be retried with the evidence admitted. This appellate court went the other way and specifically stated: "[c]ourts, both trial and appellate, have the responsibility of insuring that an expert's determination of value takes into account only reasonable and credible factors." (*Central Valley*, at p. 720.) While attorneys may think they can throw anything up and see what sticks to the wall (like I used to do with spaghetti when I was a youngster), this case is authority that if the valuation evidence cannot be verified by what goes on in the real world marketplace, the jury should not see or hear the evidence. The exception occurs only when the property involved is one where there is no relevant, comparable market.

Mike Rubin
Rutan & Tucker, LLP
mrubin@rutan.com

WHEN DOES 1 + 1 Equal 1?

Or what is the property unit that is looked to when assessing whether a land use restriction is tantamount to a taking of property?

Case Report for Chapter 67, IRWA September 12, 2017 Luncheon Meeting
Murr v Wisconsin 137 S. Ct. 1933 (2017) – United States Supreme Court regulatory taking decision.

Why should Right of Way Professionals Care about this case?

It is an unusual year when the United States Supreme Court renders a decision relevant to eminent domain practitioners. While most right of way professionals (as opposed to public entity planners and decision makers) are not involved with regulation of land use, right of way professionals need to be aware of major developments in takings law in order to talk the talk, to be part of the relevant conversation. Besides, you look clever when you make 1 + 1 equal 1.

Background Facts.

The property owners (Murrs) owned two adjacent 1.25 acre parcels on the St. Croix River in Wisconsin, a scenic river designated as a federally protected river area in 1972 under the Wild & Scenic Rivers Act. One (Lot F) was acquired in 1994 and the other (Lot E) was acquired in 1995. Wisconsin state and local regulations provided well before 1994 that if a person owns adjacent parcels along the riverfront, they can only be separately sold or developed if they each have more than 1 developable acre. Because of the terrain, the developable acreage on the total 2.5 acres was less than 1 acre, so the regulations precluded sale of one lot without the other, and precluded developing them as two separate lots, effectively merging the two parcels into one, absent a hardship exemption from the regulations. The Murrs desired to sell Lot E to raise funds to develop Lot F and sought, but were denied, a hardship exemption from the local entity. They sued alleging that but for the common ownership of both properties, the parcels could be separately sold or developed, and the regulations effectuated a “taking” of Lot E for which just compensation must be paid.

For purposes of the summary judgment, the Court accepted the allegation that as an undevelopable separate lot, Lot E was worth only $40,000. The Court also accepted that Lots E & F were reduced in value to a total of $698,000 if treated as a single merged parcel, whereas the two parcels would be worth a total of $771,000 if they were allowed to be two separate buildable parcels (as they would be if they were in separate ownership).

At the trial court, the Murrs argued that whether there was a taking or not had to be evaluated based upon the impacts of the regulations on Lot E alone, since Lot E was a distinct legal parcel under state law. The trial court disagreed and granted summary judgment to the State, holding that whether there was a taking must be evaluated based upon what state law considered to be the parcel, and since the parcels were treated as merged under state law, there could only be a taking if the merged parcel met the test for a taking (and it did not). This judgment was upheld by the State Court of Appeals leading to the review of the decision by the United States Supreme Court.

Issue & Analysis: In determining whether regulations have so great an impact on private property that they constitute a taking under the Fifth Amendment, what is the proper unit of property against which to assess the effect of the challenged governmental regulation?

While there was a time when it may have been felt that a taking of property only occurs when private property has been physically occupied by governmental action, the U.S. Supreme Court held in an opinion by Justice Holmes in *Pennsylvania Coal Co. v Mahon*, 260 U.S. 393 (1922) that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S., at 415. Over the years, the U.S. Supreme Court has developed two separate tests for when land use regulations effect a taking. As summarized in the Murr opinion (at pp 1942-43): "First, 'with certain qualifications …a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings clause'". [citing *Palazzolo v Rhode Island* 533 U.S. 606, 617]. The second test was summarized as follows (at p. 1943):

> Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

The first test is extremely hard to meet since loss of all economically beneficial use is required. The second test, often referred to as the "Penn Central" factors, after the U.S. Supreme Court case where it was first articulated, is highly factually, and arguably subjective, particularly in its reliance on the "expectations" of the owner. It requires an inquiry into what expectations are reasonable given all of the circumstances applicable to the owners, the property and the community.

Either of these tests require an assessment of the severity of the restrictions on the property in question. But the question never before answered was: what is the unit of property that is looked to in applying these tests? If one were to look at only Lot E, and note that it cannot be sold individually, or developed individually, and that its value dropped to $40,000 with the restrictions, whereas it could be sold for $398,000 as a separate developable lot, the argument for a taking is much stronger than if one were to look at the combined parcels as being the relevant unit of property to which the takings tests are applied.

The U.S. Supreme Court determined that the relevant unit in this case was the two lots together, but the Court rejected both the bright line rule proposed by the property owners (any distinct legal parcel must be viewed as a separate economic unit), and the bright line rule proposed by the State (accept all state regulations to define the parcel, including the challenged merger regulations). Instead, the Court stated (at page 1945):

> [N]o single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.

Applying this multi-layered test, the court determined that the property unit to scrutinize for taking analysis were the two lots together since (i) state law provided for a merger of the parcels, and this restriction pre-dated the ownership of the parcels, (ii) the physical terrain made it challenging to utilize the parcels separately and they were located in an environmentally protected area, and (iii) the value of the properties as merged lots was only 10% less than their combined values as separately developable lots.

Five Justices joined in the opinion by Justice Kennedy, while three dissented including Chief Justice Roberts and Justices Thomas and Alito (newest Justice Gorsuch did not participate). The dissenters pointed out that the test for a taking was a complex multi-factored analysis that included the distinct investment-backed expectations of the owner, and now a similar multi-factored test gauged to expectations of the owner has been created to determine the parcel unit. Seeing the use of the complex test for one prong of the takings analysis as enough complexity, they urged that the parcel unit always be the boundaries used for distinct parcels under state law (in which case 1 + 1 would continue to equal 2).

Joe Munsey
SoCalGas
JMunsey@semprautilities.com (949) 361 8036

UH, IS THAT YOUR BEDROOM IN MY YARD?

(How to Avoid Lawsuits Over Survey and Boundary Disputes)

By Chuck West, Esq., CCIM

Originally Published August 2017 in the "WestLine News"

A new owner moves into the neighborhood. She has a surveyor check that her rear fence is accurately on the property line before she replaces the old fence with a new one. The surveyor has some bad news: the fence is not on the property line at all. In fact, the property line cuts through the swimming pool and a corner of the living room. How could this happen on an estate property with a large piece of land and a tennis court? It turns out that the property, located in Los Angeles, has a non-permitted pool and family room addition that were partially built in a city-owned 200' right-of-way. The buyer calls her attorney and sues the seller, agents, and title company.

If you think this is an isolated case, think again. Boundary disputes are a frequent cause of lawsuits, as are road rights-of-way and easement issues. Some states require that a property have a survey before the transaction closes; other states have no survey requirement.

In a recent case, the seller was asked by the buyer, "Can I add on to this one-level house to accommodate the needs of my ailing wife?" He said, "You have about 20' to expand here at the side yard until you get to the curb." It turned out that the corner property, with no sidewalks in an upscale neighborhood, had a 20' city right-of-way wrapping around the corner. The buyer had relied on the seller's representation due to his experience with the property. After the close, the buyer discovered he could not get a permit for an addition because of set-back requirements from the city right-of-way. The broker and agent claimed they knew nothing about the city right-of-way for sidewalks and greenbelt, although this brokerage had sold many homes in the area. The lesson: if you're going to offer guidance to buyers, you had better be familiar with city rights-of-way and rules on easements in the area.

Property owners cannot build structures in utility easements or easements allowing access by others. In one case, a buyer discovered the neighbor's property line ran through the home's living room. Does this mean the property owner has to remove the living room? Does the owner in the first example have to remove her swimming pool? It depends – on what the neighbor (or the City of Los Angeles in the first example) wants. Almost inevitably, these situations result in lawsuits.

What can be done to prevent this type of suit? Buyers should ask sellers if they have had a land survey, and if so, provide a copy to the buyer. If there is no survey available, buyers should be advised in writing to have a survey done.

Buyers have also sued because they later found out the land was smaller than they were told or could not be subdivided as they had expected. Lot size may be a factor in building department regulations regarding the size of house that can be built and setback requirements. What other homeowners have done in the area may not be a valid barometer as laws are changing and so is enforcement. Buyers of raw land should also have a survey to determine what they are allowed to do with the property. While land surveys can be quite expensive, depending on the size and topography of the land, they're not as expensive as the lawsuit that can result without one. ~ Barbara Nichols (REALTOR® Magazine)

Mr. West can be reached at cwestucla@yahoo.com.

IRWA
CALIFORNIA INLAND EMPIRE
CHAPTER 57

2017 Education Seminar & Casino Night Fundraiser

"Through the Eyes of the Property Owner"

WHEN: Friday, October 13th, 2017
Luncheon & Seminar: 12 – 5
Reception, Casino Night
& Costume Party: 5 – 10

WHERE: Vellano Country Club
2441 Vellano Club Drive
Chino Hills, CA 91709

WHAT: Keynote speaker and panel of professionals presenting an in depth look at the acquisition process "Through the Eyes of the Property Owner"

KEYNOTE SPEAKER:

Honorable John Kennedy (Ret.)

PANELS OF PROFESSIONALS:

Moderator: Mark Easter, Partner, Best, Best & Krieger
Appraisal: Beth Kiley, MAI, AI-GRS, President, Kiley Company; Steve Parent, MAI, SRA, AI-GRS, SR/WA, PMP, Director, Bender Rosenthal; Brad Bassi, Certified Residential Appraiser, Perdue, Russell, Matthies & Fusco Real Estate Appraisal
Acquisition: Brett Paulson, SR/WA, R/W-NAC, RAC, Project Director, CPSI; Vicky Cook, Program Manager, Overland, Pacific & Cutler; Jennifer Cole, Senior Right of Way Tech, HDR
Legal: Jennifer Dienhart, Partner, Murphy & Evertz; Jessica Lomakin, Associate, Best, Best & Krieger; Bradley Pierce, Principal, Pierce Law Firm; Kevin Day, Shareholder, Alvarado Smith; Glenn Block, Partner, California Eminent Domain Law Group
Property Owner Portrayal: Ruby Arellano, Right of Way Management Analyst, RCTC

COST:

Education Seminar Only: $70 per person
Casino Night Only: $40 per person
Full Day/Evening Ticket: $99 per person

SPONSORSHIP OPPORTUNITIES

Hawaiian Vacation - $1,500
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Diamond Sponsor - $1,000
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Epic Land Solutions
Reception/Appetizers - $700
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Please contact
Christie Santolucito, R/W-AC
at 951-225-3500 x 101 or
christie@sdgroupinc.com

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4 hours of IRWA and BREA credit (pending)

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19210 S. Vermont Avenue, Building A, Suite 100
Gardena, CA 90248
Phone: (310) 538-0233
www.irwaonline.org

Course 701: Property/Asset Management: Leasing 10.23-24.2017 Irvine, CA

Course 701: Property Management Leasing

Course Description:
In this course, participants will learn the fundamentals and practical aspects of leasing through exercises, case studies and sample documents. Participants will gain a clear understanding of the reasoning and rationale behind leasing decisions. This course emphasizes the practical aspects of leasing, specifically focusing upon two leasing situations: acquisition leases (when the agency is the lessee) and revenue leases (when the agency is the lessor). Special consideration is given to the complex problems which can arise when the lessee will construct substantial improvements.

Topics:

- Preface and introduction of asset and property management
- Leasing program overview
- Building “the team”
- Decision making
- Leasing negotiation and documentation
- Leasehold administration

Course Level:
Intermediate

Course Tuition Includes:
Participant Manual

Who Should Take This Course:
This course is intended for right of way professionals and individuals who manage properties for lease.

Course is approved by the California Bureau of Real Estate Appraisers for 15 units of continuing education credit
Approval number: 14CP382501018

Last Name First Name

Title

Company Name

Address

City, State, Zip/Postal Code

(_____)_____-_____ □ Yes □ No
Phone Member

Member ID Number

Email Address

If payment includes the fees for registrants other than yourself, check here: ☐
(Please submit names of other registrants on a separate paper along with this form)
Will you also be attending? □ Yes □ No

	Registration Deadlines	Member Tuition	Non-Member Tuition	Total Tuition Amount
On and Before:	**Oct. 12, 2017**	$415.00	$520.00	_____
On and After:	**Oct. 13, 2017**	$440.00	$545.00	_____

Total Member Registrants: _____

Total Non-Member Registrants: _____

PRINT NAME AS IT APPEARS ON CARD: _____ **3-DIGIT CVV:____**

AMEX ☐ **MC** ☐ **VISA** ☐ **Card #:** _____ **EXP:**_____

SIGNATURE: _____ **Date:**_____ **Amount to be Charged:** _____

Course 701: Property/Asset Management: Leasing 10.23-24.2017 Irvine, CA

Sponsor: IRWA Chapter 67
Date: October 23-24, 2017
Time: 2 days – 8 AM to 5 PM Daily
City: Irvine, CA

Class Location:
Las Lomas Community Park
10 Federation Way
Irvine, CA 92603
Participant Capacity: 25
Contact: Rudy Romo
Phone: (949) 724-6845

Four Ways to Register:
Online: www.irwaonline.org
Fax: (310) 538-1471
Phone: (310) 538-0233, x138
Contact Course Coordinator

Accommodations:
Holiday Inn Santa Ana - Orange County Airport
2726 S. Grand Ave
Santa Ana, CA 92705
Phone: (714) 481-6300
Contact hotel directly for rates and reservations

Course Coordinator:
James Vanden Akker, ARWP
Overland, Pacific & Cutler, Inc.
1 Jenner, Suite 200
Irvine, CA 92618
Phone: (949) 951-5263
Fax: (949) 951-6651
Email: jvandenakker@opcservices.com

Course Instructor:
Georgia S. Snodgrass, SR/WA, R/W-NAC, R/W-AMC, is a popular Instructor for the CLS-Professional Development Institute (Contract Land Staff) as well as for the IRWA. She obtained her Bachelor of Science Degree in Business Education from Eastern Kentucky University, Richmond, Kentucky and obtained her Master of Science Degree in School Business Administration from Pepperdine University, Malibu, CA. Prior to joining Contract Land Staff, she was a Real Estate Representative III for the San Antonio River Authority with responsibility for acquisition and project management oversight on behalf of the River Authority, plus additional oversight responsibilities for the asset management program. Prior to the River Authority, Ms. Snodgrass was the chief negotiator for the San Diego Unified School District and was responsible for their asset management program for 32 years. She is past Chair of both Regions 1 and 2 and Past Chair of the International Membership Committee. She has been approved since 2007 to teach the 700 Series of IRWA Asset Management Courses as well as IRWA Communications Courses 205 and 213. In addition, she is a Certified Course Coordinator for her chapter.

Cancellation Policy: All classes scheduled by IRWA are subject to cancellation. All class registrants must contact the Course Coordinator prior to making travel arrangements, keeping in mind that the class may be cancelled at any time (for reasons including, but not limited to, insufficient registration, Instructor emergencies or other issues beyond the control of the chapter and/or IRWA). Fully liquidated damages for any losses incurred by a class registrant are limited solely to a refund of the registrant's prepaid class tuition. IRWA and its chapters assume no other registrant liability resulting from class cancellation.

Tuition Refund Policy: Written notification of intent to cancel registration must be received via email by both the Course Coordinator and IRWA Headquarters Education Staff (education@irwaonline.org) prior to the class start date in order to be eligible for a tuition refund. A full tuition refund will be issued if notice is received 15 days or more prior to the class start date; a 75% refund will be issued if notice is received less than 15 days prior to the class start date, and no refund will be issued for notice received on or after the class start date.