



50th Annual Litigation Seminar

INVERSE CONDEMNATION – OR IS IT?

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AN OVERVIEW OF INVERSE CONDEMNATION

1. ORIGIN: California Constitution, Article I, Section 19 provides that private property shall not be taken or damaged for public use without just compensation
2. NATURE OF ACTION: Lawsuit filed by property owner vs. public agency/utility
 - A. Appropriation or invasion of property right by a public entity
3. BURDEN OF PROOF: Unlike direct condemnation, owner must prove property taken or damaged
4. ELEMENTS OF INVERSE CONDEMNATION CLAIM
 - A. Ownership of private property
 - B. Agency participation in public project
 - C. Taking/Damaging of property
 - D. Causation



AN OVERVIEW OF INVERSE CONDEMNATION (CONT.)

5. JUST COMPENSATION

- A. Principles of compensation and valuation same as in direct condemnation
- B. Valuation exchange procedures differ from direct condemnation
- C. Recovery of Attorneys' Fees if Agency found liable in Inverse
 - 1. Not contingent on amount of verdict
 - 2. No Final Offer/Demand process in Inverse

6. THE DEVIL IS IN THE DETAILS!: WIDE VARIETY OF CASES ON WHAT DOES AND DOES NOT CREATE INVERSE LIABILITY. THREE GENERAL CATEGORIES:

- A. Property damage cases, including but not limited to flooding
- B. Regulatory takings: where government regulation and exercise of power is so restrictive that it amounts to a taking – where regulation prohibits all economically beneficial use of land. (*Lucas v. South Coastal Council* (1972) 505 U.S. 103)
- C. Direct condemnation “fallout” cases: where there has been some defect or mistake made by the public agency in exercising its eminent domain power, or some abuse by the public agency of its eminent domain authority



WHAT IS INVERSE?

1. Agency fails to use direct condemnation when it should have or could have
 - A. Example: Agency doesn't acquire easement to address impacts such as drainage, noise, dust or fumes
 - B. Agency may assume damage is minimal
 - C. Agency may assume damage not compensable (police power)
2. Government delays filing eminent domain action for more than 6 months after adopting a Resolution of Necessity (CCP section 1245.260)
3. Acceptance and use of a street or drainage system dedicated by a developer (*Marin v. City of San Rafael* (1980) 111 Cal. App. 3d 591.)
4. Negligent maintenance of public improvement (*McMahan's of Santa Monica vs. City of Santa Monica* (1983) 146 Cal. App. 3d 683.)



WHAT IS INVERSE? (CONT.)

5. Exceeding the scope of existing easements.
 - A. Example: An agency who only holds an access easement cannot use it for utility purposes or give a utility an easement within that area
 - B. Example: You cannot use an underground utility easement as a TCE or staging area during construction
 - C. Compare--additional uses within existing easements is NOT inverse, as long as the new use does not exceed the scope of the easement rights--such as cable television installation within existing utility easements. (*Salvaty v. Falcon Cable Television* (1985) 165 Cal. App. 2d 798.)
6. Damage from a fallen tree owned by City--where the tree was part of a public improvement (*City of Pasadena v. Superior Court* (2014) 228 Cal. App. 4th 1228.)
7. Interference with access that is substantial and unreasonable (*Bacich v. Board of Control* (1993) 23 Cal. 2d 343.)



WHAT IS INVERSE? (CONT.)

8. Loss of visibility – But only from a roadway (not freeway) when the property owner has abutter's right to the street. (*People ex rel Dept. of Public Works v. Stevenson & Co.* (1961) 190 Cal.App.2d 103.)
9. The existence of a court order not an automatic shield: *City of Needles v. Griswold* (1992) 6 Cal. App. 4th 188
 - A. City terminated private party's license to operate a municipal golf course
 - B. City got court order/injunction allowing City to take possession of golf course and equipment and operate golf course
 - C. City liable in inverse for failing to use its eminent domain power



WHAT IS NOT INVERSE?

1. Loss of visibility alone, without an actual taking. (*Regency Outdoor Adver. Inc. v. City of Los Angeles* (2006) 39 Cal. 4th 507.)
2. Loss of an obstructed view where no physical invasion by agency (*Boxer v. City of Beverly Hills* (2016) 246 Cal. App. 4th 1212.)
3. Approval of plans/issuance of permits on a private development (*Ellison v. City of San Buenaventura* (1976) 60 Cal. App. 3d 453.)
4. Mere threat of future damage--*Wildensten v. East Bay Regional Park Dist.* (1991) 231 Cal. App. 3d 976--agency not liable for refusing to stabilize land to reduce threat of landslide to neighboring property
5. Mere purchase/assemblage of surrounding vacant land--where there is no planned/approved public project. No inverse claim just because the land around you is now owned by the government. (*Los Angeles v. Superior Court (Plotkin)*(2011) 194 Cal. App. 4th 210.)



WHAT IS NOT INVERSE? (CONT.)

6. Loss of future profits, in the absence of any taking, damage, or restriction (*Andrus v. Allard* (1979) 444 U.S. 51.)
 - A. The loss must be caused by the taking or damaging of property.
 - B. Similar rule with the recovery for loss of goodwill in direct condemnation actions. (CCP 1263.510)
7. Government enforcement of rights of free speech on a private shopping center-where the value/use of the real property is not unreasonably impaired. (*Pruneyard Shopping Ctr. .v. Robbins* (1980) 447 U.S. 74.)
8. Damages adjudicated or contemplated as severance damages in a previous eminent domain proceeding or acquisition.
 - A. Owner/successor is estopped from a bringing a subsequent inverse claim
 - B. Owner presumed to have been compensated regardless of whether the owner used the severance damages award to mitigate the impacts
 - C. Compare: Buyer with knowledge of damage may still have a claim-was the inverse claim assigned to them?
9. Damage to property caused by the police in making an arrest--(*Customer Co. v. City of Sacramento* (1995) 10 Cal. 4th 368.)



Examples:

Impairment of Lateral or Subjacent Support

1. What is Inverse Condemnation
 - A. When a public project impairs the lateral or subjacent support of property owner's adjoining land. (*Holtz v. Superior Court* (1970) 3 Cal.3d 296.)
 - B. Groundwater extraction program causes subsidence. (*Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670.)
2. What is not Inverse Condemnation
 - A. Public ownership of raw land adjacent to private property that had landslides onto public land. Mere ownership of land does not constitute a public project or undertaking. (*Wildensten v. East Bay Regional Park Dist.* (1991) 231 Cal.App.3d 976.)



Examples:

Liability for Airport Noise

1. What is Inverse Condemnation
 - A. There can be liability for reduction in value of property caused by airport noise. (*Parker v. City of Los Angeles* (1974) 44 Cal.App.3d 556.)
2. What is Not Inverse Condemnation
 - A. Court found there was no damage as a result of airport noise. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920.)



Examples: Unreasonable Precondemnation Delay

1. What is Inverse Condemnation
 - A. When State knew that City had restricted property owner's right to develop property based on State's plan to use property for freeway, and State delayed acquisition process after City notification that State should acquire property for freeway. (*People ex rel. Dep't of Transportation v. Diversified Properties Co. III* (1993) 14 Cal.App.4th 429.)
 - B. When proposal to acquire strip of road widening made parcel undevelopable for three years and impaired marketability of developed parcel. (*Los Angeles v. Tilem* (1983) 142 Cal.App.3d 694.)
2. What is Not Inverse Condemnation
 - A. Planning activities. (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110.)
 - B. Designation of property as potential park site is not sufficient announcement of intent to condemn. (*Guinnane v. San Francisco* (1987) 197 Cal.App.3d 862.)
 - C. Adoption of redevelopment plan, recordation of plan, sale of bonds, and application for federal funds is not sufficient announcement of intention to condemn. (*Cambria Spring Co. v. Pico Rivera* (1985) 171 Cal.App.3d 1080.)



Examples: Impairment of Access

1. What is Inverse Condemnation
 - A. Substantial temporary impairment of access. (*Jones v. People ex rel. Dep't of Transportation* (1978) 22 Cal.3d 144.)
 - B. Lowering of street, separation from sidewalk by guardrail, and closing of another abutting street was substantial impairment of access. (*United Cal. Bank v. People ex rel. Department of Public Works* (1969) 1 Cal.App.3d 1.)
2. What is Not Inverse Condemnation
 - A. As long as basic right of access is preserved, public entity is entitled to enact and enforce reasonable traffic regulations. (*People v. Ayon* (1960) 54 Cal.2d 217.)
 - B. Taking of substantial part of subdivision for freeway did not require compensation to owner of shopping center who lost access to potential customers. (*Hecton v. People ex rel. Dept. of Transportation* (1976) 58 Cal.App.3d 653.)
 - C. No substantial impairment of access when freeway construction required property owner to travel two or three blocks further to reach property. (*Wagner v. California ex rel. Department of Public Works* (1975) 51 Cal.App.3d 472.)
 - D. Building center diver in street abutting property owner's property. (*Holman v. State of California* (1950) 97 Cal.App.2d 237.)



Examples: Impairment of View and Access to Light and Air

1. What is Inverse Condemnation
 - A. Owner of property abutting on public road as right to light and air from road and right to compensation if such right is taken. (*People ex rel. Dep't of Public Works v. Symons* (1960) 54 Cal.2d 855.)
2. What is Not Inverse Condemnation
 - A. No “right to be seen” for owner of billboards that claims property is less valuable as a result of City planting palm trees along a City-owned street. (*Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507.)
 - B. Unsightly physical structure placed on neighboring property does not create a direct, substantial and peculiar burden on the property when it does not disrupt the use or enjoyment of the property. (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521.)



Examples: Water Damage

1. What is Inverse Condemnation
 - A. Diversion of water from natural watercourse causing damage to property owner's property. (*Bauer v. County of Ventura* (1955) 45 Cal.2d 276.)
 - B. Installation of storm drain that clogged and diverted natural flow of waters onto property owner's property. (*Ward Concrete Co. v. Los Angeles Flood Control Dist.* (1957) 149 Cal.App.2d 840.)
 - C. Inadequate maintenance of flood control project. (*Arreola v. Monterey County* (2002) 99 Cal.App.4th 722.)
 - D. Increased volume or velocity of surface waters discharged into natural watercourse if public entities fail to use reasonably available, less injurious alternatives. (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327.)
2. What is Not Inverse Condemnation
 - A. Damages from floodwaters that overtopped its dikes because public agency's flood control measures to divert waters from natural watercourses were reasonable. (*Bunch v. Coachella Valley Water District* (1997) 15 Cal.4th 432.)
 - B. Discharging effluents into river from sewage treatment facilities, which allegedly caused excessive growth of vegetation in river channel, as public entity did not act unreasonably. (*Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245.)



Examples: Fire Damage

1. What is Inverse Condemnation

- A. “City was liable for fire damage when design and maintenance of wires caused risk of fire in high winds.” (*Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal. App. 3d 865, 873-74.)
- B. “The court held that a privately owned public utility could be held liable in inverse condemnation if the damage resulted from a public use. Damage to private property resulted from a wildfire, which plaintiffs alleged was caused by the failure of defendant's overhead power line equipment. Defendant argued that it could not be held liable in inverse condemnation, because it is a privately owned public utility. The court disagreed, holding that when a privately owned public utility engages in a public undertaking, such as transmission of electric power to the public, damage resulting from that undertaking can constitute inverse condemnation. The court noted that publicly owned utilities have been held liable in inverse condemnation in similar situations, and it declined to differentiate between damage resulting from the operation of a utility based solely upon whether the utility is operated by a governmental entity or by a privately owned public entity.” (*Barham v. Southern Cal. Edison Co.* (1999) 74 Cal.App.4th 744, 753.)



Liability for Regulatory Takings

1. What is a Regulatory Taking

- A. “A ‘regulatory taking’ occurs when some governmental action so restricts the owner's use and enjoyment of the property that it amounts to a ‘taking’ even though there is no physical invasion or damage to the property and no planned or formal exercise of the power of eminent domain.” (§ 23:23.Regulatory takings—Definition and overview of the issues, 7 Cal. Real Est. § 23:23 (4th ed.).)

2. Types of Regulatory Takings

- A. Physical Invasion: A regulation, no matter how minor, that compels the physical invasion of property requires compensation. (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428, 434.)
- B. Denial of all economically viable use: A regulation may result in a “taking” of private property that requires compensation to the owner if it denies the property owner of all economically viable use of property. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1019.)



Examples: Zoning and Land Use Regulation

1. What is Inverse Condemnation

- A. “Delay in issuing demolition permit for fire-damaged hotel constituted temporary regulatory taking, when delay was caused by city’s enforcement of restrictions in its residential hotel ordinance despite prohibitions of Ellis Act [Gov. Code § 7060 Et seq. (allowing landlords to go out of business by withdrawing their rental units from market provided landlords comply with Act’s requirements)].” (*Ali v. City of Los Angeles* (1999) 77 Cal. App. 4th 246, 254-255.)

2. What is Not Inverse Condemnation

- A. “Change in zoning that results in diminution in value of property is valid and not basis of cause of action in inverse condemnation.” (*HFH, Ltd. V. Superior Court* (1975) 15 Cal. 3d 508, 513-518.)
- B. “Public entity was not liable for refusal to rezone plaintiff’s property in manner that would increase its value.” (*Gilliland v. County of Los Angeles* (1982) 126 Cal. App. 3d 610, 614-617.)



PREVENTION

1. Get accurate surveys and legal descriptions!
2. Easement definitions
 - A. Clear "labels": call them what they are
 - B. Too broad-risk paying higher compensation, potential right to take challenge
 - C. Too narrow: risk exceeding the scope or improper use of easement in the future
 - D. TCEs: use clear notice provisions and be generous and as specific as possible on the time period
3. Always get title insurance!
4. Precision in pre-condemnation steps (Notice of intent to appraise, appraisal/offer, notice of RON hearing)
 - A. Defective pre-condemnation steps lead to inverse and attorney's fees liability
 - B. Trend: attack on pre-condemnation appraisals as a right to take challenge



PREVENTION (CONT.)

5. Agencies: avoid unnecessary promises of future benefits such as soundwalls, landscaping work, access points
 - A. Property owners: make sure any such promises are in writing and are authorized-agencies cannot be bound by estoppel based on staff representations
6. Communications with property owners during planning process
7. Owners buying property: document assignment of any known or unknown inverse claims



STRATEGY

1. Acquisitions, Settlements and Judgments: document and record evidence that compensation paid for damages for construction of the project in the manner proposed
 - A. Final Orders of Condemnation
 - B. Grant Deeds
2. In a damages case, agency should assert in its pleadings that it wants an easement in its favor if there is a finding of liability. (*Steiger v. City of San Diego* (1958) 163 Cal. App. 2d 110.)
 - A. Cross-complaint for Declaratory Relief
 - B. Owner should join, as cross-defendants, all parties that have an interest in the real property
3. Bifurcation
 - A. Liability Phase
 - B. Just Compensation Phase



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