

Recent Developments in Inverse Condemnation Law

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Inverse Condemnation

By the end of this session, participants will leave with a better understanding of

- § What inverse condemnation is
- § How inverse condemnation affects them
- § Why inverse condemnation is an issue and why they should be concerned.

Inverse condemnation claims have become more prevalent lately, due to recent California case law broadly applying the theory to flooding, earth movement and sewer backup claims, together with “regulatory inverse” land use claims. Inverse condemnation theory, based on the U.S. and California constitutions, imposes strict liability without a showing of fault, and without the government claim notice requirements and defenses (chiefly, design immunity and natural condition immunity) available under the Tort Claims Act, and exposes public agencies to a plaintiff’s attorney fees and expert witness costs. To further complicate matters, most insurance carriers and pools restrict or eliminate coverage for inverse condemnation claims.

Our panel will discuss all of these issues, including the legal elements of inverse condemnation claims, defenses, and coverage issues, together with “war stories” illustrating the problems these claims present.

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“Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.” *California Constitution*, Article I, Section 19.

Flooding Cases

Arreola v. County of Monterey(2002) 99 Cal.App.4th 722. “We conclude that in order to prove the type of governmental conduct that will support liability in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action – or inaction – in the face of that known risk.” “Knowing that failure to properly maintain the Project channel posed a significant risk of flooding, Counties nevertheless permitted the channel to deteriorate over a long period of years by failing to take effective action to overcome the fiscal, regulatory, and environmental impediments to keeping the Project channel clear. This is sufficient evidence to support the trial court’s finding of a deliberate and unreasonable plan of maintenance.” State diversion or obstruction of surface water onto land “not historically subject to flooding” is not protected by reasonableness rule, but results in strict liability.

Skoumbas v. City of Orinda (2008) 165 Cal.App.4th 783. Diversion of surface waters into a natural watercourse creates liability only if it causes an unreasonable risk of harm under *Locklin* factors and is a substantial cause of damage. Flood control system that “fails in heavy rain and causes damage to property that has historically been subject to flooding” governed by rule of reasonableness. City could be liable even if its storm drainpipe discharged into a private pipe and the damage occurred “downstream.” ““We conclude the critical inquiry is not whether the entire system was a public improvement, but rather whether the City acted reasonably in its maintenance and control over those portions of the drainage system it does own.” “Substantial cause-and-effect relationship” is enough for liability even for downstream flooding.

Sewer backups

California State Auto Assn. Inter-Insurance Bureau v. City of Palo Alto (2006) 138 Cal.App.4th 474. “Inverse condemnation lies where damages are caused by the deliberate design or construction of the public work; but the cause of action is distinguished from, and cannot be predicated on, general tort liability or a claim of negligence in the maintenance of a public improvement. (Citations.) But damage caused by the public improvement as deliberately conceived, altered or maintained may be recovered.” “While the trial court found that neither tree roots nor inadequate slope caused the sewage backup into the McKennas’ home, and that the City had a regular program of maintenance for the sewer, it also found that the *blockage occurred in the main owned and operated by the City*. The purpose of the sanitary sewer is to carry wastewater *away* from the residence. The City’s sanitary sewer failed to carry wastewater away from the McKennas’ residence *because* of a blockage in the City’s main, and therefore, failed to function as intended.” “We believe that where, as here, there were three substantial factors in causing the sewage backup, namely, tree roots invading the porous clay pipe of the sewer main, inadequate slope, and standing water in the main, the burden should shift to the public entity to produced evidence that would show other forces alone produced the injury.”

Levees

Tilton v. Reclamation Dist. No. 800 (2006) 142 Cal.App. 848. (Distinguishing *Arreola*.) “[I]nverse condemnation does not involve ordinary acts of carelessness in the carrying out of the public entity’s program.” “[S]imple negligence cannot support the constitutional claim.” “[A]lthough there may be liability in inverse condemnatin where levee failures are integrally connected with a flawed plan for those levees and/or flawed construction, there is no such liability where similar failures are the result of negligent or inadequate operation and maintenance.”

Regulatory Taking

Monks v. City of Rancho Palos Verdes (2008) 167 Cal.App.4th 263. “The city failed to meet its burden of justifying the moratorium – as applied to plaintiff’s lots – through evidence showing a reasonable probability of personal injury or property damage other than the possibility of damage to plaintiffs’ desired homes in the distant future – damage that could be repaired. A permanent ban on home construction cannot be based merely on a fear of personal injury or significant property damage.” “In essence, the city must show that, under common law nuisance principles, it could obtain an injunction against the construction of homes on plaintiffs’ lots. (Citation.) In obtaining such relief, the city would have to establish a reasonable probability of prevailing on the merits of a nuisance claim.” “The city must establish a reasonable probability of significant harm to obtain an injunction against a nuisance.” “For the foregoing reasons, we conclude that the city’s resolution effected a permanent taking of plaintiffs’ properties.”

Insurance Coverage

Stonewall Ins. Co. v. City of Palos Verdes Estates (1996) 46 Cal.App.4th 1629 “Inverse condemnation is sometimes the sole basis of a cause of action, as where liability is imposed without fault because it is caused by the use of public improvements deliberately planned and built. (Citation.) In other cases inverse condemnation is an alternative to other theories of recovery. (Citation.) In the latter instance, the inverse condemnation theory is significant only as it relates to the remedy – to the measure of damages. To the extent of the measure of damages for negligence and nuisance the City incurred a legal obligation to compensation [plaintiff] irrespective of inverse condemnation, and this form of legal obligation is covered by the relevant insurance policies and is not subject to the inverse condemnation exclusions.” “The City argues that it is impossible to attribute any specific part of the settlement to with inverse condemnation or negligence/nuisance liability, so that the exclusion is applicable to none of the settlement. This argument ignores the fact that the record includes a jury verdict from which allocation between insured and uninsured liability may be inferred once allowable costs attributable to the negligence and nuisance claims are determined.”