Obtaining Recovery for Property Damage through Inverse Condemnation

WHEN A CLIENT'S COMMERCIAL OR RESIDENTIAL real property has been damaged by landslide, flood, fire, or other natural disaster, the results can be financially and emotionally devastating. While a lawyer may review the client's potential insurance recovery and tort claims, one additional avenue for recovery that should not be overlooked is a possible action in inverse condemnation against a governmental entity or a public utility.

Under the constitutions of California and United States, a property owner is entitled to payment of "just compensation" for the taking or damaging of private property for "public use." This is true even when the taking or damaging is the unintended result of the design, construction, maintenance, or operation of a public project. Because this right is constitutionally based, the property owner need not prove that the government was negligent or that the incident giving rise to the damage was foreseeable, as might be required in a tort lawsuit. Demonstrating a cause-and-effect relationship between the public project and the incident giving rise to the damages, evaluated under the substantial factor test, may be all that the property owner needs to prevail. Traditional tort defenses, including governmental immunities and comparative negligence, are not available to the government in defense of an inverse condemnation lawsuit. The property owner's recovery may include the cost of repair, diminution in value, attorney's fees, expert fees, and other categories of damages.

Unlike an eminent domain case, in which the governmental entity is the plaintiff and seeks an order of condemnation, an inverse condemnation case features the property owner as the plaintiff. In an inverse condemnation case, the property owner seeks to establish that the government—perhaps unintentionally—took or damaged his or her property without formally condemning it, with the result that the government must pay damages as if it had deliberately chosen to take the property for public use.

Constitutional Bases

The Fifth Amendment to the U.S. Constitution and the California Constitution, Article I, Section 19 provide the constitutional bases for inverse condemnation law in California. Under these provisions, a citizen is entitled to compensation if his or her property is "taken" or "damaged." The two terms sometimes are used interchangeably. Substantial damage to private property equates to a taking. Inverse condemnation is the procedural device for redress when these constitutional provisions are violated.

The policy principle underlying inverse condemnation law is to ensure that the cost of any loss caused by public improvements—whether or not the loss is intended or foreseeable—will be spread throughout the community rather than imposed disproportionately on one or a few property owners. The courts have recognized this policy principle and the distinction between the constitutional basis for inverse condemnation and tort law principles for over 100 years. The fundamental justification for inverse condemnation liability is that the public entity, acting in furtherance of public objectives, in constructing or maintaining improvements, is taking a calculated risk that damage to private property may occur. Public entities treat uncertain costs or damages as deferred costs of the project when they build an improvement. If unforeseen costs or damages do arise, injuring private property, those costs should be recognized as having been inflicted in the interest of fulfilling the public purpose of the project and thus subject the government to a duty to pay just compensation to the injured property owner.

Strict Liability

With limited exceptions, a strict liability test applies in inverse condemnation cases. The California Supreme Court established the general rule of liability without fault in inverse condemnation cases in the landmark decision of Albers v. County of Los Angeles. In that case, a county of Los Angeles road-building activity triggered a landslide that damaged the plaintiffs' property. The trial court found that although the county was not negligent, it was still liable for inverse condemnation. The California Supreme Court affirmed, holding that any injuries to real property caused by government improvements are compensable under the constitution, whether foreseeable or not.

The Albers opinion used "proximate cause" terminology and eliminated foreseeability as an element of the claim. This caused some confusion. Professor Arvo Van Alstine suggested in an influential law review article that the true measure of proximate cause should be defined as a "substantial" cause-and-effect relationship which excludes the probability that other forces alone produced the injury. The cases following Albers adopted this test and established that the element of causation for inverse condemnation liability is satisfied when the public entity's project, action, or omission is a substantial contributing cause of the damage. If a public entity's project, act, or omission is one of several substantial causes of damage, the public entity is liable in inverse condemnation. The presence of other concurrent causes is irrelevant. Thus, the cases hold that to establish inverse condemnation liability, it is only necessary to show that the defendant public entity's conduct was one substantial cause, though there may be others, including the property owner's conduct. The strict liability standard of Albers was affirmed but slightly modified in Holtz v. Superior Court, which recognized that a public entity might act reasonably, and hence not negligently, in connection with a work of public improvement (in that case, excavation for construction of BART), yet the public entity still would be liable in inverse condemnation to a property owner damaged by the work of improvement. This modified the Albers "proximate cause" aspect of inverse condemnation liability. At a later phase of the Holtz case, the California Supreme Court held that recovery in inverse condemnation is based on the constitutional provision requiring just com-

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