Preparing for and Litigating Unexpected Inverse Condemnation Claims

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PREPARING FOR AND LITIGATING UNEXPECTED INVERSE CONDEMNATION CLAIMS

I.

Introduction

In the perfect municipal world, a land use ordinance prohibiting development in a designated and ancient landslide area would be viewed by the court as fair and reasonable; the abandonment of a road to a single already inaccessible home would not have been deemed a compensable taking; the removal of a driveway apron within the city's right of way in order to reconstruct its road would not have been a physical taking; and the revocation of a building permit to stop unauthorized and unpermitted construction would be deemed a justifiable exercise of police power.

Unfortunately, that perfect world likely will never be achieved as the courts struggle to reconcile the conflict between the exercise of local governmental powers for the public benefit, and private property rights. Being the defendant in four unique and unexpected inverse condemnation cases has provided our City Attorney's Office with a more in-depth understanding of the complexities of this area of law. The intent of this paper is to provide a broad overview of inverse condemnation law, and practical guidance learned from "in the trenches" litigation.

II.

Summary of Inverse Condemnation Law

Direct Condemnation v. Inverse Condemnation

The constitutional guarantee granted by both the Fifth Amendment to the United States Constitution and Article I, Section 19 of the California Constitution, requiring the payment of just compensation prior to the taking of private property for public use, may at first blush seem to be a relatively straight forward concept. It is the well intentioned exercise of a governmental police power or the enactment of a land use regulation, however, that can sometimes turn that straight forward constitutional guarantee inside out and lead to costly litigation. In the ideal situation, the city makes a finding of public necessity and then acquires private property through the filing of a direct condemnation action. In this case, the city is the initiator of the litigation and typically, the property owner is not disputing the public necessity for the acquisition of his property, and the only

issue to be determined by a jury is the amount of compensation to be paid. Conversely, inverse condemnation litigation is initiated by the property owner who is asserting that the city has taken or damaged private property, either temporarily, or permanently, without payment of just compensation.

While it may seem that a government action that results in a "taking" or "damage" to private property should be easy to spot and avoid, the action that has resulted in the alleged "taking" is usually inadvertent. The city, in most cases, has not engaged in the activity with the intent to take the property, but merely to assert some form of control over its use through the implementation of a regulation or an exercise of its police power to protect public health, safety, and welfare. The four elements in an inverse condemnation case that the plaintiff must prove are: 1.) plaintiff's ownership of the property allegedly taken, 2.) participation by the city in a public project or enactment of regulation, 3.) taking or substantial damage to property, and 4.) causation.

Unlike a direct condemnation action, the primary issue to be determined in an inverse condemnation case is not the amount to be paid–though that may come later–but whether or not the city's action has risen to the level of a "taking." This is a mixed question of law and fact to be determined by the court. If the court determines that a taking has occurred, the matter of compensation may be heard by a jury just as it would be in a direct condemnation action.[1] Consequently, the parties often stipulate to a bifurcated trial, with the liability phase being determined by the court and the damages phase being heard by a jury. Where the parties cannot reach a stipulation, the court may properly order a bifurcated trial.[2]

Types of Taking under Inverse Condemnation

A claim for inverse condemnation may arise not only when there has been physical damage to real property, but may also arise over the taking of personal property,[3] or the taking of a vested right.[4] Additionally, inverse condemnation liability may be found even where the alleged taking of the property is temporary in nature.

The courts have recognized two categories of taking under inverse condemnation law: physical and regulatory. Regulatory takings fall within two subcategories: categorical takings, and takings subject to an "ad hoc" analysis.

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[1] *Marshall v. Department of Water & Power* (1990) 219 Cal.App.3d 1124, 1139-1141
[2] *Code of Civil Procedure* §598
[3] *Horne v. Dep't of Agriculture* (2015) 135 S. Ct. 2419, 2428
[4] *Lockaway Storage v. Cnty. of Alameda* (2013) 216 Cal.App.4th 161, 185

a. Physical Takings

Physical takings cases (not related to imposition of regulations) comprise a much smaller area of inverse condemnation case law. As its name suggests, a physical taking occurs when there is damage to, or a physical invasion of private property, that is proximately caused by an action or improvement constructed by the city, even if there is no negligence on the city's part.[5] Inverse condemnation actions alleging a physical invasion of property can arise from various causes, but are commonly seen in the form of damage caused by disturbance of land and water damage.

b. Regulatory Takings

A property owner may allege a regulatory taking by challenging the effect of the regulation on either a facial or as applied basis. "Generally, '[a] facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual.' [internal citation omitted.] On the other hand, '[a]n as applied challenge may seek ... relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied....'"[6]

The enactment of laws, regulations, or conditions that authorize or cause the physical invasion of private property, or deprive the owner of all economic use, are regulatory takings commonly referred to as "categorical" or "per se" takings, and generally, absent the existence of an affirmative defense, liability under inverse condemnation will be found.[7, 8] In cases involving a categorical taking, often the most fact intensive examination is not whether the taking occurred, but proving the existence of an affirmative defense. This is generally the case because an early examination of the facts by the city will demonstrate if a physical invasion occurred, or if the property owner has been deprived of all economic use of the property, and the city has chosen to proceed to trial with, what it believes, is a winning affirmative defense.

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[5] *City of Mill Valley v. Transamerica Ins. Co.* (1979) 98 Cal.App.3d 595, 600
[6] *NJD, Ltd. v. City of San Dimas* (2003) 110 Cal. App. 4th 1428, 1439 citing *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 961
[7] *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) U.S. 419, 421
[8] *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015

A compensable regulatory taking may be found when a regulation goes too far, but stops short of denying all economically viable use. In the seminal case, *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, the United States Supreme Court identified several factors that the courts could look to in determining whether or not a regulation went so far as to require payment of compensation. "*Penn Central* emphasized three factors in particular: (1) '[t]he 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.'"[9] This is an ad hoc analysis and the court need not limit its inquiry to these three factors in order to find a regulatory taking."[10]

III.

Examples of Unexpected Inverse Condemnation Liability

What follows are four short case studies of recent inverse condemnation trials held in the Santa Barbara Superior Court. All four of these cases resulted in some type of verdict/judgment against the City, with the City also being liable for attorney fees and costs. The first three cases were geographically linked and involved a relatively remote area of the City that is prone to landslides. The last case, *Corral v. City*, involves an inverse claim for a temporary taking of a vested right arising from the revocation of a building permit in the context of a code enforcement action. It is perhaps the most perplexing of these cases.

a. *Brost, Barajas, et al. v. City of Santa Barbara* (2010) SBSC No.: 1342979

Per Se Taking: The Landslide that Didn't Slide

Facts of the Case

This case was brought by Plaintiffs Brost, Canley, and Barajas, who owned property within an active landslide area in the City of Santa Barbara, known as Slide Mass C of the Conejo Slide. The Plaintiffs all resided on their properties at 478 Conejo Road, 17 Ealand Place, and 474 Conejo Road, respectively, until November 2008 when their homes were destroyed by a wildfire. The Plaintiffs were prevented from rebuilding their homes as the result of an ordinance adopted by the City in 1997 that prohibited new construction on properties entirely within Slide Mass C (hereafter the "Ordinance".)

[9] *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal. 4th 761, 775
[10] *Penn Central Transp. Co. v. City of New York* 438 U.S. 104, 124

In January 2010, the property owners contacted the City's Building Official inquiring about the possibility of rebuilding their homes. Citing the Ordinance, the Plaintiffs were informed that the Building Official had no discretion to allow reconstruction. The Plaintiffs never submitted a formal building permit application to rebuild their homes. The Plaintiffs relied on the City's Ordinance prohibiting new construction within Slide Mass C, as well as the statements made by the Building Official indicating that permits would not be granted, in determining not to apply to the City for a building permit. The Plaintiffs instead brought suit in 2010 alleging, among other causes of action, a regulatory taking of their property under inverse condemnation, as applied to the City's Ordinance.

Bifurcated Trial

The liability phase of the trial began in January 2012. The City argued that the Plaintiffs' claim under inverse condemnation was not ripe because they had failed to exhaust their administrative remedies. The City argued that the Plaintiffs had not submitted a permit application and given the City the opportunity to formally reject the application. By failing to submit an application they had deprived the City of an opportunity to reconsider its Ordinance through the administrative process. Since the Plaintiffs were challenging the effect of the Ordinance "as applied" to their property, they were required to exhaust all administrative remedies available through the City, and bring a challenge by writ of mandate prior to filing the inverse action. The Plaintiffs argued, and the Court agreed, that such an exhaustion of remedies was futile based on the language of the Ordinance, and the statements made by the Building Official that he lacked discretion to allow construction within the slide mass. The Court then found that "the City's [Ordinance] goes too far and effects a taking because it presents the extraordinary circumstances when no productive or economically beneficial use of [plaintiffs'] land is permitted." (Statement of Decision p. 21: 17 – 19.) The Court went on to conclude that "the City then has the option to amend [the Ordinance] to exempt plaintiffs' properties, to withdraw the [Ordinance], or to exercise eminent domain and proceed to trial on damages." (Statement of Decision p. 26: 24 - 26.)

The Court set the damages phase of the trial for October 2012 so that both parties could engage in expert discovery in order to assess the appropriate measure of damages. During this period, the City amended the Ordinance to provide that the "term 'new construction' shall not include the construction of a home on any legal parcel located entirely within Slide Mass C where the parcel contained a home which was destroyed by fire or other casualty after November 12, 2008." The amendment to the Ordinance reduced the "taking" of Plaintiffs' property from a permanent taking to a temporary taking measured from the date

the homes were destroyed by the fire in November 2008 to the date the City amended its Ordinance in March 2012.

The City waived its right to a jury, and the damages phase of the trial was heard by the Court. At trial the Plaintiffs argued that the proper measure of damages should be the value of the monthly fair market rent of the subject properties for the period of the temporary taking (i.e. approximately 3 ½ years), making, as Plaintiff's expert acknowledged, the "extraordinary assumptions" that the subject residences were rebuilt the day after the wildfire, and in the same conditions as if they had not burned on that date. The Plaintiffs valued the damages at:

478 Conejo Road (Brost): $130,000

17 Ealand Place (Barajas): $128,000

474 Conejo Road (Canley): $110,250

The City argued that Plaintiffs' measure of damages was flawed in that it was both extraordinary and highly speculative to surmise a fair market rent on residences that had not been rebuilt, without taking into consideration the transactional costs of rebuilding or maintaining those residences. The City asserted that the damages should be measured based on what existed after the November 2008 fire, i.e. bare land zoned for a single family home. The City acknowledged that since the "taking" was temporary, the value as of 2008 should be increased by the appropriate interest they may have earned on this sum (6%), with the total amount being the proper measure of their "takings" compensation.

The Court found the City's expert real estate appraiser, James Hammock, to be very credible and elected to use the value of the bare land approach in reaching its determination on damages. In the Statement of Decision the Court states, "[a]s I listen to [Mr. Hammock's] testimony I am not persuaded that the fair rental value [as asserted by the plaintiffs] is the appropriate method of determining the value of damages. The Court made site visits during the underlying case on liability. The likelihood of any of these folks rebuilding in this area, under the circumstances of this unusual fact scenario, appears speculative and remote. That leaves the only viable theory to support a damage award the value of the land at $200,000 at an appropriate rate of return." (Statement of Decision, p. 8, ln. 19 – 24.) The court then found that using Mr. Hammock's value of $200,000, including the suggested rate of return of 6% per year, the damages to the Plaintiff's total $12,000 per year (for three years), resulting in total damages to each plaintiff of $42,000.

Appeal & Attorney's Fees

After the damages phase of the trial was finished, the City appealed the Court's ruling on liability to the Second Appellate District, Division Six in July 2013, arguing (in part) that the trial court erred in finding that the Plaintiffs' takings claim was ripe for consideration because they failed to file formal applications to rebuild their homes. In its unpublished decision filed March 25, 2015, the Court of Appeal affirmed the trial court's judgment, finding that given the certainty of the properties' permitted uses, it agreed with the trial court that the Plaintiffs were not required to file formal development applications. Since the Ordinance precluded all development, the City's inevitable rejection of Plaintiffs' development applications was not necessary for the court to determine the extent of permitted development on the properties.

The Plaintiffs were awarded attorney's fees and expert costs in the amount of $648,522.94, which included fees, costs, and interest through the appeal.

b. *Barajas & Lucadello v. City of Santa Barbara* (2013)
SBSC No.: 1383054

Ad Hoc Taking: A Road to Nowhere Leads to Inverse Condemnation

Facts of the Case

This case involved a claim of inverse condemnation and private nuisance brought by two property owners, Plaintiffs Ruben and Pamela Barajas (collectively "Barajas") and Christine Lucadello, after the City vacated a portion of public roadway and cul de sac known as Ealand Place. Due to significant earth movement caused by frequent landslides, the lower portion of Ealand Place servicing the Plaintiffs' properties had been deteriorating for several years, until finally becoming completely impassible by vehicle in 2011. Based on an engineering study conducted by the City, it was apparent that the geological conditions in the area made it infeasible to permanently repair the lower portion of Ealand Place, and a temporary repair to service a single residence and two vacant lots would cost the City millions of dollars.

In determining whether or not to proceed with road reconstruction, the City evaluated the condition and feasibility of development of the Plaintiffs' properties at 17, 22, and 24 Ealand Place. The property at 17 Ealand Place had been purchased by the Barajas in the 1970's for $50,000, and destroyed by a wildfire in 2008. Since that property existed entirely within an active slide mass (see *Brost, Barajas, et al.* case study above) it was unlikely that another residence

could be built on the lot. Plaintiff Christine Lucadello had also purchased 24 Ealand Place (an undeveloped lot) in the 1970s for $5,000. During that period she made no significant attempts to build on the lot, and due to the close proximity to the slide mass, development would be difficult, if not impossible. The single residence at 22 Ealand Place had been purchased by the Barajas for $150,000 in early 2011 at a time when it was clear that the road was deteriorating rapidly and there was no longer driveway access to the home.

In June 2012, The City made the decision that it was in the best economic interest of the public to forego reconstruction of the road and vacate the impassible portion of Ealand Place. Shortly thereafter in 2013, Plaintiffs filed a complaint for inverse condemnation and private nuisance as a result of the City's vacation of the roadway, and failure to provide vehicular access to the properties.

Prior to trial, the Plaintiffs made a written offer to settle. The Barajas's offered to settle all claims, inclusive of attorney's fees and expert costs, in the amount of $796,500, which was broken down as follows:

- $198,000 compensation for diminution in value of 17 Ealand Place;
- $321,000 compensation for diminution in value of 22 Ealand Place;
- $100,000 in nuisance damages ($50,000 to each plaintiff);
- $161,000 in attorney's fees; and
- $16,500 in expert fees and costs.

Ms. Lucadello asserted that 24 Ealand Place had suffered a diminution in value in the amount of $200,000 and offered to settle all claims, inclusive of attorney's fees and costs for $307,000. Plaintiffs' settlement offers, to be paid by the City, totaled $1,103,500.

The City responded to Plaintiffs' offers by making its own settlement offer under Code of Civil Procedure section 998. The City offered to settle all claims and causes of action in the amount of $500,000; $350,000 offered as settlement to the Barajas's (inclusive of both plaintiffs) and $150,000 offered to Lucadello. The Plaintiffs rejected the City's offer and the parties proceeded to trial.

Bifurcated Trial

During the liability phase of the trial, the City argued that it could not be held liable for a regulatory taking because Plaintiffs could not prove that the vacating

of Ealand Place had *substantially impaired* access to the properties.[11] The properties were still accessible by short foot travel from the edge of the abandoned roadway to the residence, and the two unimproved lots. The court found the City liable for a regulatory taking under inverse condemnation, and the damages phase of the case was then heard by a jury.

After an approximate five day jury trial, the jury awarded the Barajas $100,000 for diminution in value to 22 Ealand Place, and $100,000 in diminution in value for 17 Ealand Place. The jury also awarded nuisance damages to Ruben Barajas in the amount of $4,500, and $2,000 to Pamela Barajas. Ms. Lucadello was awarded $105,000 for diminution in value to 24 Ealand Place. The total amount of damages to be paid by the City was $311,500, far less than the Plaintiff's pretrial settlement demand of $1,103,500. More importantly, however, the jury award was less than the City's CCP §998 offer of $500,000, which barred recovery of Plaintiffs' attorney's fees from the date the offer was made through trial, in an amount of approximately $200,000.

c. *Brost v. City of Santa Barbara* (2014) SBSC Case No. 1415549

Physical Taking: Taking Private Property in a Public Right of Way

Facts of the Case

This case involved an alleged physical taking under inverse condemnation of a portion of Plaintiff Luke Brost's driveway apron, located within the City's right of way. The apron was removed to facilitate reconstruction of the public street known as Conejo Road, which adjoined Mr. Brost's driveway. Reconstruction of the road was necessary due to the significant earth movement that occurred in the winter of 2011-2012, which severely damaged Conejo Road and caused it to slide downhill and outside of the City's right of way onto adjacent private property (not owned by Mr. Brost). Mr. Brost's driveway, leading to his vacant lot (see *Brost, Barajas, et al.* case study above), was connected on the uphill side to Conejo Road and slid downslope in conjunction with the City's road.

In the summer of 2012, the City initiated a significant roadway reconstruction project to return Conejo Road to the City's right of way, and make the road fully

[11] An action for inverse condemnation for impairment of access is based on a finding by the court of "substantial impairment of the right of ingress and egress, also known as the easement of access." *Border Business Park v. City of San Diego,* (2006) 142 Cal.App.4th 1538, 1551, 49 Cal.Rptr.3d 259, 269 (citing *Breidert v. Southern Pac. Co.,* (1964) 61 Cal.2d 659, 663, 39 Cal.Rptr. 903).

passable by emergency vehicle. During the road repair work, a portion of Plaintiff's driveway apron, which existed entirely within the City's right of way, was removed in order to complete construction of the road. This work was necessitated by both earth movement on Mr. Brost's property, and the earth movement that had shifted Conejo Road out of its actual right of way. The final design and reconstruction of Conejo Road within the City's right of way resulted in the slope differential between Mr. Brost's driveway and the road being greater than that which existed prior to the repair work, causing a disconnect between the remainder of Mr. Brost's driveway, and the paved portion of Conejo Road.

To remedy the situation, in December 2012, at Mr. Brost's request, the City constructed the necessary conforming asphalt improvements to reconnect his driveway to Conejo Road. The driveway apron was constructed by the City in conformance and compliance with City engineering standards for driveway aprons; however, to account for the new steeper grade between the driveway and the reconstructed road, the configuration of the driveway apron was narrowed at the connection to Conejo Road. Due to the new configuration, access to the driveway was easier via a downhill right hand turn, but was still possible from either direction. Mr. Brost objected to the new configuration and the City's use of asphalt material. Mr. Brost requested that the City replace the driveway apron "like for like," utilizing the same concrete material and design configuration that had existed prior to the road reconstruction.

The City refused on the ground that the driveway apron, which was constructed in the City's right of way, complied with the City's current code and engineering standards, and to return the driveway to its prior design would require the City to remove a portion Mr. Brost's concrete driveway and regrade the slope, all which existed on his private property. Mr. Brost then filed a single cause of action for inverse condemnation resulting from the impairment of access to his property caused by the City's removal and reconfiguration of the driveway apron.

Procedural History

The City moved for a judgment on the pleadings on the grounds that a governmental action that alters but does not eliminate road access is not an unconstitutional taking under eminent domain. Mr. Brost opposed the motion and argued that the City was misconstruing the complaint and ignoring the factual assertion that the City took a portion of his concrete driveway and replaced it with an inferior substitute. The Court agreed that by way of his complaint, Mr. Brost was alleging "two elements of harm": one was the limited

access to the driveway compared to what he had before the road construction, and the second was the physical removal of a portion of his concrete driveway.

The Court denied the City's Motion for Judgment on the Pleadings on the grounds that the complaint plead facts sufficient to prove that the City had damaged a portion of Mr. Brost's driveway, but it also held that no cause of action existed under inverse condemnation for the impairment of access arising from the driveway reconfiguration.

Trial

Due to the limited nature of the potential damage award, the City waived its right to a jury and the parties stipulated that the issue of liability and damages would be heard concurrently by the Court. At trial, the City asserted the defense of estoppel by deed and argued that it was immune from liability because it had removed only the portion of the driveway located within its right of way, and that the damage to that area was a reasonably foreseeable result of the City's maintenance and use of its right of way. The Court was not persuaded by the City's argument and found that the relocation of the road, resulting in a grade differential between the pavement and Mr. Brost's driveway, which required the driveway apron to be removed and reconfigured, was not a reasonably foreseeable use by the City of the right of way. The Court held that the City's removal of a portion of the Plaintiff's driveway and refusal to return it to its original condition, or pay just compensation for the damage, was a physical taking of his property.

The court awarded damages in the amount of $23,000, which was the value of the cost to restore the driveway apron to its original condition. Plaintiff was also awarded attorney's fees and expert costs in the amount of $58,725.

d. *Corral v. City of Santa Barbara* (2015)
SBSC Case No. 1466439

Vested Right: The Legal Journey from Code Enforcement to Inverse Condemnation

Facts of the Case

This case is presented as a cautionary tale of how a code enforcement action can unexpectedly lead to an inverse condemnation action. The facts of the case stretch back to 2008 in what started out as a typical building and zoning code

enforcement action on a property located in downtown Santa Barbara, owned by Debra Corral, as trustee of the Corral Family Trusts. A building inspection of Ms. Corral's property in 2008 revealed that her four unit commercial property had been unlawfully converted into two residential dwelling units, and that a third unit had been converted into an illegal marijuana dispensary. The inspection also revealed that rampant unpermitted construction had been performed throughout the property, including the installation of dangerous and substandard electrical wiring and plumbing. The City issued a Notice and Order directly to Ms. Corral to obtain a building permit to abate the illegal construction and return the building to its approved uses. Additionally, due to the serious threat to health and safety posed by the illegal construction, the property was "red tagged" and all the units, with the exception of one, were required to be vacated. Ms. Corral was notified that the units could not occupied until the building and zoning code violations were abated through an approved building permit.

In 2010, because Ms. Corral still had not obtained the required building permit, the City Attorney's Office filed a Complaint for Injunctive Relief and Civil Penalties seeking a court order to compel her to obtain the building and abate the violation. The City and Ms. Corral eventually entered into a Stipulated Judgment whereby the court retained jurisdiction over the case, and Ms. Corral admitted to the violations and agreed to obtain a building permit to abate the code violations within a specified timeframe. The Stipulated Judgment was subsequently amended three times, and civil penalties assessed, to extend the abatement deadlines because Ms. Corral failed to obtain the required building permit.

Finally, on May 7, 2012, four years after the violations had been discovered by the City, and much foot dragging by Ms. Corral, the City was able to issue Building Permit Number BLD2009-01925 (the "Original Permit"). Under the Original Permit, the construction was limited to abating the interior unpermitted construction and returning the building to its original internal configuration. No exterior alterations were authorized to the building beyond the replacement of new doors and windows.

An inspection of the property conducted in October 2012, however, revealed that the construction being done at the property exceeded the scope of the Original Permit. Specifically, all of the stucco had been removed from the building, the entire exterior wall running the long length of the building had been removed and replaced (or was in the process of being replaced), and the new unpermitted framing had been secured to the foundation with illegal shot pin anchors. The City immediately issued a Stop Work Order halting all further construction on the property.

The City's planning staff reviewed the new unpermitted construction and determined that it had so greatly exceeded the scope of the Original Permit that the structural integrity of the building was potentially affected. City planning staff considered allowing Ms. Corral to address the unpermitted construction through the issuance of a permit revision, but this idea was ultimately rejected as the City had a written policy that prohibited unpermitted construction from being corrected through a revision to the original underling building permit. Staff decided that the simplest and most expeditious course of action for both the City and the property owner would be to void/revoke the Original Permit, and open a new permit that would incorporate both the old and new illegal construction. Ms. Corral's architect was informed that the Original Permit was going to be voided and a new permit would need to be opened that would address all the unpermitted construction that now been performed on the property. The City Attorney's Office similarly relayed this information to Ms. Corral's attorney by email. To that end, on December 13, 2012, Ms. Corral personally signed an application to open a new building permit. The City then opened Building Permit No. BLD2012-02447 (the "2012 Permit") and simultaneously changed the status of the Original Permit to "Void."

Ms. Corral never objected to the voiding of the permit and began submitting plans for plan check under the new 2012 Permit. After fourteen months of the plans being returned to her by the City for correction due to inadequate and insufficient information, Ms. Corral hired a building permit consultant, Roy Harthorn, to assist her in the permitting process. Mr. Harthorn (and Ms. Corral's attorney) contacted the City Attorney's Office and requested that the City's Plan Check Supervisor, Larry Cassidy, be asked to review the project plans, since Mr. Harthorn believed the current plan check staff was requiring unnecessary engineering changes. The City Attorney's Office consulted with Mr. Cassidy and he agreed to review the plans.

Mr. Harthorn submitted the plans to Mr. Cassidy for review. Mr. Cassidy reviewed the plans and it appeared that with a few modifications, the City could issue the 2012 Permit. At the same time that Mr. Harthorn submitted the plans, he also requested that Mr. Cassidy reinstate the Original Permit, and allow Ms. Corral to apply for a permit "revision" rather than submit under the 2012 Permit. This request came as a surprise to Mr. Cassidy. He concluded, however, that while a revision was less than ideal, and not generally within City policy, anything that would get the project moving was better than allowing a six year old code enforcement case to languish unabated. Since the plans that would be submitted and approved were generally the same, whether they were submitted

as a revision under the Original Permit or as new plans under the 2012 Permit, Mr. Cassidy agreed to reinstate the Original Permit, and allow Ms. Corral to proceed with a revision. Mr. Cassidy then reinstated the Original Permit on February 5, 2014. Two months later, Ms. Corral sued the City for a temporary taking of a vested right.

Procedural History

Debra Corral's complaint alleged a single cause of action under inverse condemnation for the temporary taking of a "vested right" from the date the City revoked her building permit (allegedly without notice) to the date it was reinstated. The City demurred to the Complaint on the grounds that Plaintiff failed to assert facts that she had exhausted her administrative remedies. The City argued that if Plaintiff was alleging a regulatory taking, she must demonstrate exhaustion of administrative remedies prior to, or simultaneous to, filing the complaint. Plaintiff opposed the motion, arguing that exhaustion of administrative remedies was futile because the City had voluntarily agreed to reinstate the permit and that "this was not regulatory taking but the taking of a vested right." To the City's surprise the Court agreed, and overruled the demurrer holding that "the exhaustion doctrine has no application to this matter and [the Court] will overrule City's Demurrer. *This is not a regulatory taking case.* The essence of plaintiff's complaint is that she had a vested property right that was unlawfully taken away from her when City revoked her building permit."[12] (Emphasis added.)

This ruling lead to a quandary as to how the City would prepare for trial. Should the City go forward under the theory of inverse condemnation as generally alleged in the complaint, or should it proceed under substantive due process (which provides only for equitable relief, which would have made the case moot)? In its Motion for Summary Judgment and Judgment on the Pleadings, the City sought clarity by again raising the issue that if Plaintiff intended to proceed under the theory of an alleged regulatory taking, she must first prove exhaustion of administrative remedies, or futility (of which there were no facts for to support either). The Court, however, declined to revisit this issue as it had already rendered a decision in its ruling on the City's demurrer.[13]

Trial & Settlement

[12] Santa Barbara Superior Court Order and Ruling dated June 11, 2014 on City's Demurrer to Complaint.
[13] Citing Code of Civil Procedure §438(g)

During the liability phase of the trial, the City presented evidence of the unpermitted construction, and Ms. Corral's willingness to continue under the 2012 Permit for fourteen months without objection. Conversely, the Plaintiff argued that the work that was performed was not outside the scope of the Original Permit, and therefore the voiding of the permit was unlawful. In support of this argument, Ms. Corral submitted evidence of a building inspection done in July, prior to issuance of the Stop Work Order, where the City's building inspector had discovered a small area of dry rot and termite damaged wood at the southwest interior corner of the building. The building inspector had issued an infield correction notice directing the contractor "to remove dry rotted wood and termite invested wood *locally* where necessary." Plaintiff argued that since this directive was not limited to a specific location it authorized, and required, the removal and replacement of the entire exterior wall in order to address the termite and dry rot damage. The Plaintiff further argued that the reinstatement of the Original Permit was a per se admission by the City that this construction was authorized, because by its own written policy the City could not allow unauthorized construction to be accepted through the issuance of a permit revision.

After hearing all the evidence, the Court ruled that that the revocation of the building permit was improper, arbitrary, and capricious and that the City's action had resulted in a temporary taking of a vested right under inverse condemnation. The Court's opinion seemed particularly swayed by the fact that the City had revoked the permit but then subsequently changed its position and reinstated it, contrary to its own policy. In the Statement of Decision, the Court stated that "[t]his appears to be a case where, within the City, the left hand did not know what the right hand was doing," The Court also found that the revocation of the permit had unreasonably delayed Ms. Corral's ability to rent the property, thereby impacting her investment backed expectation and causing her to suffer material debt.

Prior to proceeding with the damages phase of the trial, rather than risk exposure to an unknown jury verdict, the City agreed to settle the case for $90,000, with attorney's fees and costs to be determined either through a stipulation or noticed motion.

<u>Attorney's Fees & Costs</u>

The City and the Plaintiff were able to stipulate to payment of her attorney's fees and costs in the amount of $355,729.43, but were unable to agree on expert fees in the amount of $12,730.99, and $65,640 in attorney's fees that were being

requested by her trust attorney (who had assisted Plaintiff in the code enforcement litigation but was never attorney of record in the inverse condemnation case). Plaintiff filed a Motion for Fees and costs requesting the disputed expert and attorney's fees, and also an additional $16,739 in attorney's fees as the cost for having to bring the fee motion. The court ordered that the full amount of the expert fees, and fees associated with bringing the motion were proper, but reduced the fees requested by Plaintiff's trust attorney to $34,656.50, citing that the work billed prior to the permit revocation, or not directly associated with assisting Plaintiff (on behalf of the trust) in the inverse condemnation litigation, was not recoverable. In total, the City paid $419,468.43 in attorney's fees and costs.

IV.

Tips and Strategies to Avoid Inverse Condemnation Liability

If nothing else, the foregoing cases have provided the City of Santa Barbara, through trial (and error), practical experience and strategies to limit liability and damage awards.

Pre-Litigation Analysis to Avoid a Potential Lawsuit

If you have the luxury of receiving a telephone call or letter from a property owner threatening to file an inverse condemnation lawsuit unless the City takes corrective action or pays compensation for the alleged "taking," use the opportunity to immediately begin an impartial analysis of the facts. Assess the City's potential liability and the strength of any possible affirmative defenses. Any factual issues that may suggest the City's action resulted in a physical or regulatory taking should be scrutinized and evaluated. Additionally, employee mistakes not appearing to give rise to a taking should be considered in the totality of the action. As mentioned in the case study *Corral v. City of Santa Barbara* above, it has been our experience that evidence at trial of employee mistakes or omissions, which in and of themselves may not warrant a finding of a compensable taking, can lead the Court to conclude that "the left hand did not know what the right hand was doing," and appear to have a prejudicial effect on the case when taken as a whole.

Post Filing of the Complaint: Identify the Type of Taking Being Alleged

Since an inverse condemnation action is derived from the Constitution, the California Government Claims Act does not require that a plaintiff file a claim prior to filing suit.[14] While the plaintiff may not directly state the type of taking they are alleging (e.g. a categorical taking), he or she must allege the cause of injury with specificity and assert particular facts rather than legal conclusions. If you are unable to determine the type of taking being asserted from the facts alleged in the complaint, the public interest being served by the action, or the date the governmental action occurred, the complaint is unlikely to survive a demurrer. Additionally, complaints asserting a regulatory taking that do not state facts indicating that the plaintiff has exhausted all administrative remedies prior to filing the inverse condemnation action are vulnerable to demurrer unless a valid excuse for the failure to exhaust the administrative remedies is alleged on the face of the complaint.[15]

Identify Potential Affirmative Defenses

There are many defenses that should not only be asserted at trial, but early on by way of judgment on the pleadings or summary judgment. Several of the common defenses, discussed generally below, include exercise of police power, failure to exhaust administrative remedies, waiver, estoppel, and statute of limitations

a. Proper Exercise of Police Power

Exercise of a city's police power is probably the most widely asserted defense against an inverse condemnation claim. If the court determines that the public entity was reasonably exercising its power to protect public health, safety or welfare, and not exercising its authority under eminent domain, a property owner is not entitled to compensation for the taking of or damage to his or her property.[16] Recognizing that a broad interpretation of the police power defense would "completely vitiate the constitutional requirement of just compensation" the courts will carefully scrutinize its applicability as a defense to the city's action that allegedly interfered with a private property right."[17]

The Court may be more inclined to wave the right to compensation where the interference or taking of the property (or vested right) is to abate a public nuisance. The courts have held that while a vested property right may be

[14] Government Code §905.1
[15] *Doe v. MySpace Inc.* (2009) 175 Cal.App. 4th 561, 566; *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal. App. 4th 708, 736-737; *Gupta v. Stanford University* (2004) 124 Cal. App. 4th 407, 411
[16] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408
[17] *Holtz v. Superior Court* 197) 3 Cal.3d 296, 305

immune from divestment or destruction through ordinary police power regulation, that right may be impaired, or even revoked, if its authorized use creates a public nuisance. If the action or use authorized under the vested right is a *per se* nuisance due to its violation of an ordinance, the court *should* find that the impairment of the vested right is a proper exercise of the police power not subject to compensation.[18] If the case does not involve a per se nuisance, then a strong factual record will need to be established to prove the public nuisance conditions.

b. Exhaustion & Ripeness

Where a regulatory taking is alleged, the exhaustion of the property owner's administrative remedies is usually a condition precedent to a claim brought under inverse condemnation. California courts have traditionally held that before a government action can be challenged as a regulatory taking, the government entity charged with implementing the regulation must have reached a final decision regarding the application of the regulation to the property at issue.[19] This is the so-called "ripeness" test. "Ripeness…is a matter of final administrative adjudication. The idea of ripeness arises…because local authorities should have the chance to change their minds when a local restriction otherwise results in a compensable taking."[20] This means that first, all administrative appeals at the local government level must be exercised, and then the final administrative action must be challenged in a writ of mandate action in Superior Court. An administrative mandate action is a "procedural predicate" to seeking inverse condemnation damages based upon a regulatory taking accomplished by an administrative agency."[21] The writ of mandate action, however, may be joined with an inverse condemnation action.[22] This requirement is jurisdictional and not a matter of judicial discretion.[23]

An exception to the requirement that a plaintiff must first exhaust his or her remedies before bringing an action under inverse condemnation can be found where the plaintiff is able to successfully demonstrate that an attempt to fully exhaust administrative remedies would be futile. The futility "exception applies only if the party invoking it can positively state that the administrative agency has

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[18] *City of Costa Mesa v. Soffer* (1992) 11 Cal. App. 4th 378, 382, citing *McClatchy v. Laguna Lands Limited* (1917) 32 Cal.App. 718, 725; see also *People ex rel. Dept. Pub. Wks. v. Adco Advertisers* (1973) 35 Cal.App.3d 507, 513–514; *People v. Peterson* (1920) 45 Cal.App. 457, 459–461

[19] *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 10
[20] *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1279
[21] *Rossco Holdings Inc. v. State of California* (1989) 212 Cal. App. 3d 642, 657
[22] *Hensler v. City of Glendale,* (1994) 8 Cal.4th 1, 14
[23] *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 589

declared what its ruling will be in a particular case,"[24] when there is no administrative relief available for the plaintiff to avail himself of [25], or the City's decision in a particular case was predeterminable.[26]

c. Waiver

A property owner who accepts the conditions of a permit or regulation by acting on or complying with them, even if done under protest, waives his right to later object or seek compensation. As succinctly stated in *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, "a landowner who accepts and complies with the conditions of a building permit cannot later sue the issuing public entity for inverse condemnation for the cost of compliance."[27] The reasoning behind this ruling is based on the same principal requiring exhaustion of administrative remedies, and is designed to give the agency the opportunity to avoid a "taking and its associated compensation under inverse condemnation years after the landowner already accepted the burdens or obligations of the permit or regulation.[28] The exceptions to this general rule can be found where the city's permit conditions would "divest the developer of money or a possessory interest in property," or where the city imposes additional permit conditions or fees on subsequent phases of a project that is already underway. Under such circumstances, the developer may then pay the fee under protest without waiving the right to sue for a refund later.[29]

d. Estoppel by Deed

Estoppel by deed is a less common defense, but since it was raised as a defense by the City of Santa Barbara in *Brost v. City of Santa Barbara*, it has been included here. The Courts have held that a property owner who has conveyed a right of way to a public entity (or where one was taken for public necessity), is estopped from asserting a claim for inverse condemnation for damage that may be reasonably expected to occur to his abutting private property, by the necessary and ordinary use of the public service for which the taking of the right of way occurred.[30] The test of whether the damage to private property occurred

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[24] *Steinharrt v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313
[25] *Powell v. County of Humboldt* (2014) 222 Cal.App.4th 1424
[26] *Ogo Associates v. City of Torrance* (1974) 30 Cal.App.3d 830, 834
[27] *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 941
[28] *Id.*
[29] *McLain W. #1 v. Cty. of San Diego* (1983) 146 Cal. App. 3d 772, 777
[30] *Albers v. County of Los Angeles* (1965) 62 Cal 2d 250, 265

as a reasonable use of the right of way becomes one of *foreseeability* to be determined by the court.[31]

e. Statute of Limitations

The statute of limitations in an inverse condemnation case can seem like a moving target. The courts generally apply a three year statute of limitations to inverse condemnation actions for physical damage to property[32] and a five year statute of limitations under Code of Civil Procedure §§ 318 and 319 for regulatory takings challenges.[33] With that being said, however, since a petition for writ of mandate is a prerequisite to filing an inverse condemnation complaint alleging an "as applied taking," and the statute of limitations for filing a writ is 90 days, unless a plaintiff files a writ within 90 days, he cannot file an inverse claim thereafter (and the five year statute of limitations will not apply). Similarly, with respect to facial challenges to regulations, the statute of limitations to challenge the regulation is 120 days from the date of the enactment of the ordinance.[34] Therefore, it is important to not only initially identify the type of taking, but to determine whether or not any special–and shorter–statute of limitations apply related to the requirement to exhaust administrative remedies.

Limiting Exposure to Attorney's Fees & Costs

a. Attorney's Fees & Costs to the Prevailing Party

It is important to consider the issue of attorney's fees early in the case. Pursuant to Code of Civil Procedure section 1035, a prevailing party in an inverse condemnation action, be it the city or the plaintiff, is entitled to recover attorney's fees, expert fees and other costs and expenses incurred from the time of the alleged taking through post-trial motions and appeal.[35] The amount of the fees awarded is at the discretion of the trial court[36] and includes not only reasonable attorney's fees but appraisal and engineering fees from the time of the taking.[37] If the Court does find liability on the part of the city, it is legally obligated to pay all

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[31] *Cox v. State of California* (1970) 3 Cal.App.3d 301, 309, citing *Albers* v. *County of Los Angeles, supra*, at pp. 265-266; *Williams v. Sutter-Butte Canal Co*. (1947) 82 Cal.App.2d 100, 102-103.
[32] Code of Civil Procedure § 338(j); *Patrick Media Group, Inc. v. California Coastal Commission* 9 Cal.App.4th 592, 60
[33] *See Hensler, Supra* 8 Cal.4th 1, 24; *Hauselt v. County of Butte* (2009) 172 Cal.App.4th 550, 564*; Patrick Media Group, Supra*, 9 Cal.App.4th at 607
[34] *Hensler, supra,* 32 Cal.Rptr.2d 244, 257-58
[35] Code of Civil Procedure §1036.
[36] PLCM Group Inc. v. Drexler (2000) 22 Cal.4th 1084, 1096
[37] Customer Company v. City of Sacramento (1995) 10 Cal.4th 368, 390.

of the plaintiff's reasonable fees and costs, even if the jury awards nominal damages amounting to a single dollar. As such, attorney fees and costs can greatly exceed the amount of damages awarded to the plaintiff and because of this the code tends to reflect more favorably on plaintiffs.

As a case in point, the following is a summary of the damages and fees and costs awards from the case summaries discussed above:

- *Brost, et al. v. City of Santa Barbara* (2010), SBSC Case No. 1342979
  Damages: $126,000
  Fees & Costs: $648,522.94

- *Barajas, et al. v. City of Santa Barbara* (2013), SBSC Case No. 383054
  Damages: $311,500
  Fees & Costs: $293,445*
  **This amount does not include plaintiffs' attorney's fees through trial due to a successful CCP §998 Offer*

- *Brost v. City of Santa Barbara* (2014), SBSC Case No. 1415549
  Damages: $23,000
  Fees and Costs: $58,725

- *Corral v. City of Santa Barbara* (2015), SBSC Case No. 1466439
  Damages: $90,000
  Fees and Costs: $419,468.43

b. CCP § 998 Offers

A City can potentially reduce its exposure to these large attorney's fees and costs awards through a successful Code of Civil Procedure section 998 offer. While not available in direct condemnation cases, the Supreme Court has held that 998 offers do apply in inverse condemnation actions.[38] Code of Civil Procedure section 998 (c) (1) provides that if an offer made by a defendant is not accepted, and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff may not recover his or her post offer costs and must pay the defendant's costs from the time of the offer. The code was changed this year to only reduce *post* offer costs and fees in the event of a favorable verdict on behalf of the defendant, whereas, before the recent amendment, *pre-offer* costs were

[38] *Regency Outdoor Advertising, Inc. v. City of Los Angeles*, (2006) 39 Cal.4th 507, 529-30 & n. 11, (legislature did not intend for its exclusion of eminent domain in Code of Civil Procedure section 998 subdivision (g)(1), to encompass inverse condemnation proceedings).

deducted if the defendant received a favorable verdict. Because a section 998 offer limits exposure to fees and costs from the date the offer was made, it is important to consider making an early offer.

V.

Conclusion

Inverse condemnation claims are difficult to avoid because the alleged “taking” of the private property was usually either unintentional and frequently in the best interests of the city. The fact that the city’s actions giving rise to the claim were generally done with the purpose of benefitting or protecting the public as a whole make these types of claims even harder to swallow. Having tried four inverse condemnation cases in a span of approximately five years has allowed us to recognize that inverse condemnation cases require an impartial fact intensive analysis, which is most effective if done early in the case.

The analysis should focus on whether or not there are any available defenses that could justify the city’s action and possibly preclude liability. If you do not see any, the time to settle is sooner rather than later. Additionally, this is the opportunity to assess not only the city’s exposure to liability, but the measure of the plaintiff’s damages. Since a prevailing plaintiff is entitled to attorney’s fees and costs, it may be advisable to settle and pay a small measure of damages to avoid an even larger attorney’s fee award months or years down the line. Keep in mind that inverse condemnation litigation is not for the faint of heart or the risk averse, however, when it is obvious that trial is inevitable, do not forget to make an early Code of Civil Procedure section 998 offer.