

## California Supreme Court Reduces Public Entity Liability for Public Utility Damage to Private Property

By Michael G. Colantuono and Jennifer L. Pancake

**Introduction:** On August 15, 2019, the California Supreme Court decided *City of Oroville v. Superior Court of Butte County*, an important inverse condemnation case — its first inverse condemnation case in over two decades — which refines the standards of causation a plaintiff must show to win damages in such cases. *Oroville* makes a helpful change in the law for public entities' defense of inverse condemnation cases, which allege a physical taking or damaging of private property. The decision has practical implications for the design, construction and maintenance of public infrastructure in our state.

The California Constitution, like its federal counterpart, forbids government from taking private property for public use without compensation. There are two kinds of condemnation cases — direct eminent domain cases which governments file to obtain title to land needed for public projects and inverse condemnation cases in which private property owners sue for damage to their properties caused by either the design, construction or maintenance of public projects or by over-regulation of property, as by zoning and environmental laws. *Oroville* establishes important new causation standards for physical takings claims.

**Facts:** *Oroville* arose when a sewer backup flooded a suite of dentists' offices

that should have been, but were not, protected by a backflow prevention valve. Sewer blockages are common because, no matter how well maintained, sewer operators cannot prevent intrusion of roots from private laterals; blockages from fats, oils and grease (FOG); and other misuse of sewers. They are at the mercy of what anyone in society puts down the drain. Manholes are intended to allow not only access for maintenance, but to allow sewer spills to flow into public streets where they can be contained and cleaned up, often with little or no damage to property or the environment. The Uniform Plumbing Code requires owners of properties lower in elevation than the nearest protective manhole to install and maintain backflow prevention devices so downstream blockages do not flood those properties. The Oroville dentists' offices should have been protected by a backflow valve, but were not, likely due to an oversight when they were designed and built in the late 1980s.

**Procedural History:** After the sewer backup flooded their offices, the dentists sued in both inverse condemnation and nuisance. In the trial court, the City sought summary judgment of the inverse claim, arguing the property owners' violation of the Plumbing Code (not installing and maintaining a backflow valve) prevented a finding the City was

liable in inverse condemnation. The trial court denied summary judgment, finding it a jury question whether the damage resulted from the blockage of the main or the missing backwater valve. The dentists then sought the judge's determination of inverse condemnation liability, bringing a motion under the California Eminent Domain Law, which allows for a pretrial determination of issues relating to compensation. (Whether such a motion is permitted in inverse cases is presently before the California Supreme Court.) The trial court concluded the City was liable, relying on a 2006 decision of the San Jose Court of Appeal, *California State Automobile Assn. v. City of Palo Alto*, which seemed to make sewer systems liable for **all** backflows into structures. Oroville asked the Sacramento Court of Appeal to reverse the trial court's decision. The Court of Appeal heard the writ petition (which it was not obliged to do) and confirmed the City's liability. The City obtained California Supreme Court review, partly by showing that *Palo Alto* had led to inconsistent results in Courts of Appeal around the state.

The Supreme Court's unanimous decision for the City starts with an overview of inverse condemnation law which makes government liable for damage to private property substantially caused by the deliberate design, construction or maintenance of public improvements. The essential question in inverse claims arising from sewer spills is "whether the inherent risks associated with the sewer systems — as deliberately designed, constructed, or maintained — were the substantial cause of damage to the private party." Inverse condemnation law seeks to make government (and therefore all beneficiaries of government

services) pay the cost of public decisions about how to provide public infrastructure and services. If government saves money by designing and building a system that exposes some property owners to a risk that is too expensive to prevent, and that risk ripens into harm, all who benefited from the cost savings ought to bear that cost, not just the unlucky private property owner. That idea, however, must be balanced with the principle that necessary public works should not be discouraged by making government liable for all harm, even that which is merely tangentially related to a public work.

The general rule that government (and investor-owned utilities) must bear the cost of damage to private property caused by the design, construction or maintenance of infrastructure has exceptions for government action in an emergency (like knocking down an earthquake-damaged building to prevent injury to neighboring property) and in flooding cases, when the need for public action to protect society generally allows some harm to private property (as where a flood control project concentrates flow at a particular place when a storm exceeds the project's design capacity).

Physical-damage inverse claimants must show deliberate government decisions as to the design, construction and maintenance of public works. Mere negligence will not suffice. Thus, many cases arising from defective maintenance do not lead to inverse condemnation liability (but might create liability under a dangerous condition of public property theory). However, when agencies adopt a "fix it when it breaks" policy of forgoing maintenance until damage to private property reveals the need to replace a

water main or to fix a sewer line, for example, inverse condemnation liability may result.

**The Decision:** The California Supreme Court concluded that Oroville's sewer system did not substantially cause the damage to the plaintiff dentists and focused on the causal relationship between risks inherent in a public work and the damage to private property. The Court held that, in assessing inverse liability, a court must find more than just a causal connection between the improvement and the damage: "Public entities are not strictly or otherwise automatically liable for any conceivable damage bearing some kind of connection, however remote to a public improvement." Rather, the damage to private property must be "substantially caused" by an "inherent risk" presented by the deliberate design, construction or maintenance of the public improvement. The Court announced a new two-part test for causation: first, an inverse plaintiff must link her injury to an "inherent risk" of the public project. Second, that inherent risk must be a substantial cause of the damage. The Court wrote: "this test permits courts to consider a plaintiff's act or omission in the chain of causation, for example, a property owner's failure to follow reasonable requirements imposed by the public entity to reduce the risk to the public improvement."

The Court then analyzed the dentists' claim and rejected their reliance on the "failed to function as intended," test which the Court limited to flood control cases as a means to eliminate natural flooding as a cause of the damage. The Court also specifically disapproved of *Palo Alto's* analysis extending the "failed

to function as intended" analysis to sewer backup claims and looking only to the cause of a blockage rather than the cause of damage and whether it was substantially caused by inherent risks of the sewer system.

The Court concluded the City was not liable for inverse condemnation for a number of reasons. First, the plaintiffs did not prove the City had unreasonably designed, constructed or maintained the sewer main. Instead, the record showed the City's sewer system was well maintained and designed and constructed consistently with then-prevailing industry standards.

Second, government conduct is presumed to be reasonable and a plaintiff must rebut that presumption with evidence the government acted unreasonably. Here, the dentists did not do so, and "the City did not act unreasonably in expecting private property owners to comply with the law." "The damage to [their] property could have been averted had [the dentists] installed the backwater valve, and so the loss suffered by [them] should not be distributed throughout the community." The Court noted that government agencies are expected to "avoid patently unreasonable assumptions in the planning of public improvements" and can be liable for damage to private property if they do not.

Third, governments may impose safety standards on private property owners and design their public infrastructure on the assumption that property owners will comply with those standards. Thus, uniform building codes and other reasonable standards governing how private property interacts with public property can protect public agencies

from inverse condemnation liability. This includes required backflow valves, pressure regulators on water hookups, surge protectors on electrical panels, standards for how private driveways address public streets, etc.

The Court refused to apply a multi-factor balancing test applied in flood control and drainage cases, limiting it to such cases. This suggests that flood control/drainage case law, with its analysis of the relative reasonableness of upstream and downstream (flooded) property owners has little application in any other setting. That conclusion may be significant for the multi-billion-dollar litigation arising against PG&E and other electric utilities following the recent, catastrophic wildfires allegedly caused by power lines.

CH&W and other counsel for Oroville argued that inverse condemnation law should consider a property owner's failure to protect his or her property from damage by public property — here, the failure to install and maintain a backflow valve. The Court accepted and incorporated that idea into its newly refined causation analysis. The Court also accepted our suggestion to look to the seminal 1969 article by the late Hastings Law School Professor Arvo Van Alstyne to sensibly limit public agency liability for damages private property owners can prevent.

**Practical Tips:** Because a plaintiff must rebut the legal presumption that government acts reasonably to design, construct and maintain its facilities, a public entity can reduce liability exposure by proving it acted reasonably. Therefore, government agencies should document that design and construction decisions reflected prevailing standards

or good design when made. This is comparable to public lawyers' advice to protect against dangerous condition of public property liability by preserving the evidence needed to establish design immunity — that a public works project was designed by a qualified professional, constructed to that design, and maintained consistently with it. Second, governments must be prepared to show they have adopted reasonable plans to maintain their facilities. A reasonable policy (in light of risks and available resources) can avoid liability; a "fix it when it breaks" policy cannot.

Governments may establish private property owners' duty to prevent safety hazards through the adoption of uniform building codes which govern the relation of public and private utility infrastructure for water, sewer, gas, electric, broadband, etc. Governments might do the same for roadway hazards, perhaps by regulating curb cuts and other private-property interfaces with public roadways. Courts will review such standards for reasonableness, and while it will not allow government to export its liability wholesale, reasonable standards can reduce potential liability even where, as here, they are not enforced effectively.

**Conclusion:** This is the first California Supreme Court inverse condemnation decision in some two decades. It helpfully expands on the causation standard in inverse condemnation. It is good news for public agencies, a valuable development of the law, and a reminder to local governments to establish and document reasonable bases for their choices in the design, construction and maintenance of infrastructure.

*Michael Colantuono and Jenni Pancake briefed the Oroville case at the California*

*Supreme Court, along with the City's trial counsel and counsel for its risk pool. Michael argued the case along with risk pool counsel. Jenni leads Colantuono, Highsmith & Whatley's eminent domain and inverse condemnation practice. For more information on this subject, contact Michael at MColantuono@chwlaw.us or (530) 432-7357, or Jenni at JPancake@chwlaw.us or (213) 542-5708.*

Colantuono, Highsmith & Whatley is a law firm with offices in Pasadena and Grass Valley in the Sierra Foothills that represents public agencies throughout California. Its municipal law practice includes public revenues, land use, housing, CEQA, LAFCO matters and associated appeals and trial court litigation. We are committed to providing advice that is helpful, understandable, and fairly priced.

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