

Supreme Court Rejects Procedural Innovation in Inverse Condemnation

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The California Constitution requires just compensation when government takes or damages private property. This has led to two related bodies of law — eminent domain (when government sues to acquire private property or some interest in it for a public purpose) and inverse condemnation (when a property owner sues government for alleged damage to private property). The Legislature has adopted comprehensive statutes governing eminent domain, but left the law of inverse condemnation to the courts to develop. The Legislature may find it politically difficult to legislate in this area given its role as the manager of state finances and its sympathy for property owners damaged by public works projects. Eminent domain is more straight-forward — government wants, and almost always gets, private property and the Legislature need only ensure fair procedures to provide property owners just compensation.

Weiss v. People ex rel. Department of Transportation (Caltrans) is the Supreme Court's second inverse condemnation decision in 11 months after decades of leaving this subject to the lower courts. Last year it decided *City of Oroville v. Superior Court*, allowing governments to avoid paying for damage to private property that arises jointly from some failure of government property (a predictable sewer backup) and a property owner's failure to comply with ordinances requiring safety devices (a sewer back-flow valve). CHW represented the governments in the Supreme Court in both *Weiss* and *Oroville*.

Weiss is, in many respects, a run-of-the-mill inverse condemnation case. The Orange County Transportation Authority and CalTrans collaborated to build a sound wall on I-5 in southern Orange County. Neighbors upslope of the wall complained it reflected noise and dust toward their properties and sued in inverse condemnation, trespass and nuisance. Central to their claims was whether the alleged noise and dust affected the plaintiffs' properties particularly — as is required to prove an inverse claim — or affected a whole neighborhood. The logic here is that government should not force a few to bear the cost to provide a general service, but it can force all of us to do so.

The benefits of the sound wall to the neighborhood it protected, the agencies argued, justified noise and dust impacts on other neighborhoods — no one was singled out for a forced subsidy of a public project. The agencies also disputed whether there were meaningful noise and dust impacts.

The eminent domain statutes authorize a motion under Code of Civil Procedure section 1260.040 to allow the trial court to decide “an evidentiary or other legal issue affecting the determination of compensation.” In both eminent domain and inverse condemnation, the trial judge defines the existence and extent of a taking (i.e., whether the government need pay anything and, if so, what damage or property is to be valued). Then, a jury decides how much that damage or property is worth. A 1260.040 motion promotes settlement by allowing the parties' competing experts, who provide evidence on damage amounts and property valuations, to value the same thing — by resolving disputes as to what is to be valued. An earlier Court of Appeal decision (*Dina v. People ex rel. Department of Transportation (Caltrans)*) had been governing law for over a decade and allowed 1260.040 motions to determine the issue of inverse condemnation liability. The government agencies in *Weiss* filed such a motion to establish that the plaintiffs could not show they were singled out to bear the burden of the sound wall. They argued the plaintiffs' properties were separated by other properties owned by those not party to the suit; other property owners in the neighborhood had filed (and later abandoned) an identical suit; and other evidence suggested these owners of a handful of parcels were not affected by the sound wall differently than others.

The trial court agreed with the agencies, granted the motion, and entered judgement. The plaintiff property owners appealed to the Orange County Court of Appeal, which reversed, concluding that only the formal summary judgment procedure could produce a judgment in this way and disagreeing with *Dina*. The agencies persuaded the California Supreme Court to grant review and it ultimately agreed with the Court of Appeal, limiting 1260.040 motions to eminent domain.

Justice Groban's opinion for a unanimous Court is admirably narrow, though, and does change substantive eminent domain or inverse condemnation law and makes just one change to procedural rules for the latter. The Court was unwilling to allow a 1260.040 motion to dispose of an inverse condemnation case for three reasons. First, the Legislature did not provide for it (the Legislature leaves inverse condemnation law to the courts). Second, the rule affected procedure rather than compensation (earlier cases allowing import from eminent domain to inverse condemnation were limited to substantive rules regarding compensation). Third, judge-made expedited trial procedures raise due process concerns. Thus, while eminent domain law and inverse condemnation will continue to be largely parallel as to substantive rights (what government has to pay for and how much), they will have distinct procedures. As many inverse condemnation cases could have been filed as eminent domain cases (if government found it tactically useful to sue to directly acquire property rather than wait to be sued), this may invite strategic behavior by governments and property owners — a race to the courthouse.

The case will return to the trial court so the dispute can be resolved as ordinary civil cases are — on summary judgment, at a bench trial or, perhaps on eve-of-trial motions in limine to exclude evidence or a mid-trial motion for judgment after the close of the property owners' evidence.

So, what does the case mean for local governments? On the one hand, this means an efficient tool to dispose of significant parts of inverse condemnation cases is no longer available. The more cumbersome and expensive motion for summary judgment or summary adjudication will be needed. On the other, this means that inverse condemnation plaintiffs — who often are represented on contingency (meaning the lawyer gets a share of the award, but is not otherwise paid) — will now need to find counsel willing to fund more arduous and expensive litigation. Making it more difficult and expensive to resolve disputes could benefit government in many cases, but will cost it in others. It will depend on the details of each case.

What does it mean for government litigators? They will use the usual tools to resolve factual and legal disputes and mixed questions of fact and law: pleading attacks (demurrer, motion for judgment on the pleadings, motions to strike), summary judgment or adjudication, bench trial of liability issues and a jury trial on compensation (if a taking is established), perhaps streamlined by offers of proof, Evidence Code section 402 hearings on preliminary facts, and mid-trial motions for non-suit or for judgment.

Government will always have exposure to property damage claims and will need to find efficient ways to litigate them. Collaboration with able counsel, of course, will always be required, too.

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Jenni Pancake leads our eminent domain and inverse condemnation practice. Her experience covers a wide variety of condemnation issues and includes representation of governmental agencies, property owners, tenants and business owners on all aspects of the condemnation process. Her experiences include litigation and appeals as well as settlement and mediation. Two of her early cases resulted in published appellate decisions — *Community Redevelopment Agency v. Force Electronics* (1997) 55 Cal.App.4th 622 and *Los Angeles Unified School Dist. v. Trump Wilshire Assoc.* (1996) 42 Cal.App.4th 1682. She and Michael Colantuono were co-counsel in the California Supreme Court's two most recent inverse cases: *City of Oroville v. Superior Court* (2019) 7 Cal.5th 1091 [city not liable for sewer backup because property owner did not install back-flow valve required by plumbing code] and *Weiss v. CalTrans* (2020) ___ Cal.5th ___ Case No. S248141 (filed July 16, 2020) [pre-trial motion under CCP 1260.040 limited to eminent domain, not available in inverse condemnation].

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