



R.E.A.C.H.

Real Estate And Construction Highlights

***A Newsletter For Real Estate
and Construction Professionals***

THOITS, LOVE, HERSHBERGER & McLEAN
By Kenneth R. Van Vleck

Inverse Condemnation

THIS ISSUE: Public Entity liability for damage caused by failed public improvements.

FACTUAL SCENARIO: This month's factual scenario actually happened, and was reported in a case decided recently by the appellate court. Homeowners suffered damage to their home as a result of two raw sewage backups into their home that occurred over a short period of time. After the first backup, the homeowners hired a plumbing company to video the pipes, discovering that there was some mild blockage between their home and the City's pipes. The homeowners replaced the entire length of sewage pipe from their home to the City's main sewer main. After the second backup of raw sewage into their home, the homeowners again inspected the pipe by video, determining that the new pipe was free from blockage, but that the City's main sewage line was partially blocked by tree roots and effluent.

The homeowners' insurance carrier (which had twice paid for the damage to the home) sued the City, claiming that the City's practices in failing to

adequately maintain the sewage line caused damage to the home. The carrier claimed a right to be reimbursed under inverse condemnation. Although a trial court-level judge agreed with the City that the homeowners had failed to show “how and why” the City’s pipe had caused damage to their home, and on that basis denied recovery, the court of appeal reversed. The court of appeal held that the homeowner did not have to show how and why the backup occurred, but rather only had to show that the City’s pipe failed to function as it was intended to function, and was causally connected to the homeowners’ damage.¹

IN BRIEF:

What is Inverse Condemnation?

A property owner may recover just compensation from a public entity for any actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed, whether the result is foreseeable or not. This is considered a public taking of a private property right. Indeed, the policy basis for the payment of just compensation is a consideration of whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.

There is a proposition on the November ballot for California that could substantially affect the eminent domain laws in general – Proposition 90. This column is not intended to be a political forum. But in the event the proposition passes, we will look at its potential impact on development in California.

What Do You Need To Prove for Inverse Condemnation?

To prevail in an inverse condemnation action, a property owner must prove three elements: the claimant owned the property that was damaged; the property was either taken or damaged; and, the cause of the damage was a public project. The case recited above dealt largely with the last of these elements, the issue of “proximate cause.” To prevail, the property owner must prove only “a substantial cause-and-effect relationship excluding the

¹ These facts were reported in the case of *C.S.A.A. v. City of Palo Alto*, decided April 2006

probability that other forces *alone* produced the injury. Thus, even where there is an independent force that contributes to the damage, the public improvement remains a substantial concurrent cause if “the injury occurred in substantial part because the improvement failed to function as it was intended.” The conclusion reached by the court of appeal in April is that “a public improvement is a ‘substantial concurring cause’ if other forces alone would not have caused the damage and the public improvement failed to function as intended.”

Why is This Decision Important?

A property owner does not have to prove that a public entity acted unreasonably, or that the injury was foreseeable. These are totally irrelevant to the question of liability in an inverse condemnation case. Rather, where there are numerous potential causes of damage, one of which is the public entity’s failed project, the burden shifts to the public entity to produce evidence that would show that other forces *alone* caused the injury.

In the case cited above, there was a substantial cause and effect relationship between factors entirely within the City’s control – namely the tree roots, slope and standing water in the City’s pipes that contributed to the backup. There is no need for a property owner to prove the “how and why” of the damage in that circumstance.

Property owners have recourse against public entities that was previously unavailable where the property owner could not show the exact cause of damage. And where, as here, there is the possibility for the property owner to recover attorneys’ fees after trial as well, the risks to a public entity in failing to maintain its systems – such as the sewage system mentioned above – are greatly increased.

A property owner who believes he may have been damaged by a public entity should consult an attorney experienced in the area of inverse condemnation and real property litigation.

NEXT ISSUE: Mechanic's Liens from notice to enforcement: the basics for contractors and subcontractors.

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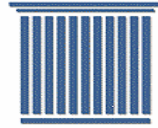
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