

August 2002 Supplement to the  
**Law of Inverse Condemnation**

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### 3.2.2 Public Entities that "Substantially Participate"

- **A city is not liable for damage caused by defective storm drain pipe it neither planned, approved, constructed, nor operated.**

When a plaintiff has no proof that a public entity built, accepted, approved or maintained an improvement on private property (such as a water pipe), it cannot base an inverse condemnation suit on the mere inference that the entity must have participated in its planning, design, supervision or approval -- at least where it is just as likely that a private developer built and maintained the improvement without public entity input.

*Dimartino v. City of Orinda* (1st Dist., Div. 2, March 28, 2000; ordered published, April 26, 2000) 80 Cal.App.4th 329 [95 Cal.Rptr.2nd 16].

- **An entity that has power to control a project is liable even if it does not actively participate in it.**

An entity with the power to control a project need not actively participate in it to suffer liability. Proof that an entity signed a contract assuming responsibility for the project, shared a common governance with an active participant, or provided an exclusive revenue source for the project, can establish control.

*Arreola v. Monterey County* (2002) \_\_Cal.App.4th\_\_ [2002 Cal. App. LEXIS 4319].

### 4.1.2 Limitations on "Taken or Damaged" Liability

#### *Rights Not Recognized Under Law*

- **Property owners have no legal interest in bonds for a road assessment district in which they own land until the obligations to the bondholders are satisfied.**

Defendant City of Lincoln sold bonds for a road assessment district and placed ten percent of the proceeds in a reserve fund for the benefit of the bondholders. Plaintiff, who was not a bondholder, bought property in the district. Plaintiff sued for unlawful taking and constructive fraud. He claimed that as a property owner, he had an interest in the bond reserve fund and that the city had misused the funds by denying him a share. The trial court held for the city.

The appellate court affirmed. The fund plaintiff complains about is in essence a

trust fund for the benefit of the bondholders. Until satisfaction of this obligation to the bondholders, the property owners have no interest. There was no constructive fraud because the city did not have a fiduciary duty to the plaintiff because only the bondholders possessed a fiduciary interest in the fund.

*Oates v. City of Lincoln* (3rd Dist. October 24, 2001) 93 Cal.App.4th 25 [112 Cal.Rptr.2d 790].

- **Mere expectation, not amounting to an option, is not a compensable property right.**

In this case involving control of a golf course, the court held that the government entity did not "take" anything from the lessee because "[a] hypothetical future lease resting on the 'probability of renewal', unlike a contractual option to renew an existing lease, is not a compensable property right [citation] because its potential execution rests upon the commercial vagaries of the market, its players and their competitive interests."

The court found critical that the plaintiff had, at most, a mere expectation, which is not a legally enforceable property interest. When there is no such interest, the government entity need not compensate the lessee in an inverse condemnation action for loss of future business, including loss of goodwill. Similarly, where the claiming party has no property interest in real property taken, precondemnation conduct as to such property does not result in a de facto taking.

*San Diego Metropolitan Transit Development Board v. Handlery Hotel, Inc.* (4th Dist., Div. 1, June 17, 1999) 73 Cal.App.4th 517 [86 Cal.Rptr.2d 473].

## 4.4 Substantial Causation

- **“Drop in a bucket” from water main break does not amount to substantial causation.**

In this case, the Court of Appeal considered whether a city's improvement substantially caused damage to a home. Appellants bought a home at the bottom of a canyon on a hillside composed of ancient landslide debris. During the winter of 1997-1998, El Nino poured a record amount of rainfall on Santa Barbara County. A landslide occurred from the saturation of the hillside above appellants' property, causing two breaks of a water main. Consequently, the water main dumped about 200,000 gallons of water. The landslide eventually damaged the home, causing it to be condemned. Appellants sued for inverse condemnation, claiming that the second break had damaged

their home.

At trial, one of the city's experts opined that the water from the main line was a "drop in the bucket" compared to the rain that had fallen during El Nino. "Because the ground was already saturated when the water main broke on February 24, very little water from the break would have penetrated the ground, and this water would not have significantly altered the progress of the Ranchita slide." A second city expert testified that the "rare, intense and sustained rainfall" during the 1997-1998 rainy season caused the Ranchita slide. The trial court directed a verdict for the city, finding that the appellants had failed to establish a causal connection between the broken water main and the damage to the appellants' property.

The appellate court affirmed. The court noted that, in an action for inverse condemnation, an injury need not be foreseeable, but the public improvement must be a substantial cause of the injury. Here, substantial evidence supported the trial court's determination that the break in the main line was not a substantial cause of the damage.

*Goebel v. City of Santa Barbara* (2nd Dist., Div. 6, September 25, 2001) 92 Cal.App.4th [549 111 Cal. Rptr. 2d 901].

- **The term "substantial" injects an element of degree and is not satisfied merely by the existence of any impairment.**

Although this case does not involve a public entity, it may be applicable to inverse condemnation, where "substantial causation" is a crucial element.

The plaintiff purchased a new vehicle from the defendant car dealer, which was covered by a bumper-to-bumper warranty. After several repair attempts were made, and some of the complaints were not corrected to his satisfaction, the plaintiff requested a replacement or repurchase of his vehicle from Ford. After his request was refused, the plaintiff successfully sued under the Lemon Law. The defendants appealed, contending that the trial court erred in its answer to a jury question about the meaning of the term "substantially."

The appellate court reversed. Whether the impairment was substantial is determined by an objective test, based on what a reasonable person would understand to be a defect. This test is applied within the specific circumstances of the buyer. While not a pattern instruction defining "substantial," the term modifies its object, "impairment." It injects an element of degree; at the least, the requirement is not satisfied by any impairment, however insignificant, that affects use, value, or safety.

*Lundy v. Ford Motor Co.* (2nd Dist., Div. 4, February 28, 2001) 87 Cal.App.4th.

472 [104 Cal.Rptr.2d 545].

- **Other recent cases on substantial causation**

The California Supreme Court and Federal Ninth Circuit have recently given further consideration to the substantial causation instructions (BAJI 3.76 and 3.77) in asbestos and radiation sickness cases. Again, these may provide some guidance in the inverse condemnation context.

BAJI No. 3.76 provides what the California Supreme Court called “standardized instructions defining cause-in-fact causation under the substantial factor test.” (*Rutherford v. Owens-Illinois* (1998) 16 Cal.4th 953, 958 [67 Cal.Rptr. 2d 16 ] [under settled statewide tort principles, burden-shifting instruction unnecessary in asbestos cancer cases].) The Court concluded that BAJI No. 3.76 along with BAJI No. 3.77 (doctrine of concurrent proximate legal causation) would “adequately appri[z]e the jury of the elements required to establish causation.” (*Id.*)

The Supreme Court suggested that it might accept a substantial factor instruction informing the jury that a “small amount [of one defendant’s share of causation] was necessarily insubstantial.” (*Id.* at 984-85 [Jury concluded that exposure to Kaylo contributed relatively small amount to decedent’s cancer risk but rejected defendant’s argument that such a small contribution should be considered insubstantial; thus, jury found inhalation of asbestos fibers from Kaylo was a substantial causative factor but allocated only 1.2% of total legal cause to defendant’s comparative fault; absent instruction or evidence that a small amount was necessarily insubstantial, and guided by BAJI No. 3.77’s command that *every contributing cause was a legal cause regardless of the degree of its contribution*, jury concluded even 1.2 percent of the cause was, on the facts, substantial].)

In a recent Ninth Circuit opinion applying California law, the Court of Appeals noted that, in *Rutherford*, the California Supreme Court cautioned that “undue emphasis should not be placed on the term ‘substantial.’” (*Kennedy v. Southern California Edison* (9<sup>th</sup> Cir. 2001) 268 F.3d 763, 770, citing *Rutherford, supra*, 16 Cal. 4th at 969). Like *Rutherford*, *Kennedy* dealt with the difficulty of proving causation, only here the Court considered the context of “fuel fleas” (particles of nuclear radiation). Essentially, both cases involve injuries in which it is difficult to prove that certain particles caused the injuries. In this context, *Kennedy* held that the substantial factor “standard minimally requires that the contribution of the individual cause be more than negligible or theoretical.” (*Id.* at 770, citing *Rutherford* at 976-77.)

On *Kennedy*’s facts (even assuming that radiation caused decedent’s disease, there

was only a one in 30,000 chance that “fuel flea” radiation was the actual cause), the contribution of the fuel fleas -- even assuming exposure and ingestion and with full knowledge that decedent actually developed the disease -- “only played an ‘infinitesimal’ or ‘theoretical’ part in bringing about [decedent’s] injury.” (*Id.* at 770-71.) Because no reasonable jury could have found that the fuel fleas were a substantial factor in causing decedent’s disease, the failure to give a *Rutherford* instruction was harmless error. (*Id.* at 770.)

### **5.2.3 Liability for Improper Maintenance Plan**

- **Failure to act can trigger inverse condemnation liability.**

A levee project failed during a heavy rainstorm, flooding plaintiffs’ properties. Defendant counties’ refusal to keep the channel clear, in clear violation of Army Corps of Engineers guidelines, caused the breach. Their inaction amounted to a deliberate policy because they had known about the flood hazard for over 20 years. Despite the danger, they allowed the channel to fill, in order to meet Fish and Game regulations. The court held for plaintiffs, explaining that, to support inverse condemnation liability, a plaintiff need only show that an “entity was aware of the risk posed by its public improvement and deliberately chose a course of action--or inaction--in the face of that known risk.”

*Arreola v. Monterey County* (2002) \_\_Cal.App.4th\_\_ [2002 Cal. App. LEXIS 4319].

### **5.2.4 No Liability for Negligence in Routine Maintenance**

Public entities should observe that the distinction between simple negligence and deliberate planning can blur, particularly when plaintiff’s inverse condemnation claim hinges on an entity’s failure to act. (*Paterno v. State of California, supra*, 74 Cal.App.4th at 89.) For example, the *Hayashi* court decided that a district’s refusal to repair a levee did not amount to a deliberate plan, even though it acknowledged there was “no doubt of respondent’s knowledge of the defective condition.” (*Hayashi v. Alameda Flood Control District, supra*, 167 Cal.App.2d at 591-592.) It is difficult to square the *Hayashi* decision with the admonition of the late professor Arvo Van Alstyne, cited in *Arreola*, that an entity should pay compensation when it makes a “deliberate calculated decision to proceed with a course of conduct, in spite of a known risk.” (*Arreola v. Monterey County, supra*, 2002 Cal. App. LEXIS 4319 at \*29.)

The decisions suggest failure to act in the face of a known risk may not rise to the level of planning when the span of time between discovery of the risk and actual damage is brief (*McMahan's of Santa Monica v. City of Santa Monica, supra*, 146 Cal.App.3d at

697), when conduct is properly attributed to individual employees rather than the entity as a whole (*Paterno v. State of California, supra*, 74 Cal.App.4th at 87-88), and when damage results from an unintended, rather than purposeful, operation of a public improvement. (*Yee v. City of Sausalito, supra*, 141 Cal.App.3d at 920, 922-923.)

### 5.3.1 Property Dedicated to a Public Entity

- **A company cannot expel union demonstrators from its property after it has agreed to provide unobstructed public access to a private sidewalk dedicated to public use.**

Plaintiff company dedicated a private sidewalk to public use. When the defendant county issued a permit for defendant union to demonstrate on the private sidewalk, the plaintiff claimed the county had taken its property to create a public forum. The Ninth Circuit affirmed summary judgement in favor of the defendants. A company cannot expel union demonstrators from its property after it has agreed to provide unobstructed public access to private sidewalk. Sidewalks are the hallmarks of traditional public forums, and this sidewalk lost its private character when the plaintiff dedicated it to public use.

*Venetian Casino Resort v. Local Joint Executive Board of Las Vegas* (9th Cir. July 12, 2001) 257 F.3d 937.

### 6.5.3 Property Historically Subject to Flooding

- **Public projects not related to flood control trigger strict liability when they cause water damage to property, even if it is historically subject to flooding.**

A state highway backed up flood water onto plaintiffs' property. The appellate court concluded that the two sources of the rule of reasonableness--traditional private water law, and Professor Van Alstyne's balancing analysis--both weighed towards strict liability. First, traditional water law does not privilege downstream obstruction of flood water, as in the instant case. Second, Van Alstyne's public policy analysis only permits a reasonableness approach where a project's primary purpose is to protect plaintiffs' property. Here, the State's purpose in building the highway was to benefit the traveling public.

*Arreola v. Monterey County* (2002) \_\_ Cal.App.4th \_\_ [2002 Cal. App. LEXIS 4319].

## 6.5.6 [New] Relevance of Design Capacity

Even when flood control projects function as intended, they may fail when unusually large storms exceed their capacity. In such cases, the “design capacity” doctrine shields public entities from liability.

The design capacity doctrine begins with the premise that the government has no inherent duty to protect property from floods. (*Tri-Chem, Inc. v. Los Angeles County Flood Control District, supra*, 60 Cal.App.3d at 312 .) As a result, a public entity cannot be held liable unless it subjects property to more flooding than would have occurred absent construction of an improvement. (*Shaeffer v. State of California* (1972) 22 Cal.App.3d 10137 [99 Cal.Rptr. 861].) Put another way, a project must be a substantial concurring cause of injury to property. (See Sec. 4.4 above; *Belair v. Riverside County Flood Control District, supra*, 47 Cal.3d at 559-60.) If supervening forces alone produce injury, plaintiffs cannot succeed on an inverse condemnation claim. (*Id.* at 559; *Bunch v. Coachella Valley Water District, supra*, at 433.)

When a project fails solely because water flow exceeds its design capacity, the overflow is not the substantial cause of the property damage. Instead, nature acts as a sole supervening cause of the damage, absolving public entities from liability. (See, e.g., *Tri-Chem, Inc. v. Los Angeles County Flood Control District, supra*, 60 Cal.App.3d at 311-312)

By contrast, a project that fails below capacity *is* a substantial cause of resultant injury, even if the damaged property is historically subject to flooding. (*Belair v. Riverside County Flood Control District, supra*, 47 Cal.3d at 560.) Although the property would have flooded absent the project, property owners only improved and settled the area because they reasonably believed it would protect them. (*Holtz v. Superior Court, supra*, 3 Cal.3d at 304.) Here inducement of expenditures establishes the key link in the chain of causation, possibly subjecting the public entity to liability.

Design capacity is an attractive defense because it defeats an inverse condemnation claim without requiring a showing of reasonable conduct. However, an entity should never assume it will be absolved from liability merely because a project performs to specifications. (*Akins v. State of California, supra*, 61 Cal.App.4th at 44.) Design capacity only applies when the “particular factual underpinnings of the case” defeat substantial causation. (*Id.* at 43.) As a result, the doctrine’s protection is limited in scope.

First, design capacity does not immunize damage to property not historically subject to flooding. (*Id.* at 47.) Since such property does not flood naturally, a project that

damages it is always the substantial cause of the injury. This is equally true whether or not the water flow exceeds the project's capacity.

Second, even if a property is historically subject to flooding, design capacity does not apply if a project increases the water flow to that property. (*Id.* at 45. n.39) The project substantially causes damage to the extent it exceeds natural flood damage.

A recent case established that a practical understanding of government reports controls determination of a project's design capacity. In *Arreola v. Monterey County*, the appellate court held that County could not establish capacity by tying it to a specific number in a report. (*Arreola v. Monterey County, supra*, at \*) Documents suggested that the project contained freeboard enabling it to carry an extra 4,000 cubic square feet of water per second. (*Id.* at \*) The court included the freeboard into the capacity calculation, even though it was excluded from the number identified as the design capacity in the report. (*Id.* at \*) The issue in *Arreola* is also ultimately one of causation. (*Id.* at \*) Landowners rely on the protection afforded by a project, and a reasonable understanding of how much water the project can hold should be used to determine whether nature or a project failure caused the damage.

### **6.5.7 [Previously 6.5.6] Unanswered Questions**

- **City strictly liable on inverse condemnation theory for water damage caused when pipe leading to fire hydrant burst.**

A City-owned water pipe leading to a fire hydrant burst, damaging plaintiff's property. The City argued (1) that it had immunity under Government Code § 850.4 (fire hydrant immunity); and (2) that it was not liable on an inverse condemnation theory because its maintenance of the pipe was reasonable. The City acknowledged that the general rule in inverse condemnation cases is strict liability, but argued that in water damage cases a rule-of-reasonableness exception applies.

The Court of Appeal held (1) that immunities provided by the Tort Claims Act do not insulate public entities from liability for inverse condemnation; and (2) that the City was strictly liable on an inverse condemnation theory even if it maintained the pipe reasonably. The court explained that the water law exception, on which the City relied, applied only to damages caused by public flood control improvements. Because the subject water pipes were not flood control improvements the general rule applied and the City was strictly liable for the damage to plaintiff's property.

*Pacific Bell v. City of San Diego* (4th Dist., Div. 1, June 13, 2000) 81 Cal.App.4th

## 12.11 [New] The “Transfer of Title” Remedy

Inverse condemnation complaints commonly pray for, not only money damages, but also an order transferring title of the plaintiff’s damaged property to the public entity. The theory is that inverse condemnation is just the reverse of eminent domain, in which the public entity’s goal is to receive title. The practical consequence is that the public entity may be saddled with title to unwanted property for which the cost of remediation exceeds its fair market value.

No published opinion has sanctioned this “transfer of title” theory. However, in an unpublished opinion, *Amonic v. City of Los Angeles*, the Second District Court of Appeal affirmed a trial court judgment in a residential landslide case that assessed \$2 million against the City -- representing a complete loss of fair market value -- *and* transferred title to the City. The Supreme Court denied the City’s petition for review. (*Amonic v. City of Los Angeles*, S071819, S.Ct. 1998 Cal. LEXIS 5491 (August 19, 1998).) Given the novelty of the decision and its potential importance, the appellate court’s disinclination to publish may denote its uncertainty about the wisdom of the “transfer of title” remedy. The unpublished opinion has no precedential value and gives public entities leeway to oppose the transfer of title remedy at the trial court level.

Public entities should argue that inverse condemnation does not entitle plaintiff to the “transfer of title” remedy. Inverse condemnation is an action for damages, not for injunctive relief. In fact, inverse condemnation action and injunctive relief are mutually exclusive. Once an entity is held to have “taken” property, the entity can *ask for and receive* title to the property. But the plaintiff cannot *force* the entity to take the property.

“Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.” (Code of Civil Procedure section 1230.030.) The power to condemn lies in the legislature (and those to whom it delegates power), not the courts. It is generally recognized that the foregoing principle precludes a court from compelling a public entity to condemn property. (*City of Oakland v. Nutter* (1970) 13 Cal.App.3d 752, 764 [92 Cal.Rptr. 347].) Section 1230.020 provides that the power of eminent domain may be exercised *only* pursuant to statute.

A cause of action of inverse condemnation may be based on the takings clauses of either or both the federal and California Constitutions. (See *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 376, and fn. 1 [41 Cal.Rptr.2d 658].) Both the federal

and state Constitutions state that an owner whose property is taken (or, under the California Constitution, is damaged) is entitled to “just compensation.” (Federal Constitution, Fifth Amendment [“. . . nor shall private property be taken for public use, without just compensation”]; California Constitution, article I, section 19 [“Private property may be taken or damaged for public use only when just compensation . . . has been paid . . . .”].)

The courts have interpreted the term “just compensation” in both clauses to refer to *damages* -- usually, the fair market value of property. (*United States v. 87.30 Acres of Land* (9th Cir. 1970) 430 F.2d 1130, 1132 [“[J]ust compensation is fixed as the value of the interest taken or, in other words, ‘Market Value’”]; *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43 [104 Cal.Rptr. 1] [“just compensation” is measured by the market value of the property]; *Marshall v. Dept. of Water & Power* (1990) 219 Cal.App.3d 1124, 1145 [268 Cal.Rptr. 559] [same].) Although alternative measures of damages to fair market value are available in exceptional situations, all of those alternatives still consist of *damages*. (E.g. costs of repair, loss of use, lost profits, loss of prospective profits, increased operating expenses, increased construction costs, and incidental damages. See *Frustruck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 367 [28 Cal.Rptr. 357].)

No published cases have interpreted “just compensation” to include equitable relief, such as ordering a public entity to take title to property. To the contrary, California courts have regularly characterized inverse condemnation as a cause of action for *damages* -- and contrasted it to such equitable actions as quieting title, ejectment, or claims for prohibitory injunctions. (See *Kachadoorian v. Calwa County Water Dist.* (1979) 96 Cal.App.3d 741, 747 [158 Cal.Rptr. 223] [“[T]he landowner is not entitled to quiet title or to injunctive relief; rather, his remedy is by way of damages in the nature of inverse condemnation”]; *Pettis v. General Tel. Co.* (1967) 66 Cal. 2d 503, 507 [58 Cal.Rptr. 316] ; *Frustruck, supra*, 212 Cal.App.2d at 370-71. See also *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 963 [218 Cal.Rptr. 839] [“The landowner who brings an inverse condemnation action for a taking of his or her property essentially concedes the issue of propriety of the taking by choosing to seek *monetary damages* for the taking *rather than an injunction* or writ of mandate”] [emphasis added].)

In fact, as discussed in section 12.6 of the book, the courts have steadfastly held that when a public entity has taken, damaged, or invaded property *for a public use*, the landowner cannot obtain any equitable relief concerning his property, such as ejectment, an action to quiet title, or an injunction to force the entity to remove materials from the property. The landowner can only sue in inverse condemnation, for *damages*. (*Kachadoorian, Frustruck, and Pettis, supra*; see *Salton Bay* at p. 965.) Both the federal and California Constitutions establish a taking “for public use” as an indispensable

element of inverse condemnation. Since that indispensable element precludes equitable relief, equitable relief should not be available for inverse condemnation.

Landowners may contend that since inverse condemnation is the reverse of eminent domain -- an action in which the entity sues to condemn the property and take title -- a decision that the entity has taken the property *automatically* transfers title to the entity. True, both eminent domain and inverse condemnation are based on the constitutional rule that private property may not be taken or damaged for public use without just compensation. “But the proceedings are not synonymous, and the terms are not interchangeable.” (*Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 558 [111 Cal.Rptr.2d 901].) That is why there can be takings that *do not transfer title*. For instance, a regulation that “goes too far” may effect a taking of property, “*though its title remains in private hands*.” (*Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 773 [66 Cal.Rptr.2d 672] [emphasis added].) Similarly, an owner can sue in inverse condemnation for a *temporary* taking of property, or the taking of one property right, such as the right of access. (*Ibid*; *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 387-388 [110 Cal.Rptr. 489] [temporary taking of right of access by destruction of private bridge].) In both cases, title obviously remains in the owner even after he recovers.

Landowners may point to the Court’s statements in *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.’s* (1985) 172 Cal.App.3d 914 [218 Cal.Rptr. 839] that in inverse condemnation cases where a taking has been found, “the public entity acquires an interest in the property in return for the payment of damages” (*Id.* at 962.); and that the District in *Salton Bay* “was entitled to an interest as a matter of law.” (*Id.* at 963, fn. 14, see discussion at section 12.3 of the book.) But *Salton Bay* ultimately does not support the title-transfer argument, for two reasons. First, the only interest the District sought there was a *flooding easement*, not the title to all of the property owned by the multiple plaintiffs. And the court was very clear that the District was only getting that easement, and no other interest in the property. (*Id.* at 926, 964.) Second, the *District* sought the easement (so that it could continue the flooding in the future). The property owners did not ask for the transfer of interest as a remedy. In fact, they fought it. (*Id.* at 962-65.) So all *Salton Bay* says is that the *entity* can *ask for* and receive an interest in property it pays for in inverse condemnation. It does *not* say that the *owner* can *force* the entity to take any interest in the property, let alone full title.

The cases *Salton Bay* cites confirm this conclusion. They either involve cases where public entities *sought* easements for the flow of water over private property, or were found to have taken property without compensation by taking de facto water easements over property. (*Salton Bay, supra*, at 962-63; *Mehl v. People ex rel. Dept. of Public Works* (1975) 13 Cal.3d 710, 715, 718, fn. 4 [119 Cal.Rptr. 625] [State took

easement by directing waters across property]; *Elmore v. Imperial Irrigation Dist.* (1984) 159 Cal.App.3d 185, 198 [205 Cal.Rptr. 433] [mandamus granted to stop diversion of water over property]; *Podesta v. Linden Irr. Dist.* (1956) 141 Cal.App.2d 38, 53 [296 P.2d 401] [District created easement by diverting waters over land, creating a taking]; *Beckley v. Reclamation Board* (1962) 205 Cal.App.2d 734, 746 [23 Cal.Rptr. 428] [same]; *Inns v. San Juan Unified School Dist.* (1963) 222 Cal.App.2d 174, 180 [34 Cal.Rptr. 903] [defendant district sought drainage easement in inverse action; court granted it even though district did not plead request for it]; *Steiger v. City of San Diego* (1958) 163 Cal.App.2d 110, 117 [329 P.2d 94] [City sought easement in inverse action; court declined to grant it because City didn't ask for it in pleadings.] None holds that a public entity who has condemned property must take title to it.

Finally, the pleadings in most inverse condemnation actions for flooding or earth movement show at most *damage* to the property, rather than a taking. And case law is clear that when an entity must pay in inverse condemnation for *damaging* property, rather than taking it, the entity cannot take an interest in the property by paying damages. (*Salton Bay, supra*, 172 Cal.App.3d at 964, citing *Steiger v. City of San Diego, supra*, 163 Cal.App.2d at 115-17.) If the public entity cannot obtain a property interest by damaging property, the owner should not be able to transfer title as a remedy for that damage.

Nevertheless, given the unpublished opinion in *Amonic*, it is not possible to predict the outcome when plaintiffs pray for the transfer of title remedy.

## 12.12 [New] Eminent Domain Cases

The following eminent domain cases are included because they may be relevant to determining fair market value in inverse condemnation cases.

- **The testimony of an inventory appraiser should be admitted if it is relevant and material, and based on a proper legal standard.**

The Department of Transportation wanted to widen a freeway. It brought an eminent domain action against operators of a salvage yard. The trial court ordered Caltrans to compensate defendant for the fair market value of its business inventory. The fair market value was appraised at well over \$2 million by an appraiser for the salvage company. Caltrans appealed on grounds that the jury should have considered testimony from their appraiser, who valued the property at under half a million dollars.

The appellate court reversed. The testimony of an inventory appraiser should be admitted if it is relevant and material, and based on a proper legal standard. The trial

court denied Caltrans a fair trial by excluding its opinion testimony on the fair market value of the inventory. Caltrans' appraiser determined the highest fair market value between a willing buyer and a willing seller, based on wholesale value. He hired three subcontractors who were familiar with the salvage yard and developed a specific methodology for appraising the inventory. Pursuant to Evidence Code section 823, the value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable.

*The People ex. rel. Department of Transportation v. The Clauser/Wells Partnership* (4th Dist., Div. 1, February 1, 2002) 95 Cal.App.4th 1066 [116 Cal.Rptr. 2d 240].

- **The offer in an eminent domain action is unreasonable if it is not based on valuation according to the land's available uses.**

In furtherance of a freeway widening project, Caltrans sought title in eminent domain to a two-acre parcel of land belonging to the Woodsons. The land was a nonconforming mobile home park. Valuing the land as a mobile home park, Caltrans offered the Woodsons \$1,400,000. A jury awarded the Woodsons \$1,876,750 in just compensation which reflected the value of the land at its best use. The Woodsons filed a motion for litigation expenses pursuant to Code of Civil Procedure section 1250.410. The motion was denied on the basis that Caltrans' offer was reasonable. The Woodsons appealed.

The appellate court reversed in favor of the Woodsons. Caltrans' offer was unreasonable. Based on the nonconforming status of the mobile home park, the land should have been valued, not as a mobile home park, but according to the uses for which it was "available." A city ordinance required termination of a nonconforming mobile home park, so that use was illegal anyway. Moreover, Caltrans' offer was \$476,750 less than and equal to only 74 percent of the jury award.

*People ex rel. Department of Transportation v. Woodson* (4th Dist., Div. 3, November 14, 2001) 93 Cal.App.4th 954 [113 Cal.Rptr.2d 559].

- **Hypothetical income from a landfill operation may not be used in valuation of the subject property in an eminent domain action.**

In this case, expert testimony valuing farm land based on its hypothetical use as a landfill was excluded. Hypothetical income from a landfill operation may not be used in the valuation process of the subject property in an eminent domain action; the competitive landfill market, an inchoate service, is not analogous to cases involving mineral rights,

which have intrinsic value. Further, the expert testimony lacked a sufficient factual basis when the expert failed to establish a likelihood that the private developer could obtain landfill permits, and the costs and demand regarding a landfill operation were merely speculative.

*City of Stockton v. Albert Brocchini Farms, Inc.* (3rd Dist. September 10, 2001) 92 Cal.App.4th 193 [111 Cal.Rptr. 2d 662].

## **13.1 (Litigation Expenses) General Rules**

- **A plaintiff is entitled to attorney fees incurred in an action to enforce an inverse condemnation judgment.**

The plaintiff landowner and the defendant Agency settled an inverse condemnation action. As part of the settlement, the Agency allowed judgment to be entered against it. The Agency failed to pay the entire judgment. The landowners successfully petitioned for writ of mandate under Government Code section 970, seeking to enforce the unpaid portion of the judgment. They then sought fees and costs under Code of Civil Procedure section 1036. The trial court disallowed the attorney fees and costs, and granted the Agency's motion to tax costs on the ground that no statutory authority allowed such costs. The appellate court reversed. It interpreted section 1036 to entitle a prevailing plaintiff to litigation expenses in an action to enforce the inverse condemnation judgment. The purpose of section 1036 is to prevent property owners from being forced to bear the cost of expensive litigation, and to protect their interests against unreasonable governmental conduct. That purpose is implemented by construing section 1036 to permit plaintiffs to recover litigation expenses incurred when the government unreasonably delays paying a judgment.

*Downen's, Inc. v. City of Hawaiian Gardens Redevelopment Agency* (2nd Dist., Div. 6, January 30, 2001) 86 Cal.App.4th 856 [103 Cal.Rptr.2d 644].

### **13.3.2 (Litigation Expenses) Effect of Contingency Fee Agreement**

- **Plaintiff in an indemnity action against a city may not collect attorney fees beyond what were actually incurred, even if reasonable.**

The prevailing plaintiff submitted declarations outlining her attorney's hourly rates and the time expended on the case, asserting that Section 1036 provides the right to recover reasonable costs and attorney fees in an inverse condemnation action. However,

the appellate court reversed a trial court fee award in the amount of \$43, 107 because the plaintiff failed to introduce the fee agreement or any other evidence to establish how much she actually was required to pay in attorney fees. While Section 1036 requires attorney fees awarded to be “reasonable,” it also requires them to have been “actually incurred.”

*Andre v. City of West Sacramento* (3rd Dist. September 25, 2001) 92 Cal.App.4th 532 [111 Cal.Rptr.2d 891].

### **13.3.3 Effect of Reasonable Settlement Offer**

A question related to the reasonableness standard is whether a property owner can recover litigation expenses incurred after rejecting a reasonable settlement offer from a public entity. Although no inverse condemnation case addresses this question, public entities contend that a reasonable settlement offer that equals or exceeds a jury’s later damages award cuts off recovery of fees and costs that the owner incurs after the offer.

The holding in *Meister v. Regents of the University of California*, (1998) 67 Cal. App.4th 437 [78 Cal.Rptr.2d 913], supports this argument. Plaintiff professor sued the UC regents under the Information Practices Act (IPA), claiming that improper circulation of a termination letter damaged his reputation. He rejected a settlement offer of \$44,495, but won only \$30,000 in arbitration. Plaintiff then sought over \$500,000 in attorney’s fees. The trial court awarded him \$75,500.96, limiting reimbursement to the fees he had incurred prior to the settlement offer.

The appellate court approved the award limitation. The “lodestar” method applies to a statutory attorney’s fee award unless the statute provides for another method of calculation. Civil Code Section 1798.48, which authorizes “reasonable attorney’s fees as determined by the court” in IPA actions, provides no other method. Since the “lodestar” method vests trial courts with broad discretion to determine what hours expended by attorneys are “reasonably spent,” the trial court could consider informal settlement offers in setting the amount of the fee award.

*Meister’s* holding may extend to inverse condemnation fee awards. Code of Civil Procedure 1036 governs inverse condemnation expense reimbursement. Like Civil Code section 1798.48, it fails to provide a method for calculating fees. It only requires that awards be reasonable, actually incurred, and properly apportioned. Therefore, trial courts hearing section 1036 claims can apply the “lodestar” method, enjoying wide latitude in determining the reasonableness of fee reimbursements. They should be able to bar awards of expenses incurred after reasonable settlements that exceed a jury’s later

damages award.

At the same time, public entities should note that *Meister* does not mandate, but merely allows, such “fee cut-offs.”

### **13.3.4 Public Entity’s Statutory Offer to Compromise Ineffective**

- **If an inverse condemnation plaintiff who rejected a statutory offer fails to prove a taking, he must pay the defendant entity’s post-offer costs and expert fees.**

The trial court found that El Nino rains, not a city water main, caused a landslide that condemned the plaintiffs’ house. The appellate court held that where the plaintiff *fails* to prove a public entity caused a taking of or damage to property, there is *no* inverse condemnation; therefore Code of Civil Procedure section 998 applies. The holding is distinguishable from that of *Orpheum Building Company v. San Francisco Bay Area Rapid Transit District* (1978) 80 Cal.App.3d 863, 878 [146 Cal.Rptr. 5], which held that the provision in the statute that expressly excludes “eminent domain” actions is also applicable in inverse condemnation cases. There, section 998 did not apply when an inverse condemnation plaintiff *did* prove public entity interference, but failed to obtain damages exceeding the offer.

*Goebel v. City of Santa Barbara* (2nd Dist., Div. 6, September 25, 2001) 92 Cal.App.4th 539 [111 Cal.Rptr.2d 901].

### **13.3.5 Fees and Costs that Exceed Recovery Amount**

- **It is unreasonable to pay a lawyer almost \$250,000 to win less than \$6,000.**

*Choate v. County of Orange*, (4<sup>th</sup> Dist., Div. 3, December 18, 2000) 86 Cal.App.4th 312 [103 Cal.Rptr.2d 339].

## **13.4 Other Litigation Expenses**

- **C.C.P. section 1036 does not provide for awards of costs or fees that are not considered ordinary costs under C.C.P. section 1033.5.**

In *Ferrell v. County of San Diego*, (2001) 90 Cal.App.4th 537 [108 Cal.Rptr.2d 681], the court placed an important limitation on the litigation expenses that a property owner may recover. The court construed Section 1036's provision for an award of "reasonable costs, disbursements, and expenses." Under this broad language, property owners have won extraordinary costs beyond normal litigation costs, such a filing fees and deposition transcripts, which are recoverable under Sections 1032 and 1033.5.

In that vein, the owner in *Ferrell* sought reimbursement for items that Section 1033.5 does not authorize, including expert-witness fees paid to the county's experts, mileage, postage and photocopying.

However, the court affirmed the trial court's order denial of reimbursement. The court reasoned that the words "disbursements" and "expenses," as used in Section 1036, are synonymous with "costs" and cover only those that Section 1033.5 authorizes. Further, in condemnation proceedings--which are analogous to inverse-condemnation cases--the property owner can recover only Section 1033.5 costs.

Defeating a bill for extraordinary costs--for instance, the substantial fees that a property owner must pay for the privilege of deposing the public entity's technical experts--is a palpable victory for public entities. But *Ferrell* only dulls, and does not defeat, the arrow of Section 1036 awards. Section 1036 remains a formidable weapon, and only the "reasonableness," "actually incurred" and "apportionment" requirements limit its effect.

### 14.1.3 Interest Rate

- **Prevailing plaintiff in a takings action is entitled to interest equal to what a reasonably prudent investor would receive in a reasonable return.**

The County removed several of plaintiff's vehicles from his property. Plaintiff sued the County for violation of the Takings Clause of the Fifth Amendment under section 1983. The district court awarded plaintiff prejudgment interest to compensate him for delay in payment of just compensation. It calculated the interest by adopting variable annual interest rates.

The appellate court affirmed in part, reversed in part and remanded. The prevailing plaintiff in a takings action is entitled to interest equal to what a reasonably prudent investor would receive in a reasonable return -- not an amount equal to variable annual interest rates. Plaintiff was not compensated until long after the taking and thus just compensation required an award of prejudgment interest. This is to ensure that he was put in as good a pecuniary position as he would have occupied had the County paid him for the vehicles when it took them.

*Schneider v. County of San Diego* (9th Cir. March 21, 2002) 285 F.3d 784.

## 16 [New] Regulatory Takings

### Abstention

- **A plaintiff risks abstention if challenging a city housing ordinance under the federal Constitution before challenging it under state law.**

Plaintiff apartment association challenged a city ordinance under the U.S. Constitution. The ordinance required landlords to obtain a license for each rental unit warranting compliance with the Uniform Housing Code, contingent upon an inspection of each unit and payment of a fee. The district court granted the City's motion for summary judgment. The plaintiffs appealed the judgment.

The appellate court vacated the order granting summary judgment and remanded the case to the district court, ordering abstention. Because the relief sought by the appellants may have been available under state law, the district court should not have decided the merits of the federal claims. The case involved a sensitive area of social policy; determination of constitutionality under the state statute may have eliminated the need to determine federal constitutionality; and the validity of the ordinance under the state constitution was uncertain.

*Columbia Basin Apartment Assoc. v. City of Pasco* (9th Cir. September 26, 2001) 268 F.3d 791.

- **Parallel takings cases in state and federal court are an insufficient ground for the federal court to abstain from hearing the federal action.**

Where a parallel state court takings challenge is pending, a federal court is not precluded from hearing the federal action under the *Younger v. Harris* (1971) 401 U.S. 37 abstention doctrine. Under *Younger*, a federal court cannot exercise its discretion if doing so will interfere with state judicial proceedings. Although the federal case's outcome might influence the state case, that sort of interference is insufficient to trigger *Younger* abstention -- particularly when the plaintiffs only assert federal claims in the federal action, and vice versa. The Ninth Circuit withdrew its previous opinion in *Montclair Parkowners Ass'n v. City of Montclair* (9th Cir. May 8, 2001) 211 F.3d 1144.

*Montclair Parkowners Ass'n v. City of Montclair* (9th Cir. September 5, 2001) 264 F.3d 829.

## “Categorical” Regulatory Takings

*Lucas v. South Carolina Coastal Council* created a categorical rule that when a regulation “denies all economically beneficial or productive use of land,” it automatically effects a taking. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015 [120 L. Ed. 2d 798, 112 S. Ct. 2886].)

- **Even when the government deprives property owners of all viable economic use of their land, the regulation may not be unconstitutional if it has only a temporary impact.**

Respondent Tahoe Regional Planning Agency imposed moratoria on development in the Lake Tahoe Basin while formulating a use plan for the area. Petitioner real estate owners sued alleging the moratoria constituted a taking of their property without just compensation. The district court held that there was a taking under the categorical rule set forth in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003 [112 S.Ct. 2886, 120 L.Ed.2d. 798] because the moratoria deprived the owners of all economically viable use of their land. The Ninth Circuit held that because the regulations had only a temporary impact on the petitioner’s fee interest, there was no categorical taking.

The U.S. Supreme Court affirmed. The duration of the restriction is one of the factors to be considered. The factors in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S.104 [98 S.Ct. 2646, 57 L.Ed.2d. 631] must be considered. Fairness and justice will not be served by adopting a categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking.

*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (U.S. Supreme Court, April 23, 2002) \_\_U.S.\_\_ [122 S. Ct. 1465; 152 L. Ed. 2d 517].

## Due Process

- **A county violates developers' rights to procedural due process when it fails to provide a hearing before halting a previously approved land development project.**

A county violated developers' due process rights when it failed to provide a

hearing before issuing a stop work order and imposing a six-year development moratorium on a previously approved land development project. The developers' interests in the approved plats were considerable; there was a marked absence of any alternative procedural safeguards; and providing an informal pre-deprivation hearing would have entailed only minor administrative costs and burdens on the county.

*Weinberg v. Whatcom County* (9th Cir. February 27, 2001) 241 F.3d 241.

## **Land-use Ordinances Failing to Substantially Advance Legitimate State Interests**

A regulatory taking also occurs when a regulation “does not substantially advance legitimate state interests.” (*Agins v. City of Tiburon* (1980) 447 U.S. 255, 260 [260 65 L. Ed. 2d 106, 100 S. Ct. 2138].)

- **Heightened scrutiny standard of *Dolan* and *Nollan* does not apply to permanent denials.**

The United States Supreme Court concluded in this case that a regulatory takings claim brought pursuant to 42 U.S.C. section 1983 sounds in tort, and that a suit for legal relief brought under the statute is an action at law. Therefore, the jury must hear all issues that are proper for it to determine, including the predominately factual question of whether a landowner, such as Del Monte, has been deprived of all economically viable use of its property. This was a loss for the government. The court stated that it was more difficult to decide whether the jury should resolve the question of whether the government action substantially served a government purpose. The court concluded that it was not erroneous to give the question to the jury in this case, but that would not always be appropriate in takings cases. The court hinted that the question would normally be decided as a mixed question by the court. The court laid to rest the notion that the heightened scrutiny under *Dolan v. City of Tigard* (1994) 512 U.S. 374 [129 L.Ed.2d 304, 114 S.Ct. 2309], and *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 [97 L.Ed.2d 677, 107 S.Ct. 3141] applies to permanent denials.

*City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (U.S. Supreme Court, May 24, 1999) 526 U.S. 687 [143 L.Ed.2d 882, 119 S.Ct. 1624].

- **Conditional use authorization is required if property owners are expanding a building's historical use; if a fee bears a reasonable relationship to loss of housing, there is no unconstitutional taking.**

Plaintiff hotel owners wanted to rent out their rooms to daily renters rather than to longer term residents. They were required to obtain a conditional use permit pursuant to a City ordinance, which they elected to do by paying an in lieu fee. The ordinance makes it unlawful to eliminate a residential hotel unit without obtaining a conversion permit. Plaintiffs challenged the conditional use permit requirement and alleged that the impediment constituted a taking of private property without just compensation. The trial court denied the writ petition and sustained a demurrer to the takings counts. The appellate court reversed.

The California Supreme Court affirmed in part and reversed in part. Conditional use authorization is required if property owners are expanding a building's historical use. Tourist use of the hotel before enactment of the conditional use requirements did not encompass units and did not occur full time without regard to residential occupancy and demand. Thus, plaintiffs' proposal to convert to full-time tourist use constitutes an expansion of the hotel's historical use and therefore requires conditional use authorization. The housing replacement fees bear a reasonable relationship to loss of housing; thus, there is no unconstitutional taking. The amount of the fee is based on the number of rooms being converted.

*San Remo Hotel LP v. City and County of San Francisco* (California Supreme Court, March 4, 2002) 27 Cal.4th 643 [117 Cal.Rptr.2d 269, 41 P.3d 87].

- **Rent control ordinance need not satisfy every stated goal, and court not limited to ordinance's stated goals in determining whether ordinance substantially serves legitimate goals.**

In an attempt to state an inverse condemnation claim, the plaintiff, a lessor of property subject to rent control, argued that the rent control had not benefitted the demographic groups it was supposed to favor and, thus, had not measured up to its objectives to preserve its constitutional validity. Rejecting Plaintiff's theory, the court concluded that, even assuming that the plaintiff's allegation was correct, the plaintiff's complaint did not adequately allege that rent control failed to substantially advance some legitimate state purpose -- such as keeping rent increases in check. Additionally, the court

stated that the Constitution did not limit its analysis to only looking at the rent control statutes' stated goals in determining whether it substantially serves legitimate goals. Notably, the court emphasized that it was deferring to the legislature any question of whether rent control is good policy.

*Santa Monica Beach, LTD. v. Superior Court of Los Angeles County* (California Supreme Court, January 4, 1999) 19 Cal.4th 952 [81 Cal.Rptr.2d 93, 968 P.2d 993].

- **A generally applicable city ordinance requiring developers to price fixed percentages of new units affordably does not trigger heightened takings clause scrutiny.**

An inclusionary housing ordinance requiring developers to sell 10 percent of all newly constructed units at an affordable price does not trigger heightened takings clause scrutiny used to evaluate land use bargains between individual property owners and regulatory bodies. Further, the ordinance is constitutionally valid when it substantially advances the city's legitimate government interest in creating affordable housing by increasing the supply of such housing.

*Home Builders Assoc. of Northern California v. City of Napa* (1st Dist., Div. 5, June 6, 2001) 90 Cal.App.4th 188 [108 Cal.Rptr.2d 60].

## **Non-“Categorical” Regulatory Takings**

*Lucas* held that *Penn Central Transportation Co. v. New York City* governs regulations that do not reduce a property's value to zero. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015 [120 L. Ed. 2d 798, 112 S. Ct. 2886].) When determining whether a regulation amounts to a taking, *Penn Central* undertakes an “ad hoc, factual inquiry” which considers the regulation's economic effect on the landowner, the degree to which a regulation interferes with reasonable investment-backed expectations, and the character of the government action. (*Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124 [57 L. Ed. 2d 631, 98 S. Ct. 2646].)

- **Although Limited Practice Officers have a property right in the interest earned on their clients' funds, a state-created account that uses the interest is**

**not a taking.**

**NOTE: Petition for writ of certiorari granted by Unites States Supreme Court**

IOLTA requires lawyers to place certain client funds in an interest-bearing account. The interest is collected by the state of Washington. The program was amended to require client funds of certain escrow and land title companies to be placed in the account, if the company employs at least one Limited Practice Officer who is licensed to prepare certain land sale documents. Four LPOs claimed that the program takes the interest generated by their monies and compels speech without providing just compensation, in violation of the Fifth and First Amendments. The district court held that the plaintiffs did not have a property right to the interest generated on the funds.

The appellate court affirmed in part and vacated in part. Although the interest earned belongs to the LPOs, IOLTA's action does not amount to a taking. The cost of their individual real estate transactions did not increase. Escrow and title company client trust funds traditionally did not earn interest, so plaintiffs likely would not have expected a net interest absent IOLTA. Moreover, plaintiffs are not seeking compensation for the value of something they lost. Because plaintiffs have a property right to the interest generated on the funds, the judgment on the First Amendment claim was vacated and remanded.

*Washington Legal Foundation v. Legal Foundation of Washington* (9th Cir. November 14, 2001) 271 F.3d 835.

- **A rent control regulation that requires landlords to pay tenants a higher interest rate on their security deposits than the rate actually earned may constitute a regulatory taking.**

The City of Santa Monica rent control board adopted regulations requiring residential landlords to place their tenants' security deposits in interest-bearing accounts, and to pay the tenants 3 percent interest per annum. Because banks were only paying interest rates between .5 and 1.5 percent, landlords were required to supplement the difference. The Action Apartment Association, an organization of residential landlords, sued the Board for inverse condemnation, claiming that the regulation amounted to a confiscatory taking. The trial court sustained the Board's demurrer without leave to amend. The Association appealed.

The appellate court reversed. The 3 percent interest requirement does not substantially advance a legitimate state interest and has an adverse impact on landlords. Applying the *Penn Central* factors, the economic impact on landlords not only requires landlords to use their own funds to pay a significant portion of the annual sum, but a three-year period must pass before the Board reviews the interest rate; the regulations, as applied, are contrary to the landlord's reasonable investment-backed expectations; and are remote from any concern with the health and safety, quality of housing, or welfare of the City and its residents.

*Action Apartment Assoc. v. Santa Monica Rent Control Board* (2nd Dist., Div. 1, December 13, 2001) 94 Cal.App.4th 587 [114 Cal.Rptr.2d 412].

- **A city proposition restricting owners' ability to displace tenants may constitute a regulatory taking.**

The City's proposition effectively granted tenants lifetime tenancies; while the proposition's stated purpose of preserving affordable housing stock was legitimate, the means it applied should be closely scrutinized as it was not a typical rent control law, nor generally applicable. Further, the burden on the building owners may have interfered with their reasonable expectations, did not provide mitigating benefits, and was significant.

*Cuwnar v. City and County of San Francisco* (1st Dist., Div. 2, July 10, 2001) 90 Cal.App.4th 637 [109 Cal.Rptr.2d 233].

- **A city ordinance regulating foliage height, with retroactive application, is within the city's police power and is not a regulatory taking.**

A city ordinance set height limitations on foliage. The ordinance was designed to prevent residents' and visitors' views from being significantly impaired. If existing foliage exceeded those height limitations, a neighbor whose view was impaired could apply for a "view restoration permit." If the permit was granted, the City could order the property owner to trim or replace the foliage, at the permit applicant's expense. A property owner challenged the ordinance by petitioning for administrative mandate. He contended that the city's order to trim his foliage was a taking without compensation. The trial court denied

the petition, and the appellate court affirmed.

Passing an ordinance to protect views is a legitimate exercise of the city's police power. Nor is the ordinance, as applied, a regulatory taking. The ordinance does not compel a physical invasion of the owner's property. If the City enters the property to trim the foliage after the owner refuses to do so, it is the owner's violation of the ordinance that occasions the entry -- not the ordinance itself. The ordinance does not interfere with any vested right, because the owner has no vested rights in foliage of a certain height. Trimming the foliage will not interfere with any investment-backed expectations. And since the permit applicant must pay for any foliage killed by trimming, the owner will be fairly compensated for any damage to his trees.

*Echevarrieta v. City of Rancho Palos Verdes* (2nd Dist., Div. 4 January 3, 2001; ordered published, January 18, 2001) 86 Cal.App.4th 472 [103 Cal.Rptr.2d 165].

- **A city that improperly withholds demolition permit from a landowner of residential rental property on the basis that the property is low-income housing "takes" the property and must compensate the owner.**

A residential real property owner requested a permit so that he could demolish his hotel, which had been substantially destroyed by fire, and sell his land. Apparently believing that the property was a single room occupancy (SRO) hotel, the City withheld the permit for a year and a half pursuant to its ordinance restricting the demolition of SRO housing. The City also contracted for 24-hour security, assessing the costs against the plaintiff. In a bifurcated writ of mandate proceeding, the trial court ruled in the first phase that the assessments be set aside and refunded to the plaintiff \$399,999 plus interest. In the second phase, the court awarded the plaintiff \$1,199,237 plus interest (the parties stipulated as to damages) on the plaintiff's regulatory takings cause of action.

*Ali v. City of Los Angeles* (2nd Dist., Div. 4, December 28, 1999) 77 Cal.App.4th 246 [91 Cal.Rptr.2d 458].

## Ripeness

- **A takings claim is not ripe when a final decision regarding the challenged regulation has not yet been reached by the agency in charge of implementing**

## **the regulation.**

A takings claim challenging a land-use regulation is not ripe unless the agency charged with implementing the regulation has reached a final decision regarding the regulation's application to the subject property. Such final decisions do not occur until the responsible agency determines the extent of permitted development of the land. Further, a takings claim is not barred when an acquisition of title to the property occurs after the effective date of the applicable regulation.

*Palazzolo v. Rhode Island* (U.S. Supreme Court, June 28, 2001) 533 U.S. 606 [150 L.Ed.2d 592, 121 S.Ct. 2448].

- **A takings claim is not ripe when a city denies property owners use of their land as a landfill.**

Plaintiff property owners argued that the defendant City had taken their land through a series of planning decisions. The City argued that the takings claim was not ripe. The court agreed with the City, finding that the City's unwillingness to approve an intense and unique use such as a landfill does not establish that the City will prevent plaintiffs from developing their land in any economically viable manner. The court further held that the City's delay in adopting a new plan does not create the futility needed to establish a ripe takings claim.

*Calprop Corp. v. City of San Diego* (4th Dist., Div. 1, January 12, 2000) 77 Cal.App.4th 582.

## **Statute of Limitations**

**A state agency does not have a duty to renew or reissue revoked billboard permits when the billboard could not be lawfully erected at the time the new permit was sought.**

Caltrans cancelled billboard permits that the appellant's predecessors in interest obtained between 1930 and 1972. The billboards were evidently taken down or converted to less lucrative on-site advertising, which did not require a permit from Caltrans under

the Outdoor Advertising Act. In 1997, the appellant attempted to renew one of the permits by letter, but Caltrans did not respond. The appellant sued the Department of Transportation, claiming that the permits were unlawfully cancelled without notice by Caltrans, that Caltrans failed to provide any review or appeal procedure regarding the permit cancellation, and that it failed to provide any compensation. The appellant sought to compel Caltrans to reissue or renew the permits, or alternatively, to recover damages on an inverse condemnation theory for loss of the permits and the revenue they could have generated. The trial court sustained Caltrans' demurrer without leave to amend.

The appellate court affirmed. The causes of action were barred by statutes of limitation, and by section 5360, subdivision (b), which provided that any permit that was not renewed after January 1, 1993, was deemed revoked. When the permits here were revoked, they were extinguished, and when the deadlines for challenging the revocations expired they were extinguished conclusively. From that point they were no longer capable of renewal or reissuance. Therefore, since the time for challenging the revocations here has passed, the appellant was in the position of any new applicant. In that posture, he was not entitled to the permits.

*Traverso v. Dept. of Transportation* (1st Dist., Div. 4, March 20, 2001) 87 Cal.App.4th 1142 [105 Cal.Rptr.2d 179].