

Legal

Inverse Condemnation Remedies—The Saga Continues

By Gideon Kanner

During the past year this column has been keeping an eye on the development of the law of remedies in inverse condemnation. Usually, the controversy centers on whether the owner who establishes a taking by harsh regulations is entitled to recover "just compensation," or whether he can only get the courts to declare the regulation invalid. The U.S. Supreme Court had the issue before it earlier this year in *Agins v. City of Tiburon*, 100 S. Ct. 2138, but it declined to resolve it, and decided that case on procedural grounds instead. Perhaps later on in the coming Supreme Court term we may get the answer; the court agreed to hear the *San Diego Gas & Electric* case which is in the process of briefing as of this writing, and which raises the same issue. In the meantime, two state courts have taken a novel approach to the problem.

In *Estuary Properties, Inc., v. Askew*, 381 So. 2d 1126, the Florida Court of Appeal took a new approach to the problem. The owner in that case had plans for a major development which called for the creation of a waterway through about 1,800 acres of land containing black mangroves. The approval for the project was denied to protect those mangroves, and the owner sued. After an adverse judgment in the trial court, the owner appealed, and the appellate court reversed. The court took the position that the pertinent Florida statute required a balancing of the impact of the proposed project, including whether it will "favorably or adversely" affect the availability of housing. However, the court concluded that such a balancing had not occurred here; that the governmental entities concentrated on the preservation of the mangroves, and cast on the landowner the burden of overcoming governmental doubts and suspicions as to the effect of the project. Said the court: "... the position of the Planning

Council is that a private landowner has no private right to use his property, unless he can prove that such will not impair a public benefit." This was not acceptable to the court. "One cannot possibly read the record in this case without concluding that the principal reason for the denial of the [owner's] application was to preserve mangroves which serve as a protective buffer" for nearby bays, preserves and fishing grounds. Thus, reasoned the court, the owner had been denied the use of his property "because that use would deny the public certain free benefits."

Most significant, however, was the remedy which the court granted the owner. It neither invalidated the permit denial, nor did it award damages; rather, it presented the government with a choice: the government could either acquire the mangrove land or it had to let the owner proceed with his project. Specifically, the government was ordered either to grant approval for the project, or to commence eminent domain proceedings to acquire the affected land within 30 days after filing of the court's opinion. There is an epilogue to this ruling, however. The Florida Supreme Court granted certiorari, and the case was argued this summer. As of this writing an opinion is expected any time. And so, this story is to be continued.

A somewhat similar approach was taken by the Supreme Court of Minnesota at the other end of the country. In *McShane v. City of Faribault*, 292 N.W. 2d 253, the landowner was complaining about a zoning ordinance restricting land near airports to low intensity uses such as agriculture, cemeteries, etc. Although the subject property was actually used for agricultural purposes, its Highest and Best Use was commercial and the owner contemplated selling it as such. The owner

prevailed in the trial court which issued a writ of mandamus requiring the city to institute condemnation proceedings to acquire the subject property. The city appealed, and obtained a reversal. Significantly, the appellate court first rejected the city's argument that the owner should have sought administrative relief first. "Here, a variance would neither be adequate nor appropriate relief from the effect of the airport zoning regulations . . . We have consistently held that administrative remedies need not be pursued if it would be futile to do so." Here, the owners meant to sell the subject property, not develop it, and hence there was no development plan on which to base a variance. The court went on to distinguish between the use of zoning as allocating reciprocal burdens and benefits among members of the community (arbitration function), and its use in such a manner as to benefit the government (enterprise function). In the latter case—as here—the burden falls on a few individuals while the public receives substantial benefits, and so it is not necessary to show that the owner lost substantially all his property rights; a substantial diminution in value is sufficient.

As for remedies, the court agreed with the city. It reversed the order of mandamus. Instead, it enjoined the enforcement of the airport ordinance. This would permit the city to condemn the subject property, or to repeal the ordinance. The court was not persuaded by arguments going to high cost of acquisition of the land, and stuck to its preferred injunctive remedy. It noted, however, that this is not necessarily the exclusive remedy; where the "taking" effect of an ordinance should prove irreversible, injunction would not be proper, and presumably inverse condemnation awarding just compensation would then be in order.