The Continuing Evolution of Inverse Condemnation

RICHARD BARRETT, *Assistant Attorney General, Wisconsin*

• In Wisconsin we are getting into inverse condemnation more and more, due to the fact that there are now a number of items of damage which are compensable under our statute which never were compensable before. When we changed the law last fall, instead of combining those items with the usual fair market value items, they were listed separately to be put in as claims. Those new items are change of grade where there is no taking, moving costs, rearrangement of property on the same site, costs of refinancing, and costs of building plans that are no longer usable because of the taking.

Of these five items, the moving costs ordinarily cause no particular difficulty. The rearrangement of property, on the other hand, can sometimes cause a considerable amount of difficulty because very complicated fact situations and refinancing costs are involved. But of course, the big problem concerns compensation for the change of grade where there is no taking. Under our new law the landowner makes a claim, and if it is denied or not allowed within 60 days, he may follow this with what amounts to an inverse condemnation action in the courts.

We have had other forms of inverse condemnation on our books for some time. Where property is taken by the condemnor, a property owner has always had his right to pursue the condemnor for damages. Traditionally the issue in such cases has been a difference between what you or I may think is his damage, and what the property owner may think. That has caused us and will cause us more and more difficulty as we go along, because there certainly is room for dispute over this element of damages in many situations. For example, I have one case where the property is a night club located on the Wisconsin River. The Highway Department changed the grade by moving the highway back higher on the bluff, but leaving the old road intact so that the night club owner could use it for parking instead of having his customers park along the highway as they always had before. Notwithstanding this the property owner claimed he was damaged. It has caused us some difficulty to determine how the benefits and damages balance out in this set of circumstances.

Outside of these five items provided for in the new statute we find that we are now involved with a law recently passed to take care of water damage but which amounts to an inverse condemnation law. According to its provisions the highway commission has to furnish sufficient ditches and culverts or other outlets to allow the free and unobstructed flow or percolation of water from adjacent lands onto the highway right-of-way itself or other places designed to receive and absorb water and to prevent the lowlands from being flooded and so on. Technically, of course, it is an engineering impossibility to build a highway that does not interfere to some degree at least with the percolation of water and the flow of water. Just the impact or weight of the highway itself — the fill, the concrete, and the structures — on a piece of property, the engineers say, is enough to stop the percolation because it compresses the soil to such an extent that you do not get free flow and percolation

that existed before. So we are vulnerable to a new form of inverse condemnation which from a practical standpoint we cannot avoid. We have tried to work this out through the Legislative Counsel, and have put in a suggested bill making this damage noncompensable, but that cannot be acted on until the next session.

We have developed several practical responses to this trend to broaden the scope of inverse condemnation. If we sincerely believe that a property owner has been damaged we do not follow the policy of making that person go to court to collect damages. I think that it is wrong to force him to do that. We use a rule that we have here in Wisconsin which allows us to bring a condemnation action ourselves without following the usual rule of admitting, by initiating the action, that the taking is valid. Most States seem to have a rule that when the State starts condemnation it can no longer contest the title of the person against whom the action is brought and his ownership of the land in question is admitted. However, in Wisconsin [1] the court has held that where, in making the award of damages in condemnation, the State alleges that it does not admit title in the property owner, the matter of ownership or property rights becomes an issue for adjudication. We are thus able to close out the possibility of injunction suits, and in effect condemn their lawsuit, but still reserve our rights to try the case on its merits. And if we can show that the claim is invalid, or fraudulently brought, or can prove the fact that there is no ownership in the person, we are able to close out these things without waiting for them to bring inverse condemnation against us. This happens sometimes where there is a property dispute between various parties.

In Wisconsin we are particularly disturbed by the recent tendency of our court to throw away what we consider to be the law of condemnation, and allow damages on the court's own ideas of what is compensable. This, of course, invites the use of inverse condemnation by the property owner. I think Wisconsin is not alone in this tendency of the courts to enlarge the concept of just compensation. For example, in the Carazalla case[2] there were dicta in the first decision to the effect that damages during construction could be considered as pertaining to the fair market value. Now that was just dicta in the first case, and we wanted to get it straightened out, so when another case came along we took it up again. In the second Carazalla decision, we argued to the court that this item was a matter within the scope of the police power and not pertaining to eminent domain. I think this clearly was a case of the police power, because construction does not relate to eminent domain.

There is a perennial problem regarding the man from whom you do not take anything. He may be inconvenienced as badly during construction as the man from whom property has been taken, but heretofore the courts have said this inconvenience was not compensable. I am afraid we are going to run into more and more of these cases. Recently our court rejected the doctrine of sovereign immunity in a Milwaukee case[3] in which a child was injured while playing on a specially constructed children's playground. Somehow there was a manhole near a bubbler, and the tot caught her hand in the manhole cover. The attorneys who brought the lawsuit did not seek to upset the rule of sovereign immunity, which was firmly established in Wisconsin, but they went in to get a determination of whether this was a proprietary function or a governmental function. The court threw this distinction out, but went on to say that we created sovereign immunity, and now we hereby abolish it!

[1] Perszyk v. Chicago, Milwaukee Electric R.R. & Light Co., 215 Wis. 233, 254 N.W. 753 (1934).

[2] Carazalla v. State, 269 Wis. 593, 70 N.W.2d 276 (1954).

[3] Holytz v. Milwaukee, 17 Wis.2d 26 115 N.W.2d 618 (1962).

I predict that this will mean that once it is settled just how these suits can be started we are going to be busy with them. Our court said that the State can still have a law saying when and where they may be sued, but I frankly do not know what that means. Does it mean that the legislature can re-create sovereign immunity? I do not know how to interpret it.

There is an excellent article in the Virginia Law Review of April 1962 on recovery of consequential damages in eminent domain, and it goes into the evolution of what should be compensable, pointing out the evolution that is taking place in eminent domain now. I would like to quote a portion of this article citing a recent decision of the New Hampshire Supreme Court:

> The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms ... The constitutional prohibition (which exists in most, or all, of the States) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read,—"No person shall be divested of the formal title to property without compensation, but he may without compensation, be deprived of all that makes the title valuable" To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "an exclusive appropriation," "a total assumption of possession," "a complete ouster," an absolute or total conversion of the entire property, "a taking the property altogether." These views seem to us to be founded on a misconception of the meaning of the term "property," as used in the various State constitutions.[4]

It goes on to explain that property does not have to be an entire entity. Property can be taken when there is a partial deprivation of use, and this article notes the liberalizing trend of supreme courts all over the country and of the U. S. Supreme Court. These matters are bound to be brought up to the courts primarily through actions of inverse condemnation because individual items of damage can be selected and brought up this way. More and more in the future we are going to see efforts to get the courts to change by their decisions the conception of what is compensable. This is a huge field; we are going to see many changes; and I think it will come about primarily through inverse condemnation.

Before I close, I want to call your attention to a recent case in a little different field of highway law. This is *Town of Ashwaubenon v. State,* 17 Wis.2d 120, 116 N.W.2d 498 (1962). This involved laying out a corridor for a highway just south of Green Bay, and it was required by both Federal and State law that a public hearing be held before final decision on the route. This hearing was for both the Federal and State requirement. The Highway Commission held a public hearing and later determined that the route that they had selected was the best on a more or less Statewide basis. This selected route was to serve through traffic, but the town of Ashwaubenon and the City of DePere, which contested the matter, had different ideas which visualized it as a local route which would develop business and industry along the line. These were the basic differences. The Highway Commission in addition to the public hearing went into the field and examined the various routes. They considered several things not brought out at the public hearing. Then they made their determination.

The next thing we knew we were taken into court on the theory that we had not shown by the weight of evidence that the route the commission had selected was the best. In other words, they treated this hearing as a contested case. We have the same situation that most of you have with administrative procedure. We call ours Ch. 227; and we were called in on a Ch. 227 review. This involved the problem of showing by the preponderance of the evidence that our route selection was best. We were faced with the question of what are we doing in these public hear-

[4] Spies, E., and McCoid, Jr., "Recovery of Consequential Damages in Eminent Domain." 48 Va. L. Rev. 437, 443 (1962).

ings. Are we retrying a case? Do we have to disprove the contentions made by landowners at these hearings? We tried to argue that this was legislative hearing of the type the legislature holds when they are considering bills, and the public is invited to express its views pro and con, and that is all it amounted to. We said the only test that the commission was faced with was whether their decision was arbitrary and capricious or made in fraud or something like that. Otherwise the decision of the commission is valid so long as it has any evidence to support it. We lost the case in circuit court, but the supreme court reversed it and said this was a legislative type hearing and following the theory that we had argued. Admittedly this involved a delegation of large powers, but, as the court said, until the legislature feels this is wrong, it must be considered as a legislative hearing and not a contested case.

DISCUSSION

LEONARD I. LINDAS, *Chief Counsel, Oregon State Highway Commission, Presiding*

Lindas.—This matter of inverse condemnation has many ramifications. A recent case in Oregon involving a drainage matter involved the question of what title or property interest the State acquired after it had been ruled that there was a taking. We argued that we were entitled to a flowage easement on the ground that this is what we actually had taken. The supreme court held that wherever it was proved there was a taking we were entitled to the title to the land taken or, if it was matter of drainage damage, we were at least entitled to a flowage easement to allow us to flood it in the future. Of course, the owner could come back to court again if the drainage pattern was changed again in the future.

I wonder whether the type of constitutional provision that the State has—a "taking" as opposed to "taking and damage"—will make a great deal of difference in inverse condemnation?

Thomson.—I believe Iowa and Oregon have much the same constitutional provisions limiting the compensation to taking. As you know, however, the concept of taking has been getting broader. In Iowa, the Liddick[1] case and the Anderlik[2] case considerably broadened the context of taking to include change of grade, interference with rights of air, light and view, and it seems to me that there is a tendency for it to make less and less difference except in the close cases involving a tort-like situation.

Lindas.—In our State we recently had a case where the landowner said that the county took his property because of setting off dynamite blasts in a quarry site where the county jail is. As a result the plaster in his house was cracked, dust settled all over his dishes and flying rocks came onto his property. Our supreme court held that this was not a taking.

Turning to the mention of sovereign immunity, I note that California has recently lost its sovereign immunity.

Carlson.—Yes, in 1960 we lost our sovereign immunity, but the legislature declared a two-year moratorium on lawsuits against us. The first year we had $11 million worth of claims filed against us, and as of June 30 of this year we had $15 million worth of claims against the Highway Department. This moratorium gives us time to organize a defense section and investigate these claims. But in 1963 when the legislature tells us what will have to be proved in order to collect against the State we will have to deal with these claims.

[1] Liddick v. Council Bluffs, 232 Ia. 197, 5 N.W.2d 361 (1942).

[2] Anderlik v. Iowa State Highway Commission, 240 Ia. 919, 38 N.W.2d 605 (1949).

Barrett.—One of the troubles we have arises because we have a State Claims Commission which uses a very informal type of proceedings. When there is a highway accident of some sort the first we know about it is when the Commission tells us a claim has been filed. I think there should be some time limits on these claims, otherwise you never know where you stand.

Lindas.—Our supreme court ruled on it, and said we still have sovereign immunity except where the State or agency has insurance. In the case of a school district which was insured the court said that we had waived our sovereign immunity to the extent of the insurance coverage. And they further said if the enabling act allowing purchase of insurance also stated that the legislature did not by this act waive the sovereign immunity of the State, then the sovereign immunity was not waived.

Barrett.—We had a case here where a doctor was injured on a toboggan slide in a city park. The court said that even though the city had insurance the sovereign immunity was not waived because the city was engaged in a governmental function. We have had other cases just as poorly thought out, and I think that is one reason why the court finally eliminated our sovereign immunity.

C. N. Henson.—For years, Kansas had a defective highway statute, providing that the Highway Department was liable for injuries due to defects in the highway, but they set up certain ground rules that notice must be given to the Highway Department a specified period after the injury, and also that the claim must be filed within a certain time, and this defect must have been known for at least five days. The defense of these actions was normally contributory negligence.

Amey.—We had a peculiar case in our Supreme Court brought within the framework of our inverse eminent domain case law. The problem was with an arroyo, or long trough in the terrain, through which rain waters rush in the rainy season. The one in question was rather wide, and we wanted to construct a road across it instead of bridging it. We therefore built the highway across, and constructed a "dip" to let the water across. It later happened that a motorist was driving down this road following a storm when the arroyo was flowing, did not see the dip, hit a chuck hole, lost control, and was washed down the arroyo. His passenger was killed, and he was injured. His attorney brought action for wrongful death, personal injuries and loss of personal property under this eminent domain statute and inverse condemnation case law. We filed a motion to dismiss, but it is presently on appeal, and we may be faced with what happened in California.

This is one of the most frightening aspects of inverse condemnation. People are talking about personal losses and personal property damage in addition to impairment of the intangible property rights. It is bad enough to try to make the traditional rules of condemnation apply to these intangible property rights. But when we get into personal injuries we do not know what the proof of damages should be, whether the courts will award punitive damages, or whether the torts of contractor who originally built the structure will be imputed to the State or how far it will go.

Lindas.—We had an interesting series of cases arising from building highways in a canyon. A little creek flowed there and normally it is of no consequence, but after one cloudburst it rose up and took out 13 houses. We defended on the grounds that the highway construction was not the cause of the taking. We had a hydrologist expert who gave beautiful testimony on how this would have happened even if the highway was not there, but the judge did not believe it. So we bought 13 houses that were not there and 13 plots of land that are not good for anything. We also found out in this case that when dealing

with personal property claims there is no such thing as fair market value. It is all replacement value of the item new. A price tag on a used commodity is the new price.

Thomson.—As I understand it, in an inverse condemnation proceeding, the judge determines first whether there is any taking, then the matter goes to the jury. Of course you have problems of what you get through inverse condemnation, whether it is a flowage easement, fee title, or something else. What is the situation with respect to the extent of the taking. Assume you have a farm of 160 acres. Does the judge determine the extent of the flowage easement?

Lindas.—In Oregon when landowners file inverse condemnation actions we move to make the matter more definite and certain by requiring them to set out the metes and bounds description of the property affected or "taken." When the court requires them to do this, we have a metes and bounds description of the exact area which our flowage easement covers.

Thomson.—Suppose that the landowner claims that the State has taken, say, 160 acres and the evidence shows that it is only 20 acres. I should think that it would put quite a burden on the court to determine from the evidence just exactly what was taken and where. Of course, it would also put an equally difficult burden on the attorney and witnesses for the plaintiff. It seems to me that the State should have a right to have this matter laid down fairly precisely.

Lindas.—I think that if the evidence showed that the actual taking was less than alleged, there is no question that the judgment would have to conform to the actual taking as proved.

In connection with the Stadium Freeway in Portland (Oregon) we have been notified by the owner of an apartment building near the project that he is going to file an inverse condemnation action against us for noise damage. We immediately sent our men down to California to consult with some sound experts and get ready for this. We are taking our readings now around the apartment, and when the highway is completed we will do it again. Now how they, or we, will relate this noise to land value may be quite a difficult thing in the case of a high-rise apartment, but we are trying to get ready for it. Has anyone else had any experience with noise damage?

R. K. Abrahams.—I can tell you something as to airports which may provide a comparable situation. The Port of New York Authority runs the New York International Airport, and jet planes are going over all the time. In the neighborhood 809 property owners joined to file a single suit against us which they call inverse condemnation.

It seems to me that all you have in this case is a form of tort action for nuisance. They insist that we have taken their property in that they cannot sleep, they cannot do normal things, the value of their property has been decreased. And yet, obviously, there is not any physical invasion of the property itself. In fact the planes do not even fly low over this area. But they claim that with this noise there has been a taking.

I do not know how this is going to come out, but in a similar case involving Newark airport across the river a few years ago the suit was dismissed.

J. Montano.—We have a case now on its way to our Supreme Court in which a highway was constructed, and the property owner filed suit against both the highway contractor and the State claiming that his well which was located just east of the highway went dry. His case consisted of showing that before the construction he had water and after the construction he had no water. We moved for a directed verdict on the ground that he had not sustained his burden of proof, but the court got into the question of riparian rights, that if the source of water were under the highway or within the area

of construction, and we had taken that source of water, it was in fact an inverse condemnation. Our claim was that he had not shown that the source of water to his well was an underground stream rather than percolating water. There is no riparian right to percolating water. Also, it was presumed to be percolating water. The court agreed with this but said although there ordinarily is no riparian right to percolating water, when the State takes it there is one as far as they are concerned, and there is a duty to pay. So this is on its way to our supreme court.

Lindas.—Coming back to problems of drainage again, there are two theories in this country relative to water rights. One is the "common enemy rule" and the other is the "civil law rule." The common enemy rule is that you can do anything you want to keep the water off your place and the other fellow has to watch out for himself; the civil law rule says that you cannot interfere with the water as it comes across. This might make a difference in your inverse condemnation action depending on what rule your State follows.

Carlson.—I suggest that in those States where the courts take away sovereign immunity they start thinking about legislation to give them some protection. When the court overturns sovereign immunity it overturns it completely. You are liable for torts, negligence, intentional torts; you might think about some legislative limitations on liability, types of conditions which will warrant a suit, the measure of defective conditions, modify the "trivial defect rule," and define the time period for claims. All these things you avoid when the Supreme Court overturns sovereign immunity.

D. R. Banister.—In Louisiana the situation is somewhat different than it is in other States. They have the doctrine of sovereign immunity, but our doctrine came from France. I am not at all sure that our courts would say that we can now abandon the doctrine of sovereign immunity. Now one of our appellate courts did do that, but was promptly reversed by the Supreme Court. So our doctrine is still there. However, it does not amount to much because at every session of the legislature there are bills passed to permit suits against the State, parishes, school boards, and cities. These suits may not, however, be tried before a jury, but must be tried before a judge.

We have a lot of fun with this because there is nothing to prevent the legislature from coming in and waiving immunity for injuries that happened some years back. I tried a case once for injuries that were 45 years old.

Barrett.—We may be coming to a system like that the Federal Government uses in its court of claims. One of our problems is going to be to take care of these things all over the State. That is going to be a tremendous problem. I also agree that we should have some legislation on the subject to make sure that we get ourselves organized to deal with this program.

Lindas.—Is California putting in a tort claims act?

Carlson.—Our law revision commission is studying the problem and came up with a study of about 600 pages, and a statute that is about 200 lines long on dangerous and defective conditions. It seems to me that a plaintiff could get into court merely by being injured, and then the burden is on the State to prove that the risk was reasonable, and the plaintiff does not have to show that the risk was unreasonable.

I do not know whether this will pass or not, but if it does it will create a lot of problems for the State. If anybody is interested in this study of the California Law Revision Commission I suggest he write to them. Their study is a good one, covering the law of various other States, they have covered the subject of dangerous and defective conditions, medical and hospital torts, unauthorized

damage, motor vehicle torts, intentional torts, and liability of employees. They are not impressed with the fact that on a construction project where there is an accident the injured party can sue the contractor. They are not impressed with the fact that usually they can sue an employee who is insured. Really there is no sovereign immunity because of these indirect methods of recourse against the State. I think what is happening in California is that we are merely abolishing the State's indirect liability through its employees, and imposing it directly on the State. And I am afraid that when the juries see the State as a defendant, the verdicts will be substantially higher than they were when they were against our highway department employees.

Buscher.—Our sovereign immunity is intact and in Maryland we have not been bothered by inverse condemnation so far. But a couple of years ago it was determined that the highway program needed a certain piece of property, and we prevailed on the county involved not to rezone it to a higher use. The property owner's attorney wanted us to purchase this property but we did not have funds available for that purpose. So the attorney did a rather unique thing. He filed a petition in Federal court claiming that his client was deprived of property under the 14th Amendment, and asking the court to compel the State Roads Commission to start condemnation proceedings. We moved to dismiss, and the case was heard before the judge. He granted the motion to dismiss with leave for the petitioner to amend, but he told us that he did not want us to move to dismiss the amended bill. He wanted it answered completely, he wanted to take evidence and testimony and get the whole of the facts out before the public. He led us to believe he did not like our position in holding up this property owner. So, rather than go through a whole court case, and possibly an adverse court decision, we purchased the property.