



## APR - ALTERNATIVE MARKETS

### DEDICATED TO PUBLIC ENTITY

#### LESSONS FROM LOSSES—CAN THE GOVERNMENT TAKE MY PROPERTY?

*"The only mistake in life is the lesson not learned."* —Albert Einstein

#### DESCRIPTION

A landowner purchased two parcels of land totaling 10 acres near an airport. After the purchase, the County passed restrictions limiting the height of buildings specific to the two parcels and as a result, the landowner or subsequent landowners could not build anything taller than 66 feet. The resale value plummeted, and the property remained on the market for many years. The property owner sued the County, claiming that the restriction was an "inverse condemnation" of his property. The property owner claimed that the property diminished in value by more than 50% and claimed a \$6MM loss.

#### THE RESULT

After thirteen years of litigation, the County proceeded through a 12-day trial. The eight-person jury deliberated for one hour before rendering a unanimous verdict in favor of the plaintiff, agreed that the County's action was inverse condemnation and awarded \$6.5MM to compensate the property owner for the loss of value. The award was based on the difference of the value of the land without the height restriction and the current value.

#### THE PROBLEM

The County argued that the height restriction was a zoning ordinance (non-compensable) rather than inverse condemnation.

**Zoning Ordinances** can be enacted without compensating landowners. Zoning is the regulation of the use of property by local government and places restrictions on how a property can be used. Zoning includes division of a city into districts such as commercial or residential and regulates the structure and architectural design of buildings. Zoning helps assure property owners and residents that the characteristics of nearby areas will remain stable. Zoning ordinances must be enacted with a comprehensive set of plans and consider the entire municipality focusing on public health, safety, and general welfare. Zoning ordinances must promote the good of all people rather than the desires of one group: individual pieces of property should not be singled out. An ordinance is invalid if by enforcement, the owner is precluded from using the property for a reasonable purpose.

**Inverse Condemnation:** Under the 5<sup>th</sup> amendment of the United States Constitution, the government is prohibited from "taking" property without "just compensation." A taking may be physical or regulatory in nature. Physical taking may be real or tangible property such as permanent flooding of property caused by dam construction or seizure of private property such as medical supplies to use for COVID relief. Regulatory taking is a situation where the government does not actually occupy or use the property but deprives the owner of economically viable use of the property. Regulatory taking may involve the denial of a permit or restrictions on certain uses of property. Just compensation is determined by fair market value.



## LESSONS LEARNED

The County and the landowner were in litigation for 13 years over the use of the land. As a compromise, the landowner offered to trade land with the County, but the County refused. Though very similar, zoning ordinances, which are not compensable, are distinctly different than inverse condemnation.

- The 5<sup>th</sup> amendment in the U.S. Constitution prevents the government from depriving a person of life, liberty or property without due process of law; and prevents the taking of private property for public use, without just compensation. Many states have enacted more expansive laws.
- The term “inverse condemnation” derives from the government act of condemning property that requires the property owner to make a claim against the government.
- Zoning ordinances may not single out an individual property but must be part of a comprehensive plan to promote general welfare.
- Zoning ordinances may not preclude the owner from using the property for a reasonable purpose.
- When a property owner is permanently deprived of the use and enjoyment of the property by the government, the property owner must be compensated for fair market value.

***Note: Although the statements above are based on an actual loss, some of the facts may have been altered for purposes of illustration and education. This information should not be relied upon for legal advice, please contact an attorney for your specific needs.***

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