
“INVERSE CONDEMNATION” EXPLAINED

Mark A. Short

Eminent domain or condemnation relates to the power of the government and certain authorities to take title to property needed for a public purpose. While eminent domain has received plenty of attention in the last several years in the wake of the *Kelo* case, what is a property owner to do when the government fails to exercise its power of eminent domain, yet property is “taken” or “damaged” by a public works project or the enactment of some regulation or restriction? In such event, the remedy available to the landowner is through “inverse condemnation.”

An inverse condemnation action is a proceeding based on a constitutionally created right connected to the “taking” or “damaging” of property by the government. While sovereign immunity is often available to protect a government agency from suit or liability, federal and state constitutions provide a waiver of immunity where there is a “taking” of property, “damage” to property, or both.

The 5th Amendment to the United States Constitution and certain state constitutions provide that a landowner is entitled to be compensated for the detrimental impact of a public works project or regulation on his property only when part or all of the property is “taken”. However, Virginia’s Constitution, like those in the majority of States, is much more expansive in scope. Article I, Section 11 of the Virginia Constitution provides that no “private property shall be taken *or damaged* for public uses, without just compensation.” Therefore, a Virginia property owner may be compensated if any of his property has been damaged by the public work or regulation, even though no part of his property has been taken.

Inverse condemnation claims may result from a nearby public project that causes impairment or loss of access, a change in the grade of the adjacent property, impairment of visibility to or from the property, land subsidence (sinking), loss of adjacent or subjacent support, flood damage, landslide or physical occupation of the property.

Access to and from property is a private property right enjoyed by abutters of public roads. This right of access is not the mere right of going out from your home or place of business and later returning to your property, but includes a certain convenience in the use of your property. If a landowner does not retain reasonable access after a public project or regulation, the loss or impairment of access must be compensated under Virginia’s Constitution.

Similarly, change of grade of a roadway could be a constitutionally compensable damage claim to abutting property owners. In *Hannah v. City of Roanoke*, the Virginia Supreme Court considered whether an abutting landowner was entitled to compensation for damages resulting from a change in grade due to construction of a bridge. No private property was taken from the landowner and construction was done only within the City’s right of way. Finding for the landowner, the Court concluded that “under the provision of the new Constitution, a condemnation proceeding could be maintained to assess the damage done to the property of another by the improvements where no part of such property was taken for the uses of the condemnor.”

In addition to the United States Constitution and Article I, Section 11 of the Virginia Constitution, a property owner in Virginia can file a claim for inverse condemnation under Va. Code Ann. § 8.01-187. This section provides as follows:

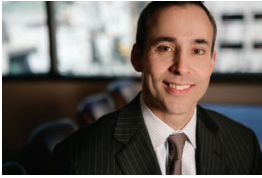
Whenever it is determined in a declaratory judgment proceeding that a person’s property has been taken or damaged within the meaning of Article I, Section 11 of the Constitution of Virginia and compensation has not been paid or any action taken to determine the compensation within sixty days following the entry of such judgment order or decree, the court which entered the order or decree may, upon motion of such person after reasonable notice to the adverse party, enter a further order appointing condemnation jurors to determine the compensation.

While referencing Virginia’s Constitution, this code section does not disturb any constitutional rights, or create a new obligation. It merely supplies a statutory remedy to supplement the remedies available to a property owner under the federal and state constitution.

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Inverse condemnation matters do have time limits that can affect a property owner's right to seek just compensation. Statute of limitations and other issues should be reviewed as promptly as possible by an attorney experienced in condemnation matters to ensure that rights are not forever lost, and attorneys' fees may be available to the owner under Virginia law.

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