Inverse Condemnation
When OAC regulators are forced to buy a sign!

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First . . . Important Caveats!

• **Case law** can vary from state to state.
  • Some states have developed case law on inverse condemnation, others do not.

• **Statutes** can vary from state to state.

• Highly case-specific → rely upon cases at your own risk!

• Very advanced stuff!!!
King George III
King of UK from 1760 to 1820

By Johann Zoffany - The Royal Collection, Public Domain,
https://commons.wikimedia.org/w/index.php?curid=4240592
Condemnation - Basics

• 5th Amendment (the “Takings Clause”)
  • “[N]or shall private property be taken for public use, without just compensation.” Just Compensation = Fair Market Value (plus damages to remaining property)

• Your state constitutions have comparable provisions.
Condemnation - Basics

• Condemnation = The **taking** of private property for a public use.

• If there is a “taking”, government must pay “just compensation.” (i.e., fair market value, plus damages)

• **Note**: Sometimes called “eminent domain.”
Condemnation - Basics

• Who has the Power?
  • Government entities and certain private entities have the authority.

• Why does it exist?
  • Needed to complete public projects.

• Obvious Example → Acquisition of nonconforming billboards!
Condemnation - Basics

Process:
1. **Immediate Possession Phase**
   • Examines whether government has lawful right to condemn.
   • Sets deposit amount for government to take possession.
2. **Pre-Valuation Trial Phase**
   • Issues of law are decided.
   • Appraisals are commissioned.
3. **Valuation Trial Phase**
   A judge, commission or jury determines the market value of the property plus damages based on expert witness testimony of appraisers.
4. **Apportionment Phase**
   Landowner and other interest holders battle over how much of the award they each get.
Condemnation - Basics

• Valuation of Signs – A [VERY BRIEF] Overview
The Police Power.

• **Police Power =** The authority of the government to regulate, restrict, control, or prohibit the conduct of any business that affects the health, safety, morals, comfort, or general welfare of the public.

• **Examples:**
  • Police officers and laws.
  • DOT Access restrictions / highway designations.
  • And, of course, OUTDOOR ADVERTISING COMPLIANCE!

• No just compensation required.
The Police Power.

- Due Process.
- Notice.
- Right to a Hearing.
- Right to Appeal.
- And regulations must be reasonable!!!
Inverse Condemnation - Basics

• Inverse Condemnation = Government taking without following the eminent domain process and without paying just compensation.

• Property owner initiates by filing suit against the government entity.

• If allowed to proceed → Just Compensation Required (with money paid via either settlement or a valuation trial)
Inverse Condemnation - Basics

• Classic Examples:
  • Government builds a dam. Dam causes water to flood properties of private citizens.
  • Government acts outside scope of an easement (i.e., trespass).
  • Government does not negotiate an acquisition with the correct person.
Inverse Condemnation - Basics

- Property owner has the “burden of proof.”
- Key issue → Is it a “taking”? 
  - If it is a “taking,” then 5th Amendment is triggered and government must pay just compensation.
- In all inverse cases, government typically pays all costs and fees of the landowner.
# Recap

<table>
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<th>Police Power</th>
<th>Condemnation</th>
<th>Inverse Condemnation</th>
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</thead>
<tbody>
<tr>
<td><strong>What is it?</strong></td>
<td>Power to regulate/control.</td>
<td>Power to acquire property for public use</td>
<td>Power of citizens to make Gov’t buy property!</td>
</tr>
<tr>
<td><strong>Who initiate?</strong></td>
<td>Gov’t.</td>
<td>Gov’t.</td>
<td>Citizen.</td>
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<td><strong>Just Compensation?</strong></td>
<td>No.</td>
<td>Yes.</td>
<td>Yes!</td>
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<td><strong>Burden of Proof?</strong></td>
<td>Depends.</td>
<td>Gov’t.</td>
<td>Citizen.</td>
</tr>
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<td><strong>Gov’t Pays Attorney Fees?</strong></td>
<td>Not usually.</td>
<td>Sometimes (varies among states).</td>
<td>Yes!</td>
</tr>
<tr>
<td><strong>Gov’t Pays Expert Witness Costs?</strong></td>
<td>Not usually.</td>
<td>Usually.</td>
<td>Yes!</td>
</tr>
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Inverse Condemnation in the Context of OA

• *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) – If a regulation “goes too far,” then it is a regulatory taking that requires just compensation.
Inverse Condemnation in the Context of OA

- **Lucas v. South Carolina Coastal Council**, 505 U.S. 1003 (1992) - Regulation "goes too far" and results in a taking “at least[] in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.” But also, two situations where there is a taking . . . .

1. Physical invasion of property not using Police Power.

2. Regulation that denies “all economically viable use.”
Inverse Condemnation in the Context of OA

• Why are inverse claims so scary?

  Just Compensation $
  +
  Interest $
  +
  Attorney Fees $
  +
  Expert Witness Fees $
  =
  $$$$$
Inverse Condemnation in the Context of OA

• Common (?) examples in OA:
  1. State DOT tries to exercise its Police Power to remove a billboard when the real purpose is to avoid paying just compensation via eminent domain.
  2. HBA / state laws allow relocation of a sign, but third party government regulations do not.
  3. State DOT/agency passes regulations that are far more restrictive / not standard compared to accepted federal or state law.
Inverse condemnation experience?
Illustrative Cases
Case Examples – Inverse Allowed.

Vivid, Inv. V. Fiedler, 512 N.W.2d 771 (Wis. 1994)

• Facts:
  • Two nonconforming signs (erected 1965-66).
  • 1988, WisDOT started widening highway I-90, near Janesville, Wisc.
  • WisDOT negotiated acquisition of land under the signs.
Case Examples – Inverse Allowed.

Vivid, Inv. V. Fiedler, 512 N.W.2d 771 (Wis. 1994)

• Facts:
  • Orders the sign owner, Vivid, to remove the signs.
  • When Vivid asks for just compensation, WisDOT refuses, reasoning the signs were personal property for which relocation expenses were allowed but not just compensation.
  • Vivid filed inverse claim, alleging the removal order was a “taking” which requires just compensation.
Case Examples – Inverse Allowed.

Vivid, Inv. V. Fiedler, 512 N.W.2d 771 (Wis. 1994)

• Results:
  • WisDOT required to pay just compensation.
  • Court reasons the HBA requires payment of just compensation for the removal of nonconforming signs along the interstate and primary systems.
  • “Effective control” includes the payment of just compensation for nonconforming signs.
Case Examples – Inverse Allowed.

Vivid, Inv. V. Fiedler, 512 N.W.2d 771 (Wis. 1994)

- Lessons for Regulators:
  - Be very wary about not paying just compensation for nonconforming signs.
  - Be very wary of raising the “personal property” argument.
- BUT SEE: City of Wichita v. Denton, 294 P.3d 207 (Kan. 2013) (holding a 14-by-48-foot, 34 foot high, 22,000 pound, digital billboard supported by 96 tons of concrete was “personal property” not requiring compensation upon the City’s order of removal at the termination of the lease).
Case Examples – Inverse Not Allowed


**Facts:**

- 2006 → Wisconsin DOT (WisDOT) planned a highway project off Highway 39.
- Lamar owned a sign off Highway 39.
- Sign was nonconforming because existed prior to enactment date of Wisconsin’s sign laws.
- Lamar illegally rebuilt sign.
- WisDOT sent removal demand, requesting removal of the sign and advising of right to request hearing within 60-days.
Case Examples – Inverse Not Allowed


• Facts (Cont.):
  • Lamar requested hearing.
  • WisDOT scheduled the hearing.
  • WisDOT then removed the sign, before the hearing.
  • With sign removed, Lamar wanted administrative case dismissed and wanted just compensation.
  • DOT objected, saying the sign is illegal, if we win in the administrative case, then no just compensation is due!
Case Examples – Inverse Not Allowed

*Lamar Cent. Outdoor, LLC v. Wis. DOT, 762 N.W.2d 745 (Wis. App. 2008).*

- **Facts (Cont.):**
  - Administrative hearing officer dismissed the case pursuant to Lamar’s request – no basis for not dismissing when the hearing requestor wants it dismissed.
  - Lamar files inverse condemnation action seeking just compensation.
  - In the action, WisDOT argues Lamar had its opportunity to contest the legality of the sign, it didn’t, so it has waived this argument and no just compensation is required.
Case Examples – Inverse Not Allowed

*Lamar Cent. Outdoor, LLC v. Wis. DOT, 762 N.W.2d 745 (Wis. App. 2008).*

• **Results:**
  • Wisconsin Court of appeal agreed with WisDOT.
  • Lamar had an obligation to contest the legality through the administrative proceeding after WisDOT issued its letter.
  • Administrative hearing is exclusive mechanism for determining legality of the sign, and by not “exhausting” its remedies, Lamar waived its right to contend the sign was legal.
  • No compensation required!
Case Examples – Inverse Not Allowed

*Lamar Cent. Outdoor, LLC v. Wis. DOT, 762 N.W.2d 745 (Wis. App. 2008).*

• Lessons for Regulators:
  • If a billboard owner attempts to claim inverse condemnation after administrative process declares it illegal or after they have waived their right to contest the legality, probably not a valid inverse claim.
  • Issue your notices/letters/orders to remove signs prior to removal or initiation of a condemnation action.
Case Examples – Inverse Not Allowed


• Facts:
  • Nonconforming billboard (constructed in 1950’s).
  • 1977 TennDOT fails to send renewal notice; permit is never renewed.
  • 1996 → TennDOT needs to expand State Route 86.
  • Tells billboard owner needs to remove billboard for project, and offers owner relocation expenses.
  • Billboard owner accepts, relocates the billboard; TennDOT pays relocation fees.
Case Examples – Inverse Not Allowed


**Facts:**

- New owner purchases billboard: Universal.
- Universal tries to update permits.
- Is told by TennDOT OA needs to pay back-fees for all of the years permit renewal fees were not paid.
- Universal agrees. Pays back fees.
- But when Universal reapplyes, TennDOT OA does due diligence and discovers the signs were removed.
Case Examples – Inverse Not Allowed


• Facts:
  • TennDOT denies permit!
  • Administrative process unfolds, and all courts agree TennDOT’s denial was lawful.
  • On appeal, Universal raises inverse claim.
Case Examples – Inverse Not Allowed


• Results:
  • Inverse claim dismissed.
  • Universal cannot bring its inverse claim in the administrative appeal.
  • Plus, one year statute of limitations bars claim. Inverse claim arose either in 1996 when sign was ordered to be removed, or in 1998 when TDOT refused to issue permit.
Case Examples – Inverse Not Allowed


• Lessons for Regulators:
  • Don’t let billboard owners bring inverse claims into administrative proceedings; they are two separate, unique judicial processes.
  • Check your state’s statute of limitations for inverse claims. See if the government action that allegedly requires compensation occurred before the window allowed for suit closed.
Case Examples – Inverse Not Allowed


• **Facts:**
  • Seattle Monorail Auth. building monorail.
  • Clear Channel owned and maintained billboard for 27 years on property.
  • 1992 → lease expired, leaving lease terminable by either party upon 30 days’ written notice.
  • Monorail purchased the underlying land.
Case Examples – Inverse Not Allowed


• Facts:
  • Monorail starts issuing notices/demands to vacate the land.
  • Clear Channel brought inverse claim.
Case Examples – Inverse Not Allowed


• Results:
  • Inverse claim dismissed!
  • Court ruled Clear Channel’s month-to-month lease conferred was not a protectable property interest.
  • The billboard is a removable fixture / personal property, and the lease contained no renewal obligation for Monorail.
Case Examples – One More Quick Case!

- Where city enacted ordinance that required removal of all non-conforming signs at the expiration of the 5 ½ year period, without payment of just compensation → inverse claim allowed because regulatory taking. *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991).
Closing Tips & Recap

• **Assess an Inverse Allegation Early -- Before it Blows Up!** Ask your attorney to provide a legal opinion about the risk of the owner succeeding on an inverse claim. Assess the whether your regulatory action deprives the owner of all economically viable uses.

  • HBA requires payment of just compensation for the removal of nonconforming billboards.
  
  • Judges don’t like when enforcement actions just so happens to precede highway projects!
  
  • If you are physically entering property to remove a billboard, the “character” of the government action looks more intrusive, so you better hope your Police Power is lawful.
Closing Tips & Recap

- Don’t Let Billboard Owners Combine Inverse Cases with Administrative Cases. Inverse claims have their own proceeding. Considering issuing violation letters before highway projects send out condemnation notices so that your DOT can prevent bogus just compensation arguments.

- Ask if they Have Case Law to Support their Inverse Claim. Case law is all over the map, and it’s highly dependent upon the facts of specific cases. Try to get a read on what research they have done and, if they have done research, how good it is.
Closing Tips & Recap

• **Examine the Lease.** What rights does the billboard company truly have? How much are those rights truly worth? Read the lease between the landowner and the billboard owner/lessee to ascertain rights and expectations of landowners and billboard owners.
  
  - Term of the lease? 99 year lease *or* 1 year lease?
  - Termination Clause?
  - Condemnation Clause?
  - Settlement / Litigation Clause?
  - $1,000 / mo. of revenue *or* $120,000 / mo. of revenue?
Closing Tips & Recap

• **Consider Raising “Personal Property” Argument.** Raising this argument may not save your case – though it might! – but it can give you leverage in negotiations. (Might check your state’s case law to ensure can be raised in good faith.)

• **See if Your State’s Statute of Limitations Could Bar the Claim.** Whatever your state’s statute of limitations is (1 year? 2 years? 3 years?), it may be applicable if the inverse condemnation claim could/should have been raised long ago.
Closing Tips & Recap

• **Get Your Agency’s ROW Professionals Involved.** Your agency’s ROW professionals are condemnation experts. Get their input shortly after an inverse threat arises.

• **Assess whether Your Rule or Law “Goes too far.”** Is the rule or law you are trying to enforce also a component of the HBA or federal regulation? If so, probably not a regulatory taking.
Closing Tips & Recap

• Don’t Panic. The inverse condemnation claimant has the burden of proof. They must show the court why there was a taking that entitled them to just compensation.
Thank You!!!