

Intentionally Reducing Flood Protection Can Lead To Strict Liability In Inverse Condemnation

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When a public agency decides to provide less flood protection than historically provided in order to protect environmental resources, it can be strictly liable for a physical taking.

The traditional California Supreme Court rule in inverse condemnation flooding cases is one of "reasonableness." An exception applies in cases of intentional diversion of flow to a specific property for which a public agency can be held strictly liable. In a recent decision, *Pacific Shores Property Owners Ass'n v. Dept. of Fish and Wildlife*, the Court of Appeal ruled the State Department of Fish and Wildlife was strictly liable in inverse condemnation because the Department intentionally reduced the level of flood protection of properties adjacent to a lagoon to protect sensitive environmental habitats.

Since the late 19th Century, a sandbar that regulated lake levels in the lagoon at Lake Earl, California's largest coastal lagoon supporting numerous habitat types, was artificially breached to protect adjacent lands. In the 1960s, a residential development known as Pacific Shores was approved and designed in reliance on historical breaching at four feet. Over the next five decades, as federal and state environmental laws were adopted, numerous public agencies analyzed the drainage and environmental issues. Since 1991, the Department studied options for breaching levels, and the sandbar was breached regularly on an "emergency" basis. Finally, in 2005, the Department reached a permanent decision that breaching should occur at eight to ten feet to protect the environmental habitat. The surrounding properties had regularly flooded at that higher level.

The Department contended it was not liable in inverse condemnation because it had no duty to provide flood control protection in the first instance and had no duty to provide any particular level of protection. The Court rejected these arguments and ruled the Department was strictly liable in inverse condemnation for a physical taking. The Department was also liable under the "reasonableness" standard: "This is a case where the agency intentionally ensures private property will be flooded by reducing the level of flood protection that had been historically provided, and doing so for purposes other than flood control."

If you would like more information regarding this case or about public entity liability for flood damage, please contact Saskia T. Asamura.