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Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation

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SOME TENTATIVE NOTES ON THE INTEGRATION OF POLICE POWER AND EMINENT DOMAIN BY THE COURTS: SO-CALLED INVERSE OR REVERSE CONDEMNATION

Recent dramatic case law developments raise important questions about police power regulation and so-called "inverse" or "reverse" condemnation. Suppose for example, that a zoning regulation purports to establish a 200-foot set back along a highway. Suppose, further, that upon review a court concludes that while a 50-foot set back might be reasonable, the 200-foot set back is "unreasonable" by at least 150 feet. Can the affected landowners successfully sue the governmental unit which imposed the control claiming "just compensation" for the "taking" of a 150-foot easement for public purposes?

It is clear that the typical remedy in such a case has been an action to enjoin the enforcement of the control on the ground that it is constitutionally invalid. Can a landowner choose inverse condemnation instead? Can he successfully argue that though the control exceeds governmental regulatory authority, it is, to the extent of 150 feet at least, a perfectly valid exercise of eminent domain power and that as a substitute for the eminent domain proceeding which the governmental unit should have brought, but didn't, he is now suing in inverse condemnation?

If affirmative answers to these questions are given, the consequences for land use regulations are going to be of first rank importance. Clearly the threat to the governmental pocket book will intimidate

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legislative bodies which are considering the imposition of land use regulatory measures. In those very areas where rapid population growth and sprawl have stretched governmental capacity to finance demanded public services, in these very areas the need for rigorous controls is apt to be greatest.[1] Yet the threat of contingent, and unplanned for, liability through inverse condemnation would, especially in these places, deter legislators from enacting the kinds of virile measures needed. Instead, financial caution would dictate milky-toast, completely safe and probably ineffective measures. Instead of walking to the brink of its constitutional powers, the legislative body would stay far inside the edge.

But is there any real likelihood that a landowner whose property interests are "unreasonably" impaired by a regulation (without physical invasion of his land space) can successfully elect to sue for condemnation damages instead of electing the orthodox remedy of injunction premised on "invalidity?" Is this a real threat to the even tenor of land use regulating ways?

To understand the current state of case law in this field we must distinguish:

1. Governmental action which works a physical invasion of the landowners' space—flooding, low air flights, etc.
2. Consequences to private rights which flow from public improvement projects, even though there is no physical invasion of the landowners' space—change of highway grades, the establishment of limited access on pre-existing rights-of-way, etc.
3. The extinguishment, without physical invasion, of private rights, by exercise of powers under government contract. For example, seizure of incompleted articles and needed materials so as to destroy materialmen's liens.
4. Destruction or substantial impairment of private property interests by regulation without physical invasion, public improvement or government contract action—for example, destruction of air access to private lands by governmental regulation.
5. Those early zoning laws which gave a statutory assurance of compensation to all persons damaged by the zoning restrictions.

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1. *See,* for example, Hightower v. City of Tyler, 134 S.W.2d 404 (Tex. Civ. App. 1939) where subdivider sued in inverse condemnation for "property taken" from him when the city required him to install sewer and water in his subdivision. The subdivider failed but on the technical grounds that he had waived his right to sue. Subdivider claimed "that any taking of property by exercise of police power is a taking within the provision" of the state constitution.

> These statutes did not require a showing of zoning invalidity under the Fourteenth Amendment in order for the compensation to become payable—something which is usually required as a condition to establishment of an inverse condemnation claim. Nevertheless these early zoning statutes and the cases decided under them are instructive in that they constitute a long-since abandoned system for the presentation of monetary claims for zoning kind of regulation, claims which when allowed were payable through special assessment. They contain a lesson of what a mess can result when police power zoning and assurance of monetary payments for restrictions imposed are mixed.[2]

In all of these situations federal or state cases have permitted inverse condemnation. In all of these cases government, having acted without first taking property interests by formal direct condemnation proceedings was later required on suit by a private land owner to pay what it would have had to pay, if formal eminent domain had been brought.

Before discussing the cases in some detail and then trying to spot possible trends into the future, several general points need to be made:

1. The inverse condemnation action is a means of avoiding the arbitrary sweep of the sovereign immunity doctrine. This immunity, as is well known, extends not only to federal and to state government but even sometimes to the smallest local units.

   The sovereign can do no wrong; it cannot be sued without its express consent. The courts have found various ways around this doctrine, even where there is no consent, the chief way being the rule that if the governmental action is "proprietary" in character then sovereign immunity does not apply. In the inverse condemnation cases, however, the courts have not found it necessary to invent an exception to the basic doctrine. They have stayed strictly and technically within it and have simply announced that the federal and some state constitutional guarantees of just compensation for public takings are self-executing consents by government to be sued for such compensation. Thus it is, as we shall see, that an action like one for nuisance damages, for example, which is barred by the sovereign immunity doctrine, may be brought under this self-executing consent for inverse condemnation damages.
2. Since in inverse condemnation, government is being treated as having acquired a property interest, the problem of accurately and specifically conveying the property interest being inversely

2. *See* Pera v. Village of Shorewood, 176 Wis. 261, 186 N.W. 623 (1922); Anderson, *Zoning in Minnesota; Eminent Domain vs. Police Power,* 16 NAT'L MUNICIPAL REV. 624 (1927) and State *ex rel.* Twin City Building and Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920).

purchased is present. It may not be present when a landowner sues a defendant for damages for the tort of trespass or for nuisance.

3. Except for the cases of actual physical invasion, the inverse condemnation cases all go beyond the old, primitive and outmoded idea that eminent domain compensation is payable for physical takings only.[3] The newer cases make it clear that impairment or destruction of property interests may give rise to eminent domain liability even though no physical invasion has occurred.
4. Since the inverse condemnation claim is premised directly upon language in a constitution, careful attention to this language is important. For example many state constitutions assure not only just compensation, but also assure "damages" for takings of property for public use. These states with damage provisions may very well, and some do, deny relief for "purchase price" and insist that the action be brought as under a self-executing consent to be sued for "damages." Here the problem of describing the property interest in a conveyance is not present.[4]
5. The inverse condemnation cases should remind us that those writers who emphasize the separate air tight, nonoverlapping character of the two basic powers—police power and eminent domain—have been too glib. The cases remind us that we may have in self-executing constitutional provisions equivalent to English statutory assurances in certain cases of compensation upon denial of planning permission under the Town and Country Planning Act.
6. Where liability in inverse condemnation arises by reason of a regulation, there is posed the question of whether or not, and at what point in time, the governmental defendant can avoid liability by repealing or amending the regulation. Suppose, for example, a judgment for the value of the plaintiff's property interest has been entered, is it then too late for the governmental unit to escape liability by repeal?
7. Statements in cases in which land use regulations are annulled as beyond the reach of the police power often contain broad sweeping statements that such regulations constitute a "taking" requiring payment of just compensation. These statements, made in cases where the issue is whether or not to enjoin the enforcement of the invalid regulations, may be used by courts to bolster inverse condemnation claims, where the landowner is treating the "taking" as valid, but wants just compensation for the interest taken.

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3. *See* 29 C.J.S. 917 (1941).

4. *See* Lindas, *Ordinary v. Inverse Condemnation* (Talk before Legal Affairs Committee, American Ass'n State Highway Officials, Nov. 1957. Mimeo.).

With these general points in mind we turn to the cases. The most easily understood cases have involved actual physical invasion of the plaintiff's land space. The most dramatic recent instance is *Griggs v. Allegheny County*[5] decided by the United States Supreme Court on March 5, 1962. The defendant county acquired land on which it developed the greater Pittsburgh Airport. At the time it developed the airport, the county could have acquired an air corridor easement across plaintiff's land near one of the runways. It did not do so. If the county had acquired the easement, the federal government would have borne up to 50 per cent of the cost. As is the case with commercial airports throughout the country, the federal Civil Aeronautics Authority fixed the glide paths for the take-off or landing of aircraft. The lowest edge of the glide path over plaintiff's home was less than 12 feet above the chimney! In actual fact planes taking off or landing flew between 30 feet and 300 feet above the house. The plaintiff and members of his family were frequently unable to sleep even when using ear plugs and sleeping pills. The vibration from airplane engines was such that plaster fell from the walls and ceilings. A spokesman for the Airlines Pilot Association testified, "If we had engine failure we would have no course but to plow into your house." The health of the plaintiff and his family was impaired.

The Pennsylvania trial court treated the action as one in condemnation, appointed viewers who found (1) a taking of an air easement, and (2) put a value on the easement of $12,690. The plaintiff appealed claiming the damages were too low, but the Supreme Court of Pennsylvania disallowed any damage at all, saying that the County was not the responsible party and indicating that the commercial air lines were.

On *certiorari* the United States Supreme Court reversed and held that as operator, promoter and developer of the airport, the county *was* responsible in inverse condemnation. Justice Black in a dissenting opinion indicated that he felt that the Civil Aeronautics Authority as the maker of the rules was the responsible party and that this federal agency should be made to bear the burden of paying just compensation for the air corridor which they had established.

The majority of the Court relied on *United States v. Causby*,[6] a case in which the airport was not only operated by the United States Air

5. 369 U.S. 84 (1962). *Compare* Gardner v. Allegheny County, 382 Pa. 88, 114 A.2d 491 (1955).

6. 328 U.S. 256 (1946).

Force but in which the offending planes were also government owned. It implied that the operator of the airport had the responsibility of either acquiring an adequate air easement corridor by purchase or eminent domain at the time the airport was developed, or of paying for them later in inverse condemnation on a showing that plaintiff's property in the form of such an easement had actually been taken. Said the Court in the *Causby* case:

> The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches of the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court of Claims plainly establish that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.[7]

Usually, a police power regulation which is held to constitute a "taking" of property is treated by the courts as an invalid exercise of the power of regulation and instead as an exercise of the power of eminent domain. But in the *Causby* case the Court is careful to make it clear that the glide path rules are perfectly valid police power measures. They are directives to air lines which must be obeyed. If, in order to fulfill these directives, air easements over private property must be acquired, then, according to the *Griggs* case, it is up to the airport operator to acquire them, either initially when the airport is developed or subsequently, if necessary, through direct or inverse condemnation.

We have then a case where valid federal aviational rules require planes to fly so low as to be "a direct and immediate interference with the enjoyment and use of the land." The operator of the airport takes the rules as given and must so arrange air easement approaches as may be necessary to avoid claims in inverse condemnation. It should perhaps be stressed that *Causby* is very careful not to describe precise levels below which air servitudes must be purchased. Among other things, of course, this is a function of the noise and vibration caused by aircraft engines and these vary with developing technology.

It is interesting to compare the landowner's problems in the *Causby*

7. *Id.* at 266-67.

and *Griggs* cases with the plight of a couple of resort operators in the upper reaches of the Superior National Forest, which culminated in *Bydlen v. U.S.* in the Court of Claims.[8] To protect and preserve the wilderness characteristics of this forest, an Executive Order was issued prohibiting air flights, except in emergency situations, at less than 4000 feet elevation. Access to the resorts by air was far more convenient than access by land and water. But to land resort guests, it was necessary for the aircraft to violate the 4000 foot ceiling order. Such violations occurred and were enjoined,[9] with the federal court of appeals flatly declaring the flight ceiling order valid. The resort owners then tried to open a land route to their places of business by way of a logging road owned in part by private firms and in part by the government.[10] Again they were unsuccessful. Barred from effective access to their places of business, they sued the federal government in the Court of Claims. They premised their claims on the contention that their "property," namely a right of access by air, had been "taken" from them so that under the self-executing consent of the Fifth Amendment, the United States was subject to suit and to liability for "just compensation." The Court of Claims in the *Bydlen* case allowed their claims[11] and no appeal has been reported.

Just as in the *Causby* and *Griggs* cases inverse condemnation liability was imposed in spite of the fact that the air flight regulation involved was a valid police power measure. But there is a major difference between the first two cases and case of the two resorters. There was no physical invasion of the resort owners' air space by outsiders. Instead in *Bydlen* we have a case where a bare regulatory measure, unaccompanied by physical invasion, was held to work such a taking as to entitle the landowners to just compensation in an inverse condemnation action.

The *Causby* and *Griggs* cases can be classified with numerous other cases of physical invasion, (1) flooding, by construction of a dam, a highway or other public improvements;[12] (2) raising the groundwater

8. 175 F. Supp. 891 (Ct. Cl. 1959).

9. Perko v. U.S., 204 F.2d 446 (8th Cir. 1953); *cert. denied,* 346 U.S. 832 (1953).

10. Perko v. Northwest Paper Co., 133 F. Supp. 560 (D. Minn. 1955).

11. Bydlen v. U.S., 175 F. Supp. 891 (Ct. Cl. 1950).

12. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871); U.S. v. Lynah, 188 U.S. 445 (1903); Lucas v. Carney, 167 Ohio St. 416, 149 N.E.2d 238 (1958); and *see* 47 KY. L.J. 215 (1959); 1960 U. OF ILL. L. FORUM 313 (1960); Fitts and Marquis, *Liability of the Federal Government and its Agents for Inquiries (sic) to Real Property Resulting from River Improvements,* 16 TENN. L. REV. 801 (1941); 18 U. CHI. L. REV. 355 (1951).

table by reason of a public improvement;[13] (3) imposition of special burdens like concentrations of gas and smoke by reason of a public improvement;[14] the backing up of sewers or drains;[15] the erection of a bridge or utility wires across private land;[16] and the washing away of riparian land caused by erection of a bridge or other public improvement.[17] Attorneys for highway departments have become accustomed to floods of claims each spring when snow melt water retarded by highways floods private fields.[18]

Much closer to the *Bydlen* case are inverse condemnation cases involving highway access rights or highway easements of light, air and view.[19] In these cases as in the *Bydlen* case there is typically no physical invasion of the claimant's land space. All of the cases I have looked at do involve physical changes or improvements—erection of a barrier to create *cul de sacs,* building of curbs, dividers, bridges, frontage roads, etc. But these changes or improvements are placed on publicly owned right-of-way—they do not directly invade the claimant's private domain. They do, however, directly implement the police power action, closing a street, limiting access to it, etc., and thereby in some factual settings are said to "take" private rights of access, light, air, or view, so as to require compensation in inverse condemnation actions. This is not the place to get involved in the complicated snarl of case law that exists around the question of when there is a "taking" requiring compensation and when, on the other hand, the action involved is a reasonable and therefore legitimate exercise of regulatory power.

Suffice it to point out that in the *Bydlen* air access case and in the highway right-of-access cases, American courts have in inverse condemnation cases done something which they have long since done in direct condemnation actions. *They have moved from the earlier primitive position requiring a physical invasion or taking to a set of holdings which say that loss of intangible property interests may be a basis for a claim of just compensation.*

13. U.S. v. Lynah, 188 U.S. 445 (1903).
14. Richards v. Washington Term. Co., 233 U.S. 546 (1914).
15. *See* 29 C.J.S. 932 (1941).
16. *See* 16 R.C.L. 68 (1915).
17. U.S. v. Cress, 243 U.S. 316 (1917).
18. *See* Lindas, *Drainage-Inverse Condemnation* (Talk before Legal Affairs Committee, American Ass'n State Highway Officials, Oct. 12, 1961. Mimeo). Sometimes these claims are based on consent statutes, rather than on the constitution directly.
19. *See* Lindas, *supra* note 4; R. NETHERTON, CONTROL OF HIGHWAY ACCESS 223 (1963).

The Restatement of the Law of Property has made it clear, following the earlier Hohlfeldian analysis, that "property" in the technical sense is not the tangible thing owned; it is a bundle of intangible interests that exist only in men's minds. Within the property interest bundle are "rights" to keep others off, "powers" to transfer that which is owned, and "privileges" to use that which is owned. The *Bydlen* case and the highway access inverse condemnation cases are basically, then, cases in which landowners whose privileges of use have been substantially curbed by public action are granted just compensation under the applicable federal or state constitutional mandate. It is interesting to note that although physical obstructions are usually erected, the action which basically takes the "privilege of use"—the property interest—is a police power action destroying or substantially curbing the exercise of the privilege. Will the courts, building on these access right cases, allow, in the future, eminent domain in reverse for any police power action which is interpreted as having interfered too substantially with intangible rights—there being no physical invasion or physical implementation of the police power order. The *Bydlen* case points in this direction. And Professor Dunham has urged that we go all the way:

> A restriction on land utilization ideally should be imposed only if society can see clearly that the gains to be obtained by the restriction outweigh the cost. Reverse condemnation would help us strike a balance.[20]

He points out that in the typical case today the landowner upon whom an onerous regulation is imposed, ordinarily attempts to get a judicial determination that the regulation cannot be applied to his land. If he succeeds, his land goes free of regulation and this may destroy the effectiveness of the plan for the area. An inverse condemnation procedure, he feels, would prevent this in many cases. It would also, Dunham believes, cause those who impose land use regulations in a democratic society to proceed with care and on a rational basis.[21] In fact, the regulators may proceed with so much caution, particularly where local finances are strained by costs of extending public services to mushrooming developments, that very little if any effective regulatory implementation of the plan will get enacted.

20. Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U. L. REV., 1238, 1254 (1960).

21. It is interesting that J. STORY, COMMENTARIES ON THE CONSTITUTION 661 (1833), pointed out 130 years ago that the Fifth Amendment just compensation clause was an important protection against irresponsible legislation.

Nevertheless, the Dunham suggestion is a completely logical extension of the present case law of inverse condemnation. Two fairly recent U.S. Supreme Court cases may contain omens for the future. In the first, that of *U.S. v. Central Eureka Mining Co.*,[22] the regulation closing gold mines for a period during World War II was held valid and not to constitute a "taking" so the inverse condemnation claim was denied. Nevertheless, a dictum in the Court's opinion is worth quoting as a possible indicator of what the future might hold. The Court first said: "It is clear . . . that the Government did not occupy, use or in any manner take physical possession of the gold mines. . . ."

And, then, nevertheless, went on to say, "We have recognized that action in the form of regulation can so diminish the value of the property as to constitute a taking."

In short, the Court clearly indicated that had it concluded that the gold mine closure order was beyond the reach of the police power, it would have allowed inverse eminent domain compensation, even though no physical seizure or entry of the mines had taken place.

The second case is more telling.[23] Rice entered into a contract with the federal government for the construction of eleven boats. Materialmen supplied materials to Rice and by the law of Maine had materialmen's liens for purchase money still owing them. Subject to the lien, title to the materials, and to the uncompleted boats, was in Rice. The contract provided, however, that in case of default by Rice, the government could take title to all uncompleted boats and needed materials on hand, and then complete the boats at the contractor's expense. Rice defaulted, the government exercised its powers under the contract and completed the boats. Armstrong and other lien claimants asserted that the government's action destroyed their liens and that this destruction was a taking of property in violation of the Fifth Amendment, for which they wanted compensation. The United States Supreme Court upheld the contention of the lienholders and sent the case back for ascertainment of the value of the destroyed liens. Said the Court:

> Neither the boat's immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.

22. 357 U.S. 155 (1958).

23. Armstrong v. U.S., 364 U.S. 40 (1960). *See* Note, 109 U. PA. L. REV. 275 (1960).

> *The Fifth Amendment's guarantee* that private property shall not be taken for a public use without just compensation *was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.*[24] (Italics supplied.)

Clearly the sweep of the italicized language is broad enough to support an inverse condemnation claim for the destruction or substantial impairment of any property interest by a regulatory measure (with or without physical invasion or seizure) where a court decides that the regulation goes beyond the range of legitimate regulation in that it forces the property owner to bear a financial burden which "in all fairness and justice, should be borne by the public as a whole." This broad statement may push the inverse condemnation remedy into areas of regulation in which it has not yet been used. Besides there is the appeal of logic behind the argument: Look, we have moved in the law of direct condemnation from a primitive definition of "taking" as requiring an actual physical occupation of the land to the destruction or serious impairment of intangible interests without physical invasion, so why shouldn't we now move this full distance for inverse condemnation also? Why should we insist on compensation for an intangible interest in unoccupied land where condemnation is initiated by the government and refuse it where the condemnation action is brought by the landowner?

Yet in spite of (1) Professor Dunham's suggestion that inverse condemnation be broadened as a way of checking arbitrary land use regulation; (2) the sweep of the *Armstrong* language and the language in other inverse condemnation cases and (3) the appeal of logic just noted, the courts may very well refuse to extend inverse condemnation beyond its present scope.

Judges who conclude that extension of inverse condemnation is an alternate remedy in any case where police power regulation is held invalid for constitutional reasons, might

1. Drastically affect the finances and operation of government;
2. Tend to make governing bodies unduly cautious;

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24. Armstrong v. U.S., 364 U.S. at 40 (1960). In addition, there are of course numerous broad statements in injunction cases that the particular police power measure being declared invalid and enjoined was a taking requiring just compensation. But in none of these cases was the landowner seeking compensation. In all of them he was successfully having a law declared unconstitutional so he wouldn't have to obey it. *See,* for example, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); East Coast Lumber Term. v. Town of Babylon, 174 F.2d 106 (2d Cir. 1949).

3. Encourage some governing bodies to use direct condemnation on the assumption that landowners affected by enacted regulations may succeed in convincing courts that the limits of fairness and justice had been exceeded.

Other judges might conclude that regulation should be tested as regulation, in the atmosphere that produced it. It should not (at least not in all cases) be subject to the possible construction that though regulatory in form is actually an exercise of eminent domain authority.[25]

Other problems present themselves as one speculates about both the present law of inverse condemnation and its possible future extension. One of these problems has to do with conveyancing. Certainly if the government is to pay fair compensation for a property interest steps should be taken to see to it that the interest is specifically and accurately transferred to the government. Easements for flooding, drainage and access represent kinds of interests which have been the subject of conveyances for generations; they normally pose no serious problems in terms for inverse condemnation transfers. But when one thinks of the wide variety of limitations on use of land that might be held in particular settings to constitute takings, then there are posed tough problems of describing just what the inverse condemnation compensation is buying—right of view, reservation of land in existing uses, excessive set-backs, height regulations, lot size controls, single use restraints, house size controls, etc., etc. Sometimes regulations which limit the use of land will not be stateable in conveyancing terms. For example, suppose that an ordinance or statute imposes a limitation on the platting of land, namely that $200 per lot be paid into a special fund reserved for school site or park purchase. Suppose a court says this exceeds the reach of the police power. Can a landowner sue for "just compensation," namely the value of his land without the regulation and its value with the regulation in force?

A second problem relates to whether or not a governmental unit which has been held to have taken property by regulation, can free itself of liability for just compensation by the simple expedient of repealing or altering the regulation. Presumably it can, so far as the future is concerned, if it acts before a court has entered judgment. But the regulation may have been substantially and adversely affecting claimant's property interests for some time before repeal or change. The claimant would apparently be entitled to just compensation for the value of this temporary interest taken from him.

25. *See* Note, 66 HARV. L. REV. 1134 (1953).

Where an inverse condemnation judgment has been entered and paid and thereafter the regulation is repealed or so changed as no longer to work a "taking," the governmental unit is left owning an unusable interest in the claimant's land. At the same time this publicly owned interest "encumbers" the marketability of the landowner's title and the government may be in a position to collect back some or all of what it paid as the price of a release of the encumbrance.

Thus, for example, suppose that after Allegheny County through payment of the inverse condemnation judgment has purchased a specifically described air corridor over Griggs' land, the CAA glide path regulations are changed so as to require planes to pass over the land above this corridor, at so high an elevation that there is no longer any taking. Or suppose that because of a realignment of the runway, planes no longer use the corridor across Griggs' land. The county still owns the air corridor easement. If a prospective purchaser from Griggs wants to build up into the corridor, a repurchase of all or part of the air easement will have to be negotiated.

Or again, assume that a court has held that by a limited access order, the state has "taken" Jones' right of access to a highway. An inverse condemnation judgment has fixed its value and this amount has been paid Jones in return for a conveyance of the right of access. Then, because of the opening of a nearby super-highway, or for some other reason, the limited access order is repealed. The state owns a negative easement in Jones' land. Presumably he will have to buy it from the state if he wants it released.

One could go on with other illustrations: After payment for the air access easement in the *Bydlen* case,[26] assume that the flight ceiling order is lifted. Or a flowage easement purchased through inverse condemnation is no longer needed because the public improvement that made it necessary has been removed. But enough has been said to suggest that in framing inverse condemnation judgments and the conveyances based upon them, the courts, at least in some kinds of cases should authorize the insertion of resale provisions in the event the governmental regulation or program is later altered or abandoned so as to "repeal" the taking. One possibility applicable to some, but not to all cases might be the purchase of the property interest in annual installments, it being understood that upon abandonment of the program, further payments would no longer need to be made and no interest would remain in the government.

26. Bydlen v. U.S., 175 F. Supp. 891 (Ct. Cl. 1959).

These are matters which will be receiving more attention in the future than they have in the past, because as an attorney with substantial experience in inverse condemnation actions has said, "I must confess that on the whole, it appears that the courts of the country are tending more and more to a liberal interpretation of the Fifth and Fourteenth Amendments of the Federal Constitution and kindred state provisions, in favor of the landowner."[27]

Certainly it can be agreed that the concept "compensable taking" is general and vague enough to allow expansion of the inverse condemnation mantle so as to include more and more type situations. This has been the history of inverse condemnation to date, there is no reason to expect that the trend will not continue. On the other hand, the courts in dealing with this flexible concept have focussed sharply on differing sets of facts case by case. It may be that the courts will identify as controlling against use of inverse condemnation, the fact that the governmental action in question was taken in a setting in which the governmental body was thinking solely in terms of regulation and had no public improvement or other activity in mind that could possibly lead to inverse liability for "takings." The courts, in short, might conclude that it is undesirable public policy to permit the purchase of compliance with unauthorized regulations and in such cases they may continue to insist that the landowner's sole remedy is an injunction against enforcement premised on a judicial finding of invalidity.[28]

In this connection the courts may give understandable emphasis to the scope of enabling statutes, so far as concerns administrative agencies and local units of government. If the governmental "regulation" is beyond the scope of the delegated power, it should be fairly easy to refuse inverse condemnation, unless, of course, the same governmental body has clear eminent domain authority over the subject matter. Again, where delegated regulatory authority is present in the enabling act, but where the governmental body has been granted no eminent domain power for the type of interest involved, courts may find an easy out. They may conclude in this situation that the landowner's only recourse is to have the regulation declared invalid, eminent domain is not available. But the difficulty with the latter position is that most inverse condemnation holdings are *not* premised on statutory delegations of eminent domain authority but directly on the constitutional assurance of just compensation.

27. *See* Lindas, *supra* note 4.
28. *See* Note, *supra* note 25.