

Government Destruction of Private Property

by Karen Frostrom, Column Editor

On November 18, 2010, a small news story began to appear in the local news. A gardener working in a yard in Escondido had been injured in some undisclosed way in a vaguely described explosion. An investigation quietly began but quickly grew to include local and federal officials and experts when the sheer volume of explosive materials on the property became apparent. The news went nationwide when the Sheriff announced that the government planned to burn the house to the ground. The house was destroyed on December 9, 2010, which was 21 days after the initial discovery. The tenant who had been living in the home lost personal property. The owner lost the property improvements. What legal rights do they have to recover what they lost? The answer is unclear. The principle at issue is the long-standing holding that the government may, in its legitimate exercise of its police power, destroy private property without invoking inverse condemnation.



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The most dramatic applications of the “emergency exception” to give the government immunity from destroying private property were decided during times of war. An oil terminal destroyed in Manila immediately prior to the Japanese invasion of the Philippines did not entitle the owner to compensation because under the emergency situation, the enemy was deprived of a valuable logistic weapon. *United States v. Caltex* (1952) 344 U.S. 149. Bridges destroyed during the United States Civil War to prevent the advance of the enemy did not entitle owners to compensation. *United States v. Pacific Railroad* (1887) 120 U.S. 227. The emergencies in these cases involved defense of sovereign land and the citizenry.

A property owner was not entitled to compensation when an “armed and dangerous” man entered a liquor store and refused to come out, resulting in the use of tear gas and damage to windows and ceiling panels because law enforcement officers needed to act quickly to protect public safety. *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 385.

When, during a massive flood, the government cut a levee causing 10 feet of flooding on private property in order to prevent greater damage, the property owner is not entitled to damages because the government is exercising its police power to address an emergency. *Thousand Trails, Inc. v. California Reclamation District No. 17* (2004) 124 Cal.App.4th 450. The *Thousand Trails* court provided the standard for consideration in “emergency” situations: “The taking or damaging of private property [must be] prompted by so great a necessity as to be justified without proper compensation to the owner.” *Id.* at 463 (emphasis in original).

The holding *Thousand Trails, Inc., supra*, needs to be carefully compared to the holding in the strikingly similar *Odello Bros. v. County of Monterey* (1998) 63 Cal.App.4th 778 case. In *Odello*, the County had recognized the existence of a flood hazard in the valley at issue and had specifically planned for modification of the levee system related thereto, but had chosen not to go forward with the plan for monetary reasons. Ten years later, the anticipated flooding occurred and the County, on an emergency basis, broke through a levee, destroying the owners’ artichoke farm. The court found in favor of the owners’ inverse condemnation claim, holding that the County’s exercise of its emergency police power “cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights as to the inviolateness of

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private property.” *Id.* at 789. A “true emergency,” the court held, must be something that could not fairly be characterized as a choice rather than a gut reaction in the moment. *Id.* at 790. The County, the court held here, had created its own emergency by maintaining what it knew to be inadequate public improvements. The property owners should be compensated for the harm they suffered as a result of the County’s *choice*.

In *Rose v. City of Coalinga* (1987) 190 Cal.App.3d 1627, the court provided clarification on what circumstances should actually qualify as an “emergency.” There, following an earthquake, the City announced plans to demolish a large swath of the downtown area due to earthquake damage. The property owners were prepared to prove that their property was not actually dangerous. The court found that two circumstances could prevent the situation from being deemed an emergency. First,

the property was fenced to prevent public access and, second, 57 days elapsed from the time of the earthquake until the destruction of the property improvements. *Id.* at 636.

When a government intentionally destroys private property under a claim of an “emergency” situation, the government bears the burden of proving the existence of the emergency “by a preponderance of the evidence.” *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 718. In ruling on the existence and the non-existence of an emergency, the court will consider whether the government made a choice that contributed to the emergency such as the lack of public improvements which would have prevented the emergency situation in *Odello Bros, supra*, or whether a delay in attempting the destruction shows that a true emergency did not exist, as in *Rose v. City of Coalinga, supra*, and whether the government had other protective and reasonable options in

its quiver as discussed in *Rose, supra*. It will then weigh the *necessities* of the case against the *inviolateness* of private property and decide which side comes up wanting.

We can predict the factors that would be considered in balancing the competing interests in the Escondido “bomb house” burning. No immediate action was necessary – this is the strongest argument in favor of compensating the private property owners. On the other hand, the County did not contribute to the *creation* of the emergency because it did not place the explosives in the building or take any action in furtherance of the danger. The matter would therefore likely turn on the nature of the options available to the County and the relative safety of those options. Was the burning truly *necessary*? Only a careful study of the facts will provide the right answer to this question. **TBN**

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