Downs v. City of Redding

Court of Appeal of California, Third Appellate District

October 30, 2018, Opinion Filed

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Reporter
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RICHARD DOWNS, as Trustee, etc., et al., Plaintiffs and Appellants, v. CITY OF REDDING, Defendant and Respondent.

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Prior History: [*1] Superior Court of Shasta County, No. 166069.

Core Terms

damages, lease, parking lot, plaintiffs', trial court, redwood, landscaping, contractor, diminution, ***inverse condemnation***, City's, temporary, condemnation, restoration, planned, parking space, deliberate, employees, entity, tenant, plans and specifications, public improvement, shipping container, just compensation, private property, property value, real property, public use, cases, ***inverse condemnation*** liability

Judges: Robie, J.; Raye, P. J., Butz, J. concurred.

Opinion by: Robie, J.

Opinion

"'Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.' [Citation.] When a public use results in damage to private property without having been preceded by just compensation, the property owner may proceed against the public entity to recover it. Such a cause of action is denominated '***inverse condemnation***.'" (*Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 737.)

Plaintiffs Richard Downs, as trustee of the Baker 1982 Trust-JMB, and W. Jaxon Baker, as trustee of the Baker 1998 Trust-KJB, (collectively plaintiffs) who own property used as commercial office space, sued the City of Redding (City) for ***inverse condemnation***[1] arising out of a public works bridge construction project (project). The bench trial was conducted in two phases.

In the first phase, the trial court considered whether use of plaintiffs' parking lot by Kiewit Construction Co. (Kiewit), the City's contractor, during the project constituted a taking of property by the City without just compensation. The trial court found no taking occurred because Kiewit's use **[*2]** of the parking lot was not a deliberate or authorized use by the City as part of the approved project. Rather, the trial court found, Kiewit's use of plaintiffs' property arose out of its two leases with plaintiffs, which included the use of 32 parking spaces, and any dispute regarding the scope of such use was a landlord-tenant issue between Kiewit and plaintiffs, since the City was not a party to those leases.

The trial court, however, agreed with the parties' stipulation that a taking did occur when Kiewit damaged the irrigation system and landscaping on plaintiffs' property because "[t]hose actions by Kiewit were within the intentional and deliberate acts approved by the City as part of the project." The damages for that taking was the focus of the second phase of trial.

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[1] Plaintiffs also asserted related causes of action for nuisance and precondemnation damages. Plaintiffs dismissed the precondemnation damages cause of action and do not appeal the trial court's judgment in favor of the City on the nuisance claim.

The parties stipulated that "[c]ompensation for the taking and damaging of plaintiffs' landscaping [would] be awarded in an amount not less than $10,510.00." The sole issue before the trial court was whether the redwood tree that died on plaintiffs' property as a result of the irrigation issue was separately compensable, in addition to the stipulated $10,510. The trial court found that, although the City "was a substantial, **[*3]** concurring cause of the demise of the redwood tree," no additional or separate damages were warranted. The trial court thus entered judgment in favor of plaintiffs in the amount of $10,510.

Plaintiffs appeal the trial court's findings that no taking occurred when Kiewit used their parking lot during the project and no additional damages were warranted for the taking of the redwood tree. We affirm.

DISCUSSION[2]

I

Standard Of Review

Our review of the trial court's findings presents mixed questions of law and fact. (*Ali v. City of Los Angeles* (1999) 77 Cal.App.4th 246, 250.) "Mixed questions of law and fact involve three steps: (1) the determination of the historical facts—what happened; (2) selection of the applicable legal principles; and (3) application of those legal principles to the facts. The first step involves factual questions exclusively for the trial court to determine; these are subject to substantial evidence review; the appellate court must view the evidence in the light most favorable to the judgment and the findings, express or implied, of the trial court. [Citations.] . . . Only the second and third steps involve questions of law for our de novo review." (*Ibid.*)

II

Kiewit's Use Of The Parking Lot

A

*The Trial Court's Factual Findings **[*4]** And Legal Conclusions*

We set forth the trial court's pertinent factual findings from its statement of decision because no party takes issue with those findings:

"1. The Cypress Bridge Project as approved by the City did not include the intentional or deliberate acquisition or use of any of the Baker Trust[3] property.

"Jon [McClain] testified that he was the project manager for the City and in that capacity was responsible to assure that the project was planned and constructed as authorized and approved by the City. [McClain] testified that the project as planned and approved did not include or allow for any use or acquisition of the Baker Trust property.

"2. The City did not authorize Kiewit to occupy or use the Baker Trust property for any purpose. The City or its agent, Pace Engineering, surveyed and staked the right-of-way property boundary between the City and the Baker Trust property, and the City instructed Kiewit, the contractor, to remain on the right-of-way side of that property line.

"[McClain] testified that the City hired Pace Engineering to survey and stake the property line along the Baker property frontage at Cypress Avenue and that the City instructed its contractor Kiewit **[*5]** to stay behind the line for all purposes in the completion of the project. The Baker Trust property is located on the *north* side of the project. [McClain] testified that the City acquired a construction easement for a construction staging area on the *south* side of Cypress Avenue. [McClain] testified he was aware at the beginning of the project that Kiewit had leased a substantial portion of one of the office buildings of the Baker Trust property (the '100 building'). When he saw shipping containers that he believed belonged to Kiewit placed in the parking lot, he believed Kiewit was authorized to do so as a tenant of Baker.[4] [McClain] received no information to the contrary.

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[2] For the reader's ease and convenience, we set forth the trial court's pertinent factual findings and legal conclusions in the Discussion portion of this opinion dealing with each phase of the trial.

[3] The trial court referred to plaintiffs as Baker Trust or Baker.

[4] McClain also testified he oversaw and supervised the planning and construction of the project and, in one instance, learned Kiewit had wooden boxes containing glass panels for the project on plaintiffs' property. McClain directed the City's inspector to ask Kiewit to remove the boxes from plaintiffs' property. While McClain saw shipping containers on plaintiffs' property during the duration of the project, he assumed the containers were located on the property in accordance with Kiewit's lease.

"Jack Baker testified that he had no information that the City authorized Kiewit to use the parking lot in the manner complained of by the Baker Trust. Jon [McClain] testified the City did not authorize Kiewit to make use of the Baker Trust property in the manner complained of by the Baker Trust.

"3. Kiewit, acting independently and without authorization or direction from the City, entered into two leases with the Baker Trust to occupy the 100 Building at the Baker Trust property. The leases were between the Baker **[*6]** Trust as landlord and Kiewit as tenant and did not involve the City. The leases were in effect at all times relevant to the allegations of the complaint. The leases authorized Kiewit as tenant to use 32 parking spaces at the Baker Trust property. The Baker Trust did not prohibit Kiewit as their tenant from any of the following: (1) placing shipping containers in the parking lot; (2) using the parking lot to stockpile materials; (3) using the parking lot to park equipment including a front-end loader, backhoe, or forklift; (4) using the parking lot for congregation of employees of Kiewit during or after work; (5) using the parking lot for employee parking by Kiewit employees, including employees who worked on the construction of the project rather than in the 100 Building leased by Kiewit from the Baker Trust; and (6) placing a light and generator in the parking lot.

"The two Kiewit leases were between the Baker Trust and Kiewit. The City was not a party to the lease agreement. Jon [McClain] testified the City was aware from Kiewit that Kiewit had leased the Baker building or a substantial portion of it. [McClain] testified the City was not involved in the lease. No evidence was presented **[*7]** by the Baker Trust that the City was a participant in the lease or approved or authorized Kiewit to enter into the lease. The lease terms provided that Kiewit was entitled to utilize 32 parking spaces and did not otherwise restrict the use of those parking spaces in any manner. Jack Baker testified that because the Baker Trust did not want to alienate Kiewit and was concerned about losing Kiewit as a tenant, the Baker Trust did not restrict Kiewit from using the parking spaces for the uses complained of, including stockpiling materials, parking of equipment such as a front-end loader, backhoe or forklift, or the placement of shipping containers. The Baker Trust wrote a letter to Kiewit in June, 2010, asking Kiewit to restrict its use of parking spaces to 32 spaces. However, Kiewit was never notified that Kiewit was not authorized to use the parking lot for shipping containers, parking of a forklift, backhoe or front-end loader, stockpiling of materials such as lumber, fencing, or rocks, or as a place for employees to gather during or after work hours. Joe Baker testified that he never confronted anyone at Kiewit or the City about the uses that the Baker Trust now complains of against **[*8]** the City.

"4. The Baker Trust did not notify the City that Kiewit was using the Baker Trust property in any manner in excess of Kiewit's authorized use as a tenant of the Baker Trust property.

"Jon [McClain], Jack Baker, and Joe Baker testified that the Baker Trust did not notify the City that Kiewit's use of the parking lot was wrongful or in violation of the lease. Jack Baker testified he called Brian Crane[, a city official,] on one occasion to complain about bad language used by Kiewit employees in the parking area as a result of information from his wife's friend. Baker thought the subject of Kiewit's use of the parking lot may have come up in the conversation, but he acknowledged it was not the point of his phone call. Even assuming the subject was discussed during the telephone call, Baker could not recall any specifics. Baker acknowledged there was no letter or other documentation of any complaint to the City. Leonard Bandell, the attorney for the Baker Trust, testified he was never asked to contact the City to complain about the use of the parking lot as a construction staging area. Mr. Bandell was instructed by the Baker Trust to contact the tenant, Kiewit, about the claimed **[*9]** excessive use of employee parking spaces. Mr. Bandell was not instructed by the Baker Trust to contact the City about the subject.

"5. The Baker Trust did not notify Kiewit that use of the parking lot by Kiewit, whether for stockpile of material, placement of shipping containers, parking of equipment, parking by employees, or congregation of employees, was in excess of or in violation of the lease."

The trial court concluded "[u]se of the Baker Trust parking lot by Kiewit was not a deliberate or authorized use by the City as part of the Cypress Bridge project as approved by the City. Therefore, any use of the Baker Trust parking lot by Kiewit was not a taking of the Baker Trust Property by the City within the meaning of law of ***inverse condemnation***." (Underlining omitted.) In the trial court's view, plaintiffs' claim amounted to a landlord-tenant dispute with Kiewit.

B

Kiewit's Use Of The Parking Lot Was Not A Taking By The City

Plaintiffs argue the trial court erred in finding no taking occurred because "[i]t is beyond dispute that, had the City's contractor *not* executed a lease with [plaintiffs] and simply occupied [plaintiffs'] parking lot, the contractor's occupancy and use of [plaintiffs'] **[*10]** parking lot would have been a clear physical invasion taking for which the City would have been liable." They argue Kiewit "did *not* execute a lease that allowed it to use [plaintiffs'] parking lot as a construction staging area" because Kiewit "only had the right to use the parking lot in a manner that was consistent with the 'general office purposes' allowed by the lease." Thus, plaintiffs posit, "[i]t is no different than if the contractor had occupied and used [plaintiffs'] parking lot without a lease."

This argument is nonsensical because the leases did in fact exist and there is no evidence that Kiewit would have occupied plaintiffs' property in the absence of the leases — and we do not so assume. While we agree with plaintiffs that the mere existence of the leases between plaintiffs and Kiewit does not necessarily foreclose an action for ***inverse condemnation*** (see, e.g., *Reinking v. County of Orange* (1970) 9 Cal.App.3d 1024),[5]

we agree with the City that the facts of this case do not support a finding of ***inverse condemnation***.

Under plaintiffs' theory, the City, in order to avoid ***inverse condemnation*** liability, would have needed to insert itself into the landlord-tenant relationship between Kiewit and plaintiffs to **[*11]** determine whether Kiewit's use of the leased property for purposes of any portion of the project ran afoul with the lease provisions. No such duty exists. Rather, in order to prevail on their theory of ***inverse condemnation***, plaintiffs had the burden of proving the City planned, authorized, or directed Kiewit's unauthorized use of plaintiffs' property for the benefit of the project.

In *Paterno v. State of California* (1999) 74 Cal.App.4th 68, we explained: "The condemnation clause provides in part that 'property may be taken or damaged *for public use*,' [citation] and this requires an act of a public body. The focus is on the acts of the public entity, which decides where, when and how to construct public improvements. In making such policy choices, the entity must consider the effect of the improvement on property owners and be prepared to pay for taking or damaging property, either by condemning it or by paying a takings judgment. Where damage results from the acts of employees, and not from a policy decision, there is no taking. Recovery, if any, lies in a tort action, such as negligence." (*Id.* at pp. 86-87.) "The necessary finding [for ***inverse condemnation***] is that the wrongful act be part of the deliberate design, construction, or maintenance of the **[*12]** public improvement." (*Arreola v. County of Monterey, supra*, 99 Cal.App.4th at p. 742.)

Stated another way, when the government "contracts for the doing of construction work according to plans and specifications theretofore adopted and the contractor performs the work with proper care and skill and in conformity with the plans and specifications, but the work thus planned and specified results in an injury to adjacent property, the liability, if any there is, for the payment of damages, is upon the [government] under its obligation to compensate the damages resulting from the exercise of its governmental power [citations]; but where the contractor departs from the contract, plans or specifications, or goes beyond them, or performs the work planned and specified in an improper, careless, or negligent manner, which results in injury to adjacent property, then he is responsible in damages for the tort he has committed." (*Marin Mun. W. Dist. v. Peninsula P. Co.* (1939) 34 Cal.App.2d 647, 652-653.)

The evidence shows the project as deliberately designed and planned by the City did not include use of plaintiffs' property. In fact, as the trial court noted: the City's approved plans and specifications included use of

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[5] We also agree with plaintiffs that the City's attempt to analogize the facts of this case to those in *County of Ventura v. Channel Islands Marina, Inc.* (2008) 159 Cal.App.4th 615 is unconvincing. In *County of Ventura*, the plaintiff constructed and operated a marina on land it had leased from the county. The lease provided the county could negotiate to purchase the improvements when the lease expired and that title to the improvements would vest in the county if no such agreement could be reached and the improvements were not removed. (*Id.* at pp. 618-619.) The lease expired and the county took possession of the improvements when the parties failed to reach an agreement for their purchase and the plaintiff was unable to remove them. (*Id.* at pp. 620-622.) The plaintiff sued for ***inverse condemnation*** and the court of appeal found plaintiff had no such claim. There, but for the lease, the plaintiff's improvements would have been part of the county's real property as a fixture. Thus, the court found the "rights and duties of the parties spr[a]ng from the lease," as did "liabilities arising from [its] breach," and the court saw "no reason to impose extracontractual liability for breach, simply because the breaching party [wa]s a governmental entity." (*Id.* at p. 625.) Here, in contrast, plaintiffs could have asserted an ***inverse condemnation*** claim based on the use of their property, even if the leases with Kiewit did not exist.

a large construction staging area on the opposite side of plaintiffs' property, and the City surveyed and staked **[*13]** the property boundary along plaintiffs' property and instructed Kiewit to remain on the City's side of that boundary throughout the project. The City believed Kiewit's use of the parking lot was authorized under its lease and it received no information to the contrary. When McClain saw wooden boxes containing glass panels for the project at plaintiffs' property, he directed the City's inspector to have Kiewit remove them. At no time did the City authorize Kiewit to use the parking lot.

Heimann v. City of Los Angeles (1947) 30 Cal.2d 746 (disapproved on other grounds in *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 679) does not assist plaintiffs.[6]

Plaintiffs argue *Heimann* stands for the proposition that "actions of a contractor in furtherance of a public work create liability for the public agency responsible for the work." *Heimann* states no such broad rule; nor does it abrogate the required element that the unauthorized public use arise from the government entity's deliberate acts before liability may be imposed. Our Supreme Court in *Heimann* merely said that the outsourcing of construction work to a contractor does not in and of itself absolve the government from liability for any taking or use of private property during the construction period. (*Heimann*, at p. 756.)

Pertinent to the contractor's **[*14]** work, our Supreme Court explained: "Where a public improvement has been constructed and private property has been taken or damaged for a public use it is immaterial that the work of construction may have been done by a contractor. The public agency authorizing the work is the party to be held liable under the constitutional provision for damage resulting from the exercise of its power. If the public work is constructed according to the plans and specifications furnished by such public agency and upon completion is accepted by it, this is sufficient to fix liability." (*Heimann v. City of Los Angeles, supra*, 30 Cal.2d at p. 756.)

Our Supreme Court held the trial court should have entertained evidence that "tended to show the alleged temporary injury; whether the alleged damage was within the contemplation of the plans and specifications for the public improvement or whether it consisted of a private act of the [contractor] so separated from any purpose of the public improvement as not to constitute the damaging of private property for public use; also whether the elements of injury so shown were actionable." (*Heimann v. City of Los Angeles, supra*, 30 Cal.2d at p. 757.)

Here, the trial court did exactly what our Supreme Court required it to do — that is, the trial court weighed the evidence and concluded, **[*15]** based on the evidence, no taking occurred because the City did not direct Kiewit to use the parking lot and such use was not within the contemplation of the plans and specifications for the project. Applying the undisputed factual findings of the trial court, we reach the same conclusion.

In their reply brief, plaintiffs argue "[t]he requisite policy choices [to impose ***inverse condemnation*** liability] can be inferred from the City's actions [of exercising supervision and control over Kiewit and the City's knowledge that Kiewit was stockpiling construction material for the project in the parking lot] just as they were inferred from the cities' actions in *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 607 and *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 696-697." Plaintiffs again miss the mark because neither case is applicable to the facts here.

Both of those cases dealt with damage caused by the public project itself, as planned, designed, or maintained by the governmental entity. (*Pacific Bell v. City of San Diego, supra*, 81 Cal.App.4th at pp. 598, 607-608 [***inverse condemnation*** liability for water damage caused by corroded cast iron water pipe because city declined to install a system with monitoring capabilities and instead adopted a "wait until it breaks" method for detecting deterioration]; *McMahan's of Santa Monica v. City of Santa Monica, supra*, 146 Cal.App.3d at pp. 687, 692-698 [***inverse condemnation*** liability for failure to replace water mains **[*16]** known to have limited life; city took calculated risk by adopting plan of pipe replacement and maintenance it knew was

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[6] Plaintiffs rely on the broad and general language in several cases — *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854; *Tahoe-Sierra P. Council, Inc. v. Tahoe RPA* (2002) 535 U.S. 302 [152 L.Ed.2d 517]; *Bronco Wine Co. v. Jolly* (2005) 129 Cal.App.4th 988; and *Sacramento & San Joaquin Drainage Dist. v. Goehring* (1970) 13 Cal.App.3d 58, (*Goehring*) — stating an owner of property is entitled to compensation for the government's use of his or her property. While the general rule is undisputed, it does not shed any light on the specific facts of this case — the pertinent question of which is whether Kiewit's alleged misuse of the parking lot imposed ***inverse condemnation*** liability on the City under the facts of this case.

inadequate].)

The record contains no evidence showing Kiewit's use of plaintiffs' property was a policy decision *by the City* — it was a decision by Kiewit alone. In the absence of "an act of a public body," no claim for ***inverse condemnation*** can lie against the City. (*Paterno v. State of California, supra*, 74 Cal.App.4th at pp. 86-87.) Considering Kiewit's departure from the project's plans and specifications regarding the location of the construction staging area, recovery, if any, lies in a tort or contract action against Kiewit. (*Ibid.*; *Marin Mun. W. Dist. v. Peninsula P. Co., supra*, 34 Cal.App.2d at pp. 652-653.)

III

Damages For Taking Of Redwood Tree

A

Just Compensation Principles Generally

The concept of just compensation is to put the owner in as good a pecuniary position as he would have been if his property had not been taken, while being fair to the public who has to pay for it. (*City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1027-1028; *Bauman v. Ross* (1897) 167 U.S. 548, 574 [42 L.Ed. 270, 283].) ""The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' . . . ."" (*Ventura County Flood Control Dist. v. Campbell* (1999) 71 Cal.App.4th 211, 218.) The owner "'is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.'" (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 715.)

"Although the measure of compensation that is 'just' **[*17]** for purposes of both the federal and state takings clause is often determined by the 'fair market value' of what has been lost, both federal and state takings cases uniformly recognize that the fair market value standard is not applicable in all circumstances and that there is no rigid or fixed standard that is appropriate in all settings." (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 203-204.)

B

The Trial Court's Factual Findings And Legal Conclusions

During Kiewit's work on the project, the City had to shut off the irrigation system on a portion of plaintiffs' property for some time. The parties stipulated that "[c]ompensation for the taking and damaging of plaintiffs' landscaping [as a result of the water shut off would] be awarded in an amount not less than $10,510.00." The only issue for the trial court's determination in the second phase of trial was whether the redwood tree that died on plaintiffs' property following the water shut off was separately compensable, in addition to the stipulated $10,510.[7]

Plaintiffs' landscape contractor testified that the appraised replacement cost of the 70-foot approximately 40-year old redwood tree was $42,700. In response, the City's real estate appraiser testified the demise of the redwood tree did not diminish **[*18]** the value of plaintiffs' property. In his opinion, "[t]he effect upon value that's created by damage of landscaping, the proper measurement of that loss in value is the cost to cure it" and, because the landscaping had been repaired and replaced, the appraiser concluded the property did not suffer any diminution in value from the lack of the redwood tree. The appraiser stated the redwood tree had no contribution to the property's value over and above the landscaping because the tree was merely viewed as part of the landscaping and the tree's value was "too small to measure for a property of that magnitude."

The trial court found "[t]he value of the redwood tree is not viewed separately, but rather is viewed with the property as a whole" and "[t]he measure of damages [applicable to ***inverse condemnation***] is the diminution, if any, in the fair market value of the property compared to after the taking of the landscaping and irrigation system." The trial court found that, because "[t]he only evidence presented at trial which related to the fair market value of the property established that the loss of the redwood tree did not result in any diminution in value of the Baker Property[,] . . **[*19]** . Plaintiffs are limited to $10,510.00, the amount of stipulated damages."

C

[7] Neither party disputes the trial court's finding that "the City was a substantial, concurring cause of the demise of the redwood tree."

The Redwood Tree Was Not Separately Compensable

Plaintiffs argue they are entitled to the $42,700 cost of replacing the redwood tree for two reasons: (1) their ***inverse condemnation*** claim rests on damage to the landscaping independent from the land; and (2) they did not seek or argue for diminution in value as a result of the landscaping damage. Neither argument has merit.

As to plaintiffs' first contention, it is well established that trees and landscaping form a part of the real property. Real property includes both land and things affixed to the land. (Civ. Code, § 658.) "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; . . . ." (Civ. Code, § 660; see *City of Los Angeles v. Hughes* (1927) 202 Cal. 731, 737, overruled on other grounds in *County of Los Angeles v. Faus, supra*, 48 Cal.2d at p. 679, [interest in real property sought to be condemned extended to "trees and shrubs planted and growing in the ground constituting an interest in the land in the nature of an improvement"].) Thus, "[t]he market value of the land, together with the improvements thereon, viewed as a whole and not separately, is the general rule. [Citation.] Exceptions to this general rule might be allowed where, **[*20]** under peculiar circumstances . . . , as by reason of the nature of the improvement itself, no other criterion would be appropriate for establishing the market value of the property other than the structural value or the reconstruction cost." (*City of Los Angeles v. Klinker* (1933) 219 Cal. 198, 211-212.)

Turning to plaintiffs' second point, they argue *Goehring, supra*, 13 Cal.App.3d at page 58 is "directly on point" because they have "not made any claim for diminution in the value" of their property.[8]

First, we note the legal determination of the appropriate measure of damages arising from ***inverse condemnation*** is not determined by how a plaintiff frames his or her request for damages; the legal determination lies with the court. Therefore, whether plaintiffs sought diminution in value is of no consequence. Second, plaintiffs read *Goehring* too expansively, relying on it for propositions not considered. (*Porter v. Bakersfield & Kern Elec. Ry. Co.* (1950) 36 Cal.2d 582, 590 [statements of law in an opinion are to be understood in light of the facts and the issues before the court].)

In *Goehring*, the drainage district condemned parcels "for a temporary easement as an access road." (*Goehring, supra*, 13 Cal.App.3d at p. 62.) "The heavy equipment used on the road resulted in chuckholes which were not repaired." (*Id.* at p. 66.) The pertinent question was: what damages were the owners entitled to when the district's **[*21]** temporary use ceased? At trial, there was no evidence the temporary taking diminished the market value of the remainder of the parcel. (*Ibid.*) There was also no evidence of the reasonable rental value for use of the road. (*Ibid.*) The only evidence introduced was the cost to restore the road, and the owners were awarded $900 based on that evidence. (*Id.* at pp. 66-67.)

On appeal, we noted the general rule that: "'Upon a temporary taking just compensation generally includes damages resulting to the property taken and to fixtures and improvements, or for cost of restoration. Where part only of a parcel is taken for a temporary period the damages include consequential damages to the remainder area. . . . [¶] It has been held that in addition to rental value for the period of the taking, the condemnee is entitled to recover, provided the sum is not in excess of the diminution in value of the property caused by physical changes made by the condemnor during the period of its possession, to the cost of restoration plus rental value during the period of the restoration.'" (*Goehring, supra*, 13 Cal.App.3d at p. 66.)

We declined, however, to "universally adopt the rule that damages will be denied the owner absent evidence of diminution of value of the **[*22]** property" "when a temporary easement is taken for road purposes necessary for project construction with resultant damage to the road." (*Goehring, supra*, 13 Cal.App.3d at p. 66.) We explained that, "[t]o require evidence that a temporary taking of the road diminished the market

[8] None of the other cases cited by plaintiffs has any application to the issue at hand. Plaintiffs cited the following cases for the following premises: *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368 [explaining the "or damaged" language added to the California Constitution's takings clause allows an owner to seek compensation for property damaged in connection with public improvements]; *Clement v. State Reclamation Board* (1950) 35 Cal.2d 628 [arguing it "[p]rov[es] diminution in the value of a larger parcel is not a predicate to Baker's recovery"]; *McMahan's of Santa Monica v. City of Santa Monica, supra*, 146 Cal.App.3d 683 [arguing diminution in value was not the test to compensate for damages to personal property in a furniture store]; *O'Dea v. County of San Mateo* (1956) 139 Cal.App.2d 659 [arguing "damages is not a predicate to recovery"]; *Sutfin v. State of California* (1968) 261 Cal.App.2d 50 [arguing "items of personal property unrelated to the value of real property qualify for compensation"].

value of the entire parcel of real property is to exact a rule of law never intended to apply to the fact situation here." (*Id.* at p. 67.) We found "[t]he property owner proved damage and the cost of restoration" and "[t]he trial result on this issue was proper." (*Ibid.*)

We specifically tied our reasoning and conclusion in *Goehring* to the "fact situation [there]" — i.e., a temporary easement; a fact situation not at issue here. (*Goehring, supra*, 13 Cal.App.3d at pp. 66-67.) The general rule on damages in ***inverse condemnation*** cases is: "The measure of damages for a physical invasion or interference with property rights that totally destroys the private property is the fair market value of the property or property interest taken. . . . [¶] When the property or property interest is only damaged (not destroyed) by the public entity, the measure of the owner's recovery is the diminution in the market value of the property or property interest damaged. . . . [¶] . . .[¶] Where there is a partial taking, the **[*23]** proper measure of damages is the diminution in value and not the costs of repair, except in extraordinary circumstances." (7 Miller & Starr, Cal. Real Estate (4th ed. 2017) § 23:14, pp. 23-81-23-82, fns. omitted.)

This is not an extraordinary case. (Cf. *Pacific Gas & Elec. Co. v. County of San Mateo* (1965) 233 Cal.App.2d 268, 273-275 [affirming cost to relocate underground gas pipeline due to safety concern as proper damages].) Here, the land with the restored landscaping suffered no diminution in value compared to the land with the original landscaping that included the redwood tree. Thus, no additional compensation for the redwood tree was appropriate. (See *United States v. Flood Building* (N.D.Cal. 1957) 157 F.Supp. 438, 439-444, affd. *Flood v. United States* (9th Cir. 1960) 274 F.2d 483 [diminution in value, not cost of restoration, appropriate where federal government temporarily used building for federal agencies and owners sued for alterations made to premises, because market value of property was not diminished and restoration costs were approximated at $441,000].)

To allow plaintiffs to recover $42,700 "would put the owners in a better pecuniary position" than they would have been in had the tree remained intact, which is contrary to the public policy underlying ***eminent domain*** and ***inverse condemnation*** actions. (*Flood v. United States, supra*, 274 F.2d at p. 487.) Such a result would not comport with fairness or equity.

DISPOSITION

The **[*24]** judgment is affirmed. The City shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

/s/ Robie, J.

We concur:

/s/ Raye, P. J.

/s/ Butz, J.

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