

County Can't Use Growth Control Initiative to Bar Previously-Approved Project

It takes an unusual set of circumstances for a California appellate court to find a regulatory taking based on denial of a discretionary land use entitlement. But those circumstances existed in a recent case in which the court not only found a taking, but upheld an award of attorney's fees to the developer for both the inverse condemnation and related civil rights claims. *Lockaway Storage v. County of Alameda*, A130874 (First District, May 9, 2013). In 1999, Alameda County approved a conditional use permit for a vehicle storage facility. The terms of the CUP required it to be implemented within three years of issuance, i.e., by September 22, 2002. In August 2000, Lockaway Storage bought the property and assumed the rights and obligations of the seller under the CUP. In November 2000, Alameda County voters enacted a growth control initiative, Measure D, which became effective in December 2000. Although Measure D prohibited the development of storage facilities in the area in which the Lockaway property was located, it also included safe harbor provisions aimed at protecting property rights and entitlements secured prior to its adoption. Before Lockaway bought the property, the County assured it that the property could be developed as a storage facility, and subsequently confirmed that if grading and building permits had been applied for but not issued by the September 2002 CUP expiration date, the County would prepare a formal letter confirming that the CUP had been "implemented" so that there would be no need to seek a new CUP. However, the County subsequently had a change of heart, and told Lockaway that unless it obtained a new CUP it could not continue with the project after the expiration of the original CUP. By this time, Lockaway had spent approximately \$400,000 on the project in addition to the property's \$800,000 purchase price. Lockaway applied for new CUP under protest on September 3, 2002. On September 19, 2002, the County issued a grading permit for the project, but later denied Lockaway's CUP application on the ground that it was inconsistent with Measure D. The court of appeal upheld an award of damages and attorney's fees in favor of Lockaway, concluding that the storage facility project was beyond Measure D's reach because it had received all discretionary approvals before Measure D became effective. The court found that the County's actions interfered with Lockaway's reasonable investment-backed expectations since Lockaway purchased the property based on the County's assurances that a storage facility could be built on the property and that the CUP had already been implemented for purposes of the September 2002 termination date, and Lockaway had worked closely with the County for several years both before and after its purchase of the property. It rejected the County's claim that its actions simply amounted to an honest mistake resulting in a delay in the entitlement process. The court also affirmed an attorney's fees award in excess of \$700,000 under Code of Civil Procedure section 1036, which allows recovery of attorney's fees in inverse condemnation actions. Although the fees also included time spent on unsuccessful civil rights claims, the court upheld the entire award, finding that the trial court had discretion to award fees for work on the civil rights claims because they were relevant to the inverse condemnation claim.

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