ORAL ARGUMENT – 10/19/04
02-1012
CITY OF KELLER V. WILSON, ET AL

LAWYER: The members of the court living in the City of Austin see everyday how what used be pastures are turned into residential subdivisions. And this case presents two questions with respect to who will pay for the consequences of that development. First, can a city ever defend an inverse condemnation lawsuit when an appellate court's evidentiary reviews of the city's intent disregards undisputed evidence showing that the city did not act with the necessary intent. Second, should an inverse condemnation suit be used as a vehicle for second-guessing a city's regulatory decision in approving development and, to require the public to pay for defects in a private developer's drainage plan?

HECHT: Where are the developments? Did the developer settle or what happened to those?

LAWYER: With respect to developers there was a directed verdict with respect to the city of Keller's claims against the developers. The Wilson's claims against the developers were resolved on summary judgment, which the CA affirmed.

HECHT: And then nothing - they are not in the case anymore?

LAWYER: That is correct.

OWEN: What does the record reflect about the frequency of flooding on the Wilson's property?

LAWYER: I believe that it shows that it did occur from time to time. It occurred in association with rainfall. The testimony is not very definite.

OWEN: There's a statement it seems like at some point that the Wilson say it's from ankle deep to waist deep. Is that at all times? some times?

LAWYER: I believe that's in association with specific rains. Obviously Dr. Spindler's report is tied to certain types of rainfall. The Wilson's testimony is a little indefinite.

OWEN: How many times has it flooded?

LAWYER: I don't think that I can tell you from the record how many times they said it flooded.

OWEN: Is it more than once?

LAWYER: Yes.

OWEN: More than 3 times?

LAWYER: I believe they would probably say it was more than 3 times.

O'NEILL: You're not taking issue with the fact the property was damaged are you? I mean you're not contesting the frequency or the extent of the damage. You're just contesting the takings claim?

LAWYER: That is correct.

O'NEILL: One of your arguments is that if anyone should be liable here it should be the developers. What relief would the Wilsons have against the developers? I understand there was a directed verdict. Why couldn't they collect against the developers, or did they?

LAWYER: They did not collect against the developers. I don't know why they wouldn't have a cause of action against the developers either under 11.086 of the Water Code or under the common law flooding cause of action that appears to be created under the Kraft v. Lankford case. Or even sue the engineers necessarily if they were negligent in the design of these detention ponds.

O'NEILL: I'm struggling though on the theory that could sue the developers and, yet, they report out on them as a matter of law on the developers. So I'm a little bit confused as to why that would be.

LAWYER: I believe that the CA's theory in this case was that if the developers conformed to city regulations they got a walk.

HECHT: That strikes me as odd. It strikes me as peculiar that you could just do whatever the city said, which a given city may know something about water diversion, and it may not know anything. And then you get a pass.

LAWYER: I agree with that, and I agree with that especially in this case. I believe the record reflects that our regulations were, you don't increase the velocity and flow of water reaching downstream properties. We didn't tell them how to do it. They were they ones that figured how to do it. Their engineers bring us the plans that says this accomplishes that result. We checked the map. We have our engineer look at it. But they get a walk.

OWEN: What's the consequence if a city or governmental unit acquires the facility that was negligently designed, and the city doesn't know that, but afterwards after the city acquires it there is frequent, current flooding? What obligation, if any, or rights do you have against the governmental unit when you know that if you continue to operate the way you are operating it it's going to continue to flood someone's property frequently?

LAWYER: I don't believe that question has been answered by a Texas case. I want to make sure the court understands what theory this case was tried on. This case was tried on the theory that there was a defect in the design. There really isn't any evidence that someone said City, you should fix this after you have acquired the right to maintain or operate the easement. We think the distinction in this case with respect to who has the liability as pointed out in the Phillips case out of the Washington SC cited in our brief, that you basically look to what caused the act. I mean what caused the damage? In this case, we say that the damage was a result of, not what we did, but the design.

OWEN: It seems that there was an older case where the Brazos river started a flooding facility, and once it became apparent that it was going to be an occurrent event, then there was some sort of taking issue.

LAWYER: Obviously that's the issue to a certain extent that was decided in Gragg.

HECHT: Sort of, but not really. We used the word is in the test, but the complaint in Gragg was you built it this way knowing this was going to happen. And you even went out and got flood easements along the way in contemplation of that. They might have made an argument, Well even if you didn't know it then, you know it now that it's flooding. But it's not clear to me that's the case.

LAWYER: I will have to admit the recurrence analysis has given me some pause. I don't think you can read Gragg as the court says. I appreciate the courts comment that Gragg was basically a result of the intended design of the dam.

HECHT: Well the recurrence goes to both issues. It goes to is it merely inevitable? If after the fact the construction just happens one time and you think well maybe this is going to keep happening or not. But if it keeps happening, then you pretty well know this is a problem. But again as J. Owen is asking, Does it matter here that the city now owns an easement that's causing flooding?

LAWYER: Under the theory in which this case was tried, I do not believe that it makes a difference. Because again, plaintiffs are saying you shouldn't have approved this drainage plan because you knew that the development caused the ground to lose its absorbency. And by virtue of that fact, you should have known if you approved this plan we would be flooded.

HECHT: You cite the Ford case, 5th circuit case, that the city's conduct must be evaluated on the knowledge the city had at the time it approved the developer's drainage plan. I take it that's the only case that you know that says that.

LAWYER: With that specific holding, but with respect to the logic of the situation the theory of the case here is that you knew this plant was going to cause the damage, not that once you took over maintenance of the easement that some act by the city then caused damage. So if you accept the theory of this case, that's why we say that certainly the pivotal moment in time is the time

of the improvement.

OWEN: We're writing a law with a broader view, not just this case. What if the city had acquired - a developer had built a sewer system, and the city acquired it and it backed up once and flooded a specific house. And then over time it became apparent that every time the water got to a certain level the sewage system was going to back up and put sewage in a specific house. At what point is there a taking if there is?

LAWYER: I suppose you have to go back to the first prong of the Jennings test, knows that a specific act is causing identifiable harm. I suppose that if you tried a case on a theory of maintenance or something such as that, that you would basically apply that test: when did you know that a specific act is causing identifiable harm? Once that work, ie sewage system became a public work, we don't agree that anything that damaged the Wilsons in this case constituted a public work because of the theory under which this case was tried.

BRISTER: But the City could do something about it? One thing you could do, you could condemn and extend the drainage in accordance with the 1991 plan.

LAWYER: I suppose that yes, that's theoretically possible.

BRISTER: Could you make the developers at this point do something about it?

LAWYER: Not that I know of.

BRISTER: What is there about the current, the plan at the time of approval that negated the 1991 plan?

LAWYER: I believe it's the CA's theory. The inference that they drew was based on two facts. One, that the ground lost its absorbency when it was developed. And two, that the 1990 or 1991 plan had this channel across the road. From that I think they draw this conclusion: 1) you knew there was going to be an increase in the velocity and flow of water; 2) you must have included that ditch, channel, across the Wilson's to protect the Wilsons from that increase flow; 3) the conclusion being, you knew not by not building the channel that there would be an increase of flow. Under the state of the record in this case, we have a regulation that says don't increase the velocity and flow. And that's not an empty formality under the record of this case. The record shows that everyone tried to conform to that regulation.

BRISTER: But you're saying that what you knew later at the time of approval conclusively outweighed all those inferences we would normally make in favor of the person that wanted ______. What is there about the new knowledge at the time of approval that conclusively wiped out what you previously?

LAWYER: I don't understand - I think the CA's inference is based upon a conclusion that

the only way to protect the Wilsons is to dig that ditch. But the record doesn't show that. The record shows that we were told by the developers that the detention basins that were part of their plan were sufficient to keep the velocity and flow of the water at a point it was prior to development. So if you accept that fact that our plan, the developer's plan is as good as envisioned by the 1991 plan, then I don't think you can reach the conclusion that we knew a specific act was causing identifiable harm.

OWEN: Was there any flooding before the city accepted the easement?

LAWYER: Yes.

OWEN: By the time you accepted the easement you did know there was flooding and you did know that the ____ plan wasn't working?

LAWYER: No. I misunderstood your question. I thought you meant was there flooding that predated development.

OWEN: No. Was there flooding that predated the city's acceptance of the drainage easement?

LAWYER: I don't believe the record indicates that.

OWEN: You say in your briefs that the Wilson's expert testified that the 1990 plan could be modified, and I think the CA's opinion said, however, that the city's people said that the plan had not ever been modified.

LAWYER: I believe what the plaintiffs are relying upon is a statement by the then director of public works, that there were no "exceptions" to the plan. But I also believe that the record indicates that the plan was a means of how the city thought water should be moved in accord with its historic path. There was testimony that the plan could be altered. There was testimony by the expert retained by the city that he thought that the change to the plan or the implementation of the developer's drainage plan as opposed to digging the ditch did not negligently impact the Wilsons. Because again it accomplished what the goal was of not increasing the velocity and flow of the water reaching the Wilsons.

OWEN: But you would concede now we all know that that didn't turn out to be the case.

LAWYER: That is apparently correct. But again, if the intent standard set out in Jennings is going to have some meaning, I don't think especially in this case, you can create a presumption that because there was damage, we can infer intent. We have to look at the intent, especially in this case, at the time the city made the decision for which plaintiff were trying to hold them liable.

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RESPONDENT

CASEY: In answer to justice's question concerning the developers. We did sue the developer for violation of 11.086, as well as the theory of trespass. The developers filed motions for summary judgment in the TC under the theory that they were following the instructions and regulations of the city and, therefore, they should not be held liable for any damage which may have resulted under water impacting or flowing upon the Wilson's property. The TC granted the motions for summary judgment.

The Wilsons went to trial only against the city of Keller under the inverse condemnation theory. The city of Keller sued the developers for contribution and indemnification under their developer's agreement. At the conclusion of the evidence, the court directed a directed verdict on behalf of the developers against the city of Keller. In other words, the court basically found that the developers were not liable under the contribution indemnification under the developers agreement in existence at the time to the city. Therefore, the only issues that were presented to the jury, or the only parties that were presented to the jury at the time of the conclusion of the trial, left were the Wilsons, the plaintiffs, and the city of Keller under both the inverse condemnation theory, which is jury question no. 8 and 9, and under the 11.068 water code theory.

BRISTER: And you are not complaining about the summary judgment?

CASEY: No. I took that up on appeal to the CA. The CA addressed it. While I felt it was not right, I thought we would be better voiced by directing my attention to the city's position than bringing up this as a side issue. We did not bring that up on appeal.

O'NEILL: Is the developer's agreement part of the record?

CASEY: Yes. Now this is the developer's agreement between the developers and the city. The city introduced the developer's agreement because they were suing, under the developer's agreement, for contribution and indemnification.

O'NEILL: And what does the developer's agreement say in terms of who's got responsibility for what?

CASEY: I do not know. My theory against the developers was the water code theory and trespass. I was not a party to that contract and, so therefore, I don't have and have not ____ that contract.

O'NEILL: It just strikes me that - you've got people who's property is damaged. And it strikes me they should be entitled to recover for it. They're pointing at the developers and the city, and the developers and the city are doing this.

CASEY: Yes. The developer's theory was somewhat similar I believe to the defense

plane's theory. We build the plane in accordance with the government's specifications and therefore we are not liable if the plane goes down. If the plane goes down, that was in essence what their theory as to why there was a break. And I think the CA held that there was a break and causal connection and found that the city was liable for this particular situation.

I would like to address a couple of things specifically. First is, in the city's brief on page 29, note 9, the city concedes that the city contributed $11,050 as participation in the drainage project because the developer oversized the permit drainage easement to accommodate the ultimate drainage needs according to the 1990 plan. This in essence was also testifying by Mr. Barnes who was the director of public works at the time and one of the engineers. In his testimony, which is in vol. 4, page 41, where I interrogated him regarding plaintiff's ex. 29, which is part of the developer's agreement. We go back to when this began. These two developments - in essence you have to stack property. The Wilsons are at the bottom, the Sebastian property is next...

BRISTER: Can we ignore the fact that when this was finally approved that three sets of engineers told the city this is going to be fine. We can't ignore that even though we're here on a no evidence review can we?

CASEY: I think what we have with a city - this to me is like any other expert testimony. When you look to the issue of intent and the city assurances, you almost have to look like a Monday morning quarterback going backwards in time. Because the city is always going to say we never intended to hurt anybody. The city has assurances...

BRISTER: In a bad faith case, the plaintiff is always going to say I have a good claim against the insurance company. But the insurance company is not required to take the first claim and pay all claims. They hire an investigator, an investigator tells them, third party investigator it's a good claim or it's a bad claim. And if they tell them it's a bad claim, then they are in good faith thereafter. Now why isn't this like that?

CASEY: The city engineers did they communicate that fact? I have no direct evidence that they did not. What I do have and we think is in front here is that this is the opinion of the engineers, that this will not violate or will not do damage. And as any expert's opinion may be disregarded by a jury...

JEFFERSON: But must a city disregard it?

CASEY: I think as with all experts the city or anybody who receives an expert opinion takes it into advisement and they have to decide whether or not to believe the expert opinion and act accordingly, to believe part of the expert opinion...

JEFFERSON: Is there any evidence in the record that would suggest that the engineer's assessment was inaccurate and that the city should have known that?

CASEY: At the time that the assurance was given?

JEFFERSON: Right.

CASEY: No.

JEFFERSON: Then why would the city have to test that engineer's opinion further than it did? Why couldn't it accept it as true and believe that they are not the experts on flooding, that the engineers are, and they say no flooding. It's going to happen. And let that be the end of it in terms of intent.

CASEY: As for as the intent, the intent issue I think are assurances of the city engineers. And I think you go back to how and when you viewed the evidence of intent. If it is pre-construction, which is when the assurances were supposedly given, or do you look at intent like all issues of intent, where you kind of almost have to look backwards after an event has happened to see whether or not intent was or was not a factor at the time of the event. And with the assurances given to the city by the engineers, did that constitute a bad faith intent? I don't think it constituted a bad faith intent. I just think that it is an opinion issued by an expert which may be disregarded by a jury at the time of the trial.

OWEN: Have you looked at the Gragg case. For example, let's suppose that the evidence in the Gragg case had been, all the engineers had told the water district in that case that this dam will not cause downstream flooding. And then after the dam was built it turns out they were wrong and it caused downstream flooding. Would that be a taking?

CASEY: I believe that there would be a taking and there would also be damages. I think the court found in Gragg that there was reverse condemnation. In this situation, the developments came across the permanent drainage easements which was owned by the city. The water was - this was a permanent drainage easement. It was 65 ft. in width, 4-5 feet deep. There was a concrete placement at the easement so as to funnel the water off these developments and additional water down through the easement so that it would outcrop onto the Wilson's property. Prior to the development, the development property was just raw land. And so the water while it did come on to the Wilson property, it came through a gully. That is why we had Dr. Spindler testify as to the difference between the water coming onto the Wilson's property preconstruction, and the water coming onto the Wilson's property after the development of the two developments. So that the jury could see a difference. Because I couldn't come up and say, well we didn't have water before. Because there was water coming across the property. And that's why we had the water.

HECHT: You clearly make the claim that the structure of this easement and drainage was done in such a way that it floods your property. The court has asked this morning the city of Keller, is there also a claim in the case that by virtue of the city's ownership of this easement now and its current contribution to flooding on the plaintiff's property, is that claim in the case that that's a taking? And the city of Keller says no. They say that's not part of your claim. Your claim is that

you set this up in such a way that it constitutes a taking, not that its current existence is a taking.

CASEY: I think there is almost a continual taking. I recognize that may be kind of a strange thing to say. They constructed this - water comes and it comes onto the property. Water still comes. It still rains. So it's almost an on-going...

BRISTER: But did you present evidence at trial that the city had some duty to do something?

CASEY: There was not a duty in the sense of a negligence because that would be subject to a defense of governmental immunity. There was a duty not to injure, which would be similar under 11.086.

BRISTER: Was there any evidence that the city intentionally did or failed to do anything after the flooding began, after development?

CASEY: I think the evidence that the city did nothing after it began has just been the city's attitude throughout the case. It has done absolutely nothing after...

BRISTER: But you didn't present evidence that they shouldn't have done anything other than they should have bought the easement on your client's property?

CASEY: Not only did we present evidence, we made an argument in summation that the city could have imminently domained my client's property. The city could have approached the Wilsons about either voluntarily giving them an easement or to sell them an easement so that they could carry out the master drainage plan. The evidence also showed that the city put in the box culvert at the South end of the Wilson's property so the water coming off the Wilson's property could exist into Little Bear Creek. I think the CA drew the inference that maybe the city felt that they could not ask the developers after they had already asked the developers to buy the Sebastian's easement and to build the easement to now go to the Wilsons and do that. We couldn't compel them to do eminent domain. Their attitude throughout the entire case has been we did nothing wrong. We either relied upon the assurances of the city engineers, or we did not intend to hurt you in any form or fashion.

HECHT: If you had had an engineer yourself at the time, and everybody was consulting with you about what's the best way to do this, and your engineer agreed with everybody else: these retention ponds will fix it, this plan is a good one, it's not going to flood, and it turns everybody was wrong. But they are wrong because it is flooding. Would you still have a taking in that situation?

CASEY: Let me see if I can give it back to you to make sure that I understand. If the Wilsons had hired an engineer to also review the plans as presented by the developers to the city, the Wilson's engineer reviewed the plans, found that they were sufficient. And then I think at that point one of two things: either we would have signed off on an easement in which event we would have

lost any right of condemnation because there would have been...

HECHT: No. Everybody says you don't need an easement on the Wilson's property. And the Wilson's...

CASEY: Your theory is, we just basically rubber-stamped the plans but we took no affirmative action _______ an easement, the city didn't do anything. We just basically said well it looks fine to us. Go ahead. In that situation I think I would probably pursue my engineer first. I would probably also...

HECHT: Im trying to get at whether it makes any difference that the city did not know at the time the work was undertaken that this was going to happen if in the end it actually did happen.

CASEY: The city did not know at the time that it was going to happen, but if it does -isn't that what happens in most cases? You think something is not going to happen and it ends up happening. And that's why I was saying that it's always kind of a Monday morning quarterbacking, because you are going back and looking at what led up to the event. And that's what the jury did in this case and all cases is that they look at what the evidence was presented and they in essence look backwards in time to see whether or not the evidence matters to the questions that are presented.

WAINWRIGHT: Maybe that's what happens in negligence cases that what you expect to happen doesn't happen. But when we're looking at intent, at least as underlies the question at the time the transaction was agreed to, that's a different issue isn't it?

CASEY: If you look at the intent at the time - there is always going to be as the CA's stated - there is always going to be a protestation by the person who is sued: I never intended anything bad to happen. Otherwise, how are you ever going to short of an admission by a party that yes I intended to do this act, I intend to hurt that person.

WAINWRIGHT: Yes, intent is a high hurdle. It's intended to be a high hurdle. But it has to be proven in order to get to damages in your case. Certainly negligence can occur if you expect something to happen on day one, but on day three something different happens that you didn't expect. You can back and test to see if folks stepped out of line, made mistakes, errors in judgment. You can do that here too. But the question is a different one: did they intend or was there substantial certainty that a result was going to occur? That's a different inquiry than the negligence inquiry isn't it?

CASEY: Yes. And I think the CA in its opinion addressed the substantial certainty issue. The other thing in this case, and that is the jury question no 8 doesn't talk about substantial certainty. This was the city's jury question as to intent. And it said did the city intentionally perform act which caused damage to the Wilson property? So that's the prism almost that you have to look through this no evidence or legal sufficiency evidence argument as opposed to the substantial

certainty argument. I'm appreciative of the CA's in addressing the substantial certainty argument in their opinion. But I think they could have basically said, we look at it through the vision and the prism as set forth in the issue which was submitted to the jury, which was a different issue than the substantial certainty issue as presented in the Gragg decision and the City of Dallas v. Jennings case.

HECHT: The city had a drainage plan. It didn't have to. Would it make any difference to your case if it didn't?

CASEY: If it didn't have a drainage plan, I think it would make a difference because this was - the plan is almost the standard as to which the jury could judge the actions of the city.

HECHT: So a city that just doesn't care very much they wouldn't be taking anything. But a city that's out there being diligent they are in more danger of having a taking?

CASEY: No. I didn't mean it that way. When the city has a plan and the plan says that the water - in the Wilson's case, that the water is going to come across the Wilson' property diagonally. We intend for the water to come across there. That's the way the plan shows it's going to come. They knew the water was going to come in this situation. I think when they have a plan it does assist a jury or any fact finder in determining whether or not they have complied with the plan, which also brings into an issue as to whether the plan is or is not adequate. If, however, they did not have a plan and just said we're just going to let the water flow willy nilly, then I think what you get to is the pubic use issue as to did the city derive a public use or its public benefit out of the developments that permitted the water to proceed.

O'NEILL: If we were Washington, I know that the city has cited on page 32 and 33 of its brief a couple of cases out of the Washington court. And one of the quotes from that case struck me. It says the fact that a county regulates development and requires compliance with road and drainage restrictions does not transform a private development into a public project. If we were Washington, would you lose under those two cases - Pepper and Phillips?

CASEY: I think if I remember the Phillips case, I think there was the three conditions, and I think we would fall under the third issue. To address what I believe is your question about a development being a public work. I think in a development there is to a certain degree all public works because the streets are given an easement to the city under the plat. And in this situation the public work was the easement which was owned by the city, where the water drained down in which the city required to have been purchased and granted to the city by the developers in this case.

O'NEILL: Again we get into the point in time analysis. If the point and time we're looking at is the approval of the plat, the city did not own it then. I think the argument is and I think we would probably all agree, we don't want to hold cities liable just for approving developer's plans. And if that's the point of time we look at, it would seem that this case would apply. Whereas, when they took over ownership and if the damage was continuing at that point and substantially certain to continue, that would be a taking at that point in time.

CASEY: I believe the approval was contingent though upon the developer's purchasing the Sebastian easement and acquiring the easement for the benefit of the city. And that was part of the approval process.

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REBUTTAL

LAWYER: I certainly agree with J. Jefferson that even if these engineers were wrong...

OWEN: Well let's explore that. In our North Brook case, some authority was widening an access road. And suppose that - and it presented a safety issue and also it became so close to an office building that it caused a sort of a fear factor of the people in the building. Would it be a defense to a taking if the authority who was widening the road, all of its engineers said this isn't a problem. Don't worry about it. This is not a safety issue. This is not an access issue. They had five different engineers sign off. Is that going to be a defense to a taking when in fact the city intended to build the road and it did have those consequences?

LAWYER: I think it would be a defense because if you look...

OWEN: So the city can build the road wherever they want without regard to the consequences as long as they get engineers to say it's not going to have any adverse impact.

LAWYER: Jennings says if you know that a specific act is causing identifiable harm...

OWEN: It is causing in this case. That's the point. When do you judge this for takings purposes?

LAWYER: The specific act causing identifiable harm in this case is the approval of the plan. So if you take a snapshot at that point in time then, yes. I think the engineer's approval is a defense. Now does a condemning authority consciously ignore an obvious risk? No. But that's not what happened in this case. What happened in this case is we had three sets of engineers say...

OWEN: The same question. Let's suppose the city decides to build a toll road through a residential area and all the experts say, well with respect to these two pieces of property the decibels level is going to be just like everybody elses. It's not going to be appreciable different. But when it turns out as built, that's not the case and the decibel level is off the charts. Is the city going to say well, we in good faith relied on these engineer's reports. And so even though it isn't a taking, physical invasion, we're not liable for a taking.

LAWYER: I think under those circumstances we have to - from Weber down to Gragg to Jennings, this court is trying to figure out how we cut this cake between an intentional...

OWEN: You intended for water to flow across the Wilson's property.

LAWYER: We knew the water would flow across it as it historically has run across it.

OWEN: You're saying we didn't know that the volume would be what it is. But you did intend a physical invasion.

LAWYER: Do you mean did we intend the physical invasion by increasing the velocity and flow of the water. No. Did we intend to physical invasion by virtue of the fact that we knew that water would continue to flow across the Wilson's property as it has historically flowed across the Wilson's property, then the answer is yes.

BRISTER: If instead of three engineers telling you it was okay. What if one said no, you are going need a drainage easement, and two said no you won't.

LAWYER: That's a fact question.

BRISTER: Then it's up to the jury. And so how is this case different since instead of one person at the time it was one plan four years earlier?

LAWYER: Again, I think that the inference that the CA draws is that the only way to protect the Wilsons was to dig this ditch as envisioned by the 1990 plan. I don't think you can draw that inference from this record.

O'NEILL: One of the things that strikes me. It seems that the first question that you might have to address is the water code violation, because that would be an alternative finding of the TC's judgment. And I presume the measure of damages is the same under that.

LAWYER: There were separate damage issues submitted with respect to water code violations.

O'NEILL: Out of 50 pages of briefing we only have like 3 pages on that. Was there any sort of dispositive motion filed with the TC or urged on the water code violation claims?

LAWYER: No. I think the amount of the briefing is the result of the fact the CA simply didn't reach that issue. They said we pass over this issue because we think the inverse condemnation issue was dispositive.

O'NEILL: So if we were to rule your way on the condemnation point, would we need to remand it to the CA to deal with the water code issue?

LAWYER: I would think so.