CHAPTER 3

INSURANCE, CASE REVIEW, AND SETTLEMENT

I. Introduction

A lawyer represents a public agency sued for a regulatory taking. What first steps does she take to protect the client's interests? Before launching a vigorous defense of the takings claim, consider the following preliminary steps. First, we offer suggestions for securing insurance coverage for the takings claim. Second, we explain how creating a strong administrative record will help support

the government agency if confronted with a takings suit. Third, we make recommendations for compiling the evidentiary record necessary to evaluate and defend a takings challenge. Finally, we offer insights on the opportunities for settling takings cases.

II. Insurance For Regulatory Takings Claims

As soon as practicable after the takings lawsuit is filed, the government lawyer should investigate the possibility that the claim is covered by insurance. At the risk of stating the obvious, the cost of litigating a protracted takings lawsuit coupled with the threat of an adverse judgment might be daunting, particularly for smaller towns and cities. Municipal attorneys should attempt to shift defense costs and any indemnity payments where appropriate.

Many public entities employ a risk manager or other official to evaluate the public entity's exposure to liability and secure liability insurance against particular risks. The government lawyer should present a copy of the complaint to the risk manager and inquire as to whether any claim in the pleading is covered by liability insurance. Alternatively, the lawyer should review copies of all liability insurance policies that might provide coverage.

Insurance coverage can be complex and, indeed, is a separate legal specialty. Where there is any question as to the nature or extent of coverage, the government lawyer should consult with a lawyer concentrating in insurance coverage.

A. Types of Coverage

Public entities insure themselves against litigation risks in a variety of ways. Some public entities carry direct liability insurance policies issued by private insurance companies. This coverage usually consists of general liability insurance for the government and/or errors and omissions insurance for the decisions of its

officials.[11] Many large public agencies are self-insured. Finally, pooling insurance arrangements are increasingly popular among smaller public entities. Under this arrangement, a group of public agencies forms a joint powers agency ("JPA") for the pooling of funds and the sharing of risk.[12] The fund usually takes the place of primary insurance coverage for the liability of any member of the pool up to a maximum amount. The pool buys secondary, or reinsurance, for coverage above that amount.

Liability insurance can take many forms. A policy can cover defense costs and liability, defense costs but not liability, or liability but not defense costs. Some policies are written on a "claims made" basis, covering only the claims filed and reported to the company during the policy period; others are occurrence-based, covering accidents or events taking place during the policy period, regardless of when the claim is filed and reported to the insurance carrier.

As of this writing, the authors are not aware of any public agency JPA or insurance carrier willing to provide express coverage for claims resulting from land use regulation.[13] Because the insurance market is currently favorable to policyholders, however, some carriers may be willing to provide such coverage.

B. Notice and Tender Issues

In the event that a regulatory takings claim is potentially covered by one or more of the government's liability insurance policies, the

---

[11] "Errors and omissions" is usually defined as "malfeasance, nonfeasance, or misfeasance" of individual decision-makers.

[12] *E.g., 1998-1999 Memorandum of Coverage of the California Joint Powers Risk Management Authority* (on file with the California Community Land Use Project) (describing a pooling insurance JPA program with approximately 150 California public entity members).

[13] The concept of a public insurance fund to compensate property owners whose property value is severely diminished by government regulation is explored in depth in WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (Donald G. Hagman, et. al. eds., 1978).

government lawyer should immediately tender the claim to the insurance carrier at the address listed for filing claims in the policy as well as to the government's insurance broker.[14] The tender letter should notify the carrier that the public agency will expect the carrier to pay the cost of the defense of the action and indemnify the agency for any money damages awarded against the agency, depending on the terms of the policy.

If an insurance carrier accepts the defense of a case, that acceptance is typically one of two types: a qualified acceptance of the defense subject to "a reservation of rights," or an unqualified acceptance. Under a reservation of rights, the insurance company pays for the defense of the suit, but because of concerns that the claim might not be covered, the carrier reserves its rights to disclaim coverage if it later determines that no coverage exists. The carrier may also attempt to reserve its rights to seek reimbursement from the agency for any defense or settlement payments if it later determines that such payments were not covered by the policy. *See, e.g., Buss v. Superior Court*, 939 P.2d 766, 775-78 (Cal. 1997).

If the insurance carrier accepts the defense of a case under a reservation of rights or under other circumstances that may create a potential conflict of interest between the policyholder and the carrier (*e.g.*, where the defense strategy of the underlying case may determine coverage), the carrier might be required to provide independent counsel to the insured. Many states have statutes that require an insurance carrier owing a duty to defend to appoint and pay for independent counsel of the policyholder's choosing. The carrier might contend that a salaried in-house agency counsel should defend the case in any event, letting the insurance carrier off the hook for outside counsel defense costs. However, in some states, the insurance carrier cannot refuse to pay the cost of independent counsel for the agency/policyholder. *See, e.g.*, CAL. CIV. CODE § 2860 (West 1999).

---

[14] In some states, notice of a claim to the broker requires the broker to notify the carrier.

C. Responding to Defenses to Insurance Coverage

An insurance carrier will frequently respond to a request for insurance coverage by asserting a barrage of coverage exclusions and defenses. We discuss potential responses to some of the most frequently offered coverage defenses below.

Government counsel should keep in mind several general rules of insurance policy interpretation that are helpful in securing coverage. First, ambiguities in coverage provisions are generally construed against the carrier, particularly if the carrier drafted the policy. *See, e.g., Borg v. Transamerica Ins. Co.*, 54 Cal. Rptr. 2d 811, 815 (Ct. App. 1996). Second, the duty to defend under an insurance policy is broader than the duty to indemnify. As long as there is a remote possibility of coverage, the duty to defend exists unless the carrier can show by undisputed facts that there is no potential for coverage. *See, e.g., id.* at 814; *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153, 1157 (Cal. 1993). Thus, whenever there is an argument that a claim should be covered, government counsel should tender the claim to the carrier.[15]

1. Inverse Condemnation Exclusions

The strongest ground for an insurance carrier to deny coverage for an inverse condemnation claim is a policy exclusion specifically barring coverage for such claims. Unfortunately, many insurance policies issued to local governments contain these inverse condemnation exclusions.[16]

---

[15] These general rules of construction of insurance contracts do not apply to self-insured joint powers agreements. In those cases, the intent of the parties determines the duty of the JPA insurer. *See* City of South El Monte v. Southern Cal. Joint Powers Ins. Auth., 45 Cal. Rptr. 2d 729, 735 (Ct. App. 1995). It bears repeating that because these coverage issues are often complicated and involve potentially large sums of money, government counsel should consult with an attorney specializing in insurance coverage.

[16] *See, e.g.*, Stonewall Ins. Co. v. City of Palos Verdes Estates, 54 Cal. Rptr. 2d 176, 188-190 (Ct. App. 1996); City of Laguna Beach v. Mead Reinsurance Corp., 276 Cal.

The good news is that inverse condemnation exclusions are not all created equal. Some policies with exclusions may nevertheless provide defense and indemnity coverage for some land use/takings claims. The broadest inverse condemnation exclusions preclude coverage for "claims arising out of or in connection with land use regulation, land use planning, the principles of eminent domain, condemnation proceedings or inverse condemnation."[17] This broad form exclusion appears sufficiently comprehensive to bar coverage for all takings claims. Another version of the exclusion, however, excludes only claims "arising out of . . . inverse condemnation."[18] A final type of exclusion simply references the Takings Clause of the state constitution, excluding all claims brought pursuant to that provision. *See General Ins. Co. of America v. City of Belvedere*, 582 F. Supp. 88, 89-90 (N.D. Cal. 1984).

Government counsel should aggressively seek coverage under policies with either of these latter inverse condemnation exclusions. For example, a local government may be able to obtain defense and possibly liability coverage despite these exclusions when a property owner sues on legal theories such as equal protection, due process,

---

Rptr. 2d 438, 440 (Ct. App. 1990); Missouri Intergovernmental Risk Management Ass'n. v. Gallagher Bassett Servs. Inc., 854 S.W.2d 565, 567 (Mo. Ct. App. 1993).

[17] *See* 1998-1999 MEMORANDUM OF COVERAGE OF THE CALIFORNIA JOINT POWERS RISK MANAGEMENT AUTHORITY, Section VI, Exclusions, at 11 ("Claims arising out of or in connection with land use regulation, land use planning, the principles of eminent domain, condemnation proceedings or inverse condemnation by whatever name called, and whether or not liability accrues directly against any covered party by virtue of any agreement entered into by or on behalf of any covered party.")

[18] *See, e.g.*, Royal Indemnity Company Policy RHJ 090050 (Feb. 9, 1999) Sec. IVG, Exclusions, at 5 (excluding from coverage "liability arising out of or in connection with the principles of eminent domain, condemnation proceedings or inverse condemnation, by whatever name called, . . . "); The Insurance Carrier of the State of Pennsylvania, *Special Excess Liability Policy for Public Entities* (10/02/97), Section V, Exclusions, at 15 (excluding claims "[a]rising out of direct condemnation of property or exercise of power of eminent domain by you, on your behalf, for inverse condemnation, any taking of property by you which is compensable under the Fifth or Fourteenth Amendments of the United States Constitution, or any taking of property by you which is compensable under the Constitution of the State in which the claim is made.")

or state statutory or common law claims, in addition to inverse condemnation.[19] The law in most states requires a carrier to provide a defense on all claims stated in the complaint if coverage is required for at least one claim. *See, e.g., Buss v. Superior Court*, 939 P.2d 766, 775 (Cal. 1997). The carrier can seek reimbursement of defense costs for claims not covered if the evidence allows a clear segregation of those costs. *See id.* at 778. However, the carrier has the burden of proof on segregation. *See id.* Given the nature of most "mixed" actions, the carrier will often be unable to meet that burden.

The recent decision by a California appellate court in *Stonewall Insurance Co. v. City of Palos Verdes Estates*, 54 Cal. Rptr. 2d 176 (Ct. App. 1996), serves as an example.[20] The jury in *Stonewall* found the city liable to the property owner in the underlying suit on two separate counts, negligence/nuisance and inverse condemnation. *See id.* at 180. The jury awarded the plaintiff $1,881,946 on the inverse condemnation claim and $1,188,791 on the negligence/nuisance claim,[21] and the town ultimately settled the case for a total of $1.6 million. *See id.* at 180-81. The court ruled that the carriers with inverse condemnation exclusions were liable for the "portion of the $1.6 million [that] was paid to settle the negligence/nuisance verdict and costs on that verdict." *Id.* at 192.

---

[19] A prime example of this type of case is *City of Monterey v. Del Monte Dunes, Ltd.*, 119 S.Ct. 1624, 1634 (1999), in which the facts in support of the takings claim were indistinguishable from the facts supporting the equal protection claim, and the jury awarded the same damages for each.

[20] *Stonewall* is a complicated and somewhat confusing case that illustrates why insurance coverage law is a highly specialized field. For those seeking insurance coverage for inverse condemnation cases, however, a close reading of the decision is well worth the effort.

[21] The jury in the underlying action in *Stonewall* appears to have awarded the same actual damages of $1.188 million on both the negligence/nuisance claim and the inverse condemnation claim. The difference in the two awards was "largely attributable to prejudgment interest and attorney fees and other costs allowable on the inverse condemnation claim." Stonewall, 54 Cal. Rptr. 2d at 192. The record was silent with regard to costs allowable on the negligence/nuisance claim, thus the appellate court remanded the case to the trial court to determine what costs would be awarded on the negligence/nuisance claim. *See id.* at 193.

The court explained that "to the extent of the measure of damages for negligence and nuisance the City incurred a legal obligation to compensate [the plaintiff] irrespective of inverse condemnation, and this form of legal obligation is covered by the relevant insurance policies and is not subject to the inverse condemnation exclusions." *Id.* at 192.

With respect to the duty to defend, the *Stonewall* court recognized that different theories of relief in a single complaint may be so intertwined that the carrier owes a duty to defend on all counts even where the insurance policy expressly excludes coverage for inverse condemnation. *See id.* at 188 ("A duty to defend . . . can arise where there is merely a *potential for coverage* . . . a duty to indemnify is whether there is *actual coverage*, not merely a potential for coverage.").[22] With respect to the duty to indemnify, the court held that it would probably be "impossible to attribute any part of the settlement to either inverse condemnation or negligence/nuisance liability." *Id.* at 192-193. The court, therefore, instructed the trial court to hold the carriers with inverse condemnation exclusions liable for "that proportion of the $1.6 million which the jury's award of damages for negligence/nuisance as adjusted upward for costs bears to the entire judgement . . . ." *Id.* at 193. Thus, the city was able to recover at least 63%[23] of the $1.6 million settlement in an inverse condemnation case, despite an inverse condemnation exclusion. *See id.* at 180, 193.

Stonewall provides an additional argument for coverage for defense costs and indemnity under policies with exclusions referencing state takings provisions. One of the carriers in *Stonewall* issued a policy that excluded coverage for claims under Article I,

---

[22] *See also* Horace Mann Ins. Co. v. Barbara B., 846 P.2d 792 (Cal. 1993) (finding that the carrier held a to duty to defend when pleadings or facts extrinsic to the complaint suggest potential for coverage).

[23] $1.188 million (the jury's actual award for the nuisance/negligence claim) is 63% of $1.881 million (the jury's award on the inverse condemnation award, including interest and costs). The city could recover a greater percentage from the carriers if it could demonstrate that interest and other costs should have been awarded on the negligence/nuisance claim. *See* footnote 21.

Section 19 of the California Constitution (stating that property "shall not be taken or damaged for public use without just compensation"). *See Stonewall*, 54 Cal. Rptr. 2d at 188-89. The court held that this description failed to apprise a layperson that the policy excluded claims of "inverse condemnation." *Id.* at 188-89. The court concluded: "[The l]anguage in the policy is to be construed as a layman might read it, not as an attorney or insurance agent might read it . . . ." *Id.* (quoting from *General Ins. Co. of America v. City of Belvedere*, 582 F. Supp. 88, 89-90 (N.D. Cal. 1984)). In other words, the policy exclusion's reference to the state constitution's Takings Clause failed to put a lay person on notice that inverse condemnation or regulatory takings claims were also excluded.

Finally, some insurance policies exclude claims for land use regulation, yet except from that exclusion inverse condemnation claims for "accidentally caused physical injury to or destruction of tangible property."[24] Under this type of policy, if the takings claimant alleges that the challenged regulation effects a physical taking, agency counsel might argue under some circumstances that a physical taking constitutes property damage and that the takings claim is covered under this exception, notwithstanding the express exclusion.

2. No Occurrence and Intentional Act Defenses

Government counsel should also anticipate that insurance companies will respond to a claim for coverage by suggesting that the alleged taking by the agency was intentional and the agency's claim is either not an "occurrence" covered by the policy[25] or is an

---

[24] *See* 1998-1999 MEMORANDUM OF COVERAGE OF THE CALIFORNIA JOINT POWERS RISK MANAGEMENT AUTHORITY, at 11.

[25] Most insurance policies define "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." *See* Insurance Services Office, Inc., *Commercial General Liability* (1997) at 12. Others define "occurrence" as "an accident or event." *See, e.g.*, Policy issued by Royal Indemnity Company to California Sanitation Risk Management Authority (Feb. 1999) at 9. An "event" could include regulation of land. Some include the "expected or

intentional act excluded by the policy.[26] Both these defenses raise the question of whether the local government expected or intended that its land use decision would take private property, and whether a regulatory taking could ever be deemed an "accident."

These "intent" defenses may bar coverage for exercises of eminent domain. Similarly, where the government action is a permanent physical occupation, a court might find that the government agency intended to take the property. On the other hand, while a land use regulation or a decision by a local zoning board is inherently intentional, the agency will rarely, if ever, expect or intend that the result of the regulation is to effect a regulatory taking. In certain states, the word "occurrence" relates to the act itself and not the result. *See Collin v. American Empire Ins.*, 26 Cal. Rptr. 2d 391, 403-05 (Ct. App. 1994); *Shell Oil v. Winterhur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 836-38 (Ct. App. 1993). But, in other states, a policyholder must expect or intend harm to result from its intentional actions in order for coverage to be voided. *See Arco Indus. Corp. v. American Motorist Ins. Co.*, 531 N.W. 2d 168, 175 (Mich. 1995). As this Handbook demonstrates, local government liability in inverse condemnation cases is infrequent and hard to accurately predict. Regulatory takings verdicts are therefore best viewed as occurrences that are neither expected nor intended by the local government policyholder and should, therefore, be covered by the policy.

---

intended" language in the definition of an occurrence. *See* Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co., 177 F.3d 210, 216 & n.3 (3d Cir. 1999) (concerning a policy that defines occurrence as "an event neither expected nor intended by the insured"); Collin v. American Empire Ins., 26 Cal. Rptr. 2d 391, 400 (Ct. App. 1994); Shell Oil Co. v. Winterthur Swiss Ins. Co., 15 Cal. Rptr. 2d 815, 834 (Ct. App. 1993) (same).

[26] A standard general liability coverage form used by insurers for public entities provides under "Exclusions: This insurance does not apply to: . . . 'property damage' expected or intended from the standpoint of the insured." Insurance Services Office, Inc., *Commercial General Liability* (1997) at 1. This exclusion stems, in part, from the public policy denying indemnification for intentional torts in order to remove the "moral hazard" from the conduct of the insured. *See, e.g.*, CAL. GOV'T CODE § 825 (government agency prohibited from reimbursing individual employee for punitive damages).

III. Creating a Strong Administrative Record

Takings cases frequently turn on the facts. As a result, the importance of solid administrative and trial court records cannot be overemphasized. Deficient records have led to some notable government losses. For example, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (discussed in Chapters 5-7), the ruling against the government was based on a trial court finding that the challenged regulation rendered Lucas's land completely valueless (*see id.* at 1020 & n.9), a finding that several Justices believed to be erroneous. *Id.* at 1033-34 (Kennedy, J., concurring in the judgment) (expressing "reservations" about this "curious finding"); *id.* at 1043-44 (Blackmun, J., dissenting) (the finding is "almost certainly erroneous"); *id.* at 1065 n.3 (Stevens, J., dissenting) (the "land is far from valueless."); *id.* at 1076 (Statement of Souter, J.) (the finding is "highly questionable.").

Similarly, some have suggested that the government could have prevailed in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (discussed in Chapter 11), if it had presented its findings more effectively in the administrative record. *Cf. id.* at 863 (Brennan, J. dissenting) (suggesting that in future cases the Commission "should have little problem presenting its findings in a way that avoids a takings problem"); *see also Surfside Colony, Ltd. v. California Coastal Commission*, 277 Cal Rptr. 371, 378-79 (Ct. App. 1991) (upholding a takings challenge to a condition in a seawall permit because the administrative record failed to include a site-specific showing that the seawall would cause the erosion that the condition was designed to address).

IV. Case Review

The effective defense of a regulatory takings case requires government counsel to collect and review all relevant records. In addition to a review of the pleadings, at the earliest opportunity,

Text Block 3.1

Tips for Creating an Administrative Record

The following suggestions may help ensure that there is a solid administrative record to use in defending a takings challenge.

1. Educate the staff of the decision-maker of the need to make an adequate administrative record to support the agency's decision.

2. Insure that the decision-maker's staff documents the harmful impacts of the project in a written report. This report, as well as letters from interested persons to the decision-maker commenting on the harms of the project, should be placed in the record.

3. For large and controversial projects, consider retaining experts and consultants to develop evidence of the harm that would result from the proposed project, have the consultants testify at the public hearing on the application, and place the consultants' written reports in the record.

4. Prepare the commissioners to ask questions of the applicant and its consultants at the public hearing that will yield evidence to support a denial.

5. Draft proposed findings of fact and conclusions for the decision-maker to support a decision denying the project.

   (a) Each finding and conclusion should be supported by citations to evidence in the record. If the agency prepared an environmental evaluation of the proposed project, the findings should rely heavily on that document.

   (b) The findings should bridge the analytic gap between the evidence and the ultimate decision. The findings should use the word "because" repeatedly.

(c) In the case of conditions of approval, the findings should connect each condition to a harmful impact or impacts of the proposed project.

(d) Findings should be stated with certainty. Avoid words such as "could cause," "might result in," or "may increase."

(e) Findings should not merely restate applicable law; they should show that the decision-maker has considered the particular facts of the case and analyzed those facts within the law to reach a fair result.

6. If at the public hearing on the development application:

(a) The decision-maker declines to follow a staff recommendation;

(b) The decision-maker indicates an intent to make findings that depart in material respects from a staff recommendation;

(c) Evidence is presented that is not reflected in the staff report or the findings drafted by the staff and government counsel; or

(d) The staff and government counsel have not presented proposed findings to the decision-maker,

government counsel should suggest that the decision-maker issue a tentative decision only, and postpone the adoption of formal findings and conclusions to its next meeting. The continuance will allow the staff and government counsel sufficient time to prepare formal findings that will support the decision, and, if necessary, incorporate any new evidence.

7. Have a court reporter transcribe the public hearing.

agency counsel should obtain copies of the following: the administrative record, legislative files, staff files, and title records.

In cases in which there have been administrative proceedings, government counsel should compile a complete administrative record. As a general rule, the public agency must produce a complete copy of the administrative record to the plaintiff upon payment of the cost of preparation and copying. Because the government lawyer is typically required to supervise the compilation of the record in any event, the lawyer should use the opportunity to the advantage of the agency.

Takings cases often arise out of the denial of a permit by a quasi-adjudicatory body, such as a planning commission. The landowner typically joins a claim that the administrative decision is invalid under state law with a claim that the decision results in a taking. Under the administrative law of some states, a challenge to a land use regulation imposed on a specific application by an administrative body is limited to evidence in the administrative record. Ordinarily, the court cannot consider evidence from outside the record.[27] The government lawyer should control the preparation of the record to prevent the plaintiff from inserting self-serving documents that were not before the decision-maker.

The administrative record is also the source for most of the factual support for the agency's case. The lawyer should become familiar with this record before developing legal theories for defending the case.

The government attorney should always check the law of the state to determine whether the administrative record may include documents from the files of the staff of the administrative tribunal, in addition to the files actually presented to the tribunal. If the standard of judicial review of the decision in question is the deferential,

---

[27] *See* CAL. CODE CIV. PRO. § 1094.5 (West 1999); 735 ILL. COMP. STAT., §5/3-110 (West 1999); Houseman v. Board of Med. Exam'rs, 190 P.2d 653 (Cal. Ct. App. 1948). However, at least in some states, the court is not limited to the administrative record in adjudicating the takings claim. *See, e.g.*,Hensler v. City of Glendale, 876 P.2d 1043, 1052 (Cal. 1994).

substantial evidence standard or its equivalent,[28] these additional staff documents can bolster the agency's showing that substantial evidence supports the administrative decision.

If the staff conducted an environmental study of the project, the report and any supporting documents, studies, and analysis that the decision-maker considered or could have considered should be included in the administrative record. The environmental review document will often contain important evidence justifying the denial of the project.

In anticipation of the need to produce files of the administrative tribunal in response to a discovery request, remove all privileged documents from the file and prepare a log of the documents. In some jurisdictions, a party withholding documents from production on the ground of privilege must deliver to the requesting party a log stating the date, author, recipient, subject, type of privilege asserted, and other information with respect to any document withheld. *See* CAL. CODE CIV. PRO. § 2031(f)(3) (West 1999). Even if a privilege log is not required in your jurisdiction, the preparation of a log is still advisable to prevent the inadvertent disclosure of privileged documents and to aid in responding to a discovery motion to compel production of the documents.

To prepare the administrative record for filing with the court, a government lawyer should gather all of the files of each administrative decision-making body concerned with the development project at issue. The custodian of records for the tribunal, the secretary, executive officer, or clerk of the planning commission, city council, or board of zoning appeals should maintain a file containing all of the documents submitted to the decision-maker for its review. The

---

[28] *See* 735 ILL. COMP. STAT., §5/3-110 (West 1999) ("Every action to review any final administrative decision shall be heard and determined by the court with all convenient speed. The hearing and determination shall extend to all questions of law and of fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.").

administrative record also includes written transcripts of hearings. If the hearing has been taped, the lawyer should have the tape transcribed by a person certified by the state to prepare official transcripts. In order to authenticate portions of the agency's file for admission into evidence, the clerk or other authorized custodian of the records of the administrative tribunal must certify that the records are true and accurate copies of the actual documents in the file.

If the government attorney determines that important records bearing on the takings claim were not included in the administrative record, he or she should consult state law for the correct procedures for augmenting the record.

A. Legislative Files

To defend a takings challenge to legislation, government counsel should review the file maintained by the legislative body that enacted the ordinance or statute. In the case of a local agency such as a city council or a county board of supervisors, the clerk of the legislative body typically maintains the files of the body. Copying the file is generally a simple and inexpensive proposition. Where the statute at issue is adopted by a state legislature, obtaining the complete legislative history (to the extent any exists) is more difficult. In some states, however, there are independent services that will compile the legislative history of any state measure for a fee.

The legislative history of a statute may be particularly relevant in cases where a landowner argues that a statute does not substantially advance a legitimate state interest (a theory discussed in Chapter 8). The legislature's purpose in adopting the statute is obviously a relevant inquiry in such cases. The file on the legislative measure may contain legislative history and other useful information revealing the intent of the legislative body and the state interest promoted by the law. In order to authenticate portions of the legislature's file for admission into evidence, the clerk or other authorized custodian of the records of the legislature must certify that the records are true and accurate copies of the actual documents in the file.

B. Staff Files and Interviews

After copying and reviewing the administrative record and/or legislative file, the lawyer should obtain copies of and review all files relating to the development project at issue from each department, official, or employee of the public agency concerned with the project. The lawyer should retain control over the public agency's documents to effect an orderly, accurate response to formal discovery requests and to avoid the inadvertent disclosure of privileged documents.

After such review, the lawyer should interview the key staff persons and decision-makers involved with the project. These interviews will afford the lawyer the opportunity to begin preparing these staff persons as witnesses, should the case be tried, to obtain clarification of facts, and to assess the strength of the agency's case.

In many land use cases, community groups, environmental organizations, or individual activists have opposed the proposed project in the administrative process or have been instrumental in the enactment of the challenged legislation. In preparing a legal defense, agency counsel should interview members of these groups, including their counsel, if any, to develop a complete factual background. Ask for copies of any legal or other memoranda that the organization has developed that could aid the agency counsel in defending the case. In appropriate cases, the agency counsel should request that these interested parties intervene in the suit to add a perspective to the case that the government cannot. *See* FED. R. CIV. PRO. 24.

C. Title Search

Finally, the lawyer should conduct a title search. *See Kim v. City of New York*, 681 N.E.2d 312, 314 (N.Y. 1997) (stating that "a threshold inquiry into an owner's title is generally necessary to the proper analysis of a takings case . . . ."). A title search is a review of the deeds and other records of ownership of real property. These records can usually be searched by assessor's lot number, street address, and owner's name. The records will reveal the name of the

owner or owners of the property, the dates of purchase, and possibly the purchase price.

The government lawyer, or a title company at the request of the lawyer, should search the title of the property at issue and any other parcels in the vicinity under the same or related ownership as well as parcels that have a unity of use with the parcel in question. For example, if an owner applies to develop houses on a highly visible ridge and a title search reveals that the same owner owns numerous developable adjacent lots on the lower hillside, the government may be able to treat all lots as the relevant parcel for takings analysis. *See* discussion of relevant parcel in Chapter 6.

As discussed in Chapter 5, the extent to which a regulation constitutes part of the background principles of law or defeats a landowner's reasonable investment-backed expectations is an important factor in the determination of the agency's liability for a regulatory taking. A title investigation will disclose when the plaintiff acquired the property. If the owner acquired the property after the challenged regulation was in place, then the regulation was a part of the background principles of law, and the right to develop the property in conflict with that regulation was not a property right that the owner acquired. Similarly, the owner cannot claim that it had a reasonable investment-backed expectation to develop the property free from the regulation.

A title investigation may also show the amount the owner paid for the property. If the owner contends that the regulation has a severe economic impact on the value of the property, a low purchase price may help prove that the owner did not have a reasonable investment-backed expectation at the time of purchase that the property could be profitably developed. *See* discussion of investment-backed expectations in Chapter 5.

A title search may also reveal that the owner's predecessor in title is a related person or entity. In that instance, the knowledge of the previous owner as to the reasonable development potential of the property might be imputed to the current owner. Moreover, if the owner's predecessor is a related entity, the statute of limitations within

which the property owner must file a takings lawsuit may have expired.

V. Settlement

To a developer, time is money. Because litigation is costly and can take years to resolve, it is the solution of last resort for most developers. A developer who is unsuccessful in the administrative process has a strong incentive to reach a settlement with the agency, even after filing suit.

Government counsel, however, often are not in the position to settle regulatory takings claims. Legislative bodies and administrative tribunals rarely make land use policy without careful study and rigorous public debate. In general, land use regulation tends to be the product of deliberate and informed decision-making. To the extent that the regulatory agency and the developer are willing to compromise, such accommodations that are possible have usually been achieved in the give-and-take of the administrative and legislative process. Although the threat of litigation hovers over most controversial land use permitting decisions, a regulatory agency is not likely to retreat from its considered decision merely because the developer files suit.

Nevertheless, there are cases that the government should consider trying to settle early in the litigation. The cases appropriate for settlement fall into two categories: (1) cases that the government is at great risk of losing, or (2) cases in which the government and the developer can accept a compromise that was not contemplated in the administrative or legislative process. There are at least four benefits of settlement in such circumstances. The government avoids: (1) the expense of litigation; (2) the possible invalidation of an important land use policy or program; (3) creating bad precedent; and (4) the risk of a large judgment for money damages and attorneys' fees. The government lawyer should attempt to recognize cases appropriate for settlement and explore the possibility of settlement with her client.

A. Settling to Avoid Losing

Occasionally, an agency will adopt a regulation that effects a categorical taking of property. If upon reviewing a complaint alleging a regulatory taking, the regulation clearly effects a categorical taking for which there is no defense, the agency would be advised to attempt a settlement with the plaintiff. For example, if the regulation destroys all market value of the property, and the regulation is not likely to be considered part of the background principles of law affecting the property at the time the plaintiff acquired the property, the agency is at serious risk that a court will find a taking.

B. Settling to the Advantage of Both Parties

There are scenarios other than probable categorical takings in which the agency may wish to explore a settlement. For example, during the administrative process, a misunderstanding of fact or the decision-maker's political constraints can result in a hardening of positions on the part of the agency and the developer. After the developer files suit, seemingly intractable positions can thaw. It may become politically feasible for the agency to approve the project with additional mitigation measures or other changes in the design of the project that will satisfy the agency's concerns. Agency counsel should be alert to takings cases that present the opportunity for the public agency and the developer to compromise and avoid litigation.

As a second example, if the public agency made a mistake of fact or law in denying an application that (1) if corrected, might improve the chances that the project would be approved; or (2) is likely to compromise the agency's defense of the takings claim, the government lawyer should examine avenues for a rehearing and redetermination. In *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188, 1191-92 (Cal. 1998), *cert. denied*, 525 U.S. 876 (1998), the California Coastal Commission denied an application for construction of a house, in part, because the commission had not approved a lot split that created the lot in question. In a first appeal, the courts concluded that the commission had no jurisdiction over the

lot split. *See id.* at 1192. In the second appeal, the issue was whether the commission's "mistake" in asserting jurisdiction over the lot split was grounds for a taking. *See id.* at 1193. Although the commission had no justification for settling this particular case, and the court correctly rejected the takings claim, the case still illustrates the type of legal mistake that could be corrected by settlement to avoid litigation altogether.

C. Procedural Hurdles to Settlement

Even if the parties are willing to settle, several procedural obstacles exist to settling a regulatory takings case. Legislative regulations can be changed only by further legislation. Therefore, unlike ordinary negotiations between two lawyers with authority to bind their clients, often the best that government counsel can do is to negotiate a settlement with the developer contingent on the legislative body changing the challenged regulation.

Any modification of an ordinance or other legislation of a local agency will require the new measure to undergo the full legislative process, including public notice and hearings. Government counsel should assess the likelihood that a settlement proposal can navigate through the legislative process, considering that such settlements may be politically unpopular. Legislators may be reluctant to change a law that they voted to approve merely because the developer filed suit. Understandably, public officials often would seek to avoid the appearance that their original vote was mistaken or that they lacked leadership or conviction. Constituencies who advocated the regulation may oppose any dilution of the law through a settlement with the developer.

Administrative decisions are subject to similar barriers to settlement. A lawyer cannot settle a takings case challenging a quasi-adjudicative decision in a way that would vary the adjudicative decision of an administrative agency without affording other affected property owners procedural due process. The constitutional right of procedural due process requires that, before making a discretionary decision, the agency give notice and a meaningful opportunity to be

heard to the public, particularly property owners affected by the proposed development. In order to modify a regulation as part of a settlement of litigation, the agency must give the same notice and hearing it provided in passing the original regulation.[29]

Accordingly, government counsel cannot commit the administrative tribunal to exercise its discretion in any particular way. Any settlement agreement with a developer must contain the caveat that any regulatory changes are contingent on the administrative tribunal approving the modification of its regulation after a public hearing, at which the tribunal retains full discretion to accept or reject the settlement. Further complicating this process is the existence in some jurisdictions of laws imposing a minimum time period for a developer to re-apply for the government's approval of the same project. If local law prohibits a re-application within one year, for example, a settlement may be impossible unless the developer is willing to wait until the law allows a re-application.

D. Mediation

The agency may propose that the parties engage in mediation of the takings claim. If the agency is open to compromise but cannot, for political reasons, voluntarily agree to a settlement, the agency may be willing to accept a compromise proposed by a distinguished and respected former judge or lawyer, rather than a solution recommended by the agency's staff or lawyers. An experienced and detached mediator may be capable of searching out areas of agreement that the parties are too entrenched to recognize.

The mediation process can also serve as an inexpensive and efficient method for discovery of the developer's case. Similarly, mediation allows the government to show the developer the strengths of the government's case before either side becomes irrevocably committed to the litigation. Finally, mediation may expose the

---

[29] *See* Horn v. County of Ventura, 596 P.2d 1134, 1140 (Cal. 1979); Weeks Restaurant Corp. v. City of Dover Sambo's Restaurants, Inc., 404 A.2d 294 (N.H. 1979).

weaknesses of the government's case to the government itself. The government may then become more motivated to settle in order to avoid a costly loss at trial.

On the other hand, private mediation services staffed by eminent former jurists or other experts can be expensive and an exercise in futility. As discussed above, it is the rare takings case that achieves full settlement. The government lawyer should carefully choose cases for mediation.

E. Examples of Settlements

The structure of the settlement of a regulatory takings case can take many forms. Government counsel should explore the possibility of settlement with planning staff and decision-makers to identify areas of potential compromise. Several examples of successful settlements include:

- Approve the project, but with a mitigation measure or measures that will reduce the harmful effects of the project.

- Grant the developer transferable development rights, density bonuses, or other valuable — and marketable — regulatory concessions for development on other property.

- Where the government denies a project primarily in response to the opposition of a private neighborhood or community organization, identify a concession that the developer can make to win the support of the organization for the project.

- In cases where the government has clearly made a material mistake of law or fact that could change the outcome of the permit process, invite the developer to re-apply for the permit (and waive fees).

- Offer to expedite review of a re-application for a scaled-down project in exchange for holding the litigation in abeyance.

- Exchange less environmentally sensitive public property for the subject land, or offer favorable terms to the developer to purchase substitute public property that can accommodate the project.

Recommended Reading

Hon. Richard S. Cohen et al., *Settling Land Use Litigation While Protecting the Public Interest: Whose Lawsuit Is This Anyway?*, in 1994 Zoning and Planning Handbook 521 (Kenneth H. Young ed., 1994)

ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSURED (3d ed. 1995).