

# A LAY PERSON'S GUIDE TO INVERSE CONDEMNATION

By Robert Merryman

What happens if a government agency “takes” some property interest from you, but does not compensate you for that loss? For example, what if you own a residential lot and your city or county passes an ordinance that prevents you from building on the property. The day before the ordinance was passed, your lot was valuable and usable as a building site. Today, it is a tract of open space - not developed - and probably worth very little. What recourse do you have?

## A Short History Lesson

Step back in history for a moment to the colonial period. You might recall that our Founding Fathers were very concerned about the right of the King to take property, both personal and real. They wanted to limit those powers held by the new United States Federal government by imposing certain restrictions. One of those restrictions is contained within the Fifth Amendment to the United States Constitution. It is a part of the Bill of Rights and specifically sets out that “... private property shall not be taken for public use without just compensation.” This right of government to take private property for a public purpose is called eminent domain. The process that is followed to use eminent domain power is often called condemnation or expropriation. The condemnation process assures that a property owner is afforded a means to obtain just compensation.

Eminent domain in the United States permits various levels of government to take private property for determined public uses. These uses might be to build a school, an airport, or a highway. However, the provision in the Bill of Rights demands that an owner be paid for what is taken. In other words, our Founding Fathers had the insight to know that government might have to take private property, but wanted to make sure that the owners of that property were justly compensated. However, what would happen if government took the property, but felt there was no obligation to pay for it. How does a person obtain that elusive “just compensation?”

Like many legal issues, the courts have created precedents over the years that influence how these disputes are conducted. The process is called “inverse condemnation” and the property owner institutes it by suing the government for payment of some identifiable real estate interest taken. Different standards apply in the fifty states but for our purposes we will discuss them all generally.

## Inverse Condemnation vs. Police Power

An example might be useful to discuss here. Mr. David H. Lucas purchased for \$975,000, two residential lots

The idea of “just compensation” can be traced back to the Founding Fathers, who were concerned about property being unduly seized by the government.



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located in the Isle of Palms, South Carolina. The lots were zoned for single family residences and completely buildable. Mr. Lucas intended to build on them. Unfortunately, shortly after his purchase, the South Carolina Coastal Commission decided that the lots should not be developed, but instead left as open space. Mr. Lucas was now the owner of virtually worthless lots. He promptly sued the Commission. He won in trial court but lost on appeal to the State Supreme Court. Mr. Lucas continued his appeal to the U.S. Supreme Court where he eventually was victorious.

The legal arguments revolved around the use of governmental “police” powers to achieve an overall good. However, Mr. Lucas was able to show that the taking was so drastic as to constitute a total taking of the property. The U.S. Supreme Court held that it was not proper for the state to regulate away all the property's economically beneficial use. Mr. Lucas was entitled to just compensation.

In an ironic twist, after paying Mr. Lucas \$850,000 in compensation for the two lots, South Carolina proceeded to sell the lots to private parties for development. It is reported that large homes now sit on both lots.

In a recent case, the State of North Carolina DOT lost its appeal related to halting development of property potentially needed for a highway. The DOT had designated certain lands it determined were likely needed for the construction of a highway. Under the State's Map Act, the State DOT could impose a development moratorium on the property. However, as the years ticked by and nothing happened, disgruntled property owners sued the state claiming inverse condemnation. In June 2016, the North Carolina Supreme Court unanimously agreed with the property owners that the imposition of the long term moratorium constituted a taking of the property and that the owners should be compensated for the taking. The case has been sent back to the trial court to determine the amount of payment to each property owner.

In both of these cases, it is important to note that the use of government “police powers” to regulate property could be upheld even if it reduces the value of the property. However, the court determined that the police powers were used in such a way as to take the property. An example of police powers that is familiar to most of us is zoning authority. However, government cannot take so much through the use of police powers that it makes the property valueless.

In the complex world that we live in today, there will continue to be conflicts involving property rights, condemnation, inverse condemnation, and police powers. It is amazing that the U.S. Constitution, written over 200 years ago, still functions so well today. ■ ■ ■

