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LAND ACQUISITION MEMORANDUM #174

174-1 IN TWO CASES MISSOURI SUPREME COURT RULES DIMINUTION IN VALUE OF PROPERTY CAUSED BY DIVERSION OF TRAFFIC IS NONCOMPENSABLE

In the first case, the condemnee operated a motel from which she had had access by means of two driveways to Highway 67 which was a two-lane highway. Travelers could enter her property from either direction of the highway. For the purposes of construction a limited access facility, some land was acquired from the condemnee. The widened right-of-way was improved with two limited access two-lane throughways in the center portion thereof and two paved "outer roadways" on the outer edges of the right-of-way. Each of the outer roads were dual-lane trafficways so that traffic could move in either direction to designated entrances into the throughways. After the taking of her property, the condemnee still had direct access from all points of her remaining property to the two lanes of the old highway; that is, she and her invitees could enter upon the two-lane outer roadway from any point along the entire frontage of her remaining property and could proceed either north or south as before the condemnation took place and could enter the throughways at designated places some distance away. The trial court awarded the owner $57,500 and the State appealed directly to the supreme court.

The second case involved property on which a service station was operated. The property abutted U. S. Highway 40 which had two lanes for westbound traffic and two lanes for eastbound traffic. There were two entrances from the eastbound traffic lanes to the service station, one at either end of the property. There was also a crossover between the separate traffic lanes of Route 40 to the service station. This old highway was converted into an Interstate highway and the old lanes were used for the limited access lanes. However, on each side of these through traffic lanes, an "outer roadway" was constructed within the principal right-of-way, on which traffic could proceed in both directions. The owners of the property involved had access from their property only to the south outer road, which went to interchanges in two directions, each about three miles away.

In the second case a court of appeals had held that the pre-existing easement of access to the old highway constituted a property right which could not be taken away by condemnation without the payment of just compensation and that the construction of the "outer roadway" did not change the fact that the landowner had lost this property right, but merely provided him another way to get onto the highway system. That court stated that no one could seriously argue that the service station property involved had not lost commercial value as a result of the destruction of the right of direct access simply because of the substitution of the outer roadway, but that the existence of that road could be considered by the jury in mitigation of damages. (See State ex rel. State Highway Comm'n v. Brockfield,

378 S.W.2d 254 (1964), Memorandum 167-2, October 1964, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research News, No. 16, December 1964). That decision was reversed by the supreme court upon appeal by the State.

The reasoning of the supreme court in the first case applies to both cases. The court stated that the right of access was the right of ingress and egress to and from an owner's property and the abutting public highway. The right also included the further right to connect with or reach the system of public highways, which right was also subject to reasonable restrictions under the police power of the State in protecting the public and facilitating traffic. The right did not include the right to travel in any particular direction from one's property or upon any particular part of the public highway right-of-way because, after one was upon the highway, he had the same right as all other travelers and the right of travel was a public right and controlled by the police power of the State. Nor did the right of ingress to and egress from one's property include any right in and to the existing public traffic on the highway, or any right to have such traffic pass by one's abutting property. The reason was that all traffic on public highways was controlled by the police power of the State, and what the police power might give an abutting property owner in the way of traffic on the highway it might take away, and the State was not liable for any decrease of property values by reason of such diversion of traffic.

A condemnee could only recover for such items of damages as were special to him. To entitle him to recover damages he had to show that the damages due to the obstruction of a highway were peculiar to him, different in kind, and not merely in degree, from those suffered by other members of the community.

The court stated that the condemnee in the first case had the same right of ingress to and egress from her remaining property to the highway right-of-way that existed before the taking, but after she or her invitees entered upon the adjacent right-of-way of the highway, they were subject to the same regulations, inconveniences and controls that governed all other members of the traveling public. They had to go to the established entrances to get on the throughways. The "limited access" was, therefore, only the limitation of access as applied to the throughways. That limitation was imposed by the State under the police power and applied to the condemnee and her invitees just like it did to everyone else using the highway.

In the second case, the supreme court stated it could see no difference of legal significance in leaving an old pavement as an outer road and building new pavement for limited access thoroughfares, or in building a new outer road pavement and using the old pavement for the limited access thoroughfares. In either situation the abutting owner would have the same access to his property and the same circuitry of travel to reach the throughway lanes on which he desired to travel. The real basis for complaint of an abutting owner, which made a difference to him if he operated a commercial enterprise, was diversion of traffic. However, such an owner had no right to a continuation of the flow of traffic directly in front of his property (which could be affected just as much by building a new road a block or a mile away as by limiting access to the old road an giving him access by an outer road).

In a dissenting opinion, one judge stated that the State had made a distinction between providing an "outer roadway" within the principal right-of-way, and a "service road" outside of the right-of-way, both of which would permit access to the limited access throughways at designated points. He noted the State contended

that where the access road was within the main right-of-way, the condemnee was not entitled to compensation, but if it were outside of the right-of-way of the limited access highway, but nevertheless paralleled that highway, the condemnee would be entitled to compensation. The judge believed that this put the access road in its true light, that is, that it was not a part of the main highway. He noted that it was admittedly difficult to draw a clear line of distrinction between what was the exercise of the police power and what should be acquisition by eminent domain, and what was loss of access and what was loss of traffic. Loss of access necessarily involved loss of traffic, but loss of traffic did not necessarily involve loss of access. The fact that there was loss of traffic did not mean the owner had no loss of a property right, if there was also a loss of access. He thought that the nature of the access roads illustrated that the abutting property owners had suffered a loss of access for which they should be compensated. (State ex rel. State Highway Comm'n v. Meier, 388 S.W.2d 855, March 1965. State ex rel. State Highway Comm'n v. Brockfeld, 388 S.W.2d 862, March 1965).

174-2 NEW YORK COURT RULES ZONING REGULATIONS RATHER THAN BOUNDARY OF MUNICIPALITY AS OF A CERTAIN DATE WAS DETERMINATIVE OF WHETHER STATE COULD REMOVE BILLBOARD SIGNS

The State brought an action to remove signs of an advertising company that were located within 600 feet of the right-of-way of an Interstate highway. The State Legislature had passed an act authorizing the superintendent of public works to enter into an agreement with the Secretary of Commerce of the United States to control the erection and maintenance of advertising signs within the above distance of the edge of the right-of-way of an Interstate highway. The agreement read that "There shall be excluded from application of the . . . national standards any segments of the Interstate System which traverse commercial or industrial zones within the boundaries of incorporated municipalities, as such boundaries existed on September 21, 1959, wherein the use of real property adjacent to the Interstate System is subject to municipal regulation or control, or which traverse other areas where the land use, as of September 21, 1959, was clearly established by State law as industrial or commercial."

An amendment to the zoning ordinance of the Town of Clifton Park was made on December 7, 1959, which rezoned the land in question for commercial use. The State argued that the amendment came too late since it was passed some two months after the cutoff date of September 21, 1959. The advertising company argued that the State Highway Law, the rules and regulations promulgated thereunder, and also the Federal rules and regulations should be construed to mean a cutoff date as to the boundaries of municipalities as they existed on September 21, 1959, and not as to the bounds of zoning ordinances as they existed on that date.

A supreme court stated that the language of the State statute and the Federal and State regulations might have been more precisely framed, but it thought the intent was plain. It pointed out that it would strain common sense and violate every canon of practical construction to adopt the argument of the advertising company. The boundaries of towns were seldom changed but ordinances were frequently amended. If the argument of the company was correct every town through which a part of the Interstate System passed could at any time change a zoning ordinance which would render ineffective the agreement between the State and the Federal Government. The plain intent of the language, it seemed to the court, was merely to ease the situation where areas involved were already zoned for commercial