

properties which were differently located. The determination in a given situation of whether or not there had occurred a compensable damaging under the constitution was to be approached from the premise that an access right was an easement judicially recognized as appurtenant to tangible property to protect the benefits of private ownership. This should not be extended to recognize a compensable damaging where a property owner had reasonable access to his property after construction of the public improvement. The initial and primary question was whether DuPuy's access rights had been impaired to an extent which constituted a damage to property for a public use. In the court's view this was a question of law and it held that such had been shown in the DuPuy case. It therefore awarded the owner the amount the property had decreased in value as a result of the impairment of access. (DuPuy v. City of Waco, 396 S.W.2d 103, October 1965)

In the Archenhold case, the appellate court stated it was clear that the subject property was more favorably circumstanced than the property of DuPuy both before and after construction of the viaduct. The latter's property was left abutting on a cul-de-sac on the street on which it fronted, and the only street to which it had access. Archenhold, on the other hand, continued to front on, and to have full access to, Franklin Avenue. It, therefore, had been left with substantial access. The question of whether Archenhold retained reasonable access should not be made to turn on what happened on South 17th Street apart from the unimpeded frontage on Franklin Avenue. In the court's opinion, the better rule was that of the courts of New York which hold that one of two public streets could be closed without compensation to an abutting landowner if the remaining street furnished suitable means of access. The supreme court, therefore, held that Archenhold had not been deprived of reasonable access. It admitted however that Archenhold suffered special damage not suffered in common with the general public, but stated that this was not sufficient to invoke the compensation provision of the constitution concerning payment of compensation for damaging private property for public use.

The dissenting judge stated that the reasons expressed in the DuPuy case were a just basis for a recovery by Archenhold. The majority recognized that Archenhold had suffered special damage not suffered in common with the general public. It was, therefore, beyond question that the property rights of the owner had been substantially damaged for the public use. Since the State constitution provided that private property could not be damaged for public use without the payment of adequate compensation, it was clear to this judge that the owner was entitled to compensation. (Archenhold Auto. Supply Co. v. City of Waco, 396 S.W.2d 111, October 1965)

180-2 NEW JERSEY SUPREMENT COURT RULES SUIT BY BOARD OF EDUCATION CLAIMING HIGHWAY CONSTRUCTION WOULD SO DAMAGE SCHOOL AS AMOUNT TO A TAKING WAS PREMATURE

In Highway Research Circular No. 18, March 1966 (Land Acquisition Memorandum 177-1) it was reported the appellate division of the New Jersey superior court ruled that a trial court should not have summarily dismissed a board of education's suit in which it was claimed that the beneficial use of the land and building of a particular school would be destroyed due to the construction of a highway which would virtually surround the school so that it would become an island and that such action would amount to a taking of the school property. The superior court remanded the case to the trial court for a determination as to whether the board could prove that the school could no longer be used and if so, the board would be entitled to compensation even though there was no actual physical invasion of the school property.

The State highway department appealed from the superior court's decision to the Supreme Court of New Jersey. The latter court noted the present plans of the highway department (which were not available to the superior court) revealed that there would be no physical invasion of the school premises and that the school would not be encircled by the new highway or the access roads or ramps.

The supreme court stated that study of the entire record gave rise to the inescapable conclusion that at the present time the issue sought to be presented by the board of education was purely hypothetical. The effect on the school, as a school, if any, was speculative. It would continue to be so until the construction work was completed and sufficient time had elapsed to permit an informed judgment to be made as to whether any damage had been suffered by the board in the constitutional sense of a taking. (The New Jersey constitution provides for the payment of compensation only when private property is taken for a public use.) It, therefore, held that the present action was premature so that the trial court was correct in dismissing it. The decision of that court was affirmed, but without prejudice to the institution of a new action by the board, if deemed advisable, at an appropriate time after completion of the highway project and after its use for the designed purpose.

The supreme court pointed out that it expressed no view as to whether the conditions described in the superior court's opinion could be considered such a taking as would expose the highway department to liability to pay compensation to the board. Decision on that issue was expressly reserved for a future time if the board brought a new action. (Board of Educ. of Town of Morristown v. Palmer, 218 A.2d 153, March 1966)

180-3 SUPERIOR COURT OF NEW JERSEY RULES STATE HIGHWAY COMMISSIONER CAN ACQUIRE PARK LAND WITHOUT CONSENT OF A PARK COMMISSION

The New Jersey State Highway Department, through its commissioner, attempted to buy land from the Union County Park Commission in connection with the construction of Interstate Highway 78. The park commission refused to sell the desired park land at the offered price, whereupon the department brought an action to condemn the land. The park commission contended that a statute prohibited the use of its property for a highway without its consent. However, both parties agreed that in the event the highway commissioner was barred by that statute from acquiring the property in question, the Federal Government could, under Federal law, institute condemnation proceedings to acquire the land since it was to be used for a part of the National System of Interstate and Defense Highways. The superior court stated that, nevertheless, it would consider the rights and duties and authority of the State highway commissioner and the Union County Park Commission as they were set out and provided for under State laws and under other laws applicable to sovereign States.

The court pointed out that the "prior public use rule" which denied the exercise of the power of condemnation when the proposed use would destroy an existing public use (unless there had been an express or implied authority to take such property) did not apply when the condemner was, in essence, the sovereign, either Federal or State. It noted that the State highway department, by statute, was made a part of the executive branch of the State and was, therefore, the alter ego of the State. Alter ego is defined in Black's Law Dictionary as "second self". A county park commission, like a county or municipality, was a creature of the State, and the State or its alter ego could take property devoted to a public use which was owned by such a creature unless there was a statute preventing this.