

conveyed away all possible rights or privileges of access which they individually had to and from that main highway, their customers had not done so, and so long as the intersection remained open they had the privilege of reaching the motel premises through the intersection. The effective closing of that intersection did not result in the loss of any right for which anyone was entitled to direct compensation, but until that event the ability of customers to enter and leave U. S. 25 was as much an element to be considered in determining market value as was the opposite and negative factor, which always existed from the time of the creation of the intersection, that the State had the right to alter same and leave no access whatsoever to the highway at that point. All the appraisers considered the latter factor, but the State's appraisers were instructed to and did not consider the former.

Had the State of Ohio not taken any of the land belonging to the owners and/or had not changed the grade of Bible Road where it abutted their land, they could have recovered nothing by reason of the change of the intersection of Bible Road and U. S. 25, so that the former would no longer have access to the latter, and vice versa. But the moment the State took some of the owners' land and/or caused damage thereto by the change of grade of Bible Road, they were entitled, in the determination of compensation and damages, to have "every element that can fairly enter into the question of value" considered, including the fact that the property had been indirectly accessible to and from U. S. 25.

Since the testimony of the State's appraisers was based on a false and erroneous conception or foundation, it had no probative value on the issue of market value as of the date of taking, and the verdict of the jury and the judgment entered thereon were manifestly against the weight of the competent evidence, consisting of testimony of the landowners' witnesses, which did have probative value. A contrary holding would result in the landowners not being awarded just compensation as required by the State's constitution. For this reason, the case was remanded to the trial court for further proceedings. (In re Appropriation of Easements for Highway Purposes, 215 N.E.2d 612, March 1966)

184-2 SOUTH CAROLINA SUPREME COURT DECIDES TRAFFIC NOISE AND LOSS OF VIEW AND BREEZE MAY BE CONSIDERED IN DETERMINING AFTER VALUE OF PROPERTY EVEN THOUGH OTHER PROPERTIES IN AREA ARE AFFECTED BY THESE FACTORS

The State highway department condemned 20.5 acres out of a 146-acre farm for a right-of-way for a portion of Interstate 95, a controlled-access highway. The condemner contended that the court erred in permitting the jury to consider, in assessing compensation, four factors claimed by the condemnee as elements of special damage: (1) increased traffic noise at the owner's residence; (2) loss of breeze at the residence because of the elevation of the highway; (3) loss of view from the residence because of such elevation; and (4) circuitry of travel between 39 acres of the farm lying on one side of the controlled-access highway and his remaining land on the other side.

The condemner argued that increased traffic noise resulting from construction of the highway near the condemnee's residence did not constitute special damage because there was no showing that the alleged injury was special and peculiar to him and was not commonly suffered by all others whose homes were in close proximity to that highway.

The supreme court pointed out that a distinction had to be drawn between consequential damages to land remaining after a part of a tract had been condemned and consequential damages to a tract where no property was taken. In the latter case, damages were payable only if the injury was peculiar to that land and was not suffered in common with the general public. In the former case, however, it did not matter if others suffered the same type of injury to the land remaining after a taking. Special damages included any decrease in actual value of the remainder of the condemnee's property which was the direct and proximate consequence of the taking. In other words, as a general rule, special damages included all injuries or damages which caused a diminution in the value of the remaining property.

This same rule applied to the condemnee's claim for damages due to loss of view and breeze. He claimed that prior to the construction he could see 75 percent of his cultivated land, but the elevated highway would restrict his view to about one-third of his land. He also testified that the elevated highway would cut off a wonderful breeze which had favored his residence in the summertime. The appellate court stated that no argument was needed to demonstrate that the value of a homesite might be impaired by the construction of a nearby highway at such an elevation as to obstruct view and favorable breezes. It pointed out that it made no difference on the issue of special damages that loss of view and breeze did not constitute a taking of property, because the applicable statutes required that any special damages resulting from the taking of a portion of a tract for a right-of-way be considered in assessing compensation.

That court agreed with the State that circuitry of travel, as a result of severing the tract into two parts, could not be considered as a separate item, but that it had to be considered in determining the diminution in the value of the remaining land caused by the taking. (South Carolina State Highway Department v. Touchberry, 148 S.E.2d 747, 1966)

184-3 HIGHEST COURT OF NEW MEXICO DECIDES OWNERS NOT ENTITLED TO COMPENSATION FOR CIRCUITY OF TRAVEL WHERE THEY RETAIN REASONABLE ACCESS TO A MAIN HIGHWAY TO WHICH THEY HAD PREVIOUSLY HAD DIRECT ACCESS

The private persons in this case owned two tracts of land separated by State Road 422. This road was a four-lane highway, running generally north and south. There were two southbound and two northbound lanes, with a depressed medial divider and a fence down the center of the median in the vicinity of the owners' property. The larger tract was located on the east side of the highway and has always been unimproved. The smaller tract was raised, in part, to coincide with the grade of Road 422, after the owners had obtained a driveway permit to enter that road. This permit had never been revoked. The owners then filled in the State's right-of-way between the smaller tract and the highway. Upon completion of a service station, the owners operated the station from February 1, 1960 until March 1, 1961. They had direct access to the southbound lanes of Road 422, but could not directly reach the northbound lanes due to the fence in the median.

In February 1961 the State highway commission started a highway project which involved the construction of two frontage roads, one on either side of State Road 422, within the original right-of-way. Guard fences were placed between the frontage roads and the original Road 422 to prevent traffic from moving between them except at an interchange which was about 1,760 feet