Traffic-Related Noise as a Factor in Eminent Domain Proceedings in Florida

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ABSTRACT

Traffic-related noise has become an increasingly important factor in eminent domain proceedings in Florida. The nature of the eminent domain process in Florida is explored as it relates to the Florida Department of Transportation and traffic noise. Through the examination of five case studies, the impact of noise on condemnation cases is highlighted. On the basis of the developing case histories, it can be concluded that noise specialists, attorneys, and appraisers alike need to be prepared to deal with noise in a learned and professional manner.

Traffic noise is a fact of everyday life, whether one lives in Alaska or Florida. However, the liability of the state to compensate a property owner for traffic-related noise damages varies from state to state. It is the purpose of this paper to point out how traffic-related noise damage is addressed as part of the eminent domain proceedings in Florida.

EMINENT DOMAIN PROCESS IN FLORIDA

To better understand the nature of eminent domain proceedings in Florida, and how noise is involved, a brief review of the process is necessary. Eminent domain is defined as "the power of the sovereign to take property for public use without the owner's consent" (1,pp.1-7). In eminent domain proceedings, "noise is treated as consequential damage," which means it is a direct result of the actions of the condemnor (2,p.936-N2), although in Florida it may or may not be compensable. Sometimes noise is also treated as proximity damage. This is a damage resulting from the nearness of the property to the noise source. This could be the case if a highway location were moved next to a hospital's front door without actually touching the building, even though some of the land may have been taken from the hospital. This is not considered as a direct taking. The Florida constitution is structured so that Florida is a "taking" state and not a "damage" state. This means that the state pays only for the taking of property and not for damages to those properties. However, Figure 1 shows that this principle can vary once the state passes the test of severe damage, which the courts treat as a taking. To date, the Florida courts have held that "alleged damages to a resident's property not actually taken for highway, resulting from increased noises, dust and vibrations, were not compensable" (3). Florida is in a position where the courts have ruled that noise does not constitute a taking and therefore is not compensable, yet noise is frequently an issue in condemnation actions in Florida.

If property is required for a state highway project in Florida, the Department of Transportation (DOT) will establish a fair value for the parcel (or portion thereof) of land needed, using the appropriate appraisal technique. The appraisal will become the basis for an offer to the property owner.

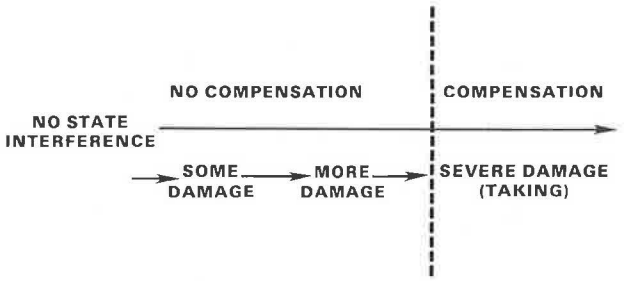

FIGURE 1 Severe damage test.

Should the property owner not be satisfied with the offer, the Department may, under Florida Statute Chapter 74, "take possession and title in advance of the entry of final judgment" (4,pp.31-270). This is done by filing a declaration of taking. Once the declaration is served (which includes a good faith estimate of value) and an order of taking is granted by the court, "the fair estimate value must be deposited in the registry of the court. The purpose for making a good faith estimate is to fix a basis for withdrawal by the owner from the deposit, so that the owner will have the use of the money as the petitioner (DOT) has the use of the land" (4).

After the order of taking but before the trial, numerous opportunities exist for both the property owner and the DOT to alter their stance and reach a mutual agreement. To ensure that the property owner is on an equal basis with the condemnor (in this case DOT), Florida law requires that DOT "must pay the owner's attorneys' fees and necessary expenses incurred in his defense of the proceedings" (4). This also holds true for appellate actions. The court will establish what fees and expenses are necessary and appropriate. It is during this time frame that DOT has normally resolved noise issues and settled with the property owner. In two major suits, however, the case went to trial and through the appeal process. The results will be discussed later in this paper.

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PROPERTY INTERESTS SUBJECT TO CONDEMNATION

When the entire parcel is taken (total take), there usually is no difficulty with noise as an issue. It is when the Department takes a part of the property (partial take) that noise has become a significant issue. This may result in the awarding of severance damages in addition to the value of the property taken. The amount of damages allowed (or awarded if established by the court) is generally determined on the concept of "before and after, which poses the question: What was the value before the taking; and what is now the market value after the taking?" (4). One way to mitigate severance damages is to provide the "cost to cure," which restores the remaining property and all improvements to their original use and value. To use this approach, the first step is to establish the total value of the damages. Then, after the damages have been determined, a method to "cure" the damage is proposed. If the cost to cure the damage is less than the estimated damage, this mitigation method may be used. This approach has frequently been used when noise is one of the issues in a condemnation proceeding.

Inverse condemnation suits usually occur when a property owner believes that his property has been damaged even though none of his property was taken by lawful actions of the DOT. Far more cases of inverse condemnation involve a physical invasion and the courts more readily find a taking to have occurred when there has been a physical invasion. But the real test is found in the degree that the owner is deprived of the use and enjoyment of his property by whatever means, "physical invasion or not" (4).

One of the important distinctions between a typical taking and inverse condemnation is in the financial arrangement. "The owner's reasonable costs and attorneys' fees are taxable against the governmental agency if the inverse condemnation action is successful. If the owner is unsuccessful in maintaining the inverse condemnation action, costs are taxable against him as in other civil actions" (4).

CASE STUDIES OF NOISE IN FLORIDA EMINENT DOMAIN PROCEEDINGS

Five cases will be examined to see how the courts and DOT have addressed the issue of highway traffic-related noise as part of the eminent domain process in Florida. The case studies will be listed in chronological order (rather than by category) to illustrate how the issue of noise has varied over time.

Northcutt v. State Road Department (3)

In the case of Northcutt v. State Road Department (1968), the Northcutt family filed an inverse condemnation suit against DOT, alleging damages to their residential property not actually taken for highway construction (Figure 2). They believed that the increased noise, dust, and vibration changed their quiet residential side street to a haul route during construction. Following the construction activities, the close proximity of Interstate 95 (Figure 3) caused structural damage to their house and the traffic caused "excessive shock waves, vibrations, and noises, at all hours of the day and night which impaired their health and caused them to lose sleep, become ill and nervous and deprived them of the use and aesthetic beauty of their property, causing it to lose its value for residential purposes so that it cannot be sold or financed for any use or purpose" (3).

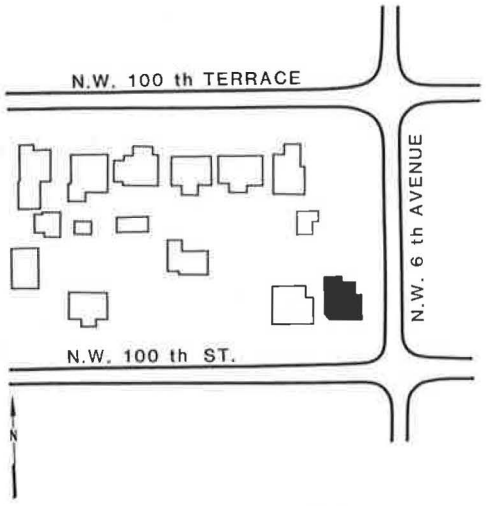

FIGURE 2 Northcutt property before take.

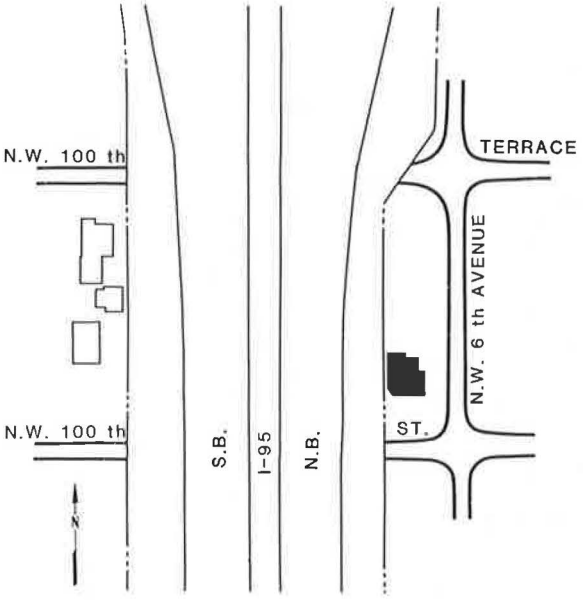

FIGURE 3 Northcutt property after take.

The Third District Court of Appeal of Florida upheld the lower court's ruling that the alleged damages were not compensable. The court noted that "there must generally be a trespass or physical invasion, since (the Florida) constitution does not provide compensation for mere damage" (3). The court indicated that "low flying jet aircraft with their great speed and noise have brought about serious legal problems for adjacent land owners" but the "plight of the property owner in this case is not the same . . . but is indistinguishable from that of thousands of their fellow country men whose homes abut highways and railroads and who endure the noise without complaint" (3). Had the landowner shown that he was "severely" damaged, the outcome might have been different.

Department of Transportation v. West Palm Beach Garden Club, et al. (5)

The next case involves the Department of Transportation v. West Palm Beach Garden Club, et al. (1977). In this case, the DOT was ordered by the Circuit Court of Palm Beach County to pay $644,275 for the value of the land taken for the construction of Interstate 95 and $1.7 million in severance damages. The DOT appealed this case on the basis of six different points of law related to eminent domain. Three of those points related to noise because $1,477,500 of the jury award for severance damages involved the construction of a noise barrier wall.

The property taken involved a small portion of a city park (Dreher Park) (Figure 4) that the owner claimed as a place of quietude and passive use. Citing the famous Dennison case in New York, the owner's attorney was successful in convincing the jury that the construction of a noise barrier was necessary to preserve the usefulness of the park.

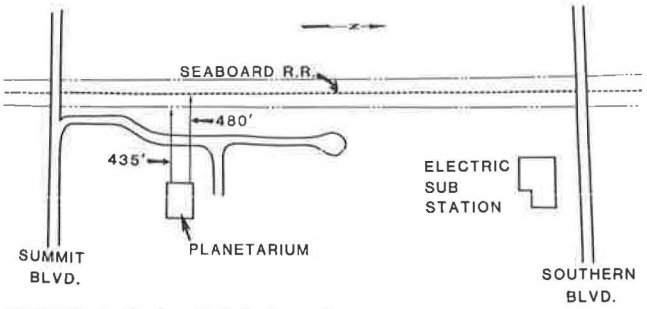

FIGURE 4 Dreher Park before take.

On appeal, the DOT pointed out that "mere highway noise as such, not coupled with a physical invasion or trespass, is not compensable in a condemnation proceeding" (5). They also noted that the "award of severance damages for (the) purpose of curing noise from (a) highway by constructing (a noise barrier) wall to preserve (the) tranquility of (the) park was (in) error, in view of (the) indication that the noise increase did not preclude use of (the) park as a park and that the park was not a secluded and peaceful park" (5). Finally, the DOT pointed out that noise from the highway would not damage the use of the zoo, science museum, and planetarium within the park and a nearby golf course because they "were not substantially deprived of their beneficial use" (5).

The Fourth District Court of Appeal reversed the lower court's decision regarding the severance damages on July 26, 1977. Judge Letts, in writing the reversal opinion, noted factors that the jury appeared to overlook. He noted that the park land had originally been sold to the city by the state of Florida for $100 and that the city was told at the time of the sale that a major highway was to be built through that location. The city converted this parcel of raw land of swamp, muck, and sand into an attractive, active park. In 1952 the city gave the state some of the land back for use in construction of a highway. At a later date an additional 150 ft of linear park land was condemned for the construction of I-95. Judge Letts noted that the city did not identify noise as a damage factor in the beginning of the condemnation suit. As a matter of fact, the city was very supportive of early completion of I-95 in this area and urged the DOT to forego any additional environmental impact studies that might delay the project.

The judge pointed out that "the bulk of the $1,700,000 award was to build a wall on land not taken and on which there was no physical invasion or trespass" (5). In considering the noise increase to the park caused by I-95 traffic, Judge Letts noted that this "is no more of a 'taking' than has been inflicted on countless tens of thousands of Florida residences . . . whose occupants endure the consequences of endless traffic noise. . . . The damage to Dreher Park is no different in kind from that suffered by anyone else similarly situated" (5). This again points out the importance of the landowner's showing "severe" damage by the state.

The city tried to portray Dreher Park as a passive park where quiet was important and the noise from the highway would destroy this tranquility. The court questioned how this could be at a park "one and one-half miles away from touchdown, next to a screaming jet glide path for a major airport, six blocks from US #1, bounded on the north and south by major arteries, bisected by a third, and bordered by the Seaboard Airline Railroad tracks. Moreover, the park itself has a zoo, a museum, ball fields, model airplane club, and immediately to the north, an electrical substation" (5) (Figure 5).

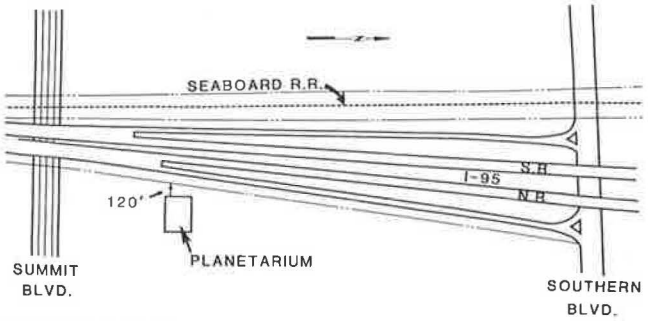

FIGURE 5 Dreher Park after take.

On the basis of the evidence presented, the entire severance and cost-to-cure award of $1,700,000 was reversed and sent back to the trial court for review. The outcome was that the severance damages (cost to cure) were reduced from $1,700,000 to $72,500.

Department of Transportation v. Elmer R. Harjula, et al.

In the case of State of Florida Department of Transportation v. Elmer R. Harjula, et al. (1984), the DOT sought to acquire a total of 19,284 ft^2 of property from the Garden Lakes Homeowners Association, Inc. (Figure 6). This land, referred to as "the common areas" (shared by the members of the homeowners association), is part of a large condominium property. The property was needed for the construction of I-95 in northern Palm Beach County and the expansion of Military Trail, a local arterial (Figure 7).

During the environmental assessment process, a noise study was conducted that indicated that there could be noise impacts in the area of the subject property. The need for abatement was explored and a noise barrier wall was recommended. A subsequent noise analysis reversed the previous study and stated that abatement was not necessary. As final design was approached and right-of-way takings proceeded, the issue of noise and noise abatement was raised by the attorneys for the homeowners associa-

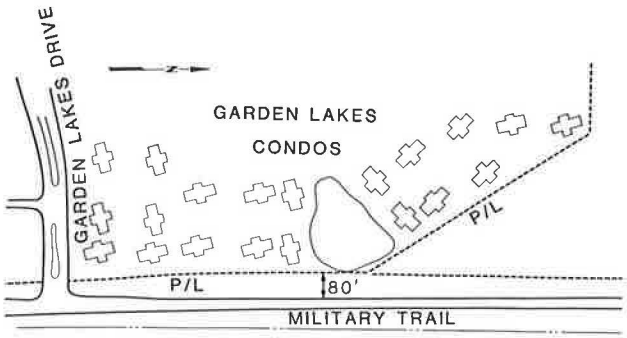

FIGURE 6 Garden Lakes condos before take.

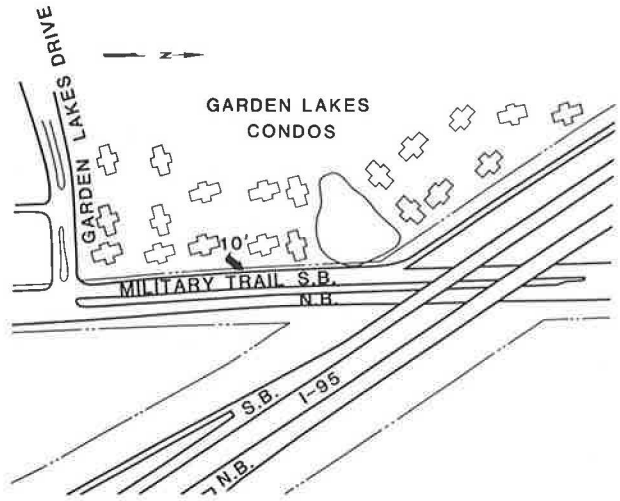

FIGURE 7 Garden Lakes condos after take.

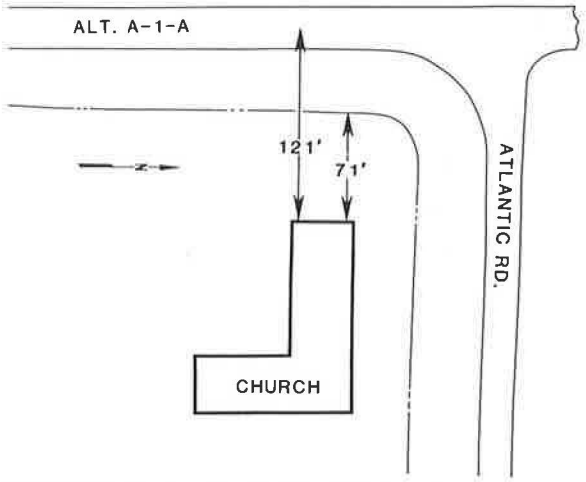

FIGURE 8 Gardens Baptist Church before take.

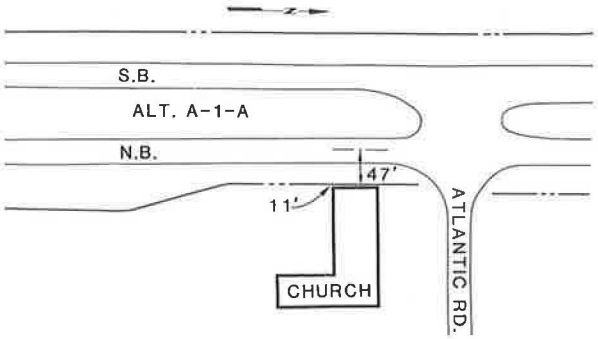

FIGURE 9 Gardens Baptist Church after take.

tion. The homeowners' contention was that noise would be a problem and abatement should be provided at the expense of the Department.

Several abatement alternatives were suggested for consideration, each of which exceeded $500,000 and, more importantly, would delay the final design and letting of a $17,000,000 project. To ensure that the noise issue was properly addressed and that the project schedule was maintained, it was suggested that the DOT attorneys contact the homeowners association about a possible award to allow the homeowners to design and build their own noise barrier on their own land.

This suggestion was met with approval by the homeowners association and on December 11, 1984, the DOT entered into a stipulated final judgment for the sum of $200,000. This amounted to $27,600 for the land taken and approximately $172,400 as cost to cure, notably to erect a noise barrier on the property of the homeowners association.

Department of Transportation v. Kenneth P. Thomas, et al.

Another case in Palm Beach County, State of Florida Department of Transportation v. Kenneth P. Thomas, et al. (1985), involved the Gardens Baptist Church of Palm Beach Gardens. The widening of Alternate A-1-A (State Road 811) from a two-lane to a four-lane roadway required the taking of approximately 19,000 ft^2 of church property. In the before setting (Figure 8), the main church building was located some 121 ft from the centerline of the highway. After construction, the centerline of the northbound roadway (closest to the front of the church) was 47 ft from the church (Figure 9).

The owners of the church believed that the adverse impact on the church resulting from traffic noise would not be tolerable unless the building was relocated on the eastern portion of the church property. This would put the church at a distance from the highway that was similar to that before construction. Excluding the value of the land taken for the project, the church requested $97,158 for cost to cure. This involved the physical relocation of the church building, a concrete-block structure.

The Department's attorney questioned the wisdom of this expenditure and requested a special noise study. The results of this investigation identified two mobile homes that were being used as classrooms for Sunday School and for a day school during the week. Although the adverse impact from noise on the church was determined to be minimal and did not warrant relocation of the church, the portable classrooms presented a totally different problem.

Two methods to relieve the noise problem were suggested in the noise study. One was to construct a noise barrier wall on the DOT right-of-way at an estimated cost of $52,000. The second alternative was to relocate the portable classrooms on the east side of the church and use the church building as a noise screen. This relocation was estimated to cost $5,000.

Before the trial, the attorneys for both parties met, along with the noise experts and the appraisers

for both sides. Negotiations led to the conclusion that some remodeling of the church would enhance its utility and also reduce interior noise levels. This cost to cure was shown to be less than the estimated severance damages. The cure involved relocating the front entrance of the church, replacing single-paned windows with double-glazed windows, and relocating the two portable classrooms.

The stipulated final judgment, signed on January 4, 1985, awarded the church $73,245 for full payment for the property taken and for damages to the remainder. This breaks down to $19,660 for the land and $53,585 for damages, of which $34,385 was needed to cure the noise problems.

Department of Transportation v. Gideon Clack, et al.

The final case study to be reviewed also involved a church. In the State of Florida Department of Transportation v. Gideon Clack, et al. (1985), the DOT needed to acquire 175 ft² of land from St. Michael and All Angels Church. This Episcopal church, located in Tallahassee, was situated in a quiet residential area of the city (Figure 10). The realignment and extension of a pair of existing one-way streets resulted in the taking of a small corner of the subject property.

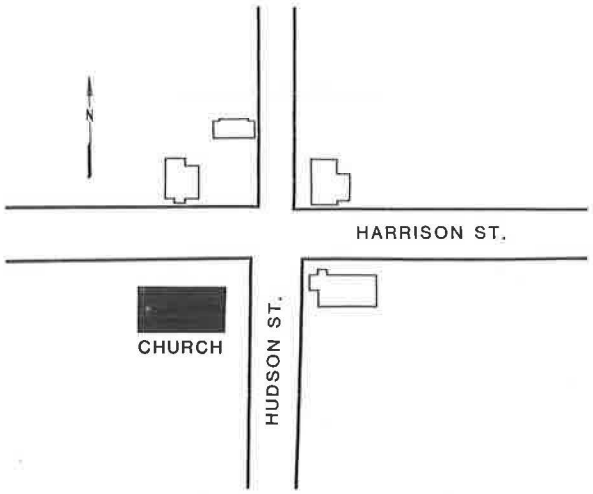

FIGURE 10 St. Michael and All Angels Church before take.

During the condemnation proceedings, the church contested the appraiser's valuation, which was set at $450. They claimed that the church was going to be a total loss because of the proximity to an arterial highway (Figure 11) and all the noise, traffic, and loss of on-street parking. The church sought $339,000 on the basis of the value of the property in the before setting.

A review of the environmental studies and the attendant noise study revealed that no significant noise impacts were expected. By using an indoor-outdoor noise loss comparison and assessing a second church in a similar setting located on the existing arterial one-way pair, the court determined that no loss of utility to the first church was anticipated.

The final judgment, signed on January 24, 1985, awarded the church $10,000 for the property taken and damages. This amounted to $450 for the value of the land and $9,550 for damages. Noise was not separated from other damages, but its contribution was considered negligible.

In both cases involving churches, the DOT staff attorneys were of the opinion that a jury trial would have been detrimental to the Department's position. This is based on experience and a knowledge of the importance of quiet in the church setting, accentuated by an emotional involvement. In his Recommendation of Settlement, one DOT attorney noted that "the moral to be gained is that in Leon County aesthetic-type issues such as destroying shrubbery, taking trees or churches, or running up against 'little old ladies,' are troublesome for a condemning authority" (6,p.3).

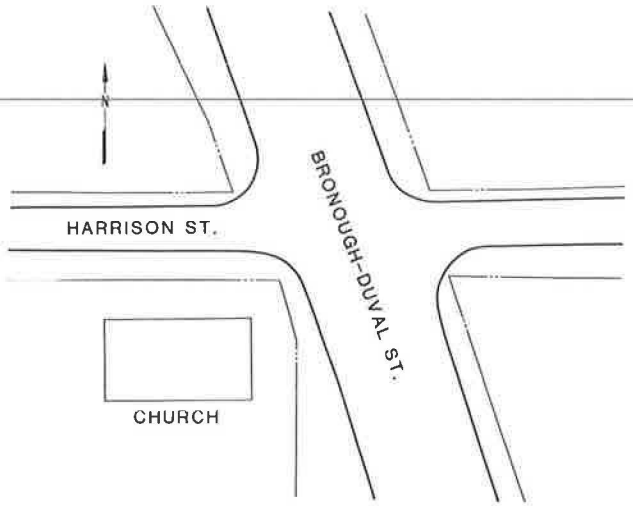

FIGURE 11 St. Michael and All Angels Church after take.

SUMMARY AND CONCLUSION

It is evident that Florida courts and attorneys involved in eminent domain proceedings have come to recognize noise as an item to be considered in the taking of property where there is a remainder. Although the courts have held that noise is not compensable unless the test of "severe" damage is met, it may be considered in severance damages. As each year passes, more and more highway projects will be facing noise as an issue in eminent domain proceedings.

This leads one to the conclusion that noise specialists must do a very thorough job of documenting existing and future noise conditions in their environmental review, especially for sensitive sites such as churches. In addition, attorneys and appraisers alike will need to address noise impacts as a possible damage issue and be prepared to deal with noise in a learned and professional manner.

ACKNOWLEDGMENTS

The contributions of many Florida Department of Transportation professionals that made this paper possible need to be recognized. Special recognition is due Ken Towcimak and Charles Stratton for their guidance and advice. To Jay Reilly and Jack Scruggs of the Eminent Domain legal staff goes a tip of the hat for the use of their files and their advice. Also a note of gratitude to the clerical staff of Eminent Domain for digging up old files and tolerating many interruptions. Finally, recognition is due Roger Eudy for excellence in the graphics.

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Analyzing Construction Noise by a Level/Duration Weighted Population Technique

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ABSTRACT

A technique is described for comparing the potential noise impacts of construction hauling for a number of project alternatives. The technique is used on a modification of the level weighted population method to account for the duration of the hauling activity on the various haul route links; the resultant descriptor is termed Level/Duration Weighted Population (LDWP). A complex microcomputer spreadsheet was developed to facilitate data entry and calculation of LDWP for a base case and each study scenario, as well as a relative change in impact (RCI) over the base case for the scenarios.

River flood control construction projects funded by the U.S. Army Corps of Engineers require environmental assessments. Project alternatives typically include the construction of tall levees or flood walls or the cutting of channels to divert the river flow from floodplain. Such projects can take as long as 6 to 7 years to construct; hence, a serious potential impact of the project can be construction noise--in particular, the extensive material-hauling operations.

To assess and compare the construction haul-noise impacts of a set of different alternatives for a flood control project in Harlan, Kentucky, a technique was developed that considered existing community noise levels, future haul-noise levels, duration of haul activities, and population densities. In this paper that technique is described; it was implemented with a sophisticated microcomputer spreadsheet program.

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PROBLEM DEFINITION

Harlan, Kentucky, and its neighboring communities of Loyall, Rio Vista, and Baxter are located along the Cumberland River and two of its forks in Southeast Kentucky (1). The study area, shown in Figure 1, is characterized by steep-sided valleys with most of the commercial and residential development concentrated in narrow floodplains. Major floods occur mostly in the winter or spring; the flood of record, in April 1977, crested at over 30 ft above gauge zero. To minimize potential future damage, the Corps is evaluating a series of alternatives for flood control (1). These alternatives include the following:

1. A-77: Building levees and flood walls in the Harlan and Loyall areas for the 1977 flood levels.
2. A-SPF: Same as A-77, but for the Standard Projected Flood level.
3. B-SPF-Filled: Cutting new channels through the 200- to 300-ft high hills behind Harlan and Loyall, building diversion dikes along the river at the ends of these channels, and filling in the existing riverbeds between the diversion dikes.
4. B-SPF-Unfilled: Same as B-SPF-Filled, but leaving the riverbeds unfilled in the diversion areas.