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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: 12 planning, 15 socioeconomics, 17 energy and environment, 70 transportation law (01 highway transportation; 02 public transit)

Supplement to

Planning and Precondemnation Activities as Constituting a Taking Under Inverse Law

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the Agency conducting the research. The report was prepared by John C. Vance. Ross D. Netherton, TRB Counsel for Legal Research, was principal investigator.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highay law. This report supplements and updates a paper in Volume 2, Selected Studies in Highway Law, entitled "Planning and Precondemnation Activities as Constituting a Taking Under Inverse Law," pp. 884-N75 to 884-N97.

This paper will be published in a future addendum to SSHL. Volumes 1 and 2 of SSHL, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976. Volume 3, dealing with contracts, torts, environmental and other areas of highway law was published and distributed early in 1978. An expandable publication format was used to permit future supplementation and the addition of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979; and a second addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of 1981. In December 1982, a third addendum, consisting of 8 new papers,

7 supplements, as well as an expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new papers and 8 supplements that have been published since the original publication in 1976, except two papers that will be published when Volume 5 is issued. The text now totals some 4400 pages, comprising, in addition to the original chapters, 83 papers of which 38 are published as supplements and 29 as new papers in SSHL. Additionally, 9 supplements and 7 new papers appear in the Legal Digest series and will be published in the SSHL in the near future.

Copies of SSHL have been sent free of charge, to NCHRP sponsors, other offices of State and Federal governments, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the volumes are for sale through the publications office of TRB at a cost of $145.00 per set.

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Supplement to

PLANNING AND PRECONDEMNATION ACTIVITIES AS CONSTITUTING A TAKING UNDER INVERSE LAW

SUPPLEMENTARY MATERIAL

Editor's note: Supplementary material to the paper "Planning and Precondemnation Activities as Constituting a Taking Under Inverse Law" is referenced to topic headings therein. Topic headings not followed by a page number relate to new matters.

INTRODUCTION AND BACKGROUND (p. 884-N75)

It was seen in the original paper, which this monograph supplements, that the problem of when and under what circumstances compensation is to be awarded landowners for value-depressing precondemnation activities is a complex and troublesome one. It requires a delicate balancing test between the interest of the public in having condemning authorities proceed with caution and at a careful and deliberate pace, and the obligation of the courts to protect private property in accordance with the constitutional mandate of just compensation.

It is to be observed that in *de jure* condemnation, the courts, after some initial hesitation and difference of opinion, are now in accord that depreciation caused by the project for which land is condemned is to be excluded in valuation. This rule finds expression in the policy provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. 4651(3), as follows: "Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such is acquired, or by the likelihood that the property would be acquired . . . will be disregarded in determining the compensation for the property." However, the treatment of project-caused depreciation in inverse, as opposed to direct, condemnation, is far from being clearly settled. As was seen in the original paper the courts have adopted at least three different approaches to the problem. These differences in approach stem (in part at least) from differences in conceptualization as to what does and does not, in legal contemplation, constitute a *de facto* taking.

The one approach takes the view that there cannot be a *de facto* taking of property absent a showing of physical invasion or direct legal restraint on the use of property.[1] Another approach has been that a *de facto* taking can occur, absent a showing of invasion or direct legal restraint, in circumstances where the precondemnation activities of the condemning authority have been such as substantially to impair, interfere with, or destroy the beneficial use and enjoyment of property.[2] Still a third approach takes the view that recovery may be had under inverse law, without a showing of facts constituting a *de facto* taking, in circumstances where the condemning authority has been guilty of unreasonable delay, bad faith, or other oppressive precondemnation conduct.[3]

Under the first approach, not only can there be no recovery (no matter how egregious the injury suffered from precondemnation activity) absent a showing of physical invasion or direct legal restraint, but in addition, in order to recover for project-caused depreciation, the owner has no option but to await *de jure* condemnation, wherein, consistent with the generally prevailing rule, he is entitled to have his property valued as if it had not been subject to the debilitating effect of a threatened condemnation; and where condemnation is abandoned (as the condemnor generally has the right to do) the owner is left without remedy (absent statutory provision to the contrary) either for the aforementioned project-caused decline in market value, or for the recoupment of consequential or incidental damages, such as loss of rental income due to the threat of condemnation. He must continue to pay taxes, mortgage loan installments, maintenance costs, and so on, all without relief by and through the inverse condemnation process.

The more liberal view is represented in the cases taking the position that a *de facto* taking may occur upon a showing of substantial interference with or impairment of the use and enjoyment of property. However, it is strongly to be emphasized that this rule is given application on a strictly case-by-case basis, the courts frequently stressing that each case is to be approached and evaluated on its own set of facts, and that no hard and fast rules obtain as to what does and does not constitute such substantial deprivation of the use and enjoyment of property as will constitute a *de facto* taking. The courts further frequently emphasize that the burden is on the owner to establish a *de facto* taking, adding that such burden is a heavy one. This is substantially borne out by the fact that the cases allowing recovery are in the considerable minority.

It is to be noted that this approach, in contradistinction to the first approach, takes into account consequential damages in the form of rental loss, the same having been adjudged in several cases an important factor in arriving at the holding that a *de facto* taking had occurred.[4]

Under the third approach, as stated earlier, the owner is entitled to show that the condemning authority has been guilty of unreasonable delay in instituting *de jure* condemnation, or has committed other acts constituting unreasonable or oppressive precondemnation conduct, and upon the making of such showing can recover in damages, including such consequential damage as loss of rental income.[5]

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[1] City of Buffalo v. J. W. Clement Company, 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895 (1971), *Selected Studies in Highway Law* (hereinafter SSHL), Vol. 2, p. 884-N85; Klopping v. City of Whittier, 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972), SSHL, Vol. 2, p. 884-N90.

[2] Washington Market Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 343 A.2d 408 (1975), SSHL, Vol. 2, p. 884-N87; Lincoln Loan Co. v. State, State Highway Commission, 274 Or. 49, 545 P.2d 105 (1976), SSHL, Vol. 2, p. 884-N89; Conroy-Prugh Glass Company v. Commonwealth, Department of Transportation, 456 Pa. 384, 321 A.2d 598 (1974), SSHL, Vol. 2, p. 884-N93.

[3] Klopping v. City of Whittier, n. 1, *supra*.

[4] Luber v. Milwaukee County, 47 Wis.2d 271, 177 N.W.2d 380 (1970), SSHL, Vol. 2, p. 884-N94; Foster v. City of Detroit, 254 F.Supp. 655 (E.D.Mich., 1966), *aff'd* 405 F.2d 138 (C.A. 6, 1968), SSHL, Vol. 2, p. 884-N93; *In re* Elmwood Park Project Section 1, Group B, 311 Mich. 311, 136 N.W.2d 896 (1965), SSHL, Vol. 2, 884-N92; Lincoln Loan Co. v. State, State Highway Commission, n. 2, *supra;* Conroy-Prugh Glass Company v. Commonwealth, Department of Transportation, n. 2, *supra*.

[5] Klopping v. City of Whittier, n. 1, *supra*.

With this brief encapsulation of certain broad principles and summary outline of differing approaches taken by the courts in mind, attention is now turned to a consideration of the cases handed down since the original paper was written.

RECENT CASES

Difficulties are presented in the way of review of recent cases because they touch on no more than a small number of the many questions that are presented in this broad and complex field. The cases will be considered for the narrow or particular instruction that they provide, with the caveat that many significant matters relating to the effect of precondemnation activities are thereby left unexamined in this paper. Further it should be said that the recent cases tend to iterate established principles rather than provide a measure of advance over or departure from the prior case law, as set forth in the original paper.

Planning Activities as Not Constituting a Taking

The rule has long been established that mere planning in anticipation of condemnation does not, without more, constitute a taking.[6] This rule was given expression in *Lone Star Industries, Inc. v. Secretary of the Kansas Department of Transportation,* 234 Kan. 121, 671 P.2d 511 (1983). Plaintiff, in this case, was engaged in the manufacture of cement and cement products. The property on which it conducted its operations came under consideration as part of the land to be acquired for the construction of I-670. The proposed construction was to be in the form of an elevated roadway that would trisect plaintiff's land. Discussion and negotiations with representatives of the Kansas Department of Transportation took place over a period of years, but neither definite plans, nor a timetable for acquisition, was ever established. Plaintiff brought suit in inverse condemnation, alleging that its business operations had been severely disrupted by reason of uncertainty as to whether its property would be taken. At the time of suit, direct condemnation had not been instituted. In ruling that no *de facto* taking had occurred, the Supreme Court of Kansas relied on the general rule that planning in anticipation of condemnation does not in and of itself constitute a taking. It stated that in order for planning to constitute a taking it must be coupled with a restriction on the use of the land, and because no such restriction was shown in this case, the precondemnation activities of the Department of Transportation did not amount to a taking.

Effect of Fluctuations in Value

It has long been fully recognized that fluctuations in value will occur when property is subject to the threat of condemnation (in some instances increasing and in some decreasing), and it is the settled rule that such fluctuations are to be treated as mere incidents of the ownership of property. This is based on the reasoning that all property held in private ownership is subject to the contingency that it may some day be taken for a public use.

The general rule with respect to such fluctuations in value was stated by the Supreme Court of the United States, in *Danforth v. United States,* 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240 (1939), in the much-quoted language as follows: "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

This rule found application in the more recent case of *Agins v. City of Tiburon,* 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). In this case the owners of a 5-acre tract of land in the City of Tiburon, California, brought suit against the City, alleging (*inter alia*) that the latter's adoption of zoning ordinances limiting construction on the tract to between one and five single-family residences constituted a taking of their property without payment of just compensation. The Supreme Court of California upheld rulings of the lower California courts that no taking had occurred.[7] The Supreme Court of the United States, in affirming the decision of the California Supreme Court, stated:

> The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking.... Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. *Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."* (Citations omitted and emphasis added.)

Agins was followed in *Thompson v. Tualatin Hills Park and Recreation District,* 701 F.2d 99 (C.A. 9, 1983). In this case plaintiff was the owner of vacant land, suitable for development, lying within an area comprising the Tualatin Hills Park and Recreation District. He also was the owner of an option to purchase adjacent land, acquisition of which would have improved access to and augmented the size of a subdivision he proposed to construct. Defendant District instituted suit to condemn plaintiff's property, and because of the pendency of condemnation, plaintiff allowed the option to expire. Later, the District abandoned the condemnation proceeding, and plaintiff brought an inverse action to recover the difference in value between his property with the adjacent land and his property without the same.

In holding that no taking had occurred, the Federal Court of Appeals

[6] See the annotation entitled "Plotting or Planning in Anticipation of Improvement as Taking or Damaging of Property Affected," 37 A.L.R.3d 127 (1971).

[7] 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979).

ruled that although plaintiff was deprived of the enhancement in value of his property which would have accrued had he exercised the option, such loss was but an "incident of ownership" (citing *Agins*) and that the sum total of defendant's precondemnation activities did not amount to a "taking" in the constitutional sense.

Thus, the recent case law affirms the long-standing rule that mere fluctuations in the value of property due to the threat of condemnation are to be disregarded and treated as but incidents of the ownership of property.

Loss of Financing or Other Economic Opportunity

The rule has also long been settled that loss of financing or other economic opportunity due to precondemnation activity does not, in and of itself, furnish grounds for a taking, and the recent cases support this rule.

Of particular interest is the well-reasoned case of *Littman v. Gimello,* 115 N.J. 154, 557 A.2d 314 (1989). (Because the Supreme Court of New Jersey in this case undertook a comprehensive review of the law pertaining to the effect on compensability of precondemnation activities, it is recommended reading.)

This was a consolidated case involving two landowners who brought suit to recover against the New Jersey Hazardous Waste Siting Commission. The latter was statutorily charged with the responsibility of locating appropriate sites for the future construction of hazardous waste facilities needed by the State of New Jersey. Both plaintiffs asserted that the designation by the Commission of their properties as potential hazardous waste sites created a "yellow cloud" hanging over the properties, and denied them "all beneficial use of the land." One of the plaintiffs alleged that plans for the construction of a senior citizens mobile-home park on its property had to be abandoned because financial backing was withdrawn after site identification by the Commission. Both plaintiffs alleged that plans for long-term farming operations on their properties were required to be foregone because of inability to attract investment capital following upon site identification. At the time of trial direct or *de jure* condemnation had not been instituted against the properties of either plaintiff.

In approaching the problem of whether a taking had occurred the Court first considered the question of whether a showing of physical invasion is necessary to the establishment of a *de facto* taking. It concluded that although this had at one time been an "indispensable" element of a taking claim, it no longer represented the majority view. It stated:

> The clearest example of a taking is a situation in which property is physically invaded.... *Traditionally,* physical invasion was an *indispensable* element of a "taking" claim.... This requirement, however, began to erode, and [i]t is *generally held* in New Jersey [and] *elsewhere* ... [that] in a few narrowly defined situations" compensation will be awarded for "non-invasive" governmental activity. (Emphasis added.)

In respect to fluctuations in value the Court followed the hereinabove stated general rule that the same are to be disregarded:

> Likewise, we find the plaintiffs' contention that a compensable taking has occurred because the market value of their land has diminished as a result of publicity concerning the ... site equally unpersuasive. The cases are legion that hold that decreases in the value of property during governmental deliberations, absent extraordinary delay, are incidents of ownership and do not constitute a taking. As the Supreme Court stated: "[I]n the absence of an interference with an owner's legal rights to dispose of his land even a substantial reduction in the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth amendment." (Citation omitted.)

In respect to loss of financing or economic opportunity as a ground of taking, the Court had the following to say:

> [Plaintiff's] allegation that it cannot build its senior citizens' trailer park because of a lack of financing does not rise to the level of a taking. Lost economic opportunities allegedly occasioned by pretaking government activity do not constitute a compensable "taking" under either the United States or New Jersey Constitutions.... The loss of financing also does not amount to a taking.... Strong policy considerations underpin our holding that lost economic opportunities, foregone financing, and diminution in market value arising from government plans and their attendant publicity do not alone give rise to a compensable taking.

Lost economic opportunity was the basis of a taking claim in *Barsky v. City of Wilmington,* 578 F.Supp. 170 (D.C.Del., 1984). The complaint in this case alleged that plaintiff was the owner of property in an area scheduled for redevelopment; that she had received, prior to the announcement of the redevelopment plan, a firm offer from a prospective buyer to purchase the property; and that as a result of the announcement of the redevelopment plan the offer was withdrawn. In holding that such loss of economic opportunity did not constitute a compensable taking, the Court said:

> The de facto taking doctrine was never intended to penalize a municipality for publicizing its land use decisions. The Court therefore holds that, in the circumstances of this case, the defendants' announcement of its proposed condemnation program does not constitute a taking of property requiring immediate compensation for plaintiff's property. Plaintiff must wait for the formal condemnation process to unfold in state court.

Oppressive or Unreasonable Precondemnation Conduct as Constituting a Taking

The rule has been announced in numerous cases that oppressive or unreasonable precondemnation conduct may result in a *de facto* taking. Such rule is illustrated in the recent case of *Gaughen v. Commonwealth, Department of Transportation,* 554 A.2d 1008 (Pa. Commw., 1989), the facts in which were as follows: Plaintiffs in this case purchased a tract of land for the purpose of constructing a senior citizens' housing project. Temporary approval for the construction of a portion of the planned

project was granted by the appropriate officials of Hampden Township, within whose boundaries the project was located. Financing for the project was intended to be secured by means of a tax exempt bond issue of the Cumberland County Housing and Redevelopment Authority, a method under which plaintiff would receive a rate of financing below the interest rate charged for conventional financing. However, it appeared that PennDOT had plans for highway construction which would take a portion of plaintiff's property, and that in order to protect its planning, it repeatedly made requests of Hampden Township to delay any development within the proposed highway corridor. In addition, it wrote a letter to the Housing and Redevelopment Authority stating its concern vis-a-vis noise damage to plaintiff's planned project. As a result of the chilling effect of this letter, plans to secure financing through the Authority had to be abandoned. Plaintiff brought suit charging a *de facto* taking. In holding that a partial *de facto* taking had taken place the Court stated that "the publicity concerning the imminent condemnation of [plaintiff's] property, DOT's repeated efforts to delay subdivision in the corridor and DOT's interference in [plaintiff's] attempt to obtain financing substantially deprived [plaintiff] of the beneficial use and enjoyment of his property within the corridor."

By the same token, where the facts reflect fair play on the part of the condemning authority and lack of oppressive or unreasonable precondemnation conduct, such factor is persuasive evidence that a *de facto* taking did not occur. This is illustrated in the case of *Fitger Brewing Company v. State*, 416 N.W.2d 200 (Minn. App., 1987), the facts in which were as follows: The Fitger Brewing Company had been conducting brewery operations in its building in Duluth, Minnesota, for a number of years, when it learned that the Minnesota Department of Transportation was considering plans for the alignment of I-35 into the City of Duluth, and that one of the plans would require a taking a part of the Fitger facilities. At approximately the same time the Minnesota Pollution Control Agency gave notice to Fitger that it must either install certain pollution control devices or terminate its brewery operations. Thus, a problem was presented as to whether the expenditure of monies for installation of pollution control devices was justifiable in the face of possible condemnation. Negotiations took place over a fairly lengthy period of time, including communication with the Governor of Minnesota in respect to the problem of Fitger being "squeezed" between two State agencies.

A letter was written, on behalf of the Governor, by the Highway Commissioner, stating in part that: "As we all know, it appears that it would be impractical for you to install pollution abatement facilities in view of the planning currently in progress regarding the possible extension of I-35 within the City of Duluth. We can inform you that in all of the plans now under consideration for the extension of I-35, some part or all of the Fitger Brewing Company would have to be acquired." However, the letter continued by advising that another alignment might in the future be decided upon which would "eliminate the necessity of taking the Fitger Brewing Company property." This in fact later happened, but in the meantime Fitger had decided to cease operations and closed its doors.

Fitger then brought suit to recover as for a *de facto* taking, and the trial court awarded judgment in its favor. The issue on appeal, as stated by the Court, was as follows: "Did the state's actions, followed by the respondent's decision to close its brewery, constitute a taking for the purposes of the constitutional requirement of compensation?"

In reversing and remanding, the Court of Appeals placed chief reliance on the fact that the State had at all times been straightforward and open in its dealings with Fitger, and had not abused the power of eminent domain. The Court commended the State's candor in agreeing that compliance with the order of the State Pollution Control Agency was impractical in the face of possible condemnation, while at the same time correctly advising Fitger that an alternate route might be selected and its property not taken. It noted that Fitger had at all times been allowed freedom of choice in its decision-making with respect to the installation of pollution control devices. It stressed that Fitger's decision to close down was one independently made and not reflecting any pressure on the part of the State to cease operations. Finding no lack of good faith on the part of the State, or that any of its actions reflected oppressive or unreasonable precondemnation conduct, the Court concluded that on the facts presented no *de facto* taking was shown.

Commercial Property Versus Residential Property

A series of Pennsylvania cases has drawn a distinction between commercial and residential property in the treatment of the legal effect of precondemnation activities.

Appellees, in *Commonwealth, Department of Transportation v. Lawton*, 412 A.2d 214 (Pa.Commw., 1980), were the owners of properties, used for commercial rental purposes, that lay in the path of the proposed construction of a six-lane limited access highway (known as the Blue Route) which was to act as a connector between the Pennsylvania Turnpike and I-95. Before formal condemnation proceedings were instituted to take the properties for such project, the instant litigation was commenced, by the filing of a petition for the appointment of viewers, pursuant to § 502(e) of the Pennsylvania Eminent Domain Code, reading that: "If there has been a compensable injury suffered and no declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers."

The petition averred that as a result of publicity surrounding the construction of the Blue Route, the instant properties had become unsalable and unrentable, that taxes had not been paid for a period of 2 years, and that the owners were consequently faced with loss of their properties through a sheriff's sale. PennDOT filed objections to the petition, asserting that no *de facto* taking had occurred because the owners had not been deprived of "the beneficial use and enjoyment" of their properties. The Court of Common Pleas disagreed, found that a *de facto* taking had occurred, and PennDOT appealed.

In affirming the action of the lower court, the Commonwealth Court stated:

> The thrust of the appellee's petition is that the proposed Blue Route and the concomitant publicity of the imminence of formal condemnation have caused loss of rental income, unmarketability of the property, and the threat of loss at a sheriff's sale for unpaid taxes. These averments are similar to the facts in *Conroy-Prugh Glass Co. v. Commonwealth,* 456 Pa. 384, 321 A.2d 598 (1974), a de facto taking case involving two four-story inter-connected industrial buildings located at the end of a bridge to which the Commonwealth planned to build connecting ramps from a proposed highway. Our Supreme Court held that the landowner's averments that (1) the location of the proposed public improvement had become so fixed that condemnation of its property was inevitable, (2) publicity over an extended period about the imminence of that inevitable condemnation had caused the property owner to lose tenants so that the property no longer generated sufficient income to cover taxes and operating expenses, and (3) as a consequence, the property owner faced the loss of its property, were sufficient "significant facts" to establish a de facto taking of property by the effects of a proposed highway and to entitle the landowner to relief under Section 502(e) of the Code. In the instant case the appellees have averred the existence of a proposed plan for the Blue Route and the threat of eventual loss of their property through a tax sale. The focus of our inquiry is whether the appellees have demonstrated by substantial evidence that a formal condemnation of their land was inevitable and that the loss of rental income and the unmarketability of the property was the proximate result of the Department's activities.
>
> A careful review of the record convinces us that there is substantial evidence supporting the appellees on these two points. . . .
>
> The record is replete with substantial evidence that the loss of rental income the appellees suffered and the unmarketability of their land was the proximate result of the Department's activities. . . . We conclude that the court of common pleas properly concluded that appellees had made out a cause of action for a de facto taking.

However, the same Court reached a different result in the case of residential property.

In *Commonwealth, Department of Transportation v. Kemp,* 515 A.2d 68 (Pa.Commw., 1986), appellee (one Hazel Kemp) was the owner of residential property fronting on Calcon Hook Road in Sharon Hill, Pennsylvania. Kemp learned that PennDOT was planning improvements to Calcon Hook Road, which would require condemnation of the front footage of her property to a point where the road would pass only 6 ft in front of her home, and that access to Calcon Hook Road would be wholly denied, although ingress and egress to another road would remain unimpaired. PennDOT subsequently officially informed Kemp of its intention to take that part of her property, fronting on Calcon Hook Road, and made an offer of $10,400 as just compensation.

Kemp countered by filing a petition for appointment of viewers, claiming that PennDOT's precondemnation activities had effected a taking of her entire property. Thereafter PennDOT filed a declaration of taking for the front footage only. Each party filed objections to the other's petition, and the matters were heard together by the Court of Common Pleas. The Court found that Kemp had suffered serious financial loss, that her property had become unmarketable "at any price," and that a *de facto* taking of the entire property had been effected. Appeal was taken by PennDOT to the Commonwealth Court, which observed that in the instant case it was "faced with the novel question of whether a residential property owner who continues to reside in and make use of her residential property, despite adverse precondemnation activity, can be said to be 'substantially deprived of the beneficial use and enjoyment of her property.' "

The Court first noted that "the issue of whether an owner has been substantially deprived of the beneficial use of his property has been considered primarily in the context of an income-producing commercial property." It then observed that while the cases involving income-generating property "tend to place emphasis on the financial viability of the property in reaching their decisions, it is not clear that such an approach would be appropriate in the present case involving residential property." The Court went on to say:

> In the case of a *residential* property, on the other hand, the loss in value and the inability to sell such a property are not themselves evidence that an owner has lost the use of his property *as a residence.* A property may continue to be used as a residential home whether or not it is marketable as such. . . .
>
> Kemp acknowledges that she continues to have physical possession of the house, but contends that she does not have beneficial use because of the taking of the frontage and the elimination of access to Calcon Hook Road. While such changes have no doubt made the house less desirable to live in, they have not prevented Kemp from using the house as a residence and thus have not substantially deprived her of that use. (Emphasis by the Court.)

The Court then ruled that no *de facto* taking had occurred.

A like result was reached in *Commonwealth, Department of Transportation v. Steppler,* 542 A.2d 175 (Pa.Commw., 1988). The property involved in this case likewise consisted of a parcel of land used for residential purposes. Such property lay within the projected path of a new highway and the owners learned that PennDOT had plans to acquire a portion thereof for such new road. They thereupon listed the property with a succession of realtors, none of whom were able to effect a sale. Petition for appointment of viewers was then filed, alleging that the entire property had become "unmarketable" and that a *de facto* taking of the whole parcel, including the residence, had been effected. In denying that a *de facto* taking had occurred, the Court stated:

> Generally, in order to show a *de facto* condemnation of a property, the landowner must show that the pre-condemnation activities of the condemning body either: (1) deprived the owner of the use and enjoyment of his property, or (2) subjected the owner to the loss of the property.
>
> These general principles were applied to residential property in *Department of Transportation v. Kemp* [supra]. In *Kemp,* the Department required a strip of the Kemp's front yard ranging in depth from six and one-half to eighteen feet in order to widen the existing highway. We held that where the owner of a residential property has not lost the use of his

property as a residence, no *de facto* taking of the entire property had occurred, notwithstanding the fact that the residence had a reduced market value....

Again . . . we must reiterate what we said in *Kemp* that mere difficulty in the marketability of a residence does not substantially deprive property owners of their right to beneficial use and enjoyment, where it is shown that the residence owner can still use his property as a residence....

Thus, a distinction has been drawn by the Pennsylvania courts in the treatment of property used for commercial purposes and property used for residential purposes. This distinction is based on *highest and best use.* Where the highest and best use of property is for commercial purposes, a showing of loss of rentals, accompanied by threatened loss of the property, will lead to a finding of *de facto* taking, as in *Lawton, supra.* However, where the highest and best use is for non-income producing residential purposes, depreciation in market value, or even loss of marketability, will not result in a taking, so long as the property can still be used for its highest and best use, i.e., as residential property.

Factors Constituting Persuasive Evidence of a Taking

This paper now turns to a consideration of those factors that have been identified by the courts as constituting persuasive evidence of a taking. Because, as previously indicated herein, uniformity of approach is lacking, the enumeration of critical factors in the recent cases varies (at least to a degree) from jurisdiction to jurisdiction.

The frequently cited case of *Thomas W. Garland, Inc. v. City of St. Louis,* 596 F.2d 784 (C.A. 8, 1979), involved the alleged taking of a mercantile leasehold estate as a result of blight arising out of a redevelopment project of the City of St. Louis. In reversing the action of the lower court in ruling that no taking had occurred, the Court of Appeals for the Eighth Circuit said:

> . . . We do not agree with the district court that physical invasion or appropriation of the property is essential to a claim of de facto condemnation.
>
> While the mere declaration of blight and other initial steps authorizing condemnation, even if they result in decline in property values, do not constitute a taking requiring compensation . . . governmental action short of acquisition or occupancy may constitute a constructive or de facto taking "if its effects are so complete as to *deprive the owner of all or most of his interest* in the subject matter." (Citation omitted and emphasis added.)

In *Althaus v. United States,* 7 Cl.Ct. 688 (1985), involving proposed condemnation of land for a national park, the Court stated:

> The concept of property in the fifth amendment includes the entire bundle of rights inherent in ownership, among them the right to possess, use and dispose of it.... "Taking," in a case like this, means *the destruction or deprivation of substantial property rights.* It is essentially a "question of degree—and therefore cannot be disposed of by general propositions." There is no set formula to decide if a taking has occurred; it always depends upon the particular circumstances.... It is quintessentially a question of fact. (Citations omitted and emphasis supplied.)

A somewhat more restricted view was expressed in *Reel Enterprises v. City of LaCrosse,* 146 Wis.2d 662, 431 N.W.2d 743 (1988), involving an alleged *de facto* taking by a municipality in connection with activities preliminary to the enforcement of floodplain controls. After reviewing the apposite local case law the Court stated:

> We conclude from these precedents that the pertinent law of taking is as follows: In the absence of its physical occupancy or possession, private property can be taken for public use only by state, county or municipal action which imposes a legally enforceable restriction on the use of the property. If a legally enforceable restriction is imposed on that use, then a taking occurs only if the restriction deprives the owner of all, or practically all, of the use.

In *Petition of 1301 Filbert Ltd. Partnership,* 441 A.2d 1345 (Pa.-Commw., 1982), involving claimed destruction of the commercial viability of hotel property, the Court said:

> . . . Where a property is designated for formal condemnation pursuant to a planned, prospective public improvement, adverse interim consequences caused to the property by the prospect of condemnation will not constitute a de facto taking unless those interim consequences are that *the owner is deprived of the use and enjoyment of the property,* or is subjected to the loss of the property before formal condemnation can provide compensation. If there has been such an interim deprivation of use, or exposure to loss, then the principle of de facto taking becomes applicable to accelerate the time when the governmental authority must make compensation. (Emphasis added.)

Sproul Homes of Nevada v. State, ex rel. Department of Highways, 611 P.2d 620 (Nev., 1980), was an inverse action charging that precondemnation activities of the Nevada Department of Highways had effected a *de facto* taking of its properties. In commenting on the factors necessary to establish a compensable taking, the Supreme Court of Nevada said: "Clearly, not every decrease in market value as a result of precondemnation activity is compensable. Nevertheless, when the precondemnation activities of the government are *unreasonable* or *oppressive* . . . the owner of the property may be entitled to compensation." (Emphasis supplied.)

Employing similar language the same Court said in *City of Sparks v. Armstrong,* 748 P.2d 7 (Nev., 1987): "Although the mere planning of a project is generally insufficient to constitute a taking, when precondemnation activities of the government become *unreasonable or oppressive . . . then the property owner is entitled to compensation.*" (Emphasis supplied.)

Allen Family Corporation v. City of Kansas City, Mo., 525 F.Supp. 28 (W.D.Mo., 1981), was an action charging that Kansas City's dissemination of plans to construct a park in an area encompassing plaintiff's land constituted a *de facto* taking thereof. In addressing the question of what constitutes such a taking, the Court said:

> . . . Initial steps authorizing condemnation, even if such steps result in a decline in land values, do not constitute a taking requiring compensation to be given to the landowner. In order for governmental action short of acquisition to constitute a taking, its effects must be so complete as *to deprive the owner of all or most of his interest in the land.* (Emphasis added.)

City of Brookings v. Mills, 412 N.W.2d 497 (S.D., 1987), was an action alleging that plaintiff's properties, targeted for an airport expansion project, had been the subject of a *de facto* taking. Commenting that the question presented was one of first impression in South Dakota, the Supreme Court proceeded to an extensive review of the case law of other jurisdictions relative to such takings, and on the basis thereof, suggested a fourfold test to be used, as follows:

> 1) Is condemnation *inevitable?*
> 2) Has the property suffered a *substantial loss of ability to generate income* and *substantial loss of marketability?*
> 3) Was the loss in income generation and marketability a *proximate result of* the *government's actions?*
> 4) Is the *landowner facing a threatened loss of the property* due to the property's inability to generate sufficient income to pay taxes and/or operating expenses? (Emphasis by the Court.)

In *Littman v. Gimello (supra),* also involving a comprehensive review of apposite case law, the Court enumerated the factors that are persuasive in the determination of a taking, as follows:

> . . . First and foremost, *extraordinary delay* or other unreasonable conduct on the part of the condemning authority may give rise to a taking claim. . . . In addition, the *imminence of condemnation* may also help to establish a taking claim [and] the *severity of the injury and hardship* to the property owner is yet another factor to be considered. (Emphasis supplied.)

Thus, it is seen that there is no one test nor any one legal footrule that is determinative of when and under what circumstances a *de facto* taking can be said to occur. Instead, the courts have employed varying tests, and the matter now for consideration is what they have in common.

Synopsis

First and foremost the courts seem to be largely in agreement that a taking occurs when the facts establish that the owner has been *substantially deprived of the beneficial use and enjoyment* of his property. Such substantial deprivation of beneficial use and enjoyment does not occur, as has been seen, when, because of the threat of condemnation, there is a decline in the market value of property or the owner suffers loss of financing or economic opportunity. These are treated as mere incidents of the ownership of property. However, as has also been seen, substantial deprivation of beneficial use does occur when the owner of commercial property loses rental income to such extent that he faces the loss of his property before condemnation takes place.

Because there are no hard and fast rules as to what does or does not constitute a *substantial* deprivation of the beneficial use and enjoyment of property, it follows that the cases are entirely fact dependent. As previously pointed out herein (*supra*), the courts have stressed that a case-by-case approach is to be adopted in the determination of whether a *de facto* taking has occurred. While recognizing this to be so, certain common threads can be identified. These include the following: (1) The *inevitability of condemnation* is deemed an important factor. (2) The existence of *unreasonable delay* and the *severity of the hardship* thereby imposed is another important factor. (3) A showing of *oppressive* or *unreasonable* precondemnation conduct on the part of the condemning authority is still another important factor. And, (4) a showing of *physical invasion* or *direct legal restraint* on the use of property can be a controlling factor. *All* of these are to be taken into consideration.

However, the ultimate factor to be considered by the courts is whether there has been an abuse of the power of eminent domain. In resolving this question, the courts must strike a *delicate balance* between upholding orderly condemnation procedures and according protection to rights in property that are guaranteed by the Federal and State Constitutions.

APPENDIX

BIBLIOGRAPHY

NICHOLS ON EMINENT DOMAIN (3d ed.), Vol. 4, § 12B. 17[6]; Vol. 7A, §§ 14.02[1]–14.02[2].

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APPLICATIONS

As a result of pressure to design new transportation facilities and redesign exisitng systems so as to use space more effectively, the transportation planning process and precondemnation impacts on roadside land are extensive. When planning and precondemnation activities impinge excessively or unreasonably on the use and development of private property, current legal doctrine recognizes that such activities may constitute a "taking" of property for public use.

The foregoing research should prove helpful to attorneys, planners, appraisers and administrators representing transportation agencies or other governmental bodies responsible for land acquisition or environmental protection programs, as well as private sector professionals in the fields of planning, land acquisition and eminent domain law.