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LEGAL RESEARCH DIGEST

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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: 21 facilities design, 54 operations and traffic control, 55 traffic flow, capacity and measurements, 70 transportation law (01 highway transportation)

Supplement to

Liability of the State for Highway Traffic Noise

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 highway law. This report supplements and updates a paper in Volume 2, Selected Studies in Highway Law, entitled "Liability of the State for Highway Traffic Noise," pp. 936-N1 to 936-N20. This paper will be published in a future addendum to SSHL.

Volumes 1 and 2, 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. The text now totals some 4400 pages, comprising, in addition to the original chapters, 87 papers of which 38 are published as supplements and 29 as new papers in the SSHL; additionally, 11 supplements and 9 new papers appear in the Legal Research 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 the TRB at a cost of $145.00 per set.

APPLICATIONS

The foregoing research should prove helpful to right-of-way officers and attorneys in assessing and defending noise damage claims by affected property owners. Facility design and location engineers will also benefit by being better informed about the consequences of actions which could cause liability for the highway agency. Finally, traffic engineers may also find, in this research, information bearing on the improvement of traffic operations.

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Supplement to

LIABILITY OF THE STATE FOR HIGHWAY TRAFFIC NOISE

SUPPLEMENTARY MATERIAL

Editor's note: Supplementary material to the paper "Liability of the State for Highway Traffic Noise" is referenced to topic headings therein. Topic headings not followed by a page number relate to new material.

INTRODUCTION (p. 936-N1)

Prior to review of the recent cases in this supplementation paper, a brief word in respect to matters considered in the original paper is deemed in order.

It was seen in the original paper that the case law relating to highway traffic noise grows seminally out of the body of case law relating to liability for railroad noise. The rapid growth and expansion of the railway systems during the 1800s brought to the public consciousness the injury or damage from noise, soot, dust, vibrations, etc., inseverable from railroad operations. In response thereto, beginning in 1870, certain of the states began the process of amending their constitutions to include compensability for "damaging" as well as "taking", and most of the states admitted into the Union after 1870 adopted the "taken or damaged" provision in their constitutions.

However, the matter no sooner reached the courts than the word "damage", as appearing in the state constitutions, was interpreted to mean "damage in the constitutional sense"; and the rule was laid down that damage in the constitutional sense did not include noise damage. Such rule was based on practical necessity, it being pointed out that if the rule were otherwise railroads could not be constructed and operated, and the courts would be clogged with an endless multiplicity of suits that would not serve the ends of distributive justice. This construction found expression in terms of the rule that injuries shared in common by the general public are *damnum absque injuria*.

Thus, the rule was established that where no part of a landowner's property is taken, noise damage from the operation of railroads is constitutionally noncompensable. An important exception was carved out in the case where noise damage is special or peculiar to an individual piece of property, and is not to be classified as an injury shared in common by the general public.

When the gasoline-powered engine came into common use at a later date, and a network of roads was established to accommodate the same, the exact same rules were given application to the injury of highway traffic noise.

However, in the case of a partial take for highway purposes, the majority of the cases took the position that the constitutional demands of "just compensation" required a different approach, and adopted the rule that evidence of highway traffic noise was admissible, not as a separate item or element of damage, but as one of the factors to be considered in determining the before and after value of property. The minority view adhered to the rule that noise damage was constitutionally noncompensable and hence inadmissible even in the case of a partial take, unless it could be shown that the injury was special or peculiar to the property proceeded against, and not a general injury shared in common with other landowners.

With this encapsulated outline of prior case law in mind, attention is now turned to a consideration and review of the recent cases in this field.

ADMISSIBILITY OF EVIDENCE OF NOISE DAMAGE

A search of the recent case law does not disclose any case in which a claim for highway noise damage was presented by a claimant no part of whose land was taken for a highway purpose. The cases hereinafter set forth hence deal exclusively with the question of the admissibility of evidence of traffic noise as bearing on the award for severance damages, in the case of a partial take of land for highway use. As hereinabove indicated the prior case law reached divided results on this question.

The General Damage Versus Special Damage Distinction

The cases that follow next deal with the general damage/special damage dichotomy.

State, Department of Transportation v. Van Willet, Jr., 383 So.2d 1344 (La.App. 1980), stands for the proposition that evidence of traffic noise resulting from a partial take is admissible without a showing that the injury suffered was special or peculiar to the property taken.

This case involved a partial take for highway purposes of properties lying within a residential subdivision. The trial judge disallowed evidence of traffic noise as bearing on severance damage on the ground that such noise was an injury shared in common with other landowners in the subdivision and therefore was not compensable. In reversing such ruling the Appellate Court stated:

> As we understand the trial judge he concluded that although the properties owned by defendants may have been diminished in value by reason of increased noise, traffic, etc., such diminution in value was noncompensable because the actual takings from defendants' properties did not cause such diminution in value, rather it was occasioned by reason of the overall effect of the project. In sum he concluded that such damages were damna absque injuria. We find this determination of the learned trial judge . . . to be erroneous and contrary to the decision of the Supreme Court in *State of Louisiana, Through the Department of Highways v. Garrick*, 260 La. 340, 256 So.2d 111 (La. 1971). In *Garrick*, supra, the court considered the overall effect of the contemplated public work on the properties involved and determined that "noise and vibration are not damna absque injuria" and that if such condition causes a diminution in value to the remainder of properties ACTUALLY TAKEN, severance damages are allowable even though such damages are not peculiar to the complaining owner but rather are suffered by the neighborhood generally. In *Garrick*, supra, severance damages were allowed not because the remainders were damaged because of the taking of the narrow strips from the fronts of the properties (4 ½ feet and 5 ½ feet, respectively) rather because the total effect of the contemplated public work subjected the properties to increased traffic, noise and vibration which in turn depreci-

ated their value. It is important to note however, that in *Garrick*, supra, the court was careful to make a distinction between damages that will be paid when there is no taking and the damages to be paid when there is the slightest partial taking, even though in fact the damages suffered in both instances may be the same in kind and in degree. In the former no damages are allowed . . . however, in the latter instance they are compensable.

Thus the Court announced the rule that evidence of traffic noise is inadmissible where no part of property is taken, but is admissible "when there is the slightest partial taking," and that damages from noise are allowable "even though such damages are not peculiar to the complaining owner but rather are suffered by the neighborhood generally."

To the same effect see the companion case of *State, Department of Transportation v. Van Willet, Sr.*, 386 So.2d 1023 (La.App. 1980), wherein the Court stated:

> If noise and vibration due to presence of a road cause diminution to the value of the remainder of property *actually taken*, severance damages are to be awarded even though such damages are not peculiar to the complaining owner, but rather are suffered by the neighborhood generally. (Emphasis by the Court.)

It appeared in *Roman Catholic Bishop of Springfield v. Commonwealth*, 378 Mass. 381, 392 N.E.2d 829 (1979), that Interstate Route 291 had been constructed on land lying near but constituting no part of a parcel of land owned by the Roman Catholic Church, and used for high school purposes. After completion of I-291, a drainage problem arose, and in order to correct the same, the Commonwealth brought suit to condemn an easement for drainage purposes over a portion of the Church property abutting on the highway.

The Roman Catholic Bishop of Springfield filed a petition for assessment of damages to the Church property, and damages were sought both for the taking of the easement and for injury to the educational institution located thereon in the form of traffic noise from I-291. The jury returned a verdict in the amount of $119,000.

The Commonwealth appealed, seeking to limit the award to but a fraction of the amount of the jury verdict, contending that evidence of noise damage should be excluded because there was no causal connection between the taking of an easement for drainage purposes and the emanation of noise from traffic on I-291. Petitioner, on the other hand, contended that he was entitled to all damages caused by the use of I-291 because the easement was taken in connection therewith.

The Commonwealth's argument appears to have been based, in part at least, on application to the instant facts of the Massachusetts so-called "increased proximity rule," a doctrine that had long obtained in the eminent domain law of Massachusetts and was peculiar to that jurisdiction. The Supreme Judicial Court of Massachusetts, after a lengthy review of pertinent statute and case law, concluded that the increased proximity rule had been discredited and no longer constituted the law of Massachusetts.

This left more or less open the question of recovery for noise damage, the Court stating with respect thereto: "Some uncertainty remains over whether a landowner may recover all consequential damages arising from a public improvement merely because part of his land is taken therefor or whether, instead, he may recover only for those injuries which are special and peculiar to the remaining, untaken land."

As an aid to resolution of this question the Court invoked the provisions of G.L., c. 79, sec. 12, reading in part that: "[I]n case only part of a parcel of land is taken there shall be included damages for all injury to the part not taken caused by the taking or by the public improvement for which the taking is made." The Court then ruled that the statutory language compelled the conclusion that the petitioner was entitled to all consequential damages flowing from the taking without limitation as to damage special or peculiar to the remainder property, and, in so doing stated:

> We recognize that the petitioner in this case may be recovering damages for the element of noise while other persons whose land is also affected by traffic noise along Route 291 have not been compensated therefor. The line separating those persons who do and those who do not recover for this element of damage resulting from a public improvement has been fixed by the Legislature on the basis of whether any part of their land has been taken for the project.

Thus, it appears to be clear under the law of Massachusetts that evidence of noise damage is admissible without the requirement of a showing that it is special to the remainder of land partially taken for highway use.

The Colorado Cases

The case of *City of Lakewood v. DeRoos*, 631 P.2d 1140 (Colo.App. 1981), *cert. denied* (Colo. 1981), is representative of the view that evidence of traffic noise is inadmissible in the case of a partial take, unless it can be shown that the injury was special or peculiar to the property proceeded against, and not an injury shared in common with other landowners.

In this case a portion of condemnee's land was taken for the widening of a municipal street. The trial court, by an *in limine* order, precluded the condemnee from introducing evidence of damage to the remainder from increased noise, dust, fumes, etc., unless it could be shown that such damage to his property was "different in kind, not in degree, from the damage suffered by the general public" as a result of the street improvement. Special damage could not be proved, and hence evidence of noise damage was not introduced at trial.

Error was assigned on appeal in the preclusion of evidence as to noise damage, the condemnee asserting that an owner of land that is partially taken is entitled to be made whole, whether the injury inflicted is special to the property taken, or constitutes an injury suffered in common with the general public.

In rejecting this contention the Appellate Court stated that in order for an injury to be compensable "the damage to the property must affect

some right or interest which the landowner enjoys and which is not shared or enjoyed by the public generally." The Court went on to rule that in the case of a partial take for road purposes evidence of noise damage is inadmissible unless it can be shown that the damage was "special" to the remainder property; and that in order to constitute damage that is "special," the injury must be different "in kind, not merely in degree" from the noise damage that is inflicted by a highway project on the public generally.

The decision in the foregoing case was squarely in conformance with a long line of prior Colorado case law to the same effect. However, *DeRoos* appears to have been disapproved (although not *eo nomine*) by the Supreme Court of Colorado in the later case of *La Plata Electric Association, Inc. v. Cummins*, 728 P.2d 696 (Colo. 1986). This case did not involve damage from highway traffic noise, the injury in question being aesthetic damage, in the form of loss of view occasioned by the erection of an electric power line. However, the language of the Court in *La Plata*, in respect to the distinction between general and special damage, seems broad enough to extend beyond aesthetic injury to include noise damage. The facts in this case were as follows.

La Plata Electric Association, Inc., a cooperative electric association, filed a petition in condemnation to take a 50-ft easement across the middle of a tract of 19.553 acres of land owned by condemnees, for the purpose of constructing an electric power line, which would bisect the property. An award of immediate possession was granted by the district court, and commissioners were appointed to determine the amount of compensation. The commissioners returned an award of $4,844 for the easement and $5,000 for damages to the remainder of the tract. La Plata appealed, challenging only the amount of the award for severance damage.

It was apparently contended by La Plata, in the intermediate Colorado Court of Appeals (703 P.2d 592 (Colo.App. 1985)), that severance damage could not include an award for aesthetic injury except and unless it was shown by the evidence that the injury was special or peculiar to the remainder property, and not an injury shared in common with other landowners in the vicinage. The Court of Appeals accepted the argument, but found that the aesthetic damage from the power line was, in fact, special or peculiar to the remainder property, and, on the basis of this finding, affirmed the amount of severance award made below.

Certiorari was granted by the Supreme Court of Colorado, which likewise affirmed the amount of the severance damage award, but in so doing rejected the Court of Appeals' finding that the aesthetic damage was special or peculiar to the remainder property, and not an injury shared in common with other landowners. The holding of the Supreme Court was, of course, confined to the facts of the case before it (i.e., aesthetic rather than noise damage) but the language used appears sufficiently broad to include noise damage. It stated:

> . . . [W]e conclude that the very nature of a power line—which generally runs for some distance across or near various properties from which it can or must be seen—necessarily causes any adverse aesthetic effect of a power line to be experienced throughout the general community, except in special circumstances not present here. Although some property owners may suffer greater aesthetic harm or view impairment than others from the presence of the power line, this simply amounts to damage of a greater degree, not of a different kind.
>
> Instead of adopting the approach taken by the court of appeals, we conclude that the general damage/special damage distinction has no validity in the present context, that is, when the reduction in property value results from a taking of a portion of the land held by the property owner. *In such circumstances, we hold that a property owner should be compensated for all damages that are the natural, necessary and reasonable result of the taking.* (Emphasis supplied.)

Thus, assuming that no valid distinction can be drawn between aesthetic damage and noise damage insofar as the general/special damage dichotomy is concerned, Colorado may now be counted among the group of jurisdictions adhering to the view that proof of special damage is not a prerequisite to the admissibility of evidence of traffic noise as bearing on the before and after value of property proceeded against in eminent domain.

The recent cases, taken and viewed together, thus appear to stand for the proposition that, in the case of a partial take, evidence of traffic noise is admissible without the prerequisite of proof that the damage was special or peculiar to the remainder property.

Separability of Proof of Noise Damage

A limited amount of case law in the State of Maryland appears to take the position that where noise damage caused by traffic on the portion of land taken for a highway project can be separated from noise damage attributable to the entire highway project, the same may be required as a condition precedent to the assessment of severance damages.

State Roads Commission v. Brannon, 58 Md.App. 357, 473 A.2d 484 (1984), was an action to condemn a strip of land from residential property for purposes of highway construction. The trial judge in the condemnation proceeding refused to comply with the Commission's request for an instruction reading that "under the law of Maryland, no damages are allowable with regard to the normal dust and noise incidental to the construction of a highway or its use." On appeal from a final judgment in favor of condemnees in the amount of $23,500, the Commission assigned as error (*inter alia*) the court's failure to give the proffered instruction.

In the appellate proceeding in the intermediate Court of Special Appeals, the State Roads Commission urged adoption of the rule (previously discussed herein) that evidence of noise damage is inadmissible when the injury is one shared in common with the general public. In refusing to adopt this rule the Court relied on applicable statutory language, pointing out that: "Section 12-104(b) of the Real Property article mandates recompense for '*any* severance or resulting damage to the remaining land by reason of the taking and of future use by the plaintiff of the part taken.' " (Emphasis by the Court.) The Court went on to state that "damage from highways—such as noise, pollution, and dust—need not be categorically excluded from consequential damages simply because they are a sort of

detriment suffered by the public generally." However, the Court then announced the rule that, wherever possible, noise damage from the entire project should be separated from noise damage from the land taken, and compensation determined accordingly. It stated:

> . . . Depending on the evidence adduced at trial, the consequential damage caused by the part of the public project on the condemned portion may or may not be separable from detriment suffered by the public generally as a result of the entire project. If separable, the landowner should be compensated for all damages done to his remainder *by the part of the public project on the condemned portion. . . . If inseparable, the landowner should be compensated for the specific damage done to his remainder by the entire project.* (Emphasis added.)

The significance of this approach is that the condemnee is entitled to be compensated for noise damage whether such damage is found to be separable or nonseparable, the only difference being that in the case of separability the accountable damage derives from that part of the public improvement situate on the land taken, and in the case of nonseparability the damage derives from the public improvement as an entire project.

Appeal from this ruling was prosecuted by the State Roads Commission to the Court of Appeals. In *Brannon v. State Roads Commission*, 305 Md. 793, 506 A.2d 634 (1986), the Maryland court of last resort reversed, but in so doing carefully limited its ruling to a finding that the issue of separability was not raised by the evidence adduced at trial, and because the issue was not properly raised by the evidence, the same was not properly before the intermediate court. The opinion of the Court of Appeals contained no criticism of the separability doctrine, as announced by the intermediate appellate court, and hence left unchallenged the lower court's ruling in respect thereto.

Should counsel for highway departments in states allowing recovery for general noise damage wish to take the position that, wherever possible, noise damage from the entire project be separated from noise damage from the land taken, and compensation confined to the latter, the decision of the Maryland Court of Special Appeals in *Brannon* might prove useful, it being the only case found that supports such argument and position.

Admissibility in Respect to Residential Property

Recovery for noise damage has sometimes been allowed in the case of properties placing a premium on quietude, such as churches, schools, and hospitals, it being obvious that the beneficial use of such properties is adversely affected by the noise factor.

The question whether recovery for highway traffic noise should be limited to such types of special use properties was presented in *State, by the Commissioner of Transportation v. Carroll*, 234 N.J. Super. 37, 559 A.2d 1381 (1989).

This case involved the partial take of residential property for the purpose of highway construction. At issue, *inter alia*, was the question of the admissibility of evidence of noise damage due to the taking. It appeared that prior New Jersey case law had allowed recovery for noise damage in cases involving school properties, but the question was left open as to whether evidence of noise damage was admissible in the case of property used solely for residential purposes. The State took the position that recovery for noise damage should be limited to "special use" properties and not extended to include properties used for purely residential purposes. In rejecting this contention the Court stated:

> What is a "special use"? A public use? A private use? An expensive use? An environmentally attractive use? A non-conforming land use? And what is more special than the use of a home? Home, for most of us, is the place to which we always return, physically or emotionally, the setting indelibly fixed in our memories. It is much more than "special"; noise, potentially, can destroy its use. No good reason exists to deny the right of compensation to a homeowner whose property is the subject of a partial taking when the use of the remaining property on which his home is situate is damaged by increased noise. Our present society, as it grows in size and complexity, is constantly and increasingly assaulted by noises of all kinds, noises which can seriously interfere with health, comfort and the enjoyment of property. When the State, by virtue of its power of eminent domain, adds its own assault to those already in place, it should pay compensation as one means of atonement. . . .
>
> We hold that noise damages may be compensable in a condemnation action, and are not restricted to those whose property is put to "special uses."

Although recovery has thus been allowed in the case of property put to a residential use, a different result has been reached in the case of property used for purely recreational purposes.

Admissibility in Respect to Recreational Property

In *Division of Administration, State of Florida v. Frenchman, Inc.*, 476 So.2d 224 (Fla.App. 1985), a strip of land was taken for the widening of an existing highway that ran contiguously with the border of condemnee's property, used exclusively for golf course purposes. Prior to the taking the strip had been covered with trees and shrubs that acted as a buffer against traffic noise from the adjacent highway. In disallowing condemnee's claim of damage from increased traffic noise, the Court stated:

> . . . *The golf course appears to have remained entirely playable after the taking and construction.* A taking of part of a property that brings heavy traffic to the very walls of a church or a school located on the remainder of the same property may constitute a taking of the remainder or a portion thereof; *a similar taking where a recreational facility occupies the property does not have the same legal effect.* . . . The jury should not have been permitted to consider damages claimed for the increased effects of traffic visibility, noise, fumes and dust and a decline in aesthetics following the taking of the buffer area.(Emphasis added.)

Thus the Court took the position that although evidence of traffic noise is admissible in the case of a partial take of property used for church or

school purposes, evidence of highway noise damage is inadmissible in the case of a partial taking of land the remainder of which is used for purely recreational purposes that are not significantly affected by an increase in noise.

Evidence of Noise Damage Inadmissible as Separate Item or Element of Damage

The courts appear to be agreed that evidence of noise damage is inadmissible as a separate item or element of damage. Evidence of injury from traffic noise is admissible only as one of the several factors (such as fumes, dust, vibration, loss of privacy) that are to be considered in determining the before and after value of property made the subject of a partial take. The following cases illustrate the application of this settled rule.

State ex rel. Missouri Highway and Transportation Commission v. Mosley, 697 S.W.2d 247 (Mo.App. 1985), involved a partial take of residential property for the extension of an existing highway. Prior to such taking condemnee's property did not abut a public highway, but after the taking the roadway extended through his property to connect with roads leading to a highly developed area. Defendant claimed as an element of severance damage "loss of privacy and security." The trial court allowed this claim, and the Highway and Transportation Commission appealed therefrom. The Appellate Court, in upholding the action of the lower court, stated:

> The Commission's sole point on appeal asserts trial court error in the admission of evidence relating to diminution in value of the condemnee's remaining property due to loss of security and privacy. Commission argues that such losses are not compensable in a condemnation proceeding because, *like increased noise and traffic*, they are general damages, shared in common by all. Commission relies upon the principle enunciated in *State ex rel. State Highway Commission v. Galeener*, 402 S.W.2d 336, 340 (Mo., 1966), "that noise and speed, increased traffic and their resulting inconveniences are neither elements of damages nor of benefits and they are not proper matters of proof or for the jury's consideration."
>
> Commission overlooks that the *Galeener* court went on to say that although inconvenience was not an element of compensation, "it may with other factors affect future use and therefore market value. . . ." The interpretation of this language in subsequent cases leads to the conclusion that such matters as *noise, traffic* . . . and, in this case, loss of security and privacy, *while not individual, separable elements of compensation in and of themselves, may be considered as factors which contribute to a diminution of market value. . . .*
>
> In ruling upon the Commission's objections to any evidence relating to loss of security or privacy, the experienced trial judge in this case was obviously mindful of the distinction between consideration of such items as *separate individual elements of damage and as mere factors combining to cause a diminution of market value.* He ruled "as a basis for consequential damage, I'm going to allow it, . . . but as far as any specific damages, I will sustain the objection." In presenting the evidence defendant scrupulously adhered to this distinction. His expert witness refused to assign any specific amount of reduction in the price a buyer would be willing to pay by reason of such matters as loss of privacy or security. Rather, he "lumped" them all together and concluded that a real estate developer would pay 15% less than he would be willing to pay for the remaining land if left in its present condition. (Emphasis supplied.)

Although the language of the Court in respect to traffic noise was, in this case, not necessary to the result reached, the same constitutes a clear and considered statement of the prevailing rule governing admissibility of evidence of traffic noise as a factor to be considered in determining severance damages.

Arkansas State Highway Commission v. Cottrell, 9 Ark.App. 359, 660 S.W.2d 179 (1983), was an action brought to condemn a strip of land from three adjoining residential properties, for the purpose of constructing a service road to connect with an existing highway being widened from two to four lanes. It appeared that in clearing the land so taken for the construction of the service road, that a belt of large trees was removed, which shelterbelt of trees had acted as a buffer against highway traffic noise. The State Highway Commission appealed from a ruling of the trial judge denying the Commissioner's *in limine* motion to exclude evidence of increased traffic noise due to the removal of the trees.

In sustaining the action of the trial court, the Court of Appeals pointed out that:

> The appellees in the case at bar did not attempt to assign a dollar amount to damage attributable to increased noise which they claimed to experience after appellant cut down large trees on appellees' properties. Instead, the appellees offered the evidence as one of many factors which a willing buyer would consider before purchasing appellees' properties. . . .
>
> In the instant case, the trial court gave a limiting instruction to the jury to consider the cutting of the appellees' trees and any resulting noise only as factors a willing buyer would consider when purchasing their properties. Under the circumstances of this case, we find the court did not err.

See also *State ex rel. Miller v. J. R. Norton Company*, 154 Ariz. 50, 760 P.2d 1099 (1988), involving a partial take of land for highway purposes, wherein the Court ruled that although evidence of traffic noise could not be considered as a separate item or element of damage that "evidence of traffic noise may be admitted, in a condemnation proceeding, not as a distinct element of damages, but as one of several factors that an ordinary buyer would consider in determining the value of the remaining property."

Thus the recent cases uphold the long-standing rule that in the determination of severance damages evidence of traffic noise, while inadmissible as a separate item or element of damage, is admissible as one of the factors that would be taken into consideration by a prospective purchaser of the remainder of land taken for highway purposes.

Inadmissibility of Evidence of Personal Injury

State v. Williams, 386 So.2d 426 (Ala. 1980), was an action to condemn for highway construction purposes 7.2 acres out of a tract of 48 acres

on which the landowner lived and conducted farming operations. Over objection the landowner was permitted to testify at trial that, because of a preexisting lung condition, he would be forced to leave his home property as a result of the fumes emitted by diesel-powered truck traffic using the newly constructed highway. In holding that the allowance of such testimony constituted reversible error on the part of the trial court, the Supreme Court of Alabama ruled that although evidence of fumes and traffic noise was admissible in a condemnation proceeding as a factor to be considered in determining the before and after value of property proceeded against, evidence thereof, as relating to personal injury, was inadmissible. The Court stated that in an eminent domain proceeding "[t]he object of the taking is the real property; and, thus, evidence of damages is limited to those factors that reasonably and directly affect market value of the parcel taken, with due regard for the damage or enhancement in value of any remaining parcel."

CONCLUSION

The foregoing review of the recent case law renders the following conclusions permissible:

1. Because no recent case has been found dealing with a claim for noise damage unaccompanied by a partial taking, the rule set forth in the original paper, that an abutting landowner cannot recover for noise damage absent a showing of injury special or peculiar to his property, appears to stand unimpaired.
2. The recent case law subscribes to the view that in the case of a partial take evidence of traffic noise is admissible without a showing that the damage was special or peculiar to the remainder property.
3. A small amount of recent case law appears to take the position that where noise damage attributable to the portion of land taken can be separated from noise damage attributable to the entire project, such separation should be accomplished, and the damages apportioned accordingly.
4. Recent case law takes the view that an award for noise damage is not limited to properties placing a premium on quietude, such as churches, schools, and hospitals, but also extends to and includes property used for residential purposes.
5. However, it has also been held that evidence of noise damage is not admissible in the case of property the remainder of which is used for purely recreational purposes.
6. Recent cases uphold the long-standing rule that evidence of traffic noise is not admissible as a separate item or element of damage, but is admissible as one of the several factors to be considered in the determination of the before and after value of property proceeded against in eminent domain.
7. Finally, it has been held that evidence of personal injury due to increased traffic flow is inadmissible in a proceeding to effect a partial take of land for highway use.

This concludes the review of case law handed down since the first supplement to the original paper was researched and written.

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