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Recovery for Condemnation Blight Under Inverse Law

A report prepared under ongoing NCHRP Project 20-6, "Right-of-Way and 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. Larry W. Thomas, TRB Counsel for Legal Research, is principal investigator, serving under the Special Technical Activities Division of the Board.

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 special problems involving right-of-way acquisition and control, as well as highway law in general. This report deals with the legal aspects of condemnation blight.

This paper will be included in a three-volume text entitled, "Selected Studies in Highway Law." The Transportation Research Board published Volumes 1 and 2 in 1976 and Volume 3 in 1978. Together with the first supplement published in 1979, they include 45 papers and more than 2,000 pages. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

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INTRODUCTION

The term "condemnation blight" is a label that has gained currency in the courts in recent years to describe the effect of delayed condemnation on the value of properties in the path of an improvement. It has reference to the situation where the threat of condemnation causes both sales and rental markets to be seriously depressed while the burden on the owner of maintenance, mortgage payments, insurance, and taxes continues without relief. Such situation has on occasion had disastrous effects on real property and rights therein, as in certain urban renewal projects where building permits were denied, property maintenance for all practical purposes ceased, police protection lagged, vandalism set in, inhabitants moved away, and the affected area turned into a virtual wasteland.

In recent years property owners have begun to turn to inverse condemnation for protection against such aggravated damage, and during the last decade a handful of significant cases has been decided in this field. It is with the results in these cases that this paper is concerned.

Before turning to such cases, however, it is important to note that the inverse cases grow seminally out of the long-standing problem in eminent domain of whether to include or exclude enhancement or diminution in value brought about by the influence of a public improvement. It is necessary, as a background to discussion of the inverse law in the premises, to examine briefly the handling of this problem in direct or *de jure* condemnation.[1]

EXCLUSION OF INCREASE OR DECREASE IN VALUE DUE TO A PUBLIC IMPROVEMENT

It is more often the case than not that in the condemnation of lands for a public improvement a considerable period of time elapses between the initial stages of planning and the legal date of taking (i.e., issuance of the summons or whatever time is prescribed by local law). During this period the public gains knowledge of the project, and its assessment of the impact thereof is reflected in the marketplace. Lands in the path or vicinity of the improvement may increase or decrease in value due to the influence of the project.

The problem of whether to allow or disallow enhancement or diminution in value so caused has had a long and chequered history in the courts.[2] However, in recent years certain rules have emerged that are now accorded virtually uniform application insofar as valuation in *de jure* condemnation is concerned.[3]

Summarized briefly, such rules are as follows.

Enhancement in Value

1. Where it is reasonably probable from the outset of a public improvement that certain lands will be condemned therefor, all enhancement in value of such lands caused by the project is denied.

2. Where the improvement is subsequently enlarged, the question is presented whether lands later taken for the enlargement are entitled to increment in value resulting from the original project. Resolution of this question is arrived at by the application of the so-called "scope-of-the- project" test. This test provides that, if it appeared probable from the outset of the original project that it would be enlarged and lands adjacent thereto taken for the enlargement, no increment in value attributable to the original project can be allowed owners of lands subsequently taken to effect the enlargement. And conversely, if the enlargement is to be viewed as an independent project not conceived as part of the original improvement, the owners of lands later taken are entitled to the enhancement in value resulting from the original improvement.

Diminution in Value

1. The probability of inclusion rule set forth in (1), above, is given application in the cases involving diminution in value; i.e., where it is reasonably probable from the outset of a public improvement that certain lands will be condemned therefor, diminution in value due to the improvement is excluded in valuation.

2. However, a significant difference obtains in the depreciation cases with respect to the applicability of the rule set forth in (2) above. That is to say, the courts eschew application of the "scope-of-the-project" test, which, if applied, could result in requiring the property owner to suffer decline in value where enlargement is viewed as not having been reasonably foreseeable at the commencement of the project. The depreciation cases proceed on the theory that it would be highly unjust to allow the government to take advantage of a diminution in value brought about by its own activities. Thus, the central question in such cases is whether the decline in value stems from the original project. If it is found that deterioration in value is so caused, the same is excluded in valuation. This is accomplished, not by backdating the date of taking, but by valuing the property at the time of taking as if the debilitating threat of condemnation had not occurred.

APPLICATION OF RULE EXCLUDING DEPRECIATION

City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E.2d 52 (1963), is the most frequently cited case giving exposition to the rule that depreciation in value caused by an improvement is to be excluded

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as an element of the valuation process. This was an action to condemn property located within an urban renewal area. An ordinance of the City Council of Cleveland authorizing the urban renewal project had been passed some three years prior to the institution of suit to condemn the subject property. During this period the City had employed a policy of piecemeal acquisition and demolition of buildings within the project area, with the result that the entire area became engulfed in serious "condemnation blight."

The question was presented on appeal as to the validity of instructions of the lower court requiring the jury to ascertain value as of the time of trial without exclusion of the depreciation caused by the project. In ruling the instructions erroneous, the Court of Appeals said:

> The jury under the instructions . . . determined the fair market value of appellant's property as it stood at the time of trial, virtually abandoned, vandalized and badly deteriorated, in the midst of a wasteland. Moreover, it was permitted to view the premises in such a dilapidated state for the purpose of being able to better understand and follow the evidence presented in court describing such condition and surroundings. But the fact remains that the property described by the testimony and viewed by the jury was totally different in condition and surroundings than the property that existed before the City of Cleveland had taken any affirmative steps to effectuate the St. Vincent Renewal Project. Mrs. Carcione's property at that time consisted of buildings in reasonably good condition, fully rented, and located in a built-up urban area with business activities and living conditions in keeping with the economic status of those residing in the area. The mere recitation of these bare facts, it seems to us, demonstrates that the evaluation of her property as it was at the time of the trial was unjust to her. Her property had undergone radical changes for the worse caused by activities carried on to further the very project which prompted the City of Cleveland to appropriate it. Yet, under the procedures pursued in the trial court, the appellant was compelled to suffer a substantial financial loss while the City was permitted to obtain her property at a much depreciated value. . . .
>
> Under the facts in this case and the law applicable thereto, we conclude that Mrs. Carcione was entitled to an evaluation of her property irrespective of any effect produced upon it by the action of the City in carrying out the St. Vincent Urban Renewal Project. Hence, the standard for measuring the compensation to be awarded her should have been the fair market value of it as it was immediately before the City of Cleveland took active steps to carry out the work of the project which to any extent depreciated the value of the property.

State Road Department v. Chicone, 158 So. 2d 753 (Fla. 1963), was an action to condemn lands for the construction of Interstate-64. It appeared in this case that the State Road Department of Florida first made public announcement of the proposed alignment of I-64 through the City of Orlando in 1957. The initial proceedings to acquire right-of-way for the construction of this segment of I-64 were instituted in 1957, and suit to condemn the subject lands was brought in 1960. Over objection, appraisal testimony was given by a witness for the State Road Department which discounted the value of the property as much as 20 percent, to reflect depreciation in value caused by the imminence of condemnation. In holding that reversible error was committed in permitting evidence of value to be given that was based on depreciation caused by the highway project, the Supreme Court of Florida stated:

> The rule advocated by the Department and followed in the trial in the instant case, would permit a condemnor to depreciate property values by a threat of condemnation then take advantage of the depressed value which results by paying the landowner the depreciated value.
>
> This would amount to a confiscation of the owner's property to the extent of the depreciation in value. All of our laws, organic and statutory, are intended to prevent this happening.
>
> . . . we conclude that the value of property at the time of taking as depreciated or depressed by the prospect of condemnation is not a proper basis for measure of compensation for the property taken.
>
> Effect can easily be given to this conclusion . . . by holding simply, as we do here, that compensation shall be based on value of the property as it would be at the time of the taking if it had not been subjected to the debilitating threat of condemnation and was not being taken.[4]

It will not serve a useful purpose to multiply authorities adhering to the now uniformly accepted view that evidence of depreciation due to an improvement is to be excluded in valuation. The following representative cases suffice to illustrate the application of the rule:

Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 35 L.Ed. 2d 1, 93 S.Ct. 791 (1973).

United States v. Virginia Electric and Power Company, 365 U.S. 624, 5 L.Ed. 2d 838, 81 S.Ct. 784 (1961).

Klopping v. City of Whittier, 8 Cal.3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972).

State v. Sovich, 253 Ind. 224, 252 N.E.2d 582 (1969).

City of Baltimore v. United Five and Ten Cent Stores Inc., 250 Md. 361, 243 A.2d 521 (1968).

Lipinski v. Lynn Redevelopment Authority, 355 Mass. 550, 246 N.E.2d 429 (1969).

Montana State Highway Commission v. Jacobs, 150 Mont. 322, 435 P.2d 274 (1967).

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).

Huntington Urban Renewal Authority v. Commercial Adjunct Co., 242 S.E.2d 562 (W.Va. 1978).

Thus, it is seen that in *de jure* condemnation the property owner is protected against blight and that the same is handled as an evidentiary matter, i.e., by a ruling excluding at trial evidence of depreciation due to the improvement and causing the property to be evaluated at the time of taking without regard to the value-depressing precondemnation activities of the condemnor. It is the generally held view in the courts today that the measure of protection so provided is fully adequate to safeguard the property owner's interests and satisfy the constitutional demands of payment of "just compensation."

Whether an equal measure of protection is provided the property owner who elects to bring suit in inverse condemnation is the question next for consideration.

RECOVERY FOR CONDEMNATION BLIGHT UNDER INVERSE LAW

Because in direct condemnation depreciation is excluded as part of the valuation process, the courts are not called upon to decide the question whether the precondemnation activities of the condemnor constituted a *de facto* taking of the property *sub judice*. Resolution of this question is not necessary to the result.

In the inverse cases, however, the courts are directly confronted with the question whether or not the precondemnation activities of the condemnor were of such nature as to constitute a taking.[5]

As previously stated, the cases dealing with "condemnation blight" as a taking are of recent vintage. Although a number of earlier cases involved the question of whether a particular activity or combination of activities operated to effect a *de facto* taking, the cases turned on their own sets of facts and no firm rules emerged therefrom indicating what activities will and what activities will not constitute a compensable taking.[6]

In the blight cases, however, most of which were decided in the last decade, the appellate courts began to meet squarely the problem of enunciating fundamental rules intended to be dispositive of the question when a taking occurs. Although there is no uniformity of approach in the decided cases (in fact there is wide variety of approach), certain clear rules have begun to emerge.

These rules are illustrated by the decisions in five highly significant cases. These cases, taken together, may be said to represent the whole spectrum of judicial approach to the problem.

These decisions will be considered separately and the rules announced therein ascribed to the jurisdiction wherein decided. First for consideration is the rule announced by the New York Court of Appeals.

New York Rule

The decision in *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), was squarely concerned with the question of when and under what circumstances a *de facto* taking may be said to occur. The Court phrased the question *sub judice* as follows:

> This is a case of first impression which requires that we consider in detail the somewhat amorphous and apparently perplexing concept of *de facto* appropriation in the hope of clearly defining and firmly establishing its perimeters. Specifically, we have before us the question of whether there can be a *de facto* taking *absent a physical invasion or the imposition of some direct legal restraint*. (Emphasis supplied.)

The facts giving rise to this issue before the New York Court of Appeals were as follows.

The City of Buffalo instituted a redevelopment project which included within its boundaries real property owned by the J. W. Clement Company. Clement was one of the major publishers of the world, printing annually over one hundred million paperback books and high volume magazines such as *Time* and *Reader's Digest*. Enormous printing machines were located on its property to handle the volume of its business. Clement was first notified in 1957 that its property would be taken for the redevelopment project, and by 1963 it had effected the relocation of its machinery to new premises. In the condemnation proceeding, brought by the City in 1968, the trial court found that, because of the City's protracted delay in carrying out the project, the redevelopment area had fallen into decay and that, by 1963, Clement's real property had become "unsalable and unrentable."

It ruled, therefore, that a *de facto* taking of Clement's property had been effected as of April 1, 1963. The Appellate Division affirmed, emphasizing that the property in 1963 could neither be sold nor rented and that the reason for the market's collapse was the overhanging threat of condemnation.

The Court of Appeals reversed. It said generally in respect to *de facto* takings that:

> [T]he concept of *de facto* taking has traditionally been limited to situations involving a direct invasion of the condemnee's property or a direct legal restraint on its use . . . and to hold that there can be a *de facto* appropriation absent a physical invasion or direct legal restraint would . . . be to do violence to a workable rule of law.

It described the components of a taking as follows:

> [A] *de facto* taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property.

And in respect to the effect of the announcement of condemnation it said:

> [T]he mere announcement of impending condemnation, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a taking so as to warrant awarding compensation.

Applying these rules to the facts of the case, the Court found that a *de facto* taking had not occurred.

The condemnee was not left without a remedy, however. The Court went on to draw a distinction between acts constituting a *de facto* taking and precondemnation activities that cause a mere diminution in value, characterizing the latter as "true condemnation blight." It said that a condemnee suffering from such blight is entitled to have its property evaluated "as if it had not been subjected to the debilitating effect of a threatened condemnation," and stated that the Clement property

"should be evaluated not on its diminished worth caused by the condemnor's action, but on its value except for such 'affirmative value-depressing acts' of the appropriating sovereign." (This, of course, amounts to no more than a statement of the general rule—previously discussed herein —that the condemnee in a *de jure* proceeding is not required to suffer depreciation in value caused by acts of the condemning authority.) By the application of this general rule Clement was accorded relief, the case being remanded for the introduction of evidence pertaining to value prior to commencement of the value-depressing activities of the City of Buffalo.

The conceptualization of a *de facto* taking thus announced in *Clement* is that: A *de facto* taking cannot occur absent a physical invasion of property, or the imposition of some direct legal restraint thereupon.

That such rule is a stringent one is undeniable.[7] However, the property owner who cannot show a *de facto* taking under the strict *Clement* rule is protected so long as a *de jure* proceeding is instituted by the condemning agency. This is for the reason that depreciation is excluded in a *de jure* taking to the same extent as in a *de facto* taking, the only significant difference in result between the two being that interest runs for a longer period of time in the case of a *de facto* taking than in the case of a *de jure* taking.

Although the New York rule thus appears to work well enough in the situation where *de jure* condemnation in fact takes place, what of the situation where *de jure* condemnation has not been instituted and the property owner cannot show physical invasion or direct legal restraint? Must he suffer the ravages of blight without remedy or relief under New York law?

This critical question was squarely before the Court in *Fisher v. City of Syracuse,* 78 Misc. 2d 124, 355 N.Y.S.2d 239 (1974). This was a consolidated case involving properties similarly affected by an urban renewal project of the City of Syracuse. The properties of both plaintiffs were located within the renewal area, and the only difference between their respective situations was that the property of the one plaintiff had been designated for condemnation and the property of the other plaintiff had not been so designated.

The complaint alleged that ten years had elapsed between the commencement of the project and the time of institution of suit; that as a result of such long delay on the part of the City of Syracuse and the Syracuse Urban Renewal Agency serious condemnation blight had set in; that the project area had become a high crime area wherein it was unsafe to work or live; that tenants had moved away, resulting in the loss of rental income; that plaintiffs had been placed in a special insurance pool entailing excessive premiums; that it was necessary to expend substantial sums of money simply for the purpose of protection against vandalism; and that the value of the subject properties had been greatly diminished.

An action was filed to recover for such damages but the same did not sound in inverse condemnation. This was apparently because plaintiffs could not show either (a) a physical invasion of the property, or (b) the imposition of a direct legal restraint thereon, and hence, under the rule of *Clement,* a *de facto* taking could not be alleged and proved.

Instead, plaintiffs sought recovery under the due process and equal protection clauses of the Federal and State Constitutions.

The Court denied recovery stating that it was "unable to find any case, Federal or State, which supports the theory upon which plaintiffs base their cause of action." The Court cited *Danforth v. United States,* 308 U.S. 271, 84 L.Ed. 240, 60 S.Ct. 231 (1939), for the proposition that "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." *Clement* was cited for the proposition that condemnation blight does not in and of itself effect a taking. Neither *Danforth* nor *Clement* would appear to be in point, however, because the case was not framed by the pleadings in the law of eminent domain.

The Court felt impelled to state that it was "sympathetic to the plight of the plaintiffs," but nonetheless ruled that "harsh as it may be the principle of *damnum absque injuria* prevails."

Judgment was affirmed by the Appellate Division, Fourth Department, 46 A.D.2d 216, 361 N.Y.S.2d 773 (1974), the Court stating that "without an actual or *de facto* taking of the property the appellants are not entitled to be compensated for damages under the due process and equal protection clauses of the State and Federal Constitutions." Applications for leave to appeal to the Court of Appeals and for writ of certiorari to the Supreme Court of the United States were both denied.

Thus, under New York law, the harsh result apparently obtains that property can be devastated by condemnation blight but no relief may be had unless (1) a *de jure* condemnation proceeding is instituted by the agency whose precondemnation activities caused the blight, or (2) the affected property owner can show a *de facto* taking under the *Clement* rule requiring (a) physical invasion or (b) direct legal restraint.[8]

Before proceeding to the matter next for discussion—*New Jersey Rule*—it may be noted that the *Clement* analysis of what constitutes a *de facto* taking has been approved in *Sayre v. City of Cleveland,* 493 F.2d 64 (6th Cir. 1974); *Thomas W. Garland, Inc. v. City of St. Louis,* 450 F.Supp. 239 (E.D. Mo. 1978); *Klopping v. City of Whittier,* 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972); and *Orfield v. Housing and Redevelopment Authority of the City of St. Paul,* 305 Minn. 336, 232 N.W.2d 923 (1975).

New Jersey Rule

In *Washington Market Enterprises, Inc. v. City of Trenton,* 68 N.J. 107, 343 A.2d 408 (1975), the Supreme Court of New Jersey posed the question for decision in language virtually identical with that employed by the New York Court of Appeals in phrasing the question under con-

sideration in *City of Buffalo v. J. W. Clement Company* (*supra*, p. 4). The New Jersey Court said:

> This case presents the question of whether there can be a taking of property for which the Constitution [9] demands just compensation, absent a physical invasion of the property or a direct legal restraint on its use.

Here the resemblance between the two cases ends because the Supreme Court of New Jersey reached a diametrically opposite result from that given by the New York Court of Appeals in answering the common question.

The facts in *Washington Market* were as follows:

In 1958 the City of Trenton undertook a study of the feasibility of redeveloping a considerable part of the downtown area of the municipality. As a result of such study a shopping mall was planned which, when the redevelopment project came to fruition, would require the taking of a large office building owned by the plaintiff. In 1963 the City commenced the redevelopment project with a somewhat smaller undertaking that involved the taking of land and the razing of buildings immediately adjacent to the planned mall area and plantiff's property. In 1967 the City took the first step necessary under New Jersey law in carrying out the planned mall project by designating the mall area to be a "blighted area" in accordance with the provisions of the Blighted Area Act, N.J.S.A. 40.55–21.10.[10] For a period of several years after such declaration the City proceeded with the acquisition of properties within the redevelopment area, but plaintiff's property was never taken. In 1973 plaintiff was notified by the City that the redevelopment project would be abandoned and that plaintiff's property would not be condemned.

Plaintiff thereupon filed an inverse action against the City, the complaint alleging that tenants began moving out of its building in 1963 in direct response to the threatened condemnation and that thereafter it was impossible to find long-term occupants; and that, following the declaration of blight in 1967, the area deteriorated rapidly and at the time of institution of suit the office building which had formerly generated $160,000 annually in rentals was yielding a mere $6,300.

The trial court concluded that it was bound by the rule that a *de facto* taking cannot occur absent physical invasion or direct legal restraint and, because neither was present in the case, ruled adversely to the plaintiff. However, in so doing the Court stated that the governing rule was "harsh" and "completely unfair." The Supreme Court of New Jersey granted direct certification "because of the importance of the issue presented."

The Court reviewed the historical background of the rule that the trial court felt compelled its decision, noting that in this country the concept of a *de facto* began with the notion that a physical invasion must be involved [cite for this proposition *Pumpelly v. Green Bay and Mississippi Canal Co.*, 13 Wall. 166, 80 U.S. 166, 20 L.Ed. 557 (1872)], and observing that the fundaments of a *de facto* taking were later expanded to include direct legal restraint on the use of property [citing to this effect *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158 (1922)]. It commented that the legal underpinnings of inverse condemnation are still not firmly established (viz., "the ultimate criterion for determining whether a taking has occurred is still a subject of dispute") and concluded that the rule requiring physical invasion or legal restraint was too narrow to do justice in the case of a victim of condemnation blight whose property had not and would not be taken in a *de jure* condemnation proceeding. It stated:

> Here, however, there has been no condemnation action instituted by defendant. Hence the statute [Blighted Area Act] cannot help this plaintiff, or other property owners who may be similarly situated. This contrast between the unfortunate plight of the owner whose property has suffered the consequences of a declaration of blight, but has not been condemned, and the relatively fair treatment accorded a neighboring owner whose property has in fact been taken, strongly suggests that the treatment of the former has been arbitrary and unfair.

The Court, therefore, went on to rule as follows:

> [W]e hold that where planning for urban redevelopment is clearly shown to have had such a severe impact as *substantially to destroy* the beneficial use which a landowner has made of his property, then there has been a "taking of property" within the meaning of that constitutional phrase. (Emphasis supplied.)

Thus, the Court expanded the concept of a *de facto* taking to include a situation where there has been neither physical invasion nor direct legal restraint on the use of property. The highly important *caveat* to be noted is that the Court restricted the expanded concept to a situation where the *beneficial use of property* has been *substantially destroyed*. The Court made clear that it did not intend that the expanded rule should apply to an injury amounting to a *mere diminution in value*. The perimeters of the rule were carefully enunciated so as *not* to extend beyond a situation involving *substantial destruction of the beneficial use and enjoyment of property*.

It goes without saying that the holding in *Washington Market* amounted to a flat rejection of rule laid down in *Clement*. And it is interesting to note that if the rule announced in *Washington Market* were applied to the facts in *Fisher*, *supra*, recovery would clearly be authorized.

Next for discussion is the *Oregon Rule*, which reaches a result more liberal in allowing recovery than that permitted under either the rule of *Clement* or the *Washington Market* rule.

Oregon Rule

The question before the Court in *Lincoln Loan Co. v. State, State Highway Commission*, 274 Ore. 49, 545 P.2d 105 (1976), was whether absent physical invasion or direct legal restraint recovery could be had for condemnation blight which causes *mere diminution* in value rather

than *substantial destruction* of the beneficial use and enjoyment of property (as in *Washington Market*).

Lincoln Loan was an inverse action wherein the complaint alleged that a highway construction project of the Oregon State Highway Commission had continued for a period of ten years and as a result thereof "condemnation blight" pervaded the neighborhood in which the construction took place, which area embraced the location of plaintiff's property. The acts complained of were those normally incident to highway construction, i.e., the creation and continued existence of noise, dust, fumes, confusion, and so forth. The complaint significantly did not seek to recover the full value of plaintiff's property. The damage alleged in the pleadings was, in fact, limited to the relatively small sum of $5,000.

A demurrer interposed to the complaint was sustained by the trial court and its ruling upheld by the intermediate Court of Appeals. In reversing and ruling that the complaint stated a cause of action, the Supreme Court of Oregon noted that the Court of Appeals had relied on the decision in *City of Buffalo v. J. W. Clement Co., supra,* in reaching the result. It said that it found the reasoning in *Clement* (which required physical invasion or direct legal restraint) to be "unpersuasive." It stated that the proper rule to be applied in determining whether a compensable taking had occurred was as follows:

> The proper test to determine whether there has been a compensable invasion of the individual's property rights in a case of this kind is whether the interference with use and enjoyment is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a sum certain in money. If so, justice as between the state and the citizen requires the burden imposed to be borne by the public and not by the individual alone.

Applying this test to the facts alleged in the complaint the Court went on to rule as follows:

> [W]e hold that plaintiff's complaint states facts sufficient to constitute a cause of action in inverse condemnation and that the trial court erred in sustaining the demurrer. Plaintiff has alleged adequate facts which indicate a substantial interference by the state with the use and enjoyment of its property. The combination of the acts alleged in plaintiff's complaint, the alleged pervasive extent of that combination of acts and the alleged direction of those acts over a ten-year period unite to allege a substantial interference with the use and enjoyment of its property by plaintiff.

The decision in *Lincoln Loan* is significant in that it did not (as in *Washington Market*) require *substantial destruction* of the beneficial use of property as a condition precedent to the existence of a compensable taking. It ruled instead that *substantial interference* with the use of the property is sufficient to effect such taking. The ruling thus opens the door to actions in inverse condemnation to recover for *mere diminution in value*—a highly important development.

It is to be noted that Oregon is a "taking" state [11] and that the Court hence did not have the "damage" language to rely on in reaching its liberal result. This case then serves very well to illustrate the whole accuracy of the observation made by an eminent commentator that "the taking-damaging distinction need not have any relevance in a discussion of inverse law as recovery may be just as liberal in a taking as in a damaging state." [12]

Next for discussion is the *California Rule.* Although California is a "taken or damaged" state, it is to be noted and emphasized that the Supreme Court of California did not even mention the "damage" provision in analyzing the limits of recovery for condemnation blight.

California Rule

The Supreme Court of California introduced a new element into the over-all condemnation blight picture in the case of *Klopping v. City of Whittier,* 8 Cal.3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972). This was an action in inverse condemnation to recover for damage to property allegedly caused by delay in instituting direct condemnation. It appeared that *de jure* proceedings had been commenced to acquire, for parking district purposes, properties owned by plaintiffs, and that the proceedings were then dropped. However, at the time of dismissal the condemning agency, City of Whittier, made a public announcement that it intended to resume the eminent domain action in the future, thus effectively continuing the threat of condemnation against the subject properties. Plaintiffs alleged that "the fair market value of their properties was diminished" by reason of the fact that "they were unable to fully use their properties and suffered a loss of rental income," and that the causes of such injuries were the precondemnation activities and statements of the defendant. The Supreme Court of California held that such allegations—taken as true—were not sufficient to state a cause of action for a *de facto* taking of the entire properties, but plaintiffs nonetheless were entitled to recover in damages if it could be shown that the City either (a) unreasonably delayed eminent domain action, or (b) was guilty of other unreasonable conduct prior to condemnation. It stated:

> [W]e hold that a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value.

The Court said further that:

> [W]hen the condemnor acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated. This requirement applies even though the activities which give rise to such damages may be significantly less than those which would constitute a de facto taking of the property so as to measure the fair market value as of a date earlier than that set statutorily. . . .

The Supreme Court of California thus injected into the condemnation blight picture a rule of reason. Under the *Klopping* doctrine, even though the property owner cannot recover as for a *de facto* taking of the entire property, he may recover for a diminution in the market value of his property if it can be shown that the public agency acted unreasonably in delaying condemnation after announcement of intent to condemn.

This seems to be a highly practical and workable solution to the problem of condemnation blight. Although any test of reasonableness involves the length of-the-chancellor's-foot element, nonetheless such test provides a standard by which the appropriating sovereign can measure its own conduct and adjudge whether its activities are properly directed to what must be its ultimate aim—the accomplishment of substantial justice toward the citizen it serves. The rule announced by the California Court would appear to be not only a useful tool in determining liability, but more importantly, a standard which if wisely applied could serve to prevent claims from being presented.

There is next and finally for consideration a landmark decision rendered by the Supreme Court of Wisconsin.

Wisconsin Rule

Luber v. Milwaukee County, 47 Wis. 2d 271, 177 N.W.2d 380 (1970), is the first case in American jurisprudence to abolish the rule making consequential damages *damnum absque injuria* in eminent domain. And it may be noted at the outset in connection with this watershed decision that Wisconsin is a "taking" state.[13]

The plaintiffs in *Luber* were the owners of an office building that had been condemned in 1967 by the Milwaukee County Expressway Commission. It appeared that in 1964 plaintiffs had lost a valuable long-term tenant which declined to renew its lease because of the imminence of condemnation (apparent in 1964 some three years prior to the actual taking). It further appeared that plaintiffs had made strenuous efforts to secure a new tenant but were unable to do so. A Wisconsin statute authorized the payment in *de jure* condemnation of rentals lost because of the threat of condemnation. Recovery was limited under such statute, however, to rentals lost during a period of one year prior to the actual taking. Plaintiffs brought suit under this act to recover for loss of rent, and defendant Milwaukee County moved for summary judgment on an offer of $2,100. Plaintiffs then filed a counter affidavit asking for judgment in the amount of $11,200. In support thereof plaintiffs contended that the statute in question violated the just compensation requirements of the Wisconsin Constitution in that it denied recovery for a period in excess of one year prior to the actual taking. Such posture of the plaintiffs was before the Supreme Court of Wisconsin on appeal.

In sustaining the plaintiff's position the Court said:

> In the instant case there is no question that the appellants' entire building was taken. The question is whether there are any interests other than the building itself, for which appellants are constitutionally entitled to compensation. . . . The importance of allowing recovery for incidental losses has increased significantly since condemnation powers were initially exercised in this country. During the early use of such power, land was usually undeveloped and takings seldom created incidental losses. Thus the former interpretation of the "just compensation" provision of our constitution seldom resulted in the infliction of incidental losses. The rule allowing fair market value for only the physical property actually taken created no great hardship. In modern society, however, condemnation proceedings are necessitated by numerous needs of society and are initiated by numerous authorized bodies. Due to the fact people are often congregated in given areas and that we have reached a state wherein re-development is necessary, commercial and industrial property is often taken in condemnation proceedings. When such property is taken, incidental damages are very apt to occur and in some cases exceed the fair market value of the actual physical property taken. . . . While the rule that consequential damages are *damnum absque injuria* has long been prevalent throughout this country, such rule is slowly being eroded by both courts and legislatures. . . . We believe that one's interest in rental loss is such as is required to be compensated under the "just compensation" clause of Art. I, sec. 13, Wis. Const. Sec. 32.19(4), Stats., insofar as it limits compensation for the taking of such interest is in conflict with the state constitution. *The rule making consequential damages damnum absque injuria is, under modern constitutional interpretation, discarded.* (Emphasis supplied.)

Although the consequential injury before the Court in *Luber* was restricted to the loss of rent, the language used by the Court was clearly broad enough to encompass the whole field of consequential damages. The implications of the decision in *Luber* for loss of good will and other generally noncompensable damages seem obvious. Viewing condemnation blight as a form of consequential damage the implications for recovery for such injury seem equally patent. If consequential damages are no longer to be treated as *damnum absque injuria* in eminent domain proceedings, recovery for condemnation blight should be allowable on a broad scale. And the circumstance that the governing constitutional language speaks in terms of "taking" only cannot be seen as a factor inhibitive of recovery.

Miscellaneous Cases

Before concluding this paper it is necessary to make mention of the scant few remaining cases that deal with condemnation blight. The problem of blight was before the courts in the following cases in each of which recovery was allowed:

Drakes Bay Land Company v. United States, 424 F.2d 574 (U.S. Ct. Cl. 1970).
Foster v. City of Detroit, 254 F.Supp. 655 (E.D. Mich. 1966).
Levine v. City of New Haven, 30 Conn. Sup. 13, 294 A.2d 644 (1972).
City of Detroit v. Cassesse, 376 Mich. 311, 136 N.W.2d 896 (1965).
Conroy-Prugh Glass Company v. Commonwealth, Department of Transportation, 456 Pa. 384, 321 A.2d 598 (1974).

These cases tend to a recital of egregious fact situations mirroring the impact of blight and a ruling that upon such facts a *de facto* taking had occurred. The cases are short on enunciation of underlying legal principles and, being thus uninstructive, are omitted from individual discussion in this paper.

CONCLUSION

That the injury of condemnation blight is a most serious one does not admit of argument. It can have (as shown by the recitals of facts in many of the cases) a devastating effect on rights in property. In aggravated cases the owner often cannot sell, lease, or derive any income from his property. Yet he must continue to pay taxes, meet mortgage installments, pay insurance premiums, provide maintenance, and suffer all the other burdens of ownership of real property. Obviously, if *de jure* condemnation is long delayed, he can lose his property. Obviously, if *de jure* condemnation is abandoned, he is left with little or nothing. And clearly this is not a situation that commends itself to the ordinary sense of fair play.

If the decision in *Fisher, supra,* was correct, no remedy is available under either the equal protection or due process clauses. This leaves only the Fifth Amendment, and like State provisions. If direct condemnation is long delayed or abandoned, this leaves only the remedy of inverse condemnation. The question then becomes—is inverse condemnation equal to the task?

The courts have, as has been seen, given varying and quite disparate answers to this question. That is to say, New York requires as a condition of relief a showing of physical invasion or direct legal restraint; New Jersey does not require physical invasion or direct legal restraint but demands a showing of the substantial destruction of the beneficial use and enjoyment of property; Oregon permits recovery for a mere diminution in value where substantial interference with the use and enjoyment of property can be shown; California grants recovery for loss in market value where it can be established that the public authority acted unreasonably in delaying condemnation; and Wisconsin opens the door wide to recovery by abolishing the rule making consequential injuries *damnum absque injuria* in eminent domain proceedings.

Thus, it can be fairly said that inverse law to date gives no firm and uniform answer to this question. The law in some cases (*Lincoln Loan, Klopping,* and *Luber*) appears to provide adequate protection, but the law in others (*Clement* and *Washington Market*) does not appear to do so. It can hardly be denied that a rule of law which requires "substantial destruction" of property before relief can be granted does not provide satisfactory protection. And little need be said in respect to a rule of law that, under certain circumstanecs, allows property to be destroyed without providing any remedy or relief (*Clement* and *Fisher*).

It is interesting to note that in direct condemnation full and adequate protection against the injury of condemnation blight is uniformly provided. By the mechanism of excluding project-caused depreciation in valuation the property owner is fully compensated for loss due to blight. Yet in inverse law, the origins and growth of which have always been in response to hardship situations *not* cured by the *de jure* process, hardship situations are left without satisfactory redress. It is anomalous that the roles are reversed in these companion branches of the law.

Is this result required? It is submitted that it is required only if the definition of a "taking" is made to depend on formulae or abstractions that are unnecessarily artificial. The rule that there cannot be a taking without physical invasion or direct legal restraint may be rooted in tradition, but it is not rooted in sound reason. The root question in condemnation blight is whether rights in property can be destroyed without relief. Insofar as the answer is in the affirmative the concepts of due process, equal protection, and just compensation would seem to have been invaded. *Damnum absque injuria* is an insufficient reason.

What does the future hold? It is suggested that the injury of condemnation is so serious that the conscience of the law will likely impel future development in the direction of increased liberality of recovery. It is suggested that the law will move in the direction of the rules laid down in the cases discussed in this paper that enunciate a broad interpretation of the grounds of recovery, and away from the cases that announce a narrow interpretation. This would be simple fair play toward a property owner caught in a bad squeeze by a public improvement.

BIBLIOGRAPHY

Kanner, G. *Condemnation Blight: Just How Just is Just Compensation?*, 48 Notre Dame Lawyer 765 (1973).

Sackman, J. *Condemnation Blight—A Problem in Compensability and Value,* Proceedings of the Institute on Planning, Zoning and Eminent Domain, Southwestern Legal Foundation, Part I (1973), Part II (1976).

[1] This subject was treated in a prior paper (by this writer) entitled "Valuation Changes Resulting From Influence of Public Improvements," which appears in *Selected Studies in Highway Law* (Transportation Research Board, 1976), Vol. 2, p. 733, to which reference is here made for a more full discussion of the problem.

[2] See "Valuation Changes Resulting From Influence of Public Improvements," note 1, *supra.*

[3] See policy provisions relating to valuation in eminent domain set forth in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. Sec. 4651(3).

[4] It should be noted that the trial court rulings reversed in *Carcione* and *Chicone* were not singular or eccentric, but instead followed the reasoning of certain early cases which adopted the view that because market value cannot be influenced by appreciation due to an improvement neither can market value be influenced by depreciation due to an improvement. Such reasoning (characterized in later decisions as faulty logic) is now generally repudiated. *See, e.g.,* Klopping v. City of Whittier, 8 Cal.3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972), overruling prior California decisions that allowed evidence of depreciation due to the project.

[5] The word "taking" is used herein to include "damaging." This is for the reason that no case has been found in a state having the "taken or damaged" clause wherein the court relied on the "damage" provision to the exclusion of the "taking" provision to influence the result. The cases speak in terms of "taking" whether the jurisdiction has the "taken" clause or the "taken or damaged" clause. The distinction between "taking" and "damaging"—if any real distinction in fact exists in inverse law—is discussed later in this paper.

[6] See discussion of these cases by Holloway in "Recent Developments in the Law of Inverse Condemnation," *Selected Studies in Highway Law* (Transportation Research Board, 1976), Vol. 2, p. 884–N13, *et seq.* See also collation of apposite cases in 37 A.L.R.3d 127 (1971), *Plotting or Planning in Anticipation of Improvement as Taking or Damaging of Property Affected.*

[7] The Court in *Clement* expressly noted that the cases of City of Detroit v. Cassese, 376 Mich. 311, 136 N.W.2d 896 (1965) and Foster v. City of Detroit, 254 F.Supp. 655 (E.D. Mich. 1966) represent a more liberal view of what constitutes a *de facto* taking.

[8] The meaning of "physical invasion" would not seem to require discussion, but a word is in order in respect to the term "direct legal restraint." It is suggested that the Court had in mind (there are no New York cases in point) a situation wherein dominion and control have passed from the owner to an outside agency. Exemplary of this situation is Benenson v. United States, 548 F.2d 939 (U.S. Ct. Cl. 1977). This case involved the historic Willard Hotel, located on Pennsylvania Avenue in Washington, D.C., in an area made subject to a tentative plan for the creation of a "National Square" to serve as a ceremonial gateway to The White House. Plaintiffs, owners of the vacant hotel, after years of ineffectual negotiation with official bodies as to possible use of the property, sought a permit to remove the facade of the building to examine the girders for the purpose of determining whether the structure could be converted into an office building. The permit was denied, the matter went to court, and plaintiffs were enjoined from altering the facade of the building in any way without the permission of a certain public corporation charged with the responsibility of devising and carrying out the master plan for the development of Pennsylvania Avenue. Plaintiffs therenpon brought an inverse action against the Federal Government in the United States Court of Claims alleging a *de facto* taking of the property. In holding that a *de facto* taking had occurred the Court placed strong emphasis on the fact that dominion and control over the use of the property had been taken away from the plaintiffs by the terms of the restrictive injunction.

[9] The New Jersey and New York Constitutions are alike in that both relate to property that is "taken" and not to property that is "taken or damaged."

[10] The Blighted Area Act enacted into statute law the judge-made rule that a condemnee shall not suffer depreciation in value of his property caused by the condemnor by providing that valuation in the *de jure* condemnation proceeding should be made as of the date of the declaration of blight.

[11] Art. I, Sec. 18, Ore. Const.

[12] Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wis. L. Rev. 1, 8.

[13] Art. I, Sec. 13, Wis. Const.

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, and those responsible for land acquisition and use. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in eminent domain and land use.