National Cooperative Highway Research Program

RESEARCH RESULTS DIGEST

DIGEST 150 - FEBRUARY 1986

Areas of Interest: 11 administration, 12 planning, 14 finance, 15 socioeconomics, 70 transportation law (01 highway transportation)

Planning and Precondemnation Activities as Constituting a Taking under Inverse Law

A report prepared under ongoing 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. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Technical Activities Division of the Board at the time this report was prepared.

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 in highway law. This report deals with the right of property owners to recover damages due to decrease in property value during the planning and precondemnation process.

This paper will be included in a future addendum to a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981, and a third addendum consisting of eight new

papers, seven supplements, and an expandable binder for Volume 4 was distributed in 1983. The text now totals more than 2,200 pages comprising 56 papers. 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 planning and preparation for the construction of new highways is a lengthy process involving, as it does, a host of preliminary long-term studies, and the subsequent adherence to a schedule of events, the majority of which are mandated by law, that must be complied with in sequential order over a considerable period of time before title to land for right-of-way is acquired in an eminent domain action. This chain of events, commonly known as "planning and precondemnation activities," has an inevitable impact on property values. Lands lying in the corridor route may undergo appreciation in value as a result of the project, or suffer a decline in value by reason thereof. This paper is concerned with the latter, and considers the question of what remedy, if any, the property owner has to recover for damage to property prior to the time suit is instituted and land actually proceeded against and taken in condemnation.

As a preliminary matter, it need be pointed out that when property is evaluated in a *de jure* condemnation proceeding the property owner is not required to suffer a decrease in value of his property due to the project. This rule is now firmly established in all jurisdictions and mandated by statute for Federal-Aid projects,[1] although for many years a number of jurisdictions adhered to the view that the owner is required to bear the brunt of project-caused depreciation, such result being based on the fallacious reasoning that because a landowner cannot benefit from the inclusion of appreciation in value resulting from the project neither can he benefit from the exclusion of depreciation occasioned by the project.[2] Recognizing that the property owner is (theoretically at least) fully protected against depreciation when *de jure* condemnation takes place this paper concerns itself with the question whether the owner has a cause of action in inverse condemnation, prior to the issuance of summons in direct condemnation, to recover for injury to land brought about and occasioned by preliminary planning and precondemnation activities of the state highway department or other condemning agency.

Preliminary planning and precondemnation activities take various forms. The following constitute a partial but representative listing:

1. Completion of demographic, topographic, and other requisite preliminary studies.
2. Preparation of maps and surveys.
3. Designation of route alignment.
4. Appraisals of affected property.
5. Negotiations with owners for purchase.
6. Publication or posting of requisite notices.
7. Preparation and distribution of environmental impact statement.
8. Holding of corridor hearing.
9. Holding of design hearing.
10. Preparation of plans and specifications.
11. Placing documents on file for public inspection.
12. Promulgation of resolution of necessity.
13. Formal announcement of project.
14. Denial of building permits for construction on affected lands.
15. Cooperation with the media in respect to explanatory news coverage of the planned project.

Such planning and precondemnation activities (and others not mentioned) spread word of the project to an extent that all but the least informed of the public are made aware of the proposed improvement, including precise knowledge of the terminii of the new highway and awareness of the general course that the way will travel in making connection between the terminal points. Not only are the values of properties in the vicinage of the proposed new road affected but also, on occasion, the beneficial use and enjoyment of property lying in the path of the improvement are restricted, impaired, or, in aggravated cases, even denied to the owners. Such circumstances have frequently impelled affected landholders to bring an action in inverse condemnation seeking to recover for damage to their properties (without awaiting assessment of the same in direct condemnation) on the ground that the planning and precondemnation activities of the highway department, or other condemning agency, constituted a prior *de facto* taking of the property.

When such action is brought the courts are confronted with the delicate and difficult problem of balancing the interest of the public in having improvements for a public purpose planned and developed with openness, candor, and a lack of stealth (inevitably resulting in impact on rights in property) and the equally vital interest of the public in having the individual rights of all property owners fully protected and compensation duly paid in accordance with the mandate of Federal and State constitutional demands relating to the taking of private property for a public use.

The majority rule comes down heavily on the side of treating the impact of planning and precondemnation activities as *damnum absque injuria,* or a noncompensable incident to or burden upon the ownership of private property. All property is held in private ownership subject to the chance and with the full knowledge that when required for a public use the same may be appropriated by exercise of the sovereign power of eminent domain. This fundamental principle leads to the result that the injurious impact of precondemnation activities, whether considered as a single item or items taken in combination, is ordinarily held not to be ground for and give rise to an action in inverse condemnation. The following cases will serve to illustrate the application of the rule to fact situations involving various precondemnation activities.

CASES DENYING RECOVERY

In *Selby Realty Company v. City of San Buenaventura,* 10 Cal.3d 110, 109 Cal. Rptr. 799, 514 P.2d 111 (1973), it appeared that the City of Beunaventura and County of Ventura had adopted a general plan for the long-term development of the City and County, and that pursuant to the requirements of California statute law had caused a map to be published showing the location of streets under the plan. Such map disclosed an extension of an existing street to cross plaintiff's land which was being held for the construction of a 54-unit apartment complex. Plaintiff filed an action seeking a declaration of rights as to the manner in which the general plan affected its property and asking for damages in inverse condemnation. In ruling adversely to the plaintiff the Supreme Court of California stated:

> In order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury. . . . If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of those several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land. We indulge in no hyperbole to suggest that if every landowner whose property may be affected at some vague and distant future time by any of these legislatively permissible plans was entitled to bring an action in declaratory relief to obtain a judicial declaration as to the validity and potential effect of the plan upon his land, the courts of this state would be inundated with futile litigation. It is clear, under all the circumstances, that plaintiff has not stated a cause of action against the county defendants for either declaratory relief or inverse condemnation.

Other California cases reach the same result. Thus, in *Johnson v. State,* 90 Cal. App.3d 195, 153 Cal. Rptr. 185 (1979), involving an action in inverse condemnation wherein plaintiffs alleged that their property had been taken or damaged by reason of precondemnation statements that the land would be acquired for highway right-of-way, the Court, in denying recovery, stressed that a condemnation action had not been commenced by the State and that the California Highway Commission had not by way of resolution or otherwise ever given any firm assurance that the property would in fact be taken. The Court stated:

> The actions described in the pleadings are part of the legitimate planning process for a public improvement, and the legislative designation of a state highway route and the adoption of a location for the route by the highway commission are far short of a firm declaration of an intention to condemn specific property. Throughout the design phase of a highway project, alterations and modifications of the proposed project may occur; in recent years, with considerable frequency, route location adoptions have been rescinded by the highway commission as a result of public disapproval of a project, environmental problems, or fiscal constraints. In some cases, routes have been deleted from the state highway system by the Legislature after considerable design work has been done on a proposed project and substantial amounts of right-of-way have been acquired. Until design has been completed, environmental considerations have been accounted for, and actual condemnation resolutions are issued, it cannot be said with any certainty what property will be acquired for a project. . . . [T]he freeway project in the present case is still in its planning phases. . . . Plaintiffs have not stated a cause of action in inverse condemnation.

Precondemnation activities alleged in *Smith v. State,* 50 Cal. App.3d 529, 123 Cal. Rptr. 745 (1975), to constitute a taking or damaging included the passage of a resolution by the California Highway Commission adopting a route location for a freeway and publication in connection therewith of maps showing that the freeway would bisect plaintiffs' property. In holding that such activities were part of the planning process and hence did not result in a compensable damaging of plaintiffs' property the Court said:

> In the instant case the state has announced only that it tentatively intends to construct a freeway along a tentative route subject to many conditions and contingencies. The plan is to be a step-by-step process involving consultation with communities and individuals, assessment of future traffic needs, availability of funding, and apparent constant revision in alignment grade and other physical features as well as consideration of environmental and human impacts which may surface as a result of dialogue between citizen and government. This must be coupled with technological inputs of not only local studies but advancements in the state of the art of creating a better environment. . . . Without question, when the state embarks upon a plan to develop a freeway, because of the public airing which is legally attendant to such a project, marketability of property in the affected area is adversely impacted. On the other hand, invocation of the doctrine of inverse condemnation or the assessment of damages against the state upon the public announcement of the state's plan would result in acquisition of large amounts of property that may be never used and would inordinately increase the cost of any such project. The real result would be a severe hampering of the state's ability to undertake necessary and worthwhile improvements in our highway system.
>
> We cannot find that the state has in the instant case wrongfully impaired the plaintiffs' rights in their property to the extent that plaintiffs are entitled to be compensated either in damages or in an award for inverse condemnation.

In *Jones v. City of Los Angeles,* 88 Cal. App.3d 965, 152 Cal. Rptr. 256 (1979), plaintiffs' property was included in an area affected by a street improvement program of the City of Los Angeles. Despite numerous precondemnation activities pointing to the taking of the plaintiffs' property it was never actually condemned. Plaintiffs brought suit in inverse condemnation alleging that the precondemnation activities of the City seriously reduced the market value of its property. Plaintiffs offered proof at trial supported by exhibits of certain specific activities of the

City that took place over a period of years which brought about the alleged diminution in value of their property. Such proferred evidence was excluded by the trial judge who rendered a judgment in favor of the City.

On appeal plaintiffs charged error in the exclusion of the offered evidence. The appellate court sustained plaintiffs' position in this regard and ruled that evidence of the precondemnation activities should have been admitted, including the following particular acts:

1. On March 21, 1968, a work order was established for the street improvement project assigning it an emergency status.
2. On August 22, 1968, the city began activities relating to right-of-way acquisition.
3. In June 1970 the city published a notice delineating the project and showing its effect on plaintiffs' property.
4. In August 1970 the city engineer signed construction plans.
5. On September 23, 1970, the city engineer issued a report recommending a condemnation ordinance and that authority be obtained for an order of immediate possession.
6. On January 27, 1981, the city council passed an ordinance finding the public interest required the taking of the subject properties and directing the city attorney to bring an action to condemn the same.

Notwithstanding that evidence of such activities should have been admitted and taken into consideration at the trial the judgment of the lower court in favor of the city was upheld, the appellate court reasoning that the activities in question did not state a cause of action in inverse condemnation being neither unreasonable nor oppressive insofar as plaintiffs were concerned, and, in fact, constituting no more than a normal chain of events in the planning process for the public improvement.

The chain of precondemnation activities by the Missouri State Highway Commission alleged in *Hamer v. State Highway Commission,* 304 S.W.2d 869 (Mo. 1957), to have consituted a compensable taking or damaging of plaintiff's property was, in sequential order, as follows:

1. Preparation of plans and surveys by the Commission for the construction of a proposed highway over plaintiff's land.
2. Issuance of notice to plaintiff by the Commission of its intention to construct a highway over his land and the furnishing to plaintiff of the plans and surveys for the proposed highway.
3. Plaintiff's alteration of plans for the future use of his land in order to conform to the construction of a highway over a portion of the land.
4. Negotiation by the Commission with plaintiff for the purchase of the land needed for highway purposes.
5. The subsequent announcement by the Commission that it had abandoned its plans to construct the proposed highway over the lands of the plaintiff.

In holding that neither the enumerated precondemnation activities of the Highway Commission nor plaintiff's change of plans to his detriment in the use of his property because of the threat of condemnation stated a cause of action in inverse condemnation, the Court said that mere "planning in anticipation of a public improvement is not a taking or damaging of the property affected" and that the "Highway Commission must, for obvious reasons, have the right to alter or abandon a proposed location of a highway without incurring liability to landowners along the abandoned route. A property owner who voluntarily makes changes on his property in anticipation that a proposed public improvement will be constructed thereon or nearby does so at the risk of losing his investment if the public agency exercises its unquestioned right to abandon the project or move it to a different location."

The question of the scope of the protected planning process was before the Court in *Sproul Homes of Nevada v. State ex rel. Department of Highways,* 611 P.2d 620 (Nev. 1980), an action to recover for damages alleged to have been caused by precondemnation activities of the State of Nevada and one of its counties. The complaint averred that "the defendants indicated a need for construction of the East Leg of U.S. 95 Expressway in the Las Vegas Valley"; that the location of the expressway was made public through an announcement which disclosed that the new highway would traverse plaintiff's property; that such property was being held for the specific purpose of subdividing, constructing, and selling single-family residences; and that the threat of condemnation impaired plaintiff's abilities to use the land for such purposes. The court stated that "the basis of the cause of action seems to be that the 'precondemnation announcement' as to the proposed expressway over its land constituted a taking."

In rejecting this contention and affirming the trial court's action in dismissing the complaint the Supreme Court of Nevada stated:

> It is well-established that the mere planning of a project is insufficient to constitute a taking for which an inverse condemnation action will lie. . . .
>
> In the present case . . . there has been no invasion or appropriation of [plaintiff's] property. Beyond the claimed entry for the purpose of surveying and appraising, there is no allegation of a physical invasion of its land. Nor is there any showing of finality regarding the state's proposed project. Indeed, there is no allegation that [plaintiff's] property will definitely be acquired for highway purposes . . . the state has placed no legal or physical obstacles in the path of [plaintiff] in its use of the land . . . there is no factual allegation of undue or unreasonable delay, nor is there sufficient factual averment relating to bad faith or oppressive conduct on the part of government. . . . It is clear to us, under all of the circumstances, that [plaintiff] has not stated a cause of action . . . for inverse condemnation.

The facts in *City of Chicago v. Loitz,* 61 Ill.2d 92, 329 N.E.2d 208 (1975), disclosed that in anticipation of a street realignment project the City of Chicago made an oral offer to plaintiffs for the acquisition of their properties for the project which offer was accepted. However, no formal written contract for the conveyance of real estate was ever executed. The City subsequently abandoned its plan to make acquisition of plaintiff's properties and the question in the instant case was whether the negotiations for purchase constituted a taking, the plaintiffs stren-

uously asserting that the City's conduct went far beyond the mere planning stages normally incident to the formulation of a public improvement project. The Court disagreed and in ruling that on the facts a taking had not occurred, after pointing to the "general rule followed in Illinois and most other jurisdictions . . . that mere planning . . . in anticipation of a public improvement does not constitute a taking or damaging," elaborated on the reasons for the rule as follows:

> [T]he fact that imposition of liability for precondemnation activities would tend to inhibit free and open discussion of proposed public improvements; that such activities provide notice to those in the area that their future plans may be affected; that the absence of liability for the ordinary precondemnation activities promotes flexibility in public planning and recognizes the difficulties inherent therein under present-day conditions in which large portions of public projects are financed from Federal funds, the availability of which, when needed, is less than certain; and that the problems involved in determining the date upon which a *de facto* taking occurred, were that principle to be recognized, are substantial.

The principal question in *Kingston East Realty Co. v. State, Commissioner of Transportation,* 133 N.J. Super. 234, 336 A.2d 40 (1975), was whether the action of the New Jersey Department of Transportation in filing an alignment map showing that part of plaintiff's property would be included within the limits of a proposed freeway constituted a taking or damaging of the affected property. It appeared that the New Jersey DOT took no further action in respect to plaintiff's property but that because of the filing of the alignment map plaintiff was denied a building permit which would have enabled it to proceed with its plans to construct an 18-building research, office, and laboratory complex on the site. In holding that the precondemnation activities did not constitute a taking of plaintiff's property the Court stated that "planning in anticipation of condemnation without any actual physical appropriation does not constitute a taking or compel the State to institute condemnation proceedings."

Likewise, in *Schnack v. State, Department of Transportation,* 160 N.J. Super. 343, 389 A.2d 1006 (1978), in ruling that the filing of an alignment map by the New Jersey DOT did not constitute a taking the Court stated that "it is well established that a mere plan by the State to acquire property does not amount to a compensable taking."

Holding that projections made by the City of Dallas showing that plaintiff's property would be included in a proposed street-widening project did not constitute a compensable taking or damaging, the Court in *Thurow v. City of Dallas,* 499 S.W.2d 347 (Tex. Civ. App. 1973), stated:

> The general rule is that announcement of a projected public improvement, together with preparation of plans and maps showing the property in question as within the limits of the project, without any interference with the owner's use, does not constitute a taking or compensable damaging, even though it may reduce marketability as a practical matter.

An action in inverse condemnation was instituted in *Empire Construction Inc. v. City of Tulsa,* 512 P.2d 119 (Okla. 1973), alleging that the promulgation of a Master Expressway Plan by the City of Tulsa earmarking lands of plaintiff for inclusion in a highway relocation project constituted a taking or damaging of plaintiff's property in that it was unable after the publication of such plan to put the property to any productive use. In denying recovery the Court said that "we think the damages plaintiff has alleged can only be regarded as 'consequential' and not recoverable in an inverse condemnation proceeding."

A complaint in inverse condemnation asking damages for injury allegedly caused by the public announcement of a proposed interstate highway project and disclosure that complainant's lands would be included within the right-of-way limits thereof was held, in *Baaken v. State,* 382 P.2d 550 (Mont. 1963), not to state a cause of action, on the ground that injury resulting from such announcement was *damnum absque injuria* absent "actual physical invasion" of the property.

Plaintiff, in *Howell Plaza, Inc. v. State Highway Commission,* 92 Wis.2d 74, 284 N.W.2d 887 (1979), was the owner of a 60-acre parcel of land that was in the process of being developed for a shopping center and related commercial purposes when the Wisconsin State Highway Commission released information that it planned to acquire 16 acres of the unoccupied portion of the tract for highway purposes. After such announcement, the corridor hearing was held and approval of the route made operative. Before the necessary environmental impact statement had been prepared and distributed plaintiff made application to the Commission for early acquisition on hardship grounds. In response thereto the Commission gave informal approval and appraisers were appointed to make valuation. Thereafter and for a period of approximately 2 years plaintiff was in constant contact with the appraisers and personnel of the Commission in regard to the sale of the property. Negotiations were abruptly terminated, however, when an investigation was commenced into the early acquisition procedures of the Wisconsin State Highway Commission.

Plaintiff then brought suit in inverse condemnation charging that it had been denied the beneficial use of its property during this period and claiming that a taking had occurred by reason of the precondemnation activities of the Commission. The Supreme Court of Wisconsin noted that the matter thus presented was one which arose with increasing frequency in many courts throughout the land by reason of the growth of highways, and commented that the law of eminent domain had found that this was "a difficult problem to resolve." The Court first spelled out the general rule that preliminary activities in anticipation of condemnation do not constitute a taking, and then stated that if the State Highway Commission "had placed a legal restriction upon petitioner such that it was permanently prevented from improving its property in any way a taking would probably have occurred." The Court went on to find on the facts, however, that no such restriction had been imposed, and in denying plaintiff's contention that a taking had occurred, said:

> If petitioner was in fact unable to develop its property, it was not due to any restriction imposed upon it by the commission, but to the uncer-

tainty of the future status of its land. Such uncertainty is often a result of a planned, public improvement which requires the eventual acquisition of private property and does not constitute a taking of all or substantially all of the beneficial use of the property.

The rules laid down in the foregoing cases relating to highways and streets have, needless to say, been applied in cases dealing with other types of public improvements.

Thus, in *Weintraub v. Flood Control District of Maricopa County,* 104 Ariz. 566, 456 P.2d 936 (1969), involving the question whether plaintiffs' property had been taken in inverse condemnation by reason of a notice publicizing the fact that the property was to be included in a proposed flood control project the Court in ruling to the contrary stated that "the mere publication of the fact that particular or specified property may be the subject of a future appropriation or condemnation action . . . is not a taking or damaging of such property entitling the owner to be compensated therefor."

In holding that the passage of an ordinance by the City of Houston designating plaintiff's land as part of property to be taken for the Houston Civic Center did not constitute a taking, the Court, in *City of Houston v. Biggers,* 380 S.W.2d 700 (Tex. Civ. App. 1964), said that even though the legislative enactment "might have, as a practical matter, interfered with the marketability of the property, it would cause but an incidental damage which is not compensable. The fact that at some future time land might be taken under eminent domain . . . is but one of the conditions on which an owner holds property."

Stating that "land is not damaged by reason of preliminary procedure looking to its appropriation to a public use" the Court ruled in *Eckhoff v. Forest Preserve District,* 377 Ill. 208, 36 N.E.2d 245 (1941), that plaintiff's land had not been taken or damaged even though for a period of 13 years it had been repeatedly designated by a series of ordinances and public notices as part of a larger acreage to be acquired and set aside as a forest preserve region.

Additional cases announcing the rule that planning and precondemnation activities do not constitute a compensable taking include the following:

Arizona	*City of Tucson v. Melnykovich,* 10 Ariz. App. 145, 457 P.2d 307 (1969).
Arkansas	*Adams v. Smith,* 238 Ark. 696, 385 S.W.2d 13 (1964).
California	*Toso v. City of Santa Barbara,* 101 Cal. App.3d 934, 162 Cal. Rptr. 210 (1980).
	Concrete Service Company v. State, Department of Public Works, 274 Cal. App.2d 142, 78 Cal. Rptr. 923 (1969).
	Hilltop Properties, Inc. v. State of California, 233 Cal. App.2d 349, 43 Cal. Rptr. 605 (1965).
Florida	*City of Miami v. Roper,* 73 So.2d 285 (Fla. 1954).
Illinois	*Macmor Mortgage Corporation v. Exchange National Bank of Chicago,* 30 Ill. App.3d 734, 332 N.E.2d 740 (1975).
	Chicago Housing Authority v. Lamar, 21 Ill.2d 362; 172 N.E.2d 790 (1961).
Maryland	*Arnold v. Prince GeorgesCounty,* 270 Md. 285, 311 A.2d 223 (1973).
Massachusetts	*Robie v. Massachusetts Turnpike Authority,* 347 Mass. 715, 199 N.E.2d 914 (1964).
Mississippi	*Pearl River Valley Water Supply District v. Wood,* 252 Miss. 580, 172 So.2d 196 (1965).
North Carolina	*Browning v. North Carolina State Highway Commission,* 263 N.C. 130, 139 S.E.2d 227 (1964).
Oregon	*Fifth Avenue Corporation v. Washington County,* 282 Ore. 591, 581 P.2d 50 (1978).
South Dakota	*Hurley v. City of Rapid City,* 80 S.D. 180, 121 N.W.2d 21 (1963).
Utah	*State v. Bettilyon's Inc.,* 17 Utah 2d 135, 405 P.2d 420 (1965).

See further, "Recent Developments in the Law of Inverse Condemnation," by John P. Holloway, *Selected Studies in Highway Law,* Vol. 2, p. 884-N13, *et seq.*

Summary

It will not serve a useful purpose further to multiply authorities. It has been seen that the ordinary and usual planning and precondemnation activities, such as designation of tentative route alignments, preparation of maps and surveys, conduct of appraisals, commencement of negotiations for purchase, holding of hearings, etc., have been held, whether considered singly or in combination, not to constitute a compensable taking of property. For the purpose and to the end of providing flexibility in decision-making for highway departments and other road agencies,[3] such activities have been classified as "preliminary" and the injuries inflicted thereby termed "incidental" or "consequential," thereby projecting them into the category of *damnum absque injuria.* And not to be overlooked is the fact—sometimes acknowledged in the cases—that the courts have been loathe to burden themselves with a multiplicity of suits for minor injuries to property.

Next for consideration are the cases in which precondemnation activities are stripped of the "consequential damage" shield and held to constitute compensable injury to protected rights in property.

The central point of inquiry here is under what circumstances is the blanket immunization provided precondemnation activities by the majority rule removed and liability under inverse law imposed in its stead. At the outset of discussion it is to be noted and emphasized that the cases wherein recovery has been allowed are but few in number when compared to the cases in which recovery has been denied by the courts.

CASES ALLOWING RECOVERY

Although the leading case of *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), does not permit recovery under inverse law as for a *de facto* taking, it is a useful starting point for discussion of those cases in which precondemnation activities have been adjudged to result in a compensable taking. This is for the reason that *Clement* adopts a doctrinal approach to the problem of what constitutes a compensable taking. The cases are *rare* (as witnessed by those previously discussed herein) in which the courts have met head-on the question of what constitutes a *de facto* taking and attempted clearly to define the perimeters thereof. *Clement* is one of such cases.

Despite the voluminous amount of case law handed down by the New York Court of Appeals over a period of many years, it appeared that little more than a decade ago, when *Clement* was decided, the problem of what constitutes a *de facto* taking was a matter of first impression or question *de novo* in that forum and jurisdiction. The Court of Appeals stated the question for decision in the clear, explicit, and even narrow language, 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 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.

The facts giving rise to the question posed by the Court were as follows. The City of Buffalo instituted a redevelopment project which included within its boundaries property owned by the J. W. Clement Company. Clement was one of the major publishers in the world, printing annually over one hundred million paperback books and magazines with extensive circulation such as *Time* and *Reader's Digest.* Huge printing machines were located on its property to handle the volume of business. Clement was first given notice in 1957 that its property would be taken for the redevelopment project and by 1963 it had effected the relocation of all its machinery to new premises. The City of Buffalo waited until 1968 to institute direct condemnation proceedings. In the trial that followed the court found that because of the protracted delay the redevelopment area had fallen into decay of such magnitude as to cause Clement's property to become "unsalable and unrentable." It ruled, therefore, that a *de facto* taking of the property had occurred on the date April 1, 1963. This ruling was affirmed by the Appellate Division, which attributed the collapse of the real estate market to the overhanging threat of condemnation.

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

> [T]he concept of a *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 necessary 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.

Thus, the Court answered the question for decision by the unequivocal ruling that there cannot be a *de facto* taking "absent physical invasion or the imposition of some direct legal restraint."[4]

It is evident that if the rule in *Clement* had been generally adopted in other jurisdictions it would be a long step forward (whatever the merits of the rule) in firmly delineating the perimeters of a *de facto* taking. Absent a showing of physical invasion or direct legal restraint a compensable taking could not occur. However, the rule in *Clement* has met with but scattered approval.[5] One of the problems with the rule is that it fails to take into account the situation where property is severely damaged by precondemnation activities, and condemnation, for one reason or another, is discontinued or abandoned. This eliminates the opportunity to recoup project-caused losses through the direct condemnation process.

The rule fit the facts and worked well enough in *Clement* because the case was remanded with direction to the trial court having jurisdiction of the *de jure* condemnation proceeding that the subject property "should be evaluated not on its diminished worth caused by the condemnation action, but on its value except for such 'affirmative value-depressing acts' of the appropriating sovereign." (This, of course, is no more than a statement of the general rule, previously discussed, that the condemnee in an eminent domain action is not required to suffer project-caused depreciation.)

The question whether the rule requiring physical invasion or direct legal restraint is sufficient to do justice in a case where neither factors are present, and condemnation is abandoned after property has been damaged by precondemnation activities, was squarely before the Supreme Court of New Jersey in the case of *Washington Market Enterprises, Inc. v. City of Trenton,* 68 N.J. 107, 343 A.2d 408 (1975). The ruling in *Clement,* rendered in the neighboring jurisdiction of New York some 4 years earlier, was *sub judice,* and the New Jersey Court phrased the question for decision in language virtually identical with that employed by the New York Court of Appeals in *Clement,* stating:

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

The New Jersey Court answered the question in the affirmative, and thus arrived at a result diametrically opposite from that reached by the New York Court in *Clement.*

The facts in *Washington Market* were as follows. In 1958 the City of

Trenton undertook a study of the feasibility of redeveloping part of the downtown area of the municipality, and as a result of such study a shopping mall was planned, which, when developed, would require the taking of a large office building owned by the plaintiff. In 1963 the City began acquiring properties for the project and in 1967 the mall area was declared to be a "blighted area" in accordance with the provisions of the Blighted Area Act, N.J.S.A. 40.55–21.10.[6] The City continued acquisition of properties for the project over a period of several years, but plaintiff's property was never taken. In 1973 plaintiff was notified by the City that the redevelopment project would be abandoned and that the property would not be condemned. Plaintiff thereupon filed an inverse action against the City alleging that the precondemnation activities of the municipality had effected a *de facto* taking of its property. In support of this claim was the unchallenged allegation that rentals from commercial property had dwindled from $160,000 annually to a mere $6,300 and that "what had been tenantable office and retail space is now vacant."

The trial court (apparently influenced by the decision in *Clement*) 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 it commented that the rule and its application to the instant case was "harsh" and "completely unfair." The Supreme Court of New Jersey granted direct certification "because of the importance of the issue presented."

In reversing and remanding the Court pointed out that in inverse condemnation "the ultimate criterion for determining whether a taking has occurred is still a subject of dispute." And it concluded that the rule requiring physical invasion or direct legal restraint is too narrow and fails to do justice in the case of a property owner who having been victimized by planning and precondemnation blight will not have the opportunity to recoup his losses 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 consequence 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 ... 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 the constitutional phrase.

Thus, under the law of New Jersey, recovery is allowed without a showing of physical invasion or the imposition of direct legal restraint on the use of land, in a situation where the impact of planning and precondemnation is such as "substantially to destroy the beneficial use" of property.[7]

The rule announced in *Clement, supra,* was given consideration and expressly rejected by the Supreme Court of Oregon in the case of *Lincoln Loan Co. v. State, State Highway Commission,* 274 Ore. 49, 545 P.2d 105 (1976). Here again the question was presented whether there could be a compensable taking absent physical invasion or direct legal restraint, and, as in *Washington Market, supra,* the answer was in the affirmative.

The Court stated that the plaintiff alleged a "*de facto* taking, not of the possession of the property, but of a substantial use and benefit thereof."[8] Included in the latter was the loss of rental income occasioned by the blight brought about by a highway project of the Oregon State Highway Commission that had continued for a period of 10 years.

It appeared that a demurrer interposed to the complaint in the inverse action filed by plaintiff had been sustained by the trial court and its ruling in respect thereto upheld by the intermediate Court of Appeals. In reversing and remanding the Supreme Court of Oregon repudiated the doctrine announced in *Clement* that a *de facto* taking cannot take place absent physical invasion or direct legal restraint in the language as follows:

> The Court of Appeals, in affirming the trial court, relied on *City of Buffalo v. J. W. Clement Co.,* 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895 (1971). *Clement* has been strongly criticized ... and it is not in harmony with our cases and we find it unpersuasive.

The Court stated the correct rule to be 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 of the case the Court ruled 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.

Thus, the Court ruled that "substantial interference with the use and enjoyment" of property is sufficient to constitute a compensable taking and that the measure of damages is the diminution in market value of the affected property.

Hence, it is seen that the holdings in *Washington Market* and *Lincoln*

Loan, taken together, announce the doctrine that recovery may be had under inverse law where precondemnation activities are of such nature as "substantially to destroy the beneficial use which a landowner has made of his property" or cause "substantial interference with the use and enjoyment" of property by the landowner.

A somewhat different approach was taken by the Supreme Court of California in allowing recovery 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 by the condemning authority, City of Whittier, to acquire for parking district purposes, properties owned by the plaintiffs, and that the proceedings were later dropped. However, at the time of dismissal the City made a public announcement that the condemnation action would be reinstituted at some time in the future, thereby continuing the threat of condemnation. Before such proceedings were recommenced plaintiffs brought an inverse action alleging 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. The Court stated 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.

The Court then went on to rule as follows:

> [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.

Thus, the decision in *Klopping* introduces a rule of reason, i.e., recovery is made to depend upon a showing either that condemnation was "unreasonably" delayed after announcement of intent to condemn, or a showing that other conduct of the condemning authority prior to condemnation was "unreasonable" and led to decline in property values.[9]

In the foregoing cases (*Clement, Washington Market, Lincoln Loan,* and *Klopping*) the Courts sought to delineate the perimeters of a taking, viz., "physical invasion or direct legal restraint" (*Clement*); "such a severe impact as substantially to destroy the beneficial use of property" (*Washington Market*); "substantial interference with the use and enjoyment" of property (*Lincoln Loan*); and "unreasonable delay" in instituting condemnation or "other unreasonable conduct prior to condemnation" (*Klopping*). Next for consideration are cases in which recovery has been allowed but the courts have been less than explicit in enunciating doctrinal tenets on which recovery is based. It is a useful inquiry in these cases to explore whether there is a common denominator that binds—and the answer is—that a common thread runs through the majority of the cases in which recovery has been allowed, namely, the factor of loss of rental income from commercial property.

Effect of Loss of Rentals

That the courts have arrived at a near consensus in allowing recovery where the property owner suffers *serious* financial loss as a result of vacancies in leasehold estates is not surprising. Consider the situation of a landlord whose tenants begin to remove because of the imminence of condemnation and must, during the pendency of suit, endure a progressive decline in rental income. So long as he remains the title owner he is faced with inescapable fixed expenses. These include the payment of taxes, insurance premiums, installments on mortgage indebtedness, utility bills, repairs, and other continuing and irreversible costs. If he is unable to finance these charges other than through rental income, he may well lose the property before condemnation takes place, i.e., through mortgage foreclosure, appropriation by the taxing authority for delinquent taxes, or forced sacrifice sale to a buyer willing to gamble on the amount of the condemnation award. It may properly be said that such situation does not recommend itself to a sense of fairness and that the courts have resultantly responded sympathetically to the plight of the landowner so jeopardized.

Cases Involving Loss of Rentals

It has already been seen in the recital of facts in *Washington Market, Lincoln Loan,* and *Klopping, supra,* that the principal element of damage in each of the cases was loss of income from commercial property due to the prolonged threat of condemnation, and further discussion of these cases in respect to the emphasis given this injury is not required. Moving on to other cases in which the rental loss factor was the chief element of damage one of the earliest and most frequently cited cases is *In re Elmwood Park Project Section 1, Group B,* 311 Mich. 3ll, 136 N.W.2d 896 (1965), the facts in which were as follows.

In 1950 letters were sent to plaintiff, and others, by the City of Detroit, advising that their properties would be taken up in condemnation. A *lis pendens* was duly filed and suit thereupon instituted. Ten years later the project was declared abandoned by the City and the suit dismissed. However, in 1962 a new condemnation action was commenced and carried forward to conclusion. Plaintiff appealed from this judgment asserting that his property had been the subject of a *de facto* taking 12 years

earlier in 1950 and that valuation should be as of the time of such taking rather than at the time of trial in 1962. In ruling for the plaintiff and remanding for determination of the exact date of the prior taking, the Court bottomed its holding on the finding that the threat of condemnation over a 12-year period had caused the income from plaintiff's rental property to dwindle to the point where the property was no longer of any commerical value to the plaintiff.

The fact situation in *Foster v. City of Detroit*, 254 F.Supp. 655 (E.D. Mich. 1966), *aff'd* 405 F.2d 138 (C.A. 6, 1968), another early case, bears close resemblance to that in *Elmwood Park, supra*. It appeared that the City of Detroit had filed a *lis pendens* and instituted condemnation against apartment building rental properties owned by the plaintiff, but that several years after suit was commenced the action was discontinued. At a later time the condemnation action was reinstituted and brought to judgment. Plaintiff contended that a *de facto* taking had occurred prior to the time of the *de jure* proceeding, and that valuation should be as of the earlier date. In agreeing with this contention the Court gave chief emphasis to the fact that because of the cloud of condemnation hanging over plaintiff's property for a period of several years the tenancy of the several apartments owned by the plaintiff had fallen from full occupancy to a lone occupancy by a single tenant.

Where condemnation had been delayed for a period of 9 years since the inception of precondemnation activities and as a result the plaintiff suffered loss of tenants, the Court, in the inverse action of *Levine v. City of New Haven*, 30 Conn. Sup. 13, 294 A.2d 644 (1972), stated in granting recovery that it was "of the opinion that if long periods of time elapse after initial condemnation proceedings and there is no 'taking' ... the property owner has a constitutional right to have his claim litigated."

The facts in the leading case of *Conroy-Prugh Glass Company v. Commonwealth, Department of Transportation,* 456 Pa. 384, 321 A.2d 598 (1974), were as follows.

In 1959 the State of Pennsylvania made known its plans for the extension of the Ohio River Boulevard in the City of Pittsburgh. Such extension involved the taking of plaintiff's two industrial buildings. Over the period of the next several years seven different alternative proposals for the proposed extension were made known by the State, each and all of which involved the taking of plaintiff's property. The Boulevard construction project was given wide publicity in the newspapers of the City of Pittsburgh because of the effect it would have on the economic future of the portion of the City wherein it was to be located.

Prior to the beginning of such publicity plaintiff enjoyed a 70 percent occupancy of its premises by tenants who provided an annual income in excess of $30,000. As a direct result of the publicity the plaintiff began to lose tenants at an ever increasing rate. In 1966 and 1967 only 50 percent of the usable floor space was occupied, and in the years 1968, 1969, and 1970, occupancy was so diminished that rentals did not cover taxes and operating expenses. In 1971 the property was listed for sale by the Treasurer's Office of the City of Pittsburgh. In that same year plaintiff brought suit against the State alleging that a taking of its property had been affected. Judgment was rendered against the plaintiff in both the Court of Common Pleas and the Commonwealth Court on the ground that a *de facto* taking had not occurred.

On appeal to the Supreme Court of Pennsylvania the State argued, *inter alia*, that plaintiff was fully protected in that any diminution in the value of its property due to the Boulevard project would be excluded in valuation in direct condemnation, as required by Sec. 604 of the Pennsylvania Eminent Domain Code, codifying the general rule to this effect. In rejecting this contention and ruling in favor of the plaintiff the Court said:

> Appellant is not simply a property owner whose property has declined in value due to the imminence of condemnation. Appellant is, instead, one who cannot use his property and, in fact, stands to lose his property because of the imminence of condemnation! According to appellant's averments, the Commonwealth's publicity about the imminence of condemnation has caused appellant to lose tenants at such an accelerating rate that rental income from such property is no longer sufficient to cover the taxes on the property. Thus, appellant finds itself facing a Treasurer's sale. Should we hold that no "taking" has yet occurred until the formal condemnation, Sec. 604 of the Eminent Domain Code, will be of no help to appellant because appellant will not be the owner of the property when the condemnation finally takes place. Recognizing, as we do, that the Commonwealth is required to publicize and hold hearings in advance of the initiation of formal condemnation proceedings, we still believe that when these hearings and this publicity cause the owner of a commercial property to lose tenants to such an extent that the property no longer generates sufficient income to pay the taxes, which, in turn, leads to a threatened loss of the property, that property owner has a right to ... compensation for its property. To hold that a property owner in such circumstances has no such remedy, would be to deprive that property owner of his property without due process of law.

It may be noted that although the tests of "substantial destruction" or "substantial interference" with the use of property employed in *Washington Market* and *Lincoln Loan, supra*, or the test of "unreasonable delay" in bringing condemnation as specified in *Klopping, supra*, were not *eo nomine* mentioned, the facts and holding in *Conroy-Prugh* bring the ruling within the umbrage of these tests. It may be further noted that Pennsylvania is a "taking" state and that the Court did not hence have the "damaging" language to rely on in reaching the result.

In *Luber v. Milwaukee County*, 47 Wis.2d 271, 177 N.W.2d 380 (1970), the sole item of damage sought to be recovered was loss of rentals.

Plaintiffs in *Luber* were the owners of an office building that was condemned by the Milwaukee County Expressway Commission in 1967. The complaint alleged that in 1964, because of precondemnation activities of the Expressway Commission, a valuable tenant refused to renew its lease and that plaintiffs were unable to find a new tenant despite strenuous efforts so to do. A statute of the State of Wisconsin authorized the payment in *de jure* condemnation of rentals lost because of the threat of condemnation. However, recovery was limited under such statute 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 rentals during a greater period, asserting that the statute in question violated the just compensation requirements of the Wisconsin Constitution insofar as it limited compensation for loss of rentals to a period of no more than one year prior to the date of taking. The Supreme Court of Wisconsin agreed and granted recovery. In so doing it went to the noteworthy length of discarding the consequential damage rule.

Because *Luber v. Milwaukee County* is the first case in American jurisprudence to abolish the rule making consequential damages *damnum absque injuria* in eminent domain the opinion is of interest and worth quoting at some length:[10]

> 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 redevelopment 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.... 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 added.)

That the implications of the abolition of the consequential damage rule are far reaching requires no elaboration; and it is interesting to note that this liberal result was reached in a "taking" state.

Thus it has been seen that in a number of significant decisions (being the majority of those in which recovery has been allowed) the loss of rental income was a common denominator binding the cases.

It is, of course, not meant to suggest that proof of loss of rental income is an indispensable element of recovery in an inverse action based on precondemnation activities. Other situations can and will arise wherein it is indisputable that property has been seriously damaged and recovery should be allowed, as in *Jones v. People*, 22 Cal.3d 144, 148 Cal. Rptr. 640, 583 P.2d 165 (1976), where because of a set of highly unusual circumstances, access to plaintiff's property from an abutting highway was effectively denied as a result of precondemnation activities and the Court very properly granted recovery. However, loss of tenancies and leasehold estates is a convenient tool by which to measure whether precondemnation damage is of such substantial nature as to be compensable, as illustrated by the holding in *City of Los Angeles v. Lowensohn*, 54 Cal. App.3d 625, 127 Cal. Rptr. 417 (1976), wherein recovery was denied on the *specific ground* that no proof had been adduced to show that plaintiff had suffered any loss of rental income due to the precondemnation activities of the condemning authority.

The foregoing cases constitute the significant decisions in the field. The question now is as to what general rules may be deduced therefrom that are of broad and uniform application.

Summary

The instruction furnished by the cases can be summarized as follows.

A compensable taking may be established upon a showing of "physical invasion or direct legal restraint,"[11] but the establishment thereof is not a necessary condition precedent to recovery under the majority view.[12] Under the latter where it is shown that the effect of planning and precondemnation activities has been such as "substantially to destroy the beneficial use of property,"[13] or cause "substantial interference with the use" of property,[14] "then there has been a 'taking of property' within the meaning of the constitutional phrase."[15] And where a compensable taking has been alleged the property owner "must be provided with an opportunity to demonstrate that the public authority acted improperly either by unreasonably delaying eminent domain action ... or by other unreasonable conduct prior to condemnation, and as a result of such action the property in question suffered a diminution in market value."[16] Loss of rental income from commercial property has been a common denominator in the majority of cases in which recovery has been allowed,[17] but serious injury of other kind and nature, such as loss of access, results in compensability.[18]

The general rule to be deduced from the cases may be stated as follows. A property owner affected by planning and precondemnation activities may be permitted recovery (a) upon a showing of physical invasion of the real estate or imposition of direct legal restraint on the use thereof, or (b) a showing that eminent domain action was delayed for an unreasonable length of time and as a result thereof the owner was made to suffer a substantial impairment of the beneficial use and enjoyment of his property.

The rule as stated will serve to identify those fact situations in which the categorization of *damnum absque injuria* is not applicable to planning and precondemnation activities and the same are treated and considered instead as constituting substantive and compensable injury to constitutionally protected rights in property. The measure of damages is the amount of diminution in market value of the affected property that is directly attributable to the threat of condemnation.

APPENDIX
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[1] 42 U.S.C. § 4651(3).

[2] It was not, for example, until 1972, that the Supreme Court of California, in Klopping v. City of Whittier, 8 Cal.3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345, reversed the long-standing rule in California that depreciation resulting from the project cannot be excluded in valuation.

[3] See note 9 to the decision in Agins v. City of Tiburon, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980), wherein the Supreme Court of the United States stated that: "Mere fluctuations in value during the process of governmental decision-making ... are 'incidents of ownership. They cannot be considered as a taking in the constitutional sense.' "

[4] The first of the stated conditions essential to recovery (physical invasion) needs no comment, but clarification is perhaps required in respect to the second or alternative condition (direct legal restraint). A useful exemplar of the latter is to be found in Benenson v. United States, 548 F.2d 939 (U.S. Ct. Cl. 1977), involving the historic Willard Hotel located on Pennsylvania Avenue in Washington, D.C., in an area made subject to a tentative plan for the establishment of a "National Square" to serve as a ceremonial gateway to The White House. Plaintiffs, owners of the vacant hotel, after years of fruitless 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 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 redevelopment of Pennsylvania Avenue. Plaintiffs thereupon brought an action against the Federal Government in the United States Court of Claims alleging a *de facto* taking of the property. In awarding judgment in favor of the plaintiffs the Court emphasized that plaintiffs had been denied dominion and control over their property by the direct legal restraint imposed on its use by the restrictive injunction.

[5] *See* 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 St. Paul, 305 Minn. 336, 232 N.W.2d 923 (1975).

[6] The Blighted Area Act provides that valuation in a *de jure* condemnation proceeding shall be made as of the date of the declaration of blight.

[7] It may be noted that both New York and New Jersey are "taking" states, that is, neither has the "taken or damaged" provision in its Constitution. This circumstance did not, however, influence the result in either the *Clement* or *Washington Market* decisions. Nor does the difference in constitutional language determine the result in cases in other jurisdictions dealing with the question of what constitutes a *de facto* taking. It has been stated with whole accuracy by Professor Daniel R. Mandelker 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." *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 1, at 8. Cases set forth later herein fully illustrate the accuracy of this observation.

[8] It is to be noted that Oregon, like New Jersey, is a "taking" state.

[9] The tying of "unreasonable delay" to "announcement of intent to condemn" reflected and was tailored to the facts in *Klopping*, i.e., at the time of abandonment the City of Whittier made public an intention to condemn the property at some indefinite time in the future, a circumstance stressed by the Court as continuing the threat of condemnation. *Quaere*, whether the Court intended to link the concept of "unreasonable delay" inseverably and in all cases to the fact of "announcement," particularly in the light of the broad alternative ground of recovery specified as "other unreasonable conduct prior to condemnation." Note in this connection that in *Washington Market* and *Lincoln Loan, supra*, the Courts were careful to point out that the delay in instituting condemnation had existed (in both cases) for a period of 10 years, but that the date of the initiation of the threat of condemnation was not made to relate exclusively to the act of "announcement" or to any sole or singular injurious precondemnation activity. Note further that although California is a "taken or damaged" state this circumstance was not even mentioned, the Court speaking in terms of "taking" throughout the opinion.

[10] It may be noted that Wisconsin is a "taking" state and that neither physical invasion nor direct legal restraint, prior to the actual taking, were elements of the case.

[11] 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), *supra*.

[12] Washington Market Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 343 A.2d 408 (1975); Lincoln Loan Co. v. State, State Highway Commission, 274 Ore. 49, 545 P.2d 105 (1976); Klopping v. City of Whittier, 8 Cal.3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972); *In re* Elmwood Park Project Section 1, Group B, 376 Mich. 311, 136 N.W.2d 896 (1965); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd* 405 F.2d 138 (C.A. 6, 1968); Levine v. City of New Haven, 30 Conn. Sup. 13, 294 A.2d 644 (1972); Conroy-Prugh Glass Company v. Commonwealth, Department of Transportation, 456 Pa. 384, 321 A.2d 598 (1974); Luber v. Milwaukee County, 47 Wis.2d 271, 177 N.W.2d 380 (1970), *supra*.

[13] Washington Market Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 343 A.2d 408 (1975), *supra*.

[14] Lincoln Loan Co. v. State, State Highway Commission, 274 Ore. 49, 545 P.2d 105 (1976), *supra*.

[15] Washington Market Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 343 A.2d 408 (1975), *supra*.

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

[17] Washington Market Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 343 A.2d 408 (1975); Lincoln Loan Co. v. State, State Highway Commission, 274 Ore. 49, 545 P.2d 105 (1976); Klopping v. City of Whittier, 8 Cal.3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972); *in re* Elmwood Park Project Section 1, Group B, 376 Mich. 311, 136 N.W.2d 896 (1965); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd* 405 F.2d 138 (C.A. 6, 1968); Levine v. City of New Haven, 30 Conn. Sup. 13, 294 A.2d 644 (1972); Conroy-Prugh Glass Company v. Commonwealth, Department of Transportation, 456 Pa. 384, 321 A.2d 598 (1974); Luber v. Milwaukee County, 47 Wis.2d 271, 177 N.W.2d 380 (1970), *supra*.

[18] Jones v. People, 22 Cal.3d 144, 148 Cal. Rptr. 640, 583 P.2d 165 (1976), *supra*.

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, federal administrators, and others involved in the highway planning and preliminary engineering process. Property owner claims for compensation for value lost before an actual eminent domain action are discussed with examples of cases in which the claims were denied and cases in which recovery was allowed. Attorneys should find this paper especially useful in their work as a concise reference document in inverse condemnation cases.

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