National Cooperative Highway Research Program

RESEARCH RESULTS DIGEST

DIGEST 99 - FEBRUARY 1978

Liability of the State for Highway Traffic Noise

A report submitted 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, TRB Counsel for Legal Research, 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 legal questions surrounding liability of state highway agencies for highway traffic noise. It includes legal authority relative thereto.

Because this Digest is also the full text of the agency's report, the statement above concerning loans of uncorrected draft copies of the report does not apply.

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INTRODUCTION

The problem of harassment from noise has obtained in all urban civilizations at all times and has received varying degrees of legal attention at different times and places. It may be noted, for example, that the regulation of noise by local city ordinance has a history that reaches back for centuries. It may be further noted that the classical literature of all nations is replete with references to the abuse of noise in city life, reflecting that the problem has always been with us. Thus, Benjamin Franklin, writing in characteristic vein, records that he was forced to change his place of abode in the supposedly tranquil colonial city of Philadelphia because "the din of the Market increases upon me; and that, with frequent interruptions, has, I find, made me say some things twice over."1/

Today, the problem of industrial and other noise is the subject of increasingly intensive and widespread study. The highway programs are not exempt and more concern is now being shown for the problem of highway noise than at any time in the past.

It is axiomatic that the question of liability for noise damage constitutes an integral part of the planning process in taking steps to reduce noise pollution from highway traffic. This is for the reason that fiscal responsibility requires that the cost of construction of expensive sound barriers and other effective noise reduction devices be weighed against the alternative cost of payment of money awards for noise damage. It is the purpose of this paper to study the extent of the liability of the State for damage attributable to highway noise.

Related traffic injuries such as vibration, lights, fumes and dust are excluded from consideration in this paper. However, it may be said in passing that, generally speaking, the same rules obtain with respect to such injuries as pertain to noise damage (with the exception of direct damage to property caused by vibration, viz., cracks in floors, walks, ceilings, etc., which has uniformly been held to be compensable 2/).

Relief for noise damage in the early cases was generally sought on the theory of nuisance. However, the rapid development in the last 50 years of the law of inverse condemnation has rendered this remedy archaic, and the cases today in which damages are sought for noise emanating from highways constructed on land no part of which was taken from the plaintiff are invariably brought in inverse condemnation. Where a partial take for highway purposes is effected, the claim for noise damage is incorporated in the claim for severance damage. Thus, the apposite case law in respect to liability for noise damage today lies exclusively in the field of eminent domain.

Noise in condemnation proceedings is treated as "consequential damage." It will not serve a useful purpose here to attempt to define such terms, because many injuries are included within this rubric, some of which are compensable, and some that are not.3/ Noise is also classifiable under the label of "proximity damage," but here again some proximity damage is compensable and some is not.4/ It suffices to say, that although noise in a real sense constitutes a trespass (i.e., sound waves that can be statistically measured in decibels) it is never treated as *direct* damage to property. It belongs rather in the category of consequential injuries which, depending on the circumstances, may or may not be *damnum absque injuria*.

As before stated, the cause of action for noise damage lies either in inverse condemnation or direct condemnation. This paper is divided into two parts. The first deals with the situation where the complaining party was a stranger to the condemnation for highway purposes; and the second relates to the situation where the condemnee in a proceeding to take land for highway purposes seeks damages for diminution in value of the remainder attributable to traffic noise.

1/ See *Noise and the Law*, by George A. Spater, 63 Mich. L. Rev. 1373 (1965).

2/ See Richmond County v. Williams, 109 Ga. App. 670, 137 S.E. 2d 343 (1964); Reymond v. State, 255 La. 425, 231 So. 2d 375 (1970).

3/ Netherton, *Damnum Absque Injuria and the Concept of Just Compensation in Eminent Domain*, Vol. 1, p. 25, Selected Studies in Highway Law; Spies and McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 U. of Va. L. Rev. 437 (1962).

4/ Van Alstyne, *Just Compensation of Intangible Detriment*, 16 U.C.L.A. L. Rev. 491 (1969).

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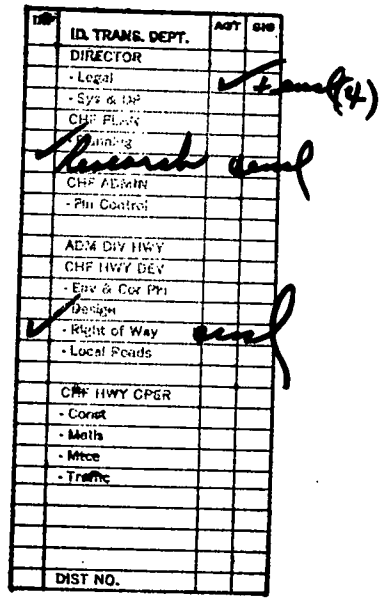

March 14, 1978

TO: CHIEF COUNSELS
STATE HIGHWAY AND TRANSPORTATION DEPARTMENTS

SUBJECT: NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM
PROJECT 20-6, "RIGHT-OF-WAY AND LEGAL PROBLEMS
ARISING OUT OF HIGHWAY PROGRAMS"

Gentlemen:

A major and continuing need of state highway and transportation departments involves not only highway law in general but also the assembly, analysis, and evaluation of operating practices and the legal elements of special problems involving right-of-way acquisition and control. In consideration of both immediate and longer-range right-of-way and legal problems, individual state experiences need to be compared and made available for possible application nationally.

This critical need is further compounded by the lack of a mechanism capable of responding in time to be of practical assistance to state highway and transportation departments. Because efforts of the Right-of-Way and Legal Affairs Committees of the American Association of State Highway and Transportation Officials (AASHTO) found no ready solution to this matter, the National Cooperative Highway Research Program (NCHRP) -- sponsored by AASHTO in cooperation with the Federal Highway Administration and administered by the Transportation Research Board -- was authorized to establish Project 20-6, "Right-of-Way and Legal Problems Arising out of Highway Programs," as a means for conducting continuing research on specific topics in the problem area and for expeditious reporting of the results. The research is being carried out by the Transportation Research Board's Counsel for Legal Research, and the results are being disseminated to the highway community within days of their availability. The enclosed NCHRP Research Results Digest #99, February 1978, "Liability of the State for Highway Traffic Noise," is an example of the means by which this is being accomplished.

The Digest was adopted in 1968 by the NCHRP as a vehicle to expedite the application of findings emanating from all research conducted under the Program. Although it is normally intended to be a brief, succinct, yet thorough, summary of the results of current research on timely subjects, the present circumstance is one of some variation in that the complete report is presented in the Digest. Ordinarily, exhaustive treatment of the subject matter is conveyed through the research agency's project report that is later edited and published in the NCHRP report series.

Because you will have an interest in the future results from this project, we are pleased to institute special measures that will assure your automatic receipt of all subsequent reports as they are completed. As a further special service to the legal branches of state highway and transportation departments, six copies of the Digest are being forwarded to cover distribution to your legal staff.

We are confident that these Digests will serve you well. We would welcome any comments on them that you may care to make, especially as to their usefulness.

Very truly yours,

K. W. Henderson, Jr.
Program Director, NCHRP

KWHJr:lr

cc: State Attorney General

Enclosures: NCHRP Research Results Digest 99.

LIABILITY FOR NOISE DAMAGE IN INVERSE CONDEMNATION CASES

The evolution of the law of liability for noise damage produced on an abutting public facility owned or authorized by the Government is largely the history of litigation against the railroads for noise damage. By the time the automobile came into common use and a network of roads servicing such traffic was constructed, the general principles governing liability for such noise injury had become firmly established. The law that developed in the railroad cases is not merely instructive in respect to liability for traffic noise on an abutting highway, it is virtually indistinguishable in the principles that must be applied to determine liability. It follows that the study of the liability of State highway departments for noise damage in inverse condemnation proceedings must begin with the history of the railroad cases. 5/

5/ *Aviation Cases:* The aviation cases, unlike the railroad cases, are not germane to the problem of liability for highway traffic noise, and hence are excluded from consideration in this paper. A brief statement will suffice to explain why such cases are deemed inapposite.

The leading Federal case is *United States v. Causby,* 328 U.S. 256, 90 L.Ed. 1206, 66 S.Ct. 1062 (1946), which has been widely interpreted as laying down the rule that there can be no invasion of property rights by the flight of aircraft absent a trespassory entry of low-level airspace over private land. Plaintiffs' property in this case lay within the glide path of military fighter, bomber, and transport aircraft using an airport leased by the United States Government. Various elements of damage were alleged, including the loss of plaintiffs' poultry business, which was shut down because the chickens panicked to self-destruction (flying into walls) from fright at the thunder of military airplanes flying overhead at tree top level. Such loss from noise was mentioned, however, only briefly in the opinion. The decision (favorable to the plaintiffs) was based squarely on the theory of trespass, the Court holding that the repeated invasions of the overlying low-level airspace were "in the same category as invasions of the surface," and that such continued intrusions into superadjacent airspace constituted the taking of an easement. The Supreme Court of the United States reaches a like result in the subsequent case of *Griggs v. Allegheny County,* 369 U.S. 84, 7 L.Ed. 2d 585, 82 S.Ct. 531 (1962), and the lower Federal courts have consistently construed the rule of *Causby-Griggs* to be that there can be no recovery in the Federal courts for damage to private property by the flight of aircraft absent a pattern of trespassory low-level overflights. See, e.g., *Batten v. United States,* 306 F.2d 580 (10th Cir. 1962), denying recovery to nearby property owners for damage caused by airplane sound and shock waves traveling laterally.

Although a similar posture has been taken by the majority of the State courts, a different result was reached in two significant and widely known decisions. *Thornburg v. Port of Portland,* 233 Ore. 178, 376 P.2d 100 (1962) and *Martin v. Port of Seattle,* 64 Wash. 2d 309, 391 P.2d 540 (1964), were both actions in inverse condemnation wherein recovery was sought for the damage caused by noise and vibrations from low-flying airplanes whose airport flight patterns did not traverse the airspace overlying plaintiffs' adjacent land. The Courts in each case carefully considered the *Causby-Griggs* doctrine of trespassory overflight, and refused to follow the same. *Thornburg-Martin* announced a different rule, which may be summarized as follows:

It is a narrow and unacceptable logic that would tie recovery for aircraft noise to common law trespass *quare clausum fregit.* It is, in fact, but sterile formality to predicate recovery on the breaking of the close and the taking of an easement in overlying airspace. The circumstance whether a wing tip passes a fraction of an inch within or a fraction of an inch without the airspace overlying private land is, indeed, pointedly irrelevant, because the constitutionally compensable injury is noise - and the vector of aircraft noise cannot be said to be confined to the perpendicular. Thus, recovery for aircraft noise should (under certain circumstances) be allowed as constituting either a "taking" or "damaging" without regard to the existence or non-existence of patterns of flight in superadjacent airspace.

The *Causby-Griggs* and *Thornburg-Martin* results were, of course, arrived at by balancing the demands of freedom of airspace vs. protection of private property rights, but in the weighting of these competing interests different conclusions were reached.

Although it might be argued that the *Thornburg-Martin* rule has relevance to inverse highway condemnation proceedings, the fact is that the courts have not so reasoned. *Thornburg* and *Martin* are simply not cited or relied on in the highway cases. The further and critically significant fact is that numerous courts have sought, categorically, to separate and distinguish the noise produced by airplanes from the noise caused by cars, truck and buses. Typical is the language in *Northcutt v. State Highway Department,* 209 So. 2d 710 (Fla. App. 1968), wherein the Court stated that "there is a substantial difference between the use of an airport by airplanes and the use of a highway and access

Railroad Cases

The Federal Constitution provides that private property shall not be "taken" for public use without payment of just compensation. Until 1870, all States had the same or similar constitutional provisions. In that year the State of Illinois amended its constitution to provide that private property shall not be "taken or damaged" without payment of just compensation. The reason for the change was the growth of the railroads and street railways, and the desire to protect property owners against damage caused by the construction of railroads and street railways. Several other States followed suit and amended their constitutions to include the word "damaged" (or its equivalent), and most of the States admitted into the Union after 1870 adopted the "taken or damaged" provision.

The question of whether the broader terminology included noise damage was immediately tested in the railroad cases. The result was that noise was held not to be a constitutionally compensable injury (with a single important exception to be discussed later). The word "damaged" as appearing in State constitutions was interpreted to mean "damaged in the constitutional sense;" and damage in the constitutional sense did not include noise damage. 6/ The States having the "taken or damaged" clause followed the rule announced by the Supreme Court of the United States in the leading case of *Richards v. Washington Terminal Company*, 233 U.S. 546, 58 L.Ed. 1088, 34 S.Ct. 654 (1914), wherein it was held that noise and other disturbances caused by the normal operation of a railroad are *damnum absque injuria*. This is expressed in terms of the rule that injuries shared in common by the general public are not constitutionally compensable. Also, as stated by the Supreme Court in *Richards*, the rule of non-compensability is "founded upon necessity." That is, if the rule were otherwise railroads could not be constructed and operate, and the courts would be clogged with an endless multiplicity of claims many of them so trivial as not to serve the ends of distributive justice.

See the following representative State cases holding that under a "taken or damaged" clause noise from the normal operation of a railroad or street railway is not a constitutionally compensable injury: *Harrison v. Denver City Tramway Co.*, 54 Colo. 593, 131 P. 409 (1913); *Austin v. Augusta Terminal R.R.*, 108 Ga. 671, 34 S.E. 852 (1899); *Louisville Ry. Co. v. Foster*, 108 Ky. 743, 57 S.W. 480 (1900); *Matthias v. Minneapolis, St. P. & S. Ste. M. Ry.*, 125 Minn. 224, 146 N.W. 353 (1914); *Dean v. Southern Ry.*, 112 Miss. 333, 73 So. 55 (1916); *Randle v. Pacific R.R.*, 65 Mo. 325 (1877); *Smith v. Northern Pac. Ry.*, 50 Mont. 539, 148 P. 393 (1915); *Wunderlich v. Pennsylvania R.R.*, 223 Pa. 114, 72 A. 247 (1909); *Twenty-Second Corp., Etc. v. Oregon Short Line R. Co.*, 36 Utah 238, 103 P. 243 (1909); *DeKay v. North Yakima & Valley Ry.*, 71 Wash. 648, 129 P. 574 (1913).

No more than the statement of the fact is needed that in States having the "taken" provision only, the same rule obtains. However, an exception exists in both the "taken" and "taken or damaged" States where it can be shown that the damage done by the operation of a railroad or street railway is special or peculiar to the affected property, and is not an injury shared in common with other property owners.

Special Damage from Railroad Noise

The Supreme Court of the United States addressed itself to the question of special damage caused by the operation of a railroad in the early case of *Baltimore & Potomac*

Footnote 5/ continued:

roads by motor vehicles. The noise intensity factor is different; the safety factors are different; and the use factors are different." (In this connection it might be noted that an attempt was made in *Thornburg* to analogize airplane noise with motor vehicle traffic noise by pressing the argument that "the plight of the plaintiffs in this case is indistinguishable from [those] whose homes abut highways", and that the Court refused to concede the validity of such analogy.)

Because it is patent that the cases involving the rule of trespassory overflight are inapplicable to the problem of highway noise, and for the reason that aircraft noise has repeatedly been held to be distinguishable from highway noise, the aviation cases are deemed to be inapposite, and hence are excluded from further consideration in this paper. The reader interested in a detailed study of the aviation cases, Federal and State, is referred to the excellent discussion thereof appearing in Wright, *The Law of Airspace* (The Bobbs-Merril Company, Inc. 1968), at pps. 148-209.

6/ In analyzing the impact of the "taken or damaged" provisions of State constitutions Orgel reaches the conclusion that: " 'Damages' are interpreted by the courts in a highly artificial way, to mean 'damages in a constitutional sense.' " *Valuation Under the Law of Eminent Domain*, Vol. 1, § 6, p. 39.

Railroad Company v. Fifth Baptist Church, 108 U.S. 317, 27 L.Ed. 739, 2 S.Ct. 719 (1882). This was an action in the nature of an action on the case to recover damages for an alleged nuisance in the form of an engine house constructed on the building line of defendant railroad s property within five-and-one-half feet of the church edifice owned by plaintiff, a religious corporation. The gravamen of the complaint was stated by Mr. Justice Field as follows:

> The engine house and repair shop of the railroad company, as they were used, rendered it impossible for the plaintiff to occupy its building with any comfort as a place of public worship. The hammering in the shop, the rumbling of the engines passing in and out of the engine house, the blowing off of steam, the ringing of bells, the sounding of whistles, and the smoke from the chimneys, with its cinders, dust, and offensive odors, created a constant disturbance of the religious exercises of the church. The noise was often so great that the voice of the pastor while preaching could not be heard. The chimneys of the engine house being lower than the windows of the church, smoke and cinders sometimes entered the latter in such quantities as to cover the seats of the church with soot and soil the garments of the worshippers. Disagreeable odors, added to the noise, smoke, and cinders, rendered the place not only uncomfortable, but almost unendurable as a place of worship.

The Court stated the general rule of law pertaining to the operation of a railroad as follows:

> Undoubtedly, a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of the cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accomodation.

The Court went on to say that such was not the case at bar. The damage in question was special to the church property and was not an injury shared in common with other property owners. It ruled that where noise from the operation of a railroad and its facilities is peculiar to a particular property and is not an injury shared in common with other properties it constitutes compensable damage. Although declining to pass on the question, the Supreme Court strongly intimated that if the case were before it on a different theory it would rule that the injury in question constituted an unlawful taking of property without payment of compensation.

The rule announced in *Fifth Baptist Church, supra*, was followed in *Chicago G. W. Ry. Co. v. First Methodist Episcopal Church*, 102 Fed. 85 (8th Cir. 1900). The facts in the two cases were nearly identical, but in *First Methodist Church* the Court squarely held that a partial taking had been effected.

It appeared that defendant railroad had constructed a passenger station approximately 60 feet from the church edifice owned by plaintiff, and a water hydrant for servicing its locomotives approximately 35 feet from the church building. The complaint alleged the locomotive engine noises, ringing of bells, sounding of whistles, combining with noxious odors, soot, dust, and cinders had so affected the church property as to render it valueless as a place of worship. In affirming the judgment entered below for plaintiff the Court of Appeals for the Eighth Circuit said:

> Conceding that the noise, vibrations, and inconveniences and annoyances which are unavoidable in the lawful running of trains over a railroad track, and which are common to the whole public and to all the abutting owners of property on the street, are not actionable injuries, the plaintiff's right of action is not affected thereby. The smoke, cinders, and offensive smells, and loud and protracted noises which constitute the nuisance to the plaintiff are not the usual and unavoidable result of the mere operation of defendant's trains over its track laid in the street, but they result from other uses by the defendant of the street and its track in the immediate vicinity of the plaintiff's property, *which*

> *do not affect in a like injurious manner the public generally, or other abutting owners of property on the street.* The smoke, cinders, offensive smells, and loud and protracted noises which are a nuisance to the plaintiff are not the consequential and unavoidable damages due from a lawful running of the defendant's trains over its track in the street, but result from the erection and use by the defendant of its water hydrant and station -- in close proximity to the plaintiff's church, *and which do not affect in a like injurious manner the public generally* .... In legal effect, the nuisance resulting from the use made of the structures by the defendant *constitutes a partial taking of the plaintiff's property for which compensation must be made.* (Emphasis added.)

The Federal rule was followed in State cases. As illustrative, see *Louisville Ry. Co. v. Foster,* 108 Ky. 743, 57 S.W. 480 (1900), an action for damages wherein it was alleged that defendant street railway company had constructed a turntable within five feet of the line of plaintiff's residence property, and that the noise of the turntable being operated almost continuously throughout the day and night impaired the value of plaintiff's property as a place of habitation. In ruling on the validity of the instructions given at trial the Kentucky Court of Appeals said:

> [T]he court....should have told the jury that appellee, as the owner of city property fronting on the street, must submit to all those noises, smells, and disturbances that are usual in city life, including the use of the highway by the street railway, insofar as they were reasonably incidental to the operation of a street railway in a city, and borne by the public generally; and that, so far as the injury complained of arose from these causes, there could be no recovery; but that she could recover for any substantial injury to her property arising from the location or operation of the turntable or cars that was caused by *such noises, smells, and disturbances as were not fairly incidental to the usual operation of such a street railway, and borne by the property owners generally along the line.* (Emphasis added.)

The rules of law laid down in the railroad cases may be briefly summarized as follows:

Noise from the normal operation of a railroad that is shared in common by all abutting property owners is *damnum absque injuria.* On the other hand, noise from the operation of a railroad that is not shared in common by all abutting property owners, but is localized and constitutes special damage to an individual piece of property may, in a particular instance, constitute compensable injury. If the injury is compensable, it is compensable in a "taking" State, or in a "taking or damaging" State.

It will be seen that the same rules apply in the highway cases, which are next for consideration.

Highway Cases

The general rule is firmly established that noise from highway traffic suffered by an abutting property owner in like manner as other abutting property owners is *damnum absque injuria.* In many of the cases the ground of "necessity" adverted to in *Richards v. Washington Terminal Co., supra,* is iterated as one of the reasons for the rule; i.e., it would be impossible to construct and maintain highways for the public accommodation if normal noise emanating from highway traffic constituted a compensable injury.

> See the following representative State cases: *Campbell v. Arkansas State Highway Commission*, 183 Ark. 780, 38 S.W. 2d 753 (1931); *Arkansas State Highway Commission v. Kesner,* 239 Ark. 270, 388 S.W. 2d 905 (1965); *People v. Symons*, 54 Cal. 2d 855, 9 Cal. Rptr. 363, 357 P. 2d 451 (1960); *Lombardy v. Peter Kiewit Sons' Co.*, 266 Cal. App. 2d 599, 72 Cal. Rptr. 240 (1968); *Northcutt v. State Road Department*, 209 So. 2d 710 (Fla. App. 1968); *Richmond County v. Williams,* 109 Ga. App. 670, 137 S.E. 2d 343 (1964); *Cheek v. Floyd County, Georgia,* 308 F. Supp. 777 (N.D. Ga. 1970); *Reymond v. State,* 255 La. 425, 231 So. 2d 375 (1970); *Thomsen v. State,* 284 Minn. 468, 170 N.W. 2d 575 (1969) [rule recognized]; *Lucas v. State,* 44 A.D. 2d 633, 353 N.Y.S. 2d 831 (1974); *Yakima v. Dahlin,* 51 Wash. App. 129, 485 P. 2d 628 (1971) [rule recognized]; *Gardner v. Bailey,* 128 W. Va. 331, 36 S.E. 2d 215 (1945).

In holding that there could be no recovery for noise, dust, etc., emanating from a freeway constructed on land adjacent to the affected property, the Supreme Court of California stated the general rule in *People v. Symons*, 54 Cal. 2d 855, 9 Cal. Rptr. 363, 357 P. 2d 451 (1960), as follows:

> It is established that when a public improvement is made on property adjoining that of one who claims to be damaged by such general factors as... noise, dust...there can be no recovery where there has been no actual taking or severance of the claimant's property.

The Court underscored the fiscal and practical consequences of a contrary ruling by stating that:

> To thus enlarge the scope of the state's liability...would impose a severe burden on the public treasury and, in effect, place "an embargo upon the creation of new and desirable roads."

A similar view was expressed in *Northcutt v. State Highway Department*, 209 So. 2d 710 (Fla. App. 1968), an inverse condemnation proceeding seeking to recover damages for noise, shock waves and vibration caused by traffic moving on a State highway constructed on property adjacent to plaintiffs' land, where in denying recovery the Court said:

> To sustain the...complaint of the plaintiffs as sufficient for inverse condemnation would bring to an effective halt the construction, operation and maintenance of access roads and highways within the State of Florida. It would be impossible to determine with any degree of accuracy, a reasonable budget for the construction of highways and access roads in the future in Florida.....
>
> The plight of the property owners in this case is ... "indistinguishable from that of thousands of their follow countrymen whose homes abut highways and railroads and who endure the noise without complaint."....
>
> Their problem appears to be...analogous to that of real property owners adjacent to railroad tracks.
>
> A review of the case law relative to land owners adjacent to railroads indicates that generally "when a railroad is constructed under legislative authority on its right-of-way, an owner of land no part of which is taken cannot recover for the lawful and prudent operation of the railroad."

The same result is reached whether the case arises in a "taking" State or in a "taking" or damaging" State. Thus, in *Reymound v. State*, 255 La. 425, 231 So. 2d 375 (1970), in denying recovery in an inverse condemnation action wherein damages were sought, *inter alia*, for noise produced by motor vehicle traffic on an Interstate highway constructed on land adjacent to plaintiff's residence property, the Supreme Court held that under Louisiana's "taken or damaged" clause injuries shared in common "which cause discomfort, disturbance, inconvenience, and even sometimes financial loss as an ordinary and general consequence of public improvements are not compensable."

However, in the case of special damage, the Court, as in the railroad cases, announced a different rule.

> The liability of a public body for property taken or damaged but not included within its actual expropriation activity must be limited to those instances where there is a physical taking or damage to that property or a special damage peculiar to the particular property and not general damage sustained by other property similarly located....
>
> The criterion for assessing the special damage suffered by a property owner because of the construction of a public project under eminent domain is whether that damage is not suffered by those in the general neighborhood -- that is, whether, the damage is peculiar to the individual who complains.

The foregoing is deemed sufficient to illustrate that the rule arrived at in the highway cases is the same as that developed in the railroad cases. Next for consideration are the scant few highway cases that deal with the problem of special damage.

Special Damage from Highway Noise

Probably the most discussed case wherein damages were allowed for highway traffic noise absent a partial take is *City of Yakima v. Dahlin*, 51 Wash. App. 129, 485 P. 2d 628 (1971). The facts in this case were as follows:

The City of Yakima proposed to construct an overpass with a solid concrete wall 20 feet in height approximately 15 feet from plaintiffs' warehouse building in which was located an office. No part of plaintiffs' property was to be taken for the new construction. Plaintiffs brought an action in inverse condemnation alleging that the sound of traffic moving within 1-1/2 feet of the wall of their building would cause a buildup of noise reverberating against the concrete wall that would be "intolerable" and render the office area unusable. The City moved to eliminate noise from jury consideration and the trial court denied the motion. On appeal from the trial court's ruling the intermediate Washington Court of Appeals said:

> The instant case does not involve a physical taking of respondent's property. This fact does not prevent an award for damages.... Generally, compensation is not allowed in such circumstances where the injury or damage is one suffered in common with the general public. On the other hand, where the injury or damage is special or peculiar to the particular property involved and not such as is common to all the property in the neighborhood, compensation may be allowed....
>
> We believe the ramp to be constructed in this case may create an echo chamber for one-way traffic immediately adjacent to the south end of respondent's warehouse and may thereby materially affect the fair market value of respondent's property. This is a special damage differing in kind from the damage sustained by other properties due to the improvement in question. In this situation the jury may consider noise as a factor....

Thomsen v. State, 284 Minn. 468, 170 N.W. 2d 575 (1969), is another special circumstance case in which it was held that noise damage could be considered although there was no taking of any part of plaintiff's property in the acquisition of right-of-way for a new highway. It appeared that plaintiff's residence property lay directly within the path of the right-of-way as originally planned. However, in what the Court characterized as "an apparent attempt to avoid physically appropriating any of plaintiff's property and the consequent necessity of condemning it" the State highway department deliberately narrowed the right-of-way as it passed plaintiff's property, so that the traveled portion of the highway when constructed was within ten feet of plaintiff's bedroom. This was done despite plaintiff's protest that the altered right-of-way would pass too close to his property and his request either to change the route location or purchase the property.

The Court described the facts of the case, an inverse condemnation proceeding, as "unique." It found that the sound of traffic passing within a few feet of plaintiff's bedroom as a result of the deliberate alteration of the right-of-way was unremitting throughout the day and night. Since Minnesota is a "taking or damaging" state, the question before the Supreme Court was whether there had been a damaging "in the constitutional sense" as a result of the gerrymandering of the right-of-way. In remanding to determine whether the unique circumstances of the case constituted damage in the constitutional sense, the Court said:

> While ordinarily an adjoining property owner could not recover from the state solely because the value of his property is decreased by noise and light from traffic on a newly constructed highway, whether plaintiff's property has been so unfairly .... and peculiarly injured that it has been damaged in the constitutional sense so that the state should be compelled to condemn it is, given all of the undisputed but highly unusual facts of this case, a question of law which must be determined by the mandamus court in the first instance.

Cheek v. Floyd County, Georgia, 308 F. Supp. 777 (N.D. Ga. 1970) was an inverse condemnation proceeding in which plaintiff sought to recover damages for loss in market value of her property caused by the construction of a highway and access ramps adjacent thereto. Various elements of damage were alleged, such as loss of parking, and change of grade. The last element of damage claimed was for the annoyance of lights and noise from vehicles using the access ramp adjoining plaintiff's property.

In ruling on the last claim and applying Georgia law the Federal Court made clear that in order to permit recovery it was requisite that it be shown that the damage from noise and lights was special, and not an injury shared in common with other property owners. It said:

> At least the claimant would have to show injury that was distinguishable from the public in general along the project....The damages must be distinguished as special when compared with the damage suffered by the public generally along the project....it would be an impossible burden on the various governmental entities connected with development of highways if every landowner who could hear passing traffic could recover damages. True, the noise from passing traffic makes property less desirable for a number of reasons. But highway construction would be virtually impossible if such recovery were allowed in every case.

The Court went on to find that the lights from vehicles using the ramp, and the "gear shift" noise of heavy trucks negotiating the twists and turns of the ramp constituted "special damage." In making an award in the amount of $1,000.00 the Court stressed that "any depreciation in value from noise, lights, etc., is minimal as it could exceed that of other property owners only slightly."

Thus, recovery in the case was placed squarely on the grounds of special damage.

One further case remains for discussion. *Board of Education of Morristown v. Palmer*, 88 N.J. Sup. 378, 212 A. 2d 564 (1965), was an inverse condemnation action asking that the State highway department be compelled to condemn certain school property owned by the plaintiff. The complaint alleged that plans for the construction of six-lane I-287 showed that the highway and a connecting interchange and ramp system would result in the complete encirclement of the school property; that such school was an elementary public school attended by children of the ages 5 to 11; that the encirclement of the school by a highspeed highway would present extreme danger to little children proceeding to and from school and using the grounds of the school area; and that the noise from the surrounding traffic would so interfere with the teaching process and oral control of the pupils as to nullify any effective educational program.

The trial judge dismissed the complaint ruling, in an oral opinion, that because New Jersey was a "taking" State there could be no constitutionally compensable injury without a physical invasion of the school property. The Superior Court of the Appellate Division reversed, holding that where the "beneficial use" of property is destroyed there is a "taking" within the meaning of the New Jersey Constitution.

It is difficult to know how much of the opinion was weighted on the factor of danger to little children and how much on the factor that making an island of the school by an express highway and its connecting parts would present an extreme case of special damage from noise.

The matter becomes moot, however, because the decision of the Appellate Division was reversed by the Supreme Court of New Jersey in *Board of Education of Morristown v. Palmer*. 46 N.J. 522, 218 A. 2d 153 (1966). The case was presented to the Supreme Court on a different and agreed set of facts; i.e., that the school would *not* be encircled by the new highway and its access roads and ramps. The Court described the case as being "premature" and the elements of alleged damage to the school property as being "speculative" and "hypothetical." It dismissed the case without prejudice to the institution of a new action by the plaintiff after completion of the highway project, and at such time as the effect thereof on the school property could be fairly determined.

The Court expressly refrained from passing on the issue of recovery for noise damage, stating:

> Decision on that issue is expressly reserved, and the matter may be considered as *res nova* for further presentation to this Court.

The foregoing are the only cases found at the time of this writing wherein recovery for highway traffic noise has been allowed in the absence of a partial taking of property.

Summary

The rules governing liability for noise from highway traffic absent a partial take can be summed up and stated in almost exactly the same terms as the rules governing liability to abutting property owners for noise from the operation of railroads and street railways.

That is: Normal noise from the movement of traffic that is suffered in common by the general public is *damnum absque injuria*; it constitutes neither a "taking" nor a "damaging in the constitutional sense." On the other hand, traffic noise that is not an injury shared in common by the general public, but is localized and peculiar to a particular piece of property may, under certain circumstances, be constitutionally compensable. Recovery in such instances is allowed on the theory of special damage; and such special damage is constitutionally

compensable in either a "taking" or a "taking or damaging" State. The measure of damages is the difference in market value of the affected property before and after the construction of the injury-producing highway facility.

It seems safe to say that the rules, as stated, are firmly established ...this despite the relative paucity of special damage cases in point. It is worth repeating that the relevant highway law grows seminally out of the antecedent railroad litigation. The principles developed in the latter body of law (and given application to highways) have been sustained repeatedly over a period of more than a century. Any significant change therein appears wholly unlikely, except as a result of direct legislative intervention. The latter seems equally improbably (at least on a widespread basis) because of the staggering cost attendant upon broadening compensation for an injury so ubiquitous as to affect all persons except those living in areas sufficiently remote as to be beyond the reach of noise emanating from motor vehicle traffic traffic on streets, roads and highways.

LIABILITY FOR NOISE DAMAGE IN DIRECT CONDEMNATION CASES

Next for consideration is the factor of traffic noise as an element of damage in direct condemnation cases. The question presented in these cases is whether noise is properly includable as an element of severance damage. 7/

View That Evidence of Traffic Noise Is Admissible

Subject to an important limitation hereinafter discussed, the general rule appears to be firmly established that evidence of traffic noise is admissible as an element of severance damage. It is permitted for the purpose of showing decline in market value of the remainder property brought about by the construction of an injury-producing public facility on that part of the property which is taken for a public use.

Noise is allowed to be considered in conjunction with fumes, dust, lights, vibration and other inconveniences and annoyances produced by motor vehicle traffic. Noise may not, however, as a general rule, be considered as a separate element of damage. 8/

The cases allowing noise to be considered as an element of severance damage are, generally speaking, concerned in chief with the quality of the proof offered; i.e., the probative value of the particular evidence proferred to show diminution in value of the remainder property. Thus, in *State, Department of Highways v. Garrick*, 260 La. 340, 256 So. 2d 111 (1971), the Supreme Court of Louisiana, in allowing noise to be considered as an element of severance damage, stated:

> Whether in a particular case damages shall be awarded...depends on whether the property was actually damaged by the public work. The resolution of this question depends usually not on some sophisticated definition of "severance damages," but upon the quality of the proof in the case....The trial court found the opinions of defendants' witnesses to be adequately supported. Their observations appeal to reason; they saw and counted traffic, heard the noise, felt the vibrations of the heavy trucks and noted the effects on the tenants; they described the change in the neighborhood,.... The houses formerly sat a short distance from a quiet dead end street. They are now 10 to 45 feet from the edge of the busy four-lane concrete highway. These factors adequately support the opinions of defendants' witnesses that the market value of the property has been reduced.

It will not serve a useful purpose here to multiply cases showing the application of the rule that evidence of traffic noise is admissible to show diminution in value of the

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7/ It may be noted that although severance damage and consequential damage are technically distinguishable (*Nichols on Eminent Domain*, § 14.1[3]), the cases quite generally lump traffic noise (a consequential injury) under the generic heading of severance damage. For present purposes there is no need to draw on the distinction because whichever label attaches the basic question remains the same, that is, whether noise is admissible as a relevant evidentiary factor affecting market value.

8/ State Highway Department v. Hollywood Baptist Church, 112 Ga. App. 857, 146 S.E. 2d 570 (1965); Mississippi State Highway Commission v. Colonial Inn, Inc. 246 Miss. 422, 149 So. 2d 851 (1963).

remainder property not taken. The reader interested in the application of the rule to a variety of fact situations is referred to the following representative cases: *Morgan County v. Griffith*, 257 Ala. 401, 59 So. 2d 804 (1952); *Arkansas State Highway Commission v. Manning*, 252 Ark. 10, 477 S.W. 2d 176 (1972); *People v. Volunteers of America*, 21 Cal. App. 3d 111, 98 Cal. Rptr 423, 51 A.L.R. 3d 844 (1971); *State Highway Department v. Hollywood Baptist Church*, 112 Ga. App. 857, 146 S.E. 2d 570 (1965); *Commonwealth v. Elizabethtown Amusements, Inc.*, 367 S.W. 2d 449 (Ky. 1963); *State, Department of Highways v. Garrick*, 260 La. 340, 256 So. 2d 111 (1971); *Mississippi State Highway Commission v. Colonial Inn, Inc.*, 246 Miss. 422, 149 So. 2d 851 (1963).

For additional cases and a full discussion thereof, see the annotation in 51 A.L.R. 3d 860, at pages 882-897.

View That Evidence of Traffic Noise Is Not Admissible Where Such Injury Constitutes General as Opposed to Special Damage

In the majority of the cases allowing noise as an element of damage the issue does not seem to have been raised whether such evidence is properly admissible absent a showing that the injury was special to the remainder property, and not general damage suffered in common with other property owners. The cases are simply silent on this issue. In other words, the courts did not pass on the question whether the rules pertaining to general and special damage developed and given application in the inverse condemnation cases should be given like application in the determination of severance damages. However, in the cases where such issue was before the court, it was ruled (with an important exception to be noted later) that traffic noise not different in kind or degree from that suffered by other property owners is not a proper element to be considered in determining severance damage.

In *State v. Watkins*, 51 S.W. 2d 543 (Mo. App. 1932), involving the condemnation for highway right-of-way of a 1-1/2 acre parcel out of a 220 acre tract of farm land, error was assigned in the refusal of the lower court to grant an instruction that noise (and other annoyances from motor vehicle traffic) should not be taken into consideration "insofar as the same are common to the other landowners in the neighborhood, no portion of whose lands is taken for the highway." In holding that the refusal to grant such instruction constituted reversible error, the Court stated:

> Our Supreme Court has held that even the noise of trains, common to other landowners in the neighborhood, is not a proper element of damages in cases of this character....Certainly the same rule should be applied to motor traffic which, in that respect, can hardly be compared to the annoyance made by the roar, whistle, soot, and smoke of the locomotive. The refused instruction was one to which plaintiff was entitled, and....we must hold its refusal reversible error.

In *State v. Sharp*, 62 S.W. 2d 928 (Mo. App. 1933), likewise involving a partial take for highway purposes, error was assigned in the granting of an instruction that "the jury in assessing the amount of damages to be allowed...will take into consideration...the resulting damage to the remaining property....including inconvenience and damage or annoyance from dirt, dust and noise."

In holding such instruction erroneous and reversing and remanding, the Court said:

> The law of this state clearly is that a jury...shall not take into consideration such inconvenience and disadvantages...as are the consequences of the lawful and proper use of the highway...insofar as the same are common to the other landowners in the neighborhood, no portion of whose lands is taken for said highway. Instruction 1-O is erroneous, in that it allows the jury to give damages arising from "inconveniece and damage or annoyance from dirt, dust and noise." These...are items of general damage.

The rule was announced in *Mississippi State Highway Commission v. Colonial Inn, Inc.*, 246 Miss. 422, 149 So. 2d 851 (1963), that highway traffic noise cannot be considered as a compensable item of damage to remainder property where such noise constitutes mere general damage suffered in common with other property owners. Recovery was allowed in the instant case on the ground that special damage had been proved. The Supreme Court of Mississippi, in allowing traffic noise to be considered, stated:

> [T]he injury must be special, and not such as is common to all the

> property in the neighborhood....Here the severance damages to the remainder not taken is special and peculiar to the particular owner ....and is distinguished from non-compensable damages to all others of the public similarly situated.

Hall v. Wilbarger County, 37 S.W. 2d 1041 (Tex. Civ. App. 1931), was a proceeding to condemn right-of-way for a federal-aid highway through defendant's 100 acre farm property. In disallowing damage to the remainder due to traffic noise, the Court stated:

> [T]he injuries resulting from the construction of the road, such as the noise and annoyance of highway traffic, cannot form the basis for damages because it is common to the community generally.

In *State Road Commission v. Williams*, 22 Utah 2d 331, 452 P. 2d 881 (1969), a 37-foot strip of land was condemned for the widening of a highway, which resulted in greater proximity of traffic on the traveled way to defendants' dwelling house situate on the remainder property. The sole question before the Supreme Court of Utah was whether the trial court committed error in disallowing a finding of $3,986.00 in damages for increased noise, assigning as its reason therefor that "such damage is not special, unique and peculiar to the property of the defendants." The Court reviewed the Utah cases construing the "taken or damaged" provisions of the State Constitution, and in the light thereof upheld the trial judge's action in denying recovery because the injury constituted general rather than special damage.

A small portion of defendant's residence property was condemned, in *City of Berkeley v. Adelung*, 214 Cal. App. 2d 791, 29 Cal. Rptr. 802 (1963), for municipal street purposes, and defendant sought $3,000.00 in severance damages, offering to prove that traffic past the remainder (on which defendant's home was located) would be tripled, with resultant increase in noise and fumes. In denying recovery for severance damages the Court stated that "the asserted injury is not compensable because it is general to all property owners in the neighborhood and not special to defendant."

The holding in *City of Berkeley v. Adelung, supra*, was approved in the subsequent California case of *People v. Presley*, 239 Cal. App. 2d 309, 48 Cal. Rptr. 672 (1966), likewise involving condemnation for street purposes, wherein the Court stated in reference to the decision in *Berkeley:*

> The court held that any decrease in the value of defendants' remainder because of [traffic noise and fumes] was uncompensable: that it was an inconvenience "general to all property owners in the neighborhood, and not special to defendant." We agree with this view....

Thus it is seen that there is an ample body of authoritative case law adhering to the view that traffic noise is not a compensable item of damage where such injury is one suffered in common with other landowners.

The Dennison Case: A Contrary View

The opposite result was reached in the well known case of *Dennison v. State*, 22 N.Y. 2d 409, 293 N.Y.S. 2d 68, 239 N.E. 2d 708 (1968). The facts in this case were as follows:

The Dennison property was located in a remote area of the Lake George region in New York, and the colonial frame house situate thereon was entirely private and secluded, being surrounded by dense woods that were both the result of natural forest growth and artful landscaping performed by the owners. The State of New York condemned a portion of the property for a new highway, which when constructed lay approximately 200 feet from the residence property. For the former view of forest and mountain was substituted the sight of a highway embankment averaging 20 feet in elevation above the property, and for the privacy of a sylvan retreat was substituted the noise, lights, and odors of a heavily traveled highway.

Severance damages were allowed by the Court of Claims which included "the loss of privacy and seclusion, the loss of view, the traffic noise, lights and odors all as factors causing consequential damage to the remaining property." The Appellate Division (Third Department) affirmed.

The State argued, on appeal, that although consequential damages are recoverable in the case of a partial take, there must be excluded therefrom "elements of damage which are not peculiar to the owner of the remaining property but are suffered by the public

generally," pointing to the fact that "where there has been no partial taking of property, an owner whose property adjoins a public highway would not be entitled to damages resulting from the depreciation of his property due to the noise of cars and trucks passing on the highway." Characterizing the State's argument as "not without some merit" the Court of Appeals went on to hold that noise was properly considered because "it would have been practically impossible for the court to separate the noise element from the other elements which ... were properly considered - the loss of privacy, seclusion and view," and to attempt to do so would achieve a result that would be "purely arbitrary and at best speculative."

Thus, the holding was placed squarely on the ground of the *practical difficulty* in attempting to segregate noise from other elements of consequential damage.

In a vigorous dissent (concurred in by two other judges) Bergan, J., pointed out that "expert witnesses and trial courts are accustomed to separating elements of damage that are proper from those elements not proper," and argued that "the rule which this court ought to adopt ... is that, where noise is an element of damage, it must be shown that its effect on the claimant is not common to other owners."

The import of the majority ruling is not altogether clear. Some commentators express the opinion that the holding should properly be confined to the facts, or at most to the facts of a like situation involving privacy and seclusion as prime valuation factors. Such view finds some support in the separate concurring opinion of Chief Judge Fuld, who wrote that:

> [W]e are not, contrary to intimations in the dissenting opinion, "accept[ing] future traffic noise as an element of consequential damage"...in "quite unrestricted form."
>
> The essential factor which distinguishes the case before us from the general run of cases...is the quietude, the tranquility and the privacy of the property, qualities which the claimant prized and desired and which undoubtedly are items that would be taken into account by an owner and a prospective purchaser in fixing the property's market value.

Summary

In order to bring the problem under discussion into perspective it might be useful to hypothesize a fact situation free of complicating circumstances (such as those present in *Dennison*).

Assume A, B, C, D and E as contiguous lots, each with a dwelling house situate thereon. A proceeding is instituted to condemn a strip from Lot A for a new highway. The highway when constructed will abut on the residue of Lot A and on the existing front footage of Lots B, C, D, and E. Assume further that the residence properties on Lots A, B, C, D, and E are roughly equidistant from the new highway and that traffic noise therefrom, measured in decibels, will affect all such properties equally. The owners of Lots, B, C, D, and E are clearly not entitled to recover for noise damage because the injury is common to all properties in the neighborhood. Should the owner of Lot A be permitted to recover for noise as an element of severance damage without regard to the fact that the injury impacts equally on all properties in the neighborhood?

In a jurisdiction adopting the rule that noise emanating from a highway constructed on abutting or adjacent property is *damnum absque injuria* absent a showing of special as opposed to general damage, it can be argued that logical consistency requires the application of the rule that noise from a highway constructed on land severed in a partial take is not a constitutionally compensable item of damage unless it can be shown that the damage is special to the remainder property, and not an injury suffered in common with all other properties in the neighborhood. It can plausibly be asserted that the contrary result would necessarily create two inconsistent rules in respect to what constitutes *damnum absque injuria* in eminent domain. That is to say, general traffic noise would be *damnum absque injuria* for the purposes of an inverse condemnation proceeding, whereas the exact same injury would be compensable for the purposes of a direct condemnation proceeding.

The contrary argument (not spelled out in the cases) would appear to be that there is no inconsistency or contradiction because in direct condemnation the requirements of just compensation dictate that all factors contributing to diminution in value of the remainder be taken into consideration, and noise, as one of such factors, must be included notwithstanding that, viewed separately, it may fall into the classification of injuries shared in common with the general public. Put another way, the before and after value of property in condemnation cannot accurately be determined if there is excluded from consideration the amount of damage to the remainder due to noise. This is for the reason that a purchaser in the open market

would, obviously, discount the value of the remainder by the amount of damage thereto caused by traffic noise. Moreover, it would be an unjust law that would permit the government to carve out certain segments of an owner's possession and leave him with a balance of assets depreciated in value because of the use to which the government will put that part of the property which it elects to take. Thus, a different rule should be applied in the case of a partial take than obtains in the situation where no taking is involved.

The New York Court of Appeals in *Dennison, supra,* arrived at what might be termed a middle ground, holding that noise injury must be compensated because it cannot be separated from other elements of consequential damage. The Court, as has been seen, acknowledged that the State's argument for noncompensability had merit, but concluded that "the practical difficulties attendant upon accepting the State's theory of evaluation outweights any benefit likely to be derived from applying it."

[*Quaere,* however, whether the segregation of noise damage poses more difficult problems for expert witnesses, judges and juries than does the separation of other kinds of non-compensable damage successfully (and often routinely) accomplished at the trial stage? The dissent in *Dennison* (representing a 4-3 division in the Court), was of the opinion that it did not, and gave expression thereto in the sharp observation that:

> [I]t is a strange doctrine, indeed, to say that a man is entitled to an item of damage...because he is unable to segregate that item from other items of damage.

Whatever the merits of the New York rule, the same appears to be *sui generis* in awarding compensation on the principal ground of the practical difficulty in separating the factor of noise injury from other elements of consequential damage.]

Without attempting to pass on the merits of the differing positions, a review of the case law makes this much clear. There is, at the present time, no unanimity of judicial opinion or approach on the question whether the rules governing general and special damage should be given application to traffic noise when considered as an element of severance damage. The question has, of course, been passed on in those jurisdictions adopting the rule that noise damage must be special in order to be considered; and the New York rule stands on its own particular ground. However, in the majority of jurisdictions (including those - other than New York - that have allowed noise as an element of severance damage) the question does not appear to have been presented in the form of an issue squarely raised for decision by either the appellate intermediate courts or courts of last resort. To this extent, the question can be said to be open. Clarification of the issue is desirable in view of the fact that the problem is present in every case involving traffic noise as an element of severance damage.

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 own 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 condemnation cases.

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