Comments on Rights of Abutters Concerning Noise, Inconvenience, Dust, Light, Air, and View

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• The question of abutters' rights with respect to light, air, access, view, etc., has been of extreme interest to me ever since I became involved in the subject of eminent domain. In connection therewith, there has always been in my mind the question of just how far these rights extend; that is, what constitutes an abutter for the purpose of determining his rights to such light, air, view, access, etc.?

Basically, the cases involving compensability for the taking or damaging of an abutter's right to light, air, and view, also involve the impairment of ingress and egress—now called access—and arose primarily in connection with the construction of elevated structures within metropolitan areas and the construction of street railroads within and upon municipal streets.[1] The latter are referred to generally as the additional servitude cases. As a matter of fact, in reviewing these old cases, it is difficult to find a pure light and air case which does not have the question of impairment of access involved.[2] The subject of the impairment of access (when compensable) has likewise been well annotated and is outside the scope of this paper.[3]

An exception to this general observation that light and air claims usually involve access as well is found in the so-called "pure air" cases (and I do not make reference to the opinions of the appellate jurists!), where sewer improvment districts are often held liable for polution of the air of adjacent properties.[4] In the Fiscus case[5] the Court held that there need be no physical invasion or spoilation of one's land before he can maintain an action for damages for taking private property for public use without just compensation. The Court likened pollution of air to pollution of water and got sufficiently carried away to quote Lewis on eminent domain:

> The impregnation of the atmosphere with noxious mixtures that pass over my land is an invasion of a natural right, a right incident to the land itself, and essential to its beneficial enjoyment. My right to pure air is the same as my right to pure water. It is an incident to the land, and necessary to and a part of it, and it is as sacred as my right to the land itself.[6]

As I read this I could not help but think what a field day an enterprising barrister could have with this precedent in Los Angeles County—if he could only determine whom to sue!

[1] See 22 A.L.R. 145; 40 A.L.R. 1321; 45 A.L.R. 534.

[2] In City of Baltimore v. Himmelfarb, 92 Atl. 595, recovery was denied even though the dust and gases incident to an adjacent public project actually depreciated value of subject property, because owners access was not disturbed. See also Haversak v. Allegheny County, 90 P.L.J. 40, where owner did not abut on the offending public improvement and thus recovery was denied.

[3] 43 A.L.R.2d 1072.

[4] Donaldson v. City of Bismarck, 3 N.W.2d 808; City of Wynn v. Fiscus, 193 S.W. 521; Contra—see City of Temple v. Mitchell, 180 S.W.2d 959; Taylor v. City of Baltimore, 99 Atl. 900; Kellogg v. Bd. of County Commissioners, 153 N.E.2d 521. For an interesting judicial disclosure on what happens when you try to stop a sewer district by imposing restrictive covenants against such use on neighboring property, see Smith v. Clifton Sanitation District, 300 P.2d 548.

[5] 193 S.W. 521.

[6] LEWIS, EMINENT DOMAIN. 3rd ed., vol. 1, §236.

The cases involving compensation for noise and dust also often involved smoke, vibration, and fire danger and arose primarily in conjunction with the coming and advance of the railroad.[7] Ironically, many of these early railroad cases, involving cinders, fire, and smoke, may now form the basis for recovery against our newest means of transportation—the jet aircraft.[8]

The word "inconvenience" should really not be a part of any serious discussion in this field because personal inconvenience, discomfort, or annoyance, unrelated to any property or right appurtenant thereto, and, hence, incapable of measurement as far as the value of the specific property is concerned, is just not compensable,[9] but it does insidiously creep in regardless of our efforts. When we have inconvenience or annoyance plus an invasion of or interference with a right or easement appurtenant to property (such as access, light, air or view), then the result can be different, but the recovery, if any, is predicated on the diminution in the market value of the subject property—not as recompense for the personal inconvenience involved, as in a personal injury case for pain and suffering. However, while numerous cases categorically state that personal annoyances, inconvenience, or discomfort are not compensable, a surprising number of these cases vacillate. For example, in a recent Colorado case the Court said:

> No personal inconvenience or annoyance, no interference with his trade or business, no decrease in the rental of his premises occasioned by the construction or operating of the railroad, and no temporary interruption or damage thereby constitutes the test. None of these things can enter into the question, except as they may appropriately aid in determining the actual depreciation in market value of the realty and improvements.[10]

Apparently, if you can prove that the personal inconvenience or annoyance was, in fact, not personal to the owner but would, in fact, be an attitude existing in the open market, then, I presume, it would be admissible.

With the classification of these items in mind, so that the trees can be distinguished from the forests, a further distinction must be noted—that these various types of injuries for which compensation may be claimed arise only in partial taking cases, or in cases where there is no physical taking at all. In other words, where the taking is total, these issues cannot arise. Additionally, it should be recognized that these items are often lumped together by the courts and erroneously referred to interchangeably as "speculative," "consequential," "potential," or "incidental" damages. These terms are not synonymous, as a reading of the cases clearly demonstrates, and judicial lack of precision accounts for much of the confusion existing in the minds of eminent domain attorneys and valuation experts.[11] For example, by statute[12] consequential damages are allowed in Colorado, although we lack

[7] See footnote 1.

[8] Most of these so-called items are actually potential or probable damages that may occur in the future. This, therefore, involves the subjective attitude or fear of an owner. For an interesting paper on this subject, well annotated, see "Fears of an Owner, Compensable?", by G. E. Rohde, given to WASHO in Portland in June 1960. See also very recent annotation on compensability of risk of fire as being an item to consider: 63 A.L.R.2d 313.

[9] See Eachus v. Los Angeles, 37 Pac. 750.

[10] Dandrea v. Bd. of County Commissioners, 356 P.2d 893. In an earlier Colorado case, LaVelte v. Town of Julesberg, 49 Colo. 291, 122 Pac. 774, the Court denied recovery for damages for noise, smoke, vapors and increased dangers from fire and said, "This inconvenience and injury would be common to all other property owners adjoining or adjacent to the power plant. The owner of property condemned is not entitled to recover damages to the residue for annoyance and inconvenience suffered by the general public. The damage to such residue is limited to some right or interest therein enjoyed by the owner, and not shared or enjoyed by the public generally." (citing other Colorado cases.)

[11] See ORGEL, VALUATION UNDER EMINENT DOMAIN (2nd Ed.), vol. 1, pp. 58-65.

[12] 50-1-6(2), C.R.S. 1963.

clarifying precedent. In essence, this statute states that the trier of fact

> . . . shall hear the proofs and allegations of the parties, and after viewing the premises, without fear, favor or partiality, shall ascertain and certify the compensation proper . . . as well as all damages accruing to the owners . . . in consequence of the condemnation of the same.

In the first situation, namely a partial taking, the results as to compensability are going to depend largely on the measure of damages applicable to each particular State. In other words, if it is a "taking plus damages to remainder" State, it is a lot easier to slip these items through, than in a straight "before and after" State.

In the other situation (namely, where there is no actual physical taking), the results as to compensability are going to depend largely on the type of constitutional requirement in effect. If you have a "taking and damage" clause in your constitution, as contrasted with a "taking only" clause, it will be a lot easier to sustain an award for any of these items, although it would appear to be only a matter of semantics—the same net result can be reached in either situation.

Finally, you should recognize that all these items could conceivably be a part of an allowance for damages to remaining property or to a property, no portion of which is taken, by mere proximity of a new highway to existing improvements in the case of a widening project, or as severance damages in the case of new highway alignment. So if the compensability of noise should be judicially proscribed, the clever respondent can accomplish the same result by merely eliminating reference to the word "noise" and take the position that all he seeks is damage to remaining property due to proximity or severance. (For example, did you ever try to get a respondent's valuation witness to state what portion of his damage is attributable to circuity of travel or some other noncompensable item?). An excellent example of this, which even the appellate court noted, is *State v. Calkins*,[13] a 1957 case arising in Washington where the Court went along with the now-recognized principle that compensation need not be paid for the "taking" of access to a newly located freeway, but recognized that the market value of the property remaining might be affected by the nature and extent of the taking for the limited-access highway and that certain factors or circumstances common to the total access denial cases might be considered in determining the severance damages. Among the listed circumstances, incidentally, were the added inconvenience, if any, in managing the property and in going from one tract to the other. As the Court prefaced this last remark by reference to market value of the property remaining, I assume it was not approving compensation for personal inconveniences! The case has further value in that it discusses and approves some good instructions and statutory provisions in this field. However, as a trial lawyer, I have found it most useful in cross-examination either to preclude certain expert testimony or to get it stricken where the expert has obviously proceeded on the loss of access theory—even though he cannot or will not state a specific amount allowed to each item of damage.

There are several recent cases[14] in this general field which deserve special attention because of the possible trends they may indicate. Some involve compensability for fear or noise in connection with the operation of an airport and aircraft. The cases are interesting and, since the United States Supreme Court got into the act, perhaps we may look forward to additional authorities on a local level which may follow the thinking of the Griggs case. In the

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[13] 314 P.2d 449.

[14] Ackerman v. Port of Seattle, 348 P.2d 664; Cheskov v. Port of Seattle, 348 P.2d 673; Mathewson v. New York State Thruway Authority, 196 N.Y.S.2d 215; People v. Symons, 357 P.2d 451; Griggs v. County of Allegheny, 82 S. Ct. 531 (U.S. Sup. Ct.).

Ackerman case,[15] for example, they recognized that property is a thing, not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal and that anything which destroys any of these elements of property to that extent destroys the property itself. Accordingly, they held that continuing and frequent low flights over appellants' land—even though vacant —amounted to the taking of an air easement for the purpose of flying airplanes over the land for which the owner was entitled to be compensated on an over-all before-and-after market value theory.

It would appear to me that those who operate airports may exercise a little more discretion in obtaining the necessary air easements of the type utilized in the Civil Aeronautics Board Regulations for safe landing and safe take-off patterns. In addition, we may look for a trend raising the minimum clearances for all types of aircraft.

What about the predicament of the property owner who purchased property with full knowledge that certain propeller-driven aircraft would be operating in the vicinity of his home but never dreamed that within a very short time the runways would be extended to accommodate the larger, noisier, jet aircraft? In the recent Griggs case,[16] the United States Supreme Court ruled that the County of Allegheny, which was the owner and operator of the greater Pittsburgh airport, was responsible for a certain taking and was the cause of the damage sustained by adjacent landowners. One quotation from this decision merits consideration here because it sets forth the various elements to be considered in arriving at the measure of damages for the type of taking involved:

> Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted "If we had engine failure we would have no course but to plow into your house."

The same analogy can be used, I think, with respect to highways. In *Mathewson v. N.Y. State Thruway Authority*,[17] residents and owners of property in a rather exclusive Westchester County village brought an equitable action to enjoin bus and truck traffic on the New England Thruway from 8:00 PM to 8:00 AM on the grounds that such use of the highway with such noise, character, intensity, and duration, and with such illumination in the nighttime, constituted a nuisance. The trial court recognized that while ". . . the noise, fumes and lights from the traffic of trucks and buses can be very annoying for persons residing along a highway . . ." these annoyances are not the ". . . basis of right to legal relief where such traffic is merely incidental to the ordinary and reasonable use of a local or state highway." However, the Court continued as follows:

> But, it is clear also that, while one may be expected as a part of his contribution to our way of life to assume incidents or ordinary highway traffic in the vicinity of his home, he may have a just complaint against the laying down of a super-highway near his door and the use of the same with the present-day type of huge buses and trucks operated at high speed in the interests of commerce. Such a highway, and such use thereof, if seriously affecting his health and comfort, and the value of his property, may constitute an actionable *nuisance*.

[15] Ackerman v. Port of Seattle, 348 P.2d 664; Cheskov v. Port of Seattle, 348 P.2d 673.

[16] 348 P.2d 664.

[17] 196 N.Y.S.2d 215.

After discussing at random, with equally wide strokes, the impracticality of injunctive relief, the Court thus gives it the coup-de-grace as follows:

> And if it appears that it is not practical for the Thruway Authority to so restrict and regulate truck and bus traffic thereon so as to protect plaintiffs in their rights, the judgment hereon may properly take the form of providing for a fixing of damages to plaintiffs properties and for payment of same.

The Appellate Division of the Supreme Court promptly reversed[18] on the ground that this Authority was immune from suit, but, even if it were not, the complaint failed to state a cause of action as there was no showing that the plaintiffs were annoyed any more than other property owners in the area similarly situated or that the noises or annoyances subject the plaintiffs to a greater share of the common burden of incidental damage than upon all those living in the vicinity. The New York Court of Appeals promptly affirmed the Appellate Division ruling.[19] If the elements of damage considered by the United States Supreme Court in the Griggs case are present as a result of construction of a new freeway or Interstate route next to a person's property, would not the same rationale apply?

One of the recent, leading, cases, wherein depreciation in value due to loss of view, noise, fumes, dust, etc., of a property abutting a freeway was denied, is *People ex rel., Dept. of Public Works v. Symons,*[20] a 1961 California Supreme Court decision. That case involved the partial taking of residential property in the City of Los Angeles for the development of streets adjacent to a State freeway. However, the condemnor was the State Department of Public Works and it was found that respondent's property was being taken for State highway purposes. The property taken consisted of a small piece of ground containing 440 sq ft on the south side of the city street in question, which was to be used for a turn-around or cul-de-sac of the city street in front of respondent's property. The State freeway right-of-way line apparently was respondent's east property line and the street was closed at its intersection with the freeway—apparently running north and south. In addition to compensation for the 440 sq ft actually taken, the respondent sought severance damage measured by the decreased value of his remaining property due to his immediate proximity to the freeway to the east. No portion of his property was acquired for the freeway proper, unless the cul-de-sac area on the city street in front of this property could be so construed. Among the factors considered by the respondent's valuation witness in arriving at his opinion that the residue was damaged, was changed from quiet residential area, loss of privacy, loss of view to the east, noise, fumes, and dust from the freeway, loss of access over the area now occupied by the freeway, and this misorientation of the house on its lot after the freeway construction. The trial court refused to allow any evidence relating to the decreased value of the residue, because the valuation witnesses could not separate the damage caused by the individual elements and, therefore, as some or all factors considered were noncompensable, the offer was irrelevant and immaterial. The Supreme Court affirmed the trial court, not on the grounds that it was correct in refusing to admit testimony relating to these items of damages,[21] but on the grounds that there had been no severance, as judicially construed in California, entitling the respondent to the damages sought. In other words,.instead of passing on the issue of compensability which was readily available to it, the court avoided same and reached down into

[18] 204 N.Y.S.2d 904.

[19] 215 N.Y.S.2d 86; 174 N.E.2d 754.

[20] 357 P.2d 451.

[21] As a matter of fact, the rule in California, as established by People v. O'Connor, 87 P.2d 702, recognizing that where these damages are merely cited by the valuation witness as the reason for his opinion, and no claim is made for special damages for each item, they are admissible.

the procedural Code of Court Procedure (§1248) and, by a very strict interpretation, held "The construction of the improvement in the manner proposed by the plaintiff did not include the freeway—only the cul-de-sac and, hence, no severance as far as any damages resulting from the freeway."

Many of our problems concerning damages arise only when a public agency is involved. The public is the victim because, for the most part, the only times these occasions arise are when an agency is acquiring a portion or a piece of property for public purposes. As an illustration, assume that in an industrial zone one owner constructs a boiler factory next to a field lot and poultry farm. They are within their rights as far as the construction and operation of their respective industries is concerned and, probably, neither has a right against the other for noise, loss of production, noxious odors and gases, etc.; but if a highway ramp and overpass were to be constructed in the same area, then under the theory of constitutional rights these elements are considered.

As far as trends are concerned, abutters, be they physical abutters or abutters in the sense that their property is affected, are becoming more cognizant of their rights under the various constitutions and statutes.[22] Frankly, I feel that any item of damage resulting to a property, a portion of which is taken for public purpose, which actually depreciates the market value thereof, is and should be compensable. The respondent whose property is only partially taken and is left with a substantial, valuable remainder after the taking, is indeed fortunate compared to the person whose property is either totally taken or not touched by the public improvement. He who is only partially taken gets full value for the land taken plus damages, which damages include items discussed herein, if properly presented. He who is totally taken, gets full value, but does not get to enjoy the fruits of enhancement which his more fortunate neighbors outside the area of taking will reap.[23] The individual who is not touched, such as the owner of property that is by-passed and perhaps actually ruined, to a great extent has, in the past, been left without much remedy.[24] I submit that our more enterprising brethren are beginning to take a closer look at the elements that appear to depreciate market value—we who represent condemning authorities must more clearly show the obvious benefits which accrue to land after establishment of new highway and improvement of old ones. The Colorado Department of Highways is currently assembling data similar to some of the studies made in California, and perhaps other States, which will be extremely helpful to the appraisers and negotiators as well as the trial lawyers. This type of data should assist us in offsetting to a degree some of the handicaps under which we operate.

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[22] State of Utah v. Parker et al., 368 P.2d 585—no damages allowed—State immune from suit. Impairment of light and air—Rose v State of California, 123 P.2d 505 and Williams v. Los Angeles, 89 P. 330. Impairment of view—First National Bank of Montgomery v Tyson, 39 So. 560 and Barnes v. Commonwealth, 25 N.E. 737, 127 A.L.R. 104. Invasion of privacy—Shano v. 5th Avenue Bridge Co., 42 Atl. 128.

[23] See recent case of Williams v. City and County of Denver, 363 P.2d 171.

[24] See 118 A.L.R. 921, and references cited therein, for collection of cases prior to 1939. Recent cases involving diversion show a tendency to group diversion of traffic and circuity of travel together. See City of Los Angeles v. Geiger, 210 P.2d 717; Quinn v. Mississippi State Highway Comm., 11 So.2d 810; State v. Linzell, 126 N.E. 2d 53; State v. Carrow, 114 P.2d 896; Holloway v. Purcell, 217 P.2d 665; Walker v. State of Washington, 295 P.2d 328.