

of the condemnees' business, was not an element or factor to be considered in determining the after value of their property. (Wolf v. Commonwealth, 220 A. 2d 868, June 1966)

185-2 SUPREME COURT OF SOUTH DAKOTA HOLDS OWNERS ENTITLED TO COMPENSATION FOR DAMAGES PECULIAR TO THEIR PROPERTY WHICH WERE CAUSED BY MATERIAL INTERFERENCE WITH ACCESS THERETO

The claimants had acquired two lots in Rapid City at different times. One lot was located on the corner of Omaha Street and West Boulevard. The other lot adjoined the first lot on the west. The two streets had been conventional streets and the owners had open, free, and unobstructed access to West Boulevard on the east of their lots for a distance of 162 feet and to Omaha Street on the south for a distance of 80 feet. The State converted West Boulevard into part of Interstate Highway 90 and erected a steel barrier along the west side of that boulevard. The barrier ran along the entire east side of the claimants' property and extended around the corner on Omaha Street for a distance of 10 feet. The barrier precluded all direct access from their property to West Boulevard.

The referee found that the highest and best use of the two vacant lots before the highway improvement was as a unit for a service station with a fair market value of \$30,000. After the construction of the barrier, the property was no longer usable as a service station and had a fair market value of \$10,000. He, therefore, found that the owners were damaged in the amount of \$20,000. The State excepted to the referee's report contending that there had been no compensable taking or damaging of the property and that there was not a unity of use between the two lots sufficient to support a consequential damage award as one parcel. The supreme court adopted the report and entered a judgment for \$20,000 together with interest from April 19, 1959, the date the barrier was erected.

The supreme court stated that an owner of property abutting on a highway had a right of access thereto which could not be taken for public use or materially impaired without compensation. The right to an unobstructed street in front of an owner's property for light and air and ingress and egress, belonging to an abutting owner, constituted the most valuable part of the property, especially in crowded thoroughfares and on business streets, and without these rights the property, in many instances, would be greatly diminished in value.

The court noted that until the latter part of the last century most States refused to compensate an owner of land which had been damaged by the construction of a public improvement where there was no physical taking of any part of the property on the theory that consequential damages were not recoverable under the "taking" clauses of their eminent domain constitutional provisions. However, about half of the States, including South Dakota, had adopted constitutional amendments which provided that private property should not be taken or damaged for public use without compensation. It was under such an amendment that an owner could claim compensation for the destruction or disturbance of easements of light and air, and of accessibility, even though no property was taken from him. However, an abutting landowner's right of access was not absolute, but was subject to reasonable regulation and restriction by the State under its police power in the public interest. The use of the police power by the State to improve its streets and thereby control

the traffic thereon did not mean that it always had immunity from liability for damages which resulted to private property abutting the improvement. The relative rights of the public and private interests and the reasonableness of the regulation and the degree of its interference with private property had to be determined in each case. If, after the construction of a public improvement an abutting land-owner continued to have reasonable access to his property, he had no compensable complaint; but if the right of access was destroyed or materially impaired, the damages were compensable if the injury sustained was peculiar to the owner's land and not of a kind suffered by the public generally. In other words, if the police power regulation was so unreasonable as to deprive the owner of all profitable use of his property, that owner was entitled to damages.

In the present case, the subject property was situated on the corner of two streets in a commercial zone of a city. Its highest and best use was for an automobile service station and one of the major factors contributing to its value for that purpose was the right of free and unobstructed access to two streets. The highway improvement closed all access to one street and left access only to the westbound traffic on another street. Consequently, the owners' right of access had been substantially impaired and they suffered a compensable loss. Their damages were different in kind and not merely in degree from that experienced by the general public and their private property right of access had been taken in the constitutional sense requiring compensation to be paid therefor.

As to the State's contention that the two parcels could not be considered as a unit when determining consequential damages because they had been acquired at different times and were vacant, the court stated that the measure of damages was the difference between the market value of the property considered at its highest, best, and most profitable use immediately before and immediately after the impairment of access. The evidence showed that the two lots used together were particularly adaptable and valuable as an automobile service station because of their location and irregular shape and size. The owners had held the property for this singular purpose and had been negotiating with major oil companies for a favorable sale or lease of the premises. Access to West Boulevard was a major consideration contributing to their value. Without such access the value of the lots had been necessarily and permanently reduced. Their use for any purpose had been materially diminished. Under the circumstances, the referee properly considered the two lots as a single parcel for the assessment of damages. (Hurley v. State, 143 N.W. 2d 722, June 1966)

185-3 HIGHEST COURTS OF PENNSYLVANIA AND NEW YORK DO NOT AGREE AS TO WHETHER OWNER OF FEE OF STREET IS ENTITLED TO COMPENSATION FOR INSTALLATION OF UTILITY FACILITIES BENEATH THE SURFACE OF A HIGHWAY RIGHT-OF-WAY

When the owners acquired the title to land abutting Beatty Road in 1921, the road was an established public right-of-way in Patton Township, Allegheny County, Pennsylvania. In 1951, the property and the abutting public highway were incorporated into Monroeville Borough. Five years later, the Equitable Gas Company laid a subsurface pipeline along the frontage of the subject property for use in the distribution of natural gas to the public.

The owner brought an action to have damages assessed for an appropriation of a right-of-way for the pipeline. The trial court ruled, as a matter of law,