

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,

that he was entitled to compensation, even though the pipeline was laid wholly within the existing public right-of-way. The utility company appealed from the judgment awarding the owner \$14,356.

The supreme court pointed out that it had long been the law in Pennsylvania that an existing street or public road located in a city or borough could be used for any public service without additional compensation due the abutting landowners. However, a different rule had been applied if the street or public roadway was located within a township. The trial court, with these rules in mind, reasoned that since the road involved was situated in a township when it was initially established for public use, the public acquired only the right of travel thereon, and all other rights remained vested in the abutting landowners from whom the right-of-way was taken. It concluded that the change of government from a township to a borough did not enlarge the scope of the public easement, nor diminish the abutting landowners' rights, and the owners were entitled to compensation under both the Pennsylvania and United States Constitutions for the new use.

The supreme court noted that under the early law, the taking of land by a municipality for public road purposes created only an easement in the public to travel thereover. However, the changes in the modes of travel and commerce created legal problems in connection with the question as to what constituted an additional servitude on the already established public easement. As pointed out above, there were different rules as to whether an abutting owner was entitled to compensation for another use of the right-of-way, depending on whether the road involved was in a township or in a city or borough. As to the latter, the courts had felt that the location of the highway subjected it to a greater servitude without additional compensation.

The supreme court stated that as the means and modes of public commerce increased, what at one time would have been considered a burden on the abutting landowner was no longer one. It was common knowledge that the level of commerce in the townships had at least reached that existing in the cities and boroughs in the Commonwealth during the latter part of the nineteenth century when the decision as to no payment for additional servitudes on city and borough streets was made. The court was, therefore, of the opinion that there was now no need to apply a different rule in determining what constituted a burden on a township road, as opposed to a city or borough street since the reasons for the distinction had disappeared. The abutting owners were, therefore, not entitled to compensation for the laying of the pipeline. (Pittsburgh National Bank v. Equitable Gas Co., 220 A.2d 12, May 1966)

In the New York case, the Town of Ramapo in Rockland County had acquired the road in question by user. The town granted a utility company the right to lay its gas main under the road. Some of the people who owned the fee to the center of the street sued to compel the company to remove its main. That company asked that the suit be dismissed or, in the alternative, that the owners' damages, if any, be determined and that they be required to convey an easement to it.

The court of appeals stated that there was no distinction as to the use which could be made in rural roads as compared to roads in more populous sections. In both cases, the owner of the fee of land to the center of a street or road was entitled to be compensated for use of the easement for other than highway purposes. The court pointed out that many a town highway had been donated through dedication by abutting owners, and the equivalent of many dollars had thus been obtained for

public use from private owners who might have hesitated to do this if they had been aware that, without mentioning them, they were also conveying pole and wire easements for telephone and power, and for conduits below ground, as well as for mains for sewer, water and gas for the service of private consumers. Thousands of deeds conveying rights-of-way between private parties and instruments of dedication of public highways had been made based on the rule that the rights-of-way could only be used for highway purposes. This rule had ripened into a rule of property which could not be changed retrospectively without altering the substance of prior land grants.

Whether or not compensation to be paid for the taking of an additional easement in an existing highway right-of-way for gas mains would be nominal or substantial would depend upon the facts in each case and the owners had the burden of proving that they suffered substantial damages. (Heyert v. Orange & Rockland Util., Inc., 218 N.E.2d 263, June 1966)