Volume 71 | Issue 2 Article 10

February 1969

Eminent Domain--Is Noise and Element of Damage?

Charles Quincy Gage
West Virginia University College of Law

that the great incidence of head injuries caused by motorcycle accidents results in a large number of these victims becoming wards of the state whose support is then borne by the public. Also, the economic interest of motorcyclists as a class surely extends to the cost of insurance, and as the number of cyclists increases,[15] their economic influence on the public increases. It has been said that protection of the safety of the public includes its economic safety.[16] In addition, some courts have relied upon the expanded police power of the states when regulating the use of their highways.[17]

Whether this bill, if passed, would be found constitutional in West Virginia is not clear. In close questions of policy such as the one involved in this type of regulation, it might well be argued that courts should yield to the judgment of the legislature. But it should be remembered that one of the foremost proponents of this concept, Mr. Justice Brandeis, also felt that the greatest threats to individual liberty often lay in beneficent legislation.[18]

William Alex Tantlinger

Eminent Domain—Is Noise an Element of Damage?

The Dennisons were owners of a home in a remote wooded area in Lake George, New York. The property was entirely secluded, quiet, and peaceful. As a result of highway construction, some of this secluded property was condemned to make way for an interchange. The seclusion and beauty of their property was replaced by the noise, lights, and odors of the traffic on the new highway. In awarding damages for the partial taking, the Court of Claims considered as factors to determine the damage to the remaining property the loss of privacy and seclusion, the loss of view, the traffic noise, lights, and odors. The Appellate Division unanimously affirmed. The state appealed contending it was error

---

[15] From 1961 to 1965, motorcycle registration increased 285%. People v. Bielmeyer, 282 N.Y.S.2d 797, 800 (Buffalo City Ct. 1967).

[16] Zeigler v. People, 109 Colo. 252, 124 P.2d 593 (1942).

[17] People v. Bielmeyer, 282 N.Y.S.2d 797, 800 (Buffalo City Ct. 1967).

[18] Olmstead v. United States, 277 U.S. 438, 479 (1928) (dissenting opinion). Justice Brandeis said:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.

to consider noise as an element of consequential damage. *Held,* affirmed. Damages caused by noise may be considered as one factor in determining the diminution in market value to the remaining property. *Dennison v. State,* 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968).

The exercise of the power of eminent domain is based on the theory that the welfare of the general public will be benefited, even though some individuals may be inconvenienced.[1] This power has been used more frequently in recent years because of the growth of highway construction. Awarding compensation in these cases has been made difficult in many circumstances because only a part of an individual's land is condemned. When there is a partial taking the owner is allowed compensation for the part taken, and he is also compensated for consequential damages to the remaining property.[2] The rationale for this rule is that one's property interest comprehends not only the thing possessed but also the right to use and enjoy it.[3]

There are two methods generally employed to measure the total compensation to be given to a landowner who has had land taken by condemnation proceedings. One is the "before and after rule" in which the compensation allowed is the difference between the market value of the total property before the taking and the market value of the remaining property after the taking.[4] The other method used is the "value plus damages rule" which measures the market value of the land taken plus the damages to the remaining property.[5] Usually, the "value plus damages rule" defines damages to the remaining property as the diminution in market value of it caused by the partial taking.[6] It is to be noted however, that the correct application of either method should lead to the same result.[7]

The factors considered in measuring damages to the remaining property or the reduction in its market value vary, but there are several general principles which are common to most jurisdictions. For example, any damage to the remaining land which is caused

---

[1] South Buffalo Ry. v. Kirkover, 176 N.Y. 301, 68 N.E. 366 (1903).
[2] Calhoun County Ct. v. Force, 106 W. Va. 581, 146 S.E. 530 (1929). *See* 27 AM. JUR. 2d *Eminent Domain* § 310 (1966).
[3] Fruth v. Bd. of Affairs, 75 W. Va. 456, 84 S.E. 105 (1915).
[4] 4 P. NICHOLS, EMINENT DOMAIN § 14.23 (3d ed. rev. 1962).
[5] State v. Snider, 131 W. Va. 650, 49 S.E.2d 853 (1948). *See* Palmore, *Damages Recoverable In A Partial Taking,* 21 SW. L.J. 740, 741 (1967).
[6] 1 L. ORGEL, VALUATION UNDER EMINENT DOMAIN § 53 (2d ed. 1953).
[7] 4 P. NICHOLS, *supra* note 4, at § 14.232(1).

by the use to which the part taken is to be put is a proper item to be considered.[8] The diminution in the market value of the remaining property is the determination to be made, and any element of value which will be the subject of negotiations between buyer and seller should be considered.[9] However, not all elements of damage are considered. The injury must be a real disturbance of a right enjoyed in connection with the property and must not be a mere subjective injury to the owner's feelings or in his imagination.[10] The injury must be of practical importance; if it is merely remote and speculative then it cannot be considered.[11] Elements of damage are not given a specific value but are considered together as a whole, and they are properly considered if they bolster and sustain evidence of a diminution in market value.[12]

One element which many courts refuse to consider in computing the decrease in market value is the noise which accompanies a super-highway.[13] Some of the rationalizations given for this position are: it is not a proper element to be taken into consideration;[14] it is an incident of living on a public street and must be borne by all;[15] it is only a matter of inconvenience which cannot be consider-

---

[8] Carazalla v. State, 269 Wis. 593, 70 N.W.2d 208, *mandate vacated on rehearing*, 71 N.W.2d 276 (1955).

[9] Strouds Creek & Muddlety R.R. v. Herold, 131 W. Va. 45, 45 S.E.2d 513 (1947). "In ascertaining, in a condemnation proceeding, the market value of the land in fee taken in whole or in part, consideration should be given to every element of value which ordinarily arises in negotiations between private persons with respect to the voluntary sale and purchase of property." *Id.* at 60, 45 S.E.2d at 522.

[10] Shenandoah Valley R.R. v. Shepherd, 26 W. Va. 672 (1885). *See* Note, *Eminent Domain-Damages To Land Not Taken*, 1960 U. ILL. L.F. 313, 316. "Such injury must be direct and proximate-not merely within the realm of possibility or the owner's imagination, or which simply affects his feelings."

[11] Richmond v. City of Hinton, 117 W. Va. 223, 185 S.E. 411 (1936). See 27 AM. JUR. 2d *Eminent Domain* § 310 (1966).

[12] State v. Evans, 131 W. Va. 744, 50 S.E.2d 485 (1948).

[13] Landowners near airports have recovered damages for noise. United States v. Causby, 378 U.S. 256 (1946), allowed a chicken rancher recovery for noise when his chickens were frightened by the direct overflight of aircraft. Griggs v. Allegheny County, 369 U.S. 84 (1962), allowed recovery for loss of sheep due to noise and vibrations caused by aircraft. Both cases involved direct overflight and allowed recovery for the taking of an easement. However, Martin v. Port of Seattle, 64 Wash. 2d 298, 391 P.2d 540, *cert. denied*, 379 U.S. 989 (1964), allowed landowners to recover for damages caused by noise without direct overflight. The WASH. CONST. art. I, § 16 as amended, amend. 9, allows recovery in condemnation proceedings for both a taking or damage to property.

[14] State v. King Bros. Motel, 388 S.W.2d 522 (Mo. 1965).

[15] Campbell v. Arkansas State Highway Comm'n, 183 Ark. 780, 38 S.W.2d 753 (1931).

ed;[16] and it is not a property interest.[17] However, in the *Dennison* case traffic noise was one of the factors considered in determining the diminution in market value of the remaining property. The decision was based on the conclusion that it would be practically impossible to separate the element of noise from the other elements of loss such as privacy, seclusion, and view which were properly considered; any reduction in the damages allowed, if noise were excluded, would be purely arbitrary and at best speculative.[18] The dissent[19] in *Dennison* raised the related problem of giving compensation to a landowner who has no land taken but who suffers significant injury on account of noise. It is argued that it is inconsistent to allow recovery for traffic noise to a man who has a small portion of land taken for a highway and deny recovery to a property owner just as near the highway who suffers the same damages but has no land taken. However, it seems implicit in the majority opinion that it is limiting its decision to a case where there has been a physical taking.[20] Furthermore, the New York Constitution provides for compensation when there has been a taking of private property for public use.[21] Thus, it would seem there must be a taking in New York before there can be recovery.

Allowing recovery only when there has been a taking would deny compensation to those landowners who have no land taken but suffer damage because of the eminent domain activity. The West Virginia Constitution is different from that of New York in that it provides that compensation be made when there has been a taking or damage to private property for public use.[22] The provision extending the possible recovery to cases where there has been damage to land without a physical taking was added because there existed a denial of justice when the use, enjoyment, and value of the property are impaired, even though there is no physical taking.[23]

[16] Richmond County v. Williams, 109 Ga. App. 670, 137 S.E.2d 343 (1964).

[17] People v. Presley, 239 Cal. App. 2d 309, 48 Cal Rptr. 672 (1966).

[18] Dennison v. State, 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968).

[19] *Id.*

[20] *Id.* at 412, 239 N.E.2d at 710, 293 N.Y.S.2d at 71. "[W]here there has been a partial taking of property of the kind present here, the noise element may be considered as one of several factors in determining consequential damages."

[21] N.Y. CONST. art. 5, § 7(a). "Private property shall not be taken for public use without just compensation."

[22] W. VA. CONST. art. III, § 9. "Private property shall not be taken or damaged for public use, without just compensation. . . ."

[23] Tidewater Ry. v. Swartzer, 107 Va. 562, 59 S.E. 407 (1907). The VA. CONST. art. IV, § 58, was also amended to allow compensation for taking

The change in the constitution has provided for recovery in cases where there has been no taking but where the public improvement substantially damages property.[24] This does not mean that noise alone would be considered as a proper element of damage in West Virginia. However, if substantial damage can be shown, noise might be considered as one of many elements present which reduce the market value of the land, even in the absence of a taking.

Allowing recovery for traffic noise in one case does not warrant the conclusion that noise should be considered as an element in all condemnation cases where noise is present. Refusing to consider noise as an element would be proper in many cases, but if noise directly affects the market value of the land when grouped with other elements, then it should be considered as a proper element of damage.

Charles Quincey Gage

Estate Tax—Payment of Premiums on a Transferred Life Insurance Policy in Contemplation of Death

In May, 1957, decedent caused a life insurance policy to be issued on his life in the face amount of $50,000, his wife to be beneficiary and life owner. The decedent did not, at any time, have the right to exercise any options or privileges in the policy or to agree with the insurance company to any change in, ammendment to, or cancellation of the policy. Decedent died on March 25, 1958, and his wife did not include the proceeds of the policy in his gross estate for federal tax purposes. The Commissioner assessed a deficiency; the widow paid and sued for a refund, alleg-

---

or damaging property. The *Tidewater Ry.* case was one of the first cases in Virginia interpreting the amendment.

[24] Cline v. Norfolk & Western Ry., 69 W. Va. 436, 71 S.E. 705 (1911). There are procedural difficulties attendant when trying to sue the state. The W. VA. CONST. art. VI, § 35 provides: "The State of West Virginia shall never be made defendant in any court of law or equity. . . ." However, damages may be caused by the construction of a highway, and the State Road Commissioner may fail to assess the damages and provide compensation. In such a case, instead of suing the state, a mandamus proceeding may be brought to force the commissioner to access damages, even in the absence of an actual taking. State *ex rel.* French v. Sawyers, 147 W. Va. 619, 129 S.E.2d 831 (1963). Thus, the mandamus proceeding will reach the desired result. In a mandamus proceeding the petitioner need not show that he has been damaged or the amount of damage; but he must show that there is a reasonable cause for these questions to be resolved by a judge and jury. State *ex rel.* Smeltzer v. Sawyers, 149 W. Va. 641, 142 S.E.2d 886 (1965).