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Eminent Domain: Inverse Condemnation--What Constitutes a Taking?

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EMINENT DOMAIN: INVERSE CONDEMNATION – WHAT CONSTITUTES A TAKING?

Northcutt v. State Road Department, 209 So. 2d 710 (3d D.C.A. Fla. 1968) *

Plaintiff's 40,000 dollar home in a quiet North Miami residential neighborhood was allegedly damaged by construction and operation of an interstate expressway and access road immediately adjacent to his property. Plaintiff offered to show that with the expressway right-of-way less than sixty feet from his property and a major access road only thirty-five feet away, vibrations and shockwaves from heavy traffic broke the terrazzo floor and foundations in half, cracked the walls inside and out, and separated members of the roof causing it to leak. In addition, he alleged the accompanying noise, dust, fumes, and headlights rendered his home unenjoyable, valueless for residential purposes, and unsalable for any use. Plaintiff sought inverse condemnation to require the state to take the property under its power of eminent domain and thus give compensation for the reasonable value of the property. The trial court dismissed the complaint with prejudice for failure to state a cause of action. Plaintiff appealed, and the Third District Court of Appeal HELD, that damages to the plaintiff's property were not recoverable in the absence of a taking of the property, and that a compensable taking required the presence of trespass or physical invasion on the part of the defendant. Judgment affirmed.

In the United States, ownership of land is held subject to the sovereign power of eminent domain to take possession for the public good. Protection against the unauthorized taking of private property is guaranteed by the constitutions of both federal and state governments,[1] and the right to condemn private property for public use is conditioned upon paying the owner due compensation according to law.[2] If the sovereign fails to compensate for the taking, the injured landowner must seek relief through the courts. One remedy, as that sought in the present case, is inverse condemnation.

Inverse condemnation is the cause of action to compel eminent domain proceedings against private property taken in fact by the governmental

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**Editor's Note*: At time of publication the Florida supreme court had granted the plaintiff's petition for a Writ of Certiorari to the Third District Court of Appeal's decision. The petition had been based and contested upon an alleged conflict of authority within the state. Respondent's brief and Order Allowing Certiorari, Case No. 37,539, Nov. 8, 1968.

1. Each state constitution has adopted in some form the property protections of the federal constitution. U. S. CONST. amend. V. *E.g.*, FLA. CONST. Decl. of Rights §12; art. XVI, §29 (Florida differs from approximately 50% of the states in not providing constitutional compensation for damage; but only for a taking. Board of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955); 3 J. ADKINS, FLORIDA REAL ESTATE LAW AND PROCEDURE §83.06 (1960). *See also* Spater, *Noise and the Law*, 63 MICH. L. REV. 1373, 1399 (1965)). For a nationwide comparison, *see* 2 NICHOLS, THE LAW OF EMINENT DOMAIN §6.1 (3) (3d ed. J. Sackman 1963) [hereinafter cited as NICHOLS].

2. THE FLORIDA BAR, FLORIDA REAL PROPERTY PRACTICE §5.27 (Fla. Bar Continuing Legal Educ. Practice Manual No. 3, 1965). For a discussion of what constitutes a "public use" for the "public good," *see* §§6-8.

defendant without the formal exercise of the power of eminent domain.[3] A "taking" traditionally requires a physical invasion of the property, an actual seizure of the premises, a permanent ouster, or such interference with the rights of an owner as to deprive him of control of his property.[4] But the modern weight of authority does not limit the requirement of a taking solely to physical displacement. "The modern and prevailing view is that any substantial interference with private property which destroys or lessens its value, or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed, is . . . a 'taking' in the constitutional sense, to the extent of the damages suffered, even thought the title and possession of the owner remains undisturbed."[5] Under this construction, there need not be a physical taking of the property or even dispossession. Any substantial interference with basic rights growing out of ownership of private property is considered a taking.[6]

The problem of the instant case arises where the land allegedly damaged is contiguous to properly condemned land. To guard against under-condemnation of property, courts recognize damage to abutting property arising from the use of the condemned land. This damage to the contiguous property is termed "consequential damages," and is classified into two distinct types.[7] First, where a portion of a man's property has been condemned and he later sustains an injury to the uncondemned portion from the use of the condemned portion, he is entitled to compensation for the damage to the remaining area.[8] But where one man's property is properly taken in its entirety, his neighbor's property is not allowed damages resulting from the use of the condemned property. Acts done on the properly condemned portion in the proper exercise of governmental powers, not directly encroaching upon private property and only indirectly impairing the use of the uncondemned private property, are held not to be a taking in the constitu-

3. City of Jacksonville v. Schumann, 167 So. 2d 95 (1st D.C.A. Fla. 1964), *cert. denied*, 172 So. 2d 597 (Fla. 1965). *See also* THE FLORIDA BAR, FLORIDA CIVIL PRACTICE BEFORE TRIAL *Inverse Doctrine* §8.7 (Fla. Bar Continuing Legal Educ. Practice Manual No. 1, 1963).

4. 2 NICHOLS §6.2.

5. *Id.* at §6.3.

6. Smith v. Erie R.R., 134 Ohio St. 135, 16 N.E.2d 310 (1938). Such interferences in other jurisdictions with constitutional provisions similar to Florida include: Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871 (1940) (refusal of a permit for operation of a gas station); City of Big Rapids v. Big Rapids Furniture Mfg. Co., 210 Mich. 158, 177 N.W. 284 (1920) (blocking a driveway by changing the grade of a road), *followed in* Thom v. State, 376 Mich. 608, 138 N.W.2d 322 (1965); *In re* Sansom St., 293 Pa. 483, 143 A. 134 (1928) (a setback ordinance restricting future building), *followed in* Cleaver v. Tredyffrin Township, 414 Pa. 367, 200 A.2d 408 (1964); Lea v. Louisville R.R., 135 Tenn. 560, 188 S.W. 215 (1916) (a temporary laying down of heavy iron pipe awaiting burial). The courts in the above cases in Michigan, Pennsylvania, and South Carolina stated that physical invasion was not a requirement. Even in Florida, excessively restrictive zoning, certainly an intangible, has been considered capable of an uncompensated taking, Burritt v. Harris, 172 So. 2d 820 (Fla. 1965); State *ex rel.* Taylor v. City of Jacksonville, 101 Fla. 1241, 133 So. 114 (1931).

7. 4 NICHOLS at §14.1.

8. Bauman v. Ross, 167 U.S. 548 (1897); Worth v. West Palm Beach, 101 Fla. 868, 132 So. 689 (1931). *See generally* 4 NICHOLS at §§14.1[2], .2.

tional sense in the absence of a physical invasion.[9] Even with a physical invasion, compensation generally has been allowed only upon instances of destruction of property or its use[10] and only where the damage incurred exceeds the general damages suffered in common with the public.[11] Thus, if the complainant owned a roadbed prior to condemnation, damages to his remaining property from noise and vibration occurring after the condemnation are recoverable, but if the bed ran adjacent to his property and there was no substantial interference by physical invasion, the damages are not recoverable.[12] Damages can be the same, the physical setting identical, and still courts continue to draw a distinction.

Florida case law also seems clearly to require the physical invasion or trespass necessary for a taking before relief or damages will be afforded to adjacent or abutting landowners.[13] Florida courts have found a taking through invasion by state construction work, such as a reduction in mill capacity by a permanent flooding of a millrace[14] and more recently, a permanent flooding of adjacent property resulting in silt deposits.[15] Relief for less permanent interferences, however, seems severely limited. For example, the courts have found no liability for flooding where it was less than permanent.[16] This line of reasoning forces state courts to find a trespass or physical invasion amounting to a taking, before allowing recovery of compensation for damage to adjacent landowners. A better solution, however, may be either to reexamine the necessity of a fictional requirement of physical trespass or to recognize "new" physical invasions.

In regard to the former approach, it is arguable that Florida courts have already created precedent concerning the requirements of a taking, which departs from the trespass or invasion theory. In 1964, in *City of Jacksonville v. Schumann*,[17] the First District Court of Appeal affirmed as a sufficient claim for relief an inverse condemnation action by homeowners adjacent to the municipal airport for noise and vibration nuisance originating from aircraft using the facility. The physical trespass of the low-flying aircraft was considered only incidentally. This case introduced Florida to the increasing line

9. Pope v. United States, 173 F. Supp. 36 (N.D. Tex. 1959); Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457 (1891). *See also* 4 NICHOLS at §14.1[1]; 5A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY *Eminent Domain* §2579 (1957). There are additional problems including governmental immunity that are not discussed here, but that can be overcome.

10. Stevens v. City of Salisbury, 240 Md. 556, 214 A.2d 775 (1965); Mayor & City Council v. Himmelfarb, 172 Md. 628, 192 A. 595 (C.A. Md. 1937). *Himmelfarb's* court expressly acknowledged the possibility of severe uncompensated injury under the constitution as it then stood, but elected to leave constitutional change to the legislature.

11. Pope v. United States, 173 F. Supp. 36 (N.D. Tex. 1959).

12. 4 NICHOLS at §14.2462.

13. Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956); Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457 (1891); City of Tampa v. Texas Co., 107 So. 2d 216 (2d D.C.A. Fla. 1958). *See also* 12 FLA. JUR. *Eminent Domain* §68 (1957).

14. State Road Dep't v. Tharp, 146 Fla. 745, 1 So. 2d 868 (1941).

15. State Road Dep't of Fla. v. Darby, 109 So. 2d 591 (1st D.C.A. Fla. 1959).

16. Arundel Corp. v. Griffin, 89 Fla. 128, 103 So. 422 (1925).

17. 167 So. 2d 95 (1st D.C.A. Fla. 1964), *cert. denied*, 172 So. 2d 597 (Fla. 1965).

of "airport cases,"[18] a major inroad in limiting the unconstitutional taking of property, and seemed to form a basis for valid extension into other takings by nuisance. In fact, in the later appeal from the final decree in *Schumann*,[19] the court maintained that Florida is now committed to the view adopted in the airport cases that noise and vibration can be a nuisance and that such nuisance can give rise to an easement for which compensation must be paid. It maintained that the landowner has a right to be free from unreasonable interference caused by noise, and that if such noise and vibration deprived the owner of an "essential element in his relationship to his land," the public authority responsible must compensate him for his loss.[20] Again, the *Schumann* court seemed to deny the necessity of trespass as a precondition to recovery and maintained the noise that created the nuisance could come from any direction and not just from above. It should be readily apparent at this point that the nuisance and taking arise from the noise and not from the trespass. For, if the airport were one maintained strictly for gliders it would be difficult to imagine what compensable damage could be based on their continued trespass.

It should not seem too difficult to imagine a similarity between ground tremors from tractor-trailers and noise vibrations from aircraft; or a truck falling from an elevated expressway and an airplane falling from the sky; or the high rate of usage of an expressway as compared to more infrequent rate of aircraft traffic. Yet, in the present case, the Third District Court of Appeal explicitly refused, in the face of allegations of rather obvious damage, to extend the rule of law set forth in *Schumann* and instead attempted to distinguish it on differences in noise intensity, safety, and use.

In failing to recognize new types of trespass – the other approach – the present court appears to overlook another growing trend. Aside from the usual physical trespass, some courts are beginning to recognize noise and vibration as compensable intangible invasions. Professor Prosser has stated that the distinction between direct and indirect invasion is "on its way to oblivion"[21] and in fact, vibrations have been held to be both an invasion[22] and a nuisance "taking" capable of recovery.[23] While blasting cases historically recognized the trespass of debris, the courts are beginning to think of the

18. *E.g.*, Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Pope v. United States, 173 F. Supp. 36 (N.D. Tex. 1959); Thornburg v. Port of Portland, 223 Ore. 178, 376 P.2d 100 (1962). For a complete line of cases see R. WRIGHT, THE LAW OF AIRSPACE 157-82 (1968); Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207 (1967).

19. City of Jacksonville v. Schumann, 199 So. 2d 727 (1st D.C.A. Fla. 1967), *cert. denied*, 204 So. 2d 327 (Fla. 1967), *cert. denied*, 390 U.S. 981 (1968).

20. There is, of course, a substantial difference where one moves into an area of an existing nuisance. This analysis applies to one who has been injured without prior knowledge – the bona fide purchaser in good faith. "No one can move into a quarter given over to foundaries and boiler shops and demand the quiet of a farm." Stevens v. Rockport Granite Co., 216 Mass. 486, 488, 104 N.E. 371, 373 (1914).

21. W. PROSSER, LAW OF TORTS 66 (1964).

22. Exner v. Sherman Power Constr. Co., 54 F.2d 510 (2d Cir. 1931).

23. Thornburg v. Port of Portland, 223 Ore. 178, 376 P.2d 100 (1962); Lloyd, *Noise as a Nuisance*, 82 U. PA. L. REV. 567 (1934).

concussion as trespass as well.[24] In a further extension, some jurisdictions have recognized nonblasting construction vibrations as a compensable trespass.[25] Finally, not only have rays of light received consideration as a trespassory force,[26] but New York has announced it will take highway noise into consideration in computing condemnation damages.[27]

In a related line, courts continually allow compensation where there has been no physical taking but rather a taking by nuisance.[28] Although a nuisance may be noncompensable when authorized by competent authority, if the nuisance so authorized creates such severe injury to neighboring land as to render it useless and so constitute a taking, the nuisance may be abated unless compensation is provided.[29] Florida courts currently recognize this ability to enjoin a public nuisance where one suffers special injury that is different from that suffered by the public generally.[30] It is difficult to determine in these new cases whether the courts are ignoring trespass requirements or merely recognizing the nuisances as a new trespass. However, once noise and vibration invasion of the use and enjoyment of property is properly recognized as a nuisance, it is arguable that it can become a taking in the constitutional sense as in *Schumann*.

The current expansion of the highway system crossing the country demands that state and other governmental agencies reexamine their eminent domain powers and condemnation policy. Routing the expressway into and through urban areas creates a special responsibility to make an accurate appraisal of full and reasonable condemnation to prevent excessive damage to an individual and to distribute the expense among the public in general. Although the Third District Court of Appeal stands within Florida precedent, modern advancements may call for a reappraisal of the law.

The courts seem to fear an overwhelming volume of claims upon extending the compensation for a de facto taking of adjacent property. An equitable solution, however, should not be too difficult. The court's evaluation would merely have to establish a degree of damages theory based on damages that so exceed those of the general public as to deprive the complainant of reasonable beneficial interest. The rising costs of litigation and these stringent standards of excessive damage will serve to discourage frivolous claims,

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24. Wallace v. A. H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960). For an excellent look at cases and doctrine concerning blasting, *see* Annot., 20 A.L.R.2d 1372 (1951).

25. Gallin v. Poulou, 140 Cal. App. 2d 638, 295 P.2d 958 (1956); McNeill v. Redington, 67 Cal. App. 2d 315, 154 P.2d 428 (1945).

26. Martin v. Reynolds Metals Co., 221 Ore. 86, 342 P.2d 790 (1959) (dictum). This case explores the future of intangible invasions in the law of trespass and shows great perception in recognizing intangibles as a potent and destructive force.

27. Dennison v. State, 28 App. Div. 2d 28, 281 N.Y.S.2d 257 (1967), *aff'd*, 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968). It must be noted, however, that New York's constitution is one that allows compensation for damage to private property.

28. Derrick v. City of Columbia, 123 S.C. 29, 114 S.E. 857 (1922). Stoebuck, *supra* note 18, at 226.

29. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

30. Deering v. Martin, 95 Fla. 224, 116 So. 54 (1928); Brown v. Florida Chautauqua Ass'n, 59 Fla. 447, 52 So. 802 (1910).