COMPENSATION FOR LOSS OF VISIBILTY TO AND VIEW FROM THE OWNER'S PROPERTY

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The general law which addresses compensation for loss of visibility and view is somewhat divided among the various states. The courts describe a variety of issues, which determine whether or not the loss of visibility or view is compensable and, if so, to what degree. In this presentation, I would like to organize the disparate judicial treatment into three areas of discussion: Legal Principles; Collateral Factors; and Practice Tips and Suggestions.

1. Legal Principles. The legal principles which frame the discussion of compensation for loss of visibility are found in Nichols on Eminent Domain, §13.21, "Loss of Visibility", and several A.L.R. treatises, specifically, 25 A.L.R. 4th, 671, Eminent Domain: Compensability of Loss of View from Owner's Property – State Case, which addresses impairment of view; and 7 A.L.R. 5th 113, Eminent Domain: Compensability of Loss of Visibility of Owner's Property, which deals with impairment of visibility to the property.

Visibility of the Property

An interesting case to start the discussion is a case of first impression from Alaska, *8,960 Square Feet v. Dep't of Transp. and Public Facilities*, 806 P.2d 843 (Alaska 1991). Here, the Supreme Court of Alaska evaluates the case law in other jurisdictions to determine whether or not the loss of visibility is ever compensable in a condemnation proceeding. In this case, the landowner's property, which was improved by a shopping center, abutted Dimond Boulevard (the "Road") on the north. The condemning authority took a small portion of the property in order to widen the Road and lower the roadbed. At the same time, the Alaska Railroad built an overpass on a trestle over the Road in its preexisting right-of-way which abutted the property on the east. Gradually rising earth berms were built so the railroad tracks could cross over the Road. These berms blocked the visibility of motorists traveling west on Dimond Boulevard and diminished the property's visibility to those motorists. After a careful consideration of the law and the public policy consideration in other jurisdictions, the Supreme Court of Alaska held that the landowner was not entitled to any compensation for loss of visibility in connection with the railroad overpass because the berms were built entirely on the preexisting railroad right-of-way and none of the landowner's property was taken for that use, as opposed to the widening of the road, which necessitated the condemnation. The court reasoned that as a general matter, a landowner cannot recover from a neighboring landowner simply because the neighbor erects a building or other improvement which blocks the view from the first owner's land or the visibility of the first owner's land. Since the owner in the Alaska case had no property interest in the preexisting railroad right-of-way, there was no legal basis to support the owner's complaints about the loss of visibility resulting from the berms. However, since a portion of the landowner's property was taken to widen Dimond Boulevard, the court reached a different result with respect to the loss of visibility from the property, which was caused by construction to the north on Dimond Boulevard. The court reasoned:

> Ownership of land gives the owner the right and ability to limit any obstructions from being placed on that land. In particular, ownership of land abutting on a road gives the owner the right to control visibility of all adjoining land further off the road. This obviously can be an important commercial asset. Thus, when the State takes a parcel, which abuts the road, it also takes the potentially valuable right to control the visibility of the remaining parcel. For this reason, we believe that the best rule in light of reason and policy is that loss of visibility to a remaining parcel is compensable where that loss is due to changes made *on the parcel taken by the State*. (Emphasis added.)

The lesson which Nichols draws from this case is that … "loss of visibility appears to be compensable under Alaska law if the diminished visibility results from changes on the property taken from the landowner, but not where it occurs due to changes on the property of another." See §13.21, supra. This appears to be a broadly accepted rule of compensation in many, if not most, states. However, there are a variety of rulings going both ways.

The courts which deny compensation for loss of visibility generally embrace some part or all of the following legal principles:

- The barrier structure was not erected on the property owner's land and there was no physical intrusion thereon and no physical taking of the property. See, *Randall v. Milwaukee*, 212 Wis. 374, 249 N.W. 73 (1933).
- Some courts in highway cases find that "change of grade and loss of visibility is founded on the principle that the State may exercise its police power in changing the grade and … an abutting owner has no property right to be visible to traffic." See *State ex. rel. Missouri Highway Transp. Comm'n v. Dooley*, 738 S.W.2d 457 (Mo. Ct. App. 1987).
- Other courts suggest that if the adjacent landowner has a right to an easement of view over the highway then it is subordinate to the paramount right of the public in the highway and the loss of visibility to the abutting landowner is not compensable. See, *State ex. rel. State Highway Comm'n v. Lavasek*, 73 N.M. 33, 385 P.2d 361 (1963) (here, even though land was taken from the landowner, the barrier causing loss of visibility was not constructed on that land.)
- Where none of the property owner's land is being taken, particularly in an inverse condemnation case, there's no compensation. See, *Troiano v. Colorado Dep't of Highways*, 170 Colo. 484, 463 P.2d 448 (1969). But see, *Palm Beach v. Tessler*, 538 So.2d 846 (Fla. 1989).
- When it is questionable whether or not there has been a demonstrable loss of visibility, or where the property owner has failed to meet his burden of showing that the condemnation project caused the depreciation in value to the remainder property and the amount of damages, compensability may be denied. See, *Jagow v. E-470 Pub. Highway Auth.*, 49 P.3d 1151 (Colo. 2002).
- "There is no right to be located adjacent to a public highway or to have traffic pass by one's property. Our courts have consistently refused to award consequential damages because the owner's property is no longer visible to passing motorists." See *Acme Theaters, Inc. v. State*, 26 N.Y.2d 385, 258 N.E.2d 912 (1970). But compare *Keinz v.*

State of New York, 2 A.D. 2d 415, 156 N.Y.S.2d 505 (N.Y. App. 1956). Finding compensation is permitted for impairment of owner's view out of his property.

Courts allowing compensation for loss of visibility to the owner's property have adopted competing rationales, including:

- A landowner has an easement of reasonable view of their property from the adjacent highway so that when the visibility of the business premises from the main street is cut off, that is an appropriate factor to consider in awarding damages. See, *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799 (1943), but see *People ex. rel. Dep't of Public Works v. Wasserman*, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (Cal. App. 1 Dist. 1966 (recognizing easement of view, but denying loss of visibility damages caused by obstructions located on property owned by others), compare, *United California Bank v. People*, 1 Cal. App. 3d 1, 81 Cal. Rptr. 405 (Cal. App. 2 Dist. 1969) (allowing damages for visibility loss caused by underpass constructed on adjacent lands).
- Some states which have recognized a right to an easement of reasonable view from an adjacent highway have also recognized the right to compensation or relief where the view is lost by a highway project or public improvement even where no property is taken. See e.g., *Bramson v. Berea*, 33 Ohio Misc. 186, 293 N.E.2d 577 (plaza wall built on previously dedicated property).
- Other states permit compensation but use the before and after approach to compensate for loss of highway visibility indirectly not as a separate item of damage. See *City of Phoenix v. Wilson*, 200 Ariz. 2, 21 P.3d 388, 394-95 (Ariz. 2001). But compare this to *Dep't of Transp. of Colo. v. Marilyn Hickey Ministries*, 2006 Colo. LEXIS 217 (Colo. App. 2005), the recent Colorado case permitting specific visibility damages but requiring the property owner to prove with specificity the diminished value resulting from the portion of the light rail retaining wall built solely on its property.

View from the Property

In contrast to damages resulting from a loss of visibility of the owner's property, the compensability for a loss of view *from* an owner's property appears to have greater support in the courts. In a majority of cases in which the issue has been addressed, the courts have held or recognized that an owner of property abutting on a street or highway is entitled to compensation for a loss of view from the property which results from an improvement of or on the street or highway. See, 25 A.L.R. 4th, 671, Section 2. The distinction between loss of view and loss of visibility is very pronounced in some states. It may be because the property owner's right to a view from his property is more closely connected to his property rights *per se* than visibility into his property from an abutting roadway. For example, in New York, in the *Acme Theatres* case, *supra*, the court refused to permit the owners to recover for loss of their properties' visibility to passing motorists – the view into the property. But, that same court permitted compensation for impairment of the owner's view out from their property. Likewise, in the case of *Keinz v. State of New York*, *supra*, the condemning authority, condemned a one-foot strip of the owner's premises which were located along the shore line of Irondequoit Bay. In addition to taking a one-foot strip of their premises, their riparian rights and certain structures, they were deprived of

a pleasant view of the Bay which had been replaced by a thirty-foot high highway embankment. In permitting the owners to receive just compensation, the court reasoned as follows at page 506:

> We must determine the fair market value of the premises before and after the appropriation, and if any factor having a bearing on that value is disregarded, then the constitutional requirement of just compensation is not satisfied. We believe that reductions in value due to impairment of view must be considered. No appraiser could possibly isolate that factor in his mind. A "willing purchaser" would not do so. Two properties might be physically identical, yet their value markedly different because of the surroundings. As Justice Piper indicated in the *Krantz* case, this has nothing to do with riparian rights. The view might be a mountainside or a valley as well as a lake. In either event, the view augments the value of the premises, and if a portion thereof is taken and the view is spoiled, the market value of the premises remaining is reduced. The extent of the reduction is no more speculative than many other factors affecting value. It may be a matter of judgment but it is also a matter of dollars and cents, and the constitutional policy requires that such reduction in value not be borne by the owner whose property is taken for a public purpose without his consent… (omitting cases). This is but an application of the principle that "where land is acquired for public use without the consent of the owner he is entitled to recover the market value of the premises actually taken and also any damages resulting to the residue including those which will be sustained by reason of the use to which the portion taken is to be put by those acquiring it." (*County of Erie v. Fridenberg*, 221 N.Y. 389, 393, 117 N.E. 661 (1917)).

The court's analysis in the *Keinz* case finds support in a number of other jurisdictions which embrace this principle and several alternatives as well:

- If the view impairment results from an improvement of or on land taken from the property owner, compensation is routinely awarded. *State ex. rel. Highway Comm'n v. Hesselden Inv. Co.*, 84 N.M. 424, 504 P.2d 634 (1972). (Court used before and after value including all elements which would enhance or diminish the fair market value after the taking.); *LaPlata Electric Assoc. v. Cummins*, 728 P.2d 696 (1986 Colo.). (Taking for electric power line easement owner entitled to the diminished value of the remaining mountainside property resulting from the aesthetic damage.)
- Even where none of the owner's property is taken, some courts permit compensation for impairment of view or its equivalent. These courts find that since the obstruction of light, air, view and access to property abutting the street is an element of damage not common to other property generally affected then it comes within the protection of the constitutional provisions preventing the taking of private property without just compensation. See, *Chiles v. Alton, Granite & St. Louis Traction Co.*, 158 Ill. App. 508 (1910).
- Others acknowledge an abutting property owners right "in the nature of an easement" which forms the basis of compensation for loss of view. See, *State ex. rel. Dep't of Highways v. Allison*, 372 P.2d. 850 (Okla. 1972). And *Flowers v. Morgantown*, 166 W.Va. 92, 272 S.E. 2d 663 (1980) which granted the owner of land abutting a public

street easements of view, light and air. The court held that such easements constitute property permitting the owner to compensation if they are taken or damaged.

A minority of courts, however, deny compensation for loss or impairment of view and utilize some or all of the following principles, many of which are fact specific:

- Compensation was denied for impairment of view where both the before and after values of the land were based on development of the property as a subdivision and that development itself would materially disturb the view of the owner's residence more than any highway construction. *Commonweath of Kentucky v. Scott* 12 S.W.3d 682 (Ky. 1964).
- Where loss of view damages existed prior to the condemnation. *Church Point v. Carriere*, 463 So.2d 986 (La. App. 3rd Cir. 1985)
- Some courts reject the doctrine of an implied negative easement for light air and view. *Probasco v. Reno*, 85 Nev. 563, 459 P.2d. 772 (1969).
- The owner of property abutting on a public way had a right of ingress and egress as well as a right to enjoy the view from the property, but that these rights were subordinate to the underlying right of the public to have the way improved to meet the demands of public convenience and necessity. If the improvement by the public interfered with the existing means of ingress and egress and view enjoyed by the property owner, without the physical invasion of his land, then the alleged damage suffered was *damnum absque injuria* and no compensation was required. *Weir v. Palm Beach Co.*, 85 S.2d 865 (Fla. 1956). (This was an equity suit blending tort claims "taking claims" and damages to the retaining wall.)

2. **<u>Collateral Factors and Issues</u>**. The courts have identified a series of factors and issues that help determine whether compensation will be permitted and, if so, to what degree. Consider the following questions gleaned from the case law, which may assist you in determining whether or not the loss of view or impairment of visibility is compensable in your jurisdiction:

- Is the condemnor taking property from the landowner?
- Is the condemnor building a barrier in whole or in part which blocks the visibility to or the view from the landowner's property on the portion taken?
- Does the visual barrier (the berm, overpass or retaining wall) extend to adjoining properties owned by neighbors? If so, are damages suffered as a result of construction of the barriers on neighbor's property compensable? Does the doctrine of inseparability in calculating damages provide an exception to the general rule of non-compensability where the obstruction is built wholly on neighboring property?[1]

[1] This doctrine would allow the landowner to recover for damages to the remainder caused by work done on property other than his property if the overall project is inseparable. See, *United States v. 15.65 Acres of Land*, 689 F.2d 1329, 1332-33 (9th Cir. 1982), *City of Crookston v. Erickson*, 244 Minn. 321, 69 N.W.2d 909, 914 (1955). But see, *Dep't of Transp. of Colo. v. Marilyn Hickey Ministries, supra*, (which declined to apply the doctrine of inseparability and limited recovery to those damages that arose from the construction of the concrete wall supporting a raised rail track only on the landowner's property.)

- What are the constitutional requirements in the jurisdiction – does the Constitution refer only to compensation for "takings" or does it also include "damages"?
- Has the court blurred the distinction between the use of the state's police powers to alter or reconstruct state highways (raise or lower the grade of the street) and/or divert traffic away from adjacent properties without paying compensation, with the exercise of the state's condemnation power in taking a portion of the landowner's property?
- Does the court make a distinction between compensation for impairment of visibility looking inward and the view looking outward?
- Does the court, in a partial taking case, permit the landowner to recover all damages that are natural, necessary and reasonable as a result of the taking?
- Does the court permit damages in a partial taking case to be evaluated using a private market driven approach which treats the condemnor just like any other market participant seeking to acquire private property for a project that it desires to build?[2]
- Can a landowner recover from an adjacent landowner (be it the State Highway Administration or any other entity) if that entity builds a building, or berm, which blocks the view either to or from the property owner's land?
- Does it make a difference if the condemning authority uses a two-step process by first acquiring a strip of the owner's land to widen the road and then, at a later date, on the other side of the road or in the median strip, erecting a barrier impairing the property's visibility? Can the property owner treat this process as a "step transaction"?
- Can the loss of visibility be compensable as business damages?[3]
- Does it make a difference if the property is retail, commercial or residential in quantifying damages for loss of view or for loss of visibility?
- How does an appraiser quantify or support the damages resulting from a loss of this type?
- Can the condemnor effectively mitigate visibility or view damages by restricting the damage to only that portion of the barrier on the property owner's property?

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[2] See *LaPlata Electric Ass'n v. Cummins*, 728 P.2d 696 (Colo. 1986) where the court states:

"Consider the hypothetical case of a landowner who receives a bid from a private party to buy a portion of the landowner's property for a particular use. The landowner rationally will fix the selling price at an amount that will compensate the landowner not only for the portion sold, but also for any diminution in value of the remainder of his land that results from the use of the property sold, whether or not adjoining lands will suffer diminution of value as well. The buyer must pay the price to acquire the desired portion. The condemning authority should be required to compensate in like manner.

On the other hand, a landowner whose property is reduced in value by the acquisition and use of the adjoining land by a private party cannot recoup this loss from the adjacent landowner. Only the imposition of a duty by operation of law, e.g., under the law of nuisance, can alter this result. In the absence of such a duty, the adjoining land user, having no need for any of the injured landowner's property, will pay that landowner nothing and the injured landowner has no remedy. We conclude that a condemning authority should be subject to the same burdens and benefits as a private party and that the condemning authority's liability should be no less and no greater than that of a private party in a theoretical market place."

[3] *State of Florida, Dep't of Transp. v. Weggies Banana Boat*, 576 So.2d 722, 724 (Fla. Ct. App. 1990) review denied, 589 So.2d 294 (Fla. 2d Dist. Ct. App. 1990).

- Is a motion *in limine* or a motion for summary judgment a good method to resolve legal issues concerning compensability and quantum of damage which arise in these cases?

3. **<u>Practice Tips and Suggestions</u>**. Based on the legal principles involved and the collateral issues that are implicated, the following suggestions may be useful:

1. Carefully research the law in your jurisdiction to determine whether your state has already taken a position concerning compensation *vel non* for the loss of visibility of and view from a landowner's property.

2. The general case law suggests the strongest case for compensation is when loss of visibility or view is caused by an improvement or barrier placed on the property taken from the owner as opposed to the relocation of a highway or change of grade where no property is taken or the construction of a barrier is placed on adjacent property.

3. Consider utilizing a view impairment case first, if possible, since it has been recognized in a majority of states, whereas visibility damages (looking into the property) are more controversial in many states such as New York, which recognizes view damages but not visibility damages.

4. Work with your expert witnesses and appraisers to obtain concrete data demonstrating the diminution in value to the remainder property. For example, in connection with retail shopping centers, search for market data, sales volume information and customer traffic in similar malls or shopping centers (before and after) which have been impacted by impaired visibility and also possibly impaired access since these events often occur in the same project. If you are dealing with an office building where the view from the window offices has been destroyed, consider searching for comparable properties where view has been impaired and use basement rents and windowless offices as comparables for rental purposes. Compare the rents for above-grade space with below ground. Also, if the trial for just compensation is delayed for several years, and the barrier is constructed in the interim, use diminished sales data on the subject property to make your case.

5. Obtain property plats, taking maps, cross-sections and profiles and consider developing a digital photo rendering or animation representing the before and after situation of the subject property as demonstrative evidence.

6. Develop the most simple and direct approach to proving diminished value. Under one approach, the fair market value of the part taken is determined and to that is added severance damages to the part not taken or the remainder. This directly identifies and measures this damage as a separate item. The other approach is the "before and after" rule (sometimes called the federal rule) in which the damages are calculated by taking the difference in fair market value of the parcel as a whole before the taking and comparing that with the fair market value of the remainder after the taking. Many jurisdictions are more comfortable with the before and after approach

where the loss of highway visibility is not calculated as a separate compensable element of damage, rather it is but one of the many factors in determining the value of the remainder property or in determining that property's highest and best use. See, for example, *State ex. rel. Missiouri Highway & Transp. Comm'n v. Jim Lynch Toyota, Inc.*, 830 S.W.2d 481, 486 (Mo. Ct. App. 1992); *City of Phoenix v. Wilson, supra*. Be aware, however, that some jurisdictions, such as Colorado, do not permit the "before and after" approach and require the property owner to quantify the compensable and non-compensable damages and prove that those damages were caused by the barrier placed on the subject property. This is a more difficult and rigorous proof. See *Dep't of Transp. of Colo. v. Marilyn Hickey Ministries, supra*.

7. Consider the use of demonstrative evidence and, in particular, animations showing how the retaining wall, bridge, berm or overpass impacts the property looking out from the property and looking from the road back toward the property. This is particularly effective if the barrier has not been constructed by the time the trial takes place and the jury view is undertaken. Also, make good use of aerial photographs and other photographic materials to document the situation both before and after.

Conclusion

If any generalizations may be drawn from these disparate treatments of loss of visibility of and loss of view from the condemnee's property, it appears to be that courts are more sympathetic, and thus more likely to adopt a supporting rationale, when the damage caused the owner is demonstrable and significant. The more speculative and attenuated the damages, the more likely the court will be to adopt a limiting analysis, such as the condemnor is simply exercising its police power and the damages are not compensable. Thus, counsel are well advised to present the damages from loss of view in great detail, supported by evidence from the market, and in the most traditional form possible, such as "before an dafter values" of the property.

In conclusion, let's apply some of these principles, questions and practice tips to one of the cases we are working on now and, after that is concluded, let's open up a round table discussion on this subject and discuss your cases.